



OFFICIAL REPORT
AITHISG OIFIGEIL

Constitution, Europe, External Affairs and Culture Committee

Thursday 10 November 2022

Session 6



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CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE
25th Meeting 2022, Session 6

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Donald Cameron (Highlands and Islands) (Con)

COMMITTEE MEMBERS

*Alasdair Allan (Na h-Eileanan an Iar) (SNP)

*Sarah Boyack (Lothian) (Lab)

*Maurice Golden (North East Scotland) (Con)

*Jenni Minto (Argyll and Bute) (SNP)

*Mark Ruskell (Mid Scotland and Fife) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Michael Clancy (Law Society of Scotland)

Dr Emily Hancox (University of Bristol)

Dr Kirsty Hood KC (Faculty of Advocates)

Charles Livingstone (Brodies LLP Solicitors)

Professor Alison Young (University of Cambridge)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Constitution, Europe, External Affairs and Culture Committee

Thursday 10 November 2022

[The Convener opened the meeting at 09:33]

Decision on Taking Business in Private

The Convener (Clare Adamson): Good morning and a warm welcome to the 25th meeting of the Constitution, Europe, External Affairs and Culture Committee in 2022.

Agenda item 1 is a decision on taking business in private. Are members content to take item 3 in private?

Members *indicated agreement.*

Retained EU Law (Revocation and Reform) Bill

09:34

The Convener: Item 2 is an evidence-taking session on a legislative consent memorandum on the Retained EU Law (Revocation and Reform) Bill.

We are delighted to be joined by Dr Kirsty Hood KC, Faculty of Advocates; Dr Emily Hancox, lecturer in law, University of Bristol; and Charles Livingstone, partner, Brodies LLP Solicitors. We are also joined online by Michael Clancy OBE, director of law reform, Law Society of Scotland; and Professor Alison Young, professor of public law, University of Cambridge. I welcome them all warmly.

I will try to manage the hybrid situation. It is never as easy as when everyone is in the room but we will try our best to ensure that everybody gets a chance to contribute.

I will open with a question relating to our recent report into the impact of Brexit on devolution, in which the committee set out its view that

“the extent of UK Ministers’ new delegated powers in devolved areas amounts to a significant constitutional change.”

The Retained EU Law (Revocation and Reform) Bill is another bill in the post-Brexit era that confers significant powers on ministers, including United Kingdom ministers, potentially in devolved areas. Do the witnesses have reflections on that? Is the bill’s approach proportionate?

Dr Emily Hancox (University of Bristol): Thank you very much for inviting me.

I will address the changes to devolved competence and the level of significant constitutional change brought about by the bill. It appears to me that, although the bill in some ways does not make significant changes to devolved competence, it changes the division of powers in the sense that it grants the UK Government—ministers of the Crown—powers over a considerable amount of retained European Union law, which will include many statutory instruments, including Scottish statutory instruments, without any proposal for a consent mechanism.

On a wider constitutional issue, the bill also changes the protection of fundamental rights in the UK, in the sense that the general principles of EU law will no longer be part of retained EU law. That introduces a further divergence in fundamental rights protection across the UK, in that Northern Ireland still remains bound by the Charter of

Fundamental Rights of the European Union, although there are powers potentially to restate it.

Dr Kirsty Hood KC (Faculty of Advocates): I agree with what Dr Hancox said. There are two key parts to the issue. The first is one that Dr Christopher McCorkindale already identified when advising the committee, which is the extent to which, in practice, the bill allows UK ministers to move into the devolved space. Secondly, the mechanism involved allows that in a way that does not necessarily require consent from the Scottish Parliament. Those are the two key areas in relation to which I can understand why the committee would want to consider whether the bill involves an incursion into devolved competence.

Charles Livingstone (Brodies LLP Solicitors): From my perspective, the striking thing about the powers conferred on ministers of the Crown in the bill is that they are at least in part powers to preserve and restate legislation that is within devolved competence. I find it surprising that there would be thought to be any need for the UK Government to perform that role. To put it simply, if the Scottish Government does not care enough to use its own powers to restate or save legislation that is in a devolved area, why would the UK Government want to step in? The inclusion of powers for the UK Government in those areas is indicative of a little bit of a habit having been formed by the earlier Brexit legislation.

Whereas in relation to legislation such as the European Union (Withdrawal) Act 2018, one could at least see the argument that there were certain things that, mechanically, would need to happen in order to give effect to Brexit, and that UK ministers might want to have the power to ensure that those things happened even if the devolved authorities were not keen to exercise their own powers, I see no equivalent need in the Retained EU Law (Revocation and Reform) Bill. I see no mechanical necessity for the UK Government to be able to step in to do something in devolved areas if the Scottish Government or the other devolved authorities have declined to do so.

Therefore, to some extent, we are in a different situation from the one that we were in with the Brexit legislation—the stuff to give effect to Brexit as a mechanical issue. Whatever one's philosophical conception of Brexit—whether the bill is completing Brexit or otherwise—we are no longer in mechanical territory, where there are certain things that are unavoidable and which somebody has to do. If we take the sunset provision as our starting point, I do not see what the objection would be to saying that, if the legislation in question is within devolved competence, only the Scottish Government should have the power to decide whether it stays, is restated or is modified.

That is my concern. We might say that the core Brexit legislation was *sui generis*—it was in a category of its own, because they were extraordinary times and so on—but this seems to be becoming a bit of a habit and being repeated in areas in which the same case cannot be made.

The Convener: Unfortunately, we have technical gremlins, which I believe mean that our online witnesses cannot hear our discussion. I hope that we will be able to bring them into the discussion shortly. I apologise to them for that situation.

We move to questions from the committee, starting with Mr Cameron.

Donald Cameron (Highlands and Islands (Con): I refer to my entry in the register of members' interests: I am a member of the Faculty of Advocates.

