BINGHAM CENTRE FOR THE RULE OF LAW

The EU (Withdrawal) Bill and the Rule of Law

Expert Working Group

Meeting 1: Legal Certainty and Clauses 1-6

DISCUSSION PAPER*

9 October 2017
Chair: The Rt Hon Dominic Grieve QC MP

Summary

This paper has been prepared to assist the first meeting of the Expert Working Group. It discusses rule of law problems in the EU (Withdrawal) Bill in relation to Clauses 1-6. Though the paper focuses on legal issues, the Bill gives rise to a number of practical problems, including:

- Whether the loss of the EU Charter of Fundamental Rights would foreclose legal challenges to data protection law akin to that initiated by David Davis MP and Tom Watson MP in relation to the Data Protection and Investigatory Powers Act 2014;
- A potential loss of environmental protections through the operation of Clause 4 and the non-retention of the polluter pays and precautionary principles;
- The possibility that individuals will no longer be able to obtain damages against the state for breaching its obligation to implement EU law, even where the circumstances giving rise to the breach occurred prior to withdrawal;
- Whether the confusion regarding which EU laws will be retained after exit will inhibit businesses' long-term planning strategies regarding cross-border economic activity and dispute resolution; and
- Whether, in the absence of express guidance from the Government regarding the treatment of post-exit EU case law, the courts' will be able to effectively and fairly apply the law to disputes before them.

In addition to this paper, a list of resources on various aspects of the Bill has been distributed to Group members.

Introduction – Legal Certainty and the Withdrawal Bill

A chief aim of the European Union (Withdrawal) Bill (hereinafter 'the Bill') is to provide legal continuity upon Brexit Day. It aims to do so by retaining specific aspects of EU law in the UK domestic legal framework and by providing the Government with powers to correct deficiencies that may arise as a result of that exercise once we have withdrawn from the EU. Legal certainty is an important part of ensuring continuity during and after withdrawal. The scale of the

challenge facing the Government, and the drafters of the legislation, should not be underestimated: after 45 years of membership of the EU, our legal systems have become enmeshed in many respects and disentanglement is no easy task. However, the Bill as presently drafted poses a number of obstacles to achieving legal certainty which merit examination.

Accessibility of the law, including legal certainty, is the first of the eight principles set out in Tom Bingham's *The Rule of Law*.[1] Lord Bingham argued that it was of fundamental importance to any legal system that the law "must be accessible and so far as possible intelligible, clear and predictable".[2]

This discussion paper will focus on **legal certainty in relation to six issues, covering Clauses 1-6 of the Bill and related Schedules**. These are the issues likely to dominate the first few days of the Bill's consideration in Committee of the Whole House which is expected to commence during the week beginning 16 October. The paper does not examine Clause 7 and delegated powers because these issues are unlikely to be reached until the second week of debate. The six issues are:

- Retention of existing EU law in domestic law: Clauses 1-4
- The legal status of retained direct EU law: Clause 3
- The principle of supremacy of EU law post-Brexit: Clause 5(1)-(3) and Schedule 1
- Interpretation of retained EU law: Clause 6
- Non-retention of the EU Charter of Fundamental Rights: Clause 5(4) and (5); and general principles of EU law: Schedule 1, paragraphs 2 and 3
- Redress for breaches of retained EU law and challenges to the validity of retained EU law: Schedule 1, paragraphs 1 and 4; Schedule 8, paragraph 27

1. Retention of existing EU law in domestic law: Clauses 1-4

Clause 1 of the Bill repeals the European Communities Act 1972 (ECA) on exit day. To preserve legal continuity, Clauses 2 through 4 provide for the retention of existing EU law by saving or incorporating certain categories of EU law within the domestic legal framework. This is known collectively as 'retained EU law'. However, the way in which these categories of law have been defined in the Bill presents several points of uncertainty regarding exactly which EU laws will be retained after exit day. For example, it is unclear whether key environmental provisions will withstand the retention process. The difficulties in identifying retained EU law create a situation of uncertainty for individuals and businesses who will be less able to ascertain their rights and obligations.

