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SUBMISSION TO PUBLIC BILL COMMITTEE ON THE RETAINED EU LAW (REVOCATION AND REFORM) BILL

The Role of the Courts: Improving Clause 7 of the Retained EU Law (Revocation and Reform) Bill

1. INTRODUCTION

1. The focus of this submission is on retained EU and domestic case law on the position of case law and the courts, as envisaged by clause 7 of the *Retained EU Law (Revocation and Reform) Bill* (Bill 156–EN).[2] I take this as my specific focus because it falls directly within my research interest and expertise on judicial decision-making: I am Professor of English Law at The Dickson Poon School of Law, King's College London; and currently Visiting Fellow at All Souls College, Oxford.

2. The Retained EU Law (Revocation and Reform) Bill is the latest stage in the UK Government's engagement with the implications of Brexit. The Bill would amend the European Withdrawal Act 2018 (which was itself amended by the European Union (Withdrawal Agreement) Act 2020) to make significant changes to the retention of EU legislation and case law in UK law.

3. It would clarify the overall structure of which courts are able to depart from retained EU case law and retained domestic case law (cl 7(7)): this would not involve a substantive change to the existing list of appellate courts, but would include it in the primary legislation.[3] It would also remove the power to make regulations relating to that matter (cl 7(5)).

4. Beyond that, the Clause has four proposals to be discussed here, considered in the order in which they appear in the Bill:

> First, it would introduce additional criteria with respect to how the relevant appeal courts are to decide whether to depart from retained case law.[4]
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> Second, it would introduce a reference power for lower courts and tribunals to refer points of law where they are bound by retained case law.[5]

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[1] All views, and any errors, are my own.

[2] I leave the problems with the sunsetting approach being proposed for retained legislation to other submissions. Given the focus on case law, I do not explore here the further proposed addition of s6D to the 2018 Act, relating to 'incompatibility orders' where there are found to be inconsistencies between domestic legislation and retained domestic legislation.

[3] The list is currently found in reg 3 of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020/1525 ('Relevant Court Regulations' after this).

[4] cl 7(2 – 4); (6), substituting s.6(4ba) and (5) of the 2018 Act and inserting a new section 6(5ZA).

[5] cl 7(8), inserting a new section 6A into the 2018 Act.

> Third, it would confer a reference power on law officers to refer points of law to higher courts.[6]
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> Fourth, it would confer a right of intervention on law officers in respect of proceedings where a party argues that a higher court should depart from retained case law.[7]

5. I begin with a general point, which is that, as it stands, there has been insufficient explanation provided as to what the problems are that are being addressed.[8] Ahead of the publication of the Bill, the Government made available a 'Retained EU law dashboard'[9] which sought to identify the 'EU-derived' legislation that remains part of UK law post-withdrawal.[10]. On launching the dashboard, the Government stated that there were over 2,400 pieces of legislation collected in the catalogue of Retained EU law.[11] There has, to date, been no such exercise for case law (whether retained EU case law or retained domestic case law). Insofar as there are any specific retained EU cases or retained domestic cases where the Government, or Members of Parliament, are of the view that they remain, or have become problematic (having not seen fit to address them in the 2018 or 2020 Acts), they could legislate to address the issue. It is incumbent on the government to make a clearer case for why such significant changes are necessary.[12]

6. In what follows, I explain which sub-clauses should in my view be removed, or if they are to remain, I make a constructive suggestion for modified wording, with reference to recent case law and other related provisions of the Bill.

2. PRECEDENT: TEST AND CRITERIA

7. The Bill would replace s 6(5) of the 2018 Act, which currently provides for the approach to be taken by the Supreme Court or the High Court of Justiciary (on Scottish criminal matters) in deciding whether to depart from retained EU case law:

> (5) In deciding whether to depart from any retained EU case law, the Supreme Court or the High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law.

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[6] cl 7(8), inserting a new section 6B into the 2018 Act.

