

European Scrutiny Committee

Oral evidence: Post-Brexit Scrutiny of EU Law and Policy, HC 2493

Wednesday 17 July 2019

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Members present: Sir William Cash (Chair); Martyn Day; Richard Drax; Mr David Jones; Stephen Kinnock; Andrew Lewer; Dr Philippa Whitford.

Questions 1-62

Witnesses

I: Professor Catherine Barnard, Professor of European Union and Labour Law, University of Cambridge; Professor Steve Peers, Professor of EU Law and Human Rights, University of Essex.

Examination of Witnesses

Witnesses: Professor Catherine Barnard and Professor Steve Peers.

Q1 Chair: Good afternoon, Professor Barnard and Professor Peers. Thank you for coming along to help us with this inquiry, which will be considering how the UK's exit from the EU will affect the current system in Parliament for scrutinising EU law and policy and what changes might be needed. This is our first evidence session. We will be picking up on this in early September. Our aim is to understand the legacy, and indeed any complications that might arise from that legacy, that EU law will leave under the terms of the European Union (Withdrawal) Act 2018 and to consider how different Brexit outcomes might affect the status, reach and legal effect of EU laws and policies in the UK once it is outside the EU.

I ought to add that, while the European Union (Withdrawal) Act 2018 was going through, it was on certain assumptions, which are liable to be radically changed in the event of a change of Prime Minister. Therefore, a lot of the questions might appear to be hypothetical at this stage, but we will ask them nonetheless, particularly regarding the draft withdrawal agreement. So long as we are where we are, we have to ask those questions. By the time we have got into September, the situation may have changed. Who knows? I do.

An important theme running through our inquiry is whether distinctive systems and structures to enable Parliament to scrutinise EU laws and policies will still be needed after the UK leaves, and, if so, how they might need to change to reflect the different status and effect of EU law and policy after Brexit. They use the expression "EU law" the whole time, as if EU law will remain EU law, but that will not be the case. That raises the whole question of supremacy of Parliament and the extent to which, in future, there may be changes to the withdrawal Act itself. It is by no means clear or likely that it will remain exactly as it is, because that Act itself is capable of being changed by a future Act, if indeed it was deemed necessary to do so.

I ask that question in the most general terms now, and put the point, because when the withdrawal Act was going through, there was an assumption that the current Government at that time, up to 29 June, which was the date of Royal Assent of that Act, were being conducted on a supposition that was then totally changed by what I regarded as an outrageous change on 6 July, when we had Chequers, and then the draft withdrawal agreement. There are lots of potential questions that are not necessary for you to answer this afternoon. I am putting that in context for the sake of the record, just in case anybody might think there are those of us who assume that what was done in those days will necessarily apply in future.

We will kick off this session with some questions on the status and effect of retained law under the EU (Withdrawal) Act 2018, before moving on to



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consider a range of possible Brexit outcomes. I will do the first question relating to the following. What do you believe are the key features of the European Union (Withdrawal) Act 2018 regarding the status of the EU in the UK after Brexit?

Professor Barnard: Do you want me to kick off?

Chair: It is the status of EU law in the UK after Brexit.

Professor Barnard: Thank you for inviting us to give evidence. I am here as a member of UK in a Changing Europe, which is a non-partisan think tank. What I am going to say will be based on my knowledge as a lawyer and not trying to argue the case for one side or the other.

In respect of your question about the EU (Withdrawal) Act, as you know, it tries to deliver on three things. First, it repeals the European Communities Act, and so, most importantly, repeals the notion of supremacy and direct effect, at least at first sight, and turns off the mechanism by which EU law becomes part of domestic law.

Chair: On exit day.

Professor Barnard: On exit day.

Q2 **Chair:** You accept that exit day is 31 October as far as the law is concerned.

Professor Barnard: That is right.

Q3 **Chair:** Furthermore, the European Council summit that took place on 11 and 12 April clearly stated in any event 31 October, because that is what they said. None of this has been ratified and the treaties have not been signed. Can we just clear that point?

Professor Barnard: I agree with you entirely that the exit date at the moment is 31 October. It was a European Council decision that the UK—

Chair: Demand.

Professor Barnard: Legally, it was a decision. The UK assented to that. At the moment, that will be the day on which, under article 50, we leave the European Union, with or without a deal. The only way that date can be changed is if the UK was to request it and if the EU was to agree to it by unanimity.

Q4 **Chair:** That relates to exit day, not to the question of repeal. The repeal part of section 1 of the withdrawal Act is quite explicit. You slightly elided that point. You qualified it and said “as things stand” or something like that. Actually, the expression that the European Communities Act 1972 is repealed on exit date includes the entire bag of all laws, treaties and European decisions, the whole gamut, in one place. Then you suggested that might not be absolutely as clear as it states. I refer you to *Macarthys Ltd v Smith*.



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Professor Barnard: Exit day can be changed by secondary legislation. That is why I said “as it stands”. The fact is that the EU (Withdrawal) Act refers to exit day.

Q5 **Chair:** But the substance of the repeal of the 1972 Act itself is law. Exit day can be changed, but the rest of it cannot. That is the point, because it is an Act of Parliament. It is express and it is clear, and therefore, despite some suggestions about challenging the issues in the court, which some people seem to be imagining could happen, it would be impossible for anybody to misconstrue the words of section 1.

Professor Barnard: Section 1 is extremely clear.

Chair: That is all I am saying.

Professor Barnard: My caveat about turning off supremacy is that, while the European Communities Act is turned off under section 1 of the 2018 Act, section 5 of the EU (Withdrawal) Act nuances the position somewhat. I can talk about that in a moment.

Chair: That is what we are going to do. That is very clear. Thank you.

Professor Barnard: Your question was about what the aims are and what the Act does. The first is to repeal the European Communities Act. Secondly, it is—to put it crudely—to convert the whole content of EU law into domestic law so it becomes a new type of law called EU retained law. The notable exception to that continuity approach is in respect of the Charter of Fundamental Rights.

Chair: That is excluded.

Professor Barnard: That is expressly excluded. The third aim of the EU (Withdrawal) Act is to give these so-called Henry VIII powers to correct aspects of domestic law that will not work particularly in the event of a no-deal Brexit.

Q6 **Chair:** Can I follow that up? I think the word “deficiencies” is what was used. Is that correct?

Professor Barnard: Yes.

Q7 **Chair:** In that context, that is quite an elastic word. It can have a subjective or an objective interpretation. It would not just be a mistyping or a mistake. Deficiency can mean something that is lacking. I do not have the Oxford dictionary in front of me. Perhaps Professor Peers has or can think of an expression that betters mine. The word “deficiency” is quite broad, is it not?

Professor Peers: Yes. I would have not used the word “deficiency”.

Q8 **Chair:** It was not my word. It was the word that was used at the time.

Professor Peers: No, of course. I would not have used the word the drafters of the Act used, because it could be understood as suggesting a



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criticism of the legislation that somehow needs fixing because there is something wrong with it. That is a misunderstanding. "Conversion" or something like that would have been a better word. What we are actually doing with those powers in the Act is altering the statute books to a different situation, which is the UK as a non-member state.

All the references that assume the UK is a member state made perfect sense at the time. Those do not make sense any more and have to be corrected in some way, to refer to a UK agency instead of the Commission doing a review, or some different processes and so on that might be relevant. I looked at some of the secondary legislation that has been passed to this end and that is the sort of thing it has been doing. It has also included things like transitional clauses on asylum requests and so on.

