

Select Committee on Exiting the European Union

Oral evidence: The European Union (Withdrawal) Bill, HC 373

Wednesday 11 October 2017

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Members present: Hilary Benn (Chair); Mr Peter Bone; Joanna Cherry; Mr Christopher Chope; Stephen Crabb; Mr Jonathan Djanogly; Richard Graham; Peter Grant; Wera Hobhouse; Stephen Kinnock; Mr Pat McFadden; Craig Mackinlay; Seema Malhotra; Jacob Rees-Mogg; Stephen Timms; Mr John Whittingdale; Hywel Williams; and Sammy Wilson.

Questions 1 - 68

Witnesses

Sir Stephen Laws, former First Parliamentary Counsel; Sir Konrad Schiemann, former UK judge at the CJEU and Court of Appeal; Professor Richard Ekins, Associate Professor of Law, University of Oxford, and Head of Judicial Power Project, Policy Exchange; Dr Charlotte O'Brien, Senior Lecturer, York Law School.

Examination of witnesses

Sir Stephen Laws, Sir Konrad Schiemann, Professor Richard Ekins and Dr Charlotte O'Brien.

Q1 **Chair:** I begin by welcoming our witnesses today: first of all, Sir Konrad Schiemann, a former UK judge at the CJEU and the Court of Appeal; Sir Stephen Laws, former First Parliamentary Counsel; Dr Charlotte O'Brien, senior lecturer at the York Law School; and Professor Richard Ekins, associate professor of law at the University of Oxford. We are very grateful to you for giving up your time. As you can see, we are a substantial committee in terms of numbers. We have a great deal of ground to cover, so brevity in your answers insofar as it is possible would be much appreciated. It will not be necessary for all four of you to



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answer every question; you may do a certain amount of looking at each other and saying, "You take that and I will take this".

I wanted to begin with the issue that has been commented on by Lord Neuberger, who said that, if the government "doesn't express clearly what the judges should do about decisions of the ECJ after Brexit, or indeed any other topic after Brexit, then the judges will simply have to do their best". My opening question to you is this: do you think there is sufficient clarity in the Bill about what the UK courts should, should not or might do, in respect of CJEU judgments once the UK has left the European Union?

Sir Konrad Schiemann: The long and short of it is that these are policy decisions. From the point of view of judges, we are used to dealing with obscure material. I can see that from the point of view a sitting judge, as I have been, one tries to avoid something that will create enormous political controversy. It would be fair to say that touching the EU currently is like touching a lighted fuse. From that point of view, it would be very nice for the judge if the Bill set out every possible thing, but it cannot be done. There are too many obscurities. There is a trade-off between giving Ministers sufficient flexibility to cater for the unknown and setting things out. The judges just have to do the best that they can.

Sir Stephen Laws: The Bill deals with it mainly in Clause 6(2) by saying that after the exit, a court may have regard "if it considers it appropriate to do so". I can understand why the courts might think that does not give them sufficient clarity. I would approach the problem differently. There is Section 3, at the moment, of the European Communities Act, which provides that European Court jurisdiction needs to be taken into account in deciding the question of European law. That section is being repealed by the Bill.

The questions are: what does that repeal apply to, and to what extent should it be saved? It may even be that it needs to be applied to all law relating to facts that occurred before exit, as some of those cases will take place after exit. In relation to post-exit cases, it seems to me that you could quite easily say, "Section 3 has disappeared; you do not need to take into account European Court decisions after exit".

That leads you to the question: what can you do? The courts must give some meaning to Section 3, so obviously European Court decisions will require less consideration. There is an existing principle under which, when deciding a law, the courts will look at foreign judgments, and treat them as persuasive but not binding. My view is that, if you rely just on the applications of the repeal to post-exit cases, you will be left with that principle: that you will take into account European Court decisions to the extent that you at the moment take into account decisions of foreign courts. If there were any doubt about that, you could say that you were not affecting that principle.



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That would be a better approach than to introduce a new test of what is appropriate, which would be a substitute for that existing principle, and would lack clarity because it would leave it entirely to the courts to decide what “appropriate” means in different contexts.

Dr O’Brien: It seems to me that there are two points of lack of clarity on the relevant subsection: both that the courts may take it into account, and the extent to which it is appropriate to do so. It is not clear what “appropriate” means; it is an extremely vague word. It is not clear what the principles are that the courts are meant to take into account in determining what is deemed appropriate.

Even if something is deemed appropriate, it is not necessarily clear what “taking account” means. To the extent that taking account offers quite a degree of latitude, I am not certain why the extra qualification of if the courts consider it appropriate is necessary. It would be possible to suggest that they take it into account, but taking it into account could be basically noting it and not doing anything with it.

Professor Ekins: Lord Neuberger is right in general that political choices are for political authorities, and the courts should have as much guidance as possible. I think he is wrong, though, to be especially worried about guidance on post-exit European Court of Justice cases. I have some sympathy with what my colleagues say, but I do not think paragraph 2 of Clause 6 is especially vague, actually. The structure of the Bill is such that after exit day, judgments of the European court will be judgments of a foreign court that could be relevant or persuasive. The point of the clause is to make it the case that no one thinks the judges are doing anything wrong if they read them.

Having said that, you could delete the clause and I think the judges would, properly, do the same thing. It might be better to frame it differently, such that one makes it clear that judgments will be like the judgments of a foreign court dealing with legal materials of a common heritage, in the same way that courts around the Commonwealth might consider materials that have a common root. Their judgments could be relevant without clearly having any authoritative status.

Q2 **Chair:** The point you made, Dr O’Brien, is that you could just say you can take account and leave out the second bit. Lord Neuberger went on to say that judges “would hope and expect Parliament to spell out” how they would approach that sort of issue—how to take into account CJEU judgments—“after Brexit, and to spell it out in a statute”. However, it sounds from what you have said—and particularly from your first answer, Sir Konrad—that you do not really think there is a way in which that can be done with any greater degree of clarity.

Sir Konrad Schiemann: Judges have a particular case to decide in particular circumstances, and what seems sensible in any particular case will vary. When I was a judge, I sometimes took into account French law, Israeli law, Canadian law, all sorts of things, sometimes not even



mentioning it. I thought, "That is rather a good idea. Why can we not approach it that way?" That is the way judges work. I can see entirely Lord Neuberger's point: he wants to put the umbrella up for the judges when they are attacked by the politicians, as they not infrequently are.

Sir Stephen Laws: It is worth pointing out that the statutory concept of taking into account judgments of other foreign courts is not without history. There is a provision in Section 2 of the Human Rights Act that requires courts to take into account the judgments of the European Court of Human Rights. Because it is a statutory right rather than the common law principles that say, "Well, we can look at foreign courts if we want to", it gives the judgments of the European Court of Human Rights more authority. There is greater authority when the taking into account is done under statute than without the statutory provision.

Professor Ekins: It is certainly true that the effect of Section 2 of the Human Rights Act turns partly on the context, which is the UK's continuing obligation under the European convention. Plainly, after exit day, there will be no continuing obligation to follow EU law as such; it will be a common transposed body of law. Even if one were to say one may or must take into account those judgments, it would not quite establish an analogue to Section 2.

In the latest draft, it says much less and is much less onerous than the Section 2 obligation. It is precisely that you do not have to take into account, but you may do if you wish. It will not be nearly as strong. If the courts were to approach post-exit Court of Justice judgments in the same way as they approach European Court of Human Rights judgments, they would be plainly acting wrongly in a way the structure of the Bill forbids. In a way, that is ruled out, and there are fewer options available than that precedent might suggest.

Sir Konrad Schiemann: It is worth bearing in mind that, if there is a commercial contract between a British firm and a German firm, that contract may provide that goods are to comply with EU law. In those circumstances, where a question of whether the goods comply with EU law is brought up before a British court, it has no choice but to look at EU law to see what that provides. Exactly the same can be said of goods that must comply with French law or with US law; you would look at US law to see if we comply. It is not very difficult in those circumstances. In other circumstances, it is much more difficult to do that.

Dr O'Brien: It is worth bearing in mind that future judgments of the Court of Justice will in large part relate to what is deemed here to be retained EU law: EU law already in existence. It would be slightly perverse if, as a result of this Bill, the UK was wedded to an entrenched version of that law, which was not being followed by the other member states of the EU as a consequence of a later Court of Justice judgment that said, "Actually, this is what that means". If the UK courts were not



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to take that into account, you would end up with this strange, slightly ossified version of EU law being applied.

Q3 ***Joanna Cherry:*** Sir Stephen, in your experience, do you think there is a reason why the words “have regard” have been chosen rather than “take into account”?

Sir Stephen Laws: No. Well, yes, in the sense that I think the drafter felt it better captured what he was being asked to do, and felt perhaps that it was less binding. However, you would not plan to make a distinction rest on whether you would use one set of words rather than another.

Chair: That is very helpful.

Q4 ***Seema Malhotra:*** The Bill creates a power to enable Ministers to use secondary legislation to correct retained EU law in order to deal with any deficiencies arising from exit, particularly through Clause 7. Some of the deficiencies that are highlighted include “anything which has no practical application in relation to the United Kingdom or any part of it or is otherwise redundant”, or “contains EU references which are no longer appropriate”. From your interpretation of this, what do you envisage as examples of deficiencies? Would you see those as inherently administrative and innocuous, or do you think that they could also be political?

Sir Stephen Laws: I do not think that the deficiencies are going to include political problems, but they are going to include whether the law makes technical sense in terms of what it provides. The sort of examples that are given by the Government—and which are quite good examples—are where you have references to another member state, or, say, to a place of undertaking in a member state, which was one I used in the paper I submitted to you. Does that include or does it not include the United Kingdom? There could be a reference to an EU institution: that you have to notify an EU institution, or you have to get permission from an EU institution. That will not work, because we will no longer be members of the EU and the institution may not be able to co-operate, or may not be interested in the notice that we give it. Those are examples of things that might need correction.