[7] (cl 7(8), inserting a section 6A into the 2018 Act.

[8] Reasons for these specific provisions do not appear in HM Government, *The Benefits of Brexit: How the UK is taking advantage of leaving the EU* January 2022, pp 32-3; or The Government's Response to the Report of the European Scrutiny Committee Report, REU0029 https://committees.parliament.uk/writtenevidence/113000/pdf/.

[9] Retained EU Law Dashboard Guidance https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance

[10] https://www.gov.uk/government/publications/retained-eu-law-dashboard

[11] https://www.gov.uk/government/publications/retained-eu-law-dashboard

[12] As Prof Catherine Barnard submitted to the EU Scrutiny Committee's call for evidence on 'Retained EU Law: What next?', 'now lawyers, judges and academics have started to understand the legal complexities surrounding EUWA 2018, changes should be made only where there are very good legal and political reasons for doing so': REU0019, para 31 https://committees.parliament.uk/writtenevidence/107889/pdf/.

The ‘relevant courts’, including the intermediate appellate courts in each jurisdiction of the United Kingdom, must currently also apply the same test as the Supreme Court when deciding whether to depart from its own case law.[13]

8. The test that the Supreme Court would apply is that which has been adopted under the Practice Statement on Judicial Precedent[14] in the House of Lords, and the subsequent nearly sixty years of jurisprudence: to ‘treat former decisions of the House [and the Supreme Court] as normally binding, but that it would depart from a previous decision when it appeared right to do so’.[15]

9. Instead, a new s6(5) would provide, for retained EU case law:

> In deciding whether to depart from any retained EU case law by virtue of subsection (4)(a), (b) or (ba), the higher court concerned must (among other things) have regard to—
>
> (a) the fact that decisions of a foreign court are not (unless otherwise provided) binding;
>
> (b) any changes of circumstances which are relevant to the retained EU case law;
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> (c) the extent to which the retained EU case law restricts the proper development of domestic law.

Although the wording of the proposed new s6(5)(a) points out the basic claim that ‘decisions of a foreign court are not (unless otherwise provided) binding, that is somewhat beside the point here. The relevant CJEU decisions are not ‘binding’, in the sense that the higher courts are empowered to depart from them in principle, but those decisions are not merely decisions of foreign courts (and therefore only of persuasive authority), because they have been ***retained*** in English law by the chosen framework of the 2018 and 2020 Acts.

10. Where a higher court is considering whether to depart from its own decisions on retained domestic case law, s6(5ZA) would replicate the criteria above, but with a difference in the wording of criterion (a):

> (a) the extent to which the retained domestic case law is determined or influenced by retained EU case law from which the court has departed or would depart

11. In the debate at the time of the Bill’s Second Reading, the Rt Hon Hilary Benn MP spoke against the Bill, viewing the wording as ‘extraordinary’, and he asked of subclause (c)

> What on earth does that mean? Can any hon. Member explain what the proper development of domestic law is? I think that clause 7 is trying to kick the judiciary again into being more enthusiastic about Brexit, but Ministers know that in the end, the courts will take into account the things that they think are relevant.[16]

Although it may be understandable that the framing of the criteria included here leads to wonder, with respect to Mr Benn MP, ‘proper development’ need not have a loaded meaning. The Practice Statement recognised that ‘too rigid adherence to precedent may… unduly restrict

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[13] Relevant Court Regulations, reg 5.

[14] [1966] 1 W.L.R. 1234.

[15] *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28 per Lord Hope at [24]; James Lee, ‘Fides Et Ratio: Precedent in the Early Jurisprudence of the United Kingdom Supreme Court’ *King's College London Law School Research Paper* No. 2015-33 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2609013.