I want to pick up on Mr Livingstone's final point. Obviously, the Scottish Government has the ability to "keep pace" with EU law, and it is the stated policy of the Scottish Government to align with EU law. The Scottish Government has the ability to do so in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. I am interested in the relationship between the Scottish Government's existing ability to align with EU law and the potential under the Retained EU Law (Revocation and Reform) Bill for the Scottish Government and others to restate retained EU law. Do you have any further observations on that?

Charles Livingstone: Is that question for me specifically?

Donald Cameron: It is for all the witnesses.

Charles Livingstone: If the bill goes through, the Scottish Government's powers to restate EU legislation and, more important, to save it from repeal to begin with would certainly mean that the Scottish Government would have the ability to stop any retained EU law that is within devolved competence being sunsetted. That creates issues of legal certainty, which we might come on to, depending on the mechanics of how it would work.

Whether we look at the powers in the Retained EU Law (Revocation and Reform) Bill or the powers in the continuity act, which provides very broad secondary legislation powers, between the two pieces of legislation, the Scottish Government would have very wide powers to preserve—if that is the right word—retained EU law.

That connects with my previous point, which is that, given that the Scottish Government has all those powers, I do not think that the case has been made for the UK Government to have the powers to do the same things.

Dr Hood: All that I would add to that are two possible issues that relate to keeping pace, one of which was flagged in the faculty's written submission, which is the fact that the Retained EU Law (Revocation and Reform) Bill talks about not increasing the regulatory burden and the inability—if something is being replaced or alternative provision is being made—to increase the regulatory burden. It would be necessary to consider how that might interact with a desire to keep pace.

The other thing, which is outwith the four corners of the bill, is whether the United Kingdom Internal Market Act 2020 would put a brake on some of the mechanisms related to keeping pace.

09:45

Donald Cameron: Do you want to add to that, Dr Hancox?

Dr Hancox: I do not have very much to add. I suppose that at this point, there could be a proliferation of secondary legislative powers of different scopes and with different potential for scrutiny. The procedure that is adopted and the method that is used will be things that the Scottish Parliament will want to consider.

Donald Cameron: What is the alternative here? Is the realistic alternative to leave retained EU law on the statute book and in force, so that slowly, over time, the UK, Scottish and Welsh Governments can pick off what they want to remove and leave what they want to remain?

Dr Hood: That was well put and I think that it is the alternative. That was already the position. The idea was that at the end of the transition period, certain legislation, which plainly could not work without the UK being an EU member, would immediately be removed from the various legal systems. Some of that has already been identified and removed. A degree of amendment—although perhaps not particularly significant amendment—and modification was required to make certain things work within a different scope, and that has taken place.

What that left is exactly what you described: the ability to have a sector-by-sector, area-by-area or topic-by-topic review of what is there. Something can be changed or altered either because of that sectoral review or just because something comes to be a priority or an issue of focus for this Parliament or the Westminster Parliament. Things can be changed when it appears appropriate or by way of a sectoral review. I agree; that is the alternative.

Donald Cameron: Can I check whether our witnesses online can hear us?

The Convener: I believe that they are back online. If they want to answer the first question as well, they can do that.

Donald Cameron: Absolutely. I do not know whether Mr Clancy wants to start with my second question or my first one, which was on the tension between keeping pace and the bill.

Michael Clancy (Law Society of Scotland): Thank you for that interesting first question. I draw your attention to the comments of Tobias Lock in the paper that is before the committee today. I would not depart from anything that Dr Lock would say, in terms of the way in which the continuity act's powers have run parallel with the provisions in the RUEL bill. In years to come, the Scottish Government could enact legislation that would keep pace with EU law, even though it may have been sunsetted or otherwise dealt with under the current bill. That covers my comments on that question.

I will just locate on my screen the other question that you asked. No, I do not have your second question on my screen. Could you repeat it, please?

Donald Cameron: Yes, my second question was about the alternative. Speaking in very general terms, is the alternative to this just to leave retained EU law on the statute book and, in time, for any Government to pick off what it chooses to remove and just leave in place that which it would prefer to remain? Is that the obvious alternative?

Michael Clancy: It is the obvious alternative and, in fact, it fits with the plan, in so far as there was a plan. To quote from the "Legislating for the United Kingdom's withdrawal from the European Union" command paper, the then Prime Minister Theresa May explained that the plan was

"to convert the 'acquis' ... into UK law at the moment we repeal"

the European Communities Act 1972 and then proceed to the following:

"The same rules and laws will apply on the day after exit as on the day before. It will then be for democratically elected representatives in the UK to decide on any changes to that law, after full scrutiny and proper debate".

I think that the reference to "democratically elected representatives" is meant to comprise the UK Parliament, the Scottish Parliament, the then Welsh Assembly—now the Senedd—and the Northern Ireland Assembly.

The then Prime Minister had it in mind that there would be "full scrutiny" and "debate". Unfortunately, aspects of this bill will not permit that full scrutiny of or debate on time limits and deadlines, which are scattered throughout the bill, and the parliamentary procedures—generally

speaking, they are of a negative legislative element rather than an affirmative one—that are to be adopted when any regulations made under the bill are looked at.

Donald Cameron: Could I bring in Professor Alison Young on the same questions, please?

Professor Alison Young (University of Cambridge): I have nothing further to add on your second question. I agree that there is that possibility, but you have to read the bill against the backdrop of other provisions such as the United Kingdom Internal Market Act 2020, which would place a limitation in practice on how extensively you would be able to apply and implement EU law.

With regard to your further question about the alternative, I agree that the main alternative would be to take a sector-by-sector approach. That has the advantages of preserving legal certainty and of enhancing democratic scrutiny, because there would be more time to go away and investigate and scrutinise through primary legislation, not just secondary legislation. Therefore, you would involve legislatures more effectively in scrutinising the new rules.

It also has the advantage of enabling further consultation processes. Different legislatures and Governments would be able to approach those who are influenced by the existing rules and ask them which they want to keep and which should change. That would give us a much better way of thinking about how far we want to mirror EU provisions or potentially change them.

