

The EU (Withdrawal) Bill
A Rule of Law Analysis of
Clauses 1-6

21 February 2018

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SUMMARY

This Report sets out the Bingham Centre's Rule of Law analysis of clauses 1 to 6 of the EU (Withdrawal) Bill, to inform the House of Lords Committee Stage consideration of those clauses.

The Bill's purpose is to protect the Rule of Law as the UK withdraws from the EU. It repeals the European Communities Act ("ECA"), the legal basis for EU law having effect and supremacy in UK law, with effect from the date of the UK's exit. However, it aims to ensure legal continuity, certainty and stability for individuals and businesses by converting EU law as it stands at the moment of exit into UK law, so that the same rules and laws will apply on the day after exit as the day before. This means maintaining existing legal protections for people's rights. It will then be for elected representatives in the Westminster or devolved parliaments to decide whether or not to keep or change those laws after full democratic scrutiny and debate.

The Report analyses the provisions of clauses 1 to 6 of the Bill against the Government's own Rule of Law objectives for the Bill, to ascertain whether it meets those objectives or needs improvement. The Rule of Law analysis uses the Rule of Law Checklist, containing internationally agreed benchmarks and standards, to help assess the Rule of Law compatibility of the clauses of the Bill. The analysis has been informed by the work of the Expert Working Group on the Bill, convened by the Bingham Centre in collaboration with the Constitution Unit and the Hansard Society, which has met several times since October 2017 to consider the most significant Rule of Law implications of the Bill and to generate informed discussion of those issues both in Parliament and amongst the wider public. The Report is a report of the Bingham Centre, not the Expert Working Group. It is not concerned with arguments about whether the UK should or should not withdraw from the EU. It proceeds on the assumption that the UK will withdraw on 29 March 2019. It takes account of the work of the House of Lords Constitution Committee ("HLCC") and of amendments already tabled for Committee Stage.

Clauses 1 to 6 engage a number of overlapping and related Rule of Law standards clustered under the general principle of "legal certainty". These include the accessibility of the law; its clarity; its foreseeability; its stability and continuity; its regard for legitimate expectations; its non-retroactivity; and respect for the finality of judicial decisions. It also engages the Rule of Law principle of access to effective legal remedies for violations of legally protected rights. Legal certainty and legal continuity are not absolute requirements. Legal certainty means adequate legal certainty: legal complexity does not necessarily equate to legal uncertainty and while Parliament should always strive to pass clear and unambiguous laws it cannot eliminate the interpretive role of courts. Legal continuity similarly does not mean the law can never change, but such changes should be the result of democratic processes involving publication of, consultation on and debate and scrutiny of such changes, so that legitimate expectations are not unjustifiably infringed.

The Report considers seven Rule of Law issues raised by clauses 1 to 6.

(1) The meaning of “exit day”

Uncertainty about the precise date on which the UK will withdraw from the EU, whether there will be a transition/implementation period, and if so for how long and on what terms, is one of the greatest sources of legal uncertainty for UK businesses or businesses investing in or trading with the UK. Businesses need as much certainty as possible about the date on which the new legal framework created by the Bill will come into effect.

Legal certainty might have been better served had the Bill adopted a different approach of separating exit day from the day on which the UK leaves the EU and the UK therefore ceases to be bound in international law by the EU treaties. At the moment the latter date is known: it is 29 March 2019 unless the two year period under Article 50 is extended by the mechanism provided for in that Article. What is not yet known, because it is the subject of negotiation, is whether there will be a transition/implementation period, how long that will be and on what terms.

The House of Lords may wish to explore in Committee, and in the light of progress in the negotiations, whether the current approach to the meaning of “exit day” in the Bill maximizes legal certainty, for businesses in particular, or whether the Government could provide greater certainty, for example by explaining to Parliament what legal framework is intended to apply during any period of transition/implementation.

(2) What counts as “retained EU law”

“Retained EU law” is a central concept in the Bill and in other Brexit Bills already before Parliament (such as the Trade Bill, the Sanctions Bill and the Customs Bill). Legal certainty requires maximum clarity as to what counts as retained EU law on exit day. It includes “EU-derived domestic legislation” which is defined in clause 2 of the Bill to include secondary legislation made under s. 2(2) ECA, which would not otherwise remain in force and therefore requires saving. But it also includes a wide category of other primary and secondary legislation relating to the EU, eg primary legislation such as the Equality Act 2010 which implement EU obligations, and secondary legislation made under powers in other primary legislation than the ECA, . HLCC is concerned about the breadth of the definition of EU-derived domestic legislation in clause 2 because it significantly broadens the range of domestic law in relation to which the wide ministerial powers of correction can be exercised. Members of HLCC have proposed an amendment which would narrow the scope of EU-derived domestic legislation to secondary legislation made under the ECA.

However, there is a Rule of Law reason for the wide definition of EU-derived domestic legislation under clause 2: to ensure that such legislation continues to be interpreted in the light of pre-exit case-law of the CJEU and the general principles of EU law as provided for in clause 6. The wide definition in clause 2 is therefore designed to prevent legal uncertainty about how such legislation is to be interpreted after exit. Reducing the scope of clause 2, as recommended by HLCC, would throw into doubt the interpretation of the Equality Act after exit, for example, because it would no longer be required to

be interpreted in accordance with the pre-exit case-law of the CJEU. The Government is right to be concerned about destabilising the settled interpretation of EU-derived domestic legislation, such as the Equality Act, if it is excluded from the definition of retained EU law. This legal certainty concern could be met if clause 6 were amended to make express provision for the future interpretation of the legislation which would be removed from the scope of clause 2. However since clause 6 only bites on retained EU law this would involve some radical surgery to the architecture of the Bill. It may therefore be preferable to deal with HLCC's concerns about the scope of the ministerial powers of correction by amending other provisions in the Bill and leaving EU-derived domestic legislation to continue to be broadly defined in clause 2 of the Bill.

(3) Accessibility of retained EU law

A comprehensive list comprising the whole body of retained EU law will need to be accessible on (and preferably well before) exit day so that individuals and businesses can ascertain the laws that govern them. The Bill provides for the publication by the Queen's printer of copies of retained direct EU legislation and (retained under clause 3) but not other types of retained EU law. We recommend that the Bill be amended to make the duty to publish apply to all retained EU law. We also recommend that the Government publish a clear statement of how it proposes to ensure that on and preferably well before exit day there will exist a published, comprehensive, fully searchable database of all retained EU law, preferably hosted on the official website www.legislation.gov.uk.

The Bill also includes a ministerial power to exempt from the duty to publish retained direct EU legislation, by giving a direction to the Queen's printer not to publish, if the Minister is satisfied that the instrument concerned has not become, or will not become, retained direct EU legislation. Although the ministerial direction must be public, the grounds on which the Minister may give such a direction are subjective and open-ended. We recommend that the Bill be amended to circumscribe the ministerial power to direct that certain material need not be published.

(4) The Legal Status of Retained EU Law

The Bill does not assign a clear legal status to retained EU law. The Rule of Law requires clarity about the hierarchical status of legal norms within the legal system. Businesses and individuals need to know the status of one rule relative to another rule because this will be determinative of a number of important questions: which rule takes precedence in the event of a conflict; whether legal challenges can be made to the rule and, if so, on what grounds; what remedies are available in the event of a successful legal challenge; and the processes required before the rule can be changed or revoked. The cluster of concepts that go to make up legal certainty (clarity, predictability, foreseeability) are all engaged when there is doubt about the relative normative status of legal rules. Without certainty about relative legal status it is difficult for those subject to the law to order their affairs confident in the knowledge that they know what the law requires of them.

HLCC recommends that retained direct EU law should have the same legal status for all purposes, and that the Bill should give it the status of primary legislation. It considers that the Bill's current approach, of assigning different legal statuses for different purposes but no single status for all purposes, is highly likely to cause confusion and uncertainty, which is incompatible with the Bill's objective of securing legal continuity and certainty as the UK leaves the EU. It considers it to be imperative, to avoid such uncertainty, that all retained direct EU law has the same legal status for all purposes. It recommends that the single legal status should be that of primary legislation.

We share HLCC's Rule of Law concerns about the Bill's failure to accord a clear legal status to retained direct EU law and the Government's proposal to treat it as *sui generis* and to use ministerial powers to allocate it a legal status on a case by case basis. This would fail to provide sufficient legal certainty and would confer too wide a discretion on the Government to determine fundamental issues of access to legal remedy and processes for amending or revoking. We also see the attraction in the apparent simplicity of treating all retained EU law as primary legislation deemed to have been enacted on exit day. However, we have serious reservations about treating all retained EU direct legislation as primary legislation.

A solution to the Rule of law problem identified by HLCC needs to deal appropriately with the different strands of retained EU law, and to provide sufficient legal certainty. It also needs to address the question of the legal status of EU-derived domestic legislation in clause 2, as many of the EU-derived rights currently contained in secondary legislation made under s. 2(2) ECA are of a kind which should have the status of primary not secondary legislation. Perhaps above all, it should not accidentally incentivize the use of Henry VIII clauses on a massive scale, which risks normalizing their use.

HLCC considered that it is not possible to lay down in the Bill any formula capable of satisfactorily distinguishing between retained direct EU law that should be treated as primary legislation and that which should be treated as secondary. However, we consider that the advantages of such an approach far outweigh the disadvantages that accompany HLCC's preferred solution of treating all retained direct EU law as primary legislation. As Professor Craig argues, it would in principle be possible to address the Rule of Law issue which has been rightly identified by HLCC by ascribing a presumptive legal status to retained direct EU law according to its origins, with a power to change the deemed legal status of direct EU law by regulations, subject to the affirmative procedure, if considered necessary in light of the substance of the law in question. This would be similar to the approach suggested by Rt Hon Dominic Grieve QC MP in the Commons. In our view the Bill should also take a similar approach to designating a legal status for EU-derived domestic legislation.

It would be preferable, from a Rule of Law perspective, if the Bill were amended to presumptively designate legal status to EU law according to the status it had in EU law pre-exit. This possibility deserves serious consideration. No amendment has yet been tabled which would have this effect. This is a matter to which the House of Lords might consider it appropriate to return at Report Stage.

(5) The Supremacy of Retained EU Law over pre-exit UK law

The Bill makes clear that, after the UK's exit from the EU, the principle of the supremacy of EU law will no longer apply, so that future UK laws will take precedence over EU laws. However, it also provides for retained EU law to continue to be supreme over pre-exit UK law, until such time as Parliament deliberately decides to modify it. Pre-exit UK law will also continue to be required to be interpreted in accordance with retained EU law. This continuing limited role for the principle of supremacy is required by the Bill's Rule of Law purpose: to ensure legal continuity and therefore legal certainty, preserving settled expectations about the law's meaning and effect.

HLCC endorses the Rule of Law purpose of the provisions in the Bill which provide this limited role for the principle of supremacy, but regard the choice of means to achieve the Rule of Law objective to be constitutionally flawed, because the principle of supremacy of EU law should have no place in the UK's legal order once the UK has withdrawn from the EU. It also considers that it will cause legal uncertainty. It recommends that the Rule of Law purpose of continuity and certainty will be better achieved by removing any reference to "supremacy" from the Bill and instead providing that retained EU law is to be treated as primary legislation, enacted on exit day. An amendment to the Bill has been tabled to have that effect.

We consider that the Rule of Law objectives of legal continuity and certainty are better served by the approach taken by the Government in the Bill. The principle of supremacy is well understood and its future role is very limited, being confined to the relationship between retained EU law and pre-exit UK law. Treating all retained EU law as primary legislation enacted on exit day, on the other hand, will increase legal uncertainty because it changes the settled approach and leaves unclear whether the interpretive obligation, to interpret pre-exit UK law so as to be compatible with retained EU law, continues to apply. The approach in the Bill therefore better serves the Rule of Law objectives of legal continuity and certainty and should not be amended. Nor do we consider that it requires clarification.

(6) The Charter of Rights and General Principles

The Bill's non-retention of the Charter and its treatment of general principles of EU law raise a number of Rule of Law issues. First and foremost is the issue of legal continuity, the Government's own avowed Rule of Law objective for the Bill. If it is the case that the Charter provides substantive protections for rights which will no longer be available as a result of its non-retention by the Bill, there will be legal discontinuity because the Bill will fail to provide for the maintenance of the current level of legal protections enjoyed by businesses and individuals. Maintaining the current level of protection includes maintaining access to effective remedies for legally recognised rights. If this is the case, the Bill falls short of its own overriding Rule of Law objective, the provision of legal certainty by ensuring legal continuity. Only a competing Rule of Law objective of a greater magnitude could be capable of justifying such a departure from the Bill's objective.

It is clear beyond doubt that non-retention of the Charter will lead to a loss of the current level of rights protection available to individuals and businesses

under EU law, in at least three ways. First, the Charter protects rights that do not otherwise enjoy clear legal protection, such as the right to protection of personal data. Second, the Charter provides a direct cause of action in respect of those rights including access to legal remedies. Third, as a matter of EU law those legal remedies currently include a power in the courts to disapply legislation. This will give rise to a serious legal discontinuity which is at odds with the Government's own Rule of Law objective for the Bill, which is to take a snapshot of the current body of EU law and ensure that the same body of law is in force the day after Brexit as the day after. The Bill should not be treated as an opportunity to remove substantive protections which the Government does not like. That runs directly counter to the Government's stated Rule of Law aim of ensuring legal continuity, leaving for the future debates and arguments about whether particular aspects of retained EU law should be modified to continue to be retained. This Bill is not the place in which to have that debate. The arguments for non-retention do not come close to justifying the legal discontinuity that results from non-retention. Many of the legal uncertainty arguments against retaining the Charter rest on misunderstandings about the limited effect of retaining the Charter.

