HOUSE OF COMMONS

European Scrutiny Committee

Oral evidence: Retained EU Law: Where next?, HC 1113

Wednesday 2 March 2022

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Watch the meeting

Members present: Sir William Cash (Chair); Jon Cruddas; Allan Dorans; Margaret Ferrier; Mr Marcus Fysh; Mr David Jones; Craig Mackinlay; Anne Marie Morris; Greg Smith.

Questions 17-46

Witnesses

I: Dr Oliver Garner, Maurice Wohl Research Fellow in European Rule of Law, Bingham Centre for the Rule of Law; Martin Howe QC, Barrister; Sir Stephen Laws QC (Hon), Senior Research Fellow, Judicial Power Project, Policy Exchange; Dr Tom West, Researcher, Hansard Society.

Written evidence from witnesses:

– Dr Tom West, Researcher, Hansard Society

Examination of witnesses

Witnesses: Dr Garner, Martin Howe, Sir Stephen Laws and Dr West.

Q17 **Chair:** On behalf of the Committee, I welcome you all. Thank you for appearing to give evidence this afternoon. This is the second session of our inquiry into the future of retained EU law. Our first session covered the fundamentals of retained EU law. We considered what it is, how it differs from traditional domestic law, and how it is given effect. During today's session we will advance a little further and look at the status of retained EU law, and also touch on the issues of the supremacy of EU law, the Government's proposals for amending retained EU law, parliamentary scrutiny, and accessibility.

As constitutional experts, you will appreciate the importance of this body of law and also, of course, the provisions of the European Union (Withdrawal) Act 2018. Indeed, you will be aware of its genesis as an expedient to ensure that our statute book functioned effectively at the point of the UK's withdrawal from the EU, after which the concept of retained EU law would be revisited. It was essentially thought to be necessary for those purposes, but also as a stopgap. It was always intended that we would address the question of how to dispose of EU retained law in due course. Now is the time.

Serious questions, therefore, must be asked of the current system, and when we see them in full, careful consideration given to the Government's proposals. A particularly important issue is the status of retained EU law and the retained, albeit in amended form, doctrine of supremacy. We will touch on its appropriateness this afternoon and in later sessions. Before we start and for those watching at home—this is being streamed—would you briefly introduce yourselves? We will start with Sir Stephen, followed by Mr Howe, Dr West and then Dr Garner.

Sir Stephen Laws: I am Stephen Laws, senior research fellow at the Policy Exchange. I am a former first parliamentary counsel. I was first parliamentary counsel from 2006 to 2012. Before that I had a career as a legislative drafter that started in 1975. For the last year I have been on the independent Human Rights Act review, but that is not relevant here.

Martin Howe: I am at the Bar in practice. I specialise in the fields of intellectual property and connected European Union law, particularly freedom of goods and services. In addition, I am chairman of Lawyers for Britain, which was the lawyers group that formed part of the leave campaign. We thought our job was done once the referendum result came in, but it turned out there was a lot more work to do, so we are still active in terms of translating the decision to leave the European Union in practical legal terms into reality.

Chair: Of course, you and I have known one another well since at least 1990 when we first embarked on the business related to Maastricht and the rest of it.

Martin Howe: Indeed, Sir William.

Dr West: Good afternoon. My name is Tom West. I am a researcher at the Hansard Society, where I also manage our delegated legislation review project which, over the course of this year, is working to assess the delegated legislation system as a whole and to develop proposals for how it could be reformed.

Dr Garner: Hello, my name is Dr Oliver Garner. I am the Maurice Wohl research fellow in European rule of law at the Bingham Centre for the Rule of Law, which is part of the British Institute of International and Comparative Law. I was previously the Brexit research fellow at the Bingham Centre. The Bingham Centre has engaged with the question of retained EU law since 2018 and the EU withdrawal Bill. Part of this has been submitting a consultation to the Ministry of Justice in response to their consultation on departures from retained EU law.

Q18 **Chair:** Thank you very much indeed. The first question is to Martin Howe and Stephen Laws. We touched on this with Jonathan Jones last week, because he was the Treasury solicitor at the time when the withdrawal Act was drafted in 2018 and went through in its then form. Of course, a lot of legislative proposals have emerged since then. We have the proposed freedoms Bill and various things like that. All these things are part of a composite analysis.

Martin Howe, the European Union (Withdrawal) Act 2018 retains the principle of supremacy for retained EU law over pre-exit domestic enactments; after EU exit, do you regard that as an appropriate arrangement? If not, why not?

Martin Howe: I think you have to have it in limited respects. I can think immediately of two areas that impinge on my daily area of legal practice.

First, there is the subject of parallel imports—goods that cross frontiers—where the retained EU law continues to provide that if a brand owner, for example, puts goods to market in an EU member state, the goods can be freely imported, whether the brand owner likes it or not. That has been deliberately retained, as a matter of policy, although not extended to other states, which is a different point. The point there is that the rules on the free movement of goods need to give protection against legislation that might post-date the rule itself, which arises, originally, out of the Treaty of Rome—the TFEU.

A second example is the e-commerce regulations, which are domestic regulations that give effect to the e-commerce directive. Those protect internet service providers from liabilities for both tortious and criminal acts unless certain conditions are satisfied.

It is necessary, in the nature of both those schemes of legislation, that they prevail over subsequent legislation, because otherwise the mere fact that some new stricture was introduced after the date of the e-commerce regulations, for example, would cut away from the protection they provide.

You could make the same argument about the UK Internal Market Act, where its principles on the free movement of goods ought not to be undercut just because a later Act happens to impose something that would create a restriction on the movement of goods between different parts of the United Kingdom.

It was, obviously, a matter to do with "EU law is supreme, domestic law must give way to it". In these particular examples, I think there is a different principle—they are meant to be rules that operate even in the face of future legislation. Those are examples where I think you need to retain it, but apart from that, I cannot see the basis or need for retaining any general principle that retained EU law must be supreme over domestic-origin law that predates the end of the transition period. I think one could cut it down just to instances where the provision concerned is intended to have continuing effect, notwithstanding future legislation.

Q19 **Chair:** Would you agree, for example, that there is a fundamental question of democratic principle here? Before, while we were in the EU—understandably, because of the '72 Act and section 2 in particular, and section 3, on the receipt of obligations and the application of EU case law—those were decisions that were made in that context, before we left. Having left, presumably the question would arise as to whether or not the manner in which the legislation was passed in those days—by majority vote, behind closed doors and, for that matter, on proposals put forward by the unelected European Commission—created a completely different situation from what we would have in introducing legislation today, where it would be voted on by Members of Parliament who have been directly elected by the public and the voters as a whole, which is an essentially democratic way of doing it, and not behind closed doors without so much as a transcript available as to how the decision was taken by majority vote.

That is the context in which I am hoping we can explore some of these questions, because some say, "Oh, we might have some uncertainty as a result of getting rid of the bulk of EU retained law," but there is a fundamental democratic principle that lies at the heart of this. Would you agree with that?

Martin Howe: I agree with that, although Parliament is not constrained by any international obligation and has the right to get rid of or modify any retained EU law. The difficulty I have identified is more a practical one. It arises on completely non-EU law, such as the UK Internal Market Act 2020, where you have a relationship between that Act and possible future legislation. That Act lays down broad general principles on the freedom of movement of goods in the United Kingdom, and one would not want those general principles to be overridden by Parliament by accident in the future, although clearly Parliament has the right to override them if it chooses.