The only other possible alternative that I can think of as a kind of midway point would be to do something a little bit more staggered—take your sector-by-sector approach but set deadlines and, if you were going to have sunset provisions, be much clearer about which provisions of EU law were going to be sunsetted in that way.

One of the problems with this particular piece of legislation is that, although in some senses it might be easy to identify retained EU law enacted under section 2 of the European Communities Act 1972, because you can search for that, it is much harder to recognise every single piece of secondary legislation that was intended to implement an EU obligation but which was enacted through another piece of parent legislation. On Tuesday, for example, we saw information about further pieces of legislation that have been identified—I think that there are 1,400 more than were on the EU dashboard. That highlights how difficult it can be to spot everything.

The other possible midway point would be to do a search and say that these are the pieces of legislation that we have found and these are the ones that will be sunsetted within a certain time period, with longer time periods to scrutinise that.

That is the only other possible midway point that I can think of. Obviously, that would involve a lot of rolling provisions to set deadlines and would be far more complicated than the alternative that you have proposed, which is preferable in terms of democratic scrutiny and legal certainty.

Alasdair Allan (Na h-Eileanan an Iar) (SNP): My question is for anyone to answer, but I will direct it first to Mr Livingstone.

Aside from all the democratic questions that trouble everyone on the committee about what is in the bill and the tabula rasa that it seems to want to create, I have a question about the sheer scale of what the UK Government is proposing. It is difficult for us to get an idea of the amount of civil service time that might be involved in trying to recreate the laws that are sunsetted, whether the Scottish Parliament chooses to go along with the approach or not, given that the Government has just discovered 1,400 laws that it had forgotten about.

I see that Dr Hood is interested in answering, but I will go to Mr Livingstone first.

Charles Livingstone: I can most usefully answer that from the point of view of a practitioner who advises clients on what the law is.

You refer to the bill having a tabula rasa approach, but I think of it in terms of being concerned with where the onus is, and the onus is on the taking of proactive steps to preserve legislation rather than to repeal it or, as Alison Young suggests, identifying particular pieces of legislation for sunsetting. A greater use of sunset clauses in legislation might be a good idea, as that would encourage more post-legislative scrutiny to take stock of things and work out whether the legislation is still required. However, doing it in the way that the bill does is difficult because, as Alison Young said, you cannot know with absolute certainty what is within the category of things that is being repealed.

The one thing that I would add to that, from a practitioner's perspective, is that the Scottish Government's request of the UK Government is to exclude from the scope of the sunset clause legislation that is within devolved competence. Leaving aside any democratic issues, as you have said, from a practitioner's perspective, that would be an enormous headache. It would be difficult to have to start by identifying whether something is within the category of law to which the sunset provision applies and to then ask whether it is in the sub-category of things that are within devolved competence, which is, similarly, not always an easy question. From a legal certainty perspective, that would create quite a lot of doubt about whether a given piece of legislation was still in effect.

Alasdair Allan: Dr Hood, I think that the broader question is: why would any country volunteer to go down this legislative route?

Dr Hood: This is November 2022, and the headline time for revocation is set for the end of 2023. This is a small issue, but I echo the point that the Law Society of Scotland made in its written submission, which is that “the end of 2023” is a surprisingly vague term, given that, often, a degree of precision requires to be used in pieces of legislation. However, leaving that small technical point aside, we are talking about a date that is just over a year away and, given the amount of legislation on the dashboard and, as has been noted, the additional amount of legislation that has recently been identified, it has to be said that this is an absolutely massive piece of work.

As Mr Livingstone has pointed out, the nature of the sunset clause means that people will have to take active steps to preserve pieces of legislation, and going through all those pieces of legislation, identifying what things must be preserved and deciding whether to do that by restating or replacing them is a massive job. There are a number of dangers with that. For example, there is a danger that the civil service and the various parliamentary committees and chambers might not be able to cope with the amount of work that is involved as well as dealing with the other workstreams that are important.

10:00

There are also issues about whether legislation that was put in place to replace or restate has been rushed, which leads to concerns about whether unintended consequences or uncertainty thereby arise, because things have had to be put in place quickly without stakeholders being able to give advice on how things work or because there has not been enough time for the sense checking and testing that drafters, civil servants and the Parliament would normally wish to do.

The other big risk, because of the sunset element, is that certain things are overlooked and pass out of the statute book without anyone realising that that has happened. That would mean that—to put it plainly—we would end up with gaps in the law. That would result in uncertainty, extra cost and—at worst—injustice for people who might be affected by something dropping off the statute book because people were in a rush to deal with such a massive project.

Emily Hancox: I can only reiterate what has already been said about the huge volume of statutory instruments and retained direct EU law. However, there is a deeper point than simply keeping track of the various pieces of legislation.

As I said in my written submission, I do not think that section 4 of the dashboard is particularly comprehensive in terms of the rights that might be lost.

It is important to note that, in its sunset, the bill also sunsets a number of interpretative principles, and proposes to abolish not only general principles of EU law but the supremacy of EU law. When we think about the task facing the civil service and the devolved Administrations, we must also identify where domestic law has been interpreted in a particular way and where certain conflicts have been resolved in a certain way. The issue goes beyond the difficult task of identification and goes to the potential unforeseen changes due to, for example, changes in interpretation based on law that might not have been preserved.

There is also the fact that there is now a power to restate or replace, which might lead to differing restatements or replacements across all four nations of the UK in a way that it is hard to see interacting with what has already been agreed or proposed in terms of common frameworks and the United Kingdom Internal Market Act 2020. We need to think about what needs to be done beyond simply keeping track of all the different pieces of retained EU law.

Professor Young: The only thing that I would add is that each of the ministerial departments in Westminster will be trying to take stock of its particular area, and it will not necessarily always be clear which ministerial department has responsibility for the pieces of delegated legislation that have been identified in the dashboard or later on. There is not only the problem of identification and working out whether to restate something as well as trying to find the time to do those tasks; there is also the possibility that there will end up being all sorts of clashes between departments. That means that some things might fall through the gaps, because one department thinks that something belongs to another department and so on, or there might be a situation in which departments have to have negotiations about which one will look at various areas.