[16] Hilary Benn MP HC Deb (25 Oct 2022) Vol 721 Col 210.

the proper development of the law'. Lord Hamblen summarised the current position of the Supreme Court with respect to invitations to depart from its prior case law in *Henderson v Dorset Healthcare University NHS Foundation Trust*:[17]

> As this court has recently emphasised, it will be 'very circumspect before accepting an invitation to invoke the 1966 Practice Statement': *Knauer v Ministry of Justice* [2016] AC 908, para 23. It is important not to undermine the role of precedent and the certainty which it promotes. Circumstances in which it may be appropriate to do so include where previous decisions 'were generally thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy' - per Lord Reid in *R v National Insurance Comr, Ex p Hudson* [1972] AC 944, 966. Even then the court needs to be satisfied that a departure from precedent 'is the safe and appropriate way of remedying the injustice and developing the law' - per Lord Scarman in *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 106.

'The proper development of the law' referred to in ss6(5) and 6(5ZA) can thus be understood by the courts in context, if continuity is intended by the selection of that phrase.

12. What is the rationale for the three selected and selective named criteria come from? For both clauses 7(3) and (4), the Explanatory Notes[18] claim that this is a 'new test'[19], that 'reflect[s] some of the factors [taken] into account'[20] by the Court of Appeal in *TuneIn v Warner Music UK Ltd*,[21] one of the first cases where the power to depart from retained EU case law was considered. At first sight, this wording in the Bill might seem like a 'new test', since the new subsection replaces the existing subsection that expressly adopted the Practice Statement as the test to be applied. But the new section does not include a 'test', it merely requires the court to 'have regard to' certain criteria 'amongst others': there is no mention of what question the court must answer. In the absence of specification, the mandatory consideration of the criteria must be taken to be as part of the existing test in the Practice Statement.

13. The Court of Appeal has so far taken a consistently circumspect approach in cases where an invitation to depart from retained case law has been submitted to the court. In *TuneIn* itself, the Court of Appeal emphasised[22] the caution to be adopted when considering whether to depart from previous cases, and the importance of legal certainty,[23] following practice under the Practice Statement, as required by the 2018 Act.[24]

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[17] [2020] UKSC 43 at [87]; see also Lord Reed PSC and Lord Hodge DPSC in *Test Claimants in the Franked Investment Income Group Litigation & Ors v Revenue and Customs* [2020] UKSC 47 at [244]–[253].

[18] *Retained EU Law (Revocation and Reform) Bill* (Bill 156–EN): Explanatory Notes, September 2022. ('Explanatory Notes').

[19] Explanatory Notes paras 105 and 107.

[20] Explanatory Notes, para 106.

[21] [2021] EWCA Civ 441; see E Hancox, 'Interpreting the post-Brexit legal framework' (2021) 80 *Cambridge Law Journal* 428.

[22] [2021] EWCA Civ 441 at [74–75] (Arnold LJ).

[23] [2021] EWCA Civ 441 at [83] (Arnold LJ) and [202] (Sir Geoffrey Vos MR).

[24] S Whittaker, 'Retaining European Union law in the United Kingdom' (2021) 137 *Law Quarterly Review* 477, 483-488.

14. Since the list in the proposed section is non-exhaustive ('among other things'), the other factors identified by the court in *TuneIn* would also continue to be relevant. These other factors include the extent to which the area of law derives from international treaties;[25] the viability of alternatives;[26] the perspectives in academic literature;[27] and the importance of legal certainty.[28] The only factors identified are those which might be seen, when presented in isolation as they are in the Bill, to encourage departures from retained case law.

15. Regard for the proper development of the law can also lead the court to conclude that any change should be left to Parliament, as in another recent decision of the Court of Appeal,[29] where Coulson LJ held that it would be 'both unnecessary and undesirable to depart from [a retained CJEU decision][30] to bring about [significant] consequences without express consideration of the point by the legislature'.[31] This is also a point that Lady Rose of Colmworth, a current Justice of the Supreme Court (who when in practice was a lawyer in the Government Legal Service) and the third member of the Court of Appeal panel in the *TuneIn* case, has made in an extra-curial speech on the approach to precedent under the existing framework in the 2018 Act.[32]

16. As it stands, therefore, this provision arguably adds nothing to what the court would do in any case. I would argue that new test is therefore currently the old test, but presented in a roundabout way, and highlighting certain factors in a passive aggressive way. There must be something intended to be meaningful in the difference here – and one theory could be that it appears intended to be a restatement with a slant towards encouraging departure. But there has been no explanation as to why some criteria are mentioned over others, or what the point of doing so is intended to be.

