

APPG on the Rule of Law

Meeting Report: Rule of Law Questions for the Repeal Bill

4 July 2017, 17:00-18:45
Thatcher Room, Portcullis House

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Format

17:00 – 17:30	APPG on the Rule of Law General Meeting
17:30 – 17:35	The Rt Hon Dominic Grieve QC MP (Chair) Introduction
17:35 – 17:55	4 expert speakers (5 minutes each)
17:55 – 18:25	Questions and comment – MPs and Peers
18:25 – 18:50	Questions and comment – open to the floor

Attendance

Chair: The Rt Hon Dominic Grieve QC MP

MPs and Peers: Baroness Ludford; Bob Neill MP; Lord Woolf; Lord Norton; Lord Tyler; Lord Pannick QC

Others in attendance included: David Anderson QC (Brick Court Chambers); Katie Barraclough (EU Home Affairs Sub-Committee); Joel Blackwell (Hansard Society); Natalie Byrom (The Legal Education Foundation); Richard Dunstan (Office of Caroline Lucas MP); Brigid Fowler (Hansard Society); Ben Gaston (Bindmans LLP); Ellen Greenhalgh; Victoria Hewson (Legatum Institute); Christopher Howarth; Murray Hunt (Bingham Centre); Schona Jolly QC (Cloisters); Professor Sir Jeffrey Jowell KCMG QC (Blackstone Chambers); Jake Lee (The Legal Education Foundation); Jolyon Maugham QC (Devereux Chambers); Professor John McEldowney (University of Warwick); Amy Mount (Greener UK); Dr Jo Eric Khushal Murkens (LSE); Alexandra Runswick (Unlock Democracy); Sir Paul Silk; Dr Holly Snaith (Policy Analyst EU Financial Affairs Sub-Committee); Jan van Zyl Smit (Bingham Centre) Lucy Wake (Amnesty International); Fiona Weir (JRRT); Tom West (ClientEarth); George Wilson (Liberty); Swee Leng Harris (Bingham Centre).

Meeting Aim

To provide MPs and Peers with an opportunity to discuss the proposed Repeal Bill and rule of law questions raised by the proposals for the legislative framework to implement Brexit in UK law.

Background

The Repeal Bill will be the key constitutional statute to implement Brexit. The Bill will provide the frameworks for disentangling 40 years of integration between UK law and EU law. Given the Bill's scope and significance, Parliament has an important role to play in scrutinising the Bill and ensuring that it is consistent with the UK's constitutional principle of the rule of law.

Content of the Bill

The Government's White Paper on the Repeal Bill indicates that the Bill will, among other things:

- “convert directly-applicable EU law into UK law” (at [2.4])
- “preserve the laws we have made in the UK to implement our EU obligations” (at [2.5])
- “provide that historic [Court of Justice of the EU] case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court” (at [2.12]-[2.17])
- “provide a power to correct the statute book, where necessary, to rectify problems occurring as a consequence of leaving the EU. This will be done using secondary legislation, and will help make sure we have put in place the necessary corrections before the day we exit the EU” (at [3.7])
- delegate legislative power to “ensure that, whatever the outcome of [negotiations with the EU], the statute book can continue to function, and that decisions can be taken in the national interest and reflect the contents of the Withdrawal Agreement” (at [3.12])
- delegate legislative power to “transfer to UK bodies or ministers’ powers that are contained in EU-derived law and which are currently exercised by EU bodies” (at [3.16])

The White Paper proposes the following for parliamentary scrutiny of delegated legislation under the Repeal Bill:

The mechanistic nature of the conversion of EU law to UK law suggests that many statutory instruments will follow the negative procedure (for example, removing the requirement to send reports to the Commission on the UK’s public procurement activity). The affirmative procedure may be appropriate for the more substantive changes. (at [3.22])

In addition to the Repeal Bill, the Government will propose other stand-alone pieces of primary legislation for new policies or institutional arrangements after exit. The 2017 Queen’s Speech identified Bills on customs, trade, immigration, fisheries, agriculture, nuclear safeguards, and international sanctions.

Substantive Recommendations by Parliamentary Committees

The Constitution Committee has suggested that “a general provision be placed on the face of the Bill to the effect that the delegated powers granted by the Bill should be used only:

- so far as necessary to adapt the body of EU law to fit the UK’s domestic legal framework; and
- so far as necessary to implement the result of the UK’s negotiations with the EU.”¹

¹ Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (7 March 2017), 3.