There is a slight technical problem with the power, in that the definition of retained EU law appears to catch only those things that are saved by the Bill. Quite a lot of what will need amendment is not going to be preserved by the Bill, because it is going to exist anyway. My repeated example is the Consumer Protection Act 1987, of which I was the principal drafter. That implements an EU directive about product liability. That is an Act of Parliament; it does not need to be saved by the Bill, and so it will not be saved by the Bill and be capable of amendment, because it will not fall within the definition in Clause 6 of EU retained law.

Q5 ***Seema Malhotra:*** If I could ask Dr O’Brien to come in on this point, might there need to be more restrictions on the powers outlined,



particularly, for example, to exclude environmental protections or employment protections, which, even though we may not talk about them in these terms, arguably could fall within the scope of the powers?

Dr O'Brien: Yes, indeed. My reading of Clause 7 is such that, while the intention given by the examples might be to direct the powers towards administrative or purely technical deficiencies, the definition is so broad that it could encompass things that include what are effectively policy changes. The suggestion is that it should be where the Minister considers it appropriate not only to deal with a failure of retained EU law to operate, but arising from a deficiency in retained EU law, without defining really what is meant by a deficiency. That is potentially a very subjective aspect to it.

I would slightly disagree with Sir Stephen up to a point. It is possible that the amount of legislation that will fall within the ambit of Clause 7 is actually pretty broad, particularly if we look at the explanatory notes as to what is deemed under Clause 2 to be in effect by virtue of Clause 2. It is not just things that are effectively saved by EU law, according to the explanatory notes; it is anything that falls within the ambit of Clause 2 as being related to EU law or that may make a mention of EU law.

A potentially very broad Clause 2 facilitates the suggestion in the explanatory notes that everything under Clause 2 should be deemed to be in existence by virtue of Clause 2. Therefore, if it is in existence by virtue of Clause 2, it falls within the ambit of Clause 7. This means that there are very few protections and very little that is actually sacrosanct in terms of protection from policy, apart from the Human Rights Act, for instance.

The common denominator among all the commentary that I have read is confusion here. There is quite a bit of confusion over things like whether the Equality Act could be affected. I note that the House of Lords Constitution Committee reads the Bill as effectively excluding the Equality Act from Clause 7, because the Equality Act is standalone; it does not exist by virtue of Clause 2.

However, if you look at the explanatory notes, the suggestion is anything that falls within Clause 2, regardless of whether it is standalone legislation and would exist anyway, is potentially subject to amendment. Of course, lawyers are all exercised by what happens to be their particular area, and there are a great deal of concerns over the effects on what are deemed to be particularly important pieces of primary legislation, like the Equality Act, because they guard fundamental rights.

Professor Ekins: On this point about scope, the Bill is intended to sweep quite broadly. Even though strictly you would not need Clause 2 to save primary acts, the point is to capture them. It might not be clear enough, and one should spell out whether it is intended to capture them in the definition of retained EU law such that Clause 7 comes to bear.



On your opening question, Clause 7 is deliberately framed quite broadly. I cannot give better examples than those that are in paragraph 2 itself, and it might be that a great many of the changes that will and should be made using the power are technical. However, when you are coming up with a new, novel scheme to replace something that does not work, there are going to be some choices involved, and policymaking choices may be quite sharply circumscribed. They may not be terribly controversial, but possibly they could be, and one person's technical change could be another person's more substantive policy point.

Q6 Seema Malhotra: Could I just ask you one specific point there? Clause 7(4) states that regulations under this power could "make any provision that could be made by an Act of Parliament". Does that strike you as perhaps a broader power than might be needed for technical changes?

Professor Ekins: There is a reason for the strength of paragraph 4, there. That partly relates to the point we discussed: sometimes the change that needs to be made might be a change to primary legislation. If there are Acts that will not work properly without changes being made, you need to be able to make changes that are of the same standing as an Act of Parliament in order to amend the problematic primary legislation. This is a very broad power, certainly, and it could be used in a way that goes beyond what many people think is a technical change.

There is a good reason for the breadth of the power, although it might not be a conclusive reason. If you place too many particular restrictions on the scope of the power, those restrictions are capable of being challenged in court. If you say this is a power for making technical changes, then you are making the question whether it is technical, policy or substantive.

Q7 Seema Malhotra: Would you not agree, however, that, either way, challenges might be made in court about whether they are going beyond the scope of the powers intended by Clause 7? Do you therefore think that there are sufficient legal constraints and parliamentary oversight of this power?

Professor Ekins: Those are different questions, in a way. There is a risk of judicial challenge to many things that will go on under the Act. You would raise the risk of judicial challenge quite sharply if you introduced a distinction along the lines that this must be a technical change and cannot be a substantive change. That will open a whole can of worms. The broader power avoids that kind of challenge.

Obviously, there are some things you cannot do with the power, and it spells them out. Those could be challenged. However, it is intended to leave the responsibility for the choice to Ministers subject to parliamentary accountability. Obviously, there has been an enormous amount of commentary on the adequacy of the parliamentary accountability scheme. I do not have a great deal to add, save that there are many good suggestions being made by the Hansard Society and the



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Constitution Committee for a beefed-up version of parliamentary accountability, so you get very serious scrutiny that quite quickly sorts out whether something is truly technical, arguably technical and so forth. This then focuses the parliamentary attention on the subset that is more controversial. Some changes like that are sensible.

Sir Konrad Schiemann: I wonder whether it would help the Committee if I try to give a particular example, which is the sort of thing that could arise. I take it from a case we did in the European Court of Justice before I left it five years ago, and it concerned the biotechnology directive. It was concerned with embryonic cell lines—stem cells—and whether research in relation to those stem cells could be patented.

The first thing we did was to see if there was a common meaning among all the member states as to what was an embryo. The answer was no. Some people started at three months' gestation, and then it was all the way back to the sperm on its own looking for an egg on the laboratory bench. The arguments were not theological in the court at all, although no doubt people's mindset was involved by what they feel that human dignity requires.

However, the difficulties are such that unless one has an absolutely strict line and says, "Do not touch it ever", technology is changing all the time as to what can be done by way of research. One knows that, because the research is going on elsewhere in the world where they are doing these things. I can see that is the sort of case where enormously important decisions, certainly in some people's eyes, can be regarded as merely coping with bringing things up to date and leaving things that are no longer appropriate. Does that help at all? I do not know.

Chair: It certainly does.

Sir Stephen Laws: May I come back on two points that have arisen out of that? I agree with everything that Professor Ekins has said about judicial challenge. If the desire is to produce better parliamentary scrutiny, the worst possible incentive to do that is to create a risk that uncertainty will arise in the law because the judges have set aside the instruments. There are better ways of improving scrutiny than that.

When it comes to the political or technical question, it is important to distinguish two things: there is the trigger for the power in Clause 7, and there is how you use it. The trigger for the power in Clause 7 is that it has to arise out of withdrawal, and I think those words are apt to catch the technical consequences of our no longer being a member of the European Union.

The technical problems that arise out of that are going to give rise to policy problems. The classic example is where there is an issue of reciprocity. You can have a provision that has effect because we are offering things to people from other European countries that they are offering to us, and the legislation is built within that structure. You have



a choice when you deal with the deficiency that arises out of that, because we have left. The choice is between maintaining reciprocity, because perhaps you think it is good for the UK market for people from outside the UK still to have the rights, and confining the rights to people within the UK, because we are now outside of the European Union and are not getting reciprocity back.

Although the trigger is always going to be technical—and the Bill secures that—that does not remove the fact that how you use it once it has been triggered will give rise to policy issues. I do not think there is any satisfactory way of distinguishing when the policy issue is going to be of political importance and when it is not. That is a matter for you, and not something that can be defined in legislation.

Q8 Mr Whittingdale: Can I turn to the implementation of the withdrawal agreement? Mr Barnier has said that he welcomes the agreement of the UK to give direct effect to the agreement. The Government have suggested that the way in which they will do that, as I understand it, is by essentially taking the agreement and passing a piece of legislation to enact all the provisions within it. Do you think that that is how the EU understands our agreement to make direct effect? Do you think that the Government's approach is likely to satisfy the EU or the Parliament, which seems to want to go further and make it impossible for the legislation to be subsequently changed?

Sir Konrad Schiemann: I cannot say anything useful about that. It depends on what Parliament feels.

Sir Stephen Laws: I am afraid I do not understand either what the Government have proposed or what Mr Barnier thinks it means. The agreement will have to be given effect to in UK law. The agreement is going to be an international agreement, just as the treaties are an international agreement, and the treaties given direct effect in UK law at the moment by Clause 2(1) of the European Communities Act. You could achieve the same in the exit agreement, the deal, or whatever it is.

That is unlikely to be sufficient to tell people what the consequences of the deal are in individual cases involving UK law. Just as you have to be able to implement the EU treaties under regulations under Section 2(2), and you have to have rules about how they are construed, you would have to have similar rules for the exit deal. I can see that you can imagine a case where you treat the exit deal in the same way that the European Communities Act treats the treaties at the moment, and that may be what is being proposed. I do not see any objection to that. If that is what the deal requires, that is what you do.

Professor Ekins: I am not sure I have much to add to what Sir Stephen said. Giving it direct effect by way of, effectively, Clause 4 amended might well work. The power in Clause 9 is obviously speaking directly to implementing the agreement, and this power is even broader than the



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Clause 7 power. How it properly should be used depends on the agreement.

For my part, I am certainly a little uncomfortable with the idea that the Clause 9 power can be used to modify the Act itself. That seems to open up some pretty radical constitutional change by ministerial order, which could be very late in the day. Perhaps one could cancel particular modes of exercising that power; rule out a change to the Clause 5 savings and so forth; and immunise various parts of the Bill or the Act from the power. Certainly I cannot speak to how the EU will understand the UK's conformity or discharge. There is a range of options for implementing it.

Q9 Mr Whittingdale: There appears to be some expectation, certainly from the EU, that there should be a continuing role for the ECJ in this process. That, clearly, is something the Government do not want to see. Can that be squared under this procedure?

