

Divergence and alignment: The Rule of Law implications of the future relationship with the EU

9 March 2020

Chair:

- Davina Garrod, Partner, Akin Gump

Speakers:

- Prof Kenneth Armstrong, University of Cambridge
- Prof Piet Eeckhout, Dean, UCL Faculty of Laws
- Paul Hardy, DLA Piper
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THE BREXIT EFFECT

Alignment and Divergence
in UK Law – The
Distribution of Legal
Authority During and
After EU Membership

Kenneth A. Armstrong
University of Cambridge

The Rule of Law Perspective

- Easier to see the issues of alignment and divergence through the lens of democracy.
- Pre-commitment to an EEA (Norway) style Brexit – alignment without democratic representation.
- Pursuit of regulatory autonomy through FTA (Canada) style Brexit – alignment or divergence as sovereign choice.
- The Rule of Law perspective – where lies the lawful authority for alignment/divergence choices and how easy is it to locate?

The Legal Basis for Alignment – from membership to transition to the future

- Membership – Alignment under the European Communities Act 1972 etc.
- Repealing the 1972 Act – alignment under pre-WAB European Union (Withdrawal) Act 2018.
- Significance of whether EU regime to be modified based on Directives or Regulations.
- Alignment during transition – resurrection of the 1972 Act
- After transition – regulatory autonomy and distribution of legal authority.

Legal Basis for Alignment During Membership

European Communities Act 1972:

- Gives domestic legal effect to the Accession Treaty
- Also gives effect to the original Communities treaties and any other treaty that is added by way of statutory amendment of the 1972 Act
- Section 2(1) gives effect to directly applicable **EU regulations** – ambulatory with UK alignment automatic.
- Section 2(2) allows statutory instruments to implement EU directives – alignment requires intervention through SIs.

Other primary legislation contained powers similar to section 2(2) and could be used for the same purpose:

- Food and Drugs Act 1955 and later Food Act 1984/Food Safety Act 1990
- Consumer Protection Act 1987 – implements Toy Safety Directive
- Health and Safety at Work etc Act 1974 – implemented Biocides Directive

Alignment under the 2018 Act (pre-WAB)

- European Communities Act 1972 is repealed.
- Existing body of EU rules domesticated as “retained EU law” as of exit day.
- Section 19 – nothing in the Act to prevent UK from duplicating in domestic law any EU law measures made after exit day.
- But that absence of inhibition does not confer specific lawful authority to align post-exit and power under ECA to do so disappears.

Deficiency- Correcting SIs and Post- membership Alignment

- Sec. 8(4):
retained EU law is not deficient merely because it does not contain any modification of EU law which is adopted or notified, comes into force or only applies on or after exit day
- Same limit imposed on financial services regulators with powers to make EU exit instruments: Financial Regulators Powers (Technical Standards etc) (Amendment etc) (EU Exit) Regulations 2018 – Reg 3(3).
- BUT deficiency correcting power is used where retained EU law refers to a function that is carried out by an EU institution – leads to transfer of rule-making to UK public authorities.

Alignment at
end of
transition – ►
lessons from No
Deal SIs.

- Domestic alignment with EU rules depends on whether those EU rules are “directly applicable” regulations or are directives.
- Trend at EU level towards replacing directives-based regimes with directly applicable regulations – e.g. Biocidal Products Regulation.
- Dynamic alignment with directly applicable EU regulations ends with repeal of 1972 Act.
- Otherwise SIs which gave effect to EU Directives require amendment.



Toy Safety

- UK Toy Safety Regulations –toys must comply with essential requirements in Annex to Directive.
- Product Safety and Metrology etc (Amendment etc) (EU Exit) Regulations 2019 – Schedule 15 deals with toys (35 other product regs amended).
- New Reg 3B – Annexes to the Directive are domesticated as Schedules to Regs.
- New Regs 39B-D – empowers Sect of State to amend Schedules to take account of technical and scientific progress (annulment procedure)
- New Reg 3A – minister to designate or remove designation of technical standards used to presume conformity (no obvious control mechanism).



