



Constitution Committee

Corrected oral evidence: Annual evidence session with the Lord Chancellor

Wednesday 1 March 2023

10.15 am

Watch the meeting

Members present: Baroness Drake (The Chair); Lord Anderson of Ipswich; Baroness Andrews; Lord Falconer of Thoroton; Lord Foulkes of Cumnock; Lord Hope of Craighead; Lord Howard of Lympne; Lord Mancroft; Lord Strathclyde; Baroness Suttie; Lord Thomas of Gresford.

Evidence Session No. 1

Heard in Public

Questions 1 - 26

Witness

I: The Rt Hon Dominic Raab MP, Lord Chancellor, Secretary of State for Justice and Deputy Prime Minister.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of Witness

Dominic Raab.

Q1 **The Chair:** Thank you for coming. We appreciate it. We know you have a busy diary, and we are conscious that you need to leave promptly at 11.45 am because you have Prime Minister's questions. If we have not finished our questions by then, perhaps we can send them to you and you can reflect on whether you could add any comments to any uncovered questions.

Dominic Raab: Yes, of course.

The Chair: That is brilliant. Thanks very much indeed. We have quite a few questions to ask you today on particular matters. I hope you have some feel of what is going to be our area of interest. Would you like to open with some general comments or would you like me to go straight into the opening question?

Dominic Raab: I am very happy to be guided by you.

Q2 **The Chair:** Shall we just dive in? The starting question is more open in its nature, anyway. How would you describe your contribution to constitutional matters over the preceding year?

Dominic Raab: Thank you. It is a pleasure to be here before this committee. There is some day-to-day stuff that is constant. I am in regular touch with the judiciary, including the Lord Chief Justice, the President of the Supreme Court and the SPT. In particular, I spend quite a bit of time talking to the President of the Family Division, because there is quite a lot going on there. Given all the financial implications and the concordat process, with which you will be well versed, I am constantly talking about the things that need to be done to uphold the concordant.

More specifically, in terms of stuff we have done over the last year or so, I would include the Judicial Review and Courts Act and the reforms entailed in that, including the Cart route. We have published the Bill of Rights. I suspect there will be particular constitutional impacts from the provisions reinforcing free speech. I know we are coming on to talk about the Bill of Rights, but there is an interesting constitutional aspect to Sections 2 and 3 and what that means for the separation of powers, on top of the retail political dimension, effectively, of the HRA and the Bill of Rights.

The Covid recovery and the backlog is something I have to engage with the judiciary on. We have the HMCTS board, which, as well as dealing with the nuts and bolts of what we are doing, particularly in relation to Covid recovery, is about the relationship with the judiciary. I suspect that is probably enough on what we have done over the last year.

Q3 **The Chair:** We will come on to more specific questions about some of the points you have listed, such as the backlog, the Bill of Rights and the family law courts. Looking forward, what would you put as your top

priorities?

Dominic Raab: Maintaining those relationships is very important. We are recruiting the next Lord Chief Justice. Perhaps it would be an opportune moment for me to put on record, as I have done elsewhere, my personal tribute to the work the current Lord Chief Justice has done both in the Court of Appeal and more generally as a guardian of the constitution. We have been blessed with a particularly fine Lord Chief Justice at a particularly challenging moment in time. I am glad to put that on the record.

In crunchier terms, if I can put it like that, the Bill of Rights has also been introduced. We look forward to passing that through the House of Commons and then engaging in a civilised conversation in the other place. I am sure there will be plenty of discussions around that.

On parole reform, the Parole Board is viewed as a quasi-judicial function. There is quite an interesting theological argument about what the Parole Board does both constitutionally and on public protection. You will have seen the reforms we have consulted on. We are very close to producing legislation in relation to that.

We also have the retention of EU law. There are opportunities to shape that caucus of law according to UK needs rather than taking a blanket approach. On the other hand, I would readily admit that needs to be juxtaposed with the need for legal certainty. Getting that balance right is going to take up a fair amount of my time. Those are the key things I see on the horizon.

Q4 The Chair: As you are probably aware, we recently produced our report on the roles of the Lord Chancellor and the law officers. In that report, we concluded that the Lord Chancellor should fulfil a wider cross-departmental role in defending the rule of law and educating his or her colleagues on its importance. How do you approach your duty to the rule of law?

Dominic Raab: It is interesting. I read the report, and I was very happy to respond to it. The bottom line is that I do not look at it as a statutory challenge. There is no gap.

Having the role of Deputy Prime Minister, it probably helps to have an overarching view of what is going on. I have regular conversations with the Attorney-General. That is a very fruitful relationship. It was under the previous Attorney and it is now.

I often dipped my toe into various things as DPM, but, where there is any legal or constitutional dimension, I am expected to comment in Cabinet or in write-rounds more generally. I would say it is an empirical and inductive approach rather than a cartesian approach, if I can put it like that, but I do not really see any problem with it.

We have a Prime Minister who is quite scrupulous about doing things the correct way. That is always a good way to approach constitutional issues.

If that sounds like a very malleable or flexible approach, I would hope it is actually a more effective one.

With the legislation that is coming through—we have a busy and ambitious legislative agenda—we are very careful to make sure we are protecting the constitution, but we also have the confidence to reform it where that is required. The Judicial Review and Courts Bill—now Act—and the Bill of Rights are good examples of that. We should be confident about doing that in a typically British and pragmatic way. That is the way I approach it within Cabinet and more generally.

The Chair: The Northern Ireland Protocol Bill raised issues about your role in those circumstances, but, Lord Falconer, you wanted to ask a question on that.

Q5 Lord Falconer of Thoroton: Thank you very much indeed for coming, Lord Chancellor. I took from that answer you have just given that you do accept that the Lord Chancellor has some wider role than other Ministers in relation to protecting the rule of law.

Dominic Raab: Yes.

Lord Falconer of Thoroton: In relation to the Northern Ireland Protocol Bill, not the one we are talking about now, but in the middle of 2022, the doctrine of necessity was the justification used for breaking an international agreement the UK had entered into. It was described as though there was no option but to break the deal that had been done a few years before. Were you specifically consulted about that? What role did you regard the Lord Chancellor as having to play in that issue, which, on the face of it, involved breaking an international agreement?

Dominic Raab: I probably would not accept the characterisation you have given, but I understand the question. First and foremost, we have an exceptional Attorney-General and we previously had an exceptional Attorney-General. It is not the job of the Lord Chancellor to be a Court of Appeal for the Attorney-General's advice. It is to assess it, to scrutinise it and to discuss it.

I have had long and fascinating conversations with Attorneys-General past and present. Ultimately, that is the role of the law officers. I am not sure the rule of law or the constitution would benefit from me using my role in the way you described—I am not saying you suggested this—by acting as a Court of Appeal, if you like, or trying to trespass.

I would always want to understand the granular detail of it, which is what I did on the Bill, and support, rather than second-guess, the Attorney of the day in making sure the wider constitutional equities that are reflected in their view of the legal advice are protected and preserved.

It is a curious double act, but, as much of our constitution is unwritten, it works well in practice. As you will remember, it probably depends on the personalities. As long as you develop a *modus operandi*, it can be quite effective.

Lord Falconer of Thoroton: You described yourself as having a good relationship with the current Attorney-General. You said, “unlike the previous one”.

Dominic Raab: No, I said “as well as”.

Lord Falconer of Thoroton: I apologise.