The Bill's approach arguably creates greater legal uncertainty than retention of the Charter. Exactly what fundamental rights and principles are preserved by clause 5(4) of the Bill is not clear. The Charter itself, on the other hand, is a clear statement of articulated rights and principles. Indeed, this was the very purpose of drawing up the Charter, to provide a clear and accessible list of the rights and freedoms considered fundamental in the EU legal order.

The Rule of Law problems raised by the Bill's non-retention of the Charter cannot be solved merely by clarifying how the Bill deals with general principles. The Rule of Law issue of legal discontinuity must be confronted head on by amending the Bill to include the Charter as retained EU law. We recommend that, in order to be compatible with the Government's own Rule of Law objective of legal continuity, the Bill be amended to remove clauses 5(4) and (5) of the Bill.

Amendments have been tabled which would remove from the Bill the exceptions which provide for the non-retention of the Charter, and would make clear that the Charter continues to have effect after exit day in relation to all types of retained EU law. These amendments would have the effect of retaining the Charter, whilst making absolutely clear on the face of the Bill that the Charter will only continue to have effect after exit day in relation to retained EU law, and the relatively limited effect that retention of the Charter will have. These amendments warrant support on Rule of Law grounds.

The same Rule of Law issue of lack of legal continuity arises from the Bill's exclusion of a right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law. We recommend that para 3 of Schedule 1 which provides that there is no right of action in domestic law after exit day for any breach of general principles of EU law, should be removed from the Bill.

(7) Interpretation of Retained EU Law

The Bill's approach to the relevance of pre-exit CJEU case law to the interpretation of retained EU law, requiring courts to decide in accordance with such case law, is welcome from a Rule of Law perspective because it serves the purpose of legal continuity and therefore maximises certainty. We also think it is important to provide the same degree of legal certainty in relation to EU-derived domestic legislation implementing EU obligations, or otherwise related to the EU or EEA, which is contained in primary legislation, secondary legislation made under primary legislation other than the ECA, and devolved primary and secondary legislation. If the Bill is amended to remove such legislation from the scope of retained EU law, as HLCC recommends, this will urgently need to be addressed.

As for the relevance of post-exit CJEU case law to the interpretation of retained EU law, the Bill provides that UK courts are not bound by it but has a wide discretion to refer to it "if it considers it appropriate to do so." It is welcome, from a Rule of Law perspective, that the Bill expressly addresses the question of the legal relevance for UK courts and tribunals of future decisions of the CJEU, because it advances legal certainty to a degree. The question is whether in its current form it provides sufficient clarity about Parliament's intentions. HLCC recommended that the Bill should provide that a court or tribunal *shall* have regard to post-exit CJEU case law which the court or tribunal considers relevant to the proper interpretation of retained EU law; and that, in deciding what weight, if any, to give to such case law, the court or tribunal should take account of any agreement between the UK and the EU which it considers relevant.

The amendment able to give effect to HLCC's recommendation is an improvement on the Bill from a Rule of Law point of view. The replacement of the Bill's permissive approach with a more directive one would provide greater democratic legitimacy to courts having regard to future CJEU case law. The amendment also makes explicit that the obligation to have regard to such post-exit case law is confined to the context of interpreting retained EU law, unlike the Bill in its current form. Requiring judges to have regard to any relevant EU-UK agreements when deciding what "significance" to attach to such case law is also an improvement because it makes explicit what on any view will be a manifestly relevant consideration in deciding what weight to give to particular post-exit case law (since its relevance may in part be determined by the existence and content of such agreements).

However, the amendment arguably introduces further complexity and scope for interpretive disagreement into the Bill's provision governing the interpretation of retained EU law. We recommend what we consider to be a simpler and clearer way of giving effect to HLCC's recommendation: first, by removing the current open-ended discretion; and, second, by adding post-exit CJEU case law to the list of matters to which judges must have regard when deciding "any question as to the validity, meaning or effect of any retained EU law" to which such case law is relevant. This would have the advantage of simplifying clause 6 of the Bill, by using its existing language and structure, at the same time as achieving the principal objective of providing clearer and more directive statutory guidance to courts as to the relevance of post-exit CJEU case law.

1. INTRODUCTION

Background

1. The EU (Withdrawal) Bill is the most constitutionally significant piece of legislation to be brought before Parliament for decades. The Bill has the unenviable task of charting a path between, on the one hand, providing the legal continuity which individuals and businesses require on the day after Brexit, at the same time as giving effect to the most radical change to the UK's constitutional architecture since the passage of the European Communities Act 1972, which the Bill repeals.
2. Constitutional change on this scale, disentangling the UK legal system from the EU's legal order as a result of the vote for Brexit in the 2016 referendum, after 45 years of legal integration, poses a number of serious challenges to many of the values which make up the Rule of Law, as expounded by Tom Bingham in his accessible account of the concept in his justly famous 2010 book, *The Rule of Law*.
3. The Bingham Centre, which was founded to take forward Tom Bingham's work, therefore convened an Expert Working Group to consider the Rule of Law implications of the Bill. The Group has met 8 times since October 2017 to identify and discuss the most significant Rule of Law issues raised by the Bill.
4. This Report contains the Bingham Centre's Rule of Law analysis of Clauses 1 to 6 of the Bill, informed by the work of the Expert Working Group. It is not a Report of the Expert Working Group. The purpose of the Report is to inform the consideration of those clauses by the House of Lords as the Bill enters its Committee Stage on 21 February. A further Report will be published containing the Centre's Rule of Law analysis of the clauses concerning delegated powers and devolution, in time for the Committee stage consideration of those clauses of the Bill.

The Bill's Rule of Law Purpose

5. The EU (Withdrawal) Bill is an unusual Government Bill. Its very purpose is to protect the Rule of Law at a moment of constitutional upheaval for the UK without parallel in our lifetime, as the UK withdraws from the European Union.
6. The Government has recognised from the start of the Brexit process that disentangling the UK's legal system from the EU's legal order is complex and fraught with uncertainty, and its priority therefore has been to provide certainty and stability, for businesses, workers, investors, consumers, and every individual in the UK. Indeed, in the White Paper which preceded the publication of the Bill, this was described as the Government's "first objective" in the Brexit process.¹
7. In order to maximise certainty, the Government has made a significant policy choice: to convert the body of EU law (the *acquis communautaire*) into UK law at the moment of exit, so that, in the words of the Prime Minister in her Foreword to the White Paper, "the same rules and laws will apply on the day after exit as the day before." It will then be for democratically elected representatives in the UK, in the Westminster or devolved parliaments, to decide whether to change that law after full and proper scrutiny and debate. This decision, to bring into UK

¹ Legislating for the United Kingdom's Withdrawal from the European Union (Cm 9446), 30 March 2017, Prime Minister's Foreword.

law the body of EU law that applies to the UK at the moment of exit, is described by the Government as an “essential part” of its plan to provide the clarity and certainty that is required to help people to plan effectively, recruit appropriately, and invest as necessary as the Brexit process unfolds.²

8. The Government’s intention in its White Paper is carried through in the Bill as published. The Explanatory Notes state that the “principal purpose” of the Bill is “to provide a functioning statute book on the day the UK leaves the EU.”³ To achieve this principal purpose, the Bill “converts EU law as it stands at the moment of exit into domestic law.”⁴ The nature of the exercise has frequently been described by ministers as taking a “snapshot”⁵ of EU law that applies in the UK immediately before exit day and ensuring that it will continue to apply in the UK immediately afterwards, or as “downloading”⁶ EU law into UK law, so that the same laws will apply the day after exit as the day before.
9. The Government has even articulated this objective explicitly in Rule of Law terms. The Solicitor-General, Robert Buckland QC MP, for example, said, at Report Stage in the House of Commons:⁷

... this is a very technical Bill. Like its illustrious predecessor, the European Communities Act 1972, it is a Bill of constitutional importance; it is a framework Bill. It is not—I stress this, because it is most important—it is not a Bill that seeks to convey a policy or a particular aspect of policy It is a framework that is *designed to ensure that the law that is applied up to exit is downloaded in as clear and proper a way as possible because, to be consistent with the rule of law, the law needs to be accessible, it needs to be clear and it needs to be well understood* (emphasis added).

10. The Government’s own account of the Rule of Law purpose of the Bill provides the vital context in which its provisions should be scrutinised by Parliament. The most recurring theme in the Government’s explanations of the purposes of the Bill are the need for legal continuity, certainty and stability, and the maintenance of existing legal protections for people’s rights. As the Lord Privy Seal, Baroness Evans of Bowes Park, said at the Bill’s Second Reading in the Lords:

this Bill ensures that we have a functioning statute book on the day we leave. It is about providing certainty and continuity for people and businesses. It is about ensuring that people’s rights are upheld and legal protections are maintained. It is vital to a smooth and orderly exit from the EU.⁸

11. The Government’s decision to download a snapshot of EU law, and its emphasis on the paramount importance of legal continuity, legal certainty and stability and the maintenance of current legal protections, are very much to be welcomed from a Rule of Law perspective. Leaving the EU after more than 45 years of membership is constitutionally momentous. The degree of legal interpenetration and regulatory enmeshment which has grown up in that time means that disentanglement cannot happen overnight. Fundamental constitutional change in settled democracies

² Ibid.

³ Explanatory Notes, para. 10.

⁴ Explanatory Notes, para. 2.

⁵ See, for example, HC Deb, 14 Nov 2017, c 287-9 <https://goo.gl/EnQZuK>.

⁶ See, for example, HC Deb, 16 Jan 2018, c 777 <https://goo.gl/892fjj>.

⁷ HC Deb, 16 Jan 2018, c 777 <https://goo.gl/892fjj>.

⁸ HL Deb, 30 Jan 2018, c 1373 <https://goo.gl/PJ8LAF>.

should not be revolutionary moments involving radical legal discontinuity. It should be the product of a deliberative democratic process in which the legal implications can be carefully considered and publicly debated. Moreover, such change must be sensitive to ways in which the domestic constitution may have evolved in recent years: for example, the importance of the body of EU law that is to be domesticated by this Bill may be considered much greater when viewed from the perspective of the devolved administrations, which did not exist at the time the UK entered the EU. In the limited amount of time between now and exit day, the Government is therefore right to stress the need for legal continuity, and the preservation of existing legal rights and protections, as the overriding objective of the EU (Withdrawal) Bill. The question for Parliament as it scrutinises the Bill is to what extent it achieves the Government's avowed Rule of Law objectives.

12. This Report therefore analyses the provisions of the Bill against those Rule of Law objectives to ascertain whether there are any respects in which it could do better to achieve those objectives.

The Bingham Centre's locus

13. The Bingham Centre exists to advance the Rule of Law in both the UK and worldwide. It was brought into being in 2010 to take forward the life's work of Tom Bingham, the former Senior Law Lord and author of the most celebrated English language account of the meaning of the Rule of Law. Tom Bingham's book, *The Rule of Law*, represents a turning point in public understanding of the Rule of Law as a practical, meaningful concept.
14. The Bingham Centre recently adopted a new Five Year Strategy, *Proactively Advancing the Rule of Law: The Bingham Centre Strategy 2018-2022*, in which it sets out its strategic aims and identifies the areas of work in which it proposes to focus in the coming years.⁹ The Centre's strategic aims include "democratising" the Rule of Law, by mainstreaming it into policy making, law making and decision making in all relevant sectors and explaining it clearly to all relevant audiences, including the public; and embedding the Rule of Law, by helping to develop the necessary institutional machinery, processes and procedures to give it practical effect.
15. The Centre's proposed areas of focus in the coming years include Parliaments and the Rule of Law, in which the Centre will conduct a sustained programme of independent research into how to mainstream informed consideration of the Rule of Law into political processes in the UK and abroad. The Centre already has a track record of work on this subject, having provided the secretariat to the All Party Parliamentary Group on the Rule of Law since it was established in 2015.¹⁰ The APPG is a cross-party group focused on the Rule of Law, the purpose of which is to promote parliamentary and public discussion of the Rule of Law as a practical concept.
16. Another of the Bingham Centre's areas of focus is Business and the Rule of Law. The Centre has a Business Network for the Rule of Law, comprising businesses which wish to do more to support and promote the Rule of Law.¹¹ The Business Network acts as a bridge between the Bingham Centre and the business community and helps the Centre to identify Rule of Law issues which are of

⁹ <https://binghamcentre.biicl.org/newsitem/6281>

¹⁰ <https://binghamcentre.biicl.org/appg-rule-of-law>

¹¹ <https://binghamcentre.biicl.org/business-network>

particular interest to business. Business organisations have been amongst the most vocal in calling for legal continuity and certainty as the UK leaves the EU.¹² At a recent meeting of the Bingham Centre's Business Network, the legal uncertainty surrounding the process of Brexit was identified as one of the most significant Rule of Law issues currently facing business.