Biocidal Products

- UK Biocidal Products Regulations 2001 gave effect to EU regime based on Directives – Reg 2(10) ensured dynamic alignment with schedules and annexes to the Directive.
- New EU regime based on EU Regulation 528/2012: so ambulatory effects of 1972 Act ensured alignment during membership. Domestic regulations revoked.
- 2018 Act will retain EU Regulation 528/2012, But modification needed to allow “active substances” and technical annexes to be domesticated and modified.
- Chemicals (Health and Safety) and Genetically Modified Organisms (Contained Use) (Amendment etc.)(EU Exit) Regulations 2019 (CGMO) - amends Regulation 528/2012 and other EU legislation.
- Reg 126 allows Ministers to update Annexes to Regulation in light of technical and scientific progress subject to consent of devolved ministers.

Into Transition

- Changes through "No Deal" SIs suspended till end of transition period.
- European Union (Withdrawal Agreement) Act 2020 amends 2018 Act to resurrect the effects of the European Communities Act for a limited period till end of transition.
- New directly applicable EU regulations continue to be given effect via saving of the effect of section 2(1).
- New EU instruments requiring transposition can be implemented via saving of the effect of section 2(2) – can a repealed instrument be a valid legal basis for a wholly new instrument?

Political Choices and Distribution of Legal Authority

- FTA-style Brexit is intended to enhance regulatory autonomy of the UK – rejection of EEA-style pre-commitment to regulatory alignment.
- Ambulatory and dynamic alignment as a matter of domestic law falls away at end of transition.
- Highly complex ‘package’ of SIs amending a wide range of saved domestic regulations and retained EU law.
- Distribution of legal authority to align/diverge:
 - Between UK and devolved governments
 - Between Acts of Parliament and statutory instruments
 - Between Ministers and Regulators.
- Significant discretion with regard to non-legislative EU regulatory guidance and recommendation (e.g. financial services).

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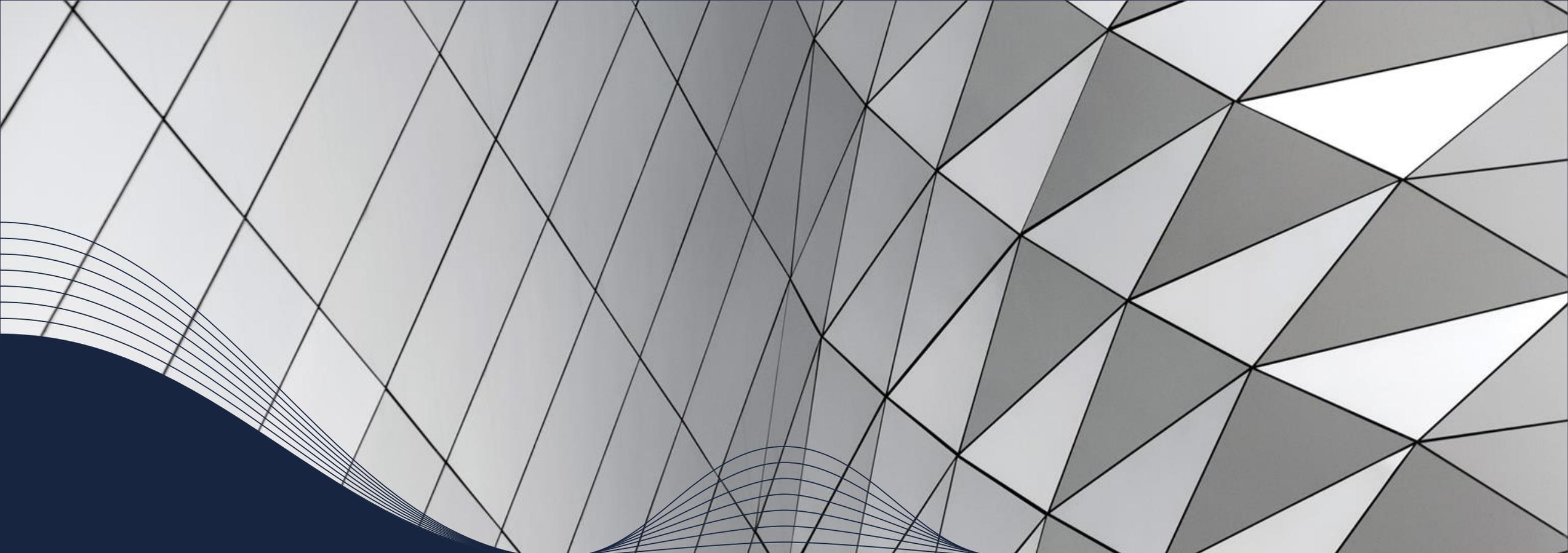
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Presenting today - Paul Hardy

