The Select Committee on the Constitution

Corrected oral evidence: The Legislative Process

Wednesday 1 February 2017
11.15 am

Watch the meeting

Members present: Lord Lang of Monkton (The Chairman); Lord Beith; Lord Brennan; Lord Hunt of Wirral; Lord Judge; Lord MacGregor of Pulham Market; Lord Norton of Louth; Lord Pannick; Baroness Taylor of Bolton.

Evidence Session No. 10 Heard in Public Questions 134 - 142

Witnesses

I: Professor John Bell, University of Cambridge; Professor Paul Craig, University of Oxford and Professor Alison Young, University of Oxford.
Examination of witnesses

Professor John Bell, Professor Paul Craig and Professor Alison Young.

Q134  The Chairman:  May I welcome our trio of professors, Professor John Bell, Professor Paul Craig and Professor Alison Young, to the Constitution Committee’s inquiry into the legislative process? We are particularly interested, of course, as we look ahead, in the European Communities Act 1972 repeal Bill, so that may feature substantially in our questions. I will ask the first question, which is a big, broad one, and feel free to dilate a little on it; we have at least 45 minutes to cover the ground.

The first question is: what do you think will be the main challenges faced by the Government in repealing the European Communities Act 1972 and in converting the acquis or European law into our law? Professor Craig.

Professor Paul Craig:  Thank you very much. There are two parts to the question. Technically, you cannot repeal the ECA until we actually leave the EU, since there would be no legal basis for the application of EU law in the UK. As we all know, we are subject to all rights and obligations of EU law until we leave, so while one might prepare the ground for leaving and for repealing the ECA, it cannot be done ahead of time; that means until the withdrawal agreement has been ratified by all relevant parties, or until after the two year deadline. It is possible that we might not even be able to repeal it exactly at that stage depending upon any transitional agreement which the UK strikes with the EU in the Article 50 process. That might require—we do not know—some avenue where some elements of EU law can penetrate into UK law. That does not necessarily mean the perpetuation of the ECA, but it does mean there would have to be some vehicle by which that could happen.

On the second part of the question, on the difficulty of converting the acquis into UK law, I think there are four difficulties in this conversion. First, and perhaps most important, for an EU lawyer the acquis includes, among other things, the case law of the CJEU and the General Court, and there is a “nice” question about exactly how you convert case law of the two European courts into UK law for the purposes of this exercise.

To make it clear, that case law is, broadly put, of two kinds. The case law may be either freestanding case law interpreting directly applicable provisions of EU law or the primary treaties themselves, so you will have case law on the meaning of the provisions about free movement of workers, goods, capital and the like, or of course there will be case law interpreting particular regulations or directives. From the perspective of EU law it is absolutely clear the acquis communautaire covers both kinds of case law. If you want a true snapshot of the acquis it has to include the CJEU and GC case law. Putting the same point conversely, if it does not you do not have a complete snapshot of the acquis—it is as simple as that. How might you do that? I have some ideas, and I can come back to that later, if the Committee so wishes.

Secondly, the acquis includes, and has to include, not merely what in the pre-Lisbon world would have been called comitology regulations but it
has to include, in the post-Lisbon world, all delegated and implementing Acts as well. These are also part of the acquis. Some of them would be directly applicable and some would not, and that makes matters more complicated. There are, literally, thousands of these—a very great many.

Thirdly, as we know, directives have a source in UK law already because a directive would have been followed by an enactment into UK law; it would have been brought into UK law, either through primary legislation or some form of secondary legislation, pursuant, say, to Section 2(2) of the ECA. The thing to understand about the complexity of EU law is that, when you look at EU law, it does not consist simply of a single tree or a series of trees where there is simply a trunk; each area of EU law is composed of a complex web where you will have a directive that has been brought into UK law in a statute already, but you will have branches coming off, and those branches might take the form of regulations. You would have a situation where, yes, the directive is already part of UK law, because there is a statute, but the regulations, the branches, might be directly applicable and would not necessarily have any accompanying or attending UK legislation. The great repeal Bill would have to bring those in, and any exercise thereafter deciding what you want to do with all of this would involve or require someone to piece together the UK primary legislation and the implementing regulations from the EU as well.