Clause 2 saves 'EU-derived domestic legislation' which is defined in the Bill to include secondary legislation made under section 2(2) of the ECA in order to implement EU law.

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*This Discussion Paper has been prepared by Justine Stefanelli, Associate Senior Research Fellow in European Law and Interim Deputy Director of the Bingham Centre for the Rule of Law. The Bingham Centre is also grateful to Swee Leng Harris for her input into these issues, especially as regards issues 1 and 2.

[1] Penguin Books, 2011 (first published 2010).

[2] Ibid, p. 37.

Clause 3 incorporates 'direct EU legislation' into domestic law. This is EU law that is directly applicable[3] in the UK as long as it is an EU Member State, such as EU regulations or decisions.

Clause 4 saves EU law that has effect in the UK because of section 2(1) ECA that is not incorporated by Clause 3. This means that Clause 4 is concerned with saving directly applicable EU Treaty provisions. The Bill's Explanatory Notes explain that this includes the 'four freedoms' in the Treaty on the Functioning of the EU (TFEU).[4] However, Clause 4(2) includes two exceptions to the Clause's saving effect. First, any "rights, powers, liabilities, obligations, restrictions, remedies or procedures" forming part of domestic law under Clause 3 cannot be saved under Clause 4. Second, Clause 4 cannot save rights, powers, etc. arising under an EU directive if the right has not been recognised by the Court of Justice of the European Union (CJEU) or a court or tribunal in the UK in a judgment issued before exit day.

Though the Bill defines 'retained EU law' across Clauses 2-4, **there remains significant uncertainty about what exactly is going to be kept.** For example, while it might be argued that identifying instruments captured by **Clause 2(2)(a)** is a less difficult task because such legislation is often accompanied by an explicit reference to the UK's obligation to implement EU law,[5] it is sometimes the case that the domestic implementing legislation will go beyond the EU requirements. This is known as gold-plating, and it is not always accompanied by an explicit reference to the UK's obligation to implement EU law. This will therefore make it difficult to determine whether a specific provision should be retained under Clause 2.

Clause 2(2)(b) captures anything passed or operating for a purpose mentioned in section 2(2)(a) or (b) of the ECA. According to the Explanatory Notes, this will include laws not specifically passed to implement EU obligations (e.g., because they predated EU legislation in a specific area), but which have since become part of how the UK demonstrates compliance with EU law.[6] Identification of every legal provision that falls within this category could prove quite difficult, especially in the absence of an express indication to that effect.

Clause 3 incorporates direct EU legislation "so far as operative" immediately before exit day. However, the concept of "so far as operative" as defined in subsection (3) is insufficiently clear, especially given the fact that the entry into force of EU regulations and decisions is self-determined. For example, EU regulations either specify the date upon which they enter into force, or, in the absence of such a specification, they enter into force on the 20th day after they are published in the Official Journal of the EU. However, it may be the case that different provisions within a single regulation enter into force at different times.

The exception in **Clause 4(2)(b)** to the saving of treaty rights presents a similar lack of clarity, specifically in relation to the phrase "of a kind". For example, it is unclear whether the EU precautionary and polluter pays principles will survive this exception. Professor Paul Craig

[3] Reference is made throughout to 'directly applicable' rather than 'directly effective' EU law because direct effect is not about the status of the law; rather it is about whether the law creates enforceable rights. 'Directly applicable' is a more accurate term: it means that law is automatically in force in the UK without the UK having to enact implementing legislation.
[4] European Union (Withdrawal) Bill Explanatory notes (Bill 5-EN), para 89.
[5] House of Commons Library, 'European Union (Withdrawal) Bill', Briefing Paper No 8079 (1 September 2017), p. 30.
[6] European Union (Withdrawal) Bill Explanatory notes (Bill 5-EN), para 74.

suggests that one reading of this provision could be that a right, power, etc. could be saved post-exit if the right is sufficiently precise, certain and clear, even in the absence of a judgment to that effect.[7] However, as he points out, paragraph 92 of the Explanatory Notes seems to suggest that such rights will only be saved where a claimant has expressly demonstrated that a provision in a directive has direct effect in a case prior to exit day.