The Women and Equalities Committee recommended that the Government “include a clause in the Great Repeal Bill that explicitly commits to maintaining the current levels of equalities protection when EU law is transposed into UK law.”²

The Joint Committee on Human Rights has said that:

the Government must resist the temptation to allow laws relating to fundamental rights to be repealed by secondary legislation for reasons of expediency. If rights are to be changed there should be an opportunity for both Houses to seek both to amend and to vote on such changes.³

The Environmental Audit Committee concluded that in the area of environmental law:

Transposition is likely to be complex and time consuming, and Government must ensure that protections are not weakened, either during the process of leaving the EU or afterward, and provide the opportunity for full parliamentary scrutiny of the UK’s future environmental legislation.⁴

Procedural Recommendations by the Constitution Committee

The Constitution Committee’s made the following recommendations for scrutiny of secondary legislation laid under Bill:

- (1) “The Minister sign a declaration in the Explanatory Memorandum to each statutory instrument amending the body of EU law stating whether the instrument does no more than necessary to ensure that the relevant aspect of EU law will continue to make sense in the UK following the UK’s exit from the EU, or that it does no more than necessary to implement the outcome of negotiations with the EU.
- (2) The Explanatory Memorandum to each statutory instrument sets out clearly what the EU law in question currently does (before Brexit); what effect the amendments made by the statutory instrument will have on the law (as it will apply after Brexit) or what changes were made in the process of conversion; and why those amendments or changes were necessary.
- (3) The Government makes a recommendation for each statutory instrument as to the appropriate level of parliamentary scrutiny that it should undergo. We would expect that a statutory instrument which amends EU law in a manner that determines matters of significant policy interest or principle should undergo a strengthened scrutiny procedure.

² Women and Equalities Committee, *Ensuring strong equalities legislation after the EU exit* (28 February 2017), [59].

³ Joint Committee on Human Rights, *The human rights implications of Brexit* (19 December 2016), [92].

⁴ Environmental Audit Committee, *The Future of the Natural Environment after the EU Referendum* (4 January 2017), [34].

- (4) A parliamentary committee(s) consider the Government's recommendation, and decide the appropriate level of scrutiny for each statutory instrument laid under the 'Great Repeal Bill'. If the two Houses perform this function separately, then it would seem appropriate in the House of Lords for this sifting function be performed by the Secondary Legislation Scrutiny Committee. Alternatively, a Joint Committee could be established to carry out this role on a bi-cameral basis.
- (5) Where the relevant committee(s) determines that a statutory instrument laid under the 'Great Repeal Bill' amends EU law in a manner that determines matters of significant policy interest or principle, it should undergo a strengthened scrutiny procedure. We do not attempt at this stage to define exactly how this strengthened scrutiny procedure should operate, or whether one of the existing statutory models should be adopted. We recognise that existing models for enhanced scrutiny can prove resource intensive and time-consuming—in our view, the only essential element of whatever strengthened procedure is selected is that it should provide an opportunity for a statutory instrument to be revised in the light of parliamentary debate."⁵

Rule of Law⁶

The primary aim of the Repeal Bill is to provide legal certainty in the UK post-exit. Accordingly, the Bill is an important instrument for the rule of law in the UK.

Nevertheless, the proposals for the Bill raise a range of rule of law questions, including the following:

- How will the functions and governance provided by EU institutions be replaced in a way that provides legal certainty? Relatedly, how quickly can these new governance arrangements be established so as to ensure there is no gap in the implementation and administration of the law?
- How will directly applicable EU laws be transposed into UK law? For example, will it be treated as primary or secondary legislation, and who will have the power to amend it after exit?
- Will the legal standards and protections derived from EU law continue in UK law after exit?
- If so, what will the enforcement mechanism(s) be for these standards and protections?
- Will the processes for changing the law established by the Bill be transparent and subject to proper scrutiny, or will the Government be given broad powers that lack definition to change the law through delegated legislation?

⁵ Constitution Committee, *The 'Great Repeal Bill' and delegated powers* (7 March 2017), 4-5.

⁶ This section reflects the introductory remarks made by The Rt Hon Dominic Grieve QC MP at the meeting.