Sir Konrad Schiemann: If I may, I think here I can contribute something. There are two separate questions. The first to bear in mind is that any agreement that is made with the EU or is, in draft form, agreed by the Council of Ministers and Parliament is subject to challenge in the European Court of Justice on the subject of the vires—the powers—of the parties who made that agreement. The European Union sees itself as a community of law bound together by the interpretation of the treaties, which is given by the ECJ. In consequence, it can happen and has happened that everybody, all the politicians, are agreed on what the answer is, but the European Court of Justice has said, "I am sorry, that does not work because it goes against the role of the European Court of Justice in the treaties".

The Commission and the people arguing on behalf of the EU are faced with the problem that they cannot just do what they think is good; they have to remain within their powers as given under the existing Acts, which were not, by and large, really designed for this situation. That is one problem that really ought to be borne in mind by those who are drafting this.

Q10 Mr Whittingdale: Are you suggesting that the terms of the withdrawal agreement could be challenged in the ECJ?

Sir Konrad Schiemann: Insofar as they touch on the role of the ECJ, certainly. You might exclude the ECJ altogether and attempt to set up, for instance, a different tribunal. This has been done in various other draft treaties to sort things out. Sometimes the ECJ has said, "Yes, that will work" and other times it has said that it will not. There have been big arguments about a patent court, which raised the same sorts of points and you get a whole series of opinions dealing with them.

Q11 Mr Whittingdale: Can I just turn to one other aspect? In answer to my honourable friend, Mr Rees-Mogg, the Prime Minister suggested that in the transition period the ECJ may still have some role in being the



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ultimate court of appeal on matters. How is that currently dealt with in the Bill? Does the Bill allow that to remain the case?

Sir Konrad Schiemann: One ought to distinguish between two things. First, at the moment, while we are in the community, the ECJ has the power to impose huge fines on member states that do not comply with EU law. €30 million was imposed on the French Government at one stage for allowing fishermen to fish with nets that had holes in them that were so small they caught all the baby fish and, therefore, affected sustainability. There is that power and it is pretty clear the Government want to get rid of that situation, where a foreign court tells the Government they must do this and this.

There is another side to the functions of the ECJ, which I would have thought could be far less controversial, which is concerned with interpreting the meaning of various EU instruments, such as regulations and directives. If there is an attempt to exclude that, clearly this country can do what it likes, but I would doubt whether the European parties would be likely to agree to that.

It seems to me one ought, in the Bill, to cater rather more clearly and expressly for the situation where there is no agreement between us and the EU. Whether for good reasons or bad, whether it is our fault, their fault or a mixture of faults, that is clearly a possible outcome. You can work out, going through the Bill, what might apply in those circumstances, but it is far from being spelt out and far from being clear.

Sir Stephen Laws: It is very difficult to find a common position on whether the ECJ should be involved in deciding what the deal means, which is the point that has just been made. It is possible to envisage that in a transitional period we would accept that we continue to be bound by certain EU obligations that are binding us while we are a member and that we will continue to be bound by them during a transitional period. As the nature of those obligations is that they are subjected to arbitration by the ECJ, that might involve the same thing, but the assumption, I suppose, would be that at the end of that period, whatever obligations continued, we would submit only to the UK courts.

Q12 **Mr Whittingdale:** This Bill is written on the premise that, at the end of March 2019, we are out of the European Union and the UK courts are sovereign. In the statement by the Prime Minister earlier this week, it appeared that that might not be the case. Does the Bill allow for the ECJ still to have that role if the Prime Minister decides that is what should happen?

Sir Stephen Laws: There is probably power in Clause 17, because Clause 17 contains the power to make transitional and transitory provisions. Transitional provisions are generally understood to mean provisions for dealing with old cases under some new system. Transitory provisions are normally regarded as provisions that are designed to keep a bit of old law in place until you have all the bits of the new law in a



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condition where you can allow the old law to disappear. What I think is envisaged where it is described as a transitional period is what I would call a transitory provision, in that you would keep the old law alive for a period and it would have to be as if the UK were still an EU member. It would keep it alive during the transitional period and then allow it to die by the time you had all the pieces in place that enabled you to let it die.

Professor Ekins: The Bill caters for this in one sense, although it is an unusual way maybe, which is that the exit day is not specified. One can set the exit day and one can set the exit day as the end of the transitional period, which would mean all the old law holding until that point, including the role of the ECJ. Then the machinery of the Act comes to bear and you are into the new arrangement.

Q13 **Mr Whittingdale:** If you set exit day at a much later date than the withdrawal day, withdrawal day becomes meaningless.

Professor Ekins: It is not meaningless. You have handled the transition by stipulating exit day using the machinery of the Act and, yes, you remain a member for the period of the transition. Obviously, a different transitional scheme would require some different action. The power might be there in Clause 9 if the withdrawal agreement makes provision for transition. I do not know if that is possible. It would seem to me very odd if one used Clause 17 to create a new transitional scheme that was not contemplated in primary legislation, and it would seem odd again to use Clause 9 to do likewise. There is something odd also about postponing the exit day until the end of the transitional period, but if that is what the transition term has agreed, namely the terms of membership continue until the transition runs out, then it is neat at least.

Q14 **Mr Bone:** Are you saying that this Bill allows the date for us withdrawing from the EU or exiting the EU to be later than 29 March 2019?

Professor Ekins: Yes.

Q15 **Craig Mackinlay:** So some nested loops are arising, in that Article 50 has a clear two-year period, so for exit day to be amended you have to go back to the EU 27 to agree an extension.

Professor Ekins: There is exiting from the treaties, the treaties ceasing to apply; then there is exit day for the purposes of the Act, and they do not have to be the same thing. Obviously, it would be a little odd, in one sense, if the treaties cease to apply and the UK has deemed exit day to be later, or even earlier, but these are different legal orders, in a way, and it is up to the responsible authorities to choose the exit day. At least in the scheme of the Act it does not specify.

Q16 **Mr Rees-Mogg:** If the treaties cease to apply on 29 March 2019, the Act implements the treaties, but what are they implementing for the implementation period? What is the legal basis? You have cut off the root of the applicability of the treaties, but you still have the body of law there. That seems, to me, a contradiction.



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Professor Ekins: That is a very good point. If one postpones exit day and one does not have treaties come to bear, one needs something to fill the gap. The filling the gap might be Clause 9 or Clause 17. Just postponing the exit day would not be enough.

Q17 **Chair:** I am going to have my two penn'orth here and then I will bring you in, Sir Stephen and Dr O'Brien. It has been argued that the Bill allows the Government to specify different exit days for different purposes. I see from nodding heads that almost all of you agree that that is the case, which is helpful to the Committee, but you did want to come in, in response to the questions that have just been asked.

Sir Stephen Laws: Yes, that was the point I was going to make. The power to appoint different days for different purposes does not mean that the day we exit is going to be different for different purposes; we are going to exit the European Union when we exit the European Union. However, for the purposes of applying the Bill, you can have different commencement dates for different provisions of the Bill or for different purposes. This is a normal provision. You put in a provision saying that we can bring into force the Bill on an appointed day and you can appoint different days for different purposes.

That is often used as a protean form of transitional provision. I do not know if this is helpful. I can give an example. I drafted a railways Bill that abolished the national rail authority and transferred its functions partly to the Office of Rail Regulation and partly to the Secretary of State. I drafted the entire Bill on the assumption that the NRA was going to be abolished on one day and all their functions were going to be distributed to the other two people at the same time. After the Bill was passed, it was decided to pass the functions over on different days and the NRA was only going to disappear at the end.

As a result of that, it was necessary to use the power to appoint different days for different purposes. You appointed one day for the purposes of ending the NRA in relation to its functions that were going to the Secretary of State and another day for ending the NRA for the purposes of the functions that were going to the Office of Rail Regulation. That illustrates what is envisaged here: that you could appoint different days, because you would want to deem things to come into force. However, Section 9 can only be used to produce a transitional period if the transitional period is part of a deal that is made under Article 52, because that is the definition of the deal that Clause 9 applies to. The other power is the power in Clause 17.

Dr O'Brien: Very briefly, I was simply going to make the point that you have already made, that multiple exit days are possible and that "exit day" should be understood as a term of art. It is not really to do with exiting as such; it is just setting commencement points or whatever it is.

Chair: That is very helpful.



Q18 Richard Graham: Just to be absolutely clear, Sir Stephen, you can understand there will be quite a lot of interest in this. If I understand correctly, you are saying that we could leave the European Union and repeal the European Communities Act on 29 March 2019, but have effectively a transitional arrangement similar to some of the implementation orders on other Bills at all times that would mean trading, customs arrangements, whatever they be, and the rulings of the European Court of Justice could continue for another two years and those two things would not be incompatible.

Sir Stephen Laws: Yes. You could probably have a provision under Clause 17 that enabled you to say that, in particular areas where the transitional deal applied, the EU law was to continue to have effect, in the way it would have effect under Section 2 of the European Communities Act, until the end of the transitional period.

Chair: That is extremely helpful.

Q19 Stephen Timms: The Bill makes clear that the Charter of Fundamental Rights is not being retained in UK law. I want to explore with you whether you think that is going to cause any difficulties. An example that has been referred to is that Article 8 of the charter gives everybody a right to data protection and that is the foundation stone, as I understand it, of current UK data protection law. It is a bit unclear what the effect on our data protection law will be if the fundamental right is no longer present. On that specific example, what do you think should be done, if anything, to fix that so that the law is clear in the future? Secondly, are there other examples of significant issues arising from the loss of the charter from UK law?

Dr O'Brien: The explicit exclusion of the charter is problematic for a number of reasons. There is a school of thought that suggests that it will not make much difference because it is merely declaratory; it is an expression of fundamental rights that subsist anyway. However, the charter has been embedded in a lot of what will be considered to be retained EU law, in terms of the case law that cites the charter and UK case law.

I did an approximate count and found that there were 248 cases in the courts of England and Wales that cited the charter, 17 in Northern Ireland, 14 in Scotland, 98 in the European Court of Human Rights and 832 EU judgments, 515 of which are the Court of Justice. That is a lot of cases that have to be read differently and it is not clear how they are to be read differently.