Dominic Raab: Just to be crystal clear, I had an exceptional relationship with Suella Braverman and I have an exceptional relationship with the current AG, Victoria Prentis.

Lord Falconer of Thoroton: Did you work together with the then Attorney-General on the necessity issue?

Dominic Raab: In Government, we often seek counsel’s opinion. The Attorney will. Sometimes you seek multiple counsels’ opinion. It is not for me to put myself in that relationship as either junior or senior counsel.

Once the Attorney, with or without counsel’s opinion, has assessed, scrutinised and then put pen to paper, it is right to test their ideas. In fairness, quite a lot of other Ministers will do the same, whether or not they have the august title of Lord Chancellor. It is understood that there is a constitutional role for the Lord Chancellor in doing so, which is natural and healthy.

Both Attorney-Generals are very expert but also confident. That breeds a willingness to engage. Again going back to personalities, that helps.

Lord Falconer of Thoroton: Can you give us an example of where, in your role as Lord Chancellor, you have intervened to defend the rule of law?

Dominic Raab: It is probably not right for me to do so if I have not already made it public for various reasons. As Lord Chancellor—I do not know whether you would agree with this, from your experience—you want to protect the discretion of the advice you give. Sometimes you will not. If I thought there was an overt attack on the judiciary, I would be plain speaking and public in my correction of that. It is not for HMG to do. We have not had that in my time as Lord Chancellor, but I am very mindful of that.

If I thought there was anything that might lead to that, I would also probably try to nip it in the bud early. I have not had cause to do so. Most of my advice is given quietly and, I hope, assiduously. As with the wider doctrine of collective responsibility in the Cabinet, those discussions are held privately. They are more effective and more rigorous as a result of that.

The Chair: We move on to one of your identified priorities, the Bill of Rights Bill and the implications for the UK being a party to the European Convention on Human Rights.

Q6 Lord Thomas of Gresford: The Bill of Rights Bill is intended to overhaul the Human Rights Act, it explicitly says, and to “restore the balance of power between the legislature and the courts”. In your view, which elements of the Human Rights Acts fail to maintain the balance of power between the legislature and the courts?

In your Bill of Rights, you provide this: “A court may not provide a post-commencement interpretation of a convention right that would require a public authority to comply with a positive obligation”. Everybody has always thought of the convention as a living instrument that adapts and adopts to the current situation. Particularly in advising in the Bill that people look at the preparatory documents to the convention, which were presumably from 1948 and 1949, you are an originalist, as the Americans would say, as opposed to treating the convention as a living instrument.

Dominic Raab: Yes. We could have a wonderful symposium on the question you have asked. It is far reaching. I do not accept your proposition about a living instrument. A living instrument is not contained in the ECHR.

Judge Spano, the outgoing president of the Strasbourg court, has said that the European Court of Human Rights has shifted from an age when it did look creatively at the ECHR and its interpretations as a living instrument to an age of subsidiarity. It will be very interesting—I was in the Strasbourg recently—to see how the new president, for whom I have great regard, approaches it.

Let us be very clear about this. The living instrument—I will speak candidly, so we can understand this—is not rooted in the convention. It involves creativity with no democratic mandate. It is different from the Human Rights Act in that respect. The Human Rights Act licenses all sorts of creativity, but, in fairness, the judiciary under Lord Bingham would have said, “Well, Parliament gave us this power, and it is for Parliament to change”.

In relation to the Strasbourg court, the doctrine of living instrument was conjured out of case law, and therefore what the Germans would call the Grundnorm of that is very much open to question.

I would also note that Strasbourg case law has ebbed recently in its creativity and has taken a more constrained approach. Of course, what ebbs may flow. The extent to which any court, domestic or international, is creating as opposed to applying law is a perfectly legitimate question.

As you said, facts change over time, and case law therefore has to adapt. There is quite an important distinction, even if it is a subtle one, between applying existing law to new facts and creating new law. It is undeniable that the European Court of Human Rights, under the living instrument doctrine, has created new law. It is also undeniable that there is no provision in the convention that allows for it. I do not think that is a literalist approach, in the way you described, but being very careful about the separation of powers is important.

The Human Rights Act is a rather different creature, but it does allow the importation of that creativity. For example, Sections 2 and 3, in particular Section 3, which is pernicious, allow for the amendment of legislation by the courts in order to force compliance not just with the ECHR but with the ever-expanding corpus of Strasbourg case law. That is constitutionally wrong on principle. If we look back, I suspect that was not the intention of the architects of the HRA, but I would defer to others who were there at the time on that. Sections 2 and 3 are ripe for reform.

There was another element to your question, which has escaped me, but this is absolutely legitimate. Forget the changes and the things that have happened. Take, for example, the creeping expansion of Article 8, which makes it more difficult to deport foreign national offenders, or the ongoing challenges I have in prisons with people suing. It is extraordinary.

Under Article 8, we have convicted terrorist offenders suing HMG for a right to socialise in prison where we deem them a risk either of disseminating extremist material or of terrorist recruitment. I find that extraordinary. That is a direct example of that creativity. That was the issue.

You asked me about the travaux préparatoires. If I understood you, Lord Thomas—I do not want to mischaracterise what you said—you suggested that somehow that was an inappropriate thing to do. As a canon of international law, including under the Vienna Convention on the Law of Treaties, particularly when there is a grey area of law, which we are often talking about, it is legitimate and lawful to look at the travaux préparatoires and find the meaning of a particular provision in a treaty.

I hope I have given a full and not unduly defensive answer to your question.

Lord Thomas of Gresford: There is room for a great debate on this.

The Chair: I have a bit of a queue of people on this issue.

Dominic Raab: I shall be more disciplined in my answers.

The Chair: No, it was not your answer at all. I was making sure that all the noble Lords who want to ask a question on this can be fitted in, given the time available.

Q7 **Lord Foulkes of Cumnock:** Good morning, Lord Chancellor. I followed you in Strasbourg, visiting the European Court of Human Rights as part of the UK delegation to the parliamentary assembly. We were given the same statistics you were given. In the United Kingdom, there are in fact the fewest complaints of any member country. Last year, of 260 complaints, 255 were ruled as inappropriate to be dealt with by the court. Only five were considered, and only two of those were dealt with by the court, one of which was in relation to the Rwanda case. It is a very small number.

You have rightly said the United Kingdom Government have no contemplation of coming out of the European Convention on Human Rights. Will you confirm that today?

Dominic Raab: We have a very good record, and we should be proud of our record, not just of compliance but as founder members of the European Court of Human Rights in Strasbourg and the International Criminal Court.

I know it is an aside, but I am doing a lot of work with Karim Khan, a British prosecutor at the ICC. Joanna Korner was elected as well. She is an exceptional advocate and now judge. We should be proud of our record.

Equally, there are moments where Strasbourg case law and the principle of margin of appreciation call for dialogue. Particularly given the amorphous parameters of case law and the fact there is not a strict doctrine of precedent in Strasbourg, it is absolutely legitimate to press on this.

We did it on prisoner voting. Everyone told me we would be kicked out of the Council of Europe. I was the junior Minister at the Ministry of Justice under David Cameron. People said we would be expelled from the Council of Europe or that we had to give prisoners the vote. I went over and had a conversation with the Committee of Ministers. We did not give prisoners the vote, and we did not fall out of the ECHR. At the time, I made clear our respect for the institutions. There is a perhaps peculiarly British—I should say English and Welsh—phenomenon, as common law countries, that we operate on a doctrine of precedent, but that is not really the way continental domestic systems work, let alone the international courts. It is right that we have the ability to challenge sometimes. The margin of appreciation recognises that.