For me, that is the main purpose of the Act as far as retained law is concerned, to keep it on the books unless in some way we decide to alter it, either by means of that process or by means of another process. There are other Acts or Bills before Parliament that would make other changes related to EU membership. We have already had all that secondary legislation going through, which has made a lot of these changes already from the point of view of deficiency. That is the core of what we are looking at now. As time goes by after Brexit, there would be more substantive changes that are made to the EU law on the books, depending on what our relationship with the EU is.

Q9 Chair: There is a point at which there is a connection between an existing EU law and a modification of it that may be made after we have left. When that happens, surely you get into rather a curious situation. Bit by bit, you move further away in time from the original proposal. You have also lost the purposive rule, because that does not apply as such once you have translated the whole of the treaties under the EU retained law concept into UK law. That is going to raise quite an interesting question for the Supreme Court, which is the extent to which you move back into the stare decisis method of interpretation as compared to purposive. Do you have any thoughts on that, as a matter of interest?

Professor Peers: At some fairly early point, we would probably have some important Supreme Court case law that answers these sorts of questions as to how much regard we still have for European court case law. Obviously there are two different categories. You would have to consider post-Brexit case law on the one hand, which is not binding on the UK, and when it would make sense to take that into account or not, as well as pre-Brexit case law, which in principle is binding, but there are reasons the Supreme Court can use to not follow that case law.

To take one of the obvious circumstances, if there was a change in the EU legislation, you would have to look carefully at it to see whether the prior case law of the Court of Justice was still relevant. A change to the legislation could be doing something quite different from what the prior legislation does, or it could be there simply to confirm what the Court of



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Justice has already said on that legislation, and to write some rule from the jurisprudence into the legislation. In that context, why should we not still follow the prior case law?

The argument is about whether there is something inherently different about being a non-member state that would require us to rethink our approach to Court of Justice case law anyway. That is the key question. People will have to decide, yes or no. Regardless of whether there have been any changes to the legislation, that is a specific issue. If there have not been changes to the legislation, should we still rethink how we traditionally interpret it, or should we simply leave it to Parliament and the Executive—whatever secondary legislative powers they have—to change the law if they want to, and if they really want to do something differently from what the case law tells us to do? Ultimately, that is what the Supreme Court will decide. I would not bet either way on which way it would decide it.

Q10 Chair: That in itself would be conditioned by the question as to whether a future Parliament might decide—on the principle that no Parliament can bind its successors—to make changes to the withdrawal Act. That would take account of the fact that the situation had moved forwards, as you were suggesting, and that questions of judicial interpretation began to get bogged down in the weeds of EU law, when a Parliament decided it wanted to be further unshackled in relation to these questions, and then decided later that it was going to modify the withdrawal Act. I have sections 5 and 6 in particular in mind here, which give supremacy to the courts in a manner that led to a very interesting exchange.

I was going to ask you whether you have had a look at the exchanges that we as a Committee had with the Prime Minister. As I understood it, that was not dealt with by DExEU at all but was dealt with exclusively in No. 10 Downing Street. Are you familiar with that? It is quite a voluminous set of letters. By nodding your head, you suggest you are aware of that.

Professor Barnard: Yes. The question that was raised was what would happen in respect of post-Brexit case law and to what extent the British courts would be obliged to follow post-Brexit case law of the Court of Justice. In fact, the language in the final version of the Act became more positive, in that it was written in the positive sense, “may have regard to”, rather than a more negative “they cannot accept”. It has created a degree of flexibility for the courts.

In answer to your broader question about how the courts will react to all of this, I think there will be a degree of pragmatism. They are keen to make sure this system works in the post-Brexit world. There will be bumps along the way because things that nobody has thought of will come up in the context of litigation. In discussions I have had with various members of the judiciary, the determination is to make sure it works, rather than being too overly technical about any particular point. To your original premise, the further we are in time away from Brexit, or



exit day, particularly if there has been a conscious parliamentary intervention in a particular field, the courts will obviously take that into account when trying to work out what the law actually means.

- Q11 **Mr Jones:** Pursuing that, is it the case, as you understand it, that the British courts would retain a power of disapplication of even primary legislation in certain circumstances, even post-Brexit?

Professor Barnard: This takes us to section 5(2) of the EU (Withdrawal) Act. This is the nuance I referred to in respect of Sir William's question. Section 5(1) says clearly, "The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day". Supremacy is turned off in respect of post-Brexit legislation.

What is interesting is the caveat in 5(2). I will read it for you. You may be familiar with it. It says, "The principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day". What does that have in mind? Take, for example, article 157 of the treaty on equal pay for men and women, which is a treaty provision and predates Brexit day. Take also the Equality Act 2010—British legislation that also predates Brexit day. If there is an inconsistency between a provision in the Equality Act 2010 and article 157, that inconsistency in the Equality Act will be disappplied.

Essentially, supremacy carries on in respect of pre-Brexit enactments. The major change is that if the British Government of the day, the Parliament of the day, do not like what the courts have ruled, they will be free to pass legislation to reverse the decision of the court that has found that.

- Q12 **Chair:** That is extremely important. I am very glad you have made that point. It fundamentally goes back to my question about Parliament not being constrained, in terms of a future piece of legislation it may wish to pass. The other thing I wanted to touch on is the issue of retained law in the context of article 4 of the—I would say now defunct, but notwithstanding—draft withdrawal agreement. First, it was never signed. Secondly, it has never been ratified, either by us or by the EU. It has a status of commentary in the media that does not quite match up, to say the least, to its actual status as a matter of law.

However, article 4 contained the mirror image of what we have just discussed, in terms of sections 5 and 6 of the withdrawal Act. I remember asking a question about this in an earlier session. Did they know they were going to get article 4 in the draft withdrawal agreement when they drafted 5 and 6? They put that into legislation and then, bingo, it suddenly appears under article 4, where it talks about the requirement under article 4 when we are being governed by 27 other member states, when we are not even there, where there is no Hansard and no record of the voting arrangements to speak of. At the same time, we would be required to obey those laws in our own Parliament, and indeed our



citizens would be bound by those laws under section 2 of the European Communities Act, as it were, despite the fact it had been repealed.

It seemed a very, very odd situation, and we have not been able to get into that because, at this moment in time, the draft withdrawal agreement is regarded as defunct, but the principle is what I wanted you to address. That is this business of disapplication of law, because, for practical purposes, that is what article 4 did under the draft withdrawal agreement in relation to laws we would not even be involved in providing for within the Council of Ministers, which is done behind closed doors. Do you have any comment on that?

Professor Barnard: Could I perhaps disaggregate some of the remarks you have made? On the withdrawal agreement, I agree with you entirely. It is not part of UK law because the implementing legislation, the so-called WAB, the Withdrawal Agreement Bill, has not gone through. Were the withdrawal agreement—or a withdrawal agreement, something along the lines of this sort of text—to go through, we would go into a period of transition. The period of transition will go to either the end of 2020 or the end of 2022. In that period of transition—you are absolutely right—we would be bound by new EU laws that are made, over which we will have no say. That said, there will not be a huge proliferation of laws in that period, because it now takes quite a lot of time for new directives, new regulations, to go through the European process.

Q13 **Chair:** But with MiFID, for example, there were accelerated procedures. If I may say, that is what I call a rather optimistic view. Where there are circumstances of urgency, it is well known that the EU accelerates the procedures.

Professor Barnard: I absolutely agree with you that, in that period of transition, we will be bound by laws, including laws that are adopted in that period, over which we have had no say.