Those are three of the problems of identifying the acquis. Fourthly, and finally, as I mentioned, in particular in the post-Lisbon world, there are delegated regulations made pursuant to directives, and Parliament would have to have the whole picture before it in deciding which parts of this puzzle to keep in any particular area.

The Chairman: Thank you for making it sound so easy. Can I follow up on the first point? The others which follow up will emerge later. On the question of the capacity of the repeal Bill, you implied that it could not be so worded as to trigger its implementation at a given time in the future. Are you suggesting that further legislation would be needed to finally take us out of the European Union?

Baroness Taylor of Bolton: Can I come in on that? My question was going to be almost the same, but are you saying that you could not have legislation with a sunrise clause?

Professor Paul Craig: No, I did not mean to imply that. I think it is perfectly possible to have legislation which will come into effect at some date in the future. It is not a problem.

Professor Alison Young: I would like to add, in addition to those elements of complications, you have situations where we have UK laws that expressly rely on interpretations or implementation measures from European agencies. The other questions you have are: are we going to keep those European agencies? Are we still going to refer to their decisions?
That can cause two complications. One is, obviously, you have the policy choice of whether we keep the European agency or transfer it to a UK-based agency. Secondly, we have the issue that, once we leave the European Union, one of the consequences will be that we will not be bound by decisions of the European Court of Justice. Then we have the question of whether we still want to continue to be bound by any forms of decisions relating to interpretations from those agencies that we are using in national law. That is another issue you will have to think about; there are those aspects as well.

The second point that I would raise, which comes from your supplementary question, is the question whether you can go away and have everything in place ready for Brexit day by implementing this particular piece of legislation. I understand it is an attractive solution but the problem is you are almost chasing a moving target. We are talking about the idea of the acquis; this is what we have, at the moment, now. Of course, what we will have going forward will depend a lot on what we get from the withdrawal agreement. You are constantly stuck in this kind of process where we want to keep what we have, but what we will need to change will depend on what we get from the withdrawal agreement, so how do we have this ability to keep track so that, on Brexit day, what we need for continuation is there, but things that we do not need—because they are not part of what we are going to have after the withdrawal agreement—have gone? Good luck is the response to that.

**The Chairman:** Thank you. Professor Bell, would you like to simplify it still further?

**Professor John Bell:** One feature will be that some issues will need to be worked on not in the withdrawal treaty but in the transition treaty. If you take a classic issue, agriculture, we do not have authority to subsidise, under WTO rules, because it is all wrapped up in the EU and there is no identified quota for the UK within the EU quota. So when we are coming back to the UK and saying, “Okay, how are we going to subsidise farmers in Wales and Northern Ireland”, and so on, we will need to have a way of doing that which probably will depend on the continuing involvement of the EU, because we are borrowing some of the EU quota to do it. There will be those sorts of transition features which need to be built into any exit Act of Parliament. It is not a total great repeal. As Professor Craig was pointing to, quite significant issues will be involved in the transition treaty and not simply the final treaty of future relationships.

**Q135 Lord Judge:** I am very encouraged. I have a very interesting question for you. What are the main challenges that Parliament—either House—will have to face when we scrutinise the great repeal Bill? What is it we should be looking for?

**Professor Alison Young:** When you are scrutinising it, you are going to have to be thinking carefully. It is almost as if you need a reverse of the House of Lords EU scrutiny committee, at the moment, where you look at legislation that comes through from Europe and you are thinking what its
consequences might be, and what level of scrutiny it might need. In a sense, you almost need the reverse. You are thinking about what the consequences would be going forward. Which parts of EU law shall we keep and which shall we not? What is going where? You almost need a committee to look at that and try and filter it through. These issues will come up quite rapidly and quickly, so you will need something to work out how much scrutiny you are going to need coming through to try and think of its potential consequences.

It is one of these areas where it is very hard to predict because it is so interlocking. You can have references to agencies in legislation; you can have nested directives that are implemented but subject to regulations that are directly applicable that follow through. I think you will need some kind of committee to filter through whether you think something does or does not have detailed consequences. It is not something I would want to predict on the basis of seeing what is coming through; you need very detailed scrutiny for that.