Moreover, Professor Mark Elliot questions whether retention of these important rights will have any practical meaning or effect once the UK is no longer an EU Member State because reciprocal arrangements between the UK and the remaining EU Member States may no longer exist.[8] This is echoed by Tom de la Mare QC and James Segan who consider that "Clause 4 necessarily assumes that these rights will remain meaningful as domestic rights if 'recognised' and made 'available' in domestic law after exit day."[9] However, they write, "the enforceability of almost all of the EU rights in question depends expressly upon the UK being a member of the EU, or the person being a citizen of the EU, or there being an effect on trade between Member States."[10] They therefore conclude that there are two possible readings of Clause 4:

> (1) The first possibility is that Clause 4 preserves little, if anything, after exit day: the text of the Treaty articles and the suchlike is carried over, but they are all on their face inapplicable if the UK is no longer a member.
>
> (2) The second possibility is that all the references to *"Member States"*, *"the Union"* the *"internal market"* and so forth in retained EU law and rights must be read as including – or perhaps even as limited to – the UK.[11] (emphasis in original)

A number of **amendments** have been tabled regarding Clauses 1-4. In particular:

- **Amendment 70**: to insert a list of directly-effective rights into the Bill.
- **Amendments 93-94**: to remove subparagraph (b) of Clause 4(1).
- **Amendment 95**: to insert two new subsections. The first deals with a situation where the UK has incorrectly implemented a directive. In cases of incorrect implementation, reliance on the EU directive may still be necessary. The second ensures that where the UK has not correctly or completely implemented EU law, prior to exit day, there will be

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[7] Professor Paul Craig, Written evidence to the House of Lords Constitution Committee's inquiry into the European Union (Withdrawal) Bill, EUW0002 (6 September 2017), § 12(b), available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/written/69633.html.

[8] Mark Elliott, 'The EU (Withdrawal) Bill: Initial Thoughts', *Public Law for Everyone* (14 July 2017), available at: https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/.

[9] Tom de la Mare QC and James Segan, 'The European Union (Withdrawal) Bill: constructive ambiguity or a political choice not yet made?', *Blackstone Chambers* (26 September 2017), available at: https://www.blackstonechambers.com/news/european-union-withdrawal-bill-constructive-ambiguity-or-political-choice-not-yet-made/.

[10] Tom de la Mare QC and James Segan, 'The European Union (Withdrawal) Bill: constructive ambiguity or a political choice not yet made?', *Blackstone Chambers* (26 September 2017), available at: https://www.blackstonechambers.com/news/european-union-withdrawal-bill-constructive-ambiguity-or-political-choice-not-yet-made/.

[11] Tom de la Mare QC and James Segan, 'The European Union (Withdrawal) Bill: constructive ambiguity or a political choice not yet made?', *Blackstone Chambers* (26 September 2017), available at: https://www.blackstonechambers.com/news/european-union-withdrawal-bill-constructive-ambiguity-or-political-choice-not-yet-made/.

a statutory obligation on Ministers to modify UK law to ensure that the relevant EU legislation is correctly and fully implemented.

Suggested Questions for Discussion

- Q1.1 Is it feasible or desirable to identify all legislation deemed 'EU-derived domestic legislation' by clause 2 of the Bill?
- Q1.2 Can the Bill be amended to make the category of retained direct EU legislation in Clause 3 of the Bill more legally certain?
- Q1.3 Is it necessary to clarify the meaning of "so far as operative" in relation to direct EU legislation in Clause 3 that may be partially, but not wholly, in force on exit day?
- Q1.4 Should the Bill be amended to provide further clarity with regard to the saving of treaty rights with direct effect in Clause 4(2)(b), and, if so, how?