We are talking about a huge task that will be difficult to do in a short period of time, without extra resources and scrutiny. The problem is that, because of the sunset clause, if you have not discovered something and decided what to do with it in order to retain it, it will just disappear. That will lead to huge problems in terms of legal certainty.

Michael Clancy: I agree with all the comments that have been made on the issue. I will offer just a couple of observations.

The blanket nature of the sunset provision in clause 1 is unjustified. I have seen pretty specific

sunset provisions in other pieces of legislation. The clause does not identify the legislation other than in the limited way of stating that it is all the “EU-derived subordinate legislation” and “retained direct EU legislation” that is to be revoked at the end of 2023.

Ideally, one would want to see a schedule with a list of those items of legislation so that people would know exactly what was going to be revoked, but there is no such list. I am sorry to say that the dashboard promises a lot but delivers not exactly what one would have hoped for. Apart from the rather confusing way in which the dashboard describes that it applies to law that has been prepared and implemented by the UK Parliament and the UK Government, it also says, “Oh, and by the way, there might be some devolved matters in there, too.”

Out of interest, I took a look at the Ministry of Justice section. Sure enough, there are pieces of legislation of Scottish origin on the continuity of the Rome convention on contract and non-contractual obligations, but one would have to know what one was looking for in order to find those. That identification issue is one of the difficulties that one is confronted with. That will be a big job. There are 2,400 pieces of legislation on the dashboard at the moment and a further 1,400 to be added, and then there is the EU exit legislation that applies from the devolved legislatures, so that will mount up to approaching 5,000 pieces of legislation. Perhaps the number will be slightly fewer, or perhaps slightly more. I am not sure that anyone has done an accurate count.

There is also the issue that the sunset provision can be extended only by ministers of the Crown—the devolved Administrations do not have that power. That creates additional uncertainty, because we are not sure that the minister of the Crown would have the same sensitivities to devolved retained EU law, to put it in that way, as they would have to all the other pieces of legislation that Whitehall departments will deal with.

I did a short analysis and, with help from the Delegated Powers and Law Reform Committee clerks, identified that 83 pieces of subordinate legislation were dealt with under the protocol between the Scottish Government and the Parliament. I think that a further 86 pieces of EU exit legislation, which may or not all be retained EU law, were passed by the Parliament, relate only to devolved matters, and were not requests to the UK to include a devolved provision in a UK instrument. That clearly indicates that there are those elements. A rough rule of thumb takes us to 170-odd pieces of subordinate legislation, but that is not necessarily a good way to do things,

especially knowing that my arithmetical skills are not the best.

Alasdair Allan: If there is time, convener, I will direct my other question to Mr Livingstone, as he referred to some of those themes.

The Hansard Society has indicated that the proposed legislation would be “an abdication” of many of the UK Parliament’s roles. I do not know what word would be used if the UK Parliament chose to remove some of the roles of the Scottish Parliament—I presume that it would be “deposing” rather than “abdication” those roles; I am not sure how it works.

The Hansard Society has said that the bill could have

“potentially serious implications for devolution”.

Will you give an indication of the implications for Scots law and the way that it develops? What will happen if it is developed increasingly by ministers who might have, to use Mr Clancy’s words, limited sensitivity to Scots law making?

Charles Livingstone: That goes back to the point about whether it is necessary for ministers of the Crown to have powers to restate, amend and so on in relation to devolved matters. I am not sure that I can improve on my previous answer, which is that I do not see the need for such powers. I do not get the impression that the powers are being conferred in anticipation of their actually being used by ministers of the Crown in relation to devolved matters, and that only reinforces my uncertainty about why there should be that scope to begin with.

At the moment, we can talk about the points in principle, which we have done. If we were to talk about them in practice, we would be speculating about whether the powers would actually be used. I would be very interested to know why the bill is written in the way that it is written and why powers are conferred in the way that they are conferred. Without knowing that, I am not sure that I can comment, but others might feel that they are better placed to speculate than I am.

Dr Hood: I will add briefly to what has been said. Alasdair Allan is quite right to identify the fact that Scotland has a different legal system. There are therefore a number of different aspects. For example, the Scottish Parliament might want to take a different direction, and there are also technical issues relating to Scots law continuing to work. If certain regulations or laws were passed at Westminster, it would be important that there was sufficient technical input to ensure that they worked in the different context of the Scottish legal system.

My only other point is the broader one that has already been covered. As has been said, the

Hansard Society has raised concerns about a lack of scrutiny in relation to the way in which legislation could be passed at Westminster. If such powers were used in the devolved space—we do not know that that would happen—there would be concerns relating to the Scottish Parliament. Obviously, if there were concerns about scrutiny and the way in which laws were being passed, the Scottish Parliament would be concerned about whether there had been sufficient input and scrutiny.

Charles Livingstone: Can I come back in briefly?

The Convener: Of course.

Charles Livingstone: I just realised that we should not be unfair to the Office of the Advocate General. The UK Parliament and the UK Government frequently make legislation that applies in Scotland and interacts with Scots law, and the Office of the Advocate General is there to ensure that such legislation works with Scots law. In technical terms, there is the ability to ensure that legislation fits with Scots law. It is not a case of a minister of the Crown freelancing and assuming that the law in Scotland is the same as it is in England and Wales.

That answer does not respond to the points about accountability and scrutiny. However, purely in technical terms, I was probably a little bit unfair to the UK Government's Scots law capabilities previously.

Michael Clancy: We can set the issue in the context of what we have by way of scrutiny at Westminster and in the Scottish Parliament. The bill provides for a limited period of time until the revoking takes place. That limit is fast approaching; it is now only a year away. Certainly, from the point of view of the Scottish Government, which has already announced its programme for government and has numerous bills on their way through the Parliament, with more to come in the course of next year, it will be challenging to deal with a significant amount of additional work that has not been factored in at this point.

10:15

That will also be challenging at Westminster, where a number of significant programme bills that were announced in the Queen's speech are already going through—including the bill that we are considering today—on the basis of hitting the end of 2023. I thank Kirsty Hood for her comment on our paper.