Q14 **Chair:** For the first time in our entire history as far as I can judge, maybe since the time of King John.

Professor Barnard: The WAB, the implementation of the withdrawal agreement, will require that some of the things that have been turned off by the withdrawal Act get turned back on temporarily during the transition period. Sections 2(1) and 2(2) of the European Communities Act are likely to be turned back on, either cut and pasted or temporarily reinstated during the period of transition.

Q15 **Chair:** As you know, I was repeatedly asking on the Floor of the House for the best part of three months to see a copy of WAB, and we were never allowed to see it and we still have not. We understand there are varying numbers of pages, but it is a very substantial Bill and included something of the order of 178 clauses, I understand. I cannot say because I have not seen it.

Professor Barnard: No, and I have not seen it either.



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Chair: That is encouraging.

Professor Barnard: In order to give effect to the transition period envisaged by the withdrawal agreement, bits of the European Communities Act would have to be turned back on, either by reference to the European Communities Act or cut and pasted, drafted in some very similar language.

Q16 **Chair:** That transition period was specified, and you said up to 2020 and maybe 2022. Is it article 132 or is it 138 that specifies the extension of the transitional period? It takes you into another potential extension of the transitional period, does it not?

Professor Barnard: Yes, you are right. It is article 132 and there can be a single extension.

Q17 **Chair:** Originally, in the first draft, it had a blank and nobody knew how long that was going to be. Then they said, "Okay, we will put a date in". What is the date in there that you have in front of you?

Professor Barnard: I think it is the end of 2022.

Q18 **Chair:** That is a single act. There is a bit of interpretation over what that word means. Is it single in the sense it can only be done once?

Professor Barnard: That is how I read it, yes.

Professor Peers: It is an extension of either one or two years, so it is either to the end of 2021 or to the end of 2022, subject to both sides deciding in the joint committee and issues about finance that have to be discussed in, I am sure, a very difficult environment, as to exactly how the details of that and agricultural policy work.

On that point about new legislation, it is also worth pointing out that directives of the EU usually have a two-year transposition period. Not much will be agreed in the near future, the next couple of months of the end of the Commission. Something agreed next year would not apply until the middle of 2022 anyway. Most of what the EU would do over the next year or so would only be starting to affect us towards the end of any extended transition period. Unless we are talking about something within the rather narrower scope of the backstop, a lot of what the EU might be doing over the next couple of years will not apply to us because of that delay in transposition.

Q19 **Chair:** We have been into all this in quite a lot of detail. I thought it was useful to draw out some of these questions at this stage so I can then get on to the other question, which Mr Richard Drax is going to ask.

Professor Barnard: Before you finish, you asked about article 4 of the withdrawal agreement. You rightly said that supremacy and direct effect would continue in respect of all EU legislation during the period of transition. At the end of the period of transition, the reference to direct effect and supremacy in article 4 is only about the direct effect and



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supremacy of this withdrawal agreement text. Apart from in respect of citizens' rights, which potentially could carry on for a very long period, this withdrawal agreement text will eventually become increasingly redundant, because it will be replaced at some future date by a future trade agreement and its implementation in the UK.

This withdrawal agreement text is the divorce. In the divorce, it is about citizens' rights, which I accept is major, and this text will be important for EU citizens for decades to come. It is about money and how much we have to pay, and it is about the backstop. The backstop has had a huge amount of attention. We know that. If there is a future free trade agreement, that will replace the backstop, or indeed may prevent the backstop from ever coming into force. What is left of the withdrawal agreement is really quite small. Although there is an express reference to direct effect and supremacy in article 4, it is about direct effect and supremacy of the withdrawal agreement, which, while at the moment it is important, in 20 or 30 years' time will really not be very important at all.

Q20 Chair: That is quite a long way ahead, if you consider what could be done in the meantime. The other point I would like to finish on is this issue of the political declaration. There are things embedded in that that have a degree of continuity about them. Would you like to comment on that? I mean the words "best endeavours", and all that sort of thing.

Professor Barnard: The remarkable feature about the political declaration is that it is a document that was written to please a large number of constituencies, so it is rather unclear as to what direction of travel it will lead to. We can probably say it will be a far more intergovernmental-style relationship, rather than an EU-style relationship. That is what is rather interesting about the text of the withdrawal agreement in respect of what lawyers would term the remedies provisions, the dispute resolution provisions, which are much more of an intergovernmental style, rather than an EU law style. That may be a testing ground. They may have tested out some of the approach to dispute resolution in the withdrawal agreement in anticipation that it would be developed and built on in respect of any future free trade agreement.

Chair: Finally, all this is against the background of two things that have come out in the last few weeks. One is continuous statements that the withdrawal agreement is dead, including what Stephen Barclay himself was saying, as current Secretary of State. The other is that the backstop has now been completely abandoned, or so it would appear, from the statements made by two of the Conservative leadership contestants, on which I am now not going to comment whatsoever. That is just to put that into context. That is quite important.

Q21 Richard Drax: Good afternoon to you both. What significance do you attach to section 19 of the Act, which provides that the Act shall not prevent the UK from replicating in domestic law any EU law made on or after exit, or continuing to participate in EU agencies? Is it a simple



statement of the obvious, or does it signal an intention to copy and paste future EU laws?

Professor Peers: It seems to me it leaves it open to Government and Parliament to decide how to go forward, which could be either unilateral or in an agreed treaty relationship of some form with the EU. I could imagine either of those scenarios, depending on how the politics play out. The Government might want to say, "We have a no-deal scenario but we are willing to continue legislative alignment in certain fields in the interest of reducing friction to trade". That is a policy that might get adopted in legislation or secondary legislation. To some extent, it stems from keeping retained law on the books anyway, as long as it is not changed, as long as it is updated to match EU developments. That would be a policy the Government might choose to adopt or might choose not to adopt.

On the other hand, access to agencies depends on what the EU agrees to. It is up to the EU to determine what the conditions of access to agencies are. A lot of the EU's legislation on agencies provides for non-EU participation. It is not unusual to have non-EU associates participating in the agencies. That is presumably what is imagined there. It would obviously depend on what both sides want to do in terms of doing that after exit day.

Professor Barnard: The only thing I would add is that any trade done with the EU, any trade in goods done with the EU, will have to comply with EU standards. It is the same for Chinese goods that are manufactured in China and sold on the EU market. The question for the UK Government will be, if the EU changes its legislation in respect of a widget, whether the UK will update our own legislation in line with the change made by the EU, or say, "We will not do that" and just allow the manufacturers to choose to comply with those standards if they want to sell into the EU. This will be a fundamental question. I think this will be a question for your Committee going forward. It is probably part of the rationale for your Committee to carry on existing in some form.

Q22 **Chair:** Are you encouraging that?

Professor Barnard: I imagine it is important for us all to keep our jobs in some form.

Q23 **Chair:** For me, in the context of the EU, it is a matter of complete indifference, but I have to say that I understand what you are saying.

Professor Barnard: If the Government were to decide to go down that route, clearly there would be a role for scrutiny. What is striking at the moment is that, if we leave with no deal on 31 October, as you rightly pointed out, the European Communities Act is turned off, including section 2(2). As you know, section 2(2) is essentially a speedy route for implementing directives and other EU measures by secondary legislation as opposed to by Acts of Parliament. It may be very inconvenient for the Government where it wants to actually give effect to a piece of EU



legislation, particularly in the short term, that they have lost the powers under section 2(2). There may have to be some legislation, even in the absence of the WAB, that re-enacts something like section 2(2).