In a number of those that deal with data protection specifically, the charter has been pretty much decisive. An example would be the challenge to the EU-Canada agreement on the exchange of passenger data, where the agreement was found to be unlawful on the basis of infringing the charter. What do you do with that, where the charter has



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been decisive, and has not just been an extra, persuasive thing that has been brought in?

Another example would be the Watson and Home Secretary case, which involved David Davis up to a point, in which, again, the charter was cited. The Court of Justice was effectively asked, "Does the charter really add anything to what is already here in this context?" The Court of Justice said, "That is an abstract question. We do not need to answer that, but we would like to point out that there is no equivalent to Article 52, the protection of personal data, in the European Convention on Human Rights, for instance".

There are suggestions that it does add value and it does add something. For better or worse, it will make a difference if it is not there, so there are big question marks over what we are supposed to do with that gap and how the courts are meant to read these cases. Sorry for going on, but it is not just cases; it is legislation as well. In the body of retained EU law, a number of instruments make explicit reference to the charter.

Q20 Stephen Timms: You have referred to the example that I gave about data protection. Is that the area where the gap is the largest or are other large gaps potentially opened up by the loss of the charter?

Dr O'Brien: It is probably the clearest, because of it creating fairly specific, concrete rights that are not necessarily enunciated in exactly the same terms elsewhere. There are potentially other areas where it makes a difference simply because of the nature of fundamental rights cases.

Q21 Stephen Timms: Can you give an example of another area?

Dr O'Brien: Yes. The nature of fundamental rights cases is such that they are all about the weight of evidence. You are balancing interests in a human rights case, the interests of one party against the other, and deciding which holds sway. An example is in the context of children's best interests. The courts are always seeking guidance on what weight to give children's best interests, and the more evidence you have on one side the more likely those interests are to hold sway. Regulation 2201/2003 on the jurisdiction of matrimonial matters and parental responsibility makes specific reference to the charter in recital 33.

That point was drawn upon in the Supreme Court, where the judgment said that if there were any doubt about the need to interpret and apply the regulation consistently with Article 24 of the charter on children's best interests, the recital puts it beyond doubt. It is a case about children's rights and, in particular, about the right to have their best interests given due regard.

There are a number of instances where it has tipped the balance. It may not be the individually decisive point, but it appears to have tipped the balance and is cited in the cases as having done so. Again, this begs the question: should the state of the law be as it has become or are the



courts meant to read it differently? If so, how do you read a case without the content? How do you retain it without that?

- Q22 **Stephen Timms:** In the case of the data protection example, presumably one could fix the problem by simply asserting somewhere in UK law that everyone has a right to their data being kept private. Would that resolve the difficulty?

Dr O'Brien: It would certainly be possible to remedy specific individual gaps by bringing them into UK law, by recreating them.

Professor Ekins: I am not an expert in data protection law, but I would not have thought removing the charter would put in doubt our existing data protection laws, insofar as the primary legislation or EU-derived law. Clause 5, paragraph 5 tries to preserve part of the residue of the charter for understanding EU direct legislation and so forth. I agree with my colleague that it is intended to make a change, so here we have the prospect of discontinuity, as is signalled in the first schedule as well, in relation to enforceability of general principles as such and the Francovich rule.

For my part, I think it is quite an intelligent change to make, because the charter is problematic. It is vague and uncertain, and creates a ground for open-ended challenges and litigation, which has been somewhat problematic in various cases, the ground for challenging, effectively arguing for disapplication of primary Acts of Parliament, including in the Watson case. That is problematic and we are better off without it, so I can see the sense in making the change. It is not a narrow policy change; it is a constitutional change consistent with the structure of the Bill, but certainly it is something different from otherwise transposing the existing.

- Q23 **Stephen Timms:** Clause 5(5) says that, "References to the charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles". Are those who have to interpret this after Brexit going to know what these fundamental rights and principles are?

Professor Ekins: That might be a question more for my EU law colleague specialist, but there has been for a long time and still is—and the Bill signals it at various points—a quite developed body of general principles of EU law. At least from my perspective as an outsider, there is an uncertain relationship with the charter, which is somewhat declaratory of those general principles, but also seems to have a generative life of its own. In the way UK courts would receive the charter after exit, it would have a generative, "let us break new ground" character to it.

Human rights lawyers have been, in a sense, looking forward to the use of the charter as an enhanced version of the Human Rights Act, with sharper teeth and more expanse to it, so I do not think it is simply



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another way of saying the same thing. However, there is this other body of general principles out there and much discussed.

Sir Stephen Laws: I entirely agree with what Professor Ekins has said, that something would be lost if it is not retained. I also agree that what would be lost would be entirely unclear. It seems to me, if there is a legal advantage to be had from leaving the EU, it is that EU law is not renowned for its accessibility, comprehensibility or clarity, and that retaining provisions that are unclear is not going to be helpful. I also come from a tradition that says, if you get the detail right, you do not need to supplement it with vague general propositions. It is true that the detail of our data protection law would be retained and, if the detail is right, it does not need to be supplemented by general principles that are difficult to understand and difficult to predict.

Q24 **Stephen Timms:** If it is the case that the detailed law has, in the past, been interpreted in the light of the fundamental right and that cannot be done in the future, might that not cause some problems?

Sir Stephen Laws: I do not think it will cause problems. It will mean that you will have to decide what it means in future and you may or may not come to the same conclusions, but you will not be proceeding on the assumption that words that can be given a meaning must mean something else because they are designed to fulfil some general purpose that is inconsistent with it. Preserving inconsistencies in the law between general principles and detail does not seem to be desirable and, given the choice, I will choose the detail.

Q25 **Mr Chope:** Can you explain how this interacts with the European Convention on Human Rights? Under the Lisbon treaty, the EU was required to join the European convention; it did not do that, because the European Court of Justice said that it was not compatible with EU law. Could the European Court of Justice intervene in a similar way if we have a treaty to leave and say it will not allow the EU to sign that treaty, as it has been drawn up, because it is not compatible with EU law? Is there a read across from the way in which the ECJ has treated the Lisbon treaty provisions relating to accession to the European Court of Human Rights?

Professor Ekins: I will give a very quick answer, which goes to Konrad from earlier. There is that risk that you get the withdrawal agreement, it is challenged within the EU and the European Court of Justice says the EU cannot be a party to this, so you have no agreement. I do not think that directly connects to the status of the charter, although there might be reasons I am overlooking there, but certainly the European Court challenging or invalidating the agreement is a standard risk of negotiating with the EU.

Q26 **Stephen Timms:** As a final point on this data protection issue, we will have to seek confirmation from the Commission that our data protection regulation is adequate in future; otherwise we will not be allowed to communicate personal data between the UK and the EU, and that would



be catastrophic for lots of businesses. Will we be able to do that, do you think? Will we be able to persuade Europe that our arrangements are adequate if we do not have Article 8 in UK law somewhere? This might be a question for Sir Konrad, perhaps.

Sir Konrad Schiemann: Not really. When you say, "Will we be able to persuade the EU?", those are EU politicians from Parliament onwards. This room knows better than most, I suppose, how variable Parliaments and people inside Parliaments are. Among the 27 member states, there is an infinite variety of interests, all of which have different things that they want, and the EU has been an attempt, not wholly successful, to try to carry on life notwithstanding the fact that there are genuine differences of opinion between people. I cannot give a guess as to what will be done either by the political institutions of the EU or, for that matter, by the European Court.

That is not just being delicate. I do not know what they will do, because we decide each case—or did in my day, and I am sure they still do—as it comes up. The people who decide it are the ones who happen to have been drawn for that case, which is not chosen by the Court; it arrives there, and they have to arrive at an answer. They try to reach an agreement and, although there is only one judgment that comes out, it does not necessarily mean that everyone agrees to it, but it is the judgment that is there. That is what they try to do.

Sometimes they do it by missing bits of the reasoning out, because it is easier to be against things than to be for them, so everybody can agree that clause so-and-so is not much good, but they cannot agree on an alternative. Sometimes they use rather vague words, rather as the politicians did in the directive dealing with embryos; they did not define "embryo" because they thought nobody would agree on the definition of an embryo. These are the sorts of problems that the judge faces on the ground.

Q27 **Richard Graham:** Sir Konrad, while we totally understand that of course the ECJ will make its decision on the facts of the day and the situation, nonetheless Christopher Chope's question and Professor Ekins's answer presupposed a situation where the ECJ might decide that an agreement reached between the European Commission and the British Government on the details of our leaving the European Union was not appropriate for the EU to reach. Is that really conceivable in your experience?

Sir Konrad Schiemann: They would not decide it was not appropriate. They would decide that it was not permitted under the powers given to the bodies that had concluded this agreement.

Q28 **Richard Graham:** Does that mean that, therefore, they could prevent any agreement from being reached?

Sir Konrad Schiemann: Yes, and that has been done.

Q29 **Richard Graham:** Therefore, technically, under that, they could prevent



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the UK leaving the EU.

Sir Konrad Schiemann: No, because Article 50 comes in and says if there is no agreement the UK leaves. That is why I say it is pretty important for Parliament to decide, the sooner the better I should have thought, what precisely we will do if there is no agreement.

Q30 **Mr Whittingdale:** On that point, I think Sir Stephen said that you felt that the Bill should say more about what would happen if there was no agreement. Can you just tell us what you think should be in the Bill to cover that eventuality?

Sir Stephen Laws: I am not sure I did.

Mr Whittingdale: I am sorry. Perhaps it was Sir Konrad.

Sir Konrad Schiemann: I am not a draftsman. I am going to give it back to someone else.

Professor Ekins: Perhaps I can answer. In a way, the Bill is drafted on the premise that there is no deal. There is power to implement a withdrawal agreement. However, if there is no deal on exit day, the treaties cease to apply but we retain most of the law, barring the charter and a few other points, we have our own version of domestic and EU law, and away we go. There are other problems to be solved, but I do not think the Bill would founder if there was no agreement.

Q31 **Mr Whittingdale:** The Bill does all that is necessary if there is no agreement.

Professor Ekins: I think so.