2. The legal status of retained direct EU law: Clause 3

It is unclear from the text of the Bill whether retained direct EU law under Clause 3 will have the status of primary or secondary legislation, or whether it should be considered as sui generis.[12] Clarity regarding the legal status of retained direct EU law is important because it will dictate the procedure by which such legislation can be amended (outside the context of amendments powers within the Bill), and it will determine the extent to which the law is subject to legal challenge. Moreover, if there is a conflict between retained direct EU law and another piece of domestic legislation after exit day, which norm prevails will depend on their relative status.[13] The need to determine relative status may counsel against designating such law as sui generis.[14]

Difficulties remain in choosing between a designation as primary or secondary legislation. For example, the EU measures included in Clause 3 vary in legal status within the EU legal order. The Bill's grouping together in **Clause 3(2)** of EU regulations, decisions and tertiary legislation conveys an erroneous message that the three have similar legal status within the EU legal order. Tertiary EU legislation is subordinate legislation, which is dependent upon primary EU law. It is therefore arguably incorrect to assign the same legal status to retained direct tertiary legislation as is given to retained primary EU law. Indeed, Professor Craig has stated:

[12] Dr Jack Simson Caird argues the lattermost position. See 'The European Union (Withdrawal) Bill: constitutional change and legal continuity', *Second Reading* (18 July 2017), available at: https://secondreading.uk/elections/the-european-union-withdrawal-bill-constitutional-change-and-legal-continuity/.

[13] Professor Paul Craig, Written evidence to the House of Lords Constitution Committee's inquiry into the European Union (Withdrawal) Bill, EUW0002 (6 September 2017), § 4(b), available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/written/69633.html.

[14] Professor Paul Craig, Written evidence to the House of Lords Constitution Committee's inquiry into the European Union (Withdrawal) Bill, EUW0002 (6 September 2017), § 5(a), available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/written/69633.html.

> The current legal reality is that an EU regulation or decision may be a legislative, delegated or implementing act made pursuant to Articles 289-291 TFEU. It may be truly something akin to primary legislation, and it may be something far more analogous to a SI.[15]

Alternatively, Professor Craig suggests either:

- classifying retained direct EU law according to whether it more substantively resembles primary or secondary legislation, *or*
- carrying over classifications according to classification at the EU level (i.e., if it was primary legislation in the EU legal order, it should be primary in the UK post-exit; whereas delegated and implemented EU acts should be treated as statutory instruments under UK law).[16]

The second option seems to have more support from the Bill itself which refers in Clause 3(2)(a) to EU legislation "as it has effect in EU law immediately before exit day". However, it is unclear whether that is the intention of the provision or whether that provision is aimed at ensuring that a particular version of direct EU legislation is retained on exit day.[17]

The uncertainty is further compounded by the fact that **Schedule 8, paragraph 19** states that "any retained direct EU legislation is to be treated as primary legislation and not subordinate legislation" for purposes of the Human Rights Act 1998 (HRA). Does this imply that it should be treated as secondary legislation for all other purposes?[18] **Schedule 8, paragraphs 3 and 5** exacerbate the situation by indicating that retained direct EU legislation should be treated as secondary legislation for purposes of amendment powers. Professor Elliott therefore concludes:

> Thus, it appears that for amendment purposes, retained direct EU law is to be treated as secondary legislation (under schedule 8), but that for priority purposes it is to be treated as having priority over pre-exit domestic legislation pursuant to the EU supremacy principle. Thus it assumes an almost schizophrenic character, being a form of secondary legislation that has primacy over (pre-exit) primary legislation.[19]

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[15] Professor Paul Craig, Written evidence to the House of Lords Constitution Committee's inquiry into the European Union (Withdrawal) Bill, EUW0002 (6 September 2017), § 6(a), available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/written/69633.html.

[16] Professor Paul Craig, Written evidence to the House of Lords Constitution Committee's inquiry into the European Union (Withdrawal) Bill, EUW0002 (6 September 2017), § 6(b)-(c), available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/written/69633.html.