The Rule of Law Checklist

17. Another of the Bingham Centre's strategic aims is to broaden agreement about the core meaning of the Rule of Law by building global awareness of the emerging international consensus about the meaning of the Rule of Law as a practical concept. The Rule of Law is a term much deployed in political debate but often in a way which does not pause to explain what it is understood to mean. The Bingham Centre has worked with the Council of Europe's Commission for Democracy through Law (the Venice Commission) to build a pan-European consensus about the meaning of the Rule of Law as a practical concept, drawing on and developing Tom Bingham's account. The work of the Centre and the Commission has demonstrated that, in the 47 States of the Council of Europe, there is now a clear consensus as to the core elements covered by the terms "Rule of Law", "Rechtsstaat" and "Etat de droit", namely: legality, legal certainty, the prohibition of arbitrariness, access to justice, respect for human rights, non-discrimination and equality before the law.
18. In 2016 this work culminated in the Venice Commission publishing its [Rule of Law Checklist](#). The Checklist is intended to be a practical tool for evaluating the degree of respect for the Rule of Law in any given country, enabling it to be assessed in a detailed, objective, transparent and fair manner. In October 2017, the Checklist received a significant boost to its democratic legitimacy, when it was endorsed by the [Parliamentary Assembly of the Council of Europe](#). Parliamentarians, drawn from Europe's national parliaments, wholeheartedly endorsed the Checklist and resolved not only to use it systematically in the Assembly's own work, but urged national parliaments and governments, international and regional organisations and civil society bodies also to make systematic use of it in all work which involves assessing respect for the Rule of Law. The President of the Venice Commission, in his [address](#) to the Parliamentary Assembly, spoke of our "shared responsibility" for the Rule of Law. The health of the Rule of Law, he reminded legislators, is not only the business of all the institutions of the State – including parliaments and governments as well as courts – but it is also the responsibility of every one of us, including business, civil society organisations and the public.
19. The Venice Commission's Rule of Law Checklist provides a practical tool for carrying out objective, thorough and transparent Rule of Law compatibility assessments against internationally agreed standards. The Bingham Centre proposes to promote systematic use of the Rule of Law Checklist in national parliaments, including the UK Parliament, to encourage more systematic Rule of Law scrutiny of legislation at the time it is being considered by the legislature. The Centre has used the Checklist to guide the work of the Expert Working Group on

¹² See e.g. the Second Reading Briefing of techUK, "the industry voice of the UK tech sector, [techUK's Briefing](#), concluding that: "Tech companies want and need clarity that the regulatory environment in which they operate will remain stable... [There is a] need for significant further work during the passage of the Bill to ensure that business are given the maximum amount of legal and regulatory certainty possible."

the Bill (described in more detail below) and as the source of the standards against which it has scrutinised clauses 1 to 6 of the Bill for their Rule of Law compatibility.

The Expert Working Group

20. To ensure that the many Rule of Law issues raised by the Bill are properly explored and ventilated during the passage of the Bill, the Bingham Centre, in collaboration with the Constitution Unit and the Hansard Society, decided to convene a Working Group of experts. The Group included parliamentarians, academics and civil society organisations, who could between them combine experience of, and expertise in, substantive EU law; the legislative process, including parliamentary mechanisms for scrutinising both primary and secondary legislation; devolution; and the meaning and practical application of the Rule of Law.¹³ The purpose of the Group is to consider the implications of the Bill for the Rule of Law and to generate informed discussion about the most significant Rule of Law issues in order to inform debate about it, in Parliament and amongst the wider public. The background discussion papers prepared for the Group are available on its website.
21. The Group has met eight times so far to discuss different Rule of Law aspects of the Bill. The analysis contained in this Report has been informed by the work of the Expert Working Group, and a draft was discussed at a meeting of the Group on 19 February 2018, but **it is not a Report of the Group, nor is to be taken to reflect the views of all the members of that Group**. The purpose of the Group was not to produce a unanimously agreed Report on the Bill, but rather to identify and discuss the most significant Rule of Law issues the Bill raises. This Report is the work of the Bingham Centre, drawing on the work of the Group.

The purpose and scope of this Report

22. The purpose of this Report is very specific. It is intended to assist Parliament perform its important role of ensuring that the legislation it passes is compatible with the requirements of the Rule of Law. To that end, it identifies the most significant Rule of Law issues raised by clauses 1 to 6 of the Bill; measures the provisions in the Bill against the relevant internationally agreed Rule of Law standards; and, where appropriate, suggests ways in which the Bill could be improved in order to be more compatible with those standards, or reduce the risk of future breaches of those standards.
23. The Report proceeds on the assumption that the UK will withdraw from the European Union on 29 March 2019. It does not engage at all with arguments about the pros and cons of the UK withdrawing from the EU. Any recommendations it makes which would require the Bill to be amended are designed neither to stop Brexit nor to make it more likely, but to ensure that if and when the UK withdraws from the EU it does so in a way which is compatible with the requirements of the Rule of Law, as that concept is widely understood and reflected in internationally agreed standards.
24. The House of Lords Constitution Committee (“HLCC”) has done Parliament a great service by the extensive and detailed work it has done on the Bill, including consideration of the Bill’s implications for the Rule of Law and legal certainty. The Bingham Centre and the Expert Working Group have drawn extensively on its

¹³ <https://binghamcentre.biicl.org/withdrawalbillworkinggroup>

reports and on the evidence the Committee took during its inquiry into the Bill.¹⁴ We share many of the Rule of Law concerns that the Committee has identified and agree with many of its conclusions. To avoid duplication, we do not spend much time going over common ground in our Report, but focus on the small number of issues on which we make different recommendations or suggest different ways in which to give effect to the Committee's recommendations.

25. Our Report begins by identifying and summarising the main Rule of Law standards that are engaged by clause 1 to 6 of the Bill (chapter 2). It then focuses on the following main Rule of Law issues:
 - The meaning of "exit day"
 - The legal uncertainty in the definition of "retained EU law"
 - The accessibility of retained EU law
 - The legal status of retained EU law
 - The continued supremacy of EU law over pre-exit UK law
 - The EU Charter of Rights and General Principles
 - The interpretation of post-Brexit CJEU case-law
26. The Report has been drafted by Murray Hunt, Director of the Bingham Centre and Legal Adviser to the APPG on the Rule of Law, with expert input from Justine Stefanelli, Senior Research Fellow in European Law at the Bingham Centre, and Swee Leng Harris, Senior Policy Adviser to the Bingham Centre on Mainstreaming the Rule of Law in Parliament. Invaluable research assistance has been provided by Isabella Buono, Research Assistant at the Bingham Centre, and Aman Bharti, Research Assistant at the Constitution Unit.
27. The Bingham Centre is grateful to the Constitution Unit and the Hansard Society, with whom it has collaborated closely in supporting the work of the Expert Working Group on the Bill, and to the members of that Group, who have freely and enthusiastically given their time and expertise to extended discussions of the Rule of Law implications of the Bill. Particular thanks are due to Rt Hon Dominic Grieve QC MP, who has chaired the meetings of the Group and facilitated a lively and informative exchange of a wide range of views.
28. The Centre is also grateful to its funders whose contributions to the Centre's core funding enable it to undertake initiatives such as the Expert Working Group and to produce Reports such as this. The Centre's funders are listed in the most recent Impact Report of the British Institute of International and Comparative Law.¹⁵

¹⁴ *The 'Great Repeal Bill' and delegated powers* (March 2017); Interim Report (September 2017); and Main Report (January 2018).

¹⁵ *Engaging with national and global issues: Annual Impact Report 2016-17*, p. 27 <https://www.biicl.org/newsitem/6256>

2. THE RELEVANT RULE OF LAW STANDARDS

Relevant Benchmarks in the Rule of Law Checklist

29. The Rule of Law Checklist contains a number of detailed “benchmarks” which are specifically designed to help with practical exercises of assessing Rule of Law compatibility. The Checklist breaks down broad principles into more specific concepts and suggests the sorts of questions that need to be asked in order to evaluate Rule of Law compatibility.
30. The subject-matter of clauses 1 to 6 of the Bill engages a number of related and overlapping Rule of Law standards under the broad heading of “legal certainty.” These include the accessibility of the law (both legislation and court decisions); its foreseeability; its stability; its regard for legitimate expectations; its non-retroactivity; and respect for the finality of judicial decisions.
31. **Accessibility of the law**, including **legal certainty**, is the first of the eight principles set out in Tom Bingham’s *The Rule of Law*.¹⁶ Lord Bingham argued that it was of fundamental importance to any legal system that the law ‘must be accessible and so far as possible intelligible, clear and predictable’.¹⁷ He observed that legal certainty was not only necessary to justify the imposition of criminal penalties, but also an important factor contributing to economic growth, noting that “the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where the parties’ rights and obligations were vague or undecided.”¹⁸
32. An important component of foreseeability is the **stability** or **continuity** of the law. Continuity obviously cannot be an absolute requirement. Laws sometimes need to be changed to adapt to changing circumstances or respond to new challenges. The ability for people to change the law through democratic processes is a distinguishing feature of democracy. However, certain procedural requirements should apply to such changes in the law, such as notice, consultation and public debate. The Venice Commission recommends asking “Are laws stable to the extent that they are changed only with fair warning?”¹⁹
33. Related to continuity is the principle of respect for **legitimate expectation** which is also a manifestation of the Rule of Law requirement of legal certainty. In general, those who act in good faith on the basis of the law as it is should have their legitimate expectations respected. Again, this cannot be an absolute principle, because sometimes in exceptional circumstances it may be justifiable to change the law in a way which interferes with such legitimate expectations. As a general principle, however, legitimate expectations engendered by stable and continuous laws should be respected unless there are strong reasons for not doing so, which reasons must be articulated and capable of being tested by scrutiny.
34. Access to effective legal remedies for violations of legally protected rights is another important aspect of the Rule of Law.

¹⁶ Penguin Books, 2011 (first published 2010).

¹⁷ *Ibid*, p. 37.

¹⁸ *Ibid*, p. 38.

¹⁹ Venice Commission, [Rule of Law Checklist](#), p. 16.

35. During the Bill's Committee stage in the Commons, the Solicitor General, Robert Buckland QC MP, indicated the Rule of Law principles in play by reference to Lord Bingham's principles:²⁰

... it is my task to try to ensure, as one of the Law Officers, that the principles of the rule of law to which my right hon. and learned Friend the Member for Beaconsfield referred in his speech—accessibility, clarity and certainty—are adhered to. We will deal with the issues so that we uphold those important principles, which were set out by the late Lord Bingham.

36. Similarly, he expressly invoked the Rule of Law in his explanation of the legal certainty rationale for clause 2's preservation of domestic regulations made under the ECA implementing EU obligations:²¹

The clause is therefore essential to preserve our statute book and provide certainty over what our law is. I think that all Members would agree that at the heart of the rule of law is the need for certainty. That was why the Prime Minister put that at the top of her list when she outlined her criteria in the Lancaster House speech.

Legal certainty

37. It is worth making an important prefatory point about the nature of legal certainty as a Rule of Law requirement. It is of fundamental importance to the maintenance of the Rule of Law, as both Tom Bingham's account and the Venice Commission's Rule of Law Checklist make clear. However, it is also important to recognise that it should not be treated as if it were an absolute requirement. Legal regulation inevitably involves a degree of complexity, and ambiguity can never be eliminated. That is why we have courts, to resolve interpretive disputes.
38. The relevant international standards on legal certainty acknowledge this. For example, the case-law of the European Court of Human Rights recognises that whether a law which potentially interferes with Convention rights is defined with sufficient precision for it to satisfy the foreseeability requirement, the test is whether those affected can understand the legal consequences of their actions, *with the benefit of legal advice*. The Rule of Law requirement is not a counsel of perfection, but a requirement that there be *sufficient* legal certainty in all the circumstances, and the context will be important to determining the adequacy question.
39. It is important to analyse the Rule of Law compatibility of the Bill against that background understanding of the nature of the legal certainty requirement. Parliament should always strive to pass clear and unambiguous laws, but cannot pass laws which eliminate any judicial role in interpreting them.

Legal continuity

40. It is also worth reflecting on what is meant by continuity in the unusual context of the UK's departure from the EU. It is clear from the Government's own statements about the Bill that it has a very clear idea of what it means by continuity: it means that there will be no diminution of legal protections as a direct result of this Bill. There may be scope in future to argue about whether legal protections which are currently enjoyed should be changed, but that is not the purpose of this Bill. Its

²⁰ HC Deb, 20 Dec 2017, c 1109 <https://goo.gl/gqF8hk>.

²¹ HC Deb, 15 Nov 2017, c 411 <https://goo.gl/9M7RUj>.

purpose is quite the opposite: to ensure that the law is exactly the same the day after exit as it is the day before. That is exactly what the Rule of Law requires: continuity of law through the process of withdrawal, leaving possible changes to that law for future discussion in the proper democratic way: by publication of policy proposals, consultation on them, deliberation, debate and scrutiny.

41. It is against that background that we turn to consider some of the specific Rule of Law issues which are raised by clauses 1 to 6 of the Bill.

3. THE MEANING OF “EXIT DAY”

The effect of the Bill

42. Clause 1 of the Bill repeals the European Communities Act 1972 (“the ECA”) “on exit day”.
43. The ECA is the Act of Parliament which gives effect to EU law in the UK, including its supremacy over UK law. Its repeal is therefore necessary to reflect the UK’s withdrawal from the EU.
44. The effects of repealing the ECA are admirably and concisely explained in the HLCC’s Report on the Bill.²² These flow from the fact that the ECA provides the legal basis for directly effective EU law to have effect in the UK without further enactment, for the supremacy of such EU law, and for implementing EU law in UK law to the extent that this is required. In short, repealing this legal basis will mean that directly effective EU law will no longer have effect in the UK or be supreme over UK law, and secondary legislation made under the ECA to implement EU directives will be invalid because their legal basis will be removed.
45. The repeal of the ECA, which necessarily follows from the UK’s withdrawal from the EU, would therefore, without more, represent a moment of radical discontinuity in our legal system which, everyone agrees, would cause nothing short of legal chaos.²³ The rest of the Bill is intended to create a framework for ensuring that there is legal continuity, not revolution, at the moment of exit.
46. The Bill defines “exit day” as 29 March 2019 at 11:00pm.²⁴ It also gives ministers the power by regulations to amend the definition of exit day “if the day or time on or at which the Treaties are to cease to apply to the United Kingdom in accordance with Article 50(3) of the Treaty on European Union is different from that specified” in the Bill.²⁵ The Government may then change the date of exit day “to ensure that the day and time specified in the definition are the day and time that the Treaties are to cease to apply to the United Kingdom.”²⁶

²² HLCC Main Report, paras 7 and 8.

²³ *Ibid.*, para. 9.