**Professor John Bell:** You will probably deal with the delegated legislation part of it later. That is the point at which there will be significant issues about which departments and which parts of the devolved settlement are involved in these things. If you make an agreement for free movement of persons from some countries, say, that has implications for the health service, which happens to be run by the various devolved assemblies. You need to have a way of incorporating the devolved assemblies in processes of scrutiny to make sure that their prerogatives and budgets are properly protected by what is being agreed.

**Professor Paul Craig:** The answer to the question depends, to some extent, on the nature of the great repeal Bill which is placed before the House. One could imagine different kinds of great repeal Bill. The Government might choose to go for something very, very short. It would not be the equivalent of the Bill which is currently being debated in the House of Commons, but it might be a very short measure which, in effect, is just the window through which the entirety of the acquis is brought into UK law, with the detail to be worked out thereafter. If the import of the question is to what extent there can be effective scrutiny of that very short Bill, then the scrutiny would have to take the form of "This is far too short"—

**Lord Judge:** Forgive me interrupting. It is the scrutiny of all your four different areas of concern.

**Professor Paul Craig:** Fine. If it is scrutiny of the four different areas of concern, the short answer is that it is a massive problem going forward.

Size matters. No one has ever attempted this kind of manoeuvre before—there is nothing like it. We normally talk about Henry VIII clauses, or something of that kind, and possible scrutiny of Henry VIII clauses within discrete legislative contexts about a particular measure. It is true that Section 2(2) of the ECA 1972 is not discrete in that way. None the less, the application of Section 2(2) was relatively discrete over time. It seems
to me that, if the import of the question is how you ensure effective parliamentary scrutiny given the size of this job, I think that problem is enormous because of the matter of scale. It is a real challenge.

**Lord Judge:** Forgive me interrupting, but may I ask you to consider what improvements or innovations to our processes we should be considering? Let us have a clean sheet of paper and the three of you construct a constitutional arrangement for us.

**Professor Paul Craig:** That is an extremely good question and if we had—

**Lord Judge:** Four days?

**Professor Paul Craig:** —all day I could go into it in detail, but we do not have all day so I will be as succinct as I can.

If you are trying to construct or think, in a tabula rasa, of the kinds of control one might have, there are process controls and substantive controls. There are process constraints and substantive constraints, and they can work in tandem. The process constraints would naturally build upon the existing process constraints we have. In other words, if we are going to amend, change or repeal parts of the acquis and it is going to be done through delegated or secondary legislation, we have an array of measures already in place to choose from. We have negative procedures; we have affirmative procedures; we have super-affirmative procedures. We do not have to start with a complete tabula rasa. Other things being equal, the obvious sense of the matter is that the more important the change the more rigorous you want the procedural scrutiny to be.

The problem is identifying in advance, ahead of time, what will be an important change. It might be easy to identify when you see it, but to write in a legislative format which would be able to predict that in advance, I think, is extremely difficult. You have to start thinking out of the box, as it were, and you would have to start thinking of a regime whereby you have these different processes on the table and you would have to build in an extra stage at which, when it became apparent how important the policy shift or the amendment was, there was the possibility of saying, “Okay, now it is clear that we need a super-affirmative procedure”, or something of that kind. One is going to have to build in, in process terms, that extra stage in order to ensure effective scrutiny.

The other kind of constraint would be substantive, or to attempt to build in a substantive constraint. By substantive constraint I mean a constraint which would say, “There are certain types of things which you simply cannot do by delegated legislation. You simply cannot use a Henry VIII clause if you want to do X, Y, or Z”. Again, the problem is predicting or identifying in advance what X, Y and Z is that you cannot do by delegated legislation through a Henry VIII clause and that you need primary statutes. It seems to me the only way in which I can see that one could comfortably or properly do that would be to build in an extra stage
whereby, when it became clear what the proposal was, there would have to be some stage at which a body within this august House had the power either to decide, or at least to recommend, that the matter had to be dealt with through primary legislation.

**Lord Judge:** Would this be the same committee that is going to act as a filter?

**Professor John Bell:** It is beyond the capacity of one committee to manage everything. When you are looking at the design of the Bill, if you take most European countries—and the same ideas are felt by your own House and your own reports on delegated legislation—the first thing, as Paul said, is that you need some substantive definition of what it is that you are delegating. That probably means you need to, in a Bill, design it sector by sector.