On your particular point, the Bill of Rights encapsulates that but within the bounds of the convention. The Government's position on the ECHR, as I make clear in relation to the Bill of Rights, is that we intend to stay a state party. Indeed, we retain the ECHR in a schedule.

If you are asking me whether we are committed to stay within the ECHR for ever and a day, the answer is that we are not able to make that commitment. It depends a little bit on the court. When I was in Strasbourg I made the point that we feel more, not less, committed to the Council of Europe as a result of Brexit. We have shown our European credentials in relation to Ukraine and what we do in NATO.

It is not a question of rejecting Europe. In fact, I see the Council of Europe as an opportunity, not just in terms of the court but in terms of some of the other work that it does, such as raising fair trial standards, to show that we can be an even stronger European neighbour.

Lord Foulkes of Cumnock: That is very helpful, but you have not said clearly that it is current government policy that there is no intention to withdraw.

Dominic Raab: I have set out meticulously, correctly, accurately and precisely the Government's position. I am happy to do so again.

Lord Foulkes of Cumnock: It is very important for the other countries that have a far worse record than we do in relation to human rights.

Dominic Raab: I agree, but, given our record and our democratic credentials, I am a bit frustrated, in the way you have described, by any suggestion of moral equivalence with other countries or the idea, for example, before Russia was expelled, that we would be put on a par with Russia because we kicked up a fuss over prisoner voting. We just need to be a bit careful about that.

I understand the point you are making. Setting a good example and maintaining high standards is important and sends a message to the world. As a former Foreign Secretary as well as a current Lord Chancellor, I get that. There is this suggestion that, if we push back at the margins on something like prisoner voting, we are somehow on a par with Russia. That is sometimes the argument here. Honestly, we need a stronger moral compass in this area.

Lord Foulkes of Cumnock: We are getting delegates from other countries raising with us the fact that the Home Secretary says she wants the UK to withdraw. That undermines our position. What can be done to stop the Home Secretary saying that and get her to stick to government policy?

Dominic Raab: It is a fundamental principle of the ECHR and a quintessentially British right to express yourself freely, particularly in the course of a leadership contest.

Q8 **Lord Hope of Craighead:** Good morning. Can I take you to a completely different aspect of the Human Rights Act, which is the part it plays in the devolution arrangements across the devolved Administrations?

As you know, the legislatures of all three devolved Administrations cannot legislate incompatibly with the convention, and the convention also affects the powers of Ministers because they cannot act incompatibly with the Human Rights Act.

The Bill of Rights, as I understand it, is to apply across all four parts of the UK. I think I am right in saying that you are proposing to amend the devolved settlements by simply changing the words "Human Rights Act" to "Bill of Rights Act", as it will be. Is that right?

Dominic Raab: The Bill has been published. You can see the name. More generally, the position on devolution is that the HRA is a UK-wide piece of legislation. It is not a reserved power, but it is a protected enactment under the devolution settlements. Any amending of it can only be for the Parliament in Westminster.

Of course, the devolved legislatures can, before and after, legislate on human rights issues within the ambit of their devolved competencies. To that extent, there is already some measure of variable geometry in

relation to human rights. That is natural, and it follows from the devolved settlements. It is also quite similar in other common law jurisdictions such as Canada, to a degree.

I believe you were touching on our approach to the Sewel convention, but you will correct me if I am wrong.

Lord Hope of Craighead: I was not going to.

Dominic Raab: In that case, I will not trespass where angels fear to tread.

Q9 **Lord Hope of Craighead:** That is an entirely separate issue. Can I raise a question about the Good Friday agreement? You cannot change the Good Friday agreement and there is no attempt in the Bill, as I understand it, to do that. The Good Friday agreement is quite simple and straightforward. It simply states that the Government are incorporating the convention into Northern Ireland, providing for direct access to the courts and remedies for breach of the convention. The way in which the Bill is changing the balance between the courts and the legislatures does not affect the working of the Good Friday agreement.

Dominic Raab: You are absolutely right. I share that interpretation. I am heartened by your take on it as well.

Lord Hope of Craighead: I have introduced this, because it has been suggested by some people that the two different approaches to the convention would create a risk of confusion. You have the reformed situation that the Bill of Rights would create, in particular in regard to free speech and so on, where there is a very important change in the balance that you are proposing. Then there is the very simple and straightforward approach in the Belfast agreement. Is there a risk of confusion?

Dominic Raab: I do not believe there is any more than exists currently as a result of the devolved settlements. The devolved settlements are enacted, but the truth is that we do not have an overarching written constitution. I am not suggesting we trespass into that. Therefore, we have tended to deal with these issues bit by bit.

The Bill of Rights preserves, certainly in relation to Northern Ireland, the right balance of power. Certainly, we have been very careful in drafting to avoid any impingement on the Good Friday agreement.

Q10 **Lord Hope of Craighead:** I want to ask about Article 6 of the convention. In Scotland, that has played a major part in reforming the way in which criminal prosecutions are handled. Is there any suggestion of change to the way the courts apply Article 6?

Dominic Raab: Do you mean in Scotland or more generally?

Lord Hope of Craighead: In Scotland in particular, there was a huge amount of case law built on Article 6. I am not quite sure what, if anything, you are proposing. To change the balance between the courts

in relation to the interpretation of Article 6, which has been of great benefit to the proper handling of criminal prosecutions in Scotland, would be significant.

Dominic Raab: We have set out our approach in the Bill of Rights to the procedural framework, including Section 6. I do not believe that it would risk any of the consequences that you say. If you wanted to write to me with any particular concerns, I would be happy to respond very carefully.

Lord Hope of Craighead: I do not have a particular point. I am really just asking generally whether you are aware of the fact that Article 6 has played a major part in reforming the way criminal prosecutions are handled, to the benefit of the system. One would not want to change that, I would have thought.

Dominic Raab: That is a point well registered.

The Chair: We may take you up on your offer. Thank you.

Q11 **Lord Howard of Lympne:** Good morning, Lord Chancellor. To set the record straight, Lord Thomas said that everyone agrees that the convention is a living instrument. You have made it clear that that is not the case, and you are not alone in dissenting from that proposition. One of the problems with the Human Rights Act is that it invites our judges to decide on issues of proportionality, something that some of us at least thought should be the job of elected politicians. How far will the Bill of Rights modify the extent to which our judges will continue to receive that invitation?

Dominic Raab: There are lots of areas, but let me try a couple. Sometimes, we will explicitly qualify a right to avoid expansive interpretations. Article 8 is the obvious example. In fairness, Article 8, paragraph 2, invites states parties to do that. It is a positive right set out with a series of qualifications, where, exactly as you have said, Lord Howard, the precise balance, up to a point, as long as you are not emasculating the right, is for elected and accountable legislatures to decide. That is one way of doing it.

There are other areas where we actually strengthened rights. We want to reinforce free speech. That is a quintessentially UK right. It has been challenged in lots of different ways. People talk about wokery, but I also think of judge-made privacy law. That is quite contrary to a British, UK-wide tradition of transparency and accountability. In any event, strengthening free speech, both in its own right and in its balancing with other things, such as Article 8, is a legitimate thing to do.