²⁴ Clause 14(1). As Sir Stephen Laws, former First Parliamentary Counsel, has pointed out, the specification of “exit day” as a time, rather than a date, requires a consequential amendment to the Bill to substitute “at” exit day for all references to “on” exit day, a tidying up which has yet to be done.

²⁵ Clause 14(3) and (4).

²⁶ Clause 14(4)(a).

Analysis

47. HLCC, which had expressed concern about the extent of ministerial discretion to define “exit day” in the Bill as introduced,²⁷ is satisfied that the Bill now provides greater clarity as to the relationship between “exit day” as it applies in domestic law and the date on which the UK will leave the EU as a matter of international law.²⁸ It concluded that the Bill allows the Government a degree of flexibility to accommodate any change to the date on which the EU treaties cease to apply to the UK at the same time as setting appropriate limits on that necessary ministerial discretion.
48. Uncertainty about the precise date on which the UK will withdraw from the EU, whether there will be a transition/implementation period, and if so for how long and on what terms, is one of the greatest sources of legal uncertainty for UK businesses or businesses investing in or trading with the UK. Businesses need as much certainty as possible about the date on which the new legal framework created by the Bill will come into effect.²⁹
49. Legal certainty might have been better served had the Bill adopted a different approach of separating exit day from the day on which the UK leaves the EU and the UK therefore ceases to be bound in international law by the EU treaties. At the moment the latter date is known: it is 29 March 2019 unless the two year period under Article 50 is extended by the mechanism provided for in that Article. What is not yet known, because it is the subject of negotiation, is whether there will be a transition/implementation period, how long that will be and on what terms.
50. **The House of Lords may wish to explore in Committee, and in the light of progress in the negotiations, whether the current approach to the meaning of “exit day” in the Bill maximizes legal certainty, for businesses in particular, or whether the Government could provide greater certainty, for example by explaining to Parliament what legal framework is intended to apply during any period of transition/implementation.**

4. WHAT COUNTS AS “RETAINED EU LAW”

HLCC’s concern

51. The concept of “retained EU law” is central to the scheme of the Bill. It is also central to the raft of other Brexit legislation which is already being brought before Parliament.³⁰ As HLCC observed in its Interim Report, “it is imperative, in the interests of legal certainty, that there is maximum clarity as to what counts as retained EU law” after exit day.³¹
52. HLCC’s main criticism of the Bill’s definition of retained EU law is that the definition of “EU-derived domestic legislation” in clause 2(1) of the Bill is “significantly broader than it needs to be”.³² This is because most of the categories of domestic

²⁷ HLCC Interim Report, para. 21.

²⁸ HLCC Main Report, para. 15.

²⁹ A number of large representative organisations which speak for business have expressed concerns in this regard. See, in particular, statements from the [CBI](#) (6 December 2017) and [BCC](#) (11 December 2017).

³⁰ See e.g. Sanctions Bill; Trade Bill; Customs Bill.

³¹ HLCC Interim Report, para. 39.

³² HLCC Interim Report, para. 25; Main Report, para. 21.

legislation which are made retained EU law by clause 2 would remain in force even without clause 2, and there is therefore no need to save them. For example, provisions in primary legislation such as the Equality Act 2010, which implement EU obligations, are not repealed or rendered legally inoperative by the UK's withdrawal from the EU or repeal of the ECA, and would therefore remain in force even without clause 2.

53. HLCC's main concern here is not one of legal certainty but rather with the implications for the scope of the ministerial powers elsewhere in the Bill to amend retained EU law. The effect of the broad definition of EU-derived domestic law is to "inflate the range of domestic law – including primary legislation – in relation to which the ministerial "correction" powers conferred by the Bill can be exercised."³³ HLCC regards it as not constitutionally necessary or appropriate for primary legislation to be treated as retained EU law and therefore subject to the wide ministerial powers of correction.
54. An amendment has been tabled by members of HLCC³⁴ to meet the Committee's concern. The amendment would significantly narrow the scope of EU-derived domestic legislation in clause 2 of the Bill by confining it to secondary legislation made under the ECA. The effect of the amendment would be to remove from the definition of retained EU law provisions that implement EU directives or other EU obligations, or otherwise relate to the EU or the EEA, contained in Acts of the UK Parliament, but also in secondary legislation made under primary legislation other than the ECA, and in devolved primary and secondary legislation.

Analysis

55. We sympathise with HLCC's view that if the principal purpose of clause 2 is to operate as a savings clause, it is significantly broader than it needs to be, because it includes within the definition of "retained EU law" many laws which do not require saving because they would continue in force notwithstanding the repeal of the ECA.³⁵ We also understand and share HLCC's concern about the scope of the ministerial powers of amendment elsewhere in the Bill, including the range of domestic legislation that is made subject to their exercise.
56. However, part of the rationale for the broad definition of EU-derived domestic law in clause 2 of the Bill is a Rule of Law concern with legal certainty and continuity. Domestic legislation falling within this widely drawn definition is preserved, subject to the effect of relevant existing case law. When interpreting such EU-derived domestic law after exit day courts will also be able to consider post-exit EU CJEU case-law if they consider it to be appropriate to do so.³⁶ This Rule of Law rationale for the wide scope of Clause 2 was explained by the Solicitor General during Committee stage in the Commons:³⁷

We drafted clause 2 in a deliberate way. We have drawn it more widely than to cover just domestic legislation created under the 1972 Act as it will also apply to any other domestic primary or secondary legislation that implements EU obligations. It will apply to any related domestic legislation, any domestic legislation relating to law that will be retained under clauses 3 and 4, and indeed any domestic legislation that is otherwise related to

³³ HLCC Main Report, para. 22.

³⁴ In the names of Lord Pannick, Baroness Taylor, Lord Norton and Lord Beith.

³⁵ See clause 14(6).

³⁶ Clause 6(3).

³⁷ HC Deb, 15 Nov 2017, c 412 <https://goo.gl/9M7RUj>.

the EU or the European Economic Area. That ensures that all that legislation will form a part of what we define as retained EU law.

We have done that for two reasons. First, it means that this legislation, where relevant, will be interpreted in the light of pre-exit case law—the case law of the Court of Justice of the European Union—and the general principles of EU law, which are provided for in clause 6. That is vital to ensure not only that we save the legislation, but that we provide for it to operate in precisely the same way as it did before, which will prevent legal uncertainty about how such provisions should be interpreted.

Secondly, our approach ensures that to the extent that deficiencies might arise in any legislation as a result of exit, they can be corrected under powers in the Bill. Saving the domestic legislation under this clause will therefore reduce the risk of uncertainty and increase continuity as to the law that applies in the UK. It will also mean that we avoid the famous cliff edge that many hon. Members are worried about when we leave the EU.

57. The Prime Minister similarly confirmed in her letter dated 9 January 2018 to the Chair of the European Scrutiny Committee, Sir William Cash MP, that the broad definition of retained EU law under clause 2 is designed to prevent legal uncertainty about how this legislation should be interpreted.³⁸
58. The breadth of the concept of retained EU law determines not only the scope of the ministerial powers to deal with deficiencies arising from withdrawal, in clause 7 of the Bill, but also the extent to which such law is subject to retained case law and any retained general principles of EU law in clause 6. As Michael Ford and Phil Syrpis have pointed out, narrowing the scope of EU-derived domestic law may meet concerns about the scope of amending powers, but it may also give rise to greater legal uncertainty, because it means that domestic law implementing EU obligations but made other than by secondary legislation under the ECA is not subject to retained case law or general principles.³⁹
59. So, for example, the effect of HLCC's recommended amendment would be that the Equality Act 2010, which is primary legislation containing provisions implementing EU law obligations, would no longer be required to be read in accordance with the case-law of the CJEU. There are many decisions of domestic courts interpreting the Equality Act in the light of CJEU case-law. The effect of the amendment proposed by HLCC, which would narrow the definition of EU-derived domestic legislation in clause 2 of the Bill, would be to cast doubt on whether the Act should be interpreted in the same way in future. It would, in the words of the authors of the piece, leave the Equality Act entirely outside the Bill, freed from its historic moorings in EU legal obligations, and adrift on uncharted waters. This would neither enhance legal certainty, nor ensure continuity by maintaining current legal protections.
60. **We consider that the Government is right to be concerned about destabilizing the settled interpretation of EU-derived domestic legislation if it is not included in the**

³⁸<http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/news-parliament-2017/pm-letter-11-01-17/>

³⁹ Michael Ford and Phillip Syrpis, 'Retained EU law in the EU (Withdrawal) Bill: A Reaction to the House of Lords Constitution Committee Report', *UK Constitutional Law Association Blog*, 14 February 2018 (<https://ukconstitutionallaw.org/2018/02/14/michael-ford-and-phil-syrpis-retained-eu-law-in-the-eu-withdrawal-bill-a-reaction-to-the-house-of-lords-constitution-committee-report/>)

concept of “retained EU law”. This legal certainty concern could in principle be met if HLCC’s recommended amendment to clause 2 were accompanied by a consequential amendment to clause 6 of the Bill making express provision for the future interpretation of the legislation which HLCC’s amendment would remove from the scope of clause 2.

61. However, since clause 6 currently concerns the interpretation of retained EU law, this would involve some radical surgery to the basic architecture of the Bill. Unless the House of Lords is prepared to countenance such fundamental change to the Bill’s conceptual foundations, we consider that HLCC’s concerns about the scope of clause 2 may be better directly addressed by amendments to other provisions in the Bill, such as in the provisions defining the scope of those powers, the provisions defining the procedures by which they are scrutinised and the interpretation provision.⁴⁰ We intend to return to how the Bill can be amended to achieve that in a future Report analysing from a Rule of Law perspective the delegated powers in the Bill.

5. ACCESSIBILITY OF RETAINED EU LAW

The Rule of Law Issue

62. In addition to the Rule of Law concern about the clarity of the definition of what counts as “retained EU law”, there is a related but distinct concern about the accessibility of this body of law, in the literal sense of whether a comprehensive list of it will be publicly available. The Rule of Law Checklist asks, under “Are laws accessible?”, “Are they easily accessible, e.g. free of charge via the internet and/or in an official bulletin?”⁴¹ In the context of the Bill, this means asking whether the practical and administrative arrangements in place to ensure that a comprehensive list of retained EU law is publicly available?

The Limited Provision in the Bill

63. The Bill makes provision for the publication by the Queen’s printer of copies of retained direct EU legislation (that is, EU law retained by virtue of clause 3 of the Bill) and related information.⁴² However, the Bill does not address publication of the other two types of retained EU law: EU-derived domestic legislation under clause 2 and directly effective EU law under clause 4. This means that there is currently no requirement under the Bill for the Government to ensure that a list of all retained EU law is publicly available.
64. During Commons Committee Stage, Chris Leslie MP suggested that “[i]t is sensible to have a schedule that lists retained EU laws”⁴³ and Joanna Cherry MP pointed out the suggestion by the Law Society of Scotland that “once the process of identifying European Union-derived UK law was complete, that body of law should be collected in an easily identifiable and accessible collection.”⁴⁴

⁴⁰ E.g. clause 14(6), the effect of which is that EU-derived domestic legislation is to be treated as continuing to be domestic law “by virtue of” clause 2 irrespective of whether it would have continued to be domestic law anyway, so enlarging the range of domestic law which is subject to the wide ministerial powers of correction.

⁴¹ Venice Commission, [Rule of Law Checklist](#), p. 15.

⁴² Clause 13(1) and Part 1 of Schedule 5.

⁴³ HC Deb, 15 November 2017, c 437 <https://goo.gl/9M7RUj>.

⁴⁴ HC Deb, 20 December 2017, c 1101 <https://goo.gl/gqF8hk>.

65. However, there have been no amendments to the Bill and there appears to be little in the way of explanation about what preparations the Government is making to ensure that the body of retained EU law is easily accessible before exit day so that individuals and businesses can ascertain the law that applies to them.
66. The scale of the task should not be underestimated. Solicitor General Robert Buckland QC MP has stated that “more than 12,000 EU regulations are currently in force” in the UK and that there are “around 7,900 statutory instruments implementing EU legislation”.⁴⁵

Ministerial power to exempt from duty to publish

67. The Bill also provides a ministerial power to create an exception from the duty to publish by giving a public direction to the Queen’s printer if satisfied that the instrument concerned has not become, or will not become, retained direct EU legislation.⁴⁶ As Rt Hon Dominic Grieve QC MP pointed out during the Bill’s Committee stage in the Commons, “[t]here appear to be no limitations on that power and no guidance on when such instruction might or might not be appropriate” and that the important Rule of Law principle of accessibility means it is “desirable that the entirety of retained direct EU legislation should be made available through the Queen’s printer”.⁴⁷

Analysis and recommendation

68. The Government has not brought forward any amendments to the Bill that would either widen the scope of the publication requirement to other types of retained EU law or circumscribe the ministerial power to create an exception from the duty to publish. The language conferring the ministerial power to exempt from the duty to publish is subjective and open-ended. Nor has Parliament been kept informed of what preparations are being made to ensure that the body of retained EU law will be readily accessible by exit day, as the Rule of Law requires.
69. **A comprehensive list comprising the whole body of retained EU law will need to be accessible on (and preferably well before) exit day so that individuals and businesses can ascertain the laws that govern them. We recommend that the Bill be amended to make the duty to publish apply to all retained EU law and to circumscribe the ministerial power to direct that certain material need not be published. We also recommend that the Government publish a clear statement of how it proposes to ensure that on and preferably well before exit day there will exist a published, comprehensive, fully searchable database of all retained EU law, preferably hosted on the official website legislation.gov.uk.**

6. THE LEGAL STATUS OF RETAINED EU LAW

The Rule of Law Issue

70. The Rule of Law requires clarity about the hierarchical status of legal norms within the legal system. Businesses and individuals need to know the status of one rule relative to another rule because this will be determinative of a number of important questions: which rule takes precedence in the event of a conflict; whether legal challenges can be made to the rule and, if so, on what grounds; what remedies

⁴⁵ HC Deb, 15 November 2017, c 413 <https://goo.gl/9M7RUj>.