Q20 **Chair:** But if we were, in a general sense, to retain EU law as a general principle, which is one way of looking at it, the bottom line is that you then end up with two sets of public statute law, one of which was made

post-Brexit, where the decisions were taken and interpreted by the courts in accordance with unconstrained domestic legislation, which would be done in the way that it was before we came into the European Union, and on the other hand we would have another set of public statute law that would be subject to interpretation, with the supremacy of EU law woven into it and a whole series of other situations, which would lead to a retention of the purposive approach of interpretation, as compared to the normal constitutional arrangements we had before. That is another reason for considering what we do.

Martin Howe: I understand that, Chair. From my perspective, my overall view would be that the principle of supremacy within retained EU law can be modified and restricted to cases where it really is appropriate and necessary and, as a consequence, as it were, disposed of as a more general wider principle.

Q21 **Chair:** Okay. Thank you very much. Sir Stephen, as part of their review of retained EU law, the Government are looking at how to remove the principle of supremacy of EU law. In your enormous experience, what do you regard as the most effective way to do that?

Sir Stephen Laws: I agree that it is not necessary to retain it as the default position in relation to future cases. This whole issue about retained EU law has been confused by a conceptual muddle about the difference between transitional cases and future new cases. When you are changing the law, you always have to distinguish between the destination and how you get there.

The destination is what the law will be like for new cases in the future. In deciding how you get there, you have to decide what you do about cases where some of the facts or circumstances have already arisen when the old law was in force and you have to decide how they will be transitioned to the new law. The issue about EU law supremacy has, in some cases, appeared to be argued out on the basis that the transitional cases had to determine what the new cases will be. That is not the case. You can decide what you like for all new cases and the law will be certain once you have enacted it.

So far as the supremacy of EU law is concerned, for all cases before you decide to change its priority, it is right that it should have priority. But you can say that, in future, it is not to have priority. You will have different legal results, but that does not cause any injustice or uncertainty. It probably creates more certainty, and it does not create injustice because people know where they stand. There may well be cases, as Mr Howe indicated, where it is necessary to retain in domestic law some of the features of EU law supremacy, but it should not be the default.

I see no reason why EU law should not in future be given the same priority as it would have if it had been contained in domestic law, so that it takes its priority from its chronology and you look at it from the moment it became part of UK law. If you apply what I always think is mistakenly described as the doctrine of implied repeal, which is a rule of

interpretation that says legislation has its effect according to its chronological succession, I think it is right that you should not remove the supremacy of EU law over domestic law that came before, because that would involve some revival of something that had been repealed.

For domestic law that came after the EU law entered into domestic law, though, I see no reason why the later domestic law should not prevail. The situation where that is going to arise will be either where the subsequent domestic law was enacted in the hope or expectation that it was not incompatible with EU law—in which case, why not in future give effect to that hope and expectation?—or where the person who made it after the EU law had been incorporated into domestic law thought they would express it in terms that would then be qualified by what had happened before. But I am not even sure that those cases can exist. If they do, they need to be found, because anybody who was doing that would, in the nature of things, want to indicate where the qualification in the previous law existed and would have said so. I think you could give EU law the same priority that it is given by its chronological place in the introduction into UK law.

Q22 **Chair:** One last point, if I may, which is to do with the power that was taken under section 5 or 6, I think, of the European Union (Withdrawal) Act 2018—what I call the Factortame blockbuster, which was to enable the courts to be able to quash any Act of Parliament that was inconsistent with EU supremacy. It is like a glorified Lord Bridge judgment, whereby he quashed the whole of the Merchant Shipping Act—understandably in the circumstances, because we voluntarily agreed that we would accept whatever it was that came out of the Council of Ministers' law making. But of course, when you got to the point where there was an inconsistency, the courts had to make a decision, and they struck down the whole of the Merchant Shipping Act, which is a vast Act of Parliament in itself. The whole thing went up in a puff of smoke. Taking a general power to be able to quash Acts of Parliament with respect to any inconsistency there may be with the supremacy of EU law seems to me to be something that really needs to be removed at the same time as part of this process.

Sir Stephen Laws: I do not think there is any need for a separate power. Under what I have suggested, you would take the domestic legislation, followed by the EU legislation, so that the EU legislation had impliedly repealed the bits that were inconsistent with it, or you would say that the domestic legislation came later. For new cases, but not for transitional cases, the domestic law should prevail, because it came later.

Chair: Any further points on that before we move on, Martin Howe?

Martin Howe: I would agree that the wording of section 5(2) of the 2018 Act is very unfortunate, because I think it has always been a misuse of language to refer to Acts of Parliament being "quashed". Actually, both the European Court itself and our courts have been very careful in their terminology, even in the Factortame case: Acts of Parliament are not "quashed"; they are disapplied.

Chair: Thank you very much for correcting me on that point. The word "quashed" does appear—

Martin Howe: Well, the draftsmen of the Act—

Chair: Yes, it actually says "quashed".

Martin Howe: Yes, I can't understand. It may be that that refers to the words "or rule of law" and not to "Acts" particularly. It is unfortunately expressed.

Chair: That is why we have people like you and Stephen Laws here, and Dr West and Dr Garner—because you have all had experience. It is not only a very important subject; it is also extremely relevant to the way we proceed in making legislation for the future.

On that score, I will now move on, if I may, unless anyone has any further points to make. Allan Dorans, please.

Q23 **Allan Dorans:** Good afternoon, gentlemen. My question is to Dr West. To set the scene, can you explain how retained EU law can currently be amended, and does a modification to retained EU law have an impact on how it is interpreted?

Dr West: It is fair to say that currently the mechanisms for amending retained EU law are not exactly straightforward. There are a number of different pathways in existence. What I will do now is to set out the general architecture for this, rather than going into all the minutiae, which we can pick up on later.

I will make two preliminary points before doing so. First, this is a complex issue, but I want to try to explain that that is not entirely arbitrary or without rationale. It is in part because of the diversity and complexity of retained EU law itself. It is not a uniform landscape of law; it has hierarchies and structures within it.

Secondly, I will just say that I will focus on legislative routes for doing so, particularly within Westminster, as that is the remit of the society and hopefully is of most interest to your inquiry.

With that in mind, what routes are available? I will split them up as best I can, first into the new and the old. By new, I mean that, of course, Parliament can enact new primary legislation—new Bills—that can amend any law, including retained EU law. In fact, it has already done so on immigration and fisheries, and we can expect that it will continue to do so. In the Brexit opportunities policy paper, we see a number of areas where new legislation is expected and anticipated.

I should say that, as well as amending retained EU law directly, new legislation can take powers to amend it. Again, we see that already, in the Environment Act and the Professional Qualifications Bill; of course, that will be limited to those areas, but it can be done.

In terms of the old, what I mean by that is via existing delegated powers. First things first: there are, of course, powers taken as a result of Brexit, not least in section 8(2) of the withdrawal Act, to amend retained EU law. I do not think that those are of central interest to this inquiry, so I will move on from them to think about other areas where it gets perhaps more complex.

The pathways available are dependent on a number of factors, including, first, how a law was first incorporated into domestic law. In that regard, we have both preserved legislation and so-called converted legislation. By preserved legislation, I refer to those statutory instruments and Acts of Parliament that pre-existed Brexit. We have SIs made under the section 2(2) ECA power. Of course, that power has gone; it cannot be used to amend. But many of those SIs would have been made under dual powers or perhaps more powers, and of course, in the circumstances where those powers remain on the books and give the vires to do so, those powers can be used to amend that law, so far as they permit.

Again, we already see that happening. In fact, down the corridor I believe that right now an SI on GMOs is being debated, which has been brought forward exactly in that way. There is one on train driving licenses as well that I am aware of.

Acts of Parliament, of course, cannot be amended in such a way, unless there is a Henry VIII power, and there will be those on the books. I am thinking of things like the Legislative and Regulatory Reform Act powers.