The Bingham Rule of Law Principles

The rule of law questions above are based on eight rule of law principles that were identified by Lord Bingham, which can be summarised as:

1. The law must be accessible and so far as possible, intelligible, clear and predictable;
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;
5. The law must afford adequate protection of fundamental human rights;
6. Means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
7. Adjudicative procedures provided by the state should be fair; and
8. The rule of law requires compliance by the state with its obligations in international law as in national law.

Speakers' Summaries

Professor Paul Craig

The following is a brief note for the APPG hearing on the Great Repeal Bill and the Rule of law. I would make the following points to complement those made by other members of the panel.

1. A measure such as the Great Repeal Bill is an inevitable consequence of Brexit. In the absence of such legislation, there would be a black hole, in the sense that areas that had been previously regulated by directly applicable EU regulations and directly effective EU law, would be subject to no legal provision at the date of exit. There must be cognizable legal rules to regulate diverse matters, ranging from washing machines to product safety, and from financial services to e-commerce.
2. There have been valuable studies on the GRB. The White Paper provides informative background and the House of Lords' Constitution Committee's Report contains a wealth of valuable recommendations concerning the procedures that should be followed when converting EU law into UK law. The remainder of this brief note focuses on three issues that need to be borne in mind.

3. The first concerns the distinction, regarded as central to the White Paper and the House of Lords' Report, between the mechanical act of converting EU law into UK law so that it makes sense, which is intended to be the primary focus of the GRB, and substantive policy amendment of such rules, which is intended to be the focus of legislative action after Brexit. It remains to be seen whether this distinction can be maintained, and the difficulty of doing so is accepted, albeit in different ways, in the preceding documents.
4. The second concerns the regulatory architecture of EU law. Members of the APPG will know that EU law consists of Treaty articles, legislative acts, delegated acts and implementing acts, combined with judicial interpretation thereof. In the post-Lisbon world legislative acts can take the form of regulations, directives or decisions, and this is true also for delegated acts. Most implementing acts take the form of regulations. The regulatory architecture in any particular area is typically an admixture of Treaty provisions, directives and regulations. It is, moreover, composed of legislative acts, in conjunction with delegated and implementing acts.
 - a. The regulatory provision in any area can therefore be likened to a tree, in which the trunk is the primary legislative act, and the branches constitute delegated or implementing acts that flesh out aspects of the legislative act. This is important when considering decisions made under the GRB. Directives will, because of their legal nature, have already been transformed into UK legislation as required by EU law.
 - b. Exercise of legislative scrutiny pursuant to the GRB will have to be alive to the interconnection between the different parts of EU law when deciding how to convert EU law into domestic law, and when deciding whether to retain, amend or repeal any particular part thereafter. This scrutiny will be concerned primarily with EU regulations, and the members of the relevant committees will need to ensure their decisions are taken fully informed as to the other parts of the regulatory architecture that governs the particular area. Failure to do so could lead to decisions that adversely affect the overall regulatory schema, and this is equally true in relation to decisions taken after Brexit concerning possible substantive amendment or repeal of such provisions.
5. The third issue is temporal. There is a danger of disjunction between the legislative process pursuant to the GRB, and the reality of the political negotiations that began after the 2017 election. The tension is simple and important: there is, on the one hand, the desire to get on with the GRB process, which is

informed by the size of the task and by the imperative to be ready by the date of withdrawal; there is, on the other hand, the fact that we do not know what the outcome of the negotiations will be and this could have significant implications for the application of the process envisaged under the GRB. The application of the conversion process would be very different if the outcome were soft Brexit, or something akin thereto, as compared to hard Brexit. This tension is thrown into sharp relief by the fact that trade negotiations will not commence until sufficient progress has been made on the terms of withdrawal. If a trade deal of any kind is forthcoming in what remains of the two-year period, there will inevitably be a transition period of some kind; this is also likely to be so even if little progress has been made towards a trade deal. The legal and political complexities attendant on such transitional agreements are considerable. The point being made here is equally applicable to the content of the separate pieces of legislation identified in the Queen's speech concerning matters such as customs and immigration.

Dr Gunnar Beck, The Rule of Law and the Great Repeal Bill – Briefing note

The White Paper proposes that, subject exceptions including the EU Charter of Fundamental Rights ("EUCFR"), the Great Repeal Bill ("the Bill") convert EU law as it stands at the moment before the UK's exit from the EU into UK law to ensure that, wherever practicable, the same rules and laws apply on the day after the leave the EU as before. To this end, the Bill will give domestic effect to directly applicable law (paragraph 2.4); preserve pre-Brexit transposed EU law (paragraph 2.5) and directly effective EU treaty rights (paragraph 2.11); and give pre-Brexit Court of Justice of the EU (CJEU) case law the same binding precedent status as UK Supreme Court decisions (paragraphs 2.12 to 2.17).