On the extension period to 17 June 2026, in our paper we again make the point that it is not necessarily the most rational way to approach the legislation to simply pick a date that is the 10th

anniversary of the EU referendum and say that we will do all the work, or defer law making, and make new law, within that period. That is not a rational approach, because it does not take account of consultation and all the other things that need to be done on a piece of legislation to ensure that it works and is clear, effective and coherent.

Of course, at the point when legislators such as yourselves and your counterparts in Westminster address a piece of legislation, you look to ensure that the law works for the people—for individuals and for businesses. In this case, there will be very little opportunity to consult properly, so individuals and businesses will perhaps find themselves in the dark at any one of those deadlines.

I hope that the amendments that the Law Society of Scotland is preparing will be accepted when the bill passes through the UK Parliament and that the deadlines will be extended, perhaps by five or 10 years, to ensure that the job is done properly, rather than in a rush against deadlines that are not particularly structured and which do not take into account all that needs to be done to make a piece of legislation.

Mark Ruskell (Mid Scotland and Fife) (Green): I am interested in how the status of retained EU case law might change as a result of the bill. I was struck by the points that are made in a number of the submissions, including that from the Faculty of Advocates, about how the status of retained case law might be diminished in some way if it was judged that that case law might restrict

“the proper development of domestic law”.

I do not have in my mind what the “proper development” of domestic law would be, in the minds of ministers. Could you expand on that? It would be useful if you could give particular examples to colour that scenario.

I will start with Dr Hood and then move on to other witnesses.

Dr Hood: There is the broader point that the bill will make a change to the way in which interpretation is handled. That comes back to a point that Dr Hancox made. In terms of EU law, when the courts consider how pieces of legislation work—bear in mind that we are now thinking historically because, when the UK left the EU, that broke the dynamic alignment—to a great extent, they are being asked to interpret what the law was at some point in the past, prior to withdrawal. Some of the key tools will potentially be taken away from the courts whereas, at the time when the parties regulated their behaviour and sought legal advice, they would have taken those key tools into consideration in considering what certain terms meant.

Given that, for example, particular terms in EU legislation will have had certain meanings and those will have been set down by courts at the time, it is difficult to ask courts to go back and interpret and apply what the law was at a given time without using the tools that they would have expected to use at that time.

The bill says that certain things would have to be taken into account if a court is deciding whether to depart from the retained EU case law. One of the factors is

“the extent to which the retained EU case law restricts the proper development of domestic law.”

It seems to me that that is potentially a very difficult factor. What is meant by “the proper development”? That is an unusual phrase. It is unusual to ask a court to try to work out what

“the proper development of ... law”

is. The courts are there to apply the law. They are there to interpret the law and apply it to the actions and behaviours of parties. As the court does that, of course, that might to some extent develop the law as a body of law, in the sense that it might shed light on something that was unclear. A particular case might allow a court to shed light on how the law is properly understood and interpreted. However, asking the court to work out how domestic law should properly develop and whether something is restricting that perhaps involves a phrase or a device that the courts would not have a lot of experience of or familiarity with.

I do not know whether the idea that particular case law that interpreted what was EU legislation was in some way appropriate to a period of EU membership but was not appropriate outwith that context was behind the thinking. That might be the thinking, but the terminology could potentially pose difficulties for the courts, given that, in respect of the making of laws for the Scottish Parliament and the other Parliaments in the UK, the courts are there simply to interpret, to apply, to shed light and to allow the body of law to develop in the important work that they do.

Mark Ruskell: Does that, in effect, invite courts to second guess the direction of policy and the direction of political decisions about environmental legislation, for example? I go back to the habitats directives. Obviously, a vast amount of case law has come on the back of those that relates to consideration of the public interest test and other aspects. Does that require courts to look at what might be coming on to the statute books and where things are going, or is the temptation always going to be to look back at the 50 years of progress and say that that is part of the “proper development” of the law?

Dr Hood: That is the difficulty. As written, does the bill extend that invitation to the courts? What

arguments would be put before the courts for parties that appear before them? As the provision is phrased, it seems to me that it could extend both invitations—the invitation to simply take a backward look or the invitation to take a forward look.

The term “proper development” in itself could perhaps be said to be a loaded one. That goes back to your point. Are courts being asked to second guess the direction or the trajectory? What if a party says to the court, “Well, that may be the trajectory, but I don’t think that’s the proper direction that the law should take.”? It strikes me that that wording potentially opens up such invitations and puts the court in a position of trying to give effect to that factor, which it is asked to do, and trying to balance its normal role in our society and our system with the way that that is put.

Mark Ruskell: I suppose that there is a wider context here, with, for example, the Levelling-up and Regeneration Bill and the potential removal of environmental assessment procedures and so on signalling a shift in policy.

Dr Hancox: I think that the bill is trying to make it easier for domestic courts to depart from EU case law, or to suggest that they do so. In its explanatory notes, the Government makes the point that the bill builds on some of the factors that were mentioned in the case of *Tunell v Warner*. In that case, however, considerable emphasis was given to legal certainty and the fact that a court would not depart from retained EU case law lightly, given the risks to legal certainty.

One of the factors that courts are supposed to take into account is that decisions of foreign courts are otherwise not binding. That was raised in *Tunell v Warner*, but it was raised in relation to the fact that comparative arguments were made in courts where there were separate legislative regimes and different case law. It is not that the European Court of Justice was not treated as a foreign court, but it was a foreign court that was interpreting a very similar body of law, on which it had considerable expertise. In addition, it was interpreting standards that were enmeshed in international standards beyond the EU framework.

On the point about the extent to which retained EU law may be impacting on

“the proper development of domestic law”,

I note that policy arguments were made relating to that point in *Tunell v Warner* and that the court refused to depart from retained EU case law. The power has been used where considerable injustice has potentially been caused through long-standing case law, but when we are talking about the interpretation of retained EU law, we are talking about the interpretation of considerable legislation.