[17] Professor Paul Craig, Written evidence to the House of Lords Constitution Committee's inquiry into the European Union (Withdrawal) Bill, EUW0002 (6 September 2017), § 6(c), available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/written/69633.html.

[18] Mark Elliott, 'The Devil in the Detail: Twenty Questions about the EU (Withdrawal) Bill', *Public Law for Everyone* (14 August 2017), para 8, available at: https://publiclawforeveryone.com/2017/08/14/the-devil-in-the-detail-twenty-questions-about-the-eu-withdrawal-bill/.

[19] Mark Elliott, 'The EU (Withdrawal) Bill: Initial Thoughts', *Public Law for Everyone* (14 July 2017), available at: https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/.

Amendments directed at this issue include:

- **Amendment NC25:** to enable Ministers to establish a list of technical provisions of retained EU law that may be amended by subordinate legislation outside of the time restrictions of the Bill.
- **Amendment 11** (Dominic Grieve MP): removing the proposal in Schedule 8, paragraph 19(1) to allow secondary legislation to be treated as primary for the purposes of the Human Rights Act 1998.

Suggested Questions for Discussion

- Q2.1 If there is a conflict between retained direct EU law and another piece of domestic primary legislation after exit day, which norm prevails?
- Q2.2 Should the Bill be made more clear regarding the legal status in UK law of retained direct EU law under Clause 3, and, if so, how?
- Q2.3 Is the suggestion to carry over classifications according to classification at the EU level feasible/desirable?
- Q2.4 Does the designation in Schedule 8, paragraph 19 of retained direct EU legislation as primary legislation for purposes of the HRA imply that it should be treated as secondary legislation for all other purposes?
- Q2.5 Similarly, does the rule in Schedule 8, paragraphs 3 and 5 that retained direct EU legislation should be treated as secondary legislation for purposes of amendment powers tell us anything about its legal status more generally?

3. The principle of supremacy of EU law post-Brexit: Clause 5(1)-(3) and Schedule 1

Clause 5(1) states that the principle of the supremacy of EU law will not apply to any legislation passed by Parliament on or after exit day. **Clause 5(2)** clarifies that supremacy will continue to apply on or after exit day "so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day." That is, the principle of supremacy can continue apply to retained EU law as it relates to other pre-exit law, "where relevant".[20] **Clause 5(3)** addresses the application of the principle of supremacy in situations where retained EU law has been amended post-exit, providing that such modification will not prevent the application of supremacy over pre-exit legislation "if the application of the principle is consistent with the intention of the modification."

Professor Elliott suggests that, normally, "directly effective EU law enjoys priority over Acts of Parliament, but the same is not true of secondary legislation enacted under the ECA for the purpose of giving domestic effect to non-directly effective EU law".[21] He further queries whether the supremacy principle will apply to all categories of retained EU law, and remarks that the

[20] European Union (Withdrawal) Bill Explanatory notes (Bill 5-EN), para 96.
[21] Mark Elliott, 'The EU (Withdrawal) Bill: Initial Thoughts', *Public Law for Everyone* (14 July 2017), available at: https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/.

Bill does not provide adequate certainty in this regard. For example, he asks whether supremacy will only apply to retained EU law deriving from EU laws which themselves enjoy supremacy.[22]

As of the time of writing, **no amendments** have been tabled in relation to the principle of supremacy of EU law.

Suggested Questions for Discussion

- Q3.1 By what criteria and by whom will it be determined whether application of the principle of supremacy is consistent with a legislative modification?
- Q3.2 Will post-exit modifications be accompanied by an explicit statement that the principle of supremacy should attach?
- Q3.3 Will supremacy depend on the legal status of the law at issue?

4. Interpretation of retained EU law: Clause 6

Clause 6 addresses the interpretation of retained EU law by the courts on and after exit day. **Clause 6(1) and (2)** provide that domestic courts:

- are no longer obliged to follow CJEU judgments handed down on or after exit day;
- can no longer refer cases to the CJEU on or after exit day; and
- are not required to have regard to anything done on or after exit day by the EU or an EU entity, unless the court "considers it appropriate to do so."