17. The framing in the Bill and Explanatory Notes might indicate that a bigger change is intended. If in fact clause 7 is intended to change the test (as the Explanatory Notes might suggest), disapproving some of the elements in identified in *Tunein*, it should expressly say so, as it does not currently state or achieve any change.

18. A better solution would be not to change the criteria at all. But at the very least it is essential to add an express statement that the relevant appeal court is to apply the test based on whether the court considers it right to do so, since there is currently no test stated at all. That would enable the courts to rely upon clear line of dicta from the House of Lords and Supreme Court (on which the Court of Appeal in *TuneIn* relied) emphasising caution and circumspection when invited to depart from precedent. A settled approach to precedent, including the circumstances in which the courts may depart from existing case law, is essential for legal certainty.

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[25] [2021] EWCA Civ 441 at [79] and [198].

[26] [2021] EWCA Civ 441 at [80].

[27] [2021] EWCA Civ 441 at [81].

[28] [2021] EWCA Civ 441 at [83]–[86] and [202].

[29] *Chelluri v Air India Ltd* [2021] EWCA Civ 1953.

[30] Case-537/17 *Wegener v Royal Air Maroc SA* [2018] Bus LR 1366.

[31] [2021] EWCA Civ 1953 at [63].

[32] The Rt Hon Lady Rose of Colmworth DBE, '1966 and All That: Changing Our Minds in a Post-Brexit World', Lecture given at King's College London, 23rd May 2022 (https://www.supremecourt.uk/docs/ukael-lady-rose-speech-23-May-2022.pdf) paras 27 to 32. The speech repays careful reading.

19. It is worth noting that, in *TuneIn*, Sir Geoffrey Vos MR referred to 'the afterthought submission from TuneIn that this court should make a wholesale departure from EU law'[33] and that the argument was 'half-hearted and inadequately thought through'[34]. Under the right to intervene proposed for s6C, the Attorney General would be given notice and be entitled to make submissions with respect to any proposed departure.

3. COURT'S OWN REFERENCES

20. Clause 7(8) would add a new section 6A into EUWA. This provision would enable a lower court bound by retained case law to refer a point of law arising from retained case law to a higher court where relevant to the proceedings before it. The court would be able to do so of its own motion, or if a party applies. The referring court must consider that the point of law is of general public importance. The court receiving the reference must accept the reference is it considers that the point is relevant to the proceedings and if of general public importance. Where a court has accepted a reference, it must decide the points (although that is of course not the same as the court being obliged to accept an invitation to depart). Once the appellate court decides the point or points in the reference, the referring court must then apply the decision so far as it is relevant to the proceedings before it. No appeal may be made from a decision of a court or tribunal not to make a reference, or to refuse a reference.[35]

21. This, in effect, mirrors the former procedure in place for UK courts to refer matters to the CJEU that was in place during the United Kingdom's membership of the European Union. Significantly, if the decision on the point of law referred to the higher court involved a departure from retained case law, then the new position would be applied to the parties before the court.

22. Subject to judicious exercise of this power, it is a sensible addition to the legislative scheme. In particular, it addresses the challenge of lower courts necessarily being bound by retained case law (As noted above, it would be impractical and a cause of uncertainty to afford courts and tribunals at every level the ability to depart from case law), by giving a route for important points to be referred to courts with the power to review authorities. It is conceivable that more submissions will be made in the lower courts that a case is suitable for a departure, but there are several safeguards around the criterion of importance that can limit its exercise. And, as explored below, it is a better mechanism than the other proposed innovation for law officers to have a reference power.