It is hard to see that the power will be used that frequently by domestic courts, although I suppose that they will have to take very seriously the fact that the criteria will be listed.

Professor Young: I reiterate the points that have been made. I agree with the concern that the phrase

“the proper development of domestic law”

seems to push too far towards policy arguments, particularly when we see it in the context of the provisions that come earlier in that subsection, which are about how the retained domestic case law was determined, changes of circumstances and the fact that, because we are no longer in the EU, there will be differences in how we want to interpret provisions. It is very odd to see the phrase

“the proper development of domestic law.”

I have been trying to understand what the reason for the provision might be if it is not just about policy choices where it is believed that the law might be required to develop. The only thing that I can think of is the idea that, when we are looking at retained EU case law—that is, case law that interprets provisions in EU law—the Court of Justice of the European Union has the context of needing to have harmonisation and uniform provision across the European Union. Once we are no longer in that scenario, we do not necessarily have to have uniformity. However, I do not understand how we could delineate clearly when the Court of Justice would have chosen a provision because it wanted uniformity and would have thought, “This is the best way to interpret this piece of legislation,” and it then achieved uniformity.

That is difficult in practice, but it is also problematic to then say that, just because we do not have to have uniformity, it would not be a “proper development” if we were to retain something. There could be other good reasons for continuing to interpret the provision in that way—for example, because of legal certainty or because it is a good interpretation.

10:30

The only example that I can think of is that, if we look at the working time regulations, which implement the working time directive, we have to determine what would be classed as work in certain scenarios. We might think about a situation in which, for example, there are workers who are on call. Does the fact that they are on call count as work, or does it not count as work, because they could be somewhere else, waiting for the call to come in? If the previous interpretation whereby an individual who was on call was within their working hours were to be changed, because it was not

“proper development” and we wanted things to develop in a different way, I cannot see that as being anything other than a policy choice not to count that person as being in their working hours. It is very hard for me to delineate that as being anything other than a policy choice when it comes to “proper development”.

That gets even more concerning, because it is not just the parties that can raise the matter and say, “We think this would restrict proper development, so we want to change the interpretation.” The law officers can intervene and make a reference up if they think that a decision was taken incorrectly, which will open up the potential for invitations to the court to make policy choices. Therefore, I am very suspicious of the idea of “proper development” in its context. I do not understand what it can mean, other than policy choices.

Mark Ruskell: The working time directive, which we have perhaps all taken for granted, is a useful example.

Does Mr Clancy or Mr Livingstone want to respond, too?

Michael Clancy: By all means. I am just finding the relevant clause in the bill.

I endorse what has been said. I think that there is a significant issue relating to the way in which we will deal with retained EU case law in the future. The provision in question highlights that by, in essence, taking away some discretion from the court. Clause 7(3), which inserts new subsection (5) in section 6 of the 2018 act, says that

“the higher court concerned must ... have regard to”.

The word used is “must”, not “may”. An obligation is being placed on the court to have regard to the other factors that are listed.

Those factors are, first,

“the fact that decisions of a foreign court are not ... binding”.

Is that a fact or is it an opinion of law? It is certainly the case that the decisions of foreign courts are not binding, unless special arrangements have been made, because it is understood that such decisions of such courts are persuasive. The comparative law argument that one would put forward to make that so would be that you would not be proposing to the court that it was bound in any way by the decision of a court outside the UK, or even a court outside the jurisdiction of Scotland, but that the decision there would be persuasive if it was dealing with the same point and the same interpretation of the same provision of the law. However, the court will now have to

“have regard to ... the fact that decisions of a foreign court are not ... binding”.

The next factor is

“changes of circumstances which are relevant to the retained EU case law”.

Well, the court would have regard to such changes of circumstances anyway. Any court would listen to the representatives who presented the case in front of it and would be aware of changes in circumstances, one of which might be withdrawal from the EU.

The third area of discussion relates to the importance of the use of the word “proper” in relation to the development of domestic law. From whose standpoint is “proper” to be interpreted? If it is to be interpreted from the point of view of the court, there might be no “proper” development of domestic law at all. The implication is that there is some policy objective that needs to be attained. I suspect that the “proper” element in that clause is inserted into the bill because the ministers involved have an objective about the interpretation of the law that probably relates to the bill’s underlying philosophy, which is to ensure that European Union retained law will not apply in the future and that so-called domestic law will apply instead.

Charles Livingstone: I do not dissent from anything that has been said, but I observe from a practitioner’s perspective that one should not underestimate the conservatism of the courts. I am not sure that the provision will result in many, if any, cases coming out differently from how they would have done in any event. When we are dealing with a principle as vague as

“the proper development of domestic law”,

the courts will often take the view that it is vague enough that they do not need to do anything with it, because they cannot clearly be accused of failing to take account of it. It is not exactly a defence of legislation to say that it is not likely to have much of an effect so we do not need to worry about it, but, as a matter of practice, the principle is not likely to be decisive in many cases.

The Convener: I am a little conscious of time, so I ask for succinct answers. Unfortunately, we have a couple of agenda items still to cover before we have to leave for the chamber.

Sarah Boyack (Lothian) (Lab): I appreciate the written evidence that the witnesses submitted in advance. It feels unprecedented, because they are all measured witnesses and the background that they all have gives weight to their worrying comments about legal certainty, risks, unintended consequences, lack of scrutiny and lack of Government capacity.

Michael Clancy, in the general comments at the start of your submission, you say:

“there is no reason why retained EU law ... cannot be considered a sustainable concept. On the other hand, it would be equally possible following a thorough review and relevant amendments that incorporation into domestic law in the four UK jurisdictions could be completed.”

Will you say a bit more on that? Thus far, the tone has been, “This will be a disaster.” What would be a more positive approach that would enable a degree of scrutiny and accountability for not only parliamentarians but the people whom we represent? Will you kick off, Mr Clancy?

Michael Clancy: I will try my best. Thank you very much for the compliments that you paid to the submission, Ms Boyack.