Subsection (3) requires that UK courts decide questions on the validity, meaning or effect of retained EU law in accordance with retained EU case law (including pre-exit CJEU judgments), retained EU general principles, and in light of the pre-exit scope of EU competences. **Subsection (4)** exempts the UK Supreme Court (and in certain circumstances the High Court of Justiciary in Scotland) from the duty to interpret retained EU law in accordance with retained case law and retained general principles. Rather, under **subsection (5)**, these courts are instructed to treat retained CJEU case law as having the same binding or precedent status as their own case law (i.e. they are to apply the test they would apply when determining whether or not to depart from their own case law). Like clause 5(3), **Clause 6(6)** permits courts to use retained CJEU case law for interpretive purposes in relation to post-exit amendments to retained EU law "if doing so is consistent with the intention of the modifications." Finally, **subsection (7)** defines relevant terminology.

Clause 6 is predicated on a clear understanding of what is meant by terms such as 'retained EU law', the ambiguities of which have been discussed above. The flexibility given to the courts in **subsection (2)** may be viewed positively as a means of allowing the courts to adapt their decision-making to the changing nature of the UK's relationship with the EU over time.[23]

[22] Mark Elliott, 'The Devil in the Detail: Twenty Questions about the EU (Withdrawal) Bill', *Public Law for Everyone* (14 August 2017), para 13, available at: https://publiclawforeveryone.com/2017/08/14/the-devil-in-the-detail-twenty-questions-about-the-eu-withdrawal-bill/.

[23] House of Commons Library, 'European Union (Withdrawal) Bill', Briefing Paper No 8079 (1 September 2017), p. 56.

However, there remains a need for guidance from the Government to assist the courts in their determination of whether it is "appropriate" to have regard to actions of the CJEU or other EU entity on or after exit day. Without such guidance, judges may be left "stranded on the front line of a fierce political battle".[24]

It will not be a straightforward task for courts to ascertain the intention of the Government in relation to the interpretation of retained EU law that has been modified post-exit under **subsection (2)**. Therefore, the Government will need to be explicit regarding whether it intends post-exit modifications to retained EU law to be interpreted in accordance with retained EU case law.

Amendments tabled in relation to Clause 6 are:

- **Amendment NC14**: to ensure that Ministers set out in detail how the provisions in clause 6 would apply during a transitional period before the UK fully implements a withdrawal agreement.
- **Amendment 137**: to leave out subsection (2) and insert "(2) When interpreting retained EU law after exit day a court or tribunal *shall pay due regard* to any relevant decision of the European Court." (emphasis added)

Suggested Questions for Discussion

- Q4.1 What guidance could be drafted for the courts to assist in their determination of whether it is "appropriate" to have regard to actions of the CJEU or other EU entity on or after exit day?
- Q4.2 What role (if any) do English/UK legal principles play in the interpretation of retained EU law?
- Q4.3 What happens to retained EU law that previously carried direct effect, but is now treated as a statutory instrument in the domestic framework?
- Q4.4 There is a distinct possibility that the UK will maintain close co-operation with the EU, or participate in specific EU legal frameworks post-exit under the future UK-EU agreement. In such cases, how are the UK domestic courts meant to interpret the law in those areas where the CJEU case-law has evolved since the UK's exit?

5. Non-retention of the EU Charter of Fundamental Rights: Clause 5(4) and (5); General Principles of EU Law: Schedule 1, paras 2 and 3

Clause 5(4) excepts the Charter of Fundamental Rights of the EU (CFREU) from becoming part of domestic law on or after exit day. The Explanatory Notes explain that this is because the Charter "did not create new rights, but rather codified rights and principles which already existed in EU law" and such rights and principles will be saved under the Bill (in clauses 2-4).[25]

[24] House of Commons Library, 'European Union (Withdrawal) Bill', Briefing Paper No 8079 (1 September 2017), p. 56, citing Raphael Hogarth, How to answer Lord Neuberger's call for clarity on the ECJ, Institute for Government (10 August 2017), available at: https://www.instituteforgovernment.org.uk/brexit-ecj-european-court-justice-lord-neuberger.
[25] European Union (Withdrawal) Bill Explanatory notes (Bill 5-EN), para 99.