More generally, Sections 2 and 3 of the HRA prevent the elastic case law in Strasbourg from automatically being imported. In Section 3, effectively, you invite courts to amend legislation. Those are areas where the procedural framework will be considerably tightened. I can see Lord Anderson twitching at my reference to Section 2. Of course, the case law, as in Strasbourg, has ebbed. It is not for me to comment on the merits of the Supreme Court's approach. As a matter of fact, a lot of commentators

will agree that it has taken a much more restrained approach than previous courts under previous compositions.

It is also the case that, if you curtail Section 3, you may invite more declarations of incompatibility. You may well end up in Strasbourg a little bit more. It is at the margins, but that is quite healthy, because, in exactly the way you describe, it is for elected parliamentarians to wrestle with socioeconomic questions or precise balances. It is for the courts to say, "Hold on. You have impinged on the fundamental right". It is not for the court then to dive in and rewrite the legislation—I am not criticising the courts—not only because of the shift in approach but because the HRA explicitly licenses and requires them to do so.

I hope that gives you a broad outline of the approach. We do not have a written separation of powers in the UK constitution and I am not suggesting that we do that. It is not a very British or UK approach. It is not a particularly common law approach. I do not think that that means we should abdicate the importance of the separation of powers. We have world-beating judiciary. We want robust judges taking robust approaches, but understanding the limits of their powers. Likewise, the Executive need to be held to account and the legislature needs to perform its role properly.

The Chair: A little brevity would be helpful at this point, Lord Anderson.

Q12 Lord Anderson of Ipswich: I will be brief. Your last answer, if I may say so, went right to the constitutional heart of the Bill of Rights. You mentioned Section 3, which of course is the section that allows the judges to interpret statutes in a way that Parliament did not necessarily intend. I understand that you described that as pernicious, because you think that is the judge trespassing on to the functions of Parliament.

I think you have answered my first question. I was going to ask you whether you thought that, if you got rid of Section 3, there were going to be more declarations of incompatibility by the courts. I think you accepted just now that there will be more.

My second question again is a constitutional question. There has been—I think it would be fair to describe it as such—a convention over the past 20 years or so that, when there is a declaration of incompatibility and the Government have appealed it unsuccessfully right to the top, the Government will change the law in obedience to the judges, who have declared the law to be incompatible with the human rights convention. Do you anticipate that that convention will remain as declarations of incompatibility become more common after your Bill comes into force and Section 3 has been repealed?

Dominic Raab: That is a very legitimate and articulate challenge, as ever. Let me be honest between us, as colleagues. I do not accept that Section 3 is purely about interpretation. It is about amending legislation. That is what the power does, in effect. I understand that sometimes there is a vanishing point between interpretation to new facts and in fact changing the rules. I have no doubt that the combination of Sections 3

and 2 has, at least previously, resulted in that kind of amendment of legislation. That is the point of principle.

Will we end up with more declarations of incompatibility? Yes, maybe at the margins, but of course government will address its approach to the new settlement. There was, only under previous Labour Governments I hasten to add, perhaps a bit of laziness in the drafting of legislation. I am teasing Lord Falconer but, if something was a bit rough around the edges, quietly it was always understood that the courts would refine it. I do not think that is an honest and correct approach, and I am sure Lord Falconer may take issue with it.

There is certainly a sense, within that particularly hyperactive legislative period in the noughties, with lots of stuff coming on to the statute book, that the courts would straighten it out. "By the way, we've given them the tools to do so". That is wrong. I am not clear that correcting that would necessarily lead to more declarations of incompatibility. It could lead to more thoughtful legislation.

Lord Anderson of Ipswich: If there are declarations—this is my question—will the Government comply with them, or will they leave it to Strasbourg?

Dominic Raab: To be honest with you, Lord Anderson, I was trying to whittle away at your assumption, so I did not have to give a particularly long answer to the trickier question that you have given me. The truth is that I am not sure that there is a convention in the way you describe. Certainly in practice, ultimately, and we spell this out in the Bill of Rights, it is Parliament that writes the laws of the land.

The reality is that, whatever we say about the procedural consequences of a declaration of incompatibility, you have to remain consistent with your international obligations. I am not suggesting otherwise. Effectively, Parliament must take responsibility for that, both in the choice of how and whether to legislate, and in quite how nuanced it wants to be. Parliament can always take a view that there are three options about how we comply with a judgment: "We'll take the minimalist approach. Let's see how that goes". That is part of the dialogue with Strasbourg. That is a legitimate thing to do.

Ultimately, Parliament must also decide, if it is not going to comply, whether it wishes to withdraw from the convention. A lot of that will depend on the wisdom of legislators in the Government but also on the approach taken in Strasbourg. That relationship is a perfectly legitimate, lawful and healthy one to have.

Lord Anderson of Ipswich: Of course, we would lose our trade and co-operation agreement with the EU, particularly in relation to criminal justice, if we were to actually withdraw from the convention.

Dominic Raab: That is speculation.

Lord Anderson of Ipswich: It is not. It is written in the TCA.

Dominic Raab: Yes, but would they exercise what was in the TCA? We have got ourselves into a good place this week on relationships with our EU friends and partners. I do not want to say anything that puts that at risk. I want a good relationship with the EU and with the Council of Europe. My father was a Czech refugee. I feel very passionately European. I also feel very passionately as a democrat.

The Chair: We move on to funding of criminal legal aid and potential implications for administration of justice.

Q13 **Lord Falconer of Thoroton:** The Bellamy report, which the Lord Chancellor's department accepted, said that the problem in relation to criminal legal aid was that, in order to have a properly functioning criminal justice system, you needed to have a sustainable defence solicitors and barristerial profession that could provide equality of arms for defendants. Sir Christopher proposed a £135 million increase in the pay for criminal defence lawyers as a first stage in trying to put the criminal defence side of the equation back into an okay state.

He described it as being in a very bad state. He is saying that the defence Bar profession, including solicitors, is not sustainable unless something substantial is done. He described the £135 million as the first step. How do you view the state of criminal defence at the moment and what further steps are you going to take to put it in a sustainable and better position.

Dominic Raab: I pay tribute to Lord Bellamy. We were so impressed with his report that we made him a Minister, albeit not with responsibility for criminal legal aid. He did an exceptional job. We published our response. We have boosted the system with the upfront investment—15% for most fees. This is alongside the wider long-term reforms that he recommended and takes the total increase in spending over £135 million up to £138 million. That takes the criminal legal aid expenditure on an annual basis to £1.2 billion a year. We are also separately looking at civil legal aid, but I know that your question was in relation to criminal legal aid.

We need to see how the system settles down. We monitor those areas geographically that have more of a challenge in finding criminal legal aid lawyers. There are some structural issues around access to the profession and advocacy rights that we also need to look at very carefully. We have come in and this issue, in fairness, had been long overdue. We own it. It is our policy and our review, but the legal aid system had come under challenge under successive Governments. We have taken an important step in investing in it to make it fit for the future. There will be more challenges and we will look at them prospectively. We have set the foundations now for a sustainable criminal legal aid profession.

Lord Falconer of Thoroton: There is nothing in that answer, with respect. Lord Bellamy made it clear that it was the first step. I am interested to know what the second, third and fourth steps are.

