



Select Committee on the Constitution

Corrected oral evidence: European Union (Withdrawal) Bill

Wednesday 1 November 2017

10.30 am

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Members present: Baroness Taylor of Bolton (The Chairman); Baroness Corston; Lord Dunlop; Lord Hunt of Wirral; Lord Judge; Lord MacGregor of Pulham Market; Lord Morgan; Lord Norton of Louth; Lord Pannick.

Evidence Session No. 1

Heard in Public

Questions 1 - 11

Witnesses

I: Rt Hon Lord Neuberger of Abbotsbury, former President of the Supreme Court; Richard Gordon QC, Barrister.

Examination of witnesses

Rt Hon Lord Neuberger of Abbotsbury and Richard Gordon QC.

Q1 **The Chairman:** Good morning and welcome. We are very pleased to have Lord Neuberger and Richard Gordon QC here to talk about the European Union (Withdrawal) Bill, which will take up a lot of time for a lot of people. You are our first witnesses, so you are especially welcome.

Can I start with a very general question, for Lord Neuberger in particular? In August, you made some statements about this issue and the need for clearer guidance for the courts. You said that, if Parliament did not make the law clear, the courts would be stepping into a void. That is quite a serious statement. Could you tell us generally your concerns about lack of clarity, particularly in Clause 6?

Lord Neuberger of Abbotsbury: You are spot on, in the sense that I had Clause 6 in mind, and in particular Clause 6(2), which, as you know, provides that any UK court should not have regard to any post-exit day decisions of the European court or any other EU entity, “but may do so if it considers it appropriate to do so”. At first sight, that is not very different from how the courts are enjoined when considering human rights points to consider decisions of the Strasbourg court. It is a slightly different formula. But in a sense, it is a more open-ended formula, basically leaving it to the courts to do as they wish.

More importantly, in many ways, the sorts of factors that could be taken into account are economic and quite high-level political factors. For instance, if the EU court had decided a point on a directive or regulation that affected the right to trade between member states, and we had a similar provision in a statutory instrument brought into effect through this Bill for the UK courts to decide, should the UK courts take into account the fact that if they decide differently from the EU court it will affect trade between the UK and the EU—or, possibly, financial arrangements, City interests, political interests or international relations between the UK and the EU? Judges are not naturally the people to take into account factors of that sort. It puts them very much into policy issues, where, on the whole, the tradition in this country has been to keep them out. If they have to decide whether to take those factors into account—and, if so, how—they will do their duty, as they must, but they may not make decisions that are welcome here. It would be better to give them guidance.

There is an unusual aspect that I have not commented on specifically—taking into account not merely decisions of the European court but decisions of “another EU entity or the EU”. Often, those will be legislative and administrative decisions subsequent to our exiting. It would be unusual for a court to take into account a legislative or administrative decision of a foreign institution. Again, if judges are not given guidance, they will have to do their best.

I am sorry that this is such a long answer. Finally, if for one reason or another it is too politically difficult or inconvenient to give any guidance,

the judges have the right to expect Parliament, and as far as is possible the media and the public, to be told that the judges are being given this unusual duty and will have to do their best. I think that they are entitled, as usual, to appropriate protection from the Executive and, in this case, the legislature.

The Chairman: You think that it could be over a very wide range of issues.

Lord Neuberger of Abbotsbury: Potentially, yes. It is unlike human rights. When there are continuing interests and relationships between the UK and the EU, both commercial and financial, and diplomatic and international, the sorts of factors that could or could not be taken into account—and, if so, how—are not factors that judges have traditionally been keen to take into account or are necessarily trained to take into account.

Richard Gordon: I agree with everything that Lord Neuberger said about the generality of that part of Clause 6(2). I have a more fundamental concern about the lack of clarity in the Bill, and that is the whole concept of separation of EU law post Brexit from EU law pre Brexit. It stems from a political initiative that has legal consequences. In a snapshot, which is effectively what the Bill aims to do, there are real problems in separating EU law post Brexit from EU law pre Brexit. The example I tend to think of is that if you take a snapshot on day one and you learn on day three—day three, in this case, being post Brexit—that your snapshot was incorrect, and that what was transferred is actually more consistent with what is said on day three, it seems to me anomalous and strange that the EU law post Brexit ought not to be as binding as the EU law pre Brexit. That is one concern I have.

The Chairman: We may come to that in detail a little later.

Q2 **Lord Judge:** If you were in the position of drafting this Bill, what sort of words would you use so that the courts were informed of their duty and were not required to enter areas they should not enter and, indeed, are not able to enter? I will give you a hint. The Human Rights Act says, “take account of”. Here we are dealing with three possibilities: the present, the transitional—assuming there is a transition—and the out. Can you give us the sort of language we should be looking at?