The Government's stated intention to give binding precedent status to all CJEU decisions including case law on the CJEU's interpretative approach is problematic for the following reasons:

In practice, any CJEU statement on the law – whether relevant to the decision in the case or not – would be binding on the UK courts.

CJEU decisions are commonly stated at a higher level of generality than domestic judgments. If CJEU judgments are given binding effect, then the UK courts must take them as they come, i.e. at a higher level of generality and hence as having potentially wider effect than domestic judgments.

Some CJEU decisions are concerned with EU treaty articles or the EUCFR which the Government does not propose to incorporate into EU.

The CJEU follows a more purposive and less text-based interpretative approach than the UK courts. The UK would be required to adopt the 'EU way' in interpreting EU-derived law as distinct from interpreting purely domestic legislation. However, domestic legislation often incorporates EU-derived as well as purely domestic law.

It is submitted that the relevance of EU case law should be strictly limited to the *interpretation* of EU-derived law (whether directly applicable and converted law, or transposed EU law). In addition, EU-derived law to which the Bill gives effect should be defined in positive terms as only encompassing directly applicable Regulations and a list of enumerated Treaty Articles which have been recognised in existing case law as giving rise to domestically enforceable individual legal rights. The suggestion in para 2.10 of the White Paper that UK courts should "*continue to be able to look at treaty provisions*" should *not* be reflected in the language of the Bill.

As a general rule, the CJEU interprets a provision of EU law in the light of its spirit, its general scheme and its wording, as well as the overall legal context including the general principles of EU law, the treaty purposes and the objectives of the measure in question. The CJEU may regard as the most reliable pointer to the true meaning of the text any one or any combination of literal, contextual and purposive interpretative criteria without hierarchical order between them. The CJEU's ultra-flexible interpretative approach extends judicial discretion well beyond the circumstances where judges are compelled to exercise their discretion as a result of bad drafting, the imperfections of language or to prevent a patently irrational or manifestly unintended result, into areas where the court is free but not compelled to exercise discretion. The integrationist objectives read into EU legislation by the CJEU introduces a dynamic, pro-Union element in the CJEU's interpretative approach which the UK courts should not be required to reproduce in their application of pre-Brexit case to new factual scenarios. For this reason, in interpreting EU-derived law the domestic courts should be required not to follow the 'EU way' but the general principle that domestic legislation which has been enacted in order to give effect to the UK's obligations under an international convention or treaty should be construed in the same sense as the convention or treaty if the words of the statute are reasonably capable of bearing that meaning: *The Jade* [1976] 1 WLR 430 at 436 (Lord Diplock).

Dr Michael Gordon, Rule of Law Questions for the Repeal Bill

The process of legislating to prepare for UK exit from the EU will raise some fundamental challenges to the rule of law in its most basic sense – in particular, ensuring certainty and continuity as to the operation of legal norms as the UK withdraws from the EU, and the domestic authority of EU law is removed.

There is very significant potential for tension between this need to provide legal certainty and the constitutional legitimacy of the process by which it will be achieved. The scale, scope and

embedded nature of EU law within the domestic legal system make its removal or replacement within a two-year timescale an immense constitutional undertaking, an unprecedented law-making exercise in the modern era. As the Repeal Bill White Paper indicates, the only realistic way to achieve this certainty will involve the use of delegated legislative powers under the primary Act, along with a range of other substantive Acts in areas where policy will have to be completely transformed. Yet exactly this reliance on secondary legislative powers will create real risks in terms of the quality and quantity of parliamentary scrutiny of executive activity.

Hyperbole about delegated legislation being an interference with the sovereignty of Parliament is misplaced, given such powers must be created by the legislature, but other constitutional principles may be at stake: the democratic accountability of the government to Parliament, and the responsibility of ministers for policy choices, must not be circumvented in the pursuit of legal certainty.