To take the German constitution, it requires that you set out the content, the purpose and the scope when you are delegating. The German constitutional court defines that as requiring that the citizen should be sufficiently clear and able to predict which power has been granted and whether the measure is within the range of what has been delegated. If that is a good litmus test—“Can the citizen predict that this is what they should have been allowed to do?”—You probably need to do it sector by sector by saying, “In agriculture, this is what we are trying to achieve”. The Government, in a sense, has already started setting out what it wants to achieve in particular areas. Rather than treating it as a universal canvas, you may need at least to begin by breaking it down.

Then, as Paul said, there is the procedure for enactment. As he says, your own House, quite recently, in 2014, looked at procedures for enacting whether proposals are put forward and made available for discussion before the final version. You have to remember that Section 2(2) of the European Communities Act is only the end-point of a very long process, which is mainly public and which goes on in Brussels. People can know what the Council and the Parliament are deciding for months, if not years, before it comes to a piece of delegated legislation under Section 2(2). We need some kind of process for opening up to technical discussion by people who know what they are doing. That is why I think one committee is not right; it should be a range of committees—maybe afforced by an expert—that can look at agriculture, social security or whatever it might be.

The third thing that most European countries have—and this is where I think we have a difficulty—is a control body. In Germany and Italy it is the constitutional courts which take a look after, but almost immediately after, these forms of delegated legislation have been taken. In France, Sweden and Finland it is done pre-legislatively. No decree of this kind can be taken in France without having gone to the administrative court in its advisory capacity and been scrutinised, essentially, for its legality and competence. You need a process which would be able to tell the Government, “This is beyond your powers”—which was Paul’s point. We do not have a body of that kind, and I think we need to invent one. The
current body sits within the Cabinet legislation committee and we need something much more external than that.

Q136 Lord Pannick: We have moved on to the very difficult question of delegation of powers to Ministers and scrutiny. Can I take you back, for a moment, to what I think is the primary question the Bill is going to have to address, which is the body of EU law that we are concerned about? The three of you have already identified the complexities in identifying what is that body of EU law, particularly by reference to judicial decisions and administrative bodies. Do the three of you think that, as a matter of constitutional propriety and, indeed, the ability for this legislation effectively to be implemented, the Bill will have to set out what is being translated across? Or would it be acceptable for that to be done in very simplistic terms?

Professor John Bell: It would have to say what it is not translating across. To take obvious things, a huge number of pieces of regulation are to do with customs tariffs. If you are not in the common market and there is no free movement, a number of things definitely have to come out. Then, as I was saying, you can set the principles for laying out the rest. Government departments, within the two-year period, will have their shopping list. Once you have the shopping list of what is in the acquis, there are decisions to be made as a matter of policy as well as a matter of detail about what you want to keep and what you do not want to keep.

Lord Pannick: In the Bill?

Professor John Bell: That is the question of where it goes. Alison, do you want to come in on that?

Professor Alison Young: There are examples that you can use from other legal systems, where you look at continuation clauses. You are looking at this element of whether we can broadly identify what we recognise as a right enforceable under European Union law that we transfer across. You could have a broad provision that tries to do that. The obvious difficulty with that is people will start trying to argue about what is and is not absolutely included in that. It can be very difficult for legal certainty to understand what that precisely means. If you try and list absolutely everything, you have the problem that if you miss something out by mistake and you have gaps. One possible way around that is to join those two together and say we have a generic, general continuation clause but we make it subject to specific exceptions that you can find listed in a schedule. Obviously, the difficulty is going to be, right from the very beginning, trying to keep up with that, knowing what will not be carried on because of whatever we get from the withdrawal agreement. That is one possible way around it, but it is not necessarily a perfect solution.

Q137 Lord Beith: You have, very helpfully, covered all the things I wanted to ask, so it gives me the opportunity to ask you something slightly different. How can we avoid a situation in which the repeal Bill having
been passed—although it is a re-enactment Bill in reality, not a repeal Bill, in more than one respect—we are getting very, very close to the deadline and Ministers are coming before Parliament with scores, dozens, hundreds, thousands of statutory instruments which are coming at the last minute because the negotiations are still going on, or because in some cases it has taken the department so long to sort them, and Ministers say, “This has to be in force by Tuesday of next week”? There is not time for any kind of procedure, let alone a super-affirmative procedure. How can we avoid that happening?