Lord Neuberger of Abbotsbury: I shelter behind the fact that it is wrong in principle to draft in Committee. I know that from bitter experience.

Lord Judge: This is the stuff of every day.

Lord Neuberger of Abbotsbury: I know. I have not come along with an immediate draft, and I would be somewhat chary about doing so. I acknowledge that the drafting of what you can and cannot take into account is not entirely easy. That does not mean that the legislature should not face up to the difficult question of whether, if the UK court was minded to depart from the EU court, and that could or would affect our

ability to trade or our financial interest, it would be something to be taken into account. It is a bit cumbersome, but it is not unusual to see statutes that say, "A judge can take into account A, B and C and/or cannot take into account D, E and F". If counsel for one party said, "If you reach a different conclusion on this particular provision in the identical UK statute or statutory instrument from the decision that the EU court reached on the identical provision in the directive or regulation, it will or may detrimentally affect trade in this way", is that something a judge could take into account? That is all I am saying. If Parliament wants to do its job rather than to get the judges to do what is ultimately a policy job, it should give guidance on that to judges. It should say that they can or cannot take it into account or that they may or may not do so.

I appreciate that it is not easy to do a list, but there are certain obvious points, such as the ones I have mentioned. If this course is taken, I would favour at least a list of "mays" and "may nots". The problem of simply having "may" is that it implies that you should probably not take other things into account. If you have "may not" only, it implies that anything else is okay. If you have "may" and "may not", it gives the court a degree of flexibility. It may be inevitable, but I think you should minimise that, because policy is for the legislature.

Richard Gordon: The opening words of Clause 6(2) are, "A court or tribunal". I would add the words, "if it considers it relevant to the case before it". If one is in the generality of taking into account, as Lord Neuberger envisages is possible, there is a danger of straying from the case in front of the court. It should have to be relevant, so that is the kind of language I would favour.

Lord Judge: You are giving dissimilar answers, are you not?

Lord Neuberger of Abbotsbury: We are.

Lord Judge: Richard Gordon is saying that, provided the court thinks it relevant—in whatever sense the court thinks it relevant—it should take it into account, whereas Lord Neuberger is saying, "We really need to be told what may be relevant and what may not".

Lord Neuberger of Abbotsbury: Our disagreement goes a bit deeper than that, I am afraid. It goes beyond the fact that it may not be relevant to a particular case. If you are interpreting a particular statutory provision for everybody, you have to be aware of the implications beyond the particular case.

Lord Judge: From what you say, you think it ought to be in the primary legislation. Are you thinking of ministerial advice or practice directions, or should it be there to be seen?

Lord Neuberger of Abbotsbury: In a perfect world—with all the complexities and time constraints we are under, we are not in a perfect world—it would be carefully thought out and in the statute. That is from

the judicial point of view; what is practical is another matter. I appreciate that I am saying what I think would be both constitutionally appropriate and the best outcome from the point of view of the judges. It is not a perfect result, because it is very difficult to compile a comprehensive list of dos and don'ts. We do not have a great deal of time, and some of the points may be contentious.

Lord Judge: What do you think, Mr Gordon? Where should this guidance be found—in statute or advice?

Richard Gordon: I have a conceptual difficulty with Parliament taking the court outside the scope of the case, but, if one opts for a model of guidance, I would prefer to see it in guidance and not in statute. It might create a lack of clarity to have it in the Act itself, particularly if it is a list of what you may take into account, leaving quite difficult questions as to whether or not one is caught by the type of things in the permissive part of the statute.

Lord Neuberger of Abbotsbury: I said that Mr Gordon and I disagreed, but the disagreement pinpoints the difficulty. He is quite right. Normally, a judge will want to decide a case by reference to the facts of that case and will not go way outside, to other matters. That is what Parliament does, with all the information and expertise that it has. The fact that we would have to look outside, because we were interpreting legislation generally, highlights very well the point of concern.

Lord Pannick: I agree that it is a fundamentally difficult problem. From my perspective, giving Ministers the power to decide what factors judges should take into account in this highly important and sensitive context does not fill me with great glee. Can I suggest a possible way forward on which I would welcome your comments?

The application of the Bill, when it becomes legislation, will be in the context that there will, we assume, be an agreement between the United Kingdom and the EU. We are assuming, I think, that that agreement will have been blessed by Parliament. A possible way forward would be to include in the Bill that when the courts are determining to what extent to take into account EU judgments post Brexit, they should do their best to implement the purposes of the agreement, as approved by Parliament—or something of that sort. Therefore, if in a particular case it would promote the objectives that Parliament has blessed to look at an EU case, the court would be encouraged to do that. I suggest something along those lines.