- Paul leads DLA Piper's Brexit advisory practice, advising public and private sector businesses on the implications of Brexit and how best to manage them.
- Prior to DLA Piper Paul worked in both Westminster and Brussels, most recently as the EU Legal Adviser to the House of Lords from 2014-2017.
- From 2009-2014, he was Counsel for European Legislation in the House of Commons and headed the team providing EU legal advice to the House and its select committees.
- Paul was also a permanent official in the European Commission in Brussels for four years where he advised on trade, foreign policy and international human rights in the Directorate-General for External Relations.



Paul Hardy

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Education

- Inns of Court School of Law (Bar Vocational Course), 1992
- University of North London, CPE (law conversion), 1991
- University of St Andrews M.A., 1989

Admissions

Barrister in England and Wales

Single Market vs Free Trade Agreements

European Commission slide: Ad Hoc Working Party on Article 50: 13/1/2020

	Single Market	Free Trade Agreement
Scope	Indivisible four freedoms: goods, services, capital, persons	No holistic approach: Limited opening, varying per area (goods, services, investment, public procurement)
Integration method	Principle of free movement/free provision	Targeted removal of barriers to trade
	Regulatory union (pooled sovereignty) <ul style="list-style-type: none"> • Prohibition of restrictions • Harmonisation of rules • Mutual recognition by default 	Regulatory autonomy (two separate regulatory spaces) <ul style="list-style-type: none"> • Access to market requires full compliance with host State rules • Regulatory cooperation on voluntary basis
	Distinct legal order; primacy and direct effect of EU law	International law; no direct effect
Decision-making	Mostly by qualified majority for secondary legislation	Mutual agreement only
Supervision & enforcement	<ul style="list-style-type: none"> • Commission, EU regulatory agencies, Member State supervisory authorities, cooperation networks • Court of Justice of EU, Member State courts 	<ul style="list-style-type: none"> • Joint Committee, specialised committees • State-to-State dispute settlement
Remedies	Compliance, lump sum/penalty payments, damages (to private parties)	Suspension of obligations, compensation

Single Market vs Free Trade Agreements: Goods

European Commission slide: Ad Hoc Working Party on Article 50: 13/1/2020

Single Market	Free Trade Agreement
<ul style="list-style-type: none">• Free movement• EU Customs Union<ul style="list-style-type: none">• No customs duties between MS• No quantitative restrictions• Regulatory integration<ul style="list-style-type: none">• <i>Harmonised areas</i>: full EU-level harmonisation of product rules and compliance methods• <i>Non-harmonised areas</i>: mutual recognition of national rules• No border controls in intra-EU trade• Integrated regulatory, supervisory, judiciary and enforcement system	<ul style="list-style-type: none">• No general free movement; customs controls and procedures• Market access<ul style="list-style-type: none">• Most duties/quotas removed over time• UK: aim for zero tariffs/quotas• Access requires full compliance with host state rules<ul style="list-style-type: none">• No harmonisation• No mutual recognition/equivalence of substantive rules• Regulatory cooperation always on a voluntary basis• Each side retains right to regulate<ul style="list-style-type: none">• Some general rules framing regulation ("rules on rules")