4. LAW OFFICER REFERENCES

23. There is a significant difference between the procedure for the reference as between the reference by a court or tribunal under proposed s6A just outlined and a law officer under s6B. This new section would grant law officers the ability to refer points from proceedings before

[33] [2021] EWCA Civ 441 at [188].

[34] [2021] EWCA Civ 441 at [196].

[35] An appeal from a relevant appeal court could be made on a substantive decision on a reference, with permission: s6A(6), (8) and (9).

courts other than a higher court, but where the parties are not taking the case further by way of an appeal. But this power has fewer limitations than that of the court reference power. This section would confer upon law officers a reference power, where proceedings have concluded and where no reference was made under s6A. The language of 'no reference was made', appears to refer only to the referring court, rather than whether the reference was taken up. However, it would improve clarity to state expressly that the s6B power cannot be deployed where a reference was refused by the appellate court.

24. The breadth of this section is cause for concern. The power is exercisable within 6 months of the final resolution of an appeal (or the expiry of the deadline for an appeal), and applies to all courts and tribunals below the appellate courts identified as higher courts (thus the High Court, equivalent tribunals, and courts below). The Bill also does not define 'a point of law which was relevant to the proceedings and arises on retained case law' – and so it is conceivable that a law officer might seek to refer a point that could have been raised in the course of the trial between the parties, but was not. The prospect of county court judgments being scoured to see if they raise tangential points that could lead to a review of retained case law is not appealing. Such references have the potential to concern abstract points of law detached from the proceedings below, rather than live issues in contested proceedings between the parties which is a hallmark of common law adjudication.

25. Nor is there the requirement or opportunity for any judge to consider whether the point being referred is a point of general public importance, nor does the court to which the reference is made have a right to refuse it s6B(5) 'The court to which the reference is made must accept the reference, and decide the point or points of law concerned.' There is no explanation for the breadth of this power and the absence of judicial assessment of whether the question is indeed of general public importance. There is a risk that scarce judicial resources in the higher courts could be taken up by a slew of references under this procedure.

26. The Explanatory Notes refer to relevant appeal courts having discretionary case management powers in respect of references (for example, by joining references for a single hearing):[36] but the power to decide whether a reference raises a point of sufficient importance for it to merit consideration by the *court*, does not apply (except if the reference was made to an intermediate appellate court and a further appeal is sought, in which case the Supreme Court can determine whether to grant permission to *appeal*). It is questionable why a reference by a judge who has reached a conclusion that a point is sufficiently important to be referred is subject to scrutiny in a way that a reference by a law officer who has not even been required to assess the importance of the point is not.

27. We can also contrast this novel reference power with the power to refer points on law in criminal matters under s.36 of the Criminal Justice Act 1972.[37] This power can be exercised where a person tried on indictment has been acquitted This power less commonly exercised since changes enabling the prosecution to appeal on interlocutory points.[38] But there have been examples, notably a referral in respect of a point of law arising from the acquittal the Colston statue protestors:[39] Lord Burnett of Maldon CJ mentioned in that case that 'the reference

[36] Explanatory Notes, para 126.

[37] See further *Blackstone's Criminal Practice* 2023, Chapter D28.

[38] s 58 of the Criminal Justice Act 2003 (points that might have been referred after an acquittal can now be raised during the course of the proceedings).

[39] *Attorney General's Reference on a Point of Law* [2022] EWCA Crim 1259.

procedure is not a mechanism to obtain a restatement of established law.'[40] In one of the early cases on the1972 Act, Lord Widgery CJ observed that the reference procedure could be used for 'short but important points'[41]

28. A decision on a point of law raised by a reference under sx6B does not affect the outcome of the proceedings which originally gave rise to the reference. That is provided by sx6B(6) 'Any such decision does not affect the outcome of the proceedings mentioned in subsection (1)'. But it is only in the Explanatory Notes that an express recognition of the implications here is made:

> 'However, in accordance with the doctrine of precedent, the decision on the point of law will be binding on lower courts or tribunals in future proceedings where the same point of law arises.'[42]

Yet here, the doctrine of precedent is being changed to accommodate references to the Supreme Court. In addition, many cases will involve statutory interpretation, where there are arguments that courts should be particularly cautious.