Sir Stephen Laws: You can infer that the Bill is drafted on the premise that there will be a deal. One of the points I made in the paper I submitted was that there are two stages. One is: what is the continuity you want? It is the most desirable continuity for the thing on the basis that we have completely left and we are not bound by anything. The next one is: what sort of continuity will we have to provide in order to satisfy the requirements of any withdrawal deal?

The default position in the Bill is really assuming that the continuity we are producing is the sort of continuity that will work if we have to retain some things in UK law in order to meet the obligations. If you were drafting a Bill that was setting out to leave completely, you would have started with a different form of continuity. You would have extinguished all EU law. You would not have tried to continue it. You would have extinguished it and then tried to rebuild the things you needed. The Bill can work for leaving it, but its premise seems to be not.

Dr O'Brien: I go back to the question about the need to persuade the EU of the adequacy of our data protection laws. I suspect that, yes, there will be an expectation in future dealings that the principles of the charter will be abided by and there will be a need to show that they have been



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given effect in some way. To incorporate the prior question as well, Clause 5(5), effectively substituting the charter for the general principles or the general principles of fundamental rights, will not be deemed sufficient, because if we are talking about the charter being a little vague, the general principles of EU law are very amorphous and intangible. Like a Rorschach blot, they can be whatever you want them to be, up to a point, and it is very difficult for them to have bite in terms of challenging laws.

That is where, again, the EU will expect us to be able to show that any deficiencies in data protection can be challenged. Schedule 1 makes quite clear that general principles are not grounds for challenging otherwise potentially inadequate laws. The lack of challenge and lack of bite of what is effectively being substituted for the charter would potentially be problematic.

Q32 Joanna Cherry: Good morning. I wonder if I could ask you a question relating to the implementation of a withdrawal agreement, if there is one, and EU citizens' rights. I want to ask you two questions, which are intertwined, starting with Dr O'Brien. First, how could the rights of EU citizens in the United Kingdom post exit day be guaranteed so that they might rely upon them in court? Secondly, given the doctrine of parliamentary sovereignty and the considerable scope for delegated legislation under this Bill, is there any way in which those rights could be made inviolable or will they always be at the mercy of change by primary or, indeed, secondary legislation under this Bill?

Dr O'Brien: An excellent question: how could they be guaranteed? There is a relatively simple answer: that it is within the gift of the UK Parliament to effect that guarantee. There is a suggestion that it is dependent upon the negotiations and how they pan out. Certainly, if what we are aiming for is reciprocity, we need to make sure both sides are on the same page. However, it is still within the gift of the UK to effect whatever guarantees it sees fit.

I and other commentators have a number of concerns over some of the proposals that have been discussed and circulated, and certainly the table of agreement that has been published between the UK and the EU, in terms of the people who might fall through the gaps. That is where I suspect it would be problematic for any withdrawal agreement that incorporates EU citizens' rights to simply be a matter of secondary legislation or a matter of ministerial power, because it is important that the people who might fall through the gaps are protected or at least offered some kind of scrutiny of what their rights are going to be.

There is a lot of fixation on directive 2004/38 in the papers that have been circulated so far, and the people who fall through those gaps at the moment include children who have lived all of their lives in the UK. There was an example case—*Sakura Patela**[1.36.08]—where a 17-year-old child claimed income support and was refused on the grounds of not having a right to reside because of not fitting in with 2004/38, despite



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having been born in the UK, lived in the UK all their lives, never having lived anywhere else, having been abandoned by their parents, who then went to a third country.

It is one thing saying, "That is how you determine access to benefits"; it is a slightly different question when you are saying, "Are those the kinds of people we want to be expecting to leave or to be kicking out?" Unless we are really scrutinising how those rights of residents to continue to live here are being affected, there is a significant possibility that the most vulnerable people—children, women, including victims of domestic abuse who have had to be relocated, so their continuity of their period of work has been broken, and women who have been the family member of a UK national rather than of an EU national—also fall outside 2004/38.

That was a very longwinded way of saying that it concerns me that the EU nationals' rights to reside ought to be falling within the ambit of Clause 9, really.

Is there any way to make them inviolable? Not in light of parliamentary sovereignty, but they could at least be granted greater protection than being effected in secondary law. We could make sure that it is a primary-law right. We are getting quite mixed messages from the Government as to what the proposed attitude towards the withdrawal agreement will be, so it is very difficult to say where it is going, but I think maximum protection and maximum chances of action or making those rights actionable to EU nationals will be important.

Professor Ekins: Very briefly, there is a range of ways to implement whatever rights the UK chooses to give EU citizens, or agrees to give, recognise or continue to extend primary legislation as to the Clause 9 power, otherwise just giving effect to the agreement. Can they be inviolable? No—parliamentary sovereignty. They could certainly be protected from change by a secondary law-making power though.

Sir Stephen Laws: As I understand it, there was going to be an immigration Bill that may be the place to deal with this, in which it may be impossible to deal with it as in this Bill by way of secondary legislation if what it needs to provide is not settled in time to go in the Bill or to go in this Act. The reason these powers are being taken is because it is expected that the withdrawal deal will not be settled until the last minute and there will not be time to deal with it in any other way than by secondary legislation. Yes, the doctrine of parliamentary sovereignty is the doctrine of parliamentary sovereignty, and there is nothing that can be said that will make anything permanent.

Sir Konrad Schiemann: We have been looking at it in this country, not unreasonably perhaps, from the point of view of our own people. If you put yourself in the situation of a citizen of Germany, say, who is living in this country, first of all there is, as everybody has rightly said, absolutely no guarantee that Parliament will not change its mind and enact a



different Act next year, just as it seems to be in the process of doing in relation to the EU at large. That is clear.

The second point, which is a little bit more subtle, is that, when you are dealing with fundamental rights, these are really rather vague things, which is a source of criticism by some—and I can understand that entirely—but there they are. At the moment, insofar as they have any substance, they are given that substance, in the last analysis, by rulings of the European Court of Justice composed of judges from all the different countries.

If we go over to a system that excludes the ECJ, from the point of view of the German citizen who is in this country, he is worse off because he is not getting the judgment of the European Court as to what should be meant by one of my favourite things at my present age, and a rather large thing: the rights of the elderly. They have a right to lead their life in dignity and independence, and participate in social and cultural life.

You may say this is all guff but, every now and then, these things come up and the court has to say, "We cannot very decently say that Parliament is talking guff", and you have to try to give some sort of meaning to it. At the moment, the body giving meaning to these very vague things is the ECJ and, once we leave, both under British law, they will have nothing to say, but also, equally, under ECJ law, I am not at all sure that it is easy, even if we wanted to, to continue to refer matters to that court after leaving. The court has quite a lot to do anyhow, and I am not sure they would very much welcome answering questions by non-members.

- Q33 **Joanna Cherry:** The explanatory notes to the Bill at page 10 say, in a grey box of comments just before paragraph 26, at the end, "The power to deal with deficiencies"—under the delegated powers—"can therefore modify, limit or remove the rights which domestic law presently grants to EU nationals, in circumstances where there has been no agreement". Would I be right in understanding that, even if there is an agreement, there is still a power under the delegated legislation powers in this Bill to modify, limit or remove the rights of EU nationals under domestic law, unless we amend Clause 9?

Sir Stephen Laws: We are supposing there will be an international agreement with the European Union that will guarantee the rights. I meant to say earlier that that will mean that the UK will be bound in international law to preserve those rights, and the UK Government has a practice of complying with its international obligations. There is that guarantee. If you are asking whether Clause 7 or, indeed, Clause 9 could be used to produce a result that is incompatible with the UK's international agreements, maybe they could, but it would still be a breach of the international agreement and they would not do it.

- Q34 **Mr Djanogly:** The Bill creates a new category of legislation, retained EU law, at Clauses 2, 3 and 4, and we have had a conversation with



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Dr O'Brien and Sir Stephen as to the interaction with Sections 7 and 9. Just going back a stage, if I may, would it be possible to identify every piece of retained EU law that the Bill aims to capture? To what extent do you agree with the Lords Constitution Committee, who thought that the Government could be casting their net too widely in including legislation that would have remained in force even without Clause 2?

Dr O'Brien: Clause 2 does appear to be cast quite widely. The facilitating provision is Clause 14(3): "In this Act references to anything which continues to be domestic law by virtue of Section 2 include references to anything to which subsection (1) of that section applies which continues to be domestic law on or after exit day (whether or not it would have done so irrespective of that section)". Clause 2 is fairly widely drawn in the first place. That makes clear that anything that falls within the clause, whether or not it would exist anyway, whether or not it is standalone legislation that does not need to be saved, is to be considered in existence by virtue of Section 2, and that means the ambit of Clause 7 is triggered. I cannot remember the first part of your question.

Q35 **Mr Djanogly:** Would it be possible to identify every piece of retained EU law?

Dr O'Brien: It would be a rather mammoth task. It is drawn as broadly and widely as possible, I think.

Sir Stephen Laws: It is a mammoth task so far as EU-derived domestic law is concerned. It is an almost impossible task so far as directly applicable law for things that are covered by Clause 3 and Clause 4 are concerned.

Q36 **Mr Djanogly:** Do you think that those three clauses adequately address the challenges of converting the *acquis* into UK law? For example, Clause 3(1) explains that only direct EU legislation, as defined in Clause 3(2), that is operative immediately before the exit day will be converted. Is the use of the word "operative" clear for direct EU legislation which features complex transitional arrangements, for instance?

Sir Stephen Laws: My problem is that I, as I have suggested in the note I put to you, have a different suggestion as to how you might retain directly applicable law, because I am not convinced that it is useful to preserve it as law. I think there is an alternative model you could have thought of. I have been a drafter on the inside and I know that you come to decisions about how you are going to do things, everybody says, "You did not understand what you were doing" and you did have reasons for doing it. I am quite prepared to believe and understand why this may have been done the way it was, but things might be simpler if you treated directly applicable law as if, post exit, it were foreign law and was treated as a question of fact and not, as paragraph 3 of schedule 5 requires, as a question of law.