**Professor John Bell:** If the Commission people are right, because the last stage of it is getting it to the European Parliament, and that is not going to be done at the last minute because the Parliament’s timetable does not permit, you will have a certain amount of time in advance. For most things it is not beyond the realms of possibility that they can at least produce proposals in draft to be scrutinised. They may need to amend them in slight form, but it will not be huge chunks that you have to redraft. You will have to do a run through to make sure that all the cross-referencing and everything is right, but you can at least produce stuff in draft. For example, no free movement means the Immigration Rules need to be redrafted, but the Government is used to giving notice of redraftings, and so on, in advance in those areas.

**Lord Beith:** Rather than doing it the way President Trump does it?

**Professor John Bell:** The point there is that the one advantage of the UK procedures, unlike, say, France, Germany and the US, is that we do not have delegated legislation which comes into effect simply at the whim of the Executive—It has to go through Parliament to be approved, in either an affirmative or negative resolution procedure, whereas the other countries have it come into force and it gets ratified afterwards by Parliament. In a sense, we already have a parliamentary check which is stronger than many other countries, and we need to build on that.

**Professor Paul Craig:** Another way of approaching the problem you have identified would be, if you have those extreme time exigencies, to have sunset clauses put in. If there is really no time for effective scrutiny you put in a sunset clause saying, “This measure now lapses”, or lapses within six months unless it is referred, et cetera. That would be another way of dealing with that kind of problem.

**Lord Brennan:** Suppose the three of you were to advise the Ministers who are about to present the great repeal Bill to Parliament. What is the general policy going to be? A short or a long Bill? A full catalogue of what you are dealing with before you get started? A timetable for how long this is all going to take? What do you think? Secondly, as part of general government policy, if as an example the devolved territories in the UK could still look to European law as a guide, if not part of their law, in a devolved competence, if the great repeal Bill is supposed to get us out of Europe, how do you stop Scotland and Northern Ireland—for reasons to do with Dublin—wanting to keep European law as part of its system in various sectors?
**Professor Paul Craig:** To take the second question first, although Professor Tierney is far more expert on this terrain than I, my own view on that is as follows: it seems to me, as a matter of principle and logic, if a matter, for example, remains within the devolved competence of Scotland in a post-Brexit world and Scotland chooses to modify its laws in the devolved area so as to make them accord with what was the pre-existing EU law in that area, short of changing the Scotland Act and putting constraints on what Scotland can do, pursuant to its devolved competence, I cannot see any legal or constitutional constraint on Scotland taking that course. That would be my answer to the second part of the question.

In answer to the first part of the question, your question raises many of the same issues that Lord Pannick raised earlier. I did not respond in particular directly to that question, but my view on that is that I think Lord Pannick and yourself are raising a very important question. I have significant concerns about the constitutional propriety of having a great repeal Bill where it is not clear what the content of the acquis is over which we are giving the Government or Parliament the power to amend. When you put it in those stark terms, it is rather constitutionally odd. Yet the problem the other way round is the one that Professor Young mentioned, which is that if you say that is constitutionally problematic then, as Professor Young said, the alternative is you list everything and consciously exclude the things which you are not listing, and that is a nightmare scenario too. If I had a single magic answer, I would tell you.

**Professor John Bell:** The only time we attempted to do anything like this before was in 1660 and the Bill was then called the Indemnity and Oblivion Act, which is probably a better title than the great repeal Bill. If you look at the Act of Oblivion, you see a much more detailed set of provisions. In a sense, what they had to do then, on a much smaller scale, was to think of the areas rather than simply go through with some great single clause that enables the government to do what it wants. You could think it through into topic areas that you want to deal with and topic areas that you want to be dealt with differently by different kinds of procedures. For example, the way you handle VAT is going to be significant because it is a UK tax but mirrored in the EU. The way you handle agriculture and other areas are going to be very different. We should probably recognise that and think it through. That would be my first thought.

On your second question, I agree with Paul. After all, surely it would be proper for the Northern Ireland Assembly to think through how the law that it now operates relates to the Republic as much as how it relates to the rest of the UK.