Dominic Raab: We followed all the recommendations that Lord Bellamy set out. They were phased in terms of the immediate financial uplift and then the structural reforms. You are well versed in the structural reforms. They are all under way and I am happy to look at the second, third and fourth steps. It makes sense to see how effective and sure-footed the first step has been before we decide what scale of further intervention is required.

We have just put a massive amount in. I would want to challenge the idea that we have a low expenditure on criminal legal aid, given the figures I have just set out. We will keep looking at it. If you have any particular reforms you think we need to be considering, I am always willing to consider it, at a particularly financially stricken time.

The Chair: You must have some contingency plans if you continue to see a sustained decline in the number of solicitors engaged in continued legal aid work.

Dominic Raab: We have the public defender regime and other opportunities. There is always the opportunity to look at the settlement again, in theory. In reality, given the financial strictures, that is very unlikely to produce any extra money. It needs structural reform. My experience is that people are more likely to come forward with propositions to increase the budget than to change and reform the system.

With Kirsty Brimelow, who I have met with and is very serious and concerted, there is also an opportunity to engage with the CBA in a different, more constructive way. As the Secretary of State and Lord Chancellor, I greatly welcome that.

Lord Thomas of Gresford: I was involved at the beginning in supporting the public defender scheme, but it is still a minute part of the defence service, is it not?

Dominic Raab: It is a small proportion, not least because there is so much opposition from within the profession to it.

Lord Thomas of Gresford: You referred to advocacy rights and that immediately makes criminal barristers feel that you are going to possibly enhance the position of solicitor advocates. Is that within your contemplation?

Dominic Raab: I would not regard it as enhancing so much as levelling the playing field. I trained as a competition lawyer way back when and I suppose I look at it a little like that. We need to be clear what our priority is. Our priority is the consumer of legal aid services. Of course we recognise the role of the practitioners. They are absolutely instrumental, but our overarching duty is the public who benefit from the service.

We have just talked about two things, the public defender service and advocacy rights for solicitors. You are quite right: whenever we talk about

anything other than money, there is huge opposition from within the sector.

Lord Thomas of Gresford: You would, presumably, want to see a skilled criminal Bar still in existence, would you not?

Dominic Raab: Yes, of course. I would also like to see a diversity of provision, which gives us—we talked about supply chain given Covid—a diverse profession with enough resilience built into it.

Lord Falconer of Thoroton: Fundamentally, Lord Bellamy is saying, “Don’t change the structure. Make sure the one that currently exists works properly”. He was saying that, if you did only the £135 million, which you have done, that would not be enough. I am reading your answers, Lord Chancellor, as being that you will wait and see how the £135 million goes down and then you will make a decision. That does not seem to me to be in line with what Lord Bellamy was saying.

Dominic Raab: Allow me to respectfully disagree. There is a short, medium and long term. We followed his short-term recommendations almost entirely, including the money. The only thing I did not do was on paying for pages of prosecution evidence because that creates a perverse incentive. Actually, the only two things structurally that I did not agree with Lord Bellamy on were anything that created an incentive to create paperwork and anything that created an incentive to prolong hearings. Those are the only two things, of all the recommendations, from recollection.

Lord Falconer of Thoroton: Was he suggesting some things that prolonged hearings?

Dominic Raab: I do not think that he was suggesting it, but I wanted to be very careful that, if we looked at the reforms across the board, we did not allow that to happen. The exceptions that I made to accepting the recommendations were those two, from recollection. We have done more or less exactly what Lord Bellamy had suggested.

In terms of the next stage, that is the medium and longer term. Given the amount of change that has come through at quite a breathless pace, notwithstanding that I know it took a long time for the Bellamy review to conclude and for the Government to respond, in fairness I came back with it very quickly. I published it within months. That was what the CBA advised me to do. Then, as quickly as we physically could, we introduced the reforms. Given the scale of that, it is right to pause for reflection and see what further is required, not least given that there are some pretty big questions in relation to structural reforms.

The Chair: That probably leaves us a little concerned, but let us see how we go with the next question, on civil legal aid.

Q14 **Lord Anderson of Ipswich:** The Ministry of Justice has recently launched a review of civil legal aid, with a final report due in 2024. The president of the Law Society recently told the Justice Committee in the

Commons that, over the past five years, over half of civil legal aid firms have left the profession. The chair of the Bar recently said, “Unless interim measures are put in place to shore up existing provision there will be no system left by 2025”. That sounds quite alarming. Are they right and, if so, do you have any interim measures in mind or, indeed, any structural plan that might allow the money to go further?

Dominic Raab: As well as undertaking the review of civil legal aid, we have had the means test review. That expanded the scope significantly. I do not have the figures here, but I am happy to write back if it is helpful. There is always a balance between doing the analysis rigorously and doing it swiftly. We need to have the conclusion of the review. If there are some things that jump out as low-hanging fruit or essentials that cannot wait that long, of course I would be willing to consider it at least.

Lord Falconer of Thoroton: In relation to private law family cases, civil legal aid was quite dramatically slashed some time ago, considerably before you became Lord Chancellor. What work has your department done to see what the effect has been on, particularly, vulnerable families, but also the amount of court time that is taken up by people not having lawyers? Many people say that it makes the process longer and more expensive, because the judges have to spend longer dealing with those cases.

Dominic Raab: This is my fourth tour of duty in the Ministry of Justice, and I have always had some locus to look at private family law and, in fairness, public family law. I will tell you what I think. In private family law, about 55% of the cases that end up in the courts are safeguarding and domestic abuse. They must have a judge dealing with them. In relation to the other 45%, effectively separation of assets and custodial arrangements, we should be actively discouraging those cases from coming to court. They ought to settle before.

What are we doing about it? This probably touches on the financial issue as well. We are investing a huge amount in the mediation and the vouchers to support it. I want to encourage ADR and mediation to resolve those issues without going to court. Aside from the financial saving, for those families and, in particular, for the children who are otherwise going to court, it is a much better outcome. It is agonising to drag children through that process.

The interesting question is the extent to which the vouchers and the mediation will work. There is already significant evidence from the pilots and the scheme that they do. Therefore it is a good example of something where we ought to invest not just to save money but for better outcomes. If the mediation is the carrot, I am also looking actively, and we will prepare legislation in due course, at what the—“stick” is not quite the right word—check is. That is so you do not get people going into mediation, resolving the issue, or being on the cusp of resolution, but thinking that they will double dip and have another crack, just in case they could get something better in court.

Whether it is cost shifting or fees, I need to look and see how we get the right balance between the incentivisation to go through mediation and then settle, and the disincentive to then go to court just because you want another bite of the cherry. As you know, in private family law you are dealing with very entrenched disputes and you want to create a virtuous cycle of resolution, not a vicious cycle of continuing the acrimony in court, particularly, as I say, in non-safeguarding, non-abuse cases where children are at stake.

Lord Falconer of Thoroton: Those are worthwhile sentiments, but what money is the Lord Chancellor's department spending to ensure the diversion of the 45% of non-domestic abuse private law family cases away from the courts into a mediated or alternative dispute resolution?

Dominic Raab: I am doing the allocations now

Lord Falconer of Thoroton: They are not spending money at the moment.

Dominic Raab: They are.

Lord Falconer of Thoroton: How much are they spending?

Dominic Raab: Let me follow up with the detail, but I am very happy to do that. I am also doing the allocations now for how we expand the current pilots. I am sure it works

Lord Falconer of Thoroton: It is only pilots.