It is what it is. Once the referendum had decided that the UK was leaving the European Union, the concept of retained EU law was the only place to go unless one wanted a free-for-all in which there was no certainty or clarity in the law. Therefore, the concept of retained EU law had to be adopted.

I think that, in previous evidence, I have highlighted the point that, when similar sorts of seismic constitutional changes have happened, such as when colonies have become independent, there has frequently been provision in the independence legislation that says that the existing law as at a particular date—normally English law, in our experience—is continued after independence until such time as the newly independent legislature changes it. Following that kind of model was correct because it ensured that there was certainty about the law and, because underlying principles such as the supremacy of EU law were maintained, there was guidance as to how that would be interpreted. Other principles such as proportionality and equal treatment were also kept.

The provisions, therefore, made sure that there was relatively good understanding of what the law would be after we left the European Union. To do it any other way would produce the opposite result: there would be a lack of clarity and certainty, with adverse impacts on individuals and businesses. As other colleagues have stated throughout this morning’s evidence-taking session, the kind of changes in the bill are reintroducing elements that give rise to a lack of certainty and clarity and the potential for adverse impacts on businesses and individuals in Scotland and the wider UK.

Sarah Boyack: Dr Hood, do you want to respond on that issue? We are now six years on from the vote, and suddenly all this legislation has to be wrapped up in a year. It will be incredibly hard for us to scrutinise it. What would your advice to the Scottish Parliament be on ensuring that we do not miss out on any vital legislation that might change people’s lives here?

Dr Hood: You are absolutely right to identify as a key issue people's lives being changed as a result of the bill. The important thing to remember is that legislation is not a symbol; it is there to facilitate and intervene in the lives and work of people and businesses across the country. It serves a purpose and allows things to work.

The fact is that individuals and businesses probably do not have much of an interest in this, other than, of course, the interest that any of us might have in how, historically, pieces of rule making came to be. Instead, they are interested in knowing what the law is when they come to arrange their affairs.

As has been indicated, the 2018 act took what seemed to be the normal stance that is taken in times of significant constitutional change, which is to keep the body of law in place to give people going about their daily lives and business continuity and certainty. That can then be changed in the appropriate way, through consultation, scrutiny and so on. That system is already in place, and trying to bring everything forward by putting a very tight deadline on such a massive piece of work and doing it in such a way that, if something is overlooked or missed, it will have very real consequences for people will involve a great deal of work for civil servants and parliamentarians. It seems to me—and, indeed, to other bodies and commentators who have commented here or have given evidence at Westminster—that such an approach brings risk with it.

Sarah Boyack: Perhaps I can follow up on those comments with Mr Livingstone, given his remarks about risk and uncertainty. What risk assessments should we, as parliamentarians, be carrying out to identify elements of the legislation that might be most vulnerable in the process?

Charles Livingstone: The issue of scrutiny and accountability by the Scottish Parliament will follow on from what the Scottish Government does in the event of the bill being passed. As I have mentioned, the Scottish Government could use the powers in the bill to save more or less everything—certainly in terms of secondary legislation—that would otherwise be sunsetted. In that case, there would not be as much for the Scottish Parliament to scrutinise.

From a certainty and risk perspective, I would say that, ideally, items of legislation would be saved with reference to a list of such items, but, if necessary, they could also be saved with reference to a category of legislation—for example, everything that falls within devolved competence or, in essence, everything over which the bill confers powers on Scottish ministers. As far as parliamentary scrutiny is concerned,

therefore, the preliminary question is: how much will there be to scrutinise?

The UK Parliament will have a much more difficult time, given the UK Government's clear intention not to save everything, but if the Scottish Government wants to act as though the bill had never happened, the powers are available to do that not entirely but certainly in a way that would take away much of the workload that would be caused.

10:45

Sarah Boyack: Dr Hancox, you gave us an interesting set of thoughts about what we should be thinking about. Do you have any comments about what we should be doing? Should the legislation go through as is?

Dr Hancox: One point that I would make—among many others—concerns sunsetting, and there is another point to make about the powers to restate. I know that one of the policy concerns behind the bill is that the Government feels that there are insufficient powers to amend retained EU law, and that goes back to the earlier questions about interactions between the continuity act and the new bill.

In my opinion, the use of the sunset clause adds further complications to the situation with regard to the fact that there are quite wide powers to amend retained EU law, and I wonder whether there is a way around sunsetting, either by listing all the provisions or through some form of downgrading of the status of retained EU law, which would avoid there being the cliff edge that we find ourselves facing.

One point that has been raised about the bill is that, even if we talk about the powers to save EU law as it is, there is a deregulatory element to the bill, as Dr Hood has mentioned, in terms of the regulatory burden, which can include things such as whether costs will be increased. All of those various concerns make the bill quite an unsatisfactory way of ensuring legal certainty and high standards and preventing injustices and changes in the law that are not intended.

Sarah Boyack: Professor Young, do you have any comments about what we should be doing to attempt to mitigate the potentially damaging impact of the bill?

Professor Young: There is also a need to keep track of decisions to restate or decisions not to bother to restate and, therefore, to allow a piece of legislation to collapse. It is important not only to scrutinise any legislation that comes through but to think of ways to scrutinise decisions to restate or not to restate.

The Convener: Before I bring in Jenni Minto, I emphasise what I said earlier about time.

Jenni Minto (Argyll and Bute) (SNP): I thank the witnesses for the documents and information that they have given us.

I have a question about the practical impact of the legislation on the normal person in the street. I note what Dr Hancox said about the deregulatory agenda and how that might impact on the way in which we live our lives. Mr Clancy, I also note the comment in the Law Society's submission about the definition of "burden" and how that might impact in terms of a race to the bottom, which was raised in the House of Commons, too. On the practical impacts, I thought that Professor Young's example of the working time directive was a strong one. Could our witnesses give us other examples that we can focus on in terms of the practical impacts of the bill?