Single Market vs Free Trade Agreements: Customs

European Commission slide: Ad Hoc Working Party on Article 50: 13/1/2020

Single Market	Free Trade Agreement
<ul style="list-style-type: none">• Borderless internal market through EU customs union and internal market• Mission of EU customs: supervision of international trade and implementation of external aspect of internal market• Union Customs Code<ul style="list-style-type: none">• Common customs procedures• Common Risk Management Framework• Trade facilitation measures, e.g. simplified procedures and authorised economic operators• Union IT systems and databases	<ul style="list-style-type: none">• Customs border: customs controls and procedures apply• Customs Cooperation to mitigate burden of customs controls and procedures<ul style="list-style-type: none">• Mutual recognition of authorised trader programmes (Japan, USA)• Mutually agreed customs security measures (Switzerland, Norway)• Mutual recognition of risk management techniques (USA)• Establish channels of communication for exchange of information (China) between customs authorities

Single Market vs Free Trade Agreements: Services

European Commission slide: Ad Hoc Working Party on Article 50: 13/1/2020

Single Market

- Fundamental freedoms (dismantling national barriers)
 - Services
 - Establishment
 - Capital
 - Persons
- Sectoral liberalisation
 - Services Directive
 - Sector-specific legislation (harmonising conditions for the provision of services)
 - Country-of-origin approach/mutual recognition

Free Trade Agreement

- Differentiated liberalisation:
 - Open on establishment (but e.g. no direct branching financial services)
 - More limited for cross-border provision of services and movement of staff (only temporary)
 - Based on existing levels of openness
- Sectoral exclusions to market access; reservations; exceptions
- Access requires full compliance with host state rules:
 - No harmonisation of rules
 - No mutual recognition of rules
- Each side retains right to regulate
 - Some general rules framing regulations ("rules on rules")

Thank you

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Statutory Instruments and Brexit: The story so far and predictions for the future

Alexandra Sinclair

Research Fellow, Public Law Project



EU Withdrawal Act 2018

- A power to make (s8(1)):
- “such provision as the Minister considers appropriate to prevent, remedy or mitigate—
- (a) any failure of retained EU law to operate effectively, or
- (b) any other deficiency in retained EU law,
- arising from the withdrawal of the United Kingdom from the EU.”
- “Crucially, we will ensure that the power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU.”



Trends to date

- Ministers initially planned to lay 800-1,000 statutory instruments. Currently around 625 have been laid.
- Minimal consultation – less than 10% subject to any form of consultation, and only around 9 had a full, formal consultation
- Multiple errors – use of ‘wash up’ SIs to correct errors made in earlier SIs– around 70 such SIs .
- The Secondary Legislation Scrutiny Committee’s 60th Report states that the number of corrections that have been needed to statutory instruments and explanatory notes has **increased in the last parliamentary session.**



Sifting procedure

- Applies to proposed negative SIs made under ss 8, 9 and 23
- Draft SI laid before both Houses of Parliament with memorandum justifying use of negative procedure
- Scrutiny by European Statutory Instruments Committee (Commons) and Secondary Legislation Scrutiny Committee (SLSC) within 10 sitting days
- Recommendation for upgrade if consider should be subject to affirmative procedure
- ‘Urgent case’ procedure using made affirmatives which are then not subject to the sift



Sifting procedure

- Since July 2018, nearly 250 Brexit SIs have been laid as proposed negatives so subject to sift
- Over 70 recommended for upgrade by either (or both) ESIC and SLSC
- All upgrade recommendations have been accepted by the Government
- ESIC focuses on whether the proposed instrument is either legally or politically important, or significant enough to warrant further consideration



Challenges to Scrutiny

- **Length of the SIs;**
 - Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019 **619 pages**
 - Minutes of debate in the house: **Commons 52 mins, Lords 51 mins**
 - The REACH etc. (Amendment etc.) (EU Exit) Regulations 2019 **64 pages**
 - Minutes of debate in the house: **Commons 1 hr 22 mins, Lords 2 hrs 12 mins**
 - The Human Medicines (Amendment etc.) (EU Exit) Regulations 2019 **188 pages**
 - Minutes of debate in the house: **Commons 1 hr 24 mins, Lords 48 mins**