⁴⁶ Schedule 5, para. 2.

⁴⁷ HC Deb, 20 December 2017, c 1081 <https://goo.gl/gqF8hk>.

are available in the event of a successful legal challenge; and the processes required before the rule can be changed or revoked. The cluster of concepts that go to make up legal certainty (clarity, predictability, foreseeability) are all engaged when there is doubt about the relative normative status of legal rules. Without certainty about relative legal status it is difficult for those subject to the law to order their affairs confident in the knowledge that they know what the law requires of them.

71. The Bill creates a new category of “retained EU law”, comprising any law which, post-exit, continues to be or forms part of domestic law by virtue of sections 2, 3 or 4 of the Bill.⁴⁸ Retained EU law is therefore comprised of EU-derived domestic legislation under clause 2, retained direct EU legislation under clause 3 and retained directly effective EU law under clause 4.
72. EU-derived domestic legislation under clause 2 comprises secondary or primary legislation that implements EU directives or other obligations or that otherwise relates to the EU or the EEA. The legal form of this legislation does not necessarily correspond to the significance of the subject-matter of the legislation. For example, many EU directives concerning fundamentally important employment rights are contained in secondary legislation passed under the ECA. This part of retained EU law therefore already has a clear legal status in UK law, albeit one which does not necessarily reflect the importance of the rights which the law protects.
73. The rest of the body of retained EU law (retained direct EU legislation under clause 3 and retained directly effective EU law under clause 4) does not have a clear legal status in UK law. It does not automatically acquire such a status by virtue of being statutorily converted into UK law, nor does the Bill assign it such a legal status other than for certain specific purposes.

HLCC’s solution

74. Professor Paul Craig, Professor of English Law at the University of Oxford, drew this Rule of Law problem at the heart of the Bill to the attention of HLCC.⁴⁹ In its interim report HLCC recommended that the legal status of retained EU law “should be addressed on the face of the Bill to avoid uncertainty.”⁵⁰
75. The Government, in its evidence to HLCC in its subsequent inquiry into the Bill, explained that it had deliberately decided not to assign a single legal status to retained direct EU law for all purposes. It sees retained direct EU law as “a unique and new category of domestic law” which will operate in a different way from both primary and secondary legislation and will have a unique status within the domestic hierarchy.⁵¹ The Solicitor General envisaged that the broad ministerial power to make consequential provision⁵² could be used to specify whether particular pieces of retained EU law should be designated as having the status of primary or secondary legislation.⁵³

⁴⁸ Clause 6(7).

⁴⁹ Professor Paul Craig, Written Evidence to HLCC <https://goo.gl/tRdSFr>.

⁵⁰ HLCC Interim Report, para. 29.

⁵¹ Department for Exiting the European Union, Written Evidence to HLCC <https://goo.gl/DFSFGA>.

⁵² Clause 17(1).

⁵³ Robert Buckland QC MP, Oral Evidence to HLCC, Q47.

76. In its recent Report on the Bill, HLCC goes further than its recommendation in its interim report and recommends a solution to this Rule of Law problem. It recommends that retained direct EU law should have the same legal status for all purposes, and that the Bill should give it the status of primary legislation.⁵⁴ It considers that the Bill's current approach, of assigning different legal statuses for different purposes but no single status for all purposes, is highly likely to cause confusion and uncertainty, which is incompatible with the Bill's objective of securing legal continuity and certainty as the UK leaves the EU.⁵⁵ It considers it to be imperative, to avoid such uncertainty, that all retained direct EU law has the same legal status for all purposes.⁵⁶
77. It recommends that the single legal status should be that of primary legislation for a number of reasons. First, because that status better accords with the status that directly effective EU law currently has.⁵⁷ Second, because directly effective EU law is closely analogous to domestic primary legislation.⁵⁸ And third, because the Committee considers it important that retained direct EU law should be immune from revocation under delegated powers in other statutes that are not Henry VIII powers.⁵⁹
78. HLCC recognises some of the drawbacks of treating all retained direct EU law as primary legislation. For example, it seriously restricts the opportunities for legal challenge to retained direct EU law.⁶⁰ Primary legislation cannot be judicially reviewed other than on grounds of incompatibility with Convention rights under the HRA, and whereas secondary legislation can be invalidated for being incompatible with Convention rights, primary legislation cannot, it can only be read compatibly if it is possible to do so, or declared incompatible which does not affect its legal validity. HLCC acknowledged these disadvantages, but considered them to be outweighed by the advantages of treating it all as primary legislation.⁶¹ In particular, it is clear that the consideration of greatest weight in HLCC's reasoning was that treating retained direct EU law as primary legislation renders it immune from revocation under delegated powers which are not Henry VIII powers.⁶² Primary legislation can only be amended or revoked by other primary legislation or pursuant to Henry VIII powers which are generally subject to an enhanced form of parliamentary scrutiny.
79. An amendment has been tabled by members of the Committee⁶³ which would insert into clause 5 a new subsection stating that "Retained EU law is to be treated as primary legislation, enacted on exit day." Since retained EU law is defined in clause 6(7) to include EU-derived domestic law under clause 2, this amendment would go further than the amendment recommended by HLCC, which would have applied only to retained direct EU legislation under clause 3 and retained directly effective EU law under clause 4.

⁵⁴ HLCC Main Report, para. 52.

⁵⁵ *Ibid.*, para. 51.

⁵⁶ *Ibid.*, para. 51.

⁵⁷ *Ibid.*, para. 46.

⁵⁸ *Ibid.*, para. 46.

⁵⁹ *Ibid.*, para. 50.

⁶⁰ *Ibid.*, paras 48 and 49.

⁶¹ *Ibid.*, para. 49.

⁶² *Ibid.*, para. 50.

⁶³ In the names of Lord Pannick, Baroness Taylor of Bolton, Lord Norton of Louth, Lord Beith.

Analysis

80. We share HLCC's Rule of Law concerns about the Bill's failure to accord a clear legal status to retained direct EU law and the Government's proposal to treat it as *sui generis* and to use ministerial powers to allocate it a legal status on a case by case basis. This would fail to provide sufficient legal certainty and would confer too wide a discretion on the Government to determine fundamental issues of access to legal remedy and processes for amending or revoking. We also see the attraction in the apparent simplicity of treating all retained EU law as primary legislation deemed to have been enacted on exit day.
81. However, we have serious reservations about treating all retained EU direct legislation as primary legislation for a number of reasons. Given the sheer volume of material that will be captured by clause 3, much of which is in no way analogous to primary legislation, we consider that HLCC's recommendation could give rise to a number of troubling results. In particular, as Professor Craig explains in his recent UK Constitutional Law Association blog piece, HLCC's recommendation would "devalue the currency" of primary legislation, by "flood[ing] the UK primary statute book with up to 10,000 primary statutes, the great majority of which are not, as judged by their substance, primary legislation."⁶⁴ Insofar as the practical demands of the Brexit process will inevitably require Ministerial amendment of that flooded statute book, "[t]he consequential danger is that politicians... become inured to use of [Henry VIII] powers, which will become the new norm for statutory change."
82. Professor Craig draws attention not only to the content and volume of Clause 2 material, but also to the legislative context in which that material is situated. First, he points out that the Clause 2 and Clause 3 categories "are not hermetically sealed": EU Directives (dealt with in Clause 2) will often have been "fleshed out through [EU] delegated and implementing acts" (incorporated by Clause 3). Given that EU Directives have commonly been implemented in UK law as statutory instruments, HLCC's recommendation would have the "constitutionally anomalous" result that, whilst many implemented Directives will continue to have the status of secondary legislation, retained delegated and implementing acts made pursuant to such Directives will be afforded the status of primary legislation.
83. Professor Craig also suggests that HLCC's approach will create confusion within the Clause 3 category. He points out that, on account of the general rule that clashes between two pieces of primary legislation are to be resolved in favour of the later in time, HLCC's recommendation would require any clash between a retained delegated/implementing act and the retained regulation by which it was made to be resolved in favour of the former. He expresses concern that attempts to avoid this "clearly... wrong result" would engender further legal uncertainty.
84. We find Professor Craig's concerns compelling on Rule of Law grounds. A solution to the Rule of law problem identified by HLCC needs to deal appropriately with the different strands of retained EU law, and to provide sufficient legal certainty. It also needs, in our view, to address the question of the legal status of EU-derived domestic legislation in clause 2, as many of the EU-derived rights currently contained in secondary legislation made under s. 2(2) ECA are of a kind which should have the status of primary not secondary legislation. Perhaps above all, it

⁶⁴ Paul Craig, 'The Withdrawal Bill, Status and Supremacy', *UK Constitutional Law Association Blog*, 19 February 2018 (<https://ukconstitutionallaw.org/2018/02/19/paul-craig-the-withdrawal-bill-status-and-supremacy/>).

should not accidentally incentivize the use of Henry VIII clauses on a massive scale, which risks normalizing their use.⁶⁵

85. HLCC considered that it is not possible to lay down in the Bill any formula capable of satisfactorily distinguishing between retained direct EU law that should be treated as primary legislation and that which should be treated as secondary.⁶⁶ However, we consider that the advantages of such an approach far outweigh the disadvantages that accompany HLCC's preferred solution of treating all retained direct EU law as primary legislation. As Professor Craig argues, it would in principle be possible to address the Rule of Law issue which has been rightly identified by HLCC by ascribing a presumptive legal status to retained direct EU law according to its origins, with a power to change the deemed legal status of direct EU law by regulations, subject to the affirmative procedure, if considered necessary in light of the substance of the law in question. This would be similar to the approach suggested by Rt Hon Dominic Grieve QC MP in the Commons. In our view the Bill should also take a similar approach to designating a legal status for EU-derived domestic legislation.
86. We agree with Professor Craig that it would be a mistake to amend the Bill to make all retained EU law primary legislation and that it would be preferable, from a Rule of Law perspective, if the Bill were amended to presumptively designate legal status to EU law according to the status it had in EU law pre-exit. This possibility deserves serious consideration. After all, as the Solicitor General has rightly observed, this is legislation of a constitutional nature, designing the hardwiring of our legal system for future generations. It is important to get such legislation right. No amendment has yet been tabled which would have this effect. This is a matter to which the House of Lords might consider it appropriate to return at Report Stage.

7. THE SUPREMACY OF RETAINED EU LAW OVER PRE-EXIT UK LAW

The effect of the Bill

87. The Bill makes clear that the familiar EU law principle of "supremacy" does not apply to any future UK laws made after the UK's exit from the EU.⁶⁷ The principle of supremacy (or primacy) of EU law simply means that EU law has a superior legal status to domestic law in Member States' legal systems. This means that in the event of a conflict between domestic law and EU law, EU law takes precedence and domestic courts are required to disapply domestic law to the extent of the inconsistency. The principle of supremacy also requires that domestic law must be interpreted, as far as possible, in accordance with EU law.⁶⁸ In the event of a conflict between a post-exit statute and a piece of retained EU law, the Act of Parliament will take precedence. This flows from the fact that the UK will no longer be a member of the EU, and therefore no longer under an obligation in future to

⁶⁵ See Lord Judge, *A Judge's View on the Rule of Law* (Annual Bingham Lecture, 3 May 2017) https://www.biicl.org/documents/1637_2017_05_11transcript_of_lord_judges_speech_3.pdf?showdocument=1; *Ceding Power to the Executive* <https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive.aspx>

⁶⁶ HLCC Main Report, para. 50.

⁶⁷ Clause 5(1): the principle of supremacy does not apply to "any enactment or rule of law passed or made on or after exit day."

⁶⁸ This is often referred to as "the *Marleasing* obligation" after the case in which the principle was established.

accept the supremacy of EU law, so this provision in the Bill is strictly speaking unnecessary but its inclusion could be said to enhance legal certainty by leaving no room for doubt that future domestic laws will take precedence over inconsistent EU law.

88. The Bill also provides, however, for the principle of supremacy to continue to apply after exit for the limited purpose of preserving the hierarchical relationship between retained EU law and pre-exit domestic law. The principle of supremacy will continue to apply post-exit in the same way as it did before exit, where a conflict arises between retained EU law and pre-exit domestic law.⁶⁹ In such circumstances, retained EU law would continue to take precedence over the inconsistent domestic law (even where the domestic law post-dates the retained EU law), just as it does now.
89. It is part of the principle of supremacy of EU law that domestic law must be interpreted, as far as possible, in accordance with EU law: this is sometimes referred to as the duty of consistent interpretation, or the *Marleasing* interpretive obligation after the case in which the principle was established in 1990. The combined effect of clause 5(1) and (2) is that this interpretive obligation will not apply to future legislation passed after exit day, but it will continue to apply to pre-exit domestic legislation.⁷⁰ In other words, pre-exit domestic law must be interpreted, as far as possible, in accordance with retained EU law.

The Rule of Law Rationale

90. The rationale for this continuing role for the principle of supremacy is a Rule of Law one: to ensure legal continuity and therefore certainty. Without this provision in the Bill, there would be a risk that questions about the relative normative status of EU law and pre-exit domestic law could be reopened, which would have a radically destabilising effect on settled expectations. The provision in the Bill merely preserves the status quo that, in the event of a conflict, retained EU law takes precedence over pre-exit domestic law. The Rule of Law justification for retaining this limited role for supremacy was explained in detail by the Prime Minister in her letter dated 9 January 2018 to the Chair of the European Scrutiny Committee⁷¹:

“Simply removing it from our law at that point would be likely to result in a confused and incoherent statute book and create uncertainty as to the law’s meaning and effect. ... Remaining silent within the Bill – or taking a different approach – would risk changing the law and creating uncertainty as to its meaning and effect.”