Therefore, according to the Note, any references to the Charter in retained EU law (including retained CJEU case law) should be read as referring to "corresponding" rights and principles that will be retained under the Bill.[26] **Subsection (5)** underscores this position by stating that the exception of the Charter from the Bill's savings provisions does not affect the interpretation of retained EU law in light of fundamental rights. Indeed, retained EU law "will continue to be interpreted in light of those underlying rights and principles."[27] However, the Charter includes a fuller set of rights than those safeguarded in the European Convention on Human Rights (ECHR) by virtue of the HRA. For example, without the Charter, it is likely that legal challenges akin to that mounted by David Davis MP and Tom Watson MP in relation to the Data Protection and Investigatory Powers Act 2014 would be foreclosed.[28]

The Rt Hon Dominic Grieve QC MP has expressed concerns regarding the uncertainty these provisions create:

> …the Charter of Fundamental Rights of the EU, whose principles form the bedrock of how EU law should be applied, ceases to apply after exit day…[I]t and the general principles of EU law it reflects are essential safeguards for individuals and businesses that might be adversely affected by the application of EU law and they cannot and should not be removed in this fashion. We are thus creating uncertainty as to how EU law will apply after incorporation. This is not a satisfactory position and it needs to be addressed during the passage of the legislation….[29]

Indeed, the Bill fails to define the concept of "fundamental rights or principles" in subsection (5). To compound matters further, many of these are encapsulated in general principles, but these are also excluded from retention under **Schedule 1, paragraph 2**, unless they have been recognised by the CJEU as such in a judgment issued before exit day.[30] In addition, **paragraph 3** prohibits a right of action in domestic law for failure to comply with any of the EU general principles, and prevents the disapplication or quashing of domestic legislative and administrative action on the ground of incompatibility with EU general principles.[31]

Professor Merris Amos considers what happens once retained EU law has been "converted" into domestic legislation following its amendment. Indeed, she highlights the fact that

> [t]he obligation to interpret retained EU law compatibly with the 'underlying rights' will only last for as long as it takes for retained EU law to be amended, replaced or repealed by the UK

[26] European Union (Withdrawal) Bill Explanatory notes (Bill 5-EN), para 99.
[27] European Union (Withdrawal) Bill Explanatory notes (Bill 5-EN), para 100.
[28] Independent Reviewer of Terrorism, 'CJEU judgment in Watson' (21 December 2017), available at: https://terrorismlegislationreviewer.independent.gov.uk/cjeu-judgment-in-watson/ (including links to the judgment and press release).
[29] Dominic Grieve, 'Only a watertight withdrawal bill can put Brexit into effect', *Evening Standard* (6 September 2017), available at: https://www.standard.co.uk/comment/comment/dominic-grieve-only-a-watertight-withdrawal-bill-can-put-brexit-into-effect-a3628376.html.
[30] House of Commons Library, 'European Union (Withdrawal) Bill', Briefing Paper No 8079 (1 September 2017), p. 40.
[31] Schedule 8, paragraph 27(3) provides an exception to clause 5(3) allowing for proceedings begun in the UK, but not finally decided before exit day. Schedule 8, paragraph 27(5) disapplies paragraph 3(2) of Schedule 1 to judicial or administrative decisions on or after exit day which are "a necessary consequence of any decision of a court or tribunal made before exit day."

> Parliament. And, as many have also noted during the parliamentary debates, changes to retained EU law need not take place via primary legislation.[32]

As such, she discusses three types of human rights claim in relation to converted retained EU law, post-exit:

- Converted retained EU law with the status of secondary legislation is incompatible with a right protected at common law, by the HRA and in the Charter. In such cases, Amos writes, "the loss of the