Moving on, there is converted legislation—the legislation converted by sections 3 and 4 of the withdrawal Act. Again, we can split this further. In fact, the withdrawal Act does so: it badges this law as either principal or minor law. The key difference here for current purposes is that the minor law can be amended by delegated powers. It can be substantively amended by delegated powers, I should say, whereas the rest—the principal law—can only be substantively amended by primary or Henry VIII powers.

That distinction is not entirely arbitrary; there is a rationale in it. It is based on the status that law had as a matter of EU law. Essentially, minor law is what was EU tertiary law: Commission delegated acts and Commission implementing acts. This law is somewhat analogous to UK secondary law—the mismatch in hierarchies is because of the extra layer of the primary law of the EU treaties. The important point is that this is technical law. It is law that will frequently be outdated, and it is analogous in that sense.

What I hope to have given there is an overall sense of the general diversity of EU law and the diverse ways in which it can be amended. As I mentioned, there may well be other mechanisms: disapplication mechanisms in the Nationality and Borders Bill, through the courts, through action in devolved nations, implied repeal, and potentially through the action of regulators if new powers are given. That is in part because of the diversity of retained EU law.

On the point on the courts and the interpretation, section 6 of the withdrawal Act requires courts to stick with retained case law only so far as that law—that is, the underlying EU law—is unmodified. What exactly that will mean, I am sure there will be disagreement on. There may be court judgments on this already, but I am not aware, I am afraid. Other panellists may be. It is also worth drawing attention to section 6(6), I think, which says that courts can still follow that retained case law where that is in line "with the intention of the modifications."

My last point here is that I think there is a distinction across these ways of amending retained EU law, depending on whether those are general ways of amending, which would apply to all retained EU law, or more focused—more policy area-specific or policy objective-specific. That is an important distinction to bear in mind when thinking about the design of new mechanisms to modify retained EU law.

Chair: Thank you very much. Do you have any further questions?

Allan Dorans: No. Thank you, Dr West: a very comprehensive answer.

Q24 **Craig Mackinlay:** Dr West, you mentioned the Nationality and Borders Bill—there may be others, but you have highlighted that one. Are some of the Bills that we have made subsequent to proper withdrawal having new Henry VIII powers inserted that could retroactively give powers back to amend measures beyond what the withdrawal agreement may have proposed?

Dr West: I do not know about retroactively.

Craig Mackinlay: Wrong word, sorry—sort of overwrite what the withdrawal agreement proposed in terms of ministerial powers.

Chair: Are you referring to repeal of repeal provisions, which can revive, I believe?

Craig Mackinlay: Sorry, Chairman?

Chair: Are you referring to repealing provisions that have been repealed, so that if you do that, you then revive the provision that was originally there according to some—

Q25 **Craig Mackinlay:** No, my thought is that you are creating a ministerial power in a new Act—that one will do as a point of reference—that was beyond a means of changing entrenched EU law at the time of the withdrawal agreement. It is a little bit abstract, and I do not know if anyone will be looking out for those clauses. *[Interruption.]* Dr Garner is nodding his head; he has got his head around it probably better than I have.

Dr West: I am sure Dr Garner will get to it. On the powers in the new Acts, Parliament can legislate as it wishes, and certainly it can do that to modify any aspect of retained EU law: it is for Parliament to give those powers. In terms of the withdrawal agreement, there are matters of international law that will affect and influence what Parliament may wish

to do on that front, but certainly we see Bills coming forward that allow for that amendment of retained EU law.

Craig Mackinlay: Thank you.

Chair: You just touched on international law. I do not think we want to spend the whole of this session on that one, but there are really important questions arising out of section 38 of the 2020 withdrawal agreement Act, in particular 38(2)(b), which gives a right in domestic law to override the withdrawal agreement and therefore also the protocol. The question of what you do about international law in that context has been posed, but I am going to leave that on the table for the moment, otherwise we will spend the whole day on it. Greg Smith, would you like to ask the next question, or two questions?

Q26 **Greg Smith:** Good afternoon to the witnesses. Just as the Chairman did for transparency, before we start, while I cannot claim to have known Martin Howe for as long as the Chairman has, he has been known to me for around 20 years or something like that.

Could we just pick up on the status of EU retained law within British law? Perhaps, Mr Howe, you can answer this first. We know, from a written ministerial statement in December, that the Government's review of retained EU law would consider giving it "a more appropriate status within the UK legal system". While I accept that this might be a "How long is a bit of string?" question, how would that best be achieved?

Martin Howe: First of all, let us be clear that retained EU law is a form of pure UK domestic law. It is not any form of an emanation of international law or international treaties. In that, it is quite distinct from the law that arises from the withdrawal agreement and has continuing effect, including the Northern Ireland protocol. In principle, Parliament could repeal the whole lot tomorrow, but, of course, the practical problem in doing that is that you then have great voids in the law.

I would suggest that, in practice, you have to have a timetable for that. I would argue that you need a sunset clause, or cut-off date, which you would put on the statute book. At the end of that, all EU retained law is repealed, and, as the Chairman indicated, if you repeal retained EU law, the previous law, which existed in the United Kingdom before it was brought into force, is revived to fill the gaps. However, if you do that, you then need a programme—if you do not have a cut-off date, we will be 35 years down the line, and there will still be swathes of retained EU law. Law students will still be being taught EU law courses, judges will be practising it, and we will have all of those EU law principles still in our legal system.

I therefore think it is essential to have a cut-off date that may be demanding but that is sensible and achievable. Then, to get there, you need to do two things. The first is around sector-specific reforms, like financial services and data protection, where a lawyer cannot just sort of reform it legally. You also, I believe, need to do more across the board. As sector by sector gets reformed and replaced with pure domestic law, you

also need to do something about what is left—hopefully a residue of decreasing size—but I think that there are things that you could do.

First, I cannot see why this principle of giving special status to decisions of the European Court of Justice has been retained. That could go tomorrow. The alarmists say, "Oh, that means there'd be terrible uncertainty," but, in practice, the judges would be very cautious in departing from existing decisions. In fact, there is a case, which I think was mentioned at your last hearing, called TuneIn *v.* Warner Music and Sony Music, where the Court of Appeal was very cautious about departing from judgments of the European Court—in an area of law that that court has spectacularly messed up, frankly, on communication with the public in the context of copyright. I think that the judges were, probably rightly, influenced by the thought that it is not really the judicial role to, as it were, re-legislate over an area of law, so they left it in place. I do not think that you would get cascades of decisions being overturned if you got rid of the rule altogether.

Short of that, you could extend the ability, to all courts, to depart from the law. On this thing of keeping it at Court of Appeal level, I read the evidence of witnesses from the previous session on this, and it seems to be, very much, a sort of Government lawyer's perspective. I act for privately-funding clients, and if you tell them that you have this decision and you cannot get the court to look at its merits unless you go up to the Supreme Court or the Court of Appeal, at a cost of hundreds of thousands of pounds, that really has a deterrent effect. I think that the good sense of courts, at all levels, should be allowed to depart from decisions. In fact, you could take the provision about post-exit decisions, where they may take them into account if they want to, and apply that to pre-exit decisions too.

Q27 **Greg Smith:** That is incredibly helpful, thank you. If I can expand the question a little bit, you mentioned the concept of a cut-off; we do know that the Government have said that they want new powers to amend retained EU law, under what they have called an accelerated process. They have said that within that there needs to be appropriate parliamentary scrutiny. I will start with you, Martin, as we are already on you, but then I open it up to the rest of the panel to offer your perspectives on what that parliamentary scrutiny process could and should look like to ensure that we have captured all the EU retained law and changed or appealed it in an appropriate manner.