29. This is therefore a form of 'prospective overruling'. A losing party who could have won had the point been pursued on appeal may well be disappointed that future cases, but not their own, will be decided differently.[43] Different considerations apply in the criminal context, because of the jury system and the inability to challenge an acquittal on appeal. And yet the breadth of the power to identify a point relevant to proceedings means that the point being referred might not have been raised in the original case.

30. Speaking in the context of the courts deciding to overrule a precedent prospectively, Professor Burrows (now Lord Burrows JSC) has written:

> The important point to stress is that breaks with the retrospective tradition of the common law will be, and should be, extremely rare. If prospective overruling is ever to be applied, the argument for it in any particular case is going to have to be overwhelmingly powerful.[44]

This issue goes to the novelty of the innovation being proposed, especially that the court may be asked to consider a point that was not live in the instant case – it should be confronted and the reasons articulated.

31. To conclude this section, the reference power should be omitted from the clause. The intervention provision affords sufficient opportunity for law officers to contribute to judicial developments of the law. If the power is to be retained, it should be modified to include constraints on its exercise, notably by adding a criterion for the point of law to be referred to be of public importance, for it to a point which has arisen in the proceedings (rather than being a point which could have been raised but was not), and the court to which a reference is made should be able to decide for itself whether it is a point of public importance. Greater clarity

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[40] *Attorney General's Reference on a Point of Law* [2022] EWCA Crim 1259 at [3].

[41] *Attorney General's Reference (No. 1 of 1975)* [1975] Q.B. 773 at 778.

[42] Explanatory Notes, para 123.

[43] M Arden, 'Prospective Overruling' (2004) 120 *Law Quarterly Review* 7; S Beswick, 'Retroactive Adjudication' (2020) 130 Yale L.J. 276 and S Beswick 'Prospective Overruling Unravelled' (2022) 41 *Civil Justice Quarterly* 29.

[44] A Burrows, 'Common Law Retrospectivity' in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earslferry* (Oxford University Press, 2013); see also Lord Goff of Chievely in *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349, 379.

should also be provided as to who, beyond the law officers, is entitled to appear in the reference proceedings, and who can apply for permission to appeal envisaged under s6B(7). Such detail as to who may appear in proceedings can be seen, for example, in the section provided for the Attorney General's power to refer points to the relevant Tribunal under s 326 of the Charities Act 2011.[45]

32. Overall, the asymmetry between ss6A and 6B is unjustifiable, but nor is there currently any attempt to justify it.

5. INTERVENTIONS

33. s6C would confer rights on law officers to intervene in the Supreme Court (or High Court of Justiciary). If a higher court is considering any argument made by a party to proceedings that the court should depart from retained case law, each UK and devolved law officer is entitled to notice of the proceedings. Then on giving notice to the court, a UK law officer (or devolved officer in the case of an argument relating to legislation from their respective devolved jurisdiction) are entitled to be joined as a party to the proceedings (proposed s6C(3)); and this notice may be given at any time during the proceedings.

34. The generosity afforded to the law officers here contrasts with the regular approach to intervention in appeals before the Supreme Court, where permission is required (Rule 26 of the Supreme Court Rules 2009) and, if permission to intervene is granted, submissions must be filed at least six weeks before the hearing.

35. However, this proposed section in its structure closely mirrors s5 of the Human Rights Act 1998,[46] which applies where a court (in the case of s5, it applies to any court) is considering whether to make a declaration of incompatibility under s 4 of the 1998 Act. Permission to intervene is not needed, and the law officer can intervene at any point. Nor is permission required for relevant officers to intervene where the Court exercises its devolution jurisdiction.