91. The reasons set out in the Prime Minister’s explanation are compelling. The provision is therefore to be welcomed from a Rule of Law point of view, because it helps to maximise legal continuity, certainty and stability of expectations. It is a necessary part of the Government’s objective of ensuring that the law is the same on the day after exit as it was the day before.
92. The Bill goes further by also providing that the principle of supremacy can continue to apply to retained EU law which is modified in the future if that is consistent with

⁶⁹ Clause 5(2).

⁷⁰ Explanatory Notes, para. 101; *DExEU Factsheet: Converting and Preserving Law* <https://goo.gl/cixNe7>.

⁷¹ <http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/news-parliament-2017/pm-letter-11-01-17/>

the intention of the modifications.⁷² This further promotes legal continuity and certainty by making clear that the mere fact that retained EU law is modified in future does not necessarily disrupt its established hierarchical relationship with pre-exit law, but only does so if that is the clear intention of the modification. If it were otherwise, EU law which currently enjoys precedence could be impliedly repealed by future legislation, rather than expressly repealed following debate and scrutiny of a measure intended to have this effect.

HLCC's recommendation

93. HLCC, however, considers that maintaining a role for the principle of supremacy after exit is "constitutionally flawed" and will cause legal uncertainty.⁷³ It considers the whole approach adopted by the Bill in clause 5(1) and (2) is misconceived and believes that an entirely different approach is required if the Bill is to achieve its objectives of legal continuity and certainty.
94. The Committee says that it supports "the policy aims" that underpin the Bill's provisions preserving a role for the principle of supremacy, because it accepts that "it would be destabilising if, upon exit, retained EU Law's status radically changes such that pre-exit domestic law could prevail over it."⁷⁴ However, it considers that the way in which clause 5 seeks to achieve these aims is "conceptually flawed, sits uncomfortably with the doctrine of parliamentary sovereignty and is a potential source of legal confusion."⁷⁵
95. The conceptual flaw, in the Committee's view, is that retained EU law, after exit, will no longer be EU law, but will be domestic law. The Committee therefore finds it impossible to see in what meaningful sense the principle of supremacy of EU law can apply post-exit. "Retained EU law, being domestic law, cannot benefit from the principle of the supremacy of EU law."⁷⁶ The supremacy principle is a principle of EU law, a creation of the CJEU, and "alien to the UK constitutional system: not only did it originate outside that system, it also sits uncomfortably with established constitutional principles, most notably the doctrine of parliamentary sovereignty."⁷⁷ "[T]o seek to graft that EU law principle onto a legislative scheme the explicit purpose of which is to remove EU law from the UK legal system and replace it with domestic law, "risks confusion and places legal certainty in jeopardy", the Committee asserts.⁷⁸ The means employed by clause 5 to achieve its objective are therefore "fundamentally flawed."⁷⁹
96. HLCC recommends an alternative approach to achieve that objective. It recommends that retained direct EU law should be made to prevail over pre-exit domestic law by providing in the Bill that retained direct EU law is to be treated as having the status of an Act of the UK Parliament enacted on exit day.⁸⁰ This would avoid the need for any "supremacy principle" and greatly simplify the constitutional position of retained EU law by ascribing it a status consistent with the doctrine of parliamentary sovereignty. And it would complete the task of "excising" EU law from domestic law by making clear that retained direct EU law is, after exit day,

⁷² Clause 5(3).

⁷³ HLCC Main Report, paras 71-103.

⁷⁴ *Ibid.*, para. 79.

⁷⁵ *Ibid.*, para. 79.

⁷⁶ *Ibid.*, para. 89.

⁷⁷ *Ibid.*, para. 91.

⁷⁸ *Ibid.*, para. 90.

⁷⁹ *Ibid.*, para. 93.

⁸⁰ *Ibid.*, para. 93.

domestic law not EU law, subject only to UK constitutional doctrines and principles, and not contingent for its status on the “externally-derived constitutional doctrines of the EU.”⁸¹

97. Amendments have been tabled by members of the Committee⁸² to give effect to its recommendation. The amendments would remove from the Bill clauses 5(1) to (3) and insert in their place a new subsection providing that “retained EU law is to be treated as primary legislation, enacted on exit day.”

Analysis and Recommendation

98. HLCC makes a powerful case for removing references to the principle of supremacy from the Bill. Its argument is rooted, in part at least, in the Rule of Law: it argues that its preferred approach is “required if the Bill is to secure its overarching objectives of legal continuity and certainty”.⁸³ We have subjected this claim to careful scrutiny.
99. In our view, the objective of clauses 5(1) to (3), namely to give retained EU law priority over pre-exit, but not post-exit domestic law, is not merely “a sensible one”,⁸⁴ it is *required* by the Rule of Law. Anything which is not crystal clear about that fundamentally important point risks giving rise to legal discontinuity, because it leaves scope for argument about which rule takes precedence in the event of a conflict between retained EU law and pre-exit domestic law.
100. We do not consider it necessary, from a legal certainty perspective, to expunge the concept of supremacy from the Bill. The limited scope of its application is clear. It applies only to conflicts between retained EU law and pre-exit UK law. There is no question of EU law being supreme over future UK law. The principle of the supremacy of EU law is well understood, having been a feature of our constitutional order since 1973.⁸⁵ No person or business who is affected by EU law, or practising lawyer advising them, is currently in any doubt about which law takes precedence when there is a conflict between directly applicable EU law and domestic law. Given this settled understanding, the Bill’s Rule of Law objective of ensuring legal continuity, so that the same law applies the day after exit as the day before, is therefore best served by continuing to refer to the supremacy principle as governing the order of precedence of retained EU law and pre-exit domestic law.
101. Removing clauses 5(1) to (3) and replacing them with a provision deeming all retained direct EU law to be primary legislation enacted on exit day does not provide the same degree of legal certainty. Indeed, in our view it risks introducing new legal uncertainty. Whereas the approach in the Bill simply freezes the current and widely understood hierarchical relationship between retained EU law and pre-exit domestic law, until such time as Parliament seeks to modify retained EU law or legislate inconsistently with it, HLCC’s recommend approach introduces a new and unfamiliar step into determining which law takes precedence:

“It is therefore to domestic principles of constitutional law, not the EU law principle of ‘supremacy’, to which Parliament should look in seeking to

⁸¹ Ibid., para. 99.

⁸² In the names of Lord Pannick, Baroness Taylor of Bolton, Lord Norton of Louth, Lord Beith.

⁸³ HLCC Main Report, para. 80.

⁸⁴ Ibid., para. 93.

⁸⁵ HLCC refers to it being “well-recognised” that, during UK membership of the EU, EU law takes priority over domestic law: Main Report, para. 79.

stipulate what the legal status and effects of retained EU law – a new body of domestic law – will be.”⁸⁶

102. This approach would give rise to a number of questions. For example, do domestic principles of constitutional law supply the same resources to resolve interpretive conflicts which may arise between retained EU law and pre-exit domestic law? In particular, if HLCC’s recommendation were adopted, should courts apply the strong interpretive principle in *Marleasing* to strive to interpret pre-exit domestic law so as to be compatible with the deemed piece of primary legislation containing the retained EU law? Domestic constitutional law includes such a principle in s. 3 of the Human Rights Act and a similar common law principle where rights recognised as fundamental by the common law are at stake, but not outside of those contexts. Such doubt about whether the duty of consistent interpretation continues to apply to pre-exit domestic legislation would give rise to precisely the sort of legal uncertainty that the Bill is designed to prevent.
103. In our view, HLCC’s recommended approach gives rise to unnecessary uncertainty and therefore risks giving rise to legal discontinuity, risks which are avoided by the simpler approach taken by the Bill.
104. **We therefore recommend that clauses 5(1) to (3) of the Bill be retained as the most effective way of achieving the Bill’s objective of ensuring legal continuity and certainty.**

Are clarifications required if the supremacy principle is retained?

105. HLCC in its Report also recommends that, if references to the supremacy principle are to be preserved in the Bill, as we recommend, clause 5 would need to be amended to provide clarification in three respects.⁸⁷
106. First, as presently drafted HLCC considers that it is not clear whether the supremacy principle is intended to benefit *all* retained EU law or only *some types* of retained EU law.⁸⁸ HLCC considers that, if the supremacy principle is to be left in the Bill, clause 5 should be amended to make clear that the supremacy principle is intended to benefit only retained direct EU legislation under clause 3 and directly effective EU law domesticated by clause 4, and not EU-derived domestic legislation under clause 2.⁸⁹
107. We note, however, that clause 5(2) already provides that the principle of supremacy continues to apply post-exit “so far as relevant” to the interpretation, disapplication or quashing of any pre-exit domestic law. In our view this makes sufficiently clear that the supremacy principle post-exit is only intended to benefit retained EU law which is recognised as enjoying supreme status pre-exit.
108. Second, the reference to “any ... rule of law” in clause 5(2) is intended by the Government to make clear that the supremacy principle applies not only to pre-exit legislation but to the common law.⁹⁰ HLCC considers that, if the supremacy principle is to be preserved in the Bill, it is not clear how it will apply to the common law, as opposed to legislation, because the common law emerges and evolves,

⁸⁶ Ibid., para. 98.

⁸⁷ Ibid., para. 101.

⁸⁸ Ibid., para. 81.

⁸⁹ Ibid., para. 83.

⁹⁰ Evidence of Solicitor General Robert Buckland QC MP to HLCC, Q50.

whereas legislation takes effect at a certain point in time.⁹¹ It considers that the application of clause 5(2) to the common law is likely to be far from straightforward and would need to be amended to provide courts and others with suitable guidance for the purpose of determining whether a rule of the common law should be taken to have been made before or after exit.⁹²

109. We note, however, that it is already the case that the principle of supremacy may require a court to disapply a rule of the common law to the extent that it is inconsistent with EU law and that the nature of the common law has not proved an obstacle to the application of the principle of supremacy in practice. If an issue arose as to a possible conflict between a retained EU law and a rule of the common law before exit, clause 5 would merely require a “snapshot” of the common law to be taken on exit day to be compared with the retained EU law. We do not see the need to amend clause 5 to deal with the application of the supremacy principle to pre-exit common law.
110. Third, HLCC considers that clause 5(3), which envisages the supremacy principle continuing to apply to pre-exit domestic legislation even it is modified after exit day, is insufficiently clear in its current form and therefore risks causing legal uncertainty. This is because the clause provides for modified retained EU law to continue to be supreme over pre-exit domestic legislation provided that is consistent with the intention of the modification and, in HLCC’s view, “it is not clear how such an intention or its absence would be discerned.”⁹³ HLCC also query whether the supremacy principle is intended to protect only “retained EU law” or continues to apply to retained EU law once it has been modified.⁹⁴ It recommends that, if the supremacy principle is preserved, clause 5(3) would need to be amended to clarify the extent to which retained EU law can be modified while retaining the benefit of the supremacy principle, and to clarify in what circumstances the modification of pre-exit domestic law would be such as to turn it into post-exit domestic law that is no longer vulnerable to the operation of the supremacy principle.⁹⁵
111. In our view, these matters are already clear on the face of clause 5(3). Modified retained EU law will continue to be supreme over pre-exit domestic law unless and to the extent that the modification is intended to make inconsistent domestic law take precedence, and that intention will be discerned by the usual means of statutory construction, starting with the language of the modifying measure and resorting to other aids to interpretation as necessary. We do not see the need for any clarification of clause 5(3). Its intention is clear: it is to exclude the possibility of implied repeal of retained EU law, which promotes legal continuity and certainty. We consider there to be a strong legal certainty argument for retained EU law to continue to take precedence over pre-exit domestic law even where the retained EU law has been substantially modified, provided that continued precedence is not inconsistent with the intention of the modifications.
112. We therefore conclude that clause 5(1) to (3) provide sufficient certainty in their current form and do not require amendment.

⁹¹ HLCC Main Report, para. 86.

⁹² *Ibid.*, para. 87.

⁹³ *Ibid.*, para. 101.

⁹⁴ *Ibid.*, para. 101.

⁹⁵ *Ibid.*, para. 103.

8. THE EU CHARTER OF RIGHTS AND GENERAL PRINCIPLES

The Bill's non-retention of the EU Charter of Fundamental Rights

113. The most significant exception to the Bill's preservation and conversion of EU law is the EU Charter of Fundamental Rights and Freedoms. The Bill provides that the Charter "is not part of domestic law on or after exit day."⁹⁶ However, the extent of this exception is qualified because the Bill also provides that the non-retention of the Charter "does not affect the retention in domestic law on or after exit day ... of any fundamental rights or principles which exist irrespective of the Charter".⁹⁷ References to the Charter in any case law are to be read as if they were references to any corresponding retained fundamental rights or principles.⁹⁸
114. The Government has sought to explain both the intended effect and the rationale behind its approach in the Explanatory Notes,⁹⁹ in evidence to the HLCC¹⁰⁰, in its ECHR Memorandum¹⁰¹, in its Right by Right Analysis document¹⁰², and in response to amendments debated in the Commons¹⁰³. In short, the Government's position is that it is unnecessary to retain the Charter, because it merely codifies pre-existing rights and principles in EU law which the Bill converts into UK law anyway as part of the EU *acquis*, and there will therefore be no loss of fundamental rights or principles.