Against this backdrop, the crucial practical challenges in legislating for Brexit will be:

- design by Parliament of the secondary legislation powers to preclude their use for significant policy changes, and beyond the point of UK exit from the EU
- establishing procedural safeguards to ensure the government is fully engaged with Parliament throughout
- construction of adequate machinery internal to Parliament to scrutinise draft secondary legislation to ensure it does not exceed these powers
- development of an active culture of scrutiny, given the volume and complexity of detailed scrutiny that will be required
- considering the Repeal Bill in context, to determine whether other substantive policy matters ought to be confronted via new and separate substantive Acts of Parliament (such as those on trade, customs, immigration, agriculture, fisheries etc)
- tailoring of only the most narrow post-Brexit secondary legislative powers to cater for oversights where retrospective remedial action may be required

Preparing the UK legal system for EU withdrawal is a major legal, political and constitutional challenge – and one which sits alongside other governmental challenges, most critically the process of negotiation with the EU. We must set appropriate, but challenging, expectations of how the process will work and what it will achieve, in light of a clear understanding of the necessarily interactive relationship between Parliament and the government. But there are real opportunities here for Parliament to influence significantly the shape of the UK legal system after Brexit, in ensuring the Repeal Bill is appropriately designed, and that the powers contained in it are appropriately exercised.

Dr Ruth Fox, Parliamentary Scrutiny and the Repeal Bill

Brexit poses the biggest legislative challenge ever undertaken by Parliament. Given the unique nature and scale of the legislative process, the delegation of powers to ministers in the Repeal Bill will be unavoidable, but there are significant weaknesses in the system for parliamentary scrutiny of such powers and the regulations that will flow from them. Unless legislative safeguards are put in place and new scrutiny mechanisms established, it will not be Parliament but the Executive that is empowered by this legislative process. The House of Commons particularly must take its democratic responsibility for secondary legislation more seriously than in the past.

Past scrutiny of enabling bills demonstrates that the best way to constrain broad, ill-defined powers is to tighten the scope of their application through constraints on the face of the bill, including safeguards to define restrictions on their use, and sunset clauses. The Legislative and Regulatory Reform Act 2006 constitutes what Parliament currently deems acceptable in terms of the 'bottom line' for delegation. Parliament will need to think carefully about the implications of lowering that standard still further if it decides not to include similar safeguards in the Repeal Bill.

A key problem with scrutiny of delegated powers in the Bill will be that if ministers cannot fully predict how a power might be used, it will be difficult for Parliament to assign a procedure to the scrutiny of that power for the future. In its White Paper the government said that powers would be subject to the negative or affirmative scrutiny procedures. It made no mention of the 11 versions of a strengthened scrutiny procedure currently provided for in various pieces of legislation. These procedures were expressly designed for circumstances in which Parliament cannot know how a power will be deployed and therefore cannot agree a scrutiny procedure for the use of that power in advance. The Legislative Reform Order model may be the strengthened scrutiny procedure best suited to the Repeal Bill provisions and circumstances. If the government proceeds with its approach as outlined in the White Paper, the most serious delegations of power will instead be assigned to an affirmative scrutiny procedure that is wholly inadequate for the task, particularly in the House of Commons.

Given the problems with the current scrutiny arrangements in the elected House, a new 'Sift and Scrutiny' system for delegated legislation is needed. The Hansard Society will shortly be publishing a detailed proposal for such a new system, the design of which is informed by five principles. That it should:

- Be more rigorous and systematic: the aim should be to reduce complexity and provide more transparency and accountability.
- Reflect the fact that Parliament is delegating power to the Executive, not subordinating itself to the government's wishes. Parliament's power to disallow or reject a Statutory Instrument

must therefore be real, not illusory. And a government response to the legitimate concerns of MPs about SIs should be required, not optional – including making provision for debating time and responding to critical reports.

- Give MPs a meaningful role and voice in the process, thereby ensuring proper democratic accountability, and more efficient and effective use of the time which Members devote to the scrutiny of SIs.
- Draw upon and encourage the development of knowledge and expertise among Members, so that they might contribute constructively to improvements in policy and legislative development.
- Reflect a bi-cameral approach: it should not undermine the scrutiny in the House of Lords, but reflect a pragmatic view of the strengths and weaknesses of each House, in the context of the limited time available to look at the volume of delegated legislation produced in any parliamentary session.

Key Points from Discussion

Definition of Powers

The draft clause suggested by the Constitution Committee to limit the scope of powers under the Bill (set out on page 3 of this report) was discussed. Whilst the drafting of the clause was not criticised, it was suggested that the Repeal Bill would need a provision that distinguishes legislative changes that concern substantive policy versus those that are mechanical.