35. Instead of s6B, criticised above, an alternative solution could be for the right of law officers to intervene to be extended to cover situations where there has been a reference by a lower court on a point of retained case law (whether it involves an express invitation to depart from case law or not). That would enable submissions to be made, but in a focused way that would not transform the role of the courts.

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[45] S326 '(2) The Attorney General is to be a party to proceedings before the Tribunal on the reference.

(3)The following are entitled to be parties to proceedings before the Tribunal on the reference—

(a) the Commission, and

(b) with the Tribunal's permission—

(i) the charity trustees of any charity which is likely to be affected by the Tribunal's decision on the reference,

(ii) any such charity which is a body corporate, and

(iii) any other person who is likely to be so affected.'

[46] A mechanism for the Crown to intervene is included in the current government's Bill of Rights Bill (Bill 117) in cl 11.

6. CONCLUSIONS

36. This comment has argued that several of innovations in cl 7 of the Retained EU Law (Revocation and Reform) Bill should be rethought. The breadth of the intervention provisions may need to be reconsidered, but permitting interventions in line with the existing human rights mechanisms is a better way of ensuring that the courts remain fora for the adjudication of live questions based on live questions. Professor Hickman has referred to s.5 HRA 1998 as one of the Human Rights Act's 'varied array of innovative oratorical devices'.[47] A similar varied array is being proposed in this Bill.

37. On when the courts may depart from retained case law, the Bill would (in the case of both species of retained case law), introduce a 'new test' that is neither new nor a test. Some of the framing and phrasing in the clause may only be ornamental, included for the purpose of demonstrating the commitment to developing the law in a post-Brexit landscape. If so, they can safely be removed from the Bill, with the commitment being clear from the other provisions throughout the Bill. But if introduced, they have the potential to occupy the courts, particularly the appellate courts, with decision-making on minor or major points of law, whether or not they have actually been raised in the relevant cases.

38. The processes envisaged would transform the work of the courts, with a new variety of strategic litigation that is undesirable. And even where a point of law is taken to the appellate courts, there is no guarantee that the relevant case law will be departed from when the decision is taken. Yet it would presumably be a matter on which the law officer feels sufficiently strongly that change is desirable. Where there is a feature of retained case law that, notwithstanding the Government's attention to the issues throughout the period of six years since the Referendum result, is identified as problematic, legislation is likely to be a more satisfactory way of addressing the matter.

39. The former Secretary of State, whose name was on the Bill when printed but who resigned shortly before its second reading, when speaking in the debate proffered 'the conclusion that those who are opposing [the Bill] actually do not like Brexit altogether'.[48] Nothing in this submission is premised on any particular view of Brexit, not least given the fact that the UK has left the European Union. Rather, some targeted, focused changes, as proposed here, to clause 7 of the Bill are not only necessary but would improve the arrangements proposed. They would avoid engendering uncertainty and respect the different constitutional and institutional roles of the courts, executive and legislature.

40. At the time of both the 2018 and 2020 Act, there were vigorous debates over the framework to be adopted. Given the starting point adopted by those Acts, it is important to work within that framework, with its focus on continuity. There was an evolution in thinking over the wording of the original clause that became s. 6 of the European Union (Withdrawal) Act 2018, with positive changes to reduce vagueness in the scheme for the courts.[49] It is hoped that similar changes may be made before enactment here.

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[47] TR Hickman, 'Constitutional dialogue, constitutional theories and the Human Rights Act 1998' [2005] *Public Law* 306, 308.

[48] Mr Rees-Mogg MP HC Deb (25 Oct 2022) Vol 721 Col 198.

[49] See further M Elliott & S Tierney, 'Political pragmatism and constitutional principle: the European Union (Withdrawal) Act 2018' [2019] *Public Law* 37, 43-45.