The Rule of Law issues

115. The Bill's treatment of the Charter raises a number of Rule of Law issues. First and foremost is the issue of legal continuity, the Government's own avowed Rule of Law objective for the Bill. If it is the case that the Charter provides substantive protections for rights which will no longer be available as a result of its non-retention by the Bill, there will be legal discontinuity because the Bill will fail to provide for the maintenance of the current level of legal protections enjoyed by businesses and individuals. Maintaining the current level of protection includes maintaining access to effective remedies for legally recognised rights. If this is the case, the Bill falls short of its own overriding Rule of Law objective, the provision of legal certainty by ensuring legal continuity. Only a competing Rule of Law objective of a greater magnitude could be capable of justifying such a departure from the Bill's objective.
116. As the HLCC points out in its recent Report on the Bill, if the Charter adds nothing to the content of retained EU law, it is hard to understand why an exception needs to be made for it.¹⁰⁴ If, on the other hand, the Charter does add substantively to the content of retained EU law, its non-retention is contrary to the Government's objective for the Bill that it maintains legal continuity by not making any substantive changes to the law which applies immediately after exit day.

⁹⁶ Clause 5(4).

⁹⁷ Clause 5(5).

⁹⁸ *Ibid.*

⁹⁹ Explanatory Notes, paras 103-104.

¹⁰⁰ Robert Buckland QC MP, Oral Evidence to HLCC, Q51.

¹⁰¹ European Convention on Human Rights: Memorandum by the Department for Exiting the European Union <https://goo.gl/mYbGNC>.

¹⁰² Charter of Fundamental Rights of the EU: Right by Right Analysis <https://goo.gl/7aLARJ>.

¹⁰³ See, for example, HC Deb, 21 Nov 2017, c 899 <https://goo.gl/YCy8WK>.

¹⁰⁴ HLCC Main Report, paras 119-120.

117. HLCC does not, however, recommend an amendment to the Bill to deal with this problem. Rather, it calls on the Government to provide greater clarity on how the Bill deals with EU general principles and how they will operate after exit day.¹⁰⁵

A loss of rights protection?

118. The Government claims that the underlying rights and principles are “preserved”. This is demonstrably not correct. The JCHR’s analysis of the Government’s “right by right analysis” of the Charter has demonstrated that the Charter protect rights which do not have equivalent legal protections elsewhere in UK law.¹⁰⁶
119. It is only necessary to refer to the recent decision of the Court of Appeal in *Watson* to demonstrate the point.¹⁰⁷ The decision of the Court of Appeal holding that DRIPA is unlawful could not have been brought had the Charter not been part of UK law. There was simply no other legal basis on which to mount the legal challenge. If the Bill remains unchanged, future legal challenges to such legislation will not be possible. So the Bill clearly leads to a diminution of rights, contrary to the Government’s protestations. As Lord Goldsmith said during the Second Reading debate:

We need to remember that the rights in the charter do not derive only from the ECHR, as is sometimes thought, but from a number of sources, including EU law as well as general principles of law which have no other individual legislative base. It also adds important remedies which do not otherwise exist.¹⁰⁸

120. Another problem with the Government’s position is that it treats the Charter as if it only has interpretive significance in EU law. It says that EU law which is converted will continue to be interpreted in light of the underlying rights and principles which the Charter codifies.¹⁰⁹ But the Charter currently has much more than mere interpretive status: it provides a free standing cause of action by which direct challenges can be made to laws and effective remedies obtained, including the setting aside of primary legislation.
121. So, non-retention of the Charter leads to a diminution of rights protection in at least three ways. First, the Charter protects rights that do not otherwise enjoy clear legal protection, such as the right to protection of personal data. Second, the Charter provides a direct cause of action in respect of those rights including access to legal remedies. Third, as a matter of EU law those legal remedies currently include a power in the courts to disapply legislation (as the UK Supreme Court did in *Benkharbouche*¹¹⁰).
122. In the face of this mounting evidence, the Government’s position appears to have shifted somewhat so that now it says that the non-retention of the Charter will not lead to any significant loss of substantive rights protection.

¹⁰⁵ Ibid., para. 120.

¹⁰⁶ JCHR, Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis <https://goo.gl/yZzHpR>.

¹⁰⁷ Secretary of State for the Home Department v *Watson* [2018] EWCA Civ 70.

¹⁰⁸ HL Deb, 31 Jan 2018, c 1597 <https://goo.gl/t7P1zF>

¹⁰⁹ Explanatory Notes, para. 104.

¹¹⁰ *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC

123. The Government says that its objective is not to remove any substantive rights that UK citizens currently enjoy. The Bill as drafted does not achieve that objective.

Can anything be done?

124. It is therefore beyond dispute that the way in which the Bill treats both the Charter and general principles of EU law will lead to a substantive loss of rights protection on the day after exit, contrary to the Government's oft-stated Rule of Law objective for the Bill of continuity: ensuring that the same law applies on the day after exit as applied on the day before. The question is whether this loss of substantive rights protection can be avoided by amending the Bill.
125. Whether removing Clause 5(4) of the Bill would provide that solution was considered in a recent *Public Law for Everyone* blog piece by Professors Mark Elliott, Stephen Tierney and Alison Young.¹¹¹ The authors argue that while removing clause 5(4) from the Bill is on the face of it a neat solution to the problem of loss of rights protection, on closer inspection it raises a number of complexities which together mean that it should not be considered a viable option. First, the removal of clause 5(4) from the Bill would not result in the whole of the Charter becoming retained EU law, but only those rights which satisfy the criteria for direct effect, including some which cannot sensibly have any application after the UK has withdrawn from the EU. Second, given the Charter's limited scope of application (being confined to where a Member State acts within the scope of EU law), there would be confusion and uncertainty about the scope of its application in UK law post-exit. Third, directly effective Charter provisions would take precedence over inconsistent pre-exit but not post-exit national law, which would be "an odd state of affairs". Fourth, if Charter rights were to be treated as retained EU law, and therefore part of domestic law, there would be no justification for continuing to give Charter rights greater remedial protection than ECHR rights receive under the HRA. Fifth, giving the Charter legal effect arguably only makes sense in the context of ongoing EU membership.
126. The authors conclude that while keeping clause 5(4)'s exclusion of the Charter from the definition of retained EU law will have a cost in terms of legal continuity, removing that clause and thereby including the Charter in retained EU law would be at too high a cost in terms of legal uncertainty. They suggest an alternative possibility, aimed at balancing continuity and certainty: the retention of some Charter rights in a schedule to the Withdrawal Bill, following a full rights audit by the JCHR to ascertain the full extent of the loss of rights protection if the Charter is not retained.

Analysis and recommendation

127. In our view, it is clear beyond doubt that non-retention of the Charter will lead to a loss of the current level of rights protection available to individuals and businesses under EU law. This will give rise to a serious legal discontinuity which is at odds with the Government's own Rule of Law objective for the Bill, which is to take a snapshot of the current body of EU law and ensure that the same body of law is in force the day after Brexit as the day before. The Bill should not be treated as an opportunity to remove substantive protections which the Government does not like. That runs directly counter to the Government's stated Rule of Law aim of

¹¹¹ Mark Elliot, Stephen Tierney and Alison Young, 'Human Rights post-Brexit – The Need for Legislation?', *Public Law for Everyone Blog*, 8 February 2018 (<http://publiclawforeveryone.com/2018/02/08/human-rights-post-brexit-the-need-for-legislation/>).

ensuring legal continuity, leaving for the future debates and arguments about whether particular aspects of retained EU law should be modified to continue to be retained. This Bill is not the place in which to have that debate.

128. We have considered carefully the arguments for non-retention, but we do not consider that any of them come close to justifying the legal discontinuity that results from non-retention. Many of the legal uncertainty arguments against retaining the Charter rest on misunderstandings about the limited effect of retaining the Charter.
129. Moreover, the Bill's approach arguably creates greater legal uncertainty than retention of the Charter. Exactly what fundamental rights and principles are preserved by clause 5(4) of the Bill is not clear.¹¹² The Charter itself, on the other hand, is a clear statement of articulated rights and principles. Indeed, this was the very purpose of drawing up the Charter, to provide a clear and accessible list of the rights and freedoms considered fundamental in the EU legal order.
130. In the Bingham Centre's view, the Rule of Law problems raised by the Bill's non-retention of the Charter cannot be solved merely by clarifying how the Bill deals with general principles. The Rule of Law issue of legal discontinuity must be confronted head on by amending the Bill to include the Charter as retained EU law. We recommend that, in order to be compatible with the Government's own Rule of Law objective of legal continuity, the Bill be amended to remove clauses 5(4) and (5) of the Bill.
131. It is important to be clear, however, about the limited effect that such an amendment would have. It would not make the rights in the Charter generally available as legally enforceable rights which can be directly relied upon as the legal basis for challenging future legislation or decisions. The Charter only applies, as a matter of EU law, where a Member State acts within the scope of application of EU law. After exit day, EU law will no longer apply in the UK and the Charter will therefore not be available to challenge future decisions or legislation. However, where questions arise as to how retained EU law should be interpreted so as to be compatible with the Charter, or whether pre-exit day UK laws or decisions implementing or within the scope of EU law are compatible with the Charter, it would be possible to rely directly on the Charter to challenge or interpret the retained EU law or the pre-exit day UK law.
132. It is important to be clear that amending the Bill to retain the Charter therefore would not provide any protection against future legislative encroachment on categories of rights which are considered by many to be fundamental (e.g. employment rights, consumer rights, environmental rights or children's rights) but which, post-exit, will only have the lowly status of secondary legislation because they were implemented by secondary legislation under the ECA. Those concerns must be dealt with by other amendments to the Bill.¹¹³ However, deleting the clauses which provide for the non-retention of the Charter would ensure that the Charter is available, as it is now, as a direct ground on which both retained EU law and pre-exit UK law can be challenged, and in proceedings which can result

¹¹² HLCC Main Report, para. 108.

¹¹³ Amendments which would have this effect of ring-fencing certain categories of rights against too easy repeal or amendment by secondary legislation were debated in the Commons (eg. New Clause 55 in the name of Rt Hon Dominic Grieve QC MP) and a similar amendment has been tabled in the Lords: see the amendment on the future treatment of retained EU law in the names of Baroness Hayter of Kentish Town, Lord Warner, Baroness Smith of Newnham and Lord Kirkhope of Harrogate. We will consider these amendments in our Report containing our Rule of Law analysis of the delegated powers in the Bill.

in an award of damages for breach of the Charter or even disapplication of the law in question.

133. To achieve the legal continuity which is the Government's objective, there must be no loss of legally protected rights as a result of the Bill. As explained above, the Government has gone to considerable lengths to achieve that in other parts of the Bill, for sound Rule of Law reasons. In relation to the Charter of Rights, however, the Bill manifestly fails to do so. We have considered carefully all the arguments against retention above but do not find any of them sufficiently compelling to warrant this major exception to the principle of legal continuity which is the Bill's overriding objective. Properly understood, retention of the Charter as part of retained EU law does not give rise to the legal uncertainty that is asserted as its inevitable consequence. The scope of its application is very limited: it will be available only in relation to challenges to retained EU law or the interpretation of such law.
134. Amendments have been tabled, in the name of Lord Goldsmith and others, which would remove from the Bill the exceptions which provide for the non-retention of the Charter,¹¹⁴ and would make clear that the Charter continues to have effect after exit day in relation to all types of retained EU law.¹¹⁵ These amendments would have the effect of retaining the Charter, whilst making absolutely clear on the face of the Bill that the Charter will only continue to have effect after exit day in relation to retained EU law, and the relatively limited effect that retention of the Charter will have. They do this by inserting an express provision to that effect into clauses 2, 3 and 4 of the Bill. The amendments would also remove the restriction on the future role of general principles in para. 3 of Schedule 1.
- 135. In our view Lord Goldsmith's amendments deserve support on Rule of Law grounds because they enhance the Bill's Rule of Law objective of securing continuity in rights protection before and after exit and do not themselves cause additional legal uncertainty.**

General Principles

136. The same Rule of Law issue of lack of legal continuity arises from the Bill's exclusion of a right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.¹¹⁶
137. A practical example of the problem to which the Bill's treatment of the General Principles gives rise has been provided by the Chartered Institute of Taxation, the professional body for tax advisers, which demonstrates the importance of legal continuity to the commercial sector.¹¹⁷ The Institute pointed out that the Bill "fails to meet the Government's objective that the same rules and laws will apply on the day after leaving the EU as on the day before [and] ... that this will lead to damaging uncertainty for taxpayers and government alike." The submission warrants citing at length as it demonstrates very well the lack of legal continuity that results from the Bill's current approach to general principles of EU law in Schedule 1 para. 3:

¹¹⁴ In the names of Lord Goldsmith, Baroness Ludford, Lord Kerslake and Lord Bowness.

¹¹⁵ In the names of Lord Goldsmith, Baroness Hayter of Kentish Town, Lord Lennie and Lord Tunncliffe.

¹¹⁶ Schedule 1, para 3.

¹¹⁷ <https://www.tax.org.uk/media-centre/press-releases/press-release-brexite-bill-lack-legal-continuity-means-uncertainty-say>

“The uncertainty arises where the Bill deviates from its primary purpose: which is to preserve the existing law as at exit day. Specifically, most of the complications arise as a result of the Bill not giving full effect, at least initially, to the general principles of EU law, given the impact they have had on decided cases about, or applicable to, UK tax issues. These general principles include the principle of ‘abuse of rights’ which currently operates to protect HMRC from egregious tax avoidance in the sphere of VAT. The Government have been clear that their intention with the EU (Withdrawal) Bill is to provide legal continuity during Brexit by copying over the entire body of EU law onto the UK’s post-exit statute book. This is a sensible aim. However, as currently drafted, it appears to us that this will not be the case. In particular this applies to the ‘general principles of EU law’ which will not be incorporated into UK law by this Bill. This is despite the fact that the UK courts have given effect to these principles for a number of years. By not giving full effect, at least initially, to the general principles of EU law, the Government are altering individuals’ rights – and the right of government departments and other bodies to bring cases too – without any consideration of the desirability of the changes. This is likely to cause considerable uncertainty about whether previously decided cases remain good law. Of course, if the consequences of the general principles of EU law on existing UK law are considered unsatisfactory in the future, the law should be able to be changed by Parliament. But this should be done at a time when there can be a fuller discussion and consideration of the implications of the change.”