Parliamentary Scrutiny of Secondary Legislation

It was observed that appointment to a delegated legislation committee is regarded as a punishment in the House of Commons, but that this is not the case in the House of Lords. Furthermore, the members of the committees do not receive papers for meeting in good time in advance of meetings, and the meetings are conducted in too little time.

It was argued that there is a need for an ‘early warning system’ of sifting delegated legislation in Parliament. Without changes, it was felt that MPs might be overwhelmed by the unprecedented volume of legislation and there were concerns that MPs might not take the scrutiny process seriously given their past record in relation to scrutiny of delegated legislation.

A further issue was raised in relation to the resources given to parliamentarians to undertake this scrutiny. There is an assumption that what has worked in the past in relation to parliamentary scrutiny of delegated legislation will work in the future. However, it might not work in the future because the scale of what is proposed is unprecedented. It was suggested that some parliamentary officials

think they can cope with the likely volume of statutory instruments based on past experience. This might be correct in terms of the technical scrutiny of statutory instruments, but scrutiny of the policy issues arising from statutory instruments generated by the Repeal Bill and other Brexit-related legislation is likely to be more challenging. Not only are frameworks and processes for scrutiny needed, but more resources are also needed for effective scrutiny. MPs will need to access specialist expertise for advice across a range of policy areas in order to undertake detailed scrutiny. It was stressed that although MPs are busy they need to give priority to this scrutiny. The new procedures and additional resources will be needed to fulfil the electorates that the new laws will be properly scrutinised and that there will be some certainty in the process.

It was observed that, by contrast, in the EU parliament members receive better information and analysis, and in better time.

There was a further question raised as to whether the review of the committee system in the House of Lords might result in an issue for resources. For the present discussion, such concerns did not arise as the House of Lords was unlikely to target cuts at the Delegated Powers Committee or Secondary Legislation Scrutiny Committee. The House of Lords would, like the House of Commons need to think carefully about how it uses its resources, but there was more concern about the Commons.

Divergence between EU and UK Law

Whilst the Repeal Bill would seek to preserve EU law, different approaches of the CJEU and UK courts mean that the two jurisdictions are likely to diverge on interpretation. How should such divergence be addressed? In areas where the UK wants to mirror EU law, the UK would need to constantly update UK law unless the law provides that UK courts must follow EU courts' interpretation.

One recommendation to address divergence was that where a CJEU case interprets a law that has been incorporated in the UK, then that decision should stand as a matter of UK law. However, where a CJEU decision was not on point, but concerned similar or related points, then if UK courts were asked to follow CJEU approach, that would create a situation where UK courts were asked to develop further EU law as frozen on exit day in the integrationist manner of the CJEU. This would, by stealth, allow for continued supremacy of EU law in the UK.

A contrary view was given that the White Paper did not intend that UK courts must follow the purposive, integrationist approach of the CJEU. If the White paper had, this would go against the point of the Repeal Bill. There will be situations where need to take account of CJEU case law up to point of exit, but the interesting and difficult questions will arise on what happens thereafter. For example, instances where a UK law mirrors an EU directive that continues to be interpreted by the CJEU. Post-exit decision by the CJEU would not

be formally binding on UK law, and nor should they be. However, UK courts would have the usual interpretive discretion to at least look at post-exit decisions of the CJEU, and the UK courts could choose to follow those decisions or not.

If UK courts do not follow such CJEU decisions, then there will be divergence, and the question is whether divergence is a problem, to which the answer is it depends on the kind of exit. If the UK has a 'hard' or 'clean' exit, then divergence will not matter. However, if the UK has a 'soft' exit, or where the UK exports goods to the EU, then regulatory harmonisation will be needed and so divergence will be a problem.

The idea of the UK having complete regulatory autonomy post-exit was a myth. In areas where the UK wants to trade with EU in goods or services, regulatory harmonisation will be needed and legal divergence will be a problem.

A further different perspective has that Supreme Court decisions such as HS2 that appeared to push back on EU law could indicate a willingness of the Supreme Court to develop its own interpretive approach to EU law post-exit.

Transition Arrangements

There was a question as to whether experience of the European Free Trade Association (EFTA) Court could provide guidance for a transition arrangement. The framework of the Repeal Bill will need to reflect the UK's future relationship with EU. If the UK has a transitional period that is similar to European Economic Area (EEA) membership, was there guidance from the EFTA court approach? The EFTA Court does not apply the ever closer union principle, nor the Charter, but some say that in essence the EFTA Court follows the same approach as the CJEU.