Lord Neuberger of Abbotsbury: I would be enthusiastic about that. There is another element, of course. Hopefully, there will be some sort of withdrawal agreement, which will contain a lot of provisions. There is then the question of how the judges can take that into account. Will it be brought into our legislation, or will it simply be an international treaty that judges can look at but does not become part of our law? If it becomes part of our law, and it is referred to in this section, as it will

become, it might answer a lot of the concerns that I have expressed, depending on its terms.

Richard Gordon: Lord Pannick's question raises a point that I was going to mention later—the need for a relationship between the Bill and the agreement. What looks like coming out of Brussels at the moment is a 20-month transitional period, with all the *acquis* being continued. That seems to be the general thrust. If it is, any agreement that comes from Brussels will be completely contrary to the structure of the Bill and may indeed alter Parliament's whole approach to the Bill.

My answer to Lord Pannick's question is this. If—but only if—the Bill itself is compatible and consistent in its structure with what is negotiated in Brussels, I absolutely agree that it should inform the courts' approach to these kinds of questions. If it is completely contrary to the Bill, there is a kind of oxymoron built into the whole idea, as part of the Bill, of taking into account what has happened in Brussels.

The Chairman: Lord Pannick, do you want to follow up on that?

Lord Pannick: No. My question has been fully answered.

Q3 **Lord Dunlop:** Could the witnesses comment on the challenges for the courts of interpreting retained EU law where it is modified on or after exit day? I refer in particular to the courts' ability to interpret in accordance with ECJ case law, where that is consistent with the intention of the modifications. To what extent does that create uncertainty? Will it always be possible to discern clearly what the intention of the modifications is?

Richard Gordon: That echoes my concern. Clause 6 is in danger of following the idea that there can be a sensible, coherent and logical split between post-Brexit EU law and pre-Brexit EU law. In my opinion, if you are taking a snapshot, it must be the correct snapshot. As EU law, by definition, is law that has to be compatible and consistent among the member states, the idea that a clarificatory judgment post Brexit does not have even more binding force than an incorrect judgment pre Brexit is rather difficult to swallow.

The other problem with Clause 6—in fact, with the whole Bill—is that it will greatly affect statutory interpretation. If you look at the modification powers in line with the idea that you can split pre-Brexit and post-Brexit EU law, you will have bits of Acts of Parliament that, because they are post-Brexit modifications, will be interpreted incompatibly with the object and purpose of the majority of the Act. If 99% of the Act contains retained EU law but a quarter of it does not, how will a court go about the task of interpreting the statute? It will surely have to be schizophrenic and say, "The object and purpose of 90% of it is EU driven and affected—in fact, not only affected but regulated—by the concept of supremacy. But the 10% modification is meant to depart from EU law, even though the statute as a whole is integrated and has to be read as a whole, according to ordinary principles of construction". There will be a lot of scope for lack of clarity.

Lord Neuberger of Abbotsbury: Your specific point was about the intention of the modification, which you find in Clause 5(3) and Clause 6(6). That could lead to difficulties. Even with UK legislation, judges sometimes have difficulty identifying the intention of a particular provision or, in this case, modification. There will certainly be arguments about what you are entitled to look at to see what the intention was. Do you have to gather it from the document itself, or can you look at what has been said by the relevant EU authorities and by the Court of Justice? To be fair to the drafters, that is the sort of consideration that would probably not be politically sensitive. Judges would be in slightly unfamiliar territory, but there are more difficult points to concentrate on. However, you are quite right—it is likely to lead to argument.

Q4 **Baroness Corston:** It has been said that the effect of paragraph 1 of Schedule 1 is that retained EU law will be protected against judicial review, not only on EU law grounds but on common law grounds. Do you share that analysis and view?

Lord Neuberger of Abbotsbury: There is a possible conflict, or it can be argued that there is a conflict, between paragraph 1 of Schedule 1 and Clause 6(3). As you say, it looks as if paragraph 1 of Schedule 1 excludes the possibility of any sort of judicial review, domestic or otherwise, of EU legislation, but Clause 6(3) states, “Any question as to the validity, meaning or effect of any retained EU law is to be decided”, and so on. There is room for argument that that means you can challenge validity, but paragraph 1 of Schedule 1 says you cannot. Even if that turns out to be a bad point, it is a point that should be ironed out so that it can be avoided.