Dominic Raab: I would need to see. Forgive me; I have genned up on the detail of all the constitutional issues, but I would need the figures at hand to see quite what the scope is. We have done pilots. I now want to roll it out. Let me come back to you with the detail. I hope you get the broad sense that it is quite a good example of a pretty substantial structural reform that we will make. I definitely accept that we will need to invest in the mediation to make it work. I think that it will save us money several times over. I am very closely engaged with the President of the Family Division on this.

Lord Falconer of Thoroton: What happens in the meantime?

Dominic Raab: In the meantime, we are rolling out and expanding the pilots.

Lord Falconer of Thoroton: No, but, in the meantime, what about those people who cannot get lawyers and who, for example, are not entitled to domestic abuse representation and advice, so end up in a situation where they are not properly represented in a dispute, for example about access to children or the division of assets?

Dominic Raab: The existing legal aid arrangements are there.

Lord Falconer of Thoroton: They are inadequate, are they not?

Dominic Raab: For the long-term, we need to make the structural changes that we described. If you ask me for the short term, the difference will be the wider changes we are making in the civil law area, including the means test review. If your question is how much money we are putting into the mediation vouchers, I will come back to you. If your question is whether I am satisfied that, in the meantime, we have the right financial support for those who rely on legal aid, I am very happy to give you a fuller answer in the same letter.

Lord Falconer of Thoroton: Take public law children cases.

Dominic Raab: That is different.

Lord Falconer of Thoroton: There is a sense, is there not, that, because of the post-pandemic problems and a whole range of others that predate the pandemic, public law children cases are now not being dealt with sufficiently speedily and not being properly resourced.

Dominic Raab: Forgive me, Lord Falconer. I thought you referred to custody rather than guardianship.

Lord Falconer of Thoroton: No, public law where the state is intervening.

Dominic Raab: I understand.

The Chair: Guardianship orders, yes.

Dominic Raab: That is not quite what I thought you said earlier. I thought we were talking about private family law. I am happy to write about the investment going into that as well.

The Chair: I know that is an issue for quite a few people outside this committee as well. We need to move on, I am afraid, but the Constitution Committee is on record as expressing its concern, consistently, about the situation in civil and criminal legal aid impacting on the administration of justice and that crystallising into an unsustainable position. Although we have listened to your answers, I do not know whether you want to make any final comment as to how you would reassure us that we will not end up in an unsustainable position.

Dominic Raab: We are obviously monitoring it very carefully. While the review of civil legal aid is under way, we are continuing to make the best of the financial envelope we have. To give you one example of that, which is acute and sensitive, we are injecting £10 million a year into housing legal aid through the housing possession court duty scheme. There is an additional £13 million going into family legal aid. I hope that I can reassure you that I am keeping it very closely under review.

The Chair: We now move on to courts funding.

Q15 **Baroness Suttie:** Good morning, Lord Chancellor. In the upcoming spring Budget, how do you plan to ensure effective and efficient support

for the courts and, in particular, for capital spending on the courts estate? The outgoing chief executive of His Majesty's Courts and Tribunals Service has previously said that there is approximately £1 billion of outstanding maintenance in the courts estate.

Dominic Raab: It is a very important issue. It is one of those issues that, as Lord Chancellor, you realise are disproportionately relevant not just to the effectiveness of the courts but to the morale and the ability to recruit judges. After pay and pensions, court maintenance, the state of the courtroom, is probably the single strongest, most prevalent bit of feedback I get.

The other point I always make to our friends in the Treasury—it is the same with prison maintenance—is that, if you lose a courtroom because of court maintenance issues, it is a totally false economy. I cannot speak to what will be in the forthcoming Budget, but I can tell you that we will have spent £184 million on court maintenance and repairs in the two years to April 2023. Our current 2022-23 budget for capital, maintenance and estates projects is £75 million.

We have a whole pipeline of works and we prioritise those very carefully to maximise the functionality of the estate and the resilience. There is also an extra £20 million spent on capital maintenance in 2022-23 for—I hesitate to say “more minor issues”—repairs and replacement of items, such as decorating, replacing carpets, furniture, the deep cleans and making sure the fire doors work, as well as the larger-scale projects.

It is an issue I discuss with the judiciary quite a lot, as well as in the context of HMCTS. We certainly strive, within our budgetary envelope, and as a matter of the concordat, to make sure we are providing enough to go in. I am entirely convinced that, notwithstanding the reticence about spending in capital during a difficult financial period, it is really part of the running costs and the operational functionality of the courts. Again, I have regular discussions. At the last HMCTS board meeting we discussed this as one of the significant issues.

Q16 The Chair: One issue the Constitution Committee has reported on before is this keenness to understand the investment in IT and digital enhancement in the court system, its impact on efficiency, throughput and data collection to inform policy more effectively. We have seen the National Audit Office report, which expresses concerns particularly about the digital case management system, which of course is a key part of improving efficiency. Would you want to comment on that?

Dominic Raab: IT projects in Whitehall have a long and less than illustrious track record. In the context of the justice system and the court service, it is absolutely imperative that we learn the lessons but keep pursuing them. There is a whole range of issues around the common platform. Frankly, I will not succumb to the luddite view that we abandon that. We have to make it work. There are examples of good progress. We need to get the pace of that right because we need to carry people with us, but that is important.

In the wider court system, there are areas where it is working quite effectively. There are some good stats on how digitalisation in divorce proceedings has been taken up. Probate is another area. Of course, in all these areas, among both the clientele and those managing the system, there is a demographic difference in view and approach. We have a Master of the Rolls who is very much a pioneer and trailblazer in encouraging digitisation and IT reform. That has certainly buoyed me when we have had challenges.

There is a lot more to do, but there is progress. The situation is not as black and white as is sometimes presented. There are all sorts of frustrations with it and we need to increase if you like the digital capacity of the users to make the very best of it, as well as to deliver things such as common platform and the other digitisation processes. I do not think that we have a choice. We need to be quite clear that we are taking on the worst vested luddite critique. At the same time, I am also sensitive to the whole point about learning lessons and getting the pace of reform right.

The Chair: We move on to court backlogs.

Q17 **Lord Mancroft:** Good morning, Lord Chancellor. There is a growing amount of anecdotal evidence, certainly in the newspapers, about the logjams and delays at all levels in the court system. What is the current state of the backlogs in the court system? Are there any areas that are particularly under intense pressure? What steps are you taking to address this problem?

Dominic Raab: The outstanding caseload in the Crown Court increased. Let us take a step back. There was a backlog before the pandemic. You always want an element of backlog, because otherwise scheduling becomes a problem. Clearly, the pandemic, for example the impact on jury trials of the social distancing rules, has increased the backlog.

We started to get it down. It then increased as a result of the CBA action. At the end of October it was 62,500. It is now decreasing. In December it was down to 61,700. Our aim is to get it down to 53,000 by 2025. There is a whole range of things that we are doing to that effect, from Nightingale courts to the removal of the maximum limit on sitting days. The single biggest issue is judicial recruitment and I am working very closely with the judiciary on that.

In the magistrates' court, the outstanding backlog fell from a peak of 445,000 in July 2020 to 342,200 at the end of December 2022. There is still a way to go, but that was progress.

In family law, the outstanding caseload in private in November 2022 was 52,700. That was a slight decrease, but not as much as we would like. We have talked through some of the structural issues there.