138. We recommend that para 3 of Schedule 1 which provides that there is no right of action in domestic law after exit day for any breach of general principles of EU law, should be removed from the Bill.

9. INTERPRETATION OF RETAINED EU LAW

Pre-exit CJEU case law

139. The Bill distinguishes between pre-exit and post-exit CJEU case law and the rationale for the Bill’s approach is clearly explained in the Bill’s Explanatory Notes.¹¹⁸
140. The Bill’s approach to the relevance of pre-exit CJEU case law to the interpretation of retained EU law in clauses 6(3) and (6), requiring courts to decide in accordance with such case law, is to be welcomed from a Rule of Law perspective because it clearly serves the important purpose of legal continuity. It will prevent the potential reopening of settled questions about the validity, meaning and effect of retained EU law. A discretionary approach to pre-exit CJEU case law, leaving it to courts and tribunals to decide, in their discretion, whether to have regard to such case law, when interpreting retained EU law,¹¹⁹ would, in our view, have given rise to an unacceptable degree of legal uncertainty.
141. For the reasons we have given in chapter 4 above, we also think it is important to provide the same degree of legal certainty in relation to EU-derived domestic legislation implementing EU obligations, or otherwise related to the EU or EEA,

¹¹⁸ Explanatory Notes, paras 109 and 112.

¹¹⁹ As recommended by HLCC in its Report on *The Great Repeal Bill and delegated powers*, para. 27.

which is contained in primary legislation, secondary legislation made under primary legislation other than the ECA, and devolved primary and secondary legislation. If the Bill is amended to remove such legislation from the scope of retained EU law, as HLCC recommends, this will urgently need to be addressed.

Post-exit CJEU case law

142. As for the relevance of post-exit CJEU case law, the Bill currently provides that a UK court or tribunal is “not bound by” such case law,¹²⁰ and “need not have regard to” such case law (or to anything else done after exit by another EU entity or the EU), but “may do so if it considers it appropriate to do so.”¹²¹
143. The Explanatory Notes state that this discretion is available to UK courts “when interpreting retained EU law”,¹²² but there is nothing in the language of clause 6(2) which expressly confines the discretion to that context.
144. From a Rule of Law perspective, it is welcome that the Bill expressly addresses the question of the legal relevance for UK courts and tribunals of future decisions of the CJEU. The statutory statement that after exit day a UK court or tribunal is not bound by future case-law and cannot refer any matter to the CJEU¹²³ could be considered to be strictly speaking unnecessary, as they follow inexorably from the repeal of the ECA by clause 1 of the Bill.¹²⁴ However, legal certainty could be said to be enhanced by expressly spelling out those consequences, for the avoidance of doubt. Expressly addressing the legal relevance of future CJEU case law undoubtedly advances legal certainty as in the absence of such a provision it would be left to the courts to decide for themselves whether future case law has any legal relevance, without any guidance from Parliament. This would be undesirable for the reasons explained by Lord Neuberger.¹²⁵ The question, however, is whether the provision in the Bill provides sufficient clarity about Parliament’s wishes to meet Lord Neuberger’s concerns.
145. The Bill as drafted gives courts and tribunals a wholly open-ended discretion as to whether to have regard to future CJEU case-law: a court or tribunal need not do so, but “may do so if it considers it appropriate to do so.” There is nothing anywhere else in the Bill, or any other explanatory material, which provides any indication to courts and tribunals of when Parliament would consider it appropriate to do so.
146. HLCC took evidence on this question in its inquiry into the Bill and concluded that the discretion left to judges in the Bill as drafted is too open-ended.¹²⁶ In view in particular of the concerns expressed by the recently retired President of the UK Supreme Court, Lord Neuberger, echoed by the new President, Baroness Hale of

¹²⁰ Clause 6(1)(a).

¹²¹ Clause 6(2).

¹²² Explanatory Notes, para. 108.

¹²³ Clause 6(1)(a) and (b).

¹²⁴ It is of course highly likely that clause 6(1) of the Bill will require amendment by the Withdrawal Agreement and Implementation Bill in order to give legal effect to whatever is agreed between the UK and the EU in the Withdrawal Agreement about the future role of the CJEU after exit day, e.g. in relation to the rights of EU nationals in the UK.

¹²⁵ Clive Coleman, ‘UK judges need clarity after Brexit: Lord Neuberger’, *BBC News*, 8 August 2017 (<http://www.bbc.co.uk/news/uk-40855526>).

¹²⁶ HLCC Main Report, paras 132-142.

Richmond,¹²⁷ HLCC reached the view that, while a degree of flexibility is desirable given the enormous variety of cases that may arise, in its current form the Bill leaves judges without proper parliamentary guidance on what it considered a fundamental question of policy. In the absence of more detailed guidance about the legal relevance of future CJEU case law, HLCC was concerned that judges might become drawn into political controversy.¹²⁸

147. HLCC therefore recommended that the Bill should provide that a court or tribunal *shall* have regard to post-exit CJEU case law which the court or tribunal considers relevant to the proper interpretation of retained EU law; and that, in deciding what weight, if any, to give to such case law, the court or tribunal should take account of any agreement between the UK and the EU which it considers relevant.¹²⁹
148. An amendment has been tabled to give effect to HLCC's recommendation.¹³⁰ The amendment, in short, would remove the current open-ended discretion given to judges and replace it with a *duty* to have regard to post-exit CJEU case law "where it considers it relevant for the proper interpretation of retained EU law."¹³¹ It would also require judges, when considering what "significance" to accord to any case law it considers relevant, to have regard to any agreement between the UK and the EU which it considers relevant.¹³²

Analysis and recommendation

149. The amendment to give effect to HLCC's recommendation is an improvement on the Bill from a Rule of Law point of view. The replacement of the Bill's permissive approach with a more directive one would provide greater democratic legitimacy to courts having regard to future CJEU case law. The amendment also makes explicit that the obligation to have regard to such post-exit case law is confined to the context of interpreting retained EU law, unlike the Bill in its current form. Requiring judges to have regard to any relevant EU-UK agreements when deciding what "significance" to attach to such case law is also an improvement because it makes explicit what on any view will be a manifestly relevant consideration in deciding what weight to give to particular post-exit case law (since its relevance may in part be determined by the existence and content of such agreements).
150. However, the amendment arguably introduces further complexity and scope for interpretive disagreement into the Bill's provision governing the interpretation of retained EU law. It replaces one subsection with three subsections. It introduces into the Bill a new concept of "relevance for the proper interpretation of retained EU law", in addition to the existing concept of relevance to "any question as to the validity, meaning or effect of any retained EU law".¹³³ And it introduces into the Bill the new concept of the "significance" of any future case law, on which courts must make a separate determination as well as determining the prior questions of

¹²⁷ Owen Bowcott, 'UK's new supreme court chief calls for clarity on ECJ after Brexit', *The Guardian*, 5 October 2017 (<https://www.theguardian.com/law/2017/oct/05/uks-new-supreme-court-chief-calls-for-clarity-on-ecj-after-brexite>).

¹²⁸ HLCC Main Report, para. 141.

¹²⁹ *Ibid.*, para. 142.

¹³⁰ In the names of Lord Pannick, Lord Goldsmith, Lord Wallace of Tankerness and Viscount Hailsham.

¹³¹ Proposed new clause 6(2A).

¹³² Proposed new clause 6(2B).

¹³³ Clause 6(3).

the relevance of the case law for the proper interpretation of retained EU law and the relevance of the terms of any UK-EU agreement.

151. We recommend what we consider to be a simpler and clearer way of giving effect to HLCC's recommendation: first, by removing the current open-ended discretion; and, second, by adding post-exit CJEU case law to the list of matters to which judges must have regard when deciding "any question as to the validity, meaning or effect of any retained EU law" to which such case law is relevant. This would have the advantage of simplifying clause 6 of the Bill, by using its existing language and structure, at the same time as achieving the principal objective of providing clearer and more directive statutory guidance to courts as to the relevance of post-exit CJEU case law.

152. The following amendments to the Bill would give effect to this recommendation:

Page 3, line 34, leave out subsection (2)

Page 3, line 42, after 'to' insert '(i)'

Page 3, line 43, after 'competences' insert:

'(ii) any principles laid down, or any decisions made, on or after exit day by the European Court; and

(iii) the terms of any agreement between the United Kingdom and the EU'

10. CONCLUSION

153. A recurring theme of this Report has been that there is a degree of tension between the Bill's Rule of Law objective of legal continuity and the understandable desire of some to purify the UK's legal system of the EU's alien concepts such as supremacy and the Charter, and to return the UK's constitutional order to the simplicity of pre-EU days when the only constitutional principle that mattered was that Parliament is sovereign.

154. Provision must of course be made to disentangle the two legal orders and in particular to make clear Parliament's ability to legislate in future in a way which is inconsistent with EU law. However, the nature of the exercise should not be forgotten: the UK is taking into its domestic law a vast body of EU law which has developed over time in the context of the overlapping legal orders within the EU, and embedded in an overarching legal system which has developed and evolved through the interactions of different legal and constitutional traditions. The UK's 45 year membership of the EU legal system has brought about a gradual evolution in the UK's own common law and constitutional doctrines, partly in order to accommodate the principle of supremacy. Concepts such as proportionality, purposive interpretation, legal certainty and legitimate expectation, non-discrimination and respect for fundamental rights have evolved in part as a result of the role of our courts in the EU legal order, as has our rich conception of the Rule of Law now embodied in Tom Bingham's account and the Rule of Law Checklist based on that account and accepted by the Council of Europe's 47 Member States as being a good articulation of their own very different constitutional traditions.

155. The interpretive obligation in s. 3 of the Human Rights Act, for example, was in part modelled on the *Marleasing* obligation developed by the CJEU and is now a well-established feature of the way in which domestic courts interpret laws which affect fundamental rights. It has also in turn influenced and strengthened the common law interpretive obligation (often referred to as “the principle of legality”), according to which the courts will interpret broad discretionary powers against a strong background presumption that Parliament did not intend to confer a power to interfere with fundamental rights recognised by the common law in the absence of clear language showing that was its intention. The contrast between the constitutional traditions of the UK and the EU should not be overlapped, as if the last 45 years were not a part of the UK’s constitutional tradition.
156. Moreover, when designing the legal framework which will govern the future role and status of former EU law in our legal system, Parliament should not lose sight of the reality that the future relationship between the UK and the EU after Brexit is likely to involve a multiplicity of agreements which may require degrees of regulatory alignment and mutual recognition including, in some contexts, continuing acceptance of certain fundamental standards. As TechUK pointed out in their Second Reading briefing on the Bill, “retaining the Right to Protection of Personal Data is important to UK efforts to secure a mutual adequacy agreement to allow the free flow of personal data post- Brexit. The Government should therefore seek to ensure that Article 8 [of the EU Charter] is replicated in UK law”.¹³⁴ Or, to give another topical example, agreements concerning security and counter-terrorism are likely to require the UK to be able to demonstrate the adequacy of its legal framework for the protection of privacy, which will include the adequacy of effective legal remedies for its protection. The greater the uncertainty about the adequacy of the UK’s new legal framework for preserving retained EU law, the more difficult it will be to demonstrate such equivalence.

¹³⁴ See eg the Second Reading briefing of TechUK: “Retaining the Right to Protection of Personal Data is important to UK efforts to secure a mutual adequacy agreement to allow the free flow of personal data post- Brexit. The Government should therefore seek to ensure that Article 8 [of the EU Charter] is replicated in UK law.”

11. ANNEX: THE EXPERT WORKING GROUP

Chair: The Rt Hon Dominic Grieve QC MP (former Attorney General)

Members:

- David Anderson QC (Visiting Professor in EU Law, King's College London; former Independent Reviewer of Terrorism Legislation)
- Professor Catherine Barnard (Professor of EU Law, University of Cambridge)
- David Beamish (former Clerk of the Parliaments)
- Joel Blackwell (Hansard Society)
- Andrea Coomber (Director of JUSTICE)
- Professor Paul Craig (Professor of English Law, University of Oxford)
- Professor Sionaidh Douglas-Scott (Co-Director, Centre for Law and Society in a Global Context, Queen Mary University of London)
- Ruth Fox (Director, Hansard Society)
- Caoilfhionn Gallagher QC (Doughty Street)
- Professor Graham Gee (Professor of Public Law, Sheffield University)
- Paul Hardy (DLA Piper, former Legal Adviser to the House of Commons European Scrutiny Committee and the House of Lords EU Committee)
- Swee Leng Harris (Senior Policy Adviser on Mainstreaming the Rule of Law in Parliament, Bingham Centre for the Rule of Law)
- Jo Hickman (Director, Public Law Project)
- Murray Hunt (Director, Bingham Centre for the Rule of Law)
- Sir Paul Jenkins KCB QC (Hon) (former Head of the Government Legal Service)
- The Rt Hon Lord Judge (former Lord Chief Justice)
- Sir Stephen Laws KCB QC (former First Parliamentary Counsel)
- Lord Lisvane KCB DL (former Clerk of the House)
- Professor John McEldowney (Professor of Law, University of Warwick)
- Lord Norton of Louth (Professor of Government, Hull and former Chair of House of Lords Constitution Committee)
- Professor Dawn Oliver (Professor of Constitutional Law, UCL)
- Professor Rick Rawlings (Professor of Public Law, UCL; former Legal Adviser to the House of Lords Constitution Committee)

- Alexandra Runswick (Director of Unlock Democracy)
- Professor Meg Russell (Director, Constitution Unit)
- Sir Paul Silk KCB (Former Clerk to the National Assembly for Wales)
- Cory Stoughton (Liberty)
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