Richard Gordon: I do not know whether the case is Foto-Frost, but currently EU law reserves to the CJEU—the EU court—the right to determine the invalidity of EU instruments. Consistent with the idea that you simply scrap EU law and the judgments of the CJEU, it is logical to have a provision such as paragraph 1 of Schedule 1. It seems to me that it is designed to prevent a UK court determining the validity of an EU instrument going back pre exit day. It is very unsatisfactory, because it proceeds from the logic of a wish to split EU law and UK law but leads to the anomaly that you have no right of redress to correct the snapshot.

Q5 **Lord Pannick:** One of the problems of legal certainty we are grappling with is that the Bill does not tell us whether retained EU law has the status of primary legislation, secondary legislation or something else. I think the Bill only addresses that question on page 55, in paragraph 19(1) of part 2 of Schedule 8, which states, “For the purposes of the Human Rights Act 1998, any retained direct EU legislation is to be treated as primary legislation and not subordinate legislation”.

Lord Neuberger of Abbotsbury: Absolutely.

Lord Pannick: That begs the question, what about other purposes? Do you think that it raises problems of legal certainty if, for example, challenges are brought to retained EU law under domestic law principles,

such as lack of procedural fairness or retrospectivity? In your view, does the legislation need to come off the fence and tell us what retained EU law status actually is?

Lord Neuberger of Abbotsbury: There is no doubt that in this potential legal minefield, spelling things out is worth doing from the point of view of legal certainty, if there is the slightest doubt. Whether it is always easy, in terms of political harmony, is another matter. Clauses 3 and 4 are slightly coy on this. I had not spotted it, but the coyness is undoubtedly reinforced by paragraph 19, which spells it out. On the whole, it would probably be statutory, but it may be *sui generis*. Clause 3, if it remains as it is, says that this forms part of our law. You could argue, therefore, that it is being brought in statutorily. You could also argue that statutory instruments are brought in statutorily but they are not primary legislation. Rather than express a view, which may be wrong, I think that very fact indicates that you are right; it should be spelled out.

Richard Gordon: It is a really difficult question and I do not know the answer. My first question internally is whether taxonomy is the right instrument. If you look at it purely as a question of taxonomy, you may reach different results pre and post Brexit. For retained EU law, you will have something like direct EU legislation, which attracts the principle of supremacy; but we know that post Brexit there is no principle of supremacy, so your taxonomy will have to give effect to two different things in relation to the same form of instrument. That seems to me to be a real problem.

The second problem of taxonomy is that, unless you give to those elements of UK legislation that are commonly given a particular taxonomy a taxonomy that enables pre-Brexit law to trump a statute, you will get into a real muddle. There is of course a third anomaly, which is that the whole concept of EU supremacy is not an easy one when there is no EU law, because you have just obliterated it on exit day. I can see completely why the draftsman has had to put it in the way he has. The question you pose is very difficult to answer, but it is a really important question about lack of clarity.

Lord Pannick: It has been suggested to us that the problem might be solved by Ministers making regulations under Clause 17 that, for particular purposes, they can specify that a particular EU law or group of EU laws has the status of primary or secondary legislation. Some of us are not very enthusiastic about such a broad ministerial power. I wonder whether you would like to comment on that.

Lord Neuberger of Abbotsbury: I would describe it—intentionally moderately—as constitutionally questionable.

Q6 **Lord Hunt of Wirral:** We are wrestling with the principle of the supremacy of EU law. Clause 5 provides that it does not apply to “any enactment or rule of law passed or made on or after exit day”. Could you give us your assessment of that provision and its consequences?

Lord Neuberger of Abbotsbury: The effect of the clause is reasonably clear, in the sense that the application of the principle is that the legislation after exit day should not have effect. In some ways, I adopt what Richard Gordon said, in the sense that this sharp distinction between pre and post exit-day law, whether from the court, the Commission or the Council of Ministers, is difficult to apply.

Richard Gordon: In my opinion, the supremacy of EU law pre and post exit day is not just difficult but conceptually erroneous. This is where I think the problem lies. The shopping list of things that do not apply after Brexit includes case law and general principles, as if case law and general principles can be severed from the content of legislation. They cannot. If a CJEU judgment tells us what the law was pre Brexit, it seems to me that the principle of the supremacy of EU law must apply there—but it does not in the Bill. You get this problem, in part, because the draftsman has separated artificially the various component elements of EU law as if they were all mutually distinct. That is a real issue.

There is also an issue, which may be just the lexicon—a terminological issue—about any principle of the supremacy of EU law existing when EU law itself has gone and there is merely retained EU law. As we know from other parts of the statute, that is not to be equated directly with EU law. It is an intrinsic problem and not a problem of degree.

Lord Hunt of Wirral: How would you solve the problem?

Richard Gordon: I am not sure you can solve the problem if you have, as a leitmotif of the Bill, the attempt to kill the jurisdiction of the CJEU and anything that flows from it post exit day. The other problem that will crop up from your last question is when exit day will be. Could there be different exit days for different parts of different Acts? Then there will be another muddle because the principle of supremacy of EU law will, effectively, be dictatable by the Minister. There are so many problems with the Bill that flow not from bad drafting but from the concept. It is hard.

Q7 **Lord Morgan:** We have already discussed somewhat the transitional period after Brexit takes place and how long it might be; what form it might take is of course exceedingly uncertain. In interpreting the status of EU law and retained EU law, would the transitional period present particular problems of its own?

Lord Neuberger of Abbotsbury: To some extent it depends on what you mean by transition period. If the exit day is put off, EU law will continue to be supreme, as it were, until the exit day. All that will happen is that it is continued longer than might otherwise be expected. In effect, the expiry of the Article 50 notice would be extended.

The alternative is that we leave and the exit day is in March 2019, but some interim or transitional period is created. That is probably what is envisaged. In that case, the Bill would need to be amended to cater for whatever has been agreed. In a sense, it highlights both what Richard

Gordon has been saying about the unsatisfactory nature of the sharp division between pre and post-exit day legislation and decisions, and what Lord Pannick said about the—I think—essential nature of the requirement that the Bill incorporates whatever agreement is reached between the UK and the EU, and all its terms. Presumably, that agreement, or maybe more than one agreement, will include all the interim period terms that would have to be incorporated into the statute. Until we know what they are, it is quite difficult to know how to cater for them. It will almost inevitably make a complicated position more complicated, but I suspect it will make a difficult position easier in practice, in the sense that it will ease the passing.

Lord Morgan: Might it be difficult to determine whether the transitional period is actually in being or not, or whether it is just a continuation of some of the previous overlappings that we were discussing earlier?

Lord Neuberger of Abbotsbury: One can see the spectre of what both Lord Pannick and Mr Gordon referred to, of it being said that, with these complicated transitional provisions, we will have to have different dates for different things and different provisions for different things, and that will all have to be done by ministerial fiat. As I indicated—I suspect nobody in this room would disagree—that would be very unsatisfactory.

Richard Gordon: I do not think the transitional period as such will necessarily give rise to more difficulty than there is already, but there are some difficulties about the concept of a transitional period. The first thing is that you will not find any reference to it in Article 50. The second is that at the moment the only reference in the withdrawal Bill to bringing in the agreement is the reference to the Minister giving effect to the withdrawal agreement. What is the withdrawal agreement? It is defined as arrangements for withdrawal under Article 50, but if in fact Article 50 makes no provision for a transitional period, there may be a nice question of EU law as to whether that can properly fit into the structure of the Bill.

For me, the most important difficulty is that, if the Government want to select bits and pieces from the *acquis communautaire* to negotiate some form of temporary access to the free market and customs union, that is going to meet with inevitable resistance from Brussels. The mandate and the negotiating guidelines make it absolutely clear that there are certain areas where the whole of the *acquis* must be complied with. It is also extremely difficult to define what the free market is. It is not defined.

I do not think there is time to reach an agreement on a full transitional period, with selective parts of the *acquis*, by April 2019, which probably means that we will have to swallow the whole of the *acquis* for a transitional period. That is contrary to the structure of the Bill, with its top-heavy abolition of EU law. We would simply be relying on a tiny bit of that Bill giving the Minister power to implement the withdrawal agreement, which would violate the whole intended structure of the Bill, until such time as a definitive agreement had been reached. Ultimately, it seems to me that the Bill itself may change so drastically, when the reality of what Brussels is likely to offer and the timing become clear, that

actually it is the Bill that will be affected rather than the legal problems of the transitional period.

Lord Morgan: Thank you very much; that is very helpful.

The Chairman: It is a nightmare in terms of the legislative process.

Q8 **Lord Hunt of Wirral:** What lessons can we learn from the legislation that took us in? A transitional period was provided for then. Your point was that there is no transition in Article 50, but there is reference to terms, which could include a transition period. What lessons can we learn from the way in which countries, including our own, entered the Common Market under the original legislation? What read-across can we put into the European Union (Withdrawal) Bill?

Richard Gordon: I do not think there are lessons. The Metric Martyrs case was interesting because it was the genesis of the whole idea of a constitutional statute. Lord Justice Laws, as he was then, said that he objected to the argument being put before him. He said that Henry VIII clauses were ultimately how EU law was brought in.

The difficulty is that you cannot compare the two constitutional processes. It was relatively easy, although a momentous constitutional change, for us to bring in the whole of the *acquis communautaire*, with its complicated structure of institutional decision-making. That has gone or will go. What we are now going to have is, "Well, we do not have the EU institutional set-up, which is a common pool of decision-making. It is going to fall on a body and the question is, which body?" There cannot be an analogy between the two processes. It will fall either on Ministers or on Parliament, which takes us into the whole question of powers, the breadth of powers and the appropriateness of powers. To my mind, the constitutional impact of the EU (Withdrawal) Bill is so different from that of the European Communities Act that you cannot sensibly read across.

Lord Neuberger of Abbotsbury: I completely agree.

Lord Pannick: I want to follow up what Richard Gordon was saying about the impact of the agreement on the Bill. Would you agree that it is highly unlikely that the EU will agree to a transitional period that does not involve at least some degree of powers for the Court of Justice in Luxembourg? The whole of the Bill is predicated on a temporal distinction that the Court of Justice will no longer have defining powers.

Richard Gordon: Absolutely. It seems to me that there is a threadbare subsection of a clause—I searched for it but I did not immediately see it—enabling the withdrawal agreement to be given effect. But when you realise that any withdrawal agreement, however temporary and however transitional, must engage the continuing jurisdiction of the CJEU, particularly in relation to citizens' rights, either you emasculate the Bill or you make it much clearer that the withdrawal agreement is an exception to the general intended statutory regime.

Q9 **Lord Pannick:** The Bill is very clear on one subject: the EU charter of

rights will not be read across. It is one of the few areas of EU law that will not be read across. There is a political battle building up as to whether that exclusion should be maintained in the Bill, but I do not want to ask you about the politics. I want to ask you about the law. Can you assist us on whether, in substance, anything of legal value not already protected by the Human Rights Act will be lost if citizens of this country are no longer able to say in court, "I rely on my rights under the EU charter of rights"? That is the question.

Lord Neuberger of Abbotsbury: I find it inconceivable that something will not be lost, but nothing immediately occurs to me of a glaring nature. I can say no more than that.

Richard Gordon: There are two things. First, the charter itself expressly refers to coincidence between its provisions and the ECHR, which is, effectively, already in our law. Secondly—I wondered if Lord Neuberger was going to make a comment about this—the courts have not been exactly static in developing constitutional domestic human rights since the beginning of our membership of the EU. I may be completely wrong in this prediction, but I would expect the courts subtly to fill in any gaps that there might be, if there were any relevant gaps.

Lord Neuberger of Abbotsbury: It is easier for Mr Gordon to say that than for me. What I would say is that I suspect that in Clause 5(5) the reference to "corresponding retained fundamental rights" could well lead to litigation.

Lord Pannick: What the draftsman means is a very clear concept.

Lord Neuberger of Abbotsbury: It is.

Lord Pannick: Would you agree that the charter of rights has greater force in domestic law than the Human Rights Act because, if legislation is in breach of the charter, the court has the power to strike it down? I cannot think of examples where that has happened. You may be able to think of examples, but in principle that is right, is it not, whereas under the Human Rights Act, if there is a clear contrast, the court can give only a declaration of incompatibility? It is a strong power but it is limited. There is a difference of principle.

Lord Neuberger of Abbotsbury: There is a difference of principle. Of course, the charter applies only in relation to EU law, but you are absolutely right that it is a stronger power. On the other hand, the power under Section 3 of the Human Rights Act is not a long way from that. It enables judges to indulge in rather imaginative interpretation, to ensure that legislation complies with the human rights convention. But you are quite right: the charter power is, as it were, more muscular.

Richard Gordon: I have not looked at the case law on this recently, but the CJEU often uses the charter and references to fundamental rights almost interchangeably. The charter will reinforce, so it may not be that much of a real change.

The Chairman: But you are saying that clarification will only come from litigation.

Richard Gordon: Yes.

Lord Morgan: In a transitional period, are fundamental human rights and how they apply likely to be a particularly difficult problem? For example, in the transitional period all sorts of issues regarding the migration of people might come up.

Richard Gordon: As Lord Neuberger said, if there is a transitional period, it will be defined in the legislation. It has to be, in which case we will not have that kind of problem.

Q10 **Lord Norton of Louth:** Clause 4 transfers EU treaty rights. Do you envisage any particular problems deriving from that clause?

Lord Neuberger of Abbotsbury: One of the issues we have not mentioned, which also applies to Clause 6, is the extent, if at all, to which the domestic courts should or can treat us as part of any sort of common European project. At first sight, that seems wholly contrary to the purpose of withdrawing, but we anticipate, I think, that the UK will be party to some measures such as the Brussels regulations and the European arrest warrant if that can be agreed. That could lead to difficulties in relation to interpreting and giving effect to Clause 4, and indeed Clause 6, if we are in the European venture for some purposes but not for others. It is a bit like the point Mr Gordon made earlier about the fact that this is not a completely black and white situation, but the non-black and white position will continue and will make a judge's position difficult under Clause 4.

It may be that in relation to this aspect we are in for some purposes and out for others. It is something you cannot really cater for further in legislation because how do you spell it out? It is more familiar territory for a judge, who can say to himself or herself, "Well, I need to take into account that the UK is a party to this, and therefore I can take it into account and there are no difficulties about it. If we are not a party to this, *prima facie* at any rate, I do not take it into account". I think it will lead to difficulties, but they are familiar types of difficulties. That is my take at the moment.

Richard Gordon: It is the same kind of difficulty to which I have been referring. Let us say you have a treaty right that has not been clarified by the CJEU pre Brexit day. It is clarified later. It always was a treaty right; it is directly effective and it always applied. It was transferred on exit day but it is not recognised by Clause 4. It cannot be recognised by Clause 4 because of the separation of court judgments from legislative instruments such as treaties. That would be a complete contradiction and the complete loss of valuable EU rights that were thought to have been transferred by Clause 4.

The Chairman: With no solution.

Richard Gordon: There is a solution, but it would involve modifying the concept behind the Bill. It would involve legislatively accepting that EU law supremacy means EU law supremacy, to whatever temporal point it attaches; that you cannot separate judgments and principles post Brexit from pre Brexit; and that ultimately you need a domestic concept that equates to EU law supremacy, which is clear.

Lord Pannick: Another problem of legal certainty we have tried to grapple with is that under Clause 4, which we have just mentioned, the retained law includes the rights under all the directives and other EU instruments. They are read across. The Bill also tells us, in Clause 2, that the retained law includes what we already have, which is the primary and secondary legislation that derives from the EU.

What will happen if there is a case where the litigant says that the rights under Clause 4 give that litigant greater rights than the domestic implementation of the EU instrument under Clause 2? There may be a conflict and an argument. As far as I can see, the Bill does not tell the court which is to have priority. Is it to give priority to the existing domestic implementation, or is it to listen to the argument that that domestic implementation does not go far enough, and the EU law that is being read across is more generous and so should take priority? Do you have any thoughts on whether you think that is a real problem? If so, how is it to be resolved?

Lord Neuberger of Abbotsbury: My immediate reaction is that, yes, of course it could be a problem. The short answer is that if something could be a problem, given that there may be lots of problems, it is a particularly good idea to reduce the number of potential problems. The nettle has to be grasped by a provision simply saying which will prevail. It may be a hypothetical problem, but one of the purposes of legislation is to minimise problems and not to leave them open unless it is politically expedient to do so.

Richard Gordon: In its interim report, the Committee referred to this problem and to the words "by virtue of" in Clause 6(7). This comes in not by virtue of, because it is already there. The problem with that analysis is that the clear legislative intention must have been to subject all pre-exit day EU law to the modification regime. It stares one in the face. The drafting is very inelegant, and there could be clarifications, as Lord Neuberger said. I notice that in the interim report the Committee said, "Well, you claimed it did not mean what you say you meant in clause whatever; would you like to just restrict it?" I think that was always the intention. There is not a substantive problem, but there is a drafting problem.

Lord Neuberger of Abbotsbury: I agree that that is probably right, but the argument the other way would be that, if you have a greater right under Clause 4, clear provision would have to be there in order to deprive somebody of a right. That would go the other way. My guess is that in the end the point would be resolved as Richard Gordon says, but there is clearly room for argument.

Q11 Lord MacGregor of Pulham Market: My question is very much a summing up. How far do you think that the Bill, as drafted, is adequate in terms of legal certainty, with regard not only to the clarity of the Bill but with regard to the operation of the legal system once the Bill becomes operative? I would like your concluding thoughts, really.

Lord Neuberger of Abbotsbury: The answers that Richard Gordon and I have each given—there is not much difference between us—indicate that there is room for improvement. His occasionally more helicopter vision of points indicates that there are real conceptual problems in the Bill. Many of those problems are inherent in the whole operation of withdrawal, and it is not possible to produce a Bill that will be completely satisfactory. It may in theory be possible, but there are so many potential pitfalls. I suspect that politically, first, there is not the time and, secondly, there are certain areas where one may say, “Yes, we should spell it out, but the expenditure of political capital to do it is too great”. It means that we will never have a particularly satisfactory statute on this. Time, political reality, the nature of the beast, with its great complications, and the fact that you are never going to find a perfect answer to some of the problems we have been discussing all mean that we are going to be cast into waters that are both unpredictable and choppy.

Recent experience suggests that it is quite difficult to predict what is going to happen. The Miller case—the one taste of Brexit that the courts have had so far—was not predicted generally following the referendum, although it came up fairly quickly. The precise course it took was not entirely anticipated. This Bill has many more implications, because, as Richard Gordon said, pulling out has so many more complications and unexpected twists and turns than joining the EU. We, and the courts in particular, are in for a difficult time. All that one can say, and ask, as a former judge is that the legislation is made as clear as possible, to pick up the sort of points we have been discussing. Even if some of them turn out to be illusory, it is better to spell them out now.

Richard Gordon: I cannot add to what Lord Neuberger said, save to say that it really is important to be able to step back from the immediate challenges posed by Brexit to the whole concept of a constitutional statute and what it should mean in our constitution. The genesis of the term “constitutional statute” is itself ambiguous. It was created by the courts in the *Metric Martyrs* case, but it is also a concept known to the Houses of Parliament—the Bill of first-class importance. The two concepts do not coincide.

Importantly, the challenges and the difficulties we have experienced with the passing of this Bill ought to give us pause for thought. I mention this to the Committee, which just might be able to do something about it: there ought to be a parliamentary procedure for evaluating constitutional statutes. How that would be done is obviously a matter of parliamentary procedure. It does not exist at the moment. It is driven by the Executive, particularly in an area such as this, and that leads to all the kinds of difficulties that we are experiencing.

Lord Neuberger of Abbotsbury: If we are looking at things at high level, perhaps I might add this. Over the past 40 or 50 years, one has observed—it is a slightly judge-centric point—judges becoming more involved in what may be called policy-type decisions and attracting more comment in newspapers that do not like particular decisions: “Unelected judges are doing this and that”. The Human Rights Act gave that extra impetus, but it was already happening.

The more that the legislature leaves it to judges to make policy decisions—coming back to Clause 6—the more we are pushing judges into making policy decisions and, if it is not too grand a word, psychologically making them think that they have more and more of a policy role. It is not for me to say to you today whether that is a good or a bad thing, but it is something the legislature should bear in mind when it leaves things to the judges because they are too difficult for the legislature.

The Chairman: Absolutely. That is back to the fundamental problem.

Lord Norton of Louth: It follows what Richard Gordon was just saying. The point you are making is that the present Bill might be improved. There is no point in coming up with a new Bill, because it will not be able to deal with the intrinsic problems that you have identified. Given that one can recognise the inherent problems and the challenges that will be faced by the judiciary, is there anything that the judiciary can do in preparation, or is it just a case of waiting until the measure takes effect?

Lord Neuberger of Abbotsbury: I would not want to take it on myself to lecture my former colleagues as to what they should be doing. There are two areas the judiciary might usefully consider; I have to admit that this is purely off the top of my head, because I had not actually thought about it until you mentioned it. First, as we all know, and I know more than most, judges have tended to come out of the closet rather more than before and to explain in speeches what they are up to. It would do no harm in due course if they were to say what problems they have faced and why they are going to do their best, so that the public and the media understand things that people in this House and the other place, hopefully, understand.

Secondly, when the Human Rights Act was in the process of being introduced—to be fair, there was a satisfactory gap between its being enacted in 1998 and brought into effect in 2000—the judges organised courses whereby people who had had substantial experience of human rights educated judges such as myself at the time, who did not have much experience of human rights, so that we were ready and properly educated on the topic before we started. This is a rather less leisurely process than the 1998 Human Rights Act, but that would be something worth considering.

Richard Gordon: Could I finish by picking up that point? The one thing that would be really useful—again, this is much more of a macro point—is judicial-parliamentary dialogue, of which there is very little at the

moment. I know from past conversations that Lord Neuberger is quite sympathetic to that, but of course you have to factor in the independence of the judiciary. It is a difficult balance, but I think there is a lot of scope for that in the future.

Lord Neuberger of Abbotsbury: Just as I finished and Mr Gordon started, I thought that was the third point I should make. He is absolutely right. Independence of the judiciary does not mean no communications or dialogue. On the contrary, taking the Law Lords out and putting them in the Supreme Court makes it all the more important that there is dialogue. As the Chair and a number of you will know, we have occasional meetings to discuss things.

The Chairman: They have proved very helpful and very useful, and are something we can build on. Thank you both for your evidence. I cannot say that you have cheered us in the task that faces us. It may be that, whatever Parliament does through amendments, there will inevitably be problems that arise in the future. Our responsibility is to try to minimise those, and in the timescale we face it will not be an easy task. Thank you both very much for your evidence.