One view is that the EFTA Court essentially extends CJEU decisions on the single market to EFTA members, which are non-EU members of the EEA. In this sense, the EFTA Court is not really independent, rather, it takes view of court of one party (the EU) and imposes it on the others. The EFTA model was contrasted with Switzerland's bilateral arrangements with the EU which use ad hoc tribunals. This seems to be approach of EU in association agreements. If a UK-EU agreement established a court like EFTA, this would effectively continue the supremacy of the CJEU in the UK.

A different view was given based on the different kinds of transition agreements that might be made. There is broad agreement on the need for a transition agreement, but under EU law, the status of that agreement is very unclear. When one talks about a transitional agreement, a distinction must be made between:

- A situation where the nature of the future trade deal is clear, and 'transition' means moving from the status quo to the agreed new arrangement; and

- A situation where there has been little progress in negotiations, and a transition agreement is used to ease the move from the status quo to an undefined final destination.

In the latter case, only continuation of the status quo under a transition agreement would make sense, and the CJEU would not allow this kind unless the CJEU had jurisdictional authority over the terms of the agreement. This should not be surprising because if the transition is a continuation of EU law, then part of the status quo is the jurisdictional authority of CJEU.

A possible transition deal to maintain the status quo would also feed into the temporal problem for the Repeal Bill. If the UK has a transition agreement that extends status quo, that affects the nature of conversions and changes to EU law under the Repeal Bill. In that scenario, the UK could not on the date of formal withdrawal bring EU law into UK law as if the UK had cut all ties with the EU, because the nature of transition at that time would be that the UK would not have cut all ties. If there was such a transition agreement, then it is not even clear that repeal of the ECA could come into effect on exit date. Thus, there is an intimate relationship between transition, jurisdictional authority, and the conversion task of the Repeal Bill.

Influence of European Law in the UK Post-Exit

Finally, there was discussion of the project to convert all directly applicable EU law into UK law and preserve supremacy of CJEU law before exit. What impact might there be on the UK legal system from this transplant? Can it be so surgical, or might there be a potential risk of contamination? What happens if there is a clash of EU legal principle and UK law?

It was hard to anticipate what the impact would be. For example, it is not clear how UK courts will proceed in the future concerning the principle of proportionality. Another question is how much difference EU law's influence on UK law would have in effect. Clearly, the UK law on judicial review has already changed such that it is closer to EU law, and it is not clear whether this will continue regardless of Brexit. A further, question concerns the Supreme Court's practice note on overturning case law: what would happen if the Supreme Court overturned its own case law in favour of CJEU? Would there be different sets of principles for overturning Supreme Court decisions and CJEU decisions?

Others were not persuaded or concerned by the prospect of the impact on UK law. EU law has influenced UK law since 1972, because EU law has been part of UK legal reality since 1972. So there would not be a substantive invasion of foreign norms in a new way, rather, the influence of EU law has existed for decades with the UK making and influencing EU law. Judicially, post exit, it will remain for the Supreme Court to decide whether or not to apply CJEU case law and principles.

Furthermore, prior to 1972, UK judges were already adopting European legal principles through contact with European law and concepts, which UK judges sometimes found useful. It was also observed that England had a concept of judicial review based on principle of proportionality since the 17th century, so the principle was not a new European import.

The project of the Repeal Bill could instead be viewed not as transplantation, but as separation. On this view, the question is the degree to which the influence of EU legal principles should be driven back. The nature of any transition agreement will depend on political circumstances at the time. The weaker the UK's position is, the more likely it is that the CJEU will have a role, unless there is no agreement at all. Arguably the CJEU should not be viewed as an independent actor. The CJEU strikes down agreements or allows them, following its integrationist agenda, because it can count on the political support of member states. If the UK and EU were to come to transitional agreement and the EU Council wanted it to go through, it was unlikely CJEU would strike down the agreement.

Speakers Biographies

Dr Gunnar Beck

Visiting Scholar at the Policy Exchange, Reader in EU law at SOAS University of London, and Barrister at 1 Essex Court (Chambers of The Rt Hon Sir Tony Baldry). Dr Beck previously taught at the University of Oxford and the London School of Economics. He has advised the UK Parliament on many EU Law issues, including during the negotiation of the Lisbon Treaty and all aspects of its significant amendments to the EU treaty framework.

Professor Paul Craig

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