**Professor Alison Young:** Your second question is easier to answer. They can choose, but they do not have to, and is this not what this is about? If the idea is to regain sovereignty and be able to decide these issues, if they decide they would like to follow what has gone before in Europe because they see this as a good solution to a particular problem,
they have the choice to do so. I do not see why this would necessarily be a problem if they are choosing to go away and follow something they think is a good idea to follow.

With regard to your first question, I do not have the golden solution either. Professor Craig has far more experience than I have, and even with Professor Craig’s extensive experience I would not be able to answer it. I wish I could help you. From a constitutional perspective, I can see there will have to be a necessity of including Henry VIII clauses to be able to deal with these kinds of issues. I can see that. As a constitutional lawyer wanting to protect the way our constitution works, I do not like seeing Henry VIII clauses unless there are elements of protecting democracy in certain areas. There are ways of trying to think about how we can limit when these clauses can and cannot be used as well as thinking about the extra form of scrutiny we might need in certain circumstances were Henry VIII clauses used.

If you would like to see examples, you have the Legislative and Regulatory Reform Act 2006 where you will find good examples in Sections 3 and 8; Section 3 setting out general limits on when broad clauses can be used, and Section 8 saying these Henry VIII clauses could not be used, for example, to modify—in that particular provision—the Human Rights Act. We might want to put other things in saying, “We do not want Henry VIII clauses to be used in a way that would, without realising it, modify rights protected in the Human Rights Act or rights protected, for example, in the Equality Act 2010”, which does rely quite a lot on European Union law for how it is interpreted. There are ways of dealing with the constitutional issues that are posed by Henry VIII clauses.

Q139 Lord Hunt of Wirral: If we can go back to where Professor Craig started, for a moment, the acquis constantly changes but, in effect, it is a body of law. Under the present system, if you wanted to join the European Union you had to sign up to all 35 chapters, even though they may change from time to time. As we contemplate the Government’s position, which is that you have to give us all these powers because we do not know actually what the result of the negotiation is going to be, so we have to be able to move to deal with whatever, can I ask you to contemplate for a moment what will be the position so far as European law is concerned if no agreement is reached in the two year period? We will have activated Article 50 on 31 March, so on 1 April 2019 what will be the position?

Professor Paul Craig: The position as identified in Article 50 of the TEU is that we fall off the edge of the cliff, and it really is falling off the edge of the cliff. The rights and obligations that pertain from EU law cease to apply. It is a cliff in the sense that there is no soft landing provided by an implicit transitional deal in the sense that the cliff is only 10 feet high and you land on a soft cushion; it really is falling off the edge of the cliff and you resort to WTO rules, or whatever the case may be. That is a recipe for legal chaos and confusion because, however quickly or rapidly Parliament might react in those circumstances, there is bound to be an
exigency of time which means that it could do very little to prevent the legal chaos which would ensue.

It seems to me, although I have no direct expertise in trade negotiations—not do many people in the UK, it seems, at the moment—it may be not be clear until the 11th hour whether a deal is going to be struck or not. It seems to me it is not fanciful to imagine that you might get a situation in which the Prime Minister decides, at the 11th hour, deal or no deal, that the deal on the table is not good enough and that therefore she is going to walk away and we resort to WTO rules.

Of course, there is the further eventuality, depending on what goes on in the other House, about whether Parliament is going to be given any voice at the end of the two-year period as to the content of the agreement that does come through.

Lord Hunt of Wirral: Professor Craig, my real question therefore is how on earth does one argue against wide-ranging Henry VIII powers? Surely the Government needs those wide-ranging powers to deal with the situation you are talking about. You referred to sunset clauses a little earlier on. What constraints can we put on the abuse of executive powers?

Professor Paul Craig: In the scenario you are depicting, the problem is exacerbated for the very reasons that you have said. We are all accepting that the great repeal Bill, even in a more orderly exit, is going to entail, to some extent, some Henry VIII clauses, but in the scenario you are depicting where we fall off the edge of the cliff after two years, the problem is much greater and the time constraints are much tighter. It seems to me, in those circumstances, the Government would need Henry VIII clauses and would almost certainly use them with greater frequency than it might otherwise have done. In those circumstances, it seems to me sunset clauses would have to be used with much greater frequency and that the rigour of the scrutiny when the six months or year had elapsed would have to be commensurately higher in order to cope with the particular problem. It would be a very difficult situation for Parliament to be in.