I can talk about other areas, but the pandemic has clearly created a problem. I am most concerned about the Crown Court backlog, but we have a plan in place. Whether it is judicial recruitment or the courts

maintenance project, we spend a lot of time looking at it and we will push everything to get down to 53,000 by 2025.

Q18 Lord Hope of Craighead: I would like to follow up a bit on the point about recruitment of judges, which you mentioned. The Lord Chief Justice last year told us that there was a shortfall in meeting the target. For example, in the case of Crown Court circuit judges, he told us he fell short by 10, which is quite a significant figure when you consider the number of judge days involved. Also, the county court is well short of the number of salaried judges that are needed.

The problem seemed to be that not enough of the candidates who were coming forward before the Judicial Appointments Commission were judged to be of significant merit to be appointed. That suggests that there is something wrong in attracting the right people. I wonder whether you can identify, beyond the state of the buildings, what other factors affect the shortfall and how they could be corrected.

Dominic Raab: Pay and pensions, although we have introduced significant reform in those areas, and the state of the court estate are the three most significant. Perhaps there is attitudinally a change. I do not have any more than an anecdotal view about the esteem that is held in, so I do not know. It seems to me that the judiciary is held in very high esteem by the public, and there is quite a lot of polling that bears that out. It would be important to continue trying to disaggregate those factors.

In terms of what we are doing about it, we are recruiting up to 1,000 judicial officeholders as part of the 2022-23 recruitment programme. For 2023-24, I have approved recruitment for another 1,000 vacancies. We have done the other things on the backlog. For the 2023-24 recruitment round, we have also approved 1,000 vacancies across all jurisdictions. That includes 70 circuit judges and 125 recorders. As you probably know, we have a concerted recruitment campaign for more magistrates. We are aiming to get 4,000 over the next few years, and we have invested the money to do that.

In terms of where we are now, we monitor it very closely. The High Court is at full strength. That is good news. Circuit judge recruitment has been challenging in the last four years; that is true. We have had shortfalls of up to 23% against the vacancy request, so we are looking at that very carefully. We are quite optimistic that, for the current round, we have a strong field of applicants.

The recruitment of deputy High Court judges and recorders has been pretty positive. I have approved an increase in the vacancy request, as there were actually more selectable candidates. We have increased it from 125 to 172. There are some challenges for sure, but it is not all quite as bleak as might be thought at first blush.

Lord Hope of Craighead: There is one point you have not mentioned and that is the natural pool for Crown Court judges, which is the criminal Bar. There are suggestions that it is shrinking, for reasons that are well

understood, such as remuneration. Is that something that you are paying attention to?

Dominic Raab: Yes. Again, your pool of practitioners will ultimately feed the quality of the applicants who come forward, which perhaps touches on some of the earlier comments that we were discussing around structural reforms to the pool of practitioners. It is something that I am very mindful of.

Q19 **Lord Howard of Lympne:** Lord Chancellor, I would like to ask you about senior judicial appointments. In your written evidence to our recent inquiry, you said that that was not a current priority, but no less an authority than Baroness Hale has said that the current arrangements place the Lord Chancellor in an impossible position. Some of us who sat on the previous inquiry had reservations about the current position.

I for one was impressed by the evidence of Jack Straw, who has written a preface to a Policy Exchange document, with which I expect you are familiar, which suggests some modest reforms. Do you have any plans, despite what you said in your written evidence, to look at that issue?

Dominic Raab: I have no current plans, but I am in the market for ideas. I have not read Jack's foreword. I will take a look at it. The most significant senior recruitment process under way is for the Lord Chief Justice. That will give me a good sense of where we are. The key elements are a pool of great talent and making sure, in a meritocratic way, we encourage the best people to come forward. There is also a diversity issue. I am not known for being a tick-box politician on these things, but structurally that is true, probably particularly for ethnic minority members of the Bar and the profession, although for gender as well.

I am certainly in the market for ideas for reform. I suspect that you are touching on the role of the Lord Chancellor in it. It is always difficult because the Lord Chancellor's role is quite flexible and malleable. On the one hand, we want judges selected on the basis of strict merit. Equally, there ought to be some form of democratic oversight over it. The Lord Chancellor is trying to balance both of those things and it is tricky. I am not sure that you ever get a perfect outcome.

In practice, for example with the Lord Chief Justice's recruitment, I think we will get an exceptional candidate out of it. I am mostly worried about what works in real time in front of me. If this committee or individuals such as Jack Straw have ideas, I am certainly willing to entertain and consider them.

The Chair: This issue is commented on by the Constitution Committee in its report on the Lord Chancellor and the law officers. To the extent that you are considering responding to that report, we highlighted our concerns about any changes impacting on the politicisation of judicial appointments. By all means reply to our report.

We now move on to retained EU law, including the issue of judicial

pensions.

- Q20 Lord Falconer of Thoroton:** The Judicial Pensions (Fee-Paid Judges) Regulations 2017 will be repealed, as you know, Lord Chancellor, by the effect of the Retained EU Law (Revocation and Reform) Bill. The consequence of that repeal will be that the department, or whoever pays them, will pay £3.5 billion less on judicial pensions for fee-paid judges. What are your plans in relation to that? Are you going to let it be repealed? If you are going to let it be repealed, what are you going to do about the pensions of fee-paid judges?

Dominic Raab: I may need to write to you about the detail of this. The bottom line is that, as I think you know, until March of last year fee-paid judges were able to accrue those pension entitlements under the fee-paid judicial pension scheme. After that, they have accrued their entitlements in the new scheme. The new scheme is not directly affected by the Bill, but I am considering the implications of the Bill for the 2017 regulations that underpin entitlements to benefit from the old fee-paid judicial pension scheme.

Lord Falconer of Thoroton: Are you saying that the Judicial Pensions (Fee-Paid Judges) Regulations 2017 will not automatically be repealed by the retained EU law Bill when it becomes law?

Dominic Raab: Let me look at that specifically and come back to you, please.

- Q21 Lord Strathclyde:** Good morning. I am a new member of this committee and this is the first of these evidence-taking sessions that I have attended. I would like to thank you very much indeed for the clarity of your answers and for coming along.

Continuing on what Lord Falconer said about the Retained EU Law (Revocation and Reform) Bill, it is, as you can imagine, arousing great passions in the House of Lords. Specifically, have you identified in the Bill other pieces of legislation that are due to be revoked and what are you doing about that to mitigate the effects or, indeed, to encourage them? It is just an overall view of what your intention is.

Dominic Raab: We are looking at this now. As it applies to the Ministry of Justice, I have four principles. First, we need to respect our international obligations, including under the withdrawal agreement, if there is retained EU law that is our implementing legislation for that or, indeed, other things where we have international obligations. It is interesting; I had not quite realised the extent of this. Sometimes it is called retained EU law, but actually it is implementing legislation for something that is tangential but, none the less, an international obligation. We ought to do that, because it is part of maintaining our international obligations.

My starting point with the remainder is to look very carefully at whether we can remove or replace. I have two core principles that guide me. As a pretty committed Brexiteer, one has to look for whether we can do

something that is tailored to the UK's circumstances, in a careful way that adds value. I am less interested in the number, if I am really honest with you. Where does it add value? Is there a regulatory change that will benefit legal practitioners or UK consumers of legal services in some way, shape or form, or that will enable us, because we are not governed by the EU, to do more internationally? I will look for that benefit.