You would then have a rule of UK law that described in what situation you would take account of or give effect to the foreign law that is EU directly applicable law in the United Kingdom. I said more about that in the note and it is all pretty intricate and difficult, so I would like to refer you to the note, but I think that would remove a lot of the conceptual problems that arise from this approach. It may give rise to other problems—I am quite prepared to believe that it will—but my comment is: is this an adequate way of doing it? There is another way that is worth exploring that would give rise to less uncertainty.

Dr O'Brien: If I might add to the question of the conversion of the *acquis* into UK law, as Sir Stephen says, we can see what the intention is behind it—the preservation of continuity and as smooth a transition as possible—but with the exception of Clause 2, which deals with law which is effectively UK law already, 3 and 4 do not effect a transmogrification. What they do is they say, “These laws will apply. They will be UK law” but without telling us how they ought to be read to make them UK law. For example, Clause 3 will deal with directly applicable EU legislation, which could include Regulation 883/2004 on social security co-ordination. What does that mean if it is also deemed to be something that requires reciprocity?

Also, it is specifically addressed to member states. A lot of regulations are specifically addressed to member states. If you read it literally, and the UK is not a member state, then you can say, “That applies but it is not applicable. It has nothing to do with us”. Are they supposed to have a literal reading or are they supposed to read it “as if”, and what is the “as if”? What is the connecting point? What is the tool of interpretation? Is it as if the UK is still a member or is it as if “member states” refers to UK? In that case, you then have all sorts of other questions about: what about those provisions that the UK has no control over because they are in the gift of other member states, whether it is in Clause 3 or Clause 4 in particular, dealing with treaty rights, like non-discrimination in other member states. That is not the gift of the UK to award, so how is that supposed to be read? Are we supposed to read it as if “member states” means the UK, only in pieces of legislation in which the UK has jurisdiction and only to the extent that the UK has jurisdiction?

Then you have the extra complexity, to add on top of it, that you might be dealing with an issue where the UK does have jurisdiction and you can read it as though it applies to the UK, but it is dealing with EU nationals’ rights to export child benefit or whatever. Are you then going to say, “It should be read as if it applies to the UK only in matters where the UK has jurisdiction and only in matters where there is no expectation of reciprocity”. There is a whole raft of extra interpretation required and there is no guidance given on how that is supposed to work.

Q37 **Mr Djanogly:** Sir Konrad, would Sir Stephen’s option be easier for judges to follow?



Sir Konrad Schiemann: I have not had a chance to look at Sir Stephen's note. English law is accustomed to the idea of treating foreign law as a question of fact. Continental jurists find this totally bizarre, and we may find that bizarre but there is a very widespread view, usually expressed in Latin, that the court knows the law. The idea that an English court applying—for the sake of argument and to get away from EU law—French law is applying facts, which seems natural to us, seems rather odd to a French jurist, who is looking at it in a different way. It is one of the oddities about the Union that we all start off from rather different points and have to reach some sort of accommodation.

I am sorry, I have not read it, but I must say, speaking as a former English judge and leaving aside EU connections, when I heard it, I thought, "Yes, I am used to doing that sort of thing". I do it all the time.

Professor Ekins: I have a lot of sympathy as well with Sir Stephen's point. Effectively, if one deleted Clause 3 and simply relied on Clause 4, which you would have to amend to remove the reference to Clause 3, that would sweep in direct EU legislation, because that comes into force as it stands under Section 2(1).

If I am looking for reasons why Clause 3 is there, I think it is intended to domesticate direct EU legislation more thoroughly. Rights, powers and liabilities referred to under Clause 4, in a sense, do remain foreign law—we just recognise them, as we have been recognising them since 1972—whereas the direct EU legislation will become a form of our law, and we might talk about the type of law it is a bit later. Then we can make various changes to it in a more familiar way. Of course, the rights that come under Clause 4 can also be subject to law-making change, given the scheme of the Act.

I am not sure, given I am not really an expert EU lawyer—I am a UK constitutional lawyer—that, if this misses anything out, it is problematic. It is intended to be quite broad, obviously, and there are specific cancellations—the charter, reliance on general principles as such. I agree that Clause 2 is broadly cast and I would think that, if you want uncertainties, they might be there in determining if some primary legislation constitutes an act that falls within Clause 2.

It is true that you do not need Clause 2 to save that legislation, but the point of doing so is in case there are points that require correction—deficiencies arising out of exit—and in order to fit into the scheme of the Bill insofar as it concerns devolution by making those primary acts, some of which we might know and others we might be able to infer, also part of the limits on existing devolved competence.

Dr O'Brien: This is simply to add to a comment on Professor Ekins's point about whether Clause 3 omits anything important. To my mind, the important omission is directives. Directives are treated throughout the Bill as though the substance of the directive is effectively irrelevant and it is all about the implementing legislation. As long as there is



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implementing UK legislation, that is what we are focusing on, and the directive was sort of an empty vessel to get there.

That is not always the case. There are many cases in which directives are relied upon directly. Even if they have been implemented in UK legislation, they are used. Directive 2000/78, the framework non-discrimination directive, and directive 2004/38, the citizenship directive, are frequently relied upon in UK courts. The failure to mention that does represent the loss of a body of law.

Sir Stephen Laws: I am sorry but I disagree with that. It would be a good thing if UK legislation implementing EU directives after exit could be capable of being relied on without people having to go behind it and see what the directives that it implemented did. I think that is what people will rely on, and the rule of law and the clarity of the law is advanced if, after exit, for future cases, people can look at the UK legislation and say, "That is as far as we need to go".

Dr O'Brien: I can give a couple of examples where—

Chair: I think we get the point that there are differences of view among our expert witnesses, who have been very helpful, but I am keen to cover the rest of the ground in the time we have.

Q38 **Mr McFadden:** I want to take us back to this area of Clause 9, and its breadth in terms of the withdrawal agreement and perhaps any transitional period. First of all, beginning with you, Sir Stephen, is it your interpretation of this clause that it would allow the Government to implement a withdrawal agreement that also included this transitional or implementation period which has been discussed?

Sir Stephen Laws: If the withdrawal agreement, which is the agreement under Article 52, includes the transitional period, yes.

Q39 **Mr McFadden:** The Prime Minister said, in her Florence speech, that, "During the implementation period, access to one another's markets should continue on current terms". She went on to say, "The framework would be the existing structure of EU rules and regulations". Is it reasonable for us to interpret that existing structure of EU rules and regulations to also include ECJ judgments?

Sir Stephen Laws: As a draftsman, I am questioning what you mean by "reasonable". I think it is reasonable to assume that that is likely to be what people are assuming.

Q40 **Mr McFadden:** Sir Konrad, I see you nodding.

Sir Konrad Schiemann: I am one of those people. I assume that is what she meant, but it has to be said she is using language that is capable of multiple interpretations, no doubt deliberately.

Q41 **Mr McFadden:** Let me try the European Parliament's interpretation on this question. Last week, they said of transition, "Such a transition can



only happen on the basis of the existing European Union regulatory, budgetary, supervisory, judiciary, enforcement instruments and structures”, and went on to say that such a transition “can only be envisaged under the full jurisdiction of the Court of Justice of the European Union”.

That is the European Parliament’s view—it is not necessarily yet part of an agreement—but if that stood, it seems pretty clear that that would envisage a role for the ECJ during the transition, the same as now. Is that correct?

Sir Stephen Laws: That quotation certainly envisages it.

Q42 **Mr McFadden:** If that is the case—and I refer to the exchange between Mr Rees-Mogg and the Prime Minister in Parliament on Monday—would this also include new judgments reached by the ECJ during the transition period?

Sir Konrad Schiemann: It would under EU law. Whether it will under the agreement will turn on what the terms of the agreement are, and I do not think I can help more on that, unless I have misunderstood your question.

Q43 **Mr McFadden:** No. What I am trying to get at is what the likely meaning of this continued role for the ECJ during the transition period is.

Sir Konrad Schiemann: From the point of view of those inside the EU system, they would envisage that the system would apply in its entirety. Leaving aside a theoretical objection, at the highest level of principle, to any input by a foreign court—which some have, which I can understand—at a lower level, as I have indicated in an earlier answer, there is perhaps room for compromise in saying, “The ECJ will no longer have power to impose millions of pounds of fines upon the United Kingdom Government for failing to observe their obligations under the agreement”.

Whether that would be attractive to the EU, I do not know. From the point of view of the citizen and the businesses trying to operate, that probably is not a very important consideration. What they want to know is what things mean. At a very early level, at some stage, somebody is going to have to decide whether a toothbrush is a cosmetic implement or a medical implement. That is the sort of question that has come up before the ECJ, and you can toss a coin and say either is right, but what is important is that there is an answer, not the right answer, and the ECJ provides an answer. As far as I know, the ECJ has not provided answers that have really proved very problematical for this country.

Sir Stephen Laws: Can I work it through an example? One assumes that, at some point in 2020, in a transitional period, an issue arises about whether a rule of UK law restricting what you can put on the internet is compliant with the electronic commerce directive and the implementing regulations. At that point, the ECJ becomes relevant in two respects. First of all, the question is: when a UK court is asked to decide this



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question, does it take account of some judgment that the ECJ gave in another case in 2019, after the end of March?

The second question is: when that dispute is exhausted in the UK courts, is it because we have included the electronic commerce directive in the transitional arrangements? Does the UK dispute go to the ECJ?

Those are two separate questions and you can come up with different answers to each of them, but that is how you have to look at it. I certainly understand what the European Union is saying as that they would want to apply ECJ jurisprudence in both respects. They would want to have their jurisprudence applied and they would want to continue to decide cases that arose during the transitional period.

Q44 **Mr McFadden:** In other words, in an evolving and not just a static way up to March 2019.

Sir Stephen Laws: Yes.

Q45 **Mr McFadden:** The withdrawal agreement is also likely to include some sort of financial settlement. We have been hearing an awful lot about this; some people call it “the divorce bill”, “ongoing obligations”—whichever term you want to use. For the purposes of the Bill, to bring us back to the Bill, Clause 9 allows Ministers to implement by order a withdrawal agreement that includes that financial settlement as well as potentially this transitional agreement. Is that a correct way for us to interpret the breadth of the power in Clause 9?