Professor John Bell: I think you are probably going to need to look at it in two phases. There is the phase of introducing this great repeal Bill or Act of Oblivion during the parliamentary Session 2017-18 and getting it more or less ready for enactment. On the scenario that you are putting forward, I could put it in a more stark form: the European Parliament, in its session in March 2019, which is practically its final session before the elections, chooses not to agree and therefore pushes the UK out without a soft landing. At that point, Parliament would have to convene to do something in an emergency in the last week in March 2019. I think that may be different from, as it were, the planning. I do not think you plan towards having to do everything in March 2019, but you may have to have a contingency plan for what might happen should the European Parliament, for whatever reason, not agree in that session.
**Professor Alison Young:** We have explained the scenario that could arise either because that is the plan and that is what we agree—to leave with just WTO—or that is what happens to be thrust on us because the European Parliament does not agree and that is what we end up with. I think you have the difficulty of trying to understand how that has a different impact on different aspects of UK law that we have in response to EU law. We keep talking to you about directives and regulations and different elements, such as directives that may have been implemented through primary or delegated legislation, so in some senses they could be there, but if we have implemented them through delegated legislation you have the issue of whether, if we have repealed the ECA and removed the parent Act that empowered you to bring the delegated legislation, people will raise the validity of that in the future because the parent Act has gone.

You then have issues of rights that we have not necessarily implemented because they are directly applicable, so looking at treaty rights or regulations that we are used to. In some of those, it will not matter that they have gone. If you are looking at customs regulations or regulations that we have in place, for example, to notify the European Community of laws we are going to bring in so they can scrutinise them to make sure they are in line with the free movement of goods, for example, it is not going to matter that they are not there. Other elements will matter that they are not there if we are used to using decisions, for example, of European agencies to decide issues for us. That will cause gaps and you will have to think about how to plan for them.

It is one of these things where we can see the problem; predicting it requires you to think very carefully about rights that have been replicated, rights we do not need to replicate, elements relying on other agencies, obligations we have that do not tie up to other rights or want different mechanisms to deal with them, and that is going to cross-cut over whether it is something that is directly applicable or a directive we have gone away and implemented through other primary or delegated legislation. We can model out what the problems are, but identifying them very precisely is much harder to do.

**The Chairman:** I shall allow two very brief supplementaries, from Lady Taylor and then from Lord Pannick.

**Q140 Baroness Taylor of Bolton:** I want to go back to the timescale. I have been very exercised by the potential for the Government to bounce Parliament at the end of the day because there was a deadline—because of the cliff edge. I think you said the cliff edge might be a little earlier because it will have to be before things go to the European Parliament. Am I right that things have to go to other European capitals?

**Professor John Bell:** It depends which treaty you are talking about. The withdrawal treaty does not need to go to the others, but anything that is a mixed agreement, which may well be the transitional agreement, may need to go to 38 parliaments, I think, because there are seven in Belgium.
Baroness Taylor of Bolton: That brings the timescale, in parliamentary terms, quite a lot further forward, does it not? It means that the constraints on this Parliament’s ability to scrutinise all of this is going to be condensed into a shorter timescale. Is that right?

Professor John Bell: I take your point. Even if you were thinking of the basic negotiations, the basic negotiations would be complete in September or October 2018 anyway to get all the consents. You are right that there is a lot of pressure. That is why I talked about the 2017-18 cycle.

Baroness Taylor of Bolton: Has anybody tried to do a timeframe?

Professor John Bell: Not that I am aware of. I have no doubt government business managers are busy. People are rightly saying it could wipe out parliamentary time available for anything else. If you have to deploy lots of people in scrutiny committees to look at different bits of stuff coming through over the next two parliamentary Sessions, it has to be done properly. Therefore you need to deploy a large number of people in sufficient groups to enable them to feed back to the main Parliament to approve things.

Lord Pannick: I am a bit concerned about this idea that there will be “legal chaos”—that was the wording that was used—if no deal is done, we are up to the two-year cut-off, there is no agreement to extend the period and, therefore, we are out. I can understand there will be enormous political uncertainty and it would be very unsatisfactory for trade and various other matters, but would there really be legal chaos? If we have done our job well on the great repeal Bill, the work, presumably, is not going to be done at the last moment; each department, surely, should be taking a judgment on which parts of European law, relevant to their expertise and responsibilities, should be preserved. It would all be very unsatisfactory, but would it really be legal chaos in terms of uncertainty?