I have to be realistic within the timeframe of either 2023 or 2026, because you can postpone it, about what can be done. I will look for where the maximum value is added for either removing or replacing and what the timeframe is within which we can legislate in a responsible way.

The second principle is that I am not looking to do it for the sake of it. There is an element of legal uncertainty that follows all of this after a period of dramatic change. I have to balance, if you like, the assessment that we do with the value added with the inevitable issue of legal certainty. Those are the two things that should be our guiding lights.

The Chair: Baroness Andrews, I think you had a slightly wider question on retained EU law.

Q22 Baroness Andrews: Good morning, Lord Chancellor. This is something maybe Lord Anderson wants to ask as well. We are deep into the Committee stage of the Bill and it is proving very lively, to say the least. We have had a Minister, for example, telling us that his approach in his department is to retain by default, rather than revoke by default. My first question is whether you have a third principle to add to the two you have just given us that is a choice between those two, as it were.

Secondly, I go back on this question of legal uncertainty. You said right at the very beginning that you were very anxious to establish the balance between new opportunities—you talked about added value—and legal certainty. We have had a huge amount of lobbying from the legal bodies themselves about issues of legal uncertainty. We have been debating, at some length already, notions of what happens to case law and interpretive law in the general passage of choice.

What would be your response or your reassurance to the issue that we may be tipping, not least because of the timetable and the speed that everyone is having to work at, as well as the real ambiguities about retention and amendment of the law? What would be your reassurance on that point?

Dominic Raab: It is a good challenge. I hoped that I had touched on most of this in my earlier answer, but let me try to unpack it a little more. I do not start from the presumption of retention. I am not sure why I would do that. I would start with whether we can remove or replace in a way that adds net value. I do not want to lazily scrap or lazily retain. "Lazily" is too strong a word, but you know what I mean. I mean casually.

This is quite an exercise to do. There is a huge amount and we have actually replaced or repealed a whole bunch already in the Ministry of

Justice. I will look at it. It is all about the value added to UK plc and the UK more generally, but I certainly do not start from a presumption to retain. It is more likely a presumption to try to remove or replace. In a way, where the presumption sits does not really matter. I am really looking for the value added. Can we do it meaningfully in the timeframe, either 2023 or postponing to 2026?

The legal uncertainty point is important, because that goes to the net value added. If actually you are creating such breathless change that we cannot yield the dividend from it, that becomes counterproductive. To give you one example, I met with TheCityUK yesterday. That was exactly the conversation we had, and I am very happy to listen to practitioners in the City and elsewhere.

Q23 Lord Falconer of Thoroton: Could you give us an indication of how many sets of regulations the Ministry of Justice is concerned with in relation to the EU retained law Bill, and what resource you have put on to looking at it?

Dominic Raab: Yes, but I would need to write to you. I had the numbers at my fingertips yesterday exactly. I knew that you would ask this, Lord Falconer. Let me add it to my to-do list of follow-up issues to write to you about.

Q24 Baroness Andrews: I want to explore the notion of value added. The Bill does not allow for additional burdens to be placed on any part of the totality. There has to be a trade-off with something that goes as well as something that arrives. How do you reconcile that with your search for value added? What would you lose? Could you give us an example?

Dominic Raab: What would you lose from replacing or retaining?

Baroness Andrews: Yes, if you took out something.

Dominic Raab: If it is unnecessary and it is gold-plating, in any event but particularly because we no longer have the EU obligation, from a deregulatory point of view, I would start from the presumption we want fewer regulations unless there is a good case for them. That is a good paradigm for legislation more generally. I am not one to hyperactively legislate. I want to see what the tangible benefit is.

Q25 Lord Anderson of Ipswich: You mentioned legal uncertainty in relation to the REUL Bill. That arises in relation not only to retained EU legislation, statutory instruments and so on, but to the directly effective EU obligations, whether they derive from the treaty, directives or international agreements, which are removed by Clause 3. We have not got on to this yet in Committee. I anticipate that we will get on to it tomorrow.

It seems to me that the scope for legal uncertainty there is at least as great as it is in relation to the legislation, first because of how Clause 3 interrelates to Clause 7. Clause 3 seems to remove these rights. Clause 7 seems to give the judges the choice of whether to continue applying them. More fundamentally, what is the effect on our common law going

to be, interpenetrated for 50 years by these EU obligations, when the obligations are simply wrenched out?

I wondered whether you thought there might be some sense not in abandoning the whole task because it is too difficult—nobody wants to do that—but in taking our time, spelling out what the anticipated consequences of removing each of these rights is likely to be and then proceeding a bit more deliberately and with a bit more opportunity for Parliament to have a look at what is happening. One thing about the sunset in Clause 3 is that it cannot be extended.

Dominic Raab: On one level, I would need to go back, think about it and give it some wider view. I have looked at this principally from the MoJ angle inductively. The only thing I would gently press back is that, in any event, a lot of EU regulation created a measure of uncertainty overall. That is almost superfluous or even more questionable now that we are not a member state. Inevitably, I do not feel so strongly about that that I am not mindful of the balance. I tend to be pragmatic about all these things. You need to weigh up the pros and cons.

I certainly do agree with you though, Lord Anderson, that we ought to have an empirical basis for it. We ought to try to search for value added. I hope I have convinced you that, at least in relation to the MoJ swathe, we have done that. Funnily enough, I think that, if you do, you probably end up getting rid of more than you suspected at the beginning, as long as you have time, where it needs to be adapted rather than just repealed, to make sure that you really understand what you are replacing it with.

The Chair: We do not have time to debate this, but, reflecting on the report that the Constitution Committee wrote on the retained EU law Bill, I am conscious of how far you take yourself, when you are looking at value add, into policy changes that it is not appropriate to deal with by delegated legislation. That is another debate, which we do not have time for with two minutes to go, but I thought I would just flag it.

Dominic Raab: It is well registered.

Q26 **The Chair:** Thank you. The question that we cannot get to is judicial diversity. I did not want to rush it because this is a really important issue. It goes, over the longer term, to confidence in the administration of justice and so forth. If I may, we will write to you on that issue—because, in addition to any opening question, we would have had supplementaries—in the knowledge that it would be a public response that you were giving to us.

Dominic Raab: Yes, absolutely. In a nutshell, the only point I would make is that I take this very seriously. I am as interested in gender and ethnicity diversity. That is obviously important. Also, there is the broader class or wider social access to what is otherwise regarded as a rather cossetted profession, fairly or unfairly.

We are leading the Pre-Application Judicial Education programme. That tries to support lawyers from underrepresented groups to think about whether they should be dreaming and aspiring to become a judge. My love-in with CILEX continues. I wrote a meritocrat's manifesto in 2012 about how we needed to create more non-graduate routes into the legal profession. I am thinking about that because it is a good idea in the profession, but also what that means to the lead-in to the pool of judicial talent.

I am very happy to respond to your question. To give you a sense that we are thinking about it thoughtfully and in a considered way, those are just a couple of things that we are doing.

The Chair: That is an excellent point. The issue of wider access and barriers right through the supply chain is really important to this. It is very good to hear that comment from you. I am very conscious that people are interested in this and I would not want them to think that we would not give it due consideration. If I may, we will write. We look forward to your answer.

I know that you have to go. Thank you very much indeed. You have fulsomely answered our questions, which is appreciated. Thank you very much indeed.

Dominic Raab: Thank you, all. It was a great pleasure and I look forward to coming back again—not too soon.