Sir Stephen Laws: I would have to look more closely at it again. Very often, you do not need power in primary legislation to pay money. There is going to be an issue about how the financial settlement is met and how that money is voted by Parliament.

Q46 **Mr McFadden:** The Clause says that a Minister “may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day”.

I am trying to get to the breadth of this power for the Minister to do this by regulation, in relation to both the financial settlement and this transition agreement—in other words, anything that is in this withdrawal agreement. Where I am really going with this is: it can be done by regulation, and this clause gives this very broad power, so the Government do not need an extra Act of Placement. Is that a correct interpretation?

Sir Stephen Laws: I do not think these regulations are enough to give parliamentary authority for spending the money on its own. You could not make regulations under this provision saying that you could pay so much over to the European Union without voting that in an appropriation Act.

Q47 **Mr McFadden:** That is quite an important point. Why is that your



interpretation? We have talked a lot about the breadth of this power. If it does not cover the financial settlement in a withdrawal agreement, it is quite a big caveat.

Sir Stephen Laws: I think that because that is the way that public money is dealt with. You have provisions in primary legislation that give rise to expenditure but the tradition is that expenditure is authorised under supply procedure, and I would expect there to be a parallel supply procedure to deal with the money.

I have not really thought about whether it is going to be paid out of votes or if it is going to be paid out of the consolidated fund as EU contributions are paid at the moment. I have not looked at the Bill to see how it deals with it, but I would expect money to be dealt with outside the Bill, as it is with all other legislation. The money that you spend on public functions is voted by departmental estimates. That is the system.

Professor Ekins: I broadly agree. Clause 9, on its face, if that is where the question is going, would extend to an appropriations authorisation by way of regulations. It is obviously a very unusual use of a secondary law-making power. It is not precisely prohibited by paragraph 3, which rules out imposing increasing taxation. There is a good argument—or an argument at least—that you would read this provision consistent with the very ancient practice of raising and spending of money, such that the spending of money would require an appropriations Bill. However, as it is framed, it certainly is very broad.

Q48 **Mr McFadden:** Just to be clear, your interpretation of Clause 9 is this would allow the authorisation of the settlement of the so-called divorce bill.

Professor Ekins: No, I am afraid I am not that clear. My interpretation is that it is not clear. On its face, it would extend to it, but there would be a strong argument for saying you have to read it in light of the ancient practice of how we spend money. You could not use a power like this to authorise the spending of money. This is plainly supposed to be a very significant power that does all sorts of remarkable things, so it would be quite a fine question. It is probably better anticipating the question to address it.

Q49 **Craig Mackinlay:** We have identified very clearly the extent and powers of Clause 9, which seem to be very broad and somewhat vague. Do you think this legislation was written with the thought that there would be transition? It seems like this was drafted in terms of: "The withdrawal agreement is on exit day. It is the day after".

Do you think Clause 9 would allow for transition? Do you think transition could reasonably be interpreted under the words "withdrawal agreement" or is this whole transition and implementation something new that has emerged since this legislation was first drafted? I am just concerned as to whether "transition" forms part of what you would call a "withdrawal agreement".



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Professor Ekins: Someone may be able to answer it, but I am not that person because I am not sure if “withdrawal agreement” has a technical term in the Bill. I cannot recall.

Sir Stephen Laws: It has to be the Article 52 agreement. If transition was ever envisaged for that agreement, it was covered; if not, then not. Clause 17 contains separate provisions about transitional provisions. Drafters are known for sometimes going for belt and braces.

Q50 **Chair:** Pursuing the point that Pat just put to you, do any of you feel that it would be preferable to deal with the issue of implementing the withdrawal agreement by separate primary legislation as opposed to what we have just been discussing that is in the Bill before us?

Sir Stephen Laws: I do not, and it seems to me that the power to implement the withdrawal agreement is the least problematic of all the powers in the Bill because, after all, we are under a lot of obligations to the EU at the moment that we are bound by international obligations to implement. There is a very wide power in Section 2(2) of the European Communities Act to do that.

This is really doing no more than that. It is just keeping a very wide power to deal with our final obligation to the EU to implement the deal by which we leave. I would say there is a very good case for this very wide power in the Bill and, indeed, it seems to me to be the one that we can be most sure cannot be exercised, except at great speed, because we know the deal is not going to be known until the last minute.

Professor Ekins: Sir Stephen’s point is obviously a very important consideration, and I can see why there is broad power. For my part, I am nervous about the power extending to modifying the Act, because you have this extremely significant constitutional measure being proposed here and, if one can adjust or change in significant ways the structure of the Act—say, the continuing relationship between retained EU law and other law—those changes should be made by primary legislation.

Having said that, if the power is used and the accountability structure is such that Members of Parliament can say, “This is an improper use of the power. Try again with a more limited exercise”, maybe that is the solution, but there may not be time for that exercise.

Q51 **Hywel Williams:** Thank you and good morning. I just want to turn to the devolution issues, which we will be looking at next week anyway, but I have a couple of brief questions. The Welsh and Scottish Governments—and specifically their First Ministers—have referred to this Bill as a power grab by Westminster, in that, where matters are already devolved and the powers are returned here, they will be retained here as well, even though they are currently devolved. Would anyone like to comment on the use of the colourful term “power grab”?



Sir Stephen Laws: The argument that the default position ought to be that all the returned powers should immediately go to the devolved Administrations, if they would, but for the EU provision, be within their existing competencies, is not sustainable. If you go back to the original devolution legislation and say, "What did Parliament intend should be the position if we ever left the EU?" I do not think you would come up with the answer that they thought that everything would go back to the devolved Administrations.

There is reasonably plausible argument as put by the Government that, if something is currently being dealt with at the international level, when you return it to the EU, there is quite a strong case for saying that, by default, it looks as if it ought to be dealt with at UK level at least. If it was appropriate up there, that does not mean you immediately move it right down to the bottom of the hierarchy of subsidiarity.

That is that argument. I think it is appropriate for the Bill to say, "By default, we will keep everything at the UK level", but that leaves open the question of how far you move it on. There are good arguments for various things to be moved on to the devolved Administrations, once you have sorted out exactly what they are and, most importantly, when you have sorted out how they will be funded.

One thing I am pretty sure of is that the way the EU funds its discharge of the functions that are being returned to the UK is not determined according to the Barnett formula. I can understand why the devolved Administrations might want to say, "Let us have the functions first and then we will have a good argument for being provided with the funds for them", but the logical way is to sort out the funding and the extent to which you pass on the functions first, and all as one issue.

I can understand why the devolved Administrations are not happy with the fact that the Bill keeps everything by default. I think there needs to be a lot of clarity about how the next process, which is how we talk about the money and how we talk about passing them on, is dealt with.

Professor Ekins: I broadly agree. I think it is a placeholder, not a power grab. It is designed to freeze competence as it stands on exit day. Effectively, the UK Parliament has always had very broad law-making powers, and UK authorities will have, effectively, more authority for the initial point, but that cannot be the end of the conversation.

It is not a ground of legal uncertainty; one could empower all the devolved authorities at large by simply lifting the existing disability on their competence not to legislate inconsistently. That would change the devolutionary scheme in a pretty radical way without much thought. To my mind, it does not solve the problem; it just parks it for a little while and provides some measures for incidental changes as we go by agreement.

Q52 **Hywel Williams:** In respect of the Barnett formula, we have already had



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assurances that, for example, funding in terms of agriculture will certainly not be decided on the Barnett formula, for quite obvious reasons. What alternatives do you think there might be to the approach that has been taken in the Bill? That is, agreement and negotiation rather than just imposition, as it is now. Could that be done now rather than later on?

Dr O'Brien: Potentially so. Like much of the Bill, it represents an attempt to deal with a difficult situation by, as Professor Ekins has said, putting a placeholder there to say, "We will sort it out later". It is not terribly clear why this quite rigid, quite retrograde approach has been taken. As the explanatory notes say, it returns competence where it used to be before the UK was a member of the EU.

That is pre-devolution, of course, so it is not clear why the interim eventualities of devolution have not been taken account of and why there is not a distinguishing between matters that might be considered reserved, as under the current devolutionary arrangements, and matters that are not and, therefore, ought to be or could be potentially returned to the Scottish Parliament and to the Welsh and Northern Ireland Assemblies. I think it would be possible to distinguish between the two: between reserved matters and matters that could be devolved.

There is the practicality of funding, of course. Questions have been raised about making sure that there is not a breakdown of the UK single market, but I do not think that this is necessary for that. You could have a much lighter-touch approach to stipulating mutual recognition, and trust and co-operation, between the different authorities and powers.

Sir Stephen Laws: I think you were asking whether there should be some formal procedure for disputes between the UK Government and the devolved Administrations set out in the Bill. That would be desirable, if you could get agreement on what it is, which I think is unlikely. In the end, somebody will have to decide. At the moment, it is the UK Government and this Parliament, which is the way things work normally.

Q53 Stephen Crabb: Given the appetite that the Welsh Assembly has shown in the past for legislating in a way that tests existing uncertainty in the devolution settlement, how strong is the constraint that Clause 11 places on devolved Administrations to prevent them from legislating in areas of retained EU law that they nevertheless regard as already devolved to them? Are we creating a new uncertainty that will ultimately need to be tested all the way through to the Supreme Court?

Sir Stephen Laws: Yes. I think the answer to that has to be yes, because there are, as we have discussed, uncertainties about what is meant by EU retained law. The restriction on competence that this imposes is in relation to law. An alternative approach might have been to repeal the EU restraint on the devolved Administrations and say that nothing in this Bill is to confer any greater competence on the devolved Administrations than they had immediately before. That might produce a clearer result. It would still be a placeholder but it might produce a



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clearer result than addressing the issue through the concepts that are used in the Bill.

Professor Ekins: The question of competence is still going to turn on what EU law was at exit day and what restrictions are placed on the devolved bodies. Inevitably, we will have to refer, for a while at least, back to the EU law position as at exit day and see how, if at all, it has been changed by this Bill, the presumption being continuity. You will get argument about that.