Martin Howe: We have had this very wide, so-called Henry VIII power, in section 2(2) of the 1972 Act. I start from the position of having been critical of the width and scope of that power. Quite apart from the power to give effect to EU obligations, it also affords very wide powers that are discretionary and are exercised by Ministers, subject to parliamentary control, in a very different way from an Act of Parliament, where there is line-by-line scrutiny.

On the other hand, I fear that the sheer scale of retained EU law is such that it would simply not be possible to do the exercise of revising it

without a delegated power. I think that necessity dictates that. I cannot put myself forward as an expert on parliamentary processes for scrutinising delegated legislation, but I would suggest that a delegated power for this purpose is necessary.

One thing that I turned over in my mind is whether you could have a commission or something that looks through retained EU law and comes up with proposals for changing it—or domesticating it properly. I think one could do that, but you would have to be careful because a lot of the decisions on what to put in its place are highly political and would have to be taken by democratically accountable Ministers and Members of Parliament—not by some quango-type body. However, you could have a body that at least does the stock-taking exercise and comes up with recommended options as to what could be done.

Q28 **Chair:** But don't you agree that that actually could take forever? It is another part of the same problem. If this is a change in our legislative statute book—and the principles that we have been discussing are essentially about democracy as well as sovereignty—then we cannot be locked into a situation where some body adjacent to the Law Commission sits down with a massive quantity of law and starts supplying its own judgments on it. That is a political and democratic decision.

Martin Howe: That may be so. I was just saying that it was something that I was contemplating, as to whether it might help the process. It could not be a body that takes—

Q29 **Chair:** As I have said before, Justinian took one look at the situation in the 4th century AD; he gave the job to 12 commissioners and said, "Get on with it. I want this changed. It's got to make sense, because it doesn't make sense for the man in the street anymore." That was in his part of the Roman Empire. They were given a few years in which to get on with it, and they actually did it. They reduced the volume, according to Jolowicz—I remember this from my days at Oxford when I was studying these matters. It was quite astonishing; they did the whole thing without any of the modern technologies that we have available today. They reduced millions of lines of legislation in a very short space of time, and everything seemed to carry on very well thereafter.

Martin Howe: Chair, I confess in my legal education I never had the opportunity to study Roman law. If this is a serious prospect, you need that cut-off date at the end, whatever the process is for getting there. If you don't have that, things will just be left in the long grass.

Q30 **Greg Smith:** The cut-off date point is something we need to take very seriously as we pull the conclusions of this inquiry together. Dr West.

Dr West: In terms of the appropriateness of the scrutiny, that is obviously something we are very interested in. We have long-standing concerns about the effectiveness of existing mechanisms for scrutinising delegated legislation.

Taking a step back, in thinking about what constitutes appropriate scrutiny, there is often a tension, or a trade-off perhaps, between speed and depth of scrutiny. You can see how there is a trade-off there. That is true of any legislative process, but particularly true here. Because of the diversity of retained EU law—you have overarching legal frameworks, real granular nitty-gritty, and you have the scope of it—the idea of a one-size-fits-all solution might be difficult to come across. As a general approach, we think there is value in some sort of sifting mechanism to try and help allocate what counts as appropriate mechanisms for making these changes.

I will say a bit more about that shortly, but on the speed/depth trade-off point, it is useful to contrast this exercise with a recent high profile experience of the use of SIs at speed—the deficiency correction, but of course the response to covid as well. We saw SIs being used quickly, but in both of those circumstances there was a clear external time pressure to do that, which was weighing on the scale of speed, which perhaps does not exist to the same extent here.

Another point I want to make is around the fixed-term nature of those two processes. There is a clear end point. At some point we are no longer going to make corrections to retained EU law. At some point we will no longer respond to coronavirus. Unless there is a cut-off point, this will be an open-ended process. A cut-off point might end up just pushing some of the risks down. You might see the cut-off point getting pushed from that deadline going down the line.

The difference there is what might be being constructed here: rather than a one-off process for changing retained EU law today, setting up mechanisms by which law and policy is made and scrutinised in those areas covered by retained EU law—those areas with EU competencies—and there is obviously a risk there. If the mechanisms used are setting up ongoing processes—potentially indefinite processes for scrutinising that law, where clearly this Parliament had little, if any, say in those in the past—if you use a process that is too focused on speed, that might risk this Parliament having limited, if any, say again in what those decisions are in the future.

On sifting, what I mean is some sort of mechanism by which Parliament today can decide what form of scrutiny is appropriate—looking at the actual policy content and the legal implications of the SI in question. The political and general context are things that cannot be known at the time an Act is passed and when the powers are drafted, whereas with the instruments in front of Parliament today, that is a time when scrutiny is appropriate, and at times that might be an accelerated process. That might be a quick process at times. If it is more substantial, big decisions, there might be a need for other mechanisms.

The experience of ESIC under the withdrawal Act is a useful starting point. This was novel in the sense that it put that decision as to what the scrutiny should be in the hands of parliamentarians. As I say, I see it as a starting point. One of our chief concerns is that the outputs of ESIC have

either been negative or affirmative procedures, neither of which we consider provide for particularly meaningful or effective forms of scrutiny, so the Committee may wish to think about what else would be useful here—things like specialist forms of scrutiny, Select Committee or otherwise; an additional requirement around supporting documentations; impact assessments; possibly in some cases some form of amendability; consideration of the impact on international law of devolution and so forth.

The basic point is to construct a system where parliamentarians—you—can focus your time, energy and effort on what matters, and not have it being spent elsewhere in Committees on issues that are uncontroversial or of limited interest.

My last point on this is to say that, as I mentioned at the start, we are currently undertaking a delegated legislation review. We are looking at the system as a whole. We think as well that for how improvements to retained EU law or issues that were previously within the competence of the EU are made and making sure that this Parliament has a proper say over those in the future, this could act as a pilot for improving the delegated legislation system as a whole, which is something that we think is needed, to prevent, essentially, further erosion of Parliament's authority on legislative matters.

Greg Smith: Thank you. I am conscious of the time, but I want to hear the evidence you have to give. Sir Stephen or Dr Garner, do you have any additional points you want to make?

Sir Stephen Laws: I want to make a few points about what Mr Howe said. First, I agree with the idea of a cut-off. The idea of a cut-off illustrates an issue that arises here, which is that taking powers to remove EU law is going to be relatively uncontroversial. The area of controversiality—the difficulty about drafting the powers—is about taking the power to replace them with something, and how far the replacement goes beyond what was there before. That is an important aspect of this issue.

I also wanted to say that this is one former Government lawyer that doesn't think it is a good idea to make people litigate up to the Supreme Court to find out what the law is. I always used to regard it as a failure if anything I drafted reached the Supreme Court.

On scrutiny, I think the way to look at this is to look at what scrutiny is for. I have always thought it is for two things. First, it is to give democratic legitimacy to matters of political salience. It is important that scrutiny should concentrate on matters of political salience, partly because that is the thing that politicians are interested in, but also because you don't want to be distracted by assuming that it is the job of Parliament to look at every piece of technical drafting that goes on. It is important that Parliament should create incentives for those who produce legislation to reach good technical standards, but that can often be achieved by random sampling. If people who draft legislation think that there is a risk that they will be politically exposed and there will be a political price to pay if a piece

of defective technical drafting is discovered, then that is incentive enough. The main thing is to concentrate on the matters of political salience.

I agree with a lot of what has already been said about that and how that might be achieved and how ESIC is a precedent. It seems to me that what the system has to do is to provide reassurance that points of political salience are not being missed, and to provide the random sampling I have talked about.