Challenges to Scrutiny

- The SLSC has frequently criticised the explanatory notes laid with the instruments: *“Unfortunately, neither EM1 nor EM2 has proved adequate. The lack of contextual detail inhibits a proper understanding of the significance of the impact of the various components of the Regulations”*
- The Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 consists of 24 disparate Parts. The SLSC stated in their review: *‘[e]ffective scrutiny is inhibited by the wide range of issues included.’*



Challenges to Scrutiny

- The SLSC said of the REACH EM and IA:
“The Committee deeply regrets that, despite the economic importance of the UK chemical industry, neither the EM nor the IA provide any financial analysis of the potential costs of the proposed regulatory regime and a ‘no deal’ scenario for the industry.”
- On the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019 the SLSC said:
- *“On the contrary, the exceptional size and complexity of the instrument inhibit effective parliamentary scrutiny of the proposals (both by this Sub-Committee and by the House in debate).”*



The sifting mechanism in practice

- Transmissible Spongiform Encephalopathies and Animal By-Products (Amendment, etc) (EU Exit) Regulations 2018
- Removed a statutory duty to ensure staff had appropriate education and training in relation to checks for mad cow disease
- Subject to the sift and recommended for upgrade by the SLSC because of this omission
- Recommendation accepted and re-laid as affirmative with the statutory duty reinserted



Legal challenges to Brexit SIs

- *The Plant Protection Products (Miscellaneous Amendments) (EU exit) Regulations 2019*
- Removal of blanket ban on hormone disrupting chemicals in pesticides
- Prohibition reinstated after ChemTrust sent pre-action protocol letter
- *The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 and The Conservation (Natural Habitats, etc.) (Amendment) (Northern Ireland) (EU Exit) Regulations 2019*
- Judicial review brought by ClientEarth and the Marine Conservation Society of changes to the Natura 2000 framework



Delegated powers in EU(WAg)A

“8C Power in connection with Ireland/Northern Ireland Protocol in withdrawal agreement

(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate—

(a) to implement the Protocol on Ireland/Northern Ireland in the withdrawal agreement,

(b) to supplement the effect of section 7A in relation to the Protocol, or

(c) otherwise for the purposes of dealing with matters arising out of, or related to, the Protocol (including matters arising by virtue of section 7A and the Protocol).



Delegated powers in EU(WAg)A – some themes

- Use of ‘such provision as the Minister thinks appropriate’
- Constrained by the Withdrawal Agreement to extent that intended to implement the powers
- Not subject to the sifting mechanism in EUWA
- Changes to primary legislation and retained direct principal EU legislation require affirmative procedure
- Otherwise many powers exercisable by negative resolution either generally or after “first use”
- Extension of sunset clauses in EUWA to 2 years after IP implementation day
- No limitations on s 8C implementing NI protocol



Immigration and Social Security Co-ordination Bill

4 Consequential etc provision

(1) The Secretary of State may by regulations made by statutory instrument make such provision as the Secretary of State considers appropriate in consequence of, or in connection with, any provision of this Part.

(2) The power to make regulations under subsection (1) may (among other things) be exercised by modifying— (a) any provision made by or under primary legislation passed before, or in the same Session as, this Act; (b) or retained direct EU legislation.



Private International Law (Implementation of Agreements) Bill

2 Implementation of other agreements on private international law

(1) The appropriate national authority may make regulations for the purpose of, or in connection with, implementing any international agreement, as it has effect from time to time, so far as relating to private international law (a “relevant international agreement”).....



Conclusions

- Trend of *appropriate* rather than *necessary* which the Constitution Committee has said is a standard that is less able to be litigated
- Use of the phrase “in connection with”
- No use of sifting committees
- Only affirmative when it is amending primary legislation or its “first use” despite the Constitution Committee saying that does not assist in determining the significance of the provision particularly where it is amending retained EU law
- Unrestricted powers- Traditional restrictions include preventing any use to impose or increase taxation or fees; make retrospective provision; create a relevant criminal offence; establish a public authority; amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it; or amend or repeal the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998.



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