Professor Paul Craig: You are right. The term I used, “legal chaos”, was inappropriate and ill-advised. I think there would be tremendous political uncertainty. What I meant by “legal chaos”—you are absolutely right in coming back to me on that—was future regulatory uncertainty. It seems to me that, if you do the falling off the edge of the cliff with no agreement, the degree to which there will be regulatory uncertainty about what the regulatory framework will be going forward is, I think, greater. In that sense, future planning on the basis of some idea of what laws might look like will become more difficult. That is what I had in mind, but you are right to pull me up.

Lord Beith: Surely, rights and obligations could not be enforced at that point if everything had gone.

Professor John Bell: That is the importance of having a savings or standstill clause in your great repeal Bill. It has been introduced a number of times—the British North America Act, for example. You have a
clause—Section 129, if you want to look it up—which says, “Everything on date X is saved”, so what was in force on 31 March is still in force on 1 April. If you have that, you avoid any problem or doubt about the boring stuff, such as the eco-design of washing machines, or what is valid to sell in England or not, those sorts of very technical details which are contained in EU regulations. People need to know which regulations currently apply.

It will, however, cause significant chaos in customs duties. That is not a political matter. If you have no free movement and you are no longer part of the customs union, you need to have thought that particular problem out—customs duties and the movement of goods in and out. There are areas where it is not total nonsense to say there is some chaos, but it will be sectoral chaos.

The Chairman: We have very little time left and have quite a lot of questions. I will ask Lord Norton to ask his question and, thereafter, we will have to draw stumps, I am afraid. I will ask the clerk to follow up with you all in writing if we can get your answers to the last three questions on our list. I am sorry. It has been so fascinating, but time does fly.

Q142 Lord Norton of Louth: You mentioned devolution earlier, but what are the challenges facing both Government and Parliament in respect of the devolution settlements when it comes to repealing the 1972 Act and converting the acquis? Are there any repatriated powers that would automatically fall within the competence of the devolved parts of the UK? If there are, would they kick in automatically or would they need to be incorporated in the great repeal Bill?

Professor John Bell: The obvious area is agriculture and, equally, free movement rights and the health service. You can see where you might have an arrangement which is a free movement one which has incidental devolved effects. The difficulty is, as you are quite rightly pointing to, repatriate to where? That means you need continued liaison.

Professor Alison Young: We were discussing this earlier. Although there is the element that you can look at the devolved powers list and say, in Scotland for example, “This is not reserved, so therefore it is devolved and it becomes something the Scottish Parliament can deal with”, and in some senses it looks quite automatic, the difficulty you have is that you have issues that will cross over. So you will not be able to deal with, say, agriculture per se, because some of that will become dependent on what you have managed, as the UK, to negotiate going forward as to which part of the agricultural regulations that we had stay with the EU. You will have this kind of complex issue regarding aspects that will be reserved and other aspects that will not. That then becomes problematic.

Another issue you would need to be concerned about with regard to devolution is, as you know, if it is delegated, the Sewel convention does not apply, so the question becomes: does that mean you want to put a
limit on when you can use Henry VIII clauses, so that you could not use them if they involved a devolved matter? Or would you want a different process to the Henry VIII clause that, in some way, involved the devolved Parliaments so you could deal with that particular issue? Those are issues you will have to think about very carefully.

Professor Paul Craig: One final point on that. I agree with what my colleagues have said but would add what everyone knows, which is that devolved settlements in Wales, Scotland and Northern Ireland are not the same, so the problems we have just gone through would have to be reasoned through separately in relation to Wales, Scotland and Northern Ireland.

The Chairman: We make a virtue of asymmetry, simply because it is there, I think.

I am sorry we have to curtail it, but I thought it was better to do that than try and squeeze in answers in a hurry. We are enormously grateful to you. It is an immensely difficult subject and you have made it much more difficult for us, I have to say, but we are grateful for that too. We shall study what you have said to us and we will also study, if you would be willing, your written answers on the last three questions, which Anthony, our clerk, will follow up with you. It only remains for me to thank you all very much indeed for giving us your time, your knowledge and wisdom. We are most grateful.