In a way, you have argument about that already, I suppose. You may have more attempts to push the edges of competence, and Sir Stephen's approach might make the point even clearer, but I think it is designed to capture a snapshot of existing competence and then have some provisions around the edges for, by agreement and so forth, expansion.

Q54 **Stephen Kinnock:** Good morning. This is a question about what you think the potential consequences could be of this Bill being enacted and provisions taken under it then not receiving the legislative consent of the devolved Administrations.

Sir Stephen Laws: I think the Supreme Court was clear in Miller that the requirements for legislative consent, including the statutory ones, are not to be enforced in the courts. It is a convention that is applied to usual cases. The question of what a usual case is and whether it is conformed to is a question of constitutional propriety and not a question of law.

Q55 **Sammy Wilson:** Dr O'Brien, in relation to the sequence of which issues should go to the devolved Administrations, does it not make more sense for the approach that there is in this Bill to be applied insofar as we take back the powers; we then, through primary legislation, decide, for example on the area of agriculture, what we wish to be retained and what we see as necessary to be retained to ensure a single market within the United Kingdom; and then work out, with the devolved Administrations, what should be devolved and what budget should be attached to that?

Is that not a much more sensible way rather than looking at what you had suggested, where the Bill should indicate what is reserved and what is devolved, ahead of the termination of negotiations with the EU?

Dr O'Brien: I appreciate that questions of practicality and the need to have something decided may have trumped the attention to detail in some places. If that is what is being planned, I would have thought it would be possible to include some guarantees of that within the Bill rather than have the implication that, at the moment, is exercising some members of the devolved authorities.

For instance, there is no sunset clause. There is no suggestion of a timescale or anything like that, so it could be that bringing it within UK powers and then dispersing is a more practical approach, but it would be



useful to know exactly how that is going to work and when it is going to work.

Q56 Richard Graham: Sir Stephen, earlier you were, I think, rather modest in describing your note to this Committee. It is, in fact, a 73-paragraph and 15-page report, which risks, therefore, not getting quite the coverage it deserves. Paragraphs 53 to 72 in particular are a devastating indictment of criticism of powers proposed in the Bill in general, and Clause 9 in particular. You describe the notion of a power-grab as “tendentious” and “wrong”. You illustrate six further misconceptions. You say it is wrong to say Parliament has no influence on the detail of statutory instruments and no constitutional principle about what should go into primary or secondary legislation.

However, you also identify the risk of Ministers and Parliament taking a different view on what is significant or controversial. To avoid that risk, you recommend that there is an undertaking of co-operation from Government in return for agreement not to amend the Bill, and closer scrutiny by a parliamentary committee to effectively triage the statutory instruments.

Would you like to tell us a bit more about how you think that could work in practice and what sort of parliamentary committee could play that role?

Sir Stephen Laws: There is the Joint Committee on Statutory Instruments, and the House of Lords has its Delegated Powers and Regulatory Reform Committee and its Merits of Statutory Instruments Committee, which look at the detail of subordinate legislation and try to detect issues that need to be drawn to the House’s attention. This would be closer to the House of Lords Merits of Statutory Instruments Committee and would look at the merits of the legislation coming forward under the Bill.

This Committee itself has other things that it needs to do but, given its format, first of all, I suggest that there should be a method of scrutinising the project. The Government are going to be running an enormous project to produce legislation, and you could be asking them what they are doing, how they are getting on with it, what their priorities are and how far they have got with various bits of the legislation—and perhaps you are. In essence, you would then need to enlist support, in order to look at everything that is coming forward, having established that there are particular things you will want to look at.

The list of things that give rise to affirmative rather than negative is a start, but there are other places, perhaps on reciprocity in particular, where you would want to identify issues that give rise to policy questions. You would ask the Government to tell you whenever they are bringing forward an instrument that gives rise to a reciprocity issue. Then you would look at it and decide whether you wanted to take it further.

Q57 Richard Graham: In essence, your recommendation is of a



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parliamentary committee that determines what is not significant and uncontroversial and, therefore, should go through statutory instruments.

Sir Stephen Laws: It would decide what level of scrutiny should be applied to it in the two Houses. I am not suggesting that you should say that the main option for the committee is to say, "Do not make a statutory instrument. Bring forward some primary legislation". I do not think that is going to be practical. It is a question of making sure that the issues are considered by Parliament and particularly by this House; otherwise, the other House will take the lead. These are going to be political issues that should be decided upon.

Q58 **Richard Graham:** Secondly, Chairman, can I come back to something that Joanna Cherry raised earlier? Some have recommended that there is a continuing role for the European Court of Justice for European nationals who continue to live in the UK after we have left the EU. Can I ask: what precedent is there, first, in the United Kingdom, for any foreign court to have a say in matters of UK law? Secondly, what precedent is there in Europe for the ECJ to play such a role in any other non-EU country? Perhaps Sir Konrad first.

Sir Konrad Schiemann: There is a lovely German expansion: "*Da bin ich überfragt*"—"I am over-questioned."ⁱ

Chair: It will not help you in this room.

Richard Graham: I thought, on this one, you had been *unterfragt* but, in the absence of an answer from you, Professor Ekins.

Professor Ekins: I had thought that the role that was proposed for the ECJ to enforce citizens' rights in the UK was unprecedented and was remarkable.

Q59 **Richard Graham:** Both in UK and EU law.

Professor Ekins: Yes, and EU practice with other third countries and so forth.

Dr O'Brien: There is some precedent for international courts having an effect on UK law.

Q60 **Richard Graham:** They are having an effect but this would be referring cases specifically to the ECJ. Is there any precedent for that?

Dr O'Brien: The referral mechanism is quite *sui generis*. It is difficult to point to an exact equivalent but the European Court of Human Rights is—

Q61 **Richard Graham:** Is there any other country in the world where the ECJ has a specific role for European nationals living in that country?

Dr O'Brien: Turkey.

Professor Ekins: I do not think it does in disputes between the EU and Turkey. It is like entrusting the United Kingdom and the Supreme Court



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with jurisdiction. If it is a court of one of the parties to the dispute, you have a basic problem of fairness. No sovereign state, at least in international practice, is going to commit itself to the jurisdiction of a tribunal that is a part of the body with whom it is in dispute. When I said “remarkable”, I meant “outrageous”, I should add.

Sir Stephen Laws: I agree with that.

Sir Konrad Schiemann: The only thing I might add to my general declaration of non-knowledge is that the EU has, of course, agreements with a number of eastern European countries—including Turkey, but there are others too—for the sending of workers over there. I certainly know that I have had to look at those agreements when sitting in the ECJ.

I cannot for the life of me remember now whether this was by reason of a reference from some form of foreign court—let us say, one of the people who was not, at the relevant time, in the ECJ. I cannot remember that but it would not entirely surprise me if that foreign court was prepared to do that in relation to the matters covered by the particular agreement it had with the EU.

Q62 **Richard Graham:** I think that general answer amounts to the same as what the others have said: you cannot see a precedent for the ECJ becoming a referring appeal court for European nationals living in non-EU countries.

Sir Konrad Schiemann: You mean a referred appeal court.

Q63 **Richard Graham:** Cases that have been heard in the UK then going to the ECJ for a further ruling is the proposal that has been made.

Sir Konrad Schiemann: I cannot remember coming across such a thing.

Q64 **Mr Bone:** Sir Stephen, I was very interested in the bit about the Joint Committee on Statutory Instruments, which I sat on for a number of years. As you all know, they are very speedy meetings at the moment, but they have the advantage of having Members from both Houses. I am very interested in strengthening parliamentary scrutiny of what the Government is up to. Are you suggesting that that would be a possible committee to do the triage work of saying, “This is technical” or “This is political” or something in between?

Sir Stephen Laws: It is a possible committee but I think, at the moment, its constitution operates on the basis that it is really only dealing with technical matters, and it would probably want a wider membership. As a model, yes, it is a good model.

Q65 **Mr Bone:** It advises the House and it will say, in certain cases, “This is ultra vires”. It does not say you cannot do it but it advises the House of that. That is the sort of thing perhaps the triaging mechanism might do.

Sir Stephen Laws: As I say, it is a model. You could use the same committee or the Houses might decide they need a different committee.

Q66 **Chair:** Can I ask one final question of clarification? Coming back to the use of delegated legislation to implement the withdrawal agreement, is it your understanding that that would open up the implementation of the withdrawal agreement to judicial review because the Government would be doing so using secondary legislation?

Sir Stephen Laws: There is always a risk when you take power to do things by subordinate legislation that that is exposing it to challenge in the courts on the grounds that it is not within the powers. That is why it is important that the powers should be framed in a way that does not give rise, unnecessarily, to angles for challenge.

In my note, I criticise the suggestion from the House of Lords committees that you change “appropriate” to “necessary”, because “necessary” seems to me to be a concept that significantly increases the risk of challenge and, for the reasons I give in the note, is inapplicable, because no amendment is necessary if there is an alternative amendment you could make, because it is then made unnecessary by the fact that you could have the other one. Yes, it is exposed to it.

Q67 **Chair:** If that is the case, then, if you wanted to avoid that possibility—I come back to the question I put to you earlier—would that not make the case for implementing the withdrawal agreement by means of primary legislation as opposed to delegated legislation?

Sir Stephen Laws: That is a case for doing that and, if there is time to do it, it has that advantage. It may have other disadvantages.

Professor Ekins: Do you mean implementing the agreement or entering into the agreement? You are certainly not going to get judicial challenge to entering into the agreement.

Q68 **Chair:** No, I mean implementing the agreement.

Professor Ekins: I agree with Sir Stephen.

Chair: Thank you very much indeed. I apologise to all of you for the over-questioning by the Committee. If you were not briefed beforehand, that is very much our habit, but I must say you have answered brilliantly and you have got us off to a great start. We are, all of us, very grateful to you for giving up your time and your expertise in enlightening us today. Thank you very much.

ⁱ Sir Konrad provided [written evidence](#) to clarify his remarks.