I do not entirely agree that current methods are inadequate, and I would be cautious about putting in lots of detailed statutory requirements, because life being what it is these days that exposes the delegated legislation to having itself litigated. I often think that the suspicion that the Government are busy trying to get legislation passed without anybody noticing it is exaggerated. On the whole, Governments like people to know when they are changing the law and having an effect—they want people to know about it so they will accept it and accept that it has gone through the democratic process. A lot of the reason why delegated legislation that is subject to delegated powers receives cursory consideration is because Parliament has decided that that is what is appropriate for it.

Chair: On that particular point, in terms of the democratic legitimacy of much of the legislation that was passed, we are accumulating some interesting archive research to show, for example, through VoteWatch—an organisation that has been doing some groundbreaking work on all this—that there were a significant number of pieces of EU legislation that we couldn't resist, because majority voting meant that it went through, but we still voted against it, because we were so appalled by the prospects.

The ports regulation might be one example of that, which was opposed by every trade union, every port employer and the Government themselves, and they still couldn't stop it. The democratic legitimacy question is an important part of this. It would be invidious if we were to end up keeping on the statute book, through a mechanism of parliamentary scrutiny, something that actually didn't have democratic legitimacy in the first place. That is the main point I would make on that. I'm sorry, Greg, I interrupted.

Q31 **Greg Smith:** My profuse apologies that after 50 minutes of the session, we're only just coming to you, Dr Garner. What is your take on this?

Dr Garner: On the question of what the new accelerated powers of amendment might look like, an important point I would like to stress is that there is reference in the policy paper to amending technical details—the point being that new powers are needed because technical details, such as energy performance certificates, could be enshrined in primary legislation. It is important to note that the paper does not state that the powers would be limited to those technical details, so there is scope for those powers to relate to matters of substance and policy.

On the appropriate level of parliamentary scrutiny, what has to be taken into account is, first, the legislation's status in domestic law and, secondly,

the category of retained EU law. This is all about the level of democratic scrutiny it received during its creation. As Dr West was saying, the category of retained EU law reflects the origins in the EU legislative system, and therefore how much democratic scrutiny it received in the EU institutions. If retained EU law is found in an Act of Parliament, that has to be the fullest extent possible of parliamentary scrutiny.

Of course, Parliament is free to unbind itself from the decisions of its predecessors. If this is done by Ministers without MP involvement, there is a real risk—in particular if these secondary powers are disconnected from a parent Act on which there had been debate. The same goes if the measure's origin is in primary EU legislation, such as the working time directive, which is transposed through regulations in the UK. Regardless of the mode of law used to transpose these obligations, it has received direct input from UK representatives in EU institutions.

Finally, if the Government want to argue for lighter scrutiny—such as in the interests of regulatory efficiency—they need to be very clear on what the conditions for that are; for example, if it is technical details. Crucially, Parliament should be fully cognisant of it and be able to debate it in the passage of any legislation.

Greg Smith: That is very helpful, thank you.

Q32 **Craig Mackinlay:** We have strayed very much into discussing the right forums and locations to make changes, whether by secondary legislation or elsewhere, so I am not going to beat that any further. We have extended our discussion this afternoon into a whole constitutional debate about how legislation goes through this place, depending on its importance.

Let me just say where I think some of the thoughts are developing: the weakest form of changes—those not scrutinised in great detail—is the negative procedure for SIs. That seems to be the prevailing view. Slightly better is the affirmative procedure, because that at least gets laid before the House. Best of all is primary legislation, which gets full debate through the usual channels. That seems to be where we're settling here.

Of course, it is rather bizarre that none of that happened in any shape, way or form with regulation powers, in particular, while we were in the EU; under QMV, we didn't even have a *Hansard* to refer to. We accepted that for a very long time, but we are trying to make something a little bit better. I think what we are settling on is: who is the gamekeeper? Who is the decider? Who is the controlling mind that will decide under which one of those routes legislation will go? Will it be a Minister deciding which route is more likely to get more or less scrutiny? What do the Whips think? What are the politics behind all this? This isn't simply a constitutional discussion; this has quite a big political dimension. I should have said, Mr Chairman, that I've known Mr Howe for many years. I want to put that on record. Based on what I've said there, what are your thoughts on that, Sir Stephen?

Sir Stephen Laws: I think that the sort of triaging system that ESIC—

Craig Mackinlay: Who is the triage nurse? That is the big question.

Sir Stephen Laws: There is a role for Parliament and parliamentary Committees in that. I think that is the sort of process that would give the reassurance that the important matters are coming for proper scrutiny.

Another thing about scrutiny is that it's said that statutory instruments receive inadequate scrutiny, but when a statutory instrument tries to do something that is politically salient, it very often does get a lot of attention—in the other place if not in this one. So I don't think there's a problem about that, but I think you need to give reassurance that nobody is trying to slip anything through. I think this is not as common an occurrence as people would like to think, but you need to give reassurance that it's not there. I was very glad that you didn't mention enhanced affirmative procedures, which is the sort of thing we had for the Public Bodies Bill and for the deregulation—

Craig Mackinlay: I probably didn't know that it existed.

Sir Stephen Laws: It would be better if it didn't, I think. I think all experience of attempts to go and fill the gap between affirmative and primary is that they have ended in failure. There have been various examples, and in all cases the awkwardness for those involved in preparing the legislation has surpassed that which you have to go through for primary legislation. So there are very few examples of enhanced affirmative procedure being used for very long. It was used a few times when it was first introduced and then people decided that it was more trouble than it was worth and they would try to get something in a Bill.

Q33 **Craig Mackinlay:** We have got something of a triage gatekeeper running with the European Statutory Instruments Committee. I don't know whether you have kept an eye on what that has been doing. It seems to me that the only thing it has done is promote from the negative to the affirmative; I'm not sure whether it has ever said anything going the other way. It has always tried to promote what I think we have agreed is a more scrutinising procedure. Have you looked at what that Committee is doing? It is a similar idea to what I think we are discussing here.

Sir Stephen Laws: I have not looked at the way it has been operating, but I know what it can do and I am not at all surprised that it just promotes things, because that's what it's for, really, isn't it? It's for identifying the things where it thinks more scrutiny is required.

The House of Lords Delegated Powers and Regulatory Reform Committee normally insists on promoting, for example, anything that is in the nature of a power to amend primary legislation. If the Government has not offered an affirmative resolution procedure in the first place, they always recommend that it should be that, and the Government always accepts that recommendation. I don't think that's a problem; that's what the Committee would be for. It would not be there for saying, "No, we'll make life easier for the Government." I don't think many parliamentarians—even those who support the Government—think that that is their function.

Q34 **Craig Mackinlay:** This is the final question from me. Under the withdrawal Act, we have the deficiencies-correcting power. Is that any different from what will become the normal procedures? Those powers expire on 31 December this year. I can't think of any examples of what those have been used for. Do you know of any? And is that any different from the normal way of doing business, with the European Statutory Instruments Committee in place?

Sir Stephen Laws: I think that power was directed primarily at things such as where you have a piece of legislation that refers to other member states and we are not one any longer. That is the sort of technical change that it addressed. I think what is proposed now will have to go further than that and, as I said before, I think the difficulty is with taking a power to replace EU law with something else, because that is more or less an open book. But so far as removing EU law is concerned, I don't see what the difficulty would be, although I am afraid I disagree that the effect of repealing a repeal is to revive what was there before. That was the common-law position, but sections 15 and 16 of the Interpretation Act now say it doesn't revive. But you could say that it does; that would be something you could put in legislation.

Q35 **Anne Marie Morris:** Dr Garner, much of what we have discussed has been looking at what I might describe as process and how we address change, given the different types of law that we are looking at. Other than a brief comment from Mr Howe, we have not really talked about the actual substance of it. I think what Mr Howe said was that financial services was one of the areas where we had gone full steam ahead and started to make changes.

Clearly, the process is very interesting and intricate, and it will take us a long time, even if there is a deadline. There are things that need to be fixed now, so what you do you suggest, and how might that work in parallel with a sector-by-sector approach? Would that be better? If we did that, which sectors might you prioritise, and what would be your criteria for prioritisation? Would one be, for example, the quantity in that sector of law that is largely governed by historically EU-driven legislation?

Dr Garner: Thank you for your question. It is perhaps ironic that a contextual sector-by-sector approach, as you have mentioned, could actually better achieve regulatory efficiency, which the Government claims is its major purpose in the policy paper, rather than the general power that it proposes, precisely because when you have a sector, you will know how the law is operating and it is clearer what needs to be changed to fit priorities. Indeed, the policy paper states that in order for the Government to achieve its regulatory, environmental and economic goals, it needs to be able to amend retained EU law.

But this suggests matters of substance and policy priorities that are befitting of primary legislation. Therefore, the point at which an Act of Parliament is debated and passed would be the occasion to create powers of amendment, as Dr West was saying earlier. This is one of the means by which retained EU law can be amended. Indeed, this approach has already

been taken by the Government in recent post-Brexit legislation. However, these examples demonstrate the risk of this ad hoc sector-by-sector approach, which is inconsistency between mechanisms used to amend retained EU law.

There are four different models. The first is schedule 11 to the Fisheries Act 2020. This can be seen as best practice for legal certainty, because minor and consequential amendments are made explicitly to defined retained EU law, such as the common fisheries policy regulation. This is done through explicit revocations and insertion of wording.

The second example, which is section 112 of the Environment Act 2021, is what we have been discussing: the creation of powers to create secondary legislation. But here it is specifically defined in relation to the habitats regulations of 2017, and the purposes for the Minister are also defined, so it is quite a constrained power. This stands in contrast to the third example, which is section 2 of the Trade Act 2021, where a general power is created for appropriate authorities to amend any retained EU law for the purpose of implementing international trade agreements.

The fourth example is what I would say is probably the worst practice for legal certainty, and it is what Dr West mentioned earlier. Clause 67 of the Nationality and Borders Bill creates a disapplication mechanism. This means that if any provisions in the Nationality and Borders Bill—if and when it comes into force as an Act—are incompatible with the retained EU trafficking directive, section 4 of the European Union (Withdrawal) Act 2018 ceases to apply to these directly effective rights. My colleague and I have said this is almost like Schrödinger's legislation, because you have a situation where it is unclear whether that law applies or not until the point at which a court is presumably called on to decide.

Here we see that there is a real mix of different mechanisms, and I would suggest that a way to try to create some consistency, but also to find a good compromise between general and sectoral powers, is through three features. I think this addresses your question about what should be the criteria for prioritisation. The first is that any legislation arising out of a Brexit freedoms Bill should engage in specific modification of retained EU law in the mode of the Fisheries Act, if the review of the substance of retained EU law, which the Government says is ongoing, identifies these explicit incompatibilities with its own priorities. I think those would be the sectors that should be focused on, and they will probably be the sectors that are outlined in the policy paper as the Government's main interests.

Secondly, the accelerated powers that are being discussed here could be created more as a limited and residual insurance policy in order to sweep up in these areas if anything is missed through the express modification. You could create a power saying, "Ministers may create regulations but in these defined areas, because this is what the substance review has shown."

The third point is that legislation could maybe create guidelines for the creation of future powers to amend legislation in Acts of Parliament, which

would avoid the pitfalls of the current inconsistent approach. Here we could do things like establish the distinction between matters of technical detail and substance, and also define the purposes. MPs would directly feed into that.

Q36 **Anne Marie Morris:** That is a very comprehensive and thoughtful answer. It sounds very pragmatic and practical. On those guidelines you talked about, have we got enough experience yet to be able to draft some? It seems to me that that might not be a bad starting point. From everything I have heard, it seems to me that we need to have a parallel approach. We cannot delay the process; we have to move along with some of the subject matter.

Dr Garner: This could be something that comes out of the Hansard Society review of delegated legislation, in terms of trying to distinguish between when something is appropriate for secondary or primary. It is important to note that there is a lot of ambiguity in when a matter should be in primary legislation or in secondary legislation. There are no clearcut distinctions, but I do not think that that should be a barrier to at least trying to do this in this area, particularly if it is a matter of the Government's priorities, while balancing that against legal certainties. It is uncharted territory, but I think it is worth at least trying to create a more general and less uncertain approach.

Q37 **Chair:** Would you not agree that the real purpose of legislation is to take the opinions of Members of Parliament and subsequently, further up the tree from mere Back Benchers, the Government, who make a decision about what kind of policy is needed? The opinion becomes a policy, which is translated into law. In essence, that is a democratic process. Would you not agree—I think you were a little critical of the idea of disapplying laws—that some laws are just politically out of date? Some laws are regarded at one point as a matter of good fashion, but in practice turn out not to be a good idea at all. The concept of disapplication is really no more than saying, "Well, we thought that might be a good idea"—rather like some people thought it was a good idea to be in the European Union but then it was decided that we did not like the failure of democratic legitimacy in the European Union and that we wanted our own self-government, which is an important principle, is it not?

I would be wary and suggest that you might reconsider the fact that disapplication may be necessary, particularly where we have a change in the legal and constitutional environment, so we are now saying, "We want to have our own laws. We don't want them imposed on us by other people, and in particular we don't want to be saddled with laws that were made in a different era for a different purpose with a different kind of democratic foundation." It is not just a technical question; it is actually about voters relating to Government making policy and thereby making law. Do you not agree with that?

Dr Garner: The specific point here is that disapplication in a sense does not serve that purpose, because it delegates the question to the courts. With what you have suggested, if the Nationality and Borders Bill had said,

"Any directly effective rights in the retained EU trafficking directive are now no longer effective," that would be absolutely fine. The fact is, however, that saying "if there are incompatibilities" is deferring the question; it is giving it to the courts to decide that, and then it will be uncertain for individuals whether that law is in force or not.

On your point of principle, I completely agree, but I think that it should be done in a diligent manner of explicitly modifying—going through and saying, as was done with the Fisheries Act, "These laws were made with the input of 27 representatives. We don't think it should be this way; it should be this," and substituting the explicit wording—rather than the compromise mechanism of saying, "Well, if there are incompatibilities in the future, it should be disapplied." The Government and Parliament should do the work now and say, "This is the regime we want to have and we are going to change it now, for the future."

Q38 **Chair:** The courts should not be making law. You are from the Bingham Centre. You will more than remember chapter 12 in "The Rule of Law", Lord Bingham's absolutely brilliant essay on the rule of law and the sovereignty of Parliament. What he had to say about Baroness Hale and Lord Hope of Craighead in that chapter is in itself very interesting. I assume that the Bingham Centre would take the line that the most important thing is the sovereignty of Parliament and not any technical way of getting around it. In other words, if we do not want a law, we change it, because that is what the voters want, which is the democratic principle. He also mentioned Goldsworthy, who said that this was a "magisterial" work. I have spoken to Goldsworthy on a couple of occasions—he is an extraordinarily fine lawyer. In that context, I take it that all those ideas that Bingham presented would be part and parcel of the jurisprudence and philosophy of the Bingham Centre, would they not?

Dr Garner: That is precisely what we advocate in saying that the best way to amend retained EU law is through express modification—through Parliament inserting wording or deciding that wording is repealed—rather than delegating this purely to Ministers.

Chair: As long as sovereignty comes first and the courts apply the law and don't make the law.

Dr Garner: Indeed.

Chair: Thank you very much.

Q39 **Mr Fysh:** At the outset, I should say that, happily, I have known Mr Howe for the last five years and I have worked with him on various things.

To follow on from that point, in terms of how the scrutiny of the existing legal context works, and how that should translate into that prioritisation process and decisions about which particular route for making express changes to the law might be best applied, who would be involved? For example, quite a lot of EU legislation has been interpreted in a purposive fashion by various court decisions through the years. Is that not an example of the sort of thing where the consideration that we were just

discussing is particularly acute? Who would be best to help Parliament to interpret whether that is the case and whether that should therefore go up the priority list? Does anyone have a view on the structure for how that should happen?

Sir Stephen Laws: I think it comes back to the issue of status. The highest priority is for all retained EU law to be translated into a form in which it can exist as UK domestic law, subject to the principles of interpretation and application that apply to other UK domestic law. For example, regulations under section 2 should not be subject, except where they are ambiguous, to any need to refer to EU law to find out what they mean. They should be construed in their terms as any other set of regulations would be construed.

I think there is a priority in translating the other aspects of EU law that have not been incorporated into domestic legislation into something that can be construed as domestic legislation. The priorities are, first of all, section 4, which creates a whole load of rights that nobody is quite sure what they are. If we need them, they ought to be translated into rights that we can access and understand. The stuff that is saved by section 3 also needs to be put into a UK form, so that it can be construed in the same way as all other UK law.

EU law is not introducing new law into the United Kingdom. Expertise, knowledge and access to EU law is going to become obsolete. There are going to be a few lawyers who are going to keep learning about it, but it is not going to matter any more for most lawyers. We need to get the law into a state that all lawyers can access with the skills that they have in relation to domestic law, because they should not have to keep learning law that has passed.

Q40 **Mr Fysh:** We have discussed this, a little bit obliquely, but I wondered if you might be able to say a little bit more, Sir Stephen, about the extent to which the current bespoke arrangements for scrutinising technical changes to retained EU law might be used as a model for the scrutiny of the substantive policy changes that we have talked about. We have talked about committees and that sort of thing, but are there any other features of the way we do that now that are worth looking at and retaining?

Sir Stephen Laws: As I said to Mr Mackinlay, I think ESIC provides a good model for doing the things that need to be done to provide the reassurance that what is coming forward for scrutiny is the important stuff that Parliament would want to consider, and to ensure that there is a system that subjects what is going to be an enormous body of change to the discipline of adherence to technical standards. I think it is wrong to think of Parliament as the author of all legislation; its practical role is as a critic. Parliament cannot look at everything—it does not look at all primary legislation—but it needs to have its attention focused on the important bits, and it needs to look at things randomly so that people know that they have to get it all right.

Mr Fysh: Does the panel have any other views on that point?

Dr West: On the point about ESIC and what we can learn, the distinction between the technical and the political is really salient. We have looked a bit at how ESIC has operated and what it has looked at. You are right to say that its job has been largely technical. The regulations made under section 8 of the withdrawal Act are very technical in nature, so its job of sifting and applying either the negative or the affirmative procedure to those is inherently technical.

When we look at this issue more widely, including within the idea of future policy and political changes to what retained EU law says and does, it becomes a question of a different ilk. It is one thing to have a Committee looking at those technical matters and saying, "Hang on, which bits do we need to make sure parliamentarians are aware of?"; it is another to work out their political salience and the political interest in them, but that is an important function.

Mr Mackinlay asked, "Who is the triage nurse?" You probably need more than one nurse, because you need to think about the technical, and look at issues where technical matters of interest arise, but there are also political matters—those are, evidently, a different matter. When thinking how to build on what ESIC has done, an awareness of incorporating not just the pure technical matters but the political salience will be key.

Q41 **Jon Cruddas:** Good afternoon, everybody. I should put on the record that I do not know Mr Howe, which I think is unique for this Committee. Dr West, I will go back to something you began to talk about when you mentioned some of your concerns with the current delegated procedures and your ongoing review. The Government's stated desire for more delegated procedures begs the obvious question about what lessons from the use of delegated powers in other areas can be applied to retained EU law. You mentioned the covid experience earlier. Can you expand on that?

Dr West: Certainly. Covid in particular has taught us a great deal about the limitations in the current processes. One big and important lesson covid has taught us is that SIs can sometimes be of great interest—they can be pretty significant and have far-reaching impacts. Just because a power has been taken, and just because many SIs are technical in nature, that does not mean that they all are.

Alongside that, although some SIs are of significance and interest, the mechanisms for facilitating interest in and debate around them are lacking. Through covid, we have come up with some bespoke or makeshift arrangements, but they perhaps do not form a model or something that can be rolled out more widely.

I think that connects to the wider point I made earlier about how you cannot always know how much interest there will be in the use of a power when you are drafting it, because that power could be used in different ways, years—or potentially decades—later. It might even be the case that

you knew what it would be used for, but the change in political context means that suddenly it is of real interest. That is where the sifting mechanism—the way you put the decision in the hands of parliamentarians today—could add value.

There are other lessons in the distinction between law and guidance, which has been much discussed through covid. That is a very important lesson. Of potential relevance here are decisions on whether to delegate or transfer powers to regulators, which is being discussed. That is part of the wider question about how we distribute powers that have been repatriated from the European Union. Where do they go between Parliament, the Executive, regulators, the devolved nations and so on?

There are lessons around urgency. First, clearly, you need urgent powers sometimes, and SIs are crucial for that—that is undoubtable—but we have seen times when Departments or Ministers have perhaps become too habituated to the use of those urgent procedures. We therefore need greater safeguards or mechanisms to control the use of these urgent procedures, which, on the scales of speed and depth of scrutiny, weigh heavily on speed and less so on depth of scrutiny. One thing we have talked about previously is requiring a Minister to give an oral statement to the House every time an urgent procedure is used, to make sure this really is a matter of urgency.

More generally, we have talked about inadequacies in the procedures in general—

Q42 **Jon Cruddas:** A binary choice, do you mean?

Dr West: Between the negative and affirmative procedures—yes, exactly. While the affirmative is a step up from the negative, is it really meaningful scrutiny? We would say, no, it is not particularly. Something that might do that is worth looking at.

That comes hand in hand with concerns over ever wider use of delegated powers. One thing we are concerned about there is the precedent effect, where once powers are given of a certain width, it becomes easier for the Executive to argue for wider and further use in the future.

Q43 **Jon Cruddas:** A sort of ratchet effect.

Dr West: Exactly.

Chair: Last question—Margaret Ferrier, please.

Q44 **Margaret Ferrier:** My question is to Mr Howe, who I don't know either, and Dr Garner. There is currently no publicly available comprehensive database of up-to-date retained EU law. The Government have said that the public has a right to know where EU-derived law is still on the statute book. Is a database of retained EU law needed? Is it feasible to establish one?

Martin Howe: Thank you for that question. This is a subject on which I do feel very strongly. I am going to hold up an exhibit, which came from the

publishers last week. It is the 10th edition of "Russell-Clarke and Howe on Industrial Designs". I am the senior editor of this book. Design law is now about 70% or 80% retained EU law. It includes both a UK Act that has been heavily amended over the years by regulations under section 2(2) of the 1972 Act, and a retained direct regulation, the community designs regulation.

The Government have kindly published the regulation as it stood at the date of the end of the transition period. What the Government have not published is the regulation as amended—it has been quite heavily amended by statutory instruments under section 8 of the 2018 Act.

Not only has it been amended once, but it has also actually been amended in two different ways, to govern two different legal rights. Without delving into the intricacies, one is the continuing community unregistered design right, and the other is the UK supplementary unregistered design right.

In order to produce this book, which has expanded by about 25% in volume, the publishers' editorial staff and the authors had to go through and produce not one but two complete versions of this regulation for the appendices, and transpose into it all the changes made by some very intricate statutory instruments.

If you want to know the law, and you are able to pay the very modest sum of £329—for £427 you can have the ebook thrown in as well—then you can find it here. But if you are a member of the public and you want to know how the designs regulation now stands as part of our law, it is an absolute nightmare—for me to do it, and I am trained in this field, it is enormously time-consuming—for someone who isn't legally qualified to try and realise, "Well, that bit has been chopped out," or "That bit has been changed," or "The reference to the EU has been changed to the United Kingdom and the EEA area," or whatever.

I would say, in fairness, the statutory instruments database of UK statutory instruments is a very good and useful tool because they do transpose the amendments into it so you can follow them. But the exercise has to be done for the retained direct EU law.

Q45 **Chair:** What you are really saying as well, I suspect, is that in practical, day-to-day terms, the really important question— I remember being on the Tax Reform Committee under a Supreme Court judge. It was to consolidate the entire tax law, and by the time you had looked at "Butterworths" and all the other stuff and the accumulated volume, the real question that lies at the heart of some of this and, as you have clearly indicated, in relation to the retention of EU law in this context is that for the ordinary man in the street—after all, that is what our legislation is meant to be about, so that people can understand it. As I said to the Home Secretary in the statement only yesterday—I think it was actually to the Foreign Secretary—"Can you make sure, when these economic sanctions are being brought in, that they are accompanied, because they are very complicated when you look at them, by something in a language that people can actually understand?"

The democratic question that underpins all this is also related to the volume of legislation that has been generated—partly through retained EU law—which is completely and totally missed by the public at large. You couldn't begin, quite understandably and rightly, to go through it all. We really have to make a massive effort to make our laws much simpler—rather like the Sale of Goods Act 1893, which is regarded as one of the paradigms of clarity of law. We must get back to that and get away from all the unnecessary complications.

I just want to ask this of Stephen Laws, who after all is one of our foremost parliamentary counsel—he was First Parliamentary Counsel. Do you agree that not oversimplifying but making the law accessible and understood by the public is part of the democratic process, and getting rid of retained EU law will help us to do just that?

Sir Stephen Laws: Yes, absolutely. Inaccessible law is a clear contravention of the rule of law. If people don't know what the law is, they can't organise their affairs to comply with it.

Q46 **Chair:** But ignorance of the law—this is laid down—actually is no excuse. So they tell us, but what if you can't understand it because it's so complicated? Why should people be put into a position, on any kind of statutory basis, of being expected to carry out their business when they cannot possibly be expected, unless they go to some famous QC or whatever it is—lawyers all cost money—to understand the law? Law has to be made simpler and more relevant to people.

Sir Stephen Laws: I also agree that there are considerable practical problems in reproducing it, as a practical exercise, and that the solution is to move it all into domestic law that is accessible.

Chair: And then we can deal with it.

Sir Stephen Laws: People can find it all in one place, although I think a digest would be highly desirable. I was trying to remember when I first went to a meeting about the statute law database. It was sometime in the 1980s, and I think the statute law database, now legislation.gov.uk, eventually got itself up to date in about 2016. So I think there are problems about producing it. I don't in any way criticise the people who got it up to date; I think they did a magnificent job. But there were lots of predecessors who didn't get it up to date.

Margaret Ferrier: Dr Garner, do you have anything to add?

Dr Garner: Yes. Thank you for the question. I agree that it is absolutely desirable, from the perspective of rule-of-law principles but almost democratic principles of accessibility and clarity of the law, for users and practitioners to have such a database or catalogue. On your first question, I wouldn't go as far as saying that it is strictly necessary in order for the legal system to operate, because as Mr Howe was saying, you can find this on the statute book, on legislation.gov.uk, and also on the EU—I think it's the EU Exit Web Archive of the national archives, which is the EU direct legislation.

Chair: In Kew.

Dr Garner: Indeed. But of course it is incredibly difficult to see it all in one place, so it would be an extremely useful tool for accessibility and clarity if there were this definitive statement that meant that practitioners and users didn't have to cross-reference everything and sew together the regulations amending the law. Indeed, it would promote legal certainty and also scrutiny, so long as the catalogue contained proposed amendments in a kind of "track changes" form.

This would mean that practitioners could, in real time, advise their clients on the state of retained EU law and what changes could be made to it, no matter how accelerated powers of amendment—potentially through secondary legislation—would be. Crucially, I think that this catalogue, if it had those tracked-changes amendments, would also assist MPs, and Committees like this one, to be proactive in their scrutiny.

On feasibility, it would obviously take a lot of capacity, as Sir Stephen alluded to, but I do not see technical barriers for the cataloguing of EU-derived domestic legislation—the first category—and EU direct legislation, as it is already in a textual format and is accessible. However, there is a challenge in the third category of the saved rights, under section 4 of the EU withdrawal Act. That is because they are not found in a defined legislative form—a textual form—at the moment.

I think the catalogue exercise risks undermining the purpose of section 4 as a sweeping-up provision to capture all of the possible directly effective rights from the treaty or the directive. If we had a catalogue that purported to be comprehensive on retained EU law but missed any of those rights, it would be undermined and people would not know which law actually applied to them. You would therefore need great care— You would probably need expertise in EU law to capture all of that in a catalogue, and it might be a desirable first step to just start with a database of the retained EU domestic derived law and the EU direct legislation.

I want to make one further point on the cataloguing exercise, about what could be good practice in the catalogue, to maybe ensure that powers of amendment do not overstretch. I think that maybe the catalogue could just focus on provisions of retained EU law in primary legislation, which have not actually transposed EU law obligations.

An example of that is section 5 of the Modern Slavery Act 2015, which implemented provisions on maximum prison terms from article 4 of the EU trafficking directive, but section 54 of that same Act creates obligations for companies to provide a statement on modern slavery and human trafficking at the start of every financial year. That was not derived from any obligation in the directive, so constituted a sovereign choice of the UK Parliament. Even though it is within that category of retained EU law, it is not actually an EU law obligation. If the catalogue managed to demarcate between those provisions—I think it is called gold-plating—then that would reduce the risk of any accelerated powers overreaching, and actually

undoing, policy choices made by Parliament in passing that legislation, aside from their obligation to transpose EU directives.

Chair: The conclusion that one would draw from that would be that the one thing that we do not want is to have a retention of EU retained law on our statute book. It is actually likely to create uncertainty, because you then have two sets of statute law. One is the kind of law that we make in the normal course of events, as we would put it—certainly post-Brexit and pre-1972 laws—where we made our own laws according to our own democratic principles, policies, and all of the things that I mentioned before. At the same time, we now have another body of law, which is more likely, if it stays on the statute book—and I think also on a database, for that matter—to then result in uncertainty, because you'd have two completely different sets of public statute law.

Would I not be right in saying that? The courts would be expected to apply different systems of interpretation and methodology in interpreting it too, so, on the object of the exercise, to come back to my rather straightforward and blunt point before, we ought to be seeking to make our law less complicated and more based on the common law, and the interpretation of law as we have understood it before.

By way of conclusion, I would thank all four of you for what has been a very interesting afternoon. It was a little bit longer than we expected, but thank you very much for coming.