Q24 Chair: There is a curious point about the argument on no deal. We are now talking about it in terms of law, rather than emotion or, for that matter, anything to do with the commercial aspects of it. Under article 50 plus section 1 of the withdrawal Act, exit day is 31 October. The provisions of article 50 terminate after two years, unless there is an extension, so it is not really right to talk about it as no deal because the deal is that it terminates at the end of the prescribed period, which in this case will be 31 October. For practical purposes, much of the noise and fury that turns on the question of no deal is based on a misunderstanding of what the EU law prescribes. Some people call it a default arrangement, but it is not even that. It is the law of the land, which is that on 31 October the repeal of the European Communities Act 1972 would come into effect.

Professor Barnard: That is true, but, on the other hand, article 50 envisages some sort of divorce agreement. If there is no divorce agreement—you are right—the treaties cease to apply. The divorce agreement is of course the text that you have in front of you but that has not been ratified or turned into UK law by the WAB.

You make a very important point in respect of the future. I agree with you that, on 31 October, article 50 gets turned off. Article 50 is a relatively benign legal regime for negotiating relations with the EU. Post 31 October, in the absence of the—or a—withdrawal agreement plus transition, anything done in respect of future trade agreement would have to be done under article 207 on free trade agreements, or article 217 on association agreements, read in conjunction with 218. I can see this is not very attractive to anyone who is not a lawyer who finds these things very exciting, but the point is that the EU has made clear that it will not negotiate any free trade agreement until we have sorted out the three big ticket items that are currently contained in the withdrawal agreement. This will be a problem.

Chair: At that point, we get into what could be described as a very direct political situation. The mechanics, after three years of what appear to be abortive negotiations, now move into a new phase on 31 October. As a matter of law, rather than what people would like, we move into a completely different zone. Then it is more or less a question of political will and the trade-offs between the two parties—the EU on the one hand, under a new European Commission from 1 November, and the United Kingdom, under a new disposition, if I can use that expression, which appears likely on the face of it.

Stephen Kinnock: I had a question very specifically related to that point.

Chair: I always love hearing what Stephen has to say on these subjects.



Q25 Stephen Kinnock: It is on articles 217 and 218 and how they relate to the withdrawal agreement. If we envisage a situation where we leave the European Union without a deal on 31 October, the legal basis for the relationship then goes to article 207, 217 or 218. The EU has made clear that the withdrawal agreement items have to be resolved before you can begin a negotiation on the new legal basis. Does that leave us in a kind of lacuna, because 207, 217 and 218 are not designed to deal with the kinds of things that were negotiated under 50? Let us say we leave without a deal and, for whatever reason, the view is that we need to try to get a better trade deal with the EU. The EU says, "Sorry, you have to resolve the issues that are under article 50". What would be the legal basis then? Is there a way of copying and pasting the withdrawal agreement into a 217 or 218 legal basis? Is that possible? It is clearly unprecedented to mix those. It is mixing oil and water really, but it would be very interesting to know what would happen if we were left in that legal vacuum.

Professor Peers: We know that association agreements have to be agreed unanimously on the EU side. Usually, they are mixed agreements, meaning that member states have to ratify them as well, although sometimes the EU either carves a bit out as an interim agreement or agrees to treaties coming into force provisionally. That is another possibility to speed things up a little bit on the EU side.

If you try to simply copy the whole text of the withdrawal agreement, whatever form it takes legally, on the EU side it would have to be a mixed agreement because it involves, even if it is just for a transition period, the free movement of people. Article 79 of the TFEU says that the numbers of non-EU citizens admitted to employment markets of member states is a national competence. We already know that alone makes it a national competence, and so would the continuation of the aviation relationship, for instance. As we know from the case law, that is also a mixed competence. There are probably several other things, but that alone, if we keep those things in place, makes it a mixed competence.

If you start taking things out, if you start taking out free movement of people, if you have a separate aviation treaty, as the EU legislation on no deal on aviation says there should be, it might be a little simpler. I expect we would not be talking about exactly the same text of the withdrawal agreement. There would be some negotiation on some aspects of it that would be changed. They might end up in separate treaties or not. The simplest way forward is to call it an association agreement because of the fairly close relationship that is in it. Then the EU is also freer from the constraints it perceives it has under article 50 in negotiating a long-term relationship.

The EU has always felt that it cannot negotiate a long-term relationship under article 50, even though the text of the withdrawal agreement says the backstop is unlimited, but in principle it is temporary, because of this perception that you cannot have a long-term relationship under article



50, but you can have an association agreement. Some of the opposition parties have had concerns, for instance: "It is not a long-term relationship in terms of labour or environmental protection. We want to get a long-term relationship on that". You would be able to do that post-Brexit day under an association agreement because you would not have some kind of inherent time limit on the association agreement. That would definitely change the possible dynamics of negotiations as well.

- Q26 **Chair:** On the question of association agreements, I have in mind the Ukraine agreement and the Moldovan agreement. There are elements in those that are effectively putting those particular countries into a very subservient position vis-à-vis the EU. I thought you might like to comment on the fact that there is quite a lot of commentary from distinguished lawyers on that question of Moldova and Ukraine. It sounds so comfortable and harmonious to talk about an association agreement, but it is not quite as simple as that, is it?

Professor Peers: There are historically a wide range of association agreements. The treaty talks very briefly about having a close association.

- Q27 **Chair:** There is Turkey, for example.

Professor Peers: Yes, Turkey has a degree of harmonisation. So do those countries that you mentioned. If you look at Switzerland and the group of the 1999 treaties, it was officially, on the EU side, an association agreement, although it is only harmonisation on certain things.

- Q28 **Chair:** They are having a stinking row with EU right now, are they not?

Professor Peers: Yes, they are having a row, but other countries have rows with the EU as well. If you look at countries in the Mediterranean, some of them have association agreements that are much less far reaching with the EU, which do not go anywhere near as far as what Ukraine and Moldova have. There is an association agreement with Chile, and I think with Mexico and the Caribbean countries. With Mercosur, it was just agreed that the trade part will be part of an association agreement as well. You can have an association agreement without anywhere near as much legislative harmonisation as Ukraine, or indeed the Swiss, Norway and Iceland, has agreed to over the years.

Chair: I am very grateful for that comment. I know Philippa wants to come in. I think we could spend the whole afternoon on the question of association agreements, but I am very grateful for your response to that.

- Q29 **Dr Whitford:** Once the article 50 process is finished, picking up on your point, is it not just that you then require national ratification? You actually need 27 countries and possibly some regional Parliaments to agree. It could take an awful lot longer, because you are not negotiating with one negotiating partner.



Professor Barnard: That is right. The article 50 legal regime is more benign, in that you only require a super-qualified majority of the states. In fact, they have been operating unanimously, but you only require a super-qualified majority, and you do not need national ratifications in respect of the text of the withdrawal agreement.

- Q30 **Chair:** I want to ask one last question on this. It relates to the manner in which article 50 was implemented. You may or may not remember from a report that we gave—I think it was a year last March, as long ago as that—we were severely critical of the extent to which the Government had effectively acquiesced in the guidelines and terms of reference that were prescribed by the EU. Therefore, from the very outset, the whole of the article 50 process became very much a one-sided operation, which led to the difficulties in the withdrawal agreement. We were supplicating the EU. I think those were the sorts of words we used in our report. It seems to me that you use the word “benign”, but unfortunately it was anything but benign, because it was being driven by a desire to appease them, to give them the means of implementing their terms of reference and guidelines. We ended up tying one hand behind our back, and I do not know if I would regard that as benign in those circumstances, but that is my interpretation of it.

Professor Barnard: I only use benign in comparison to what is coming under 207 and 217. My adjective “benign” was in comparison to the legal regime under 207 and 217, which will be infinitely more complicated. In respect of your point about sequencing, yes, the fact is that we triggered article 50 without having a very clear idea of exactly what we wanted, in both the short and the longer term. Once we triggered article 50, the clock started ticking down. The very fact that the EU got its way over sequencing meant that we were already, as you say, negotiating with one arm tied behind our back. They insisted on sorting out the money, for example, without having any firm commitment as to what our future trade relationship might look like.

- Q31 **Chair:** This is my last point. Were you astonished that we enacted the withdrawal Act only one year ago, with Royal Assent on 29 June last year. On 6 July, without reference to the Cabinet, you then have a completely new arrangement, which is thrust on them by virtue of the Chequers deal, which some people suggest was actually done in cahoots with the German Chancellor. Within a matter of days, you then have an 80-page White Paper, which I did point out at the time was pretty extraordinary and I thought disastrous. That quite clearly had been planned without reference to the Cabinet over a period of time, which must go back the best part of nine months, if you are going to take any kind of assessment of the length of time it takes to produce an 80-page White Paper. That led straight into what you said earlier, which was the manner in which the European Communities Act 1972 was turned inside out. I put it to her on 9 July: how can you reconcile Chequers with the repeal of the 1972 Act? You made the point yourself earlier. It is an extraordinary state of affairs, is it not?



Professor Barnard: It is very unfortunate that discussions such as those that were held at Chequers were not held prior to the triggering of article 50 so that there was a clearer idea of the direction of travel and what we could legitimately ask for. While article 50 is primarily about the divorce, it says that account will be taken of the future relationship. I am not sure that we pushed hard enough to say that we should be doing much more on the future relationship.

Q32 **Chair:** There is no doubt that the Cabinet was deceived, and the same applies to Parliament in that context, if one was to assume that the arrangements that were apparent in the White Paper so radically changed the nature of the withdrawal Act, which we have been discussing so far in this session. Section 1 speaks for itself and then you get a new arrangement under Chequers, followed by the withdrawal Agreement, which has an incredibly invasive effect on sections 1 and 2 of the European Communities Act 1972, or at least on the repeal of those sections.

Professor Barnard: I am a lawyer; I do not want to comment on the politics of whether Cabinet was deceived. The Chequers text could be read in different ways about the precise legal manifestation of that future relationship. It could be more intergovernmental or more supranational, depending on the various mechanisms that were put in place for monitoring that agreement.

Chair: At any rate, it could be argued.

Q33 **Mr Jones:** You have clearly already correctly concluded that the object of this inquiry is to ascertain whether there is a need for the work of this Committee to continue post-Brexit. You have already mentioned that, during any transition period, if the withdrawal agreement is implemented, the UK will be subject to legislation that is developed in the European Union, without any role in formulating that legislation. Do you think that there will be a continuing need for Parliament to scrutinise new EU law and EU policies during a post-exit transition period?

Professor Peers: If there is something like the withdrawal agreement, if there is any sort of agreement or even unilateral act to have substantial legislative alignment with the European Union, it would make sense to have some form of specialised process like this one. It might take a different form. It might be a sub-committee of something else, but it would make sense to keep something like this going in that scenario. If we do not have either a treaty commitment or a unilateral commitment on legislative alignment with the European Union, there does not seem to be a particularly strong need for it.

Q34 **Mr Jones:** I am contemplating a post-Brexit transitional period pursuant to a withdrawal agreement. In that context, do you think there would be a role for scrutiny? What would be the consequence of such scrutiny in practical terms?



Professor Peers: There would be the change that you do not have a scrutiny reserve, because the UK is not being represented in the Council and so on. I suppose the UK permanent representation would then, as a non-EU state, be making the sorts of representations that the United States or Canada make about proposed legislation that they hear about. They are not subject to the same flow of information as a member state, but they will still hear about things that are published officially. They will be making representations—"Let us not do that; let us not do this; this is a bad idea"—not having the power of the vote behind them or MEPs there, some of whom at least are likely to agree, behind them.

Nevertheless, having that possibility, I am sure the United States and others have had some success in persuading the EU at different levels to reconsider legislation. That is the sort of thing we would be aiming to do. It is obviously a different relationship. We have to reconceive it, but it would be something that it would make sense to at least attempt to do.

You would be wanting, as Parliament scrutinising the Executive, to know what position the UK Government are taking. Should they be intervening on this proposal or that proposal there on artificial intelligence, as the new Commission President wants to propose? How much does that affect our industry in Cambridge and other parts of the country? Do we want to object to that? Do we want to suggest something else? That is the sort of scrutiny you would want to take of the Executive. What are you saying to the EU? They may be more reluctant in a different environment, post-membership, to tell you what they are saying, but nevertheless there is definitely a strong place for scrutiny as long as a transition period under the withdrawal agreement applied.

Q35 **Mr Jones:** It is quite clear that Government will have an interest in legislative developments in the EU. Equally, Government have an interest in similar developments in the United States, which is a major industrial power. What it does has an effect, directly or indirectly, upon this country, as it does on other countries around the world. Should we perhaps be extending the remit of this Committee to scrutinising US legislation, Chinese legislation or Japanese legislation?

Professor Peers: That makes sense as well. The only thing is that there is a distinct legal position if we are aiming at some major legislative alignment with the EU, whereas we are not aiming at that with the United States, India or anyone else. If we no longer have any kind of legislative alignment with the EU, although there may be some small issue here or there, it would make sense to treat it exactly the same as everyone else. If we are going to have an obligation of some kind of legislative alignment, it makes sense to have at least more energy devoted to the issue. While I agree that it makes sense to have some energy devoted to what the United States or India do, there is always going to be a need for more energy related to what the EU is doing, as long as we have a legislative alignment commitment, if we do.

Q36 **Mr Jones:** If we were to scrutinise EU legislation in such a transitional



period, what would be the effect of that transition? What would be weight of any reports that this Committee delivered?

Professor Peers: I imagine you would be aiming to influence what representations the UK Government were making. You might be perhaps aiming to bring things to their attention that they had not placed enough pressure on from the Committee's point of view. Perhaps you would be aiming to urge them to take a different position: "Do not criticise that new environmental Bill. The majority of the Committee is happy with it. Do not go along with that new environmental Bill. The majority of the Committee is unhappy with it". That is the sort of thing I imagine the Committee would be interested in.

I imagine it would be interested in pointing things out from the perspective of future relationship negotiations and how we would feed into that, which would be going on at the same time. I see a lot of your recent reports have talked about the post-Brexit implications of things that you are looking at. I imagine the Committee would also be very interested in saying, "If this is what the EU is doing in terms of asylum seekers responsibility, how does that kick into an agreement we might want to sign with them or negotiate with them already on asylum seekers responsibility", or the European arrest warrant and so on. That might be something to flag up.

Q37 **Mr Jones:** At the moment, this is a powerful Committee. We have scrutiny reserves that we can decide whether or not to release. Post-Brexit, in that transitional period, we would not be a powerful Committee, would we? We would be a fairly weak Committee. We would just be seeking to exert influence rather than any sort of power the Committee has.

Professor Peers: I imagine so. That is simply the consequence of not being a member of the European Union. You are going to have less influence over what it does. I am sure that the UK Government in any scenario are going to be seeking to persuade the EU to do certain things, or not do certain things. That is much more important for us if we have some obligations of legislative alignment with the European Union. Then it is particularly important. If it feeds back into future relationship negotiations, that is particularly important too. While the Committee would no longer have such powers, I imagine it would still hope to try to be influential, as the International Trade Committee and other committees concerned with external relations hope to have that kind of influence as well.

Mr Jones: Would you like to add anything, Professor Barnard?

Professor Barnard: Norway has a very effective embassy operation, but it means the staff there spend an awful lot of time having coffee and meals. I do not say this entirely in jest, because this is how they get information. This is how they try to apply some degree of pressure or influence.



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Q38 **Mr Jones:** Before we leave that point, does the Norwegian Parliament have a committee that undertakes a role similar to this Committee?

Professor Barnard: I am afraid I do not know the answer to that question, but I think it does.

Stephen Kinnock: It does. New legislation has to be approved by the Norwegian Parliament, under the terms of the EEA agreement.

Professor Barnard: They are already much more proximate than we will be if we have some sort of CETA-type relationship with the EU.

Q39 **Mr Jones:** They of course are EEA members, so there is a formal relationship.

Professor Barnard: Norway is part of the EEA. They do not have any voting rights, so they do not have any formal influence over the shape of legislation.

Secondly, from my experience, the reports produced by parliamentary committees are taken very seriously in Brussels, because a lot of work has gone into them. They tend to be well written and they have consulted quite widely. Officials want to produce good quality legislation. They might not agree with the approach taken by the UK, because of course we will not be a member state any more, but, if we are raising technical points that they had not thought of, it may well be that we still have some influence there.

Q40 **Dr Whitford:** Moving to after any transition period that would come from a withdrawal agreement, obviously there has been a lot of focus on Northern Ireland. How extensive a role does EU law play in underpinning north-south co-operation on the island of Ireland, avoiding a hard border and protecting the Good Friday agreement—those three areas?

Professor Peers: There has been a mapping exercise, the results of which were recently released. The backstop in the withdrawal agreement refers to that, but, despite that lengthy list of issues somehow linked to EU membership, the core is what the withdrawal agreement requires there to be in terms of continuing alignment. That is mostly a long list of legislation relating to the free movement of goods. That is where there would be a continued important role for scrutiny, assuming that the backstop came into effect.

Whether it is the right place to have the scrutiny is maybe another question, because, if we are only talking about texts that have to apply to Northern Ireland, it might be that the Northern Ireland Committee, the Northern Ireland Assembly or Executive, if they are working, or both, would be a better place to look at these things. That is more important in legal terms than the broader co-operation, which of course is going to go on anyway—and it is significantly important—between the UK and Ireland, but in terms of the specifics of the UK/EU relationship not everything in the north/south co-operation has a legal importance.



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- Q41 **Dr Whitford:** But it was the UK that then proposed to change it from a Northern Ireland bubble, which was the proposal in December 2017, to the entire UK bubble, even though Northern Ireland will have closer regulatory alignment. Avoiding that divergence, does that not then create a pressure that the UK, via Northern Ireland, has to look at alignment with everything the EU decides that would relate to goods or agriculture?

Professor Peers: That would relate to the text of the backstop. Yes, that does make sense. If the UK Government are going to go down the lines of what you could say is being aligned with Northern Ireland, therefore it is indirectly aligned with the EU in those areas; therefore it makes sense for a broader scrutiny to take place. I was thinking of a scenario where it is only Northern Ireland that is subject to these new developments in practice, but of course if that is not the case it makes sense to have something broader. If we are sticking with the UK-wide version of the backstop, if that were to come into force, of course there are things in there that are UK-wide to start with, so therefore it makes sense to have a broader scrutiny of those things too.

- Q42 **Dr Whitford:** Is it not the case that, if the focus had remained on a Northern Ireland-only backstop, and on issues like animal transfer, sanitary, phytosanitary, et cetera, which are all-Ireland regulations already, we therefore would not have spent the last year and a half going round and round the same track? To your comment about being a bit further down the future relationship, we might have got more other things ironed out, whereas actually we have just been going round the same plughole for a year and a half.

Professor Peers: We do not have access to a parallel universe where that might have happened, but it is also interesting to imagine in parallel universes, if we had not had an early election and so on, where we would be. Yes, it is certainly possible that things would have turned out differently if we had not gone down that route, but there might have still been a great difficulty in getting the numbers to pass the withdrawal agreement because the DUP and some others, I am sure, would have been still concerned about that. Perhaps it would have had insufficient numbers to pass anyway.

- Q43 **Dr Whitford:** Are there other aspects around it that you think have not been considered here that would have been a solution to it? Obviously people have talked about alternative arrangements, which are not yet in place, but people who really believed in alternative arrangements in a way should not be afraid of the backstop, because the alternative arrangements would come to the fore perhaps before it was ever required.

Professor Peers: Some of those people could probably answer—I guess I should not really speak for them—that they do not believe the EU would act in good faith, that the EU would trap us into the backstop even if the alternative arrangements objectively existed. That would be what they would argue, and that the EU has the capacity to do that. In a way, this



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argument about being trapped works the other way round as well, because the backstop also guarantees access for the UK to EU markets for goods. We will be faced with a cliff edge as far as a potential no deal on goods exports, because not every detail but at least some essential elements of our market access for goods to the European Union for the UK as a whole would be built into the backstop. They could not unilaterally terminate it any more than we could. There is that fact as well, which rarely gets discussed, but, to be fair, that is the concern that people who advocate alternative arrangements have.

- Q44 **Dr Whitford:** There is a lot of concern from the European side that the UK has been given a huge advantage as a non-member, and therefore they do not particularly want it to continue any longer than necessary.

Professor Barnard: The EU has a trade surplus with the UK in respect of goods. The EU is worried about the backstop too, because, for all the talk about no cherry picking, in fact there is cherry picking of goods, particularly with the island of Ireland. On the other hand, it is an asymmetrical agreement, because it is about goods; it is not about services, and of course services is where we have a trade surplus. You can see that, whichever side of the argument you are on, there is an argument that the backstop is not a good thing, but necessary in order to have got the agreement over the line as far as the EU was concerned.

- Q45 **Dr Whitford:** How important do you think EU law, and indeed the EU itself, both was and is to the Good Friday agreement, the north/south relationship?

Professor Barnard: It has been absolutely essential. What has been absolutely striking is that relations began to thaw a bit between Ireland and the United Kingdom through meetings in the Council, and so from that point of view the operation of the four freedoms has facilitated an interchange without going down the highly politically significant route of saying, "We are abolishing the border on the map". It has delivered that and much smoother movement between the north and south of Ireland.

From that point of view, section 10 of the EU (Withdrawal) Act is quite important. As you know, it says—and I paraphrase—that nothing in the various sections of this Act authorise regulations that diminish any form of north/south co-operation provided for by the Belfast agreement, or create or facilitate border arrangements between Northern Ireland and the Republic after exit day that feature physical infrastructure. Even if we leave without any form of deal on 31 October, there is this provision in the EU (Withdrawal) Act.

- Q46 **Dr Whitford:** The relationship between the likes of John Major and Albert Reynolds is overlooked in the whole process. Therefore, does that come back to the need for ongoing scrutiny thereafter, in that obviously there will be divergence over time between Great Britain—perhaps the whole UK—and the EU?



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Professor Barnard: Of course, that touches upon what our future relationship might be with the US, not just the EU, the implications of any future trade deal with the US and what it means in terms of particular standards for agriculture and agri-food. Of course, that has issues for Northern Ireland, so that is why there is still absolutely a role for this Committee to look not just at EU standards, but at what is coming out from other fora.

Chair: In relation to the Belfast agreement you are probably aware of the remarks made by David Trimble. It is not just an assumption that the Good Friday agreement is the be-all and end-all in this context, because others take a different view. I just want to put that on the record; that is all.

Q47 **Mr Jones:** Could you tell us what mechanisms are contemplated to ensure that the United Kingdom complies with its obligations under the withdrawal agreement after the transition period has elapsed?

Professor Peers: There are several different aspects to that. Of course, the bulk of the UK's obligations would have lapsed, and of course they are reciprocal obligations; the EU's obligations to the UK would have lapsed. We would still be left with citizens' rights. We would still be left with some residual portion of the financial settlement; most of it would have been paid, but some residual, small portion of it would be left for a while. There would still probably be a few things like pending state aid cases that had begun before the end of transition. There would potentially be the backstop for at least some period afterwards, other pending cases before the EU court and that sort of thing.

There are different provisions on each of those. The citizens' rights provisions have a specific rule about continued jurisdiction of the EU courts in relation to national courts of the UK for another eight years, and then there are specific provisions on Northern Ireland as well. In general, for the withdrawal agreement, you would be looking at the main dispute settlement provisions of the agreement, which would kick in at the end of the transition period, instead of the ordinary jurisdiction of the Court of Justice, which applies throughout it.

Then you have the withdrawal agreement dispute settlement instead, which has a decidedly intergovernmental flavour but, you might say, a European Union core. If there is a dispute over EU law—and a lot of disputes would be about EU law—you could end up with a Court of Justice ruling on it because of the EU side's concern about the autonomy of EU law and not having an international court rule on it, as far as binding the EU is concerned. That is basically how it would work.

Q48 **Mr Jones:** Pausing there, so the court of one party to the agreement would have jurisdiction over the other party to the agreement.

Professor Peers: Well, it would have jurisdiction to settle disputes as to the interpretation of EU law, which would then be binding on both sides,



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yes. From the EU side's point of view, you can look at case law going back nearly 30 years. That is unavoidable from their side's point of view.

- Q49 **Mr Jones:** I appreciate from their point of view it is, but as far as the UK is concerned it is an unusual and novel state of affairs that we should be subject to the jurisdiction of the other party to an agreement to which we have contracted.

Professor Peers: Yes, it is odd, but that is the hard-to-avoid outcome of having been a member for 45 years. It is hard to extract ourselves immediately and fully. You have a transition period and then you have some residual issues after that.

- Q50 **Mr Jones:** I am sorry; I do not wish to appear rude, but why could this have not been passed to independent arbitration rather than to the jurisdiction of the European Court of Justice?

Professor Peers: In principle, it should have been passed to independent arbitration, but as a matter of EU law the case law of the Court of Justice prevents it being passed to independent arbitration, because according to the Court of Justice, going back to 1991 and 1992 in a series of cases, you cannot have an international court ruling on the interpretation of EU law for the European Union. It has to be the Court of Justice that gives the final ruling on the interpretation of EU law for the European Union. They have said you can have a different international court interpreting other law for the European Union, and they are happy with investment dispute settlement with Canada not being subject to the Court of Justice, as long as it is kept away from the Court of Justice, in fact. They are happy with that, but they are not happy with the idea that you could have an international body telling the EU how to interpret its own law. From the Court of Justice's point of view, that is unacceptable.

- Q51 **Mr Jones:** Do you know of any international precedents for the court of one party being the ultimate arbiter of a dispute with another party to a treaty or a similar arrangement?

Professor Peers: I do not know. There are many international treaties in the world, and I do not know offhand which might have a provision like that. Most international treaties do not have much to do with courts anyway; they have informal dispute settlements, arbitrators and so on.

Professor Barnard: What is in the withdrawal agreement is rather modelled on the Ukraine association agreement.

- Q52 **Mr Jones:** The difference is that Ukraine is seeing accession to the European Union, whereas we are leaving the European Union.

Professor Barnard: Yes, but you asked whether we knew of another agreement that had this sort of arrangement.

- Q53 **Mr Jones:** I came across one in the case of Montenegro, which has an arrangement with China under the belt and road initiative, whereby a Chinese court has jurisdiction over Montenegrins and in certain



circumstances could order the seizure of their property. It is right to say it is a fairly rare and unusual arrangement, internationally.

Professor Peers: Like I said, most international treaties do not provide for a court at all. They provide for arbitration or perhaps just informed discussions, so in that sense it is bound to be rare. The EU court has taken this position consistently, which perhaps makes it difficult to negotiate some of these treaties that it wants to negotiate. It has complicated their relationships with the Swiss over the years, for example. This is the position that they feel obliged to take, but they do feel obliged to take it because the Court of Justice has gone there and stuck there over the years in its interpretation.

Q54 **Mr Jones:** I appreciate it is a political point, but that makes it a lot more difficult to persuade parliamentarians that this is a good idea. Would you agree?

Professor Peers: That is going on in Switzerland as well: similar provisions in EU negotiations with them are not thrilling people in Switzerland too much. Nevertheless, that results from the position the Court of Justice has taken. You could argue—people did at the time, if you go back to 1991, as I remember—that this was going too far, but nevertheless that is the position the court took.

Q55 **Chair:** If you take Van Gend en Loos, Flaminio Costa and that line of decisions, which were pre our entry, the clear determination of the European Court was that it could override the constitutional law of any of the countries in the EU. If one was to translate your impressive adherence to the nostrums of the European Court of Justice in this context—imagine, for example, the United States contemplating the idea that there should be a superior court over the Supreme Court of the United States in relation to matters in which it had an intrinsic interest by virtue of an agreement with other countries. It is so unthinkable, and I suppose one would say the same about China. I could give a list of others and everybody in the room could do likewise.

The very idea that outside the EU we would in any shape or form be subject to the jurisdiction of the European Court, whatever it may want or think—or indeed, for that matter, what institutions may want or think—really goes back to the point that Professor Barnard and I understood one another on, which was that the manner in which the whole of this process is being conducted is based on an assumption that we are somehow or other in a relatively subservient position. That is completely unthinkable from a political point of view, and in historic terms is literally an absurdity.

We are an enormously vibrant country with an enormous historical heritage that goes back hundreds of years. The EU is just a parvenu in this context and, however large it may be, we have as much right—as we pointed out in our report a year last March—to insist that we have an equal status with the other 27 as we go out. They may be more numerous but it does not mean they are any more effective. Some people



would argue they are not only dysfunctional but they are imploding.

Professor Peers: Well, this argument about imploding has been used for decades, if not the last three years, and been proven wrong quite a number of times. The number of people who said in 2016, "It will be a series of dominoes falling" and have been proven wrong since is, of course, quite a lot. The more general point is that I was not actually suggesting adherence to the Court of Justice jurisdiction; I was just simply describing what the court has said for years.

Chair: You were describing it.

Professor Peers: I actually said it is not necessarily something I agree with. People disagreed with it at the time. Certainly some of its judgments on the ECHR and the patent court, this line of case law, were ridiculous. That is the situation that they are in. Inevitably a withdrawal agreement is going to include a lot in it about winding down EU law relationships of the previous member, and therefore, inevitably, a lot of the disputes are going to be about how to interpret EU law. That is inevitably going to bring about the jurisdiction of the Court of Justice according to the case law of the court, and you can say the case law is misguided and it is certainly politically difficult for any non-member state to accept. I can understand that. It would be constitutionally difficult for many countries to accept. That makes perfect sense to me; I can see all the legal arguments against it, and many of them are very strong. I am simply describing the situation that we are in as a result of the case law of the court.

Q56 **Dr Whitford:** One of the things that struck me when I read the Chequers agreement was almost the sudden recognition of some of the bits of the EU that were quite good, and the list of agencies that the UK Government would suddenly like to stay part of. Surely, if that was negotiated through a withdrawal agreement—although it is all in the future political declaration rather than the withdrawal agreement—that would mean, if you wanted to stay part even of bits of the club, you would have to obey the rules of the club. You would have to obey the umpire, the chairman or whatever of the club.

Professor Peers: There are non-member states that agree to relationships with the EU without the Court of Justice having direct jurisdiction. In the Schengen association agreement with Norway, Iceland and Switzerland, there is an agreement to pay due account to the court's rulings but not a jurisdiction for the court, or even for the EFTA Court, as such under that arrangement. Equally, for the EEA it is an obligation to take some account of the EU court's jurisdiction, but there is an EFTA Court, which is separate and applies that part of EU law that is extended to those states. There are many other examples of that.

We do not necessarily have to accept the Court of Justice's jurisdiction, but if you do not accept that how else do you settle disputes? You cannot just hand it to an international court or arbitrator; you would have to



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have to have sanctions or something like that instead. Maybe that is the road we should have gone down with the withdrawal agreement. As I pointed out before, the UK's negotiators cut back a lot of what the EU wanted in terms of the role of the Court of Justice in the withdrawal agreement, but they could only cut it back so far. If you are going to have any judicial dispute settlement it has to be that court, as far as EU law and the EU is concerned. As I say, purely political dispute settlement with sanctions maybe makes more sense.

Chair: I am sure you are familiar with this, because I know very well how much you know about all this. Some of us are following it as well in a different context, from a different perspective. I invite you to remember the former European court judge—I forget his name precisely—who put out a blog. In fact, I think he made a speech. It was his retirement speech, in which he said that the idea that the United Kingdom could or would subject itself to European court jurisdiction, given the practices of that court as he experienced them while he was a member of that court, was so heinous, in his opinion, that he described the prospect for the United Kingdom as “entering into a viper’s nest.” Those were the words he used.

That may be rather exaggerated language, but it demonstrates the fact that, if you are going to have a situation of the kind that you properly described—and I am not ascribing the views to you personally; I am saying that that is what they think—we have given into that. If I may vicariously answer Philippa’s point, that is why people like me are so determined that we actually do leave, and leave fully and completely, and are not left with a hangover under this now apparently defunct withdrawal agreement with jurisdiction of another court.

In a nutshell, we end up being told what to do. There are ways of avoiding that in an arbitration system, whereby the jurisdiction is for example chaired by an independent arbitrator, and you could have the two sides arguing the case. I made this case in the House of Commons in a speech I made about a year ago. In other words, I am not sure that we need to make the assumption that, because they say it, therefore we do it. That is really my point. I am not asking a question; I am making an assertion, but that will not be for the first time.

Q57 **Mr Jones:** If the United Kingdom were to leave the European Union without a negotiated agreement, to what extent might EU legislation or policies constrain the future direction of legislation and policy-making in the United Kingdom?

Professor Barnard: If we leave with no agreement at all and no plans for a future trade deal, at first sight the answer is that it will constrain very little, because that is one of the reasons people voted to leave.

Q58 **Mr Jones:** What about in practical terms?

Professor Barnard: In practical terms, in order to try to reassure, for example, UK citizens living in Spain or elsewhere, we are seeing EU



co-ordinated attempts to get states to come up with special arrangements, and that is already underway. In the UK we have already introduced a settled status scheme for EU nationals, which to an extent draws on the provisions of EU law. There is going to be quite a lengthy legacy effect of EU law in our system, but it is absolutely clear that, if we have no formal agreement in place now, and no future trading agreement, we will have much, much greater flexibility and we will be able to repeal aspects of EU law that have become EU retained law, in UK parliamentary jargon. We will be able to repeal those.

Q59 **Mr Jones:** To deal with the aftereffect of 40-odd years of membership of the European Union, to disengage from that process, we would be able to do it informally rather than through the formal structures of a withdrawal agreement that implies the supreme jurisdiction of the European Court of Justice.

Professor Barnard: We already see the signs of that taking place, particularly in respect of citizens issues. We are also looking at replacing what EU law lays down, for example in respect of the European arrest warrant, with international arrangements. You are right that those international arrangements do not come with the jurisdiction of the Court of Justice, but if you were a purist you would recognise that our hands are still somewhat tied by these international agreements because we are not an island. Of course, geographically we are an island, but we are not an island in terms of the broader regulatory sphere. Even if the rules are not coming from the EU, there are different fora. For example, in respect of financial regulation, they will be coming from Basel or wherever. There are other places where norms come from that are outside the jurisdiction of the UK.

Q60 **Mr Jones:** This is the case for every country in the world.

Professor Barnard: Yes, it is, apart from perhaps one or two.

Q61 **Mr Jones:** In other words, we would be operating on a similar basis to most other countries throughout the globe.

Professor Barnard: That is true. WTO law constrains states as well and forms a fairly minimal floor of trading rules. Most countries have additional agreements, because very few countries trade on WTO terms in and of themselves. In reality, WTO law will constrain what we can do. For example, we cannot just decide to subsidise the agriculture sector, which will lose out in the face of tariffs imposed by the EU, because that would go against the WTO agreement on subsidies.

Q62 **Mr Jones:** Is it fair to precis you as saying that, very probably, to an extent, we would be constrained for practical purposes by what is happening in the European Union, but it would be our decision as to the extent to which we are constrained.

Professor Barnard: Yes, and constrained by other international organisations as well, of which the WTO is a prime example. Of course,



the enforcement mechanisms are state to state rather than private to state. This goes back to the point somebody made earlier about the fact that Van Gend en Loos empowered individuals to bring claims to enforce EU law, to ensure that EU law was complied with. Some people think that is a good thing. Others have said it interferes with the sovereignty of a state and, therefore, we should go back to much more of an intergovernmental relationship, which is both less effective for the individual and gives more power to the state.

Chair: That really brings us to the end of today's session. Thank you very much indeed. I just thought I might mention in the context of qualified majority voting, which we did not really go into, in relation to the decision-making by other member states, that there is a remarkable book—I wonder whether you have read it—by Sir Paul Lever, the former British ambassador for Germany. It received a very considerable amount of attention. It is called *Berlin Rules*, and he goes into it in very considerable detail, with very interesting analysis.

Perhaps we have to bear in mind what he said, which is that no decision that he was aware of was ever made by the European Commission or the member states that was not cleared by those member states or the Commission with Germany before action was taken. That rather creates a legal-political question, because if the majority voting system is being driven by consensus behind closed doors and we are not even there, however much we may want to have good bilateral relationships with France, Germany or whatever, the reality is that the decisions within the EU are effectively taken, on the basis that I have described, by Germany because of its dominant nature within the European Union. It is just a matter of fact, and it has a powerful influence on the question of whether the United Kingdom could remain in the European Union anyway. I just mention that as a thought; it is called *Berlin Rules*.

Thank you very much indeed for coming.