Dr Hancox: A really clear example is article 157 of the Treaty on the Functioning of the European Union, which is the right to equal pay for male and female workers for equal work or work of equal value. That is not fully replicated in the current Equality Act 2010. There is quite recent case law in this area—including a case involving Tesco—and article 157 is still used by litigants and applicants, because it can be relied on against employers. If it is not saved, it will be fully sunsetted, but it will also have to be saved in terms of the case law of the Court of Justice—that will have to somehow be replicated in terms of how it is restated or replaced.

Dr Hood: If we consider EU legislation in its widest sense, as Dr Hancox did, in relation to interpretative context and so on, it is important to realise that that legislation, throughout the whole period of our EU membership, has become woven into so much of our law. That can include big statements of principle as well as things that involve intense technical detail. It is difficult to imagine a sector or area of the law in which there has not been an impact of some kind. Although that impact might not always be obvious to people during their daily life or daily business, many areas have been affected, so change in the various sectors has the potential to impact on people across the board.

On the point about deregulation, it is difficult to add too much to what the Hansard Society has said. As has been said this morning, the way in which "burden" is defined could mean that protections that businesses and individuals have enjoyed could be downgraded. Conversely, there could be difficulties in enhancing protections, and businesses and individuals would be—

Jenni Minto: I read somewhere that EU legislation on the testing of cosmetics on animals

is part of this, so there could be a negative impact if such legislation is lost.

Does Mr Livingstone have any comments?

Charles Livingstone: I find it slightly difficult to give concrete examples. I say that not to dodge the question but more to illustrate the key point about the bill, which is that we do not know what would go and what would be saved. The starting premise is that something will go unless it is saved, but beyond that we would be speculating. That relates to the points about scrutiny and accountability. Given that it is being done in that way, one can talk only hypothetically. When it comes to the point of decisions about what goes and what is saved, there is limited ability to discuss that. We could talk for ever about what might be included, but, until we know how the bill is to be used, we cannot have a proper discussion. That illustrates one of the difficulties with the bill.

Jenni Minto: I am thinking of known unknowns, unknown unknowns and so on.

I will go to Mr Clancy next.

Michael Clancy: The point relates to the unknown elements. We know that a minister of the Crown could extend the sunset under clause 1, but Scottish ministers, Welsh ministers and the Northern Ireland Executive could not make any extension in that regard. Therefore, we do not know what might be extended by a minister of the Crown.

I take Charles Livingstone's point about the excellent work of the office of the Advocate General in ensuring that ministers of the Crown are aware of the Scottish implications of the legislation that it deals with. However, clause 3, which is named "Sunset of retained EU rights, powers, liabilities etc", is subject to no particular extension provision at all. Indeed, the relevant legislation will be

"repealed at the end of 2023."

That includes a group of rights and powers that are not enumerated in any way other than by reference to section 4 of the European Union (Withdrawal) Act 2018. It is likely that that, as well as the general listing of EU derived subordinate legislation and retained direct EU legislation, will have some impact on individuals.

Like Charles Livingstone, I do not have a list. I think that there ought to be a list, but there is no sign that that is happening.

The point that we were making on the definition of "burden" is that the provisions in clause 15 relating to burdens are different from those in the Legislative and Regulatory Reform Act 2006, so there needs to be some kind of determinative consistency, particularly as there does not seem to

be any kind of cross-amendment of the existing legislation.

The Convener: I will let Mr Golden in briefly. If the witnesses could be succinct with their answers, that would be helpful.

Maurice Golden (North East Scotland) (Con): I want to briefly explore the comments from Dr Hood and Professor Young on the United Kingdom Internal Market Act 2020. I will start with Professor Young. Given that it is Scottish Government policy to align with newly introduced EU law—although that policy has not been enacted yet—we could see a situation whereby there is divergence between certain parts of the UK. If that happens, that would be at odds with the principles of the internal market act. How do you see that playing out, and what could the UK and Scottish Governments, along with other devolved Administrations, do to pre-empt that situation and/or resolve any issues that may arise?

Professor Young: I will try to be brief. My concern would be, in particular, with regard to EU measures that deal with product safety requirements—anything that deals with safety of supply, such as gas supply, or the safety of components that go into goods. If such measures lapse, Scotland has the ability to enact provisions to retain them. However, if the measures were not being retained in other parts of the UK, that could trigger the fact that, under the internal market act, goods that were not as safe would be lawful and should be able to be sold in Scotland. That could undermine the effect of tracking EU law in those ways, which could be problematic.

On what you can do about that, it is a case of trying your best to liaise across the devolved Governments and think about how much further you can push on the common frameworks to ensure that there is commonality to protect those particular measures. Maybe there could be mechanisms between the devolved Governments and legislatures as well as Westminster about which of the provisions you would like to use your powers to retain in order to get some form of commonality across the UK.

Dr Hood: All that I would add is that one of the points that was flagged when the United Kingdom Internal Market Bill was going through was that, on the face of it, it appeared to allow less divergence for Scotland within the UK than had been possible when the UK was an EU member state and we had a broader grouping. Obviously, that raises an issue for the Scottish Parliament and the other devolved legislatures about the extent to which effect can be given to policy choices that are voted on by elected members in the legislatures, and how far the internal market act cuts across those policy choices. We start from the proposition that, as we have devolved legislatures, the system

must have respect for those legislatures and allow them, within their areas of competence, to give effect to policy choices on which elected members in those legislatures have voted.

Charles Livingstone: I will come in briefly on a technical point. The grandfathering provision in the internal market act and its relationship with the current bill will be key. Anything that was in existence prior to the internal market act is unaffected by it. If provisions are prevented from sunseting and are saved under the bill, the grandfathering will unquestionably still apply to them. If provisions are only restated, the grandfathering will probably still apply to them. If they are modified, you get into more difficult territory. Therefore, the grandfathering provision is the key thing to keep in mind when discussing that issue.

Maurice Golden: Thank you. That is interesting.

The Convener: I will have to draw the meeting to a close. I thank all the witnesses for their attendance and for their briefings prior to this session. We now move into private session.

10:59

Meeting continued in private until 11:22.

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