



Select Committee on the Constitution

Corrected oral evidence: European Union (Withdrawal) Bill

Wednesday 29 November 2017

10.30 am

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

Evidence Session No. 2

Heard in Public

Questions 12 - 34

Witnesses

I: Rt Hon. Tom Brake MP, Liberal Democrat Spokesperson for Exiting the European Union and International Trade.

II: Rt Hon. Keir Starmer MP, Shadow Secretary of State for Exiting the European Union.

Examination of witness

Rt Hon. Tom Brake MP.

Q12 The Chairman: Welcome. I do not know if you know a great deal about this Committee. Everybody is involved in the Brexit legislation. We are not involved in the actual policy issues; we are involved in the constitutional implications and making sure that Parliament can fulfil its constitutional role. We have issued a couple of reports already, and we will be doing a fuller report for when the Bill reaches the House. We have a whole group of questions and we do not have a lot of time, so we will try to be brief.

Can we start, in a way, at the end? It will not be the end of the process, but it is one end. There has recently been a lot of discussion about the exit date and the Government's intention to be firm and to stipulate an exit date. Can you start by giving your assessment of that particular point and Parliament's role in it?

Tom Brake MP: It was a very political decision to seek to insert an exit date. I guess there were some leave supporters on the Conservative Benches who felt that this had to be offered to them. The difficulty is that it constrains the Government's scope for negotiations. Given that the Government are already heavily constrained in that, for instance, they ruled out being part of the single market and the customs union as one of the options, if they are now seeking to tie themselves down to a specific exit date, ruling out the possibility of extending Article 50, that is very problematic, and they are further reducing their options and their leverage in the negotiations.

The Chairman: Yes, and they are possibly reducing Parliament's timetable for scrutiny of all that is going on.

Tom Brake MP: Yes, indeed.

Q13 Baroness Corston: There has been quite a lot of talk about a transitional period. Is it your assessment that the withdrawal Bill provides for such a possibility, or would we require further legislation?

Tom Brake MP: That is a very good question. I am afraid it is not entirely clear to me whether it provides for that. Unfortunately, the whole of the legal process behind this with regard to Article 50 is quite vague in any case. That has meant there is not really much clarity over this.

Baroness Corston: If there was to be one, what could be the effect on the courts?

Tom Brake MP: Before coming on to the courts aspect of it, there is clearly a very strong demand from business for a transition period or an extension to Article 50. The difficulty with the latter is that, realistically, while the EU might agree to extend Article 50 by a year, I cannot see that it would be willing to extend it by the two or three-year period that most businesses feel is required for a transition period.

As to the courts, we have had very mixed messages as to whether the ECJ would operate, whether we would have to observe ECJ rulings and whether we would be bound by the ECJ. I assume that the European Union will demand that that is the case. Again, business wants clarity. It is overwhelmingly saying that a transition period should mean that absolutely nothing has changed at all, beyond perhaps some window dressing that would enable the Government to claim that we have left the European Union, such as not having Members of the European Parliament or not having a British European Commissioner. That might provide the political window dressing that demonstrates that we have left the European Union while leaving in place every aspect of the single market, the customs union and the ECJ. The whole purpose of the transition period, as I understand it to provide clarity and certainty to business, is that absolutely nothing changes during that period.

- Q14 **Lord Pannick:** The position surely is that this legislation, if enacted, will not cater for a transitional period. Indeed, a transitional period means that exit day has not yet come into force. That is the whole point of a transitional period. You cannot legislate in this Bill for the transitional period, because we do not know what it is going to say. Does this not show the real dangers of Clause 17? As I understand it, under Clause 17, which is one of the delegated powers provisions, the Minister can make regulations, including regulations that modify this legislation. Therefore, I do not see any legal reason why, if a transitional deal were done, the Minister could not just amend this Bill by a regulation, which seems to me wholly unacceptable.

Tom Brake MP: I agree with you entirely. This is a very strange Bill that allows the Government to change one of the clauses of the Bill through secondary legislation. In some respects, there does not need to be a reference to transition, because at some point the Government can come back and amend the Bill to include it. We may come on to this later, but in 20 years of being a member of Parliament I have never before experienced the sort of scope which the EU (Withdrawal) Bill gives to Ministers to do exactly what they want. They can make significant policy changes through secondary legislation. If new agencies have to be set up to take over from EU agencies, or if current agencies have to be given additional powers, you would expect that to come through primary legislation. It is true that after the EU (Withdrawal) Bill there will be a series of other Bills on agriculture, fisheries, immigration and so on. I have a nasty suspicion that through this Bill the Government will still make lots of policy changes, which I hope Members of Parliament will rebel against.

- Q15 **Lord Judge:** You have described your nasty suspicion about how the delegated powers in the Bill may be used. You have concerns about the powers. What changes would you like to see to the legislation?

Tom Brake MP: We would like to see a very clear distinction between technical changes being made through secondary legislation and every single policy change being made through primary legislation. I am not sufficiently versed in the criteria one would have to draw up in order to

distinguish between them effectively, but a committee set up for that purpose might be able to do so.

If our approach were adopted, of course, we would be attacked as being wreckers of Brexit, because requiring much more of the legislation to go through primary legislation would lead to a potential extended period of time for legislation to be debated. The EU (Withdrawal) Bill will probably come to your House in February or March. We then have some very significant Bills—the immigration Bill and the other Bills that I referred to—to go through. If we add into that process primary legislation for new agencies to be established or agencies to take on additional powers, that pushes the legislative programme further and further back. March 2019 then begins to look like tomorrow, rather than 18 months away.

Lord Morgan: By its definition, a transitional period is of indefinite length. Should it be in the power of Parliament to decide how long the transition should be and whether in fact it is in existence at any given time?

Tom Brake MP: Politically, I am sure there would be a requirement for the Government and therefore for Parliament to authorise what that period was going to be. As a party, the Liberal Democrats would be comfortable with a transition period that lasted a couple of hundred years, but that is not going to be on offer. A transition period that takes us beyond the date of the next general election will clearly not be acceptable either. I assume the most that would be agreed is a couple of years. That is still completely unsatisfactory for many business sectors and does not allow them the time that they need to adapt. Whether it is the hospitality sector or the agriculture sector, they have to go through a process of convincing young people who are at primary school at the moment that they want to go into their business when they leave school. That process will be addressed in two years' time. If it is not, unless immigration levels remain as they are, which I suspect they will, it is hard to see who will take on those roles in the hospitality sector, the agriculture sector and many other sectors.

The Chairman: I note your confidence about when the next election will be. We will watch this space.

Tom Brake MP: Indeed.

Q16 **Lord Beith:** We referred to Clause 17 of the Bill and the extraordinary powers that it gives. Do you think that Clause 17 is capable of amendment, or have you tried to amend it, to place any restriction on the ability of Ministers to make, by order, changes both to this legislation and to almost anything else?

Tom Brake MP: I will leave that in the hands of Dominic Grieve. We are getting feedback that there might be concessions on issues to do with triage around scrutiny. There may be something in the pipeline that addresses those concerns, but we have to see what those negotiations deliver.

Lord Beith: I will give one example of why the clause might be there. The Government told us, "Whether converted law is to be treated as primary or secondary legislation for the purpose of other statutes will be considered on a statute-by-statute basis and set out in further legislation or in regulations made under Clause 17(1) of the Bill as necessary". Is it not problematic to leave the legal status of retained direct EU legislation as something that has to be settled on an individual basis using a rather dubious power?

Tom Brake MP: It is. One of my more general concerns about the legal basis on which we are proceeding is that this Bill provides lots of scope for some newspapers to run with headlines, such as we have had in the past, about activist judges or enemies of the people, because there is a lack of clarity about interpretation. There is a lack of clarity in the interpretation and about whether the UK is going to follow ECJ rulings and follow subsequent changes. Any lack of clarity leaves judges open to charges.

Lord Beith: Clause 4 provides for the transfer of EU treaty rights. Have you had much discussion about that and the fact that it is supposedly based on reciprocity? The Prime Minister has hinged her arguments on reciprocity, but of course you cannot make that provision of the legislation conditional.

Tom Brake MP: I must admit that I have not focused particularly on that area. I am afraid that you are likely to get a more detailed, considered legal response from Keir Starmer than you are from me.

Lord Beith: I had in mind that I might direct that question to him.

Tom Brake MP: I am afraid I am following the withdrawal Bill from a campaign perspective. Where we think key aspects of legislation, such as environmental legislation, are vulnerable, or we have concerns about the Government being able to short-circuit the normal legislative process, as you are highlighting, that is where we are putting our efforts into the Bill.

Q17 **Lord Hunt of Wirral:** Are Clauses 5(1) and 5(2) clear enough in determining which types of retained EU law are intended to continue to benefit from the supremacy principle? The combined effect seems to be that while the supremacy principle does not operate in relation to post-exit domestic legislation, it will continue to operate in respect of pre-exit domestic legislation. What effect do you think that will have?

Tom Brake MP: The answer has to be, no, it does not provide the clarity that is needed. Having followed the discussions between the Government Front Bench and the Government Back Bench on these issues, there seemed to be certainty in both camps that either there was clarity or there was no clarity. If the Solicitor-General and the past Attorney-General cannot agree on what these clauses mean, that presents a problem for everybody, particularly for those who are not as learned as they are.

Lord Hunt of Wirral: Developing that and encouraging you to return to

your campaign mode, given that so much in this Bill requires not only parliamentary consent but public consent, does this reinforce the case for a second referendum?

Tom Brake MP: I hope so. I hope that the indication that was made today, albeit it was not a public announcement, that the settlement bill is of the order of £45 billion or £50 billion may also add to the demand. Given that one of the key priorities of the leave campaign was to take back control of our laws, the feeling in Parliament—this is very much a cross-party feeling that tends to unite people on the leave side with remainers—is that this Bill does anything but give back control to Parliament.

We have had arguments over the last few days about the sectoral reports, which, although they are not directly relevant to the EU (Withdrawal) Bill, certainly would or should be in terms of providing us with material to assess the impact, which would have a knock-on effect on the EU (Withdrawal) Bill. Again, the Government are at risk of contempt of Parliament, because they have not done what they have said they would do and hand over the information to the Select Committee.

One of your questions was about the implications for the relationship between Parliament and the Executive. That relationship has been damaged by the Government's willingness to push through a Bill that currently provides Members of Parliament with very few scrutiny options and very little time in which to scrutinise the 800 to 1,000 pieces of legislation that we have to incorporate.

The Chairman: You have said that things are moving slightly and that there are indications about the triaging and so on that might happen. Do you get a sense from what has been happening in the Commons so far that the Government will make significant concessions?

Tom Brake MP: The first test of that will be what the Government come back with on 5 December. This goes back to the debate about the Charter of Fundamental Rights, in which the Government's starting point was, "We do not need this, because everything that is in it is covered already in legislation and it is simply pulling everything together in one place". Their position has shifted and they are now saying, "There are rights in the charter that are covered by domestic law. Therefore, we do not need to do anything about them because they are covered. There are rights that we will not need to retain if we leave the EU, such as the right to vote in European elections". Then there is a third group of rights, and the Government have said they will come back to Parliament on 5 December and set out how they are going to address those, because they now recognise that they are not covered in domestic law.

The Chairman: We might learn more soon.

Q18 **Lord Norton of Louth:** This question relates to the charter and Clause 5. Clause 6 is about the role of the courts. You have identified the problems that Parliament faces, but there is a problem for the courts and

judgments of the CJEU. Lord Neuberger has variously made the point that the courts would like greater guidance and greater clarity. Do you agree with that, and if you do, how are we going to provide that greater clarity? Is it going to be in the Bill or through some other route?

Tom Brake MP: I certainly agree with him. I described some of the debates that we have had so far during the three days of the Committee stage on the EU (Withdrawal) Bill. There has been a complete lack of unanimity among suitably qualified and experienced Ministers and ex-Ministers about the precise implications for judges. As I stated earlier, that leaves them in a very vulnerable position. Dominic Grieve may have a solution in the form of something in the Bill that would provide that clarity. I suspect that is under discussion at this moment, which may well be why we have had no Committee stage of the EU (Withdrawal) Bill this week and return to it next Monday. Yes, greater clarity is required.

Lord Norton of Louth: Can we give some shape to that clarity? We keep saying "greater clarity", but there is both form and substance.

Tom Brake MP: As I said, I hope it will be possible and that those negotiations are taking place. I am afraid I do not feel qualified to set out legally how that could be secured. In any case, I am aware that however tightly drawn up the law is, you can normally get more than one view on its interpretation.

Lord Judge: I am not asking you to say what the legislation should provide, but it would be helpful if we could know whether you think it should be in primary legislation, secondary legislation or some other form.

Tom Brake MP: It would be helpful to have it in primary legislation, because it reduces the scope for doubt and the ability for it to be changed in the future. As to whether that will happen and whether it would be appropriate to have it in the EU (Withdrawal) Bill, or perhaps in a separate Bill, I assume the Government are considering that at this moment. There is no other legislative vehicle in which it could go, as far as I am aware. There are no other Bills coming down the track that it could be attached to.

The Chairman: There will be difficulty if there is not some clarity when this Bill is being discussed.

Q19 **Lord Pannick:** You mentioned the Charter of Fundamental Rights. Can you throw any light on why the Bill adopts the approach that the charter is not to be part of domestic law, but then says in Clause 5(5) that this does not exclude any fundamental rights or principles that exist irrespective of the charter from remaining part of retained domestic law?

Tom Brake MP: I and others think it is a political answer: that the Charter of Fundamental Rights sounds too much like a European initiative about human rights, and therefore presents a difficulty for some that requires it to go. If the Government's initial assessment was that we had covered all bases in relation to what was contained in it, perhaps at that

point they felt there was no necessity to carry it through. But they have now changed their position on that and acknowledged that aspects of the charter will be at risk if we do not take action of our own in legislation.

Lord Pannick: What do you say in answer to the point some people have made that it would be odd to have the charter as part of our domestic law, because it would enable the courts to strike down legislation because of inconsistency with human rights, whereas under the Human Rights Act the courts do not have that power? As you know, they can only give a declaration of incompatibility.

Tom Brake MP: You are probably making a good case for synchronisation and whether it would be more appropriate for it to reflect the position of the Human Rights Act.

Q20 **Lord Dunlop:** Can I ask you about Clause 11? The Government say that this clause is needed to maintain the current devolution parameters in relation to retained EU law, and that this will allow for an orderly process during a transitional period to agree where common UK frameworks may or may not be required. What is your view of the clause and its implications for the devolution settlements?

Tom Brake MP: I am concerned that this has a very heavy impact on the devolution settlement. It is the view of the devolved Administrations that there would be a process of centralisation a result of this. Some organisations believe there is a need for that. For instance, an organisation responsible for food standards would be keen to maintain a national UK standard and avoid the difficulties that might arise if food standards were devolved to each and every single nation. But the overwhelming argument is in favour of devolving powers so as to maintain the right level of subsidiarity.

Lord Dunlop: If the Government, during the passage of the Bill, can agree with the devolved Administrations a process by which these common frameworks are agreed, to what extent would that allay your concerns about this clause?

Tom Brake MP: It would do so to a great extent. I am not aware that any such process is likely to bear fruit in that respect. If agreement is reached with the devolved Administrations about how that matter is going to be handled, that is entirely in keeping with the relationship that the UK Government should have with the devolved Administrations and their rights, responsibilities and powers.

The Chairman: Have you been consulted in any way about that?

Tom Brake MP: No, I have not.

Q21 **Lord Morgan:** The Committee has heard, in both written and oral form, the deep dismay of the legislatures of Scotland and Wales, which feel that the proposal for getting the Brexit Bill into law bypasses or ignores the devolution settlement. Great anger has been caused about that, and yet another constitutional crisis might emerge. Do they have a major point?

Under the civil convention, is it necessary or vital for the devolved legislatures to give their views? Civil convention is said to apply in normal circumstances and this is a pretty abnormal context. If the devolved legislatures carry their view to the extreme position, would they be justified in withholding consent from the Bill?

Tom Brake MP: To your point about whether this Bill bypasses the devolution settlement, yes, I believe it does. In those circumstances, we could face a constitutional crisis if they did not give legislative consent. There are circumstances in which that would be appropriate. As you will know, we have a very strange political picture. In Wales, the politicians voted to stay in and the population voted to come out. In Scotland, the politicians voted to stay in, as did the population. In Northern Ireland, the population voted to stay in and the politicians voted to come out. That makes finding a way forward from a devolutionary perspective even more problematic. There are strong grounds for the devolved Administrations to put their foot down and, if they have not been properly consulted and the sort of initiative that Lord Dunlop talked about has not borne fruit, say no.

Lord Morgan: There has been particular focus on what is called retained EU law being repatriated and nevertheless being exercised by the Government at Westminster, not the legislatures in Cardiff Bay and in Edinburgh. Does that seem a problem to you?

Tom Brake MP: Yes, it does. Our Lib Dem party perspective is always to give more subsidiarity rather than less: to give more powers over to devolved Administrations. That means them having control of that law.

Q22 **Lord Beith:** Can I put it to you that the argument for common frameworks, and I presume part of the Government's argument for holding on to powers they would otherwise pass through, is that some kinds of disparity between the different parts of the United Kingdom might be undesirable: different levels of agricultural support or state aid. They are undesirable. The principle behind the devolution settlement as we have it now, agreed by all three UK parties at the time, is that it is a reserved-powers model, not a conferred-powers model. The answer which that model presents to undesirable disparities is that it is a political process by which the Governments of England—not England, actually, but we will leave that issue aside—Scotland, Wales, Northern Ireland and the UK Parliament are resolved by political discussion and by evidencing that a degree of disparity would have bad effects. Trying to prevent that process taking place by holding on to powers is inconsistent, is it not, with the model that was embodied in the legislation providing Scotland and Wales with their current powers?

Tom Brake MP: Yes, that would also be my understanding. I can understand why, as you have stated, there may be a desire to retain a common framework, but one of the lessons we have had from devolution is that different nations do things differently. That is a very healthy process that enables nations to learn by example when another nation has successfully pursued a policy that another has not adopted.

The Chairman: Bearing in mind that we are not involved in policy issues, is there anything else you would like to say about the constitutional implications of the process that we are going through and how Parliament itself can handle this?

Tom Brake MP: There is one aspect to this that I have not referred to, which is something that I welcome. That is the fact that the Delegated Powers and Regulatory Reform Committee decided to produce a report at Committee stage for the Commons, bringing to bear its expertise. In a slightly different way, that has been helpful in bringing the two Houses together. I am not territorial in that respect and would be very comfortable with that Committee pursuing a similar approach in relation to other Bills. We have some other large Bills that may have constitutional or regulatory implications. If it wanted to provide advice to Members of Parliament in advance of the Committee stage of any future Bill, that would be perfectly in order and very helpful.

The Chairman: Thank you very much. That was very timely, if I may say so.

Examination of witness

Rt Hon. Keir Starmer MP.

Q23 **The Chairman:** Keir Starmer, welcome. You are the main spokesman for the Opposition on these issues, so we are grateful to you for coming along to the Committee. We know you have time constraints, and we will try to respect those. This Constitution Committee is not involved in the actual policies on Brexit but in the constitutional implications and how Parliament can fulfil its proper role of scrutiny. We have a series of questions on different aspects. Can I start by asking you about something that came up quite recently, namely the Government's intention to stipulate an exit date and the kind of problems that might create for Parliament? What assessment have you made of the validity of such an approach?

Keir Starmer: Thank you very much for allowing me to give evidence. The proposal to stipulate exit day is really problematic. We have gone from an overly broad position, which you touched on in your interim report, where exit day is not determined, not necessarily overseen and could be on different days, to a position where it is absolutely fixed for all purposes. It has swung completely to the other side, and that is a mistake. The leave date is clear from the provision of Article 50. The exit date gets mixed up with the leave date, but the exit date serves a different purpose; it tells you when things have to happen in our domestic law for this whole exercise to work. It is problematic, because again as you touched on in your interim report, some things, such as fixing a day for the beginning of any sunset clauses, need to be as early as possible. Others need to be more flexible.

One thing that is determined by exit day is the function of the European Court of Justice. If you fix exit day in law for March 2019, you effectively stop the flow of case law and the ability for people to go to the European Court of Justice. Transitional arrangements are the single most important thing facing us at the moment. If you care about them as I do, and you accept the proposition that any sensible transitional arrangements need to be in a configuration that involves a role for the European, it does not seem sensible to disable the court at midnight and then have to find a way of enabling it a millisecond later, should you be in the happy position of having transitional arrangements. It is a mistake. As you know, when we were looking at this in the House, we discussed the fact that it unnecessarily constrains the flexibility the Prime Minister might need in the latter stage of the negotiations.

Although it was overly broad beforehand and we were keen to have parliamentary oversight of the date, to have then fixed it completely is a mistake. I suspect it is one the Government will have to undo, either by removing their own amendment or, if there are transitional measures, by repealing the repeal Act before it comes into force, to stop it doing what it might do in relation to the European Court of Justice. You need to capture the disabling of the court just before you disable it, so you have to get rid of this provision pretty quickly, before it comes into force. I do not quite know how the Government are going to get out of that conundrum, but they need to explain.

The Chairman: That is one of many. We will come on to both aspects of that later.

Q24 **Baroness Corston:** You just referred to a transitional period. Is there provision in the European Union (Withdrawal) Bill for such a possibility?

Keir Starmer: No, not really. The White Paper for this Bill was in March. The Bill then surfaced in July. The thinking behind the Bill was done at a time before anyone was focused on transitional arrangements. You could just about do it, probably using Clause 9, but you would have to do it completely by delegated powers. In other words, all the transitional arrangements could arguably be part of Clause 9 on the basis that they would be part of the Article 50 agreement, if such is reached.

The problem is that, first, I strongly believe the Article 50 arrangements should be implemented by primary legislation, not delegated legislation. Secondly, there is very little control, and almost no control for Parliament, over the process. I could see a way, if push came to shove, in which you could use delegated powers to achieve it. It is not satisfactory.

That is why we have argued from the start that Clause 9 ought to come out and there ought to be a separate piece of legislation implementing the Article 50 deal. The Government have now indicated that some form of legislation will be brought forward, but they are not entirely clear about the timing of it. It is pretty unsatisfactory, because without transitional arrangements we are heading for a very bleak place. We need a proper legislative vehicle for transitional arrangements.

Baroness Corston: What would the effect on the courts of the transition period be?

Keir Starmer: Do you mean our courts or the European courts?

Baroness Corston: I mean our courts.

Keir Starmer: That is a very good question. I and the Labour Party have advocated transitional arrangements on the same basic terms as we currently have with the EU. That means within the single market, within a customs union, abiding by the rules and taking the jurisdiction of the European Court of Justice. That is the position that the EU set out in its guidelines. It is the position that the Prime Minister almost got to in Florence. If we go on to transitional arrangements on those terms, the role for our courts during the transitional period will not be greatly affected. A lot of the difficulties of retained provisions et cetera will be deferred at least until the end of the transitional arrangement.

Q25 **Lord Pannick:** There are bound to be transitional arrangements, and I agree with you that they are of enormous importance. If it is wholly unacceptable for them to be implemented by delegated legislation—I agree with what you say on that—and unacceptable to rely on a political commitment to come back to Parliament, rather than a legal obligation, is one way of dealing with it to say in this Bill that this Bill ceases to have effect on 29 March 2019 unless Parliament gives approval to whatever agreement is reached, transitional or otherwise? That would guarantee parliamentary sovereignty.

Keir Starmer: That might be possible, but I have not completely thought that through as a proposition. With our amendments, we have tried to achieve the same thing, which was to say that exit day, for various purposes, could not be set on a day before the end of such transitional arrangements as may be agreed, which is trying to achieve the same thing. The example I would give goes back to the court. There would be no change to the jurisdiction of the European Court of Justice until exit day, and exit day would not be before the expiry of we put it such transitionals as may be agreed, as we put it, because we cannot legislate to agree transitional arrangements. In whichever way, the effect of this Bill has to be captured before March 2019, if we get to transitional arrangements, to enable us to go into an orderly set of transitional arrangements, which are of fundamental importance. There may be a number of techniques for achieving that.

The Chairman: Is there a definition of transitional arrangements that would allow an amendment of that kind to be secure enough?

Keir Starmer: I would have to take that away and think about it. We have tried to do it through this other mechanism, which is to defer exit day for certain purposes until the end of such transitional arrangements as may be agreed. There may be other ways of achieving the same thing. It could presumably be done by dates of coming into force of various provisions, but a lot of what is in this Bill is going to be fundamentally

affected by transitional arrangements, if they are agreed. That comes back to the point that this Bill was drafted well before anybody had given any thought to what transitional arrangements might look like.

This is a political criticism, but the faults of this Bill were pointed out pretty early in its life, in July, by politicians but also by various expert bodies and people who had real specialist knowledge. Until recently, the Government pretty well ignored all that and ploughed on regardless. For better or for worse, this has been long delayed, but that has not led to any sensible amendments from the Government to reflect the fact that there might transitional arrangements.

One of the criticisms that we had in debate last week or the week before was that the Bill as drafted does not even represent government policy as set out in the Florence speech. It makes no provision for any of the matters that were touched on there about the implementation period. It sounds odd, but bits of the repeal Bill, as it was called, will have to be repealed by the next Bill coming down the line, which is the Article 50 Bill. This needs to happen in a hurry, because it has to repeal them before they come into force. It is not that sensible.

Lord Hunt of Wirral: Another possible route is to write into the Bill the opportunity for giving the public a vote on the final deal. I seldom read the *Guardian*, but I saw this morning that the shadow Home Secretary has said that she will argue in favour of a referendum on the final Brexit deal. Will you be arguing alongside your shadow Cabinet colleague?

Keir Starmer: I have not spoken to the shadow Home Secretary about this. I have only seen what is reported. I will keep my lawyer's hat on for the moment. There are a number of legal problems with some of the propositions that are argued about. I firmly believe that we need to go on to transitional arrangements on the same basic terms as now. Therefore, the final deal—if there is a final deal, and I hope there is—will not be known until we are at the end of transitional arrangements, which may be two years. People are talking about two years. That, for the sake of argument, is about 2021.

The problem with the proposition of having a second referendum in 2021, or whenever the final deal is known and you can compare X with Y, is that we will, two years previously, have exited the EU. Therefore, “in” does not seem to be a question you can put on the ballot paper. Because that is the most orderly way through this, it drives the argument to, “You would have to have a referendum before March 2019”. That seems pretty unlikely, and I am not sure what the question would be, because no final deal would have come into being at that stage. I am not sure a referendum on staying in or transitional arrangements on the same basic terms would take us very far.

Q26 **Lord Judge:** We are very concerned, as I think everybody is, about the extent of the delegated powers in the Bill, as in so much legislation; it does not matter which party is in power. Assume for a moment somebody gave you a white sheet of paper and said, “Sir Keir, set out

your suggestions for improving the scrutiny process for delegated legislation". Could you give us a couple of suggestions that we might consider?

Keir Starmer: Let me try. First and foremost, to remove certain things from the piece of paper, some of the things that can at the moment be dealt with in the Bill by delegated legislation should not be dealt with by delegated legislation at all. I would put the Article 50 deal in that category.

Lord Judge: I understand. There are points of principle that ought to be in primary legislation, but how do we scrutinise secondary legislation? We do not do it very well.

Keir Starmer: For the secondary legislation, I would like to see an additional category in the triaging, which is some form of enhanced scrutiny for legislation that has very important policy considerations and/or involves the exercise of so-called Henry VIII powers, so that the delegated legislation could be looked at and if not amended at least sent back so it could be brought forward again.

Lord Judge: Why should it not be amended? I know it is not and it cannot be, but why should we not change our processes?

Keir Starmer: I do not have a closed mind to that. The majority view appears to be that it would be sensible to have something you could send back and then receive back once the Committee had formed a view on it. There are problems with not being able to amend delegated legislation, as you know, because you have to accept either the whole of it or none of it. That is problematic. There is that category, particularly given the wide scope of the powers in this Bill. On top of that, you should have the affirmative and negative procedures in the ordinary way.

Having that triaging, that greater scrutiny and the ability to do something about the secondary legislation will be really important, given the wider range of policy issues covered and the great volume that is going to come through in pretty short order, depending on transitional arrangements, of course.

Q27 **Lord Beith:** Following Lord Judge's point, if there is no change to the process and a very large number of statutory instruments come to the House of Lords on matters that would normally be dealt with in primary legislation, does that have implications for the assumption, shared by many and stressed by the Government, that the Lords should not send back or reject statutory instruments?

Keir Starmer: It does. The point of delegated legislation is that you agree the principles and objectives in the primary legislation, and the secondary legislation is there to give effect to them. You can see why it has this lesser form and therefore is treated differently. Once you have whacking great Henry VIII powers in this Bill, and you can on the face of it deal with or even designate certain retained laws, either primary or secondary legislation, the whole understanding of what delegated

legislation is falls apart. That requires not only greater scrutiny, but greater rigour as to what we do about the fault lines.

Lord Beith: One area that we have been concerned about in discussing this surrounds Clause 17, which gives very wide powers. One of the reasons for this appears to concern how to deal with converted law, whether as primary or secondary legislation, for the purpose of other statutes, which the Government told us will be considered on a statute-by-statute basis and set out in further legislation or in regulations made under Clause 17(1) of the Bill as necessary. Do you see it as a problem to have the legal status of retained direct EU legislation on this one-off conferred basis? Ought there not to be a default status for it?

Keir Starmer: It raises all sorts of difficulties that need to be teased out. Clause 17 is very wide. It is not unknown to have a provision like this, but it is very wide. On its face, it allows any of the safeguards that are built into either this legislation or any other delegated legislation to be written out again through the Clause 17 mechanism. That is the starting point.

On the question of designating the status of retained law, there are other problems. Some of it, as you know, is deemed to be primary legislation for the purposes of the Human Rights Act. Whether it is deemed to be primary legislation for all purposes, or just the Human Rights Act, remains open to question. That designation itself dictates whether the designated Act can be struck down or whether there is a declaration of incompatibility. There is that implication. It also affects judicial review. If it is designated as primary legislation for all purposes, presumably it cannot be judicially reviewed in the way that delegated legislation normally could be. A huge set of consequences follows from this. If retained provisions are not deemed to be primary legislation, and therefore they are delegated legislation, they can be repealed much more easily.

This was a point I tried to flag up in the House of Commons at Second Reading. Take workplace rights as a category, things such as transfer of undertakings, all of which we now accept are part of our law and we would not want to part with them. Almost of all the workplace rights, from memory, are in delegated legislation. That has not mattered much until now, because they are underpinned by our EU membership. Nobody particularly felt that their workplace rights were vulnerable, because everybody knew that unless and until either we left the EU or the EU provisions changed, although it was a lesser form of legislation, they were in truth enhanced or ring-fenced. If, through this process, they become ordinary delegated legislation, those rights can be removed by provisions other than primary legislation. The ring-fencing just falls apart with the designation. Tied up with what seems like quite a narrow legalistic point about designation are a whole series of possible constitutional consequences, which are very, very wide-ranging.

Lord Pannick: Do you have a solution to this? Have you put down an amendment that would specify whether the retained EU law is to be

treated for all purposes as primary legislation, is to be treated as secondary legislation, or has some other status?

Keir Starmer: We came at it from a slightly different angle. We put down amendments that indicated that certain categories of retained law could not be repealed, save by primary legislation. We attempted to give it an enhanced status again. That does not bind any Parliament. If Parliament decided that it did not like the working time directive, to pick an example, it could pass primary legislation to reduce or eliminate it, but it would have to pass primary legislation. We had those votes and we lost them, I am afraid. Without something like that, the enhanced status could fall away, arguably, dependent on this designation process, which is not entirely clear. There are huge consequences of what seems like a straightforward designation exercise.

- Q28 **Lord Morgan:** You said that in a sense it has not caused a problem before. You instanced workplace regulations, which would now be dealt with by delegated or secondary legislation. That would cause a problem, because it would be done by ministerial diktat. Is there not a further problem concerned with devolution, because the Ministers involved would be Ministers of a different legislature? Many of these aspects, which had been dealt with under EU law, have natural implications for the legislatures of Scotland and Wales automatically under the devolution settlement. In a way, this is an even more alarming development of your theme, which could lead—I know we are going to discuss it later—to consent being withheld by these legislatures.

Keir Starmer: That must be right. Each time you peel away a layer of problems with this Bill, there are a number of problems lying underneath. The way in which the devolved Administrations are going to cope with this needs a lot more thought than is given in this Bill.

- Q29 **Lord Beith:** Can you help us on the interpretation of Clause 4? The Government's policy tends to be based on reciprocity, but you have here the apparent domestication of EU treaty rights. What do you make of that?

Keir Starmer: I am worried about Clause 4 in relation to reciprocal rights. The Explanatory Notes at page 10 tend to suggest that the modification powers in Clause 7 would be used to get rid of reciprocal rights. That is on page 10 in a box, and the Committee will obviously be familiar with it. It looks as if the Government are lining up to say that, if the rights are reciprocal, they are going to be modified away, and therefore we need not worry ourselves about how to deal with reciprocal rights, because we are going to get rid of them anyway. That may be the consequence.

- Q30 **Lord Hunt of Wirral:** Can we return to supremacy and Clause 5(1) and (2)? The combined effect of those subsections appears to be that while the supremacy principle does not operate in relation to post-exit domestic legislation, it will continue to operate in respect of pre-exit domestic legislation. Are these clauses clear enough in determining which types of

retained EU law are intended to continue to benefit from the supremacy principle?

Keir Starmer: I think I know what the Government are trying to achieve, which is not re-opening the cases and litigation that have determined rights and issues according to the supremacy principle. I can see what they are trying to achieve. The problem is that some of the definitions of what is retained law are not clear enough. From memory, one of the Acts that you flagged up in your interim report was the Equality Act. Is it retained law? It just so happens that some of the EU provisions were brought into our law through the Equality Act. If it is retained, presumably it has this special status. If it is not, it does not.

Given that I do not think much thought was given to the vehicle used at the time, because it did not matter, you arguably create two forms. Supremacy works for retained law, but not for all law that gave effect to EU provisions. That seems pretty problematic. I should say at the outset that it introduces into our law something we have not had before, this new type of legislation with this special status, which is untested. That is not a reason not to do it, if it achieves the end, but it introduces a lot of complications.

The other issue that is not clear is how modified a piece of retained law has to be before it ceases to either be retained law or carry with it the supremacy principle? There is quite a lot of that to unpick in the detail. It is going to tie courts up for years, if we are not careful.

Q31 **Lord Norton of Louth:** Having asked about Clauses 4 and 5, you might anticipate where we are coming on to now. We have Clause 6 and the interpretation of retained EU law. We have looked at some of the problems that Parliament faces in dealing with this, but there is then the problem that faces the courts. As you are aware, Lord Neuberger has variously raised the courts' need for greater clarity and guidance. I wonder not only whether you would agree with him, but what form it should take and whether there should be something embodied in the Bill itself.

Keir Starmer: This is problematic as it stands. Until now, we have usually gone down one of two routes: either to specify with some clarity in an Act what the courts must do, and there are well-known phrases, or to rely on the rules of statutory interpretation that have been there for a very long time in relation to what courts can make of judgments of other courts around the world. There are two sets of rules. One is an express provision in the Act and it is clear. The other is the fallback of rules of interpretation. This falls between the two, because it gives no guidance one way or the other.

It is more than a theoretical headache, because one of the big political questions we will have to face sooner or later is whether we, as a country, want to retain alignment with our European partners on important things or whether we want to diverge. That is a really deeply political question. If the European Court was to make a ruling in a few

years' time that would objectively affect the way retained law ought to be read, the judges would have to decide whether we should try to keep our law broadly aligned or whether we were free not to. That is a deeply political question for a judge to decide; the politicians cannot even answer it at the moment: "Is my general duty to keep this aligned, because that is sensible and"—in my view—"a good thing, or is divergence a good thing?" Different people, certainly in our House, have very different views on that. To leave that to judges without some guidance is to introduce a very difficult element to their decision-making.

Lord Norton of Louth: What ought we to do about it, given that dilemma? How can we help them?

Keir Starmer: We had an amendment down that said they should take into account developments in the case law of the court. That is because we prefer the route in which we stay aligned. One of the concerns we have is, first, that we should not diverge and, secondly, that we should not fall behind standards across Europe as the years go by. I make no bones about that: it was a political amendment based on the way we see the future.

Lord Pannick: "Take account of" does not provide a great deal of legal certainty. It is still going to leave an enormous degree of uncertainty. One could have a provision—I know it would align with your political views—that the courts of this country, in interpreting retained law, should follow judgments of the Court of Justice even given after Brexit, unless there are exceptional circumstances. One would leave the discretion, but give a strong steer. That would promote legal certainty.

Keir Starmer: Whatever the steer is, it needs to be clear so judges know what they are trying to achieve. The formulation reflects the politics behind it, which is why it needs to be in the Act.

Lord Pannick: Can I ask you about the Charter of Fundamental Rights? One of the objections to including the charter in the Bill—as you know, it is not there at the moment; it is expressly excluded—is that you would have a situation in which the courts could overturn primary legislation by reference to human rights principles in the context of EU law, a power the Courts do not have under the Human Rights Act, where they can only give a declaration of incompatibility. What do you say to that objection?

Keir Starmer: The Government have said that they do not intend to reduce or take away rights. If they leave out the Charter of Fundamental Rights, they take away rights and protections. There is no question about that. There are lots of difficulties in converting thousands of provisions of EU law into our law. The whole exercise is very, very difficult. The Charter of Fundamental Rights has been singled out as the only instrument incapable of being brought across with any sensible modification at all. That is not a legal decision; it is a political decision. The Government do not justify their position by saying, "This is just a political decision—bad luck". They say, "Do not worry. The rights in the charter are all there anyway". They say that on 5 December, which is next Tuesday, they will

produce a schedule of some sort, telling everybody where they think the sources of these rights are, so that they can be found without the charter. That seems to me a completely pointless exercise.

The whole point of the charter was to gather up, from various different sources, all the rights and bring them together in a single document. The Government now want to say, "We are not going to get rid of the rights. We are going to scatter them again, back to their source documents. You can still rely on them". Instead of an advocate in court saying, "Here is the charter. This is the provision I rely on", the advocate will now have to say, "I rely on that provision but I do not have it any more, so I am going to take you back to where it came from in the first place and reconstruct it, so that I can rely on it". That is a completely pointless exercise, it seems to me. If you are not going to change the rights, do not just scatter them back to their sources, wherever those may be.

Secondly, it does not necessarily give the same level of protection, because it does not give the courts as many options as they had. It introduces the concept of a difference between the charter approach and the Human Rights Act approach, but we have that at the moment. It may be that, in years to come, we will have to think about how that operates. But, if this is truly an exercise of simply converting and preserving what we have, you should not be leaving the charter out.

Lord Judge: Could you not put those rights into a schedule? Then it would be primary legislation here.

Keir Starmer: You could do. The schedule would probably look pretty like the charter, I would imagine. Yes, but preserving them and giving them status is what matters. Simply scattering them back to their original sources does not help anybody.

Baroness Corston: You would not want to see the courts being able to strike them down, would you?

Keir Starmer: Do you mean the rights?

Baroness Corston: Yes. That does not happen under the Human Rights Act. The Joint Committee on Human Rights has to deal with a declaration of incompatibility from the Courts but, under the charter, would the effect be that charter rights could be struck down?

Keir Starmer: To be clear, our position is that the charter should be included in the instruments that are converted across, and preserved in its current form and with its current consequences. There would have to be modifications because some of the rights—voting for Members of the European Parliament, for example—would have to be either removed or modified. In principle, we want to retain the charter and the way it operates. That is our position.

The Chairman: It is as near as possible to the status quo.

Keir Starmer: Yes.

Q32 Lord Dunlop: Sir Keir, Lord Morgan has already mentioned devolution. Can I ask you about Clause 11? The Government argue that they need this clause to maintain the current devolution parameters for EU retained law, and that this will allow for an orderly process during a transitional period where common UK frameworks can be agreed, where they are required or not required. What is your view of the clause and its implication for the devolution settlements?

Keir Starmer: We take a different view from the Government. We say that essentially where competence has been devolved, the powers coming back from Brussels ought to go to the devolved Administrations. We accept that there needs to be some UK-wide framework to take a view on whether, in relation to some provisions, they need to be dealt with differently. We would reverse the default position. Rather than holding it, we would devolve it, but we accept that there needs to be a framework for dealing with areas where different considerations apply. It is the flip of the Government's position.

Lord Dunlop: Given that you would not have started from here, as the saying goes, if the Government can nevertheless agree with the devolved Administrations a process by which UK frameworks can be jointly agreed, to what extent would that address your concerns about this clause?

Keir Starmer: If the devolved Administrations are in agreement, we would look at whatever that agreement is. They look as if they are a long way from agreement at the moment on very many things, and this is just one of them.

Q33 Lord Morgan: It is something that requires a good deal of precision and precise analysis. I am rather reminded of the Wales Bill, where we were told that the Welsh legislature would have reserved powers and not conferred powers. Yet there were 110 exceptions, some of which judicious handling by the Ministers, including Lord Dunlop in the House of Lords, succeeded in ameliorating. This is a case where we are told the devolution settlement will be observed and where the devolved legislatures think it will not and give many, many examples where it is not. How would you feel if they felt so aggrieved that they withdrew their consent to the Bill? Would that be a reasonable thing to do? Would it be out of order, since the civil convention would not perhaps apply in this particular case?

Keir Starmer: The convention is obviously a convention. The Government ought to try to get agreement. That is what they have set out to do: they have repeatedly said they want consensus. It would be open to the devolved Administrations to withhold their consent. The Government then have a difficult decision to make as to how they proceed. It is not really for me to say what I would think of them if they did. It depends on the circumstances when we get there. The Government said they were going to try to achieve consensus and involve the devolved Administrations. There has been a lot of criticism that they have failed to do that.

Lord Morgan: I was just wondering where the position of the Labour Party is, because we have not heard any pronouncements from the Labour Front Bench on this matter and it is of extreme importance. In a worst-case scenario, you could have a dissolution of one union, followed by trouble with another. Is what you have said the official Labour Party position: that, broadly speaking, all these reverting repatriated powers should go to the Welsh, Scottish and, presumably, Northern Irish legislatures?

Keir Starmer: Yes. The amendments we have got down are the amendments we have talked through with our Welsh colleagues. Those amendments are coming up on Monday and Wednesday of next week.

Q34 **Lord Beith:** I want to explore a little further the principle that is involved here. The devolution settlements, which were supported by all three UK parties, were based on a reserved powers model, not a conferred powers model in which the Government give powers to devolved assemblies when they see fit to do so. What I think lies behind the argument here is the worry that great disparities will arise in some areas of policy that may be undesirable, whether on animal welfare, food standards or whatever, or may interfere with the UK single market.

But is the assumption of the devolution settlement not that when these problems arise, as they undoubtedly will, they are resolved between Governments, in a political process in which they try to persuade each other that it is undesirable to get too far out of step? That is now the position, for example, on income tax levels, as between Scotland and England. People might think it undesirable that they should part company, but the model assumes that any unacceptable level of difference is dealt with through political processes.

Keir Starmer: We have amendments down to that effect, and that is what we mean by the UK-wide framework. It is a matter for discussion as to quite what that framework is, but it needs to be that sort of political framework.

Lord Beith: It is a framework between the Governments, not a framework in which the statute sets out that in the following cases the UK Government will decide whether to confer the power. Is the agreement of the framework not something that Governments will do when the situation arises?

Keir Starmer: I am sure that is the case. It has to have the confidence of the devolved Administrations if it is going to work.

The Chairman: Thank you very much indeed. You have been very helpful, and it has been very interesting to hear what you have to say. Is there anything else you would like to alert us to before you dash off to Prime Minister's questions?

Keir Starmer: No.

The Chairman: We have covered everything. Okay.

Keir Starmer: Thank you very much for having me.

The Chairman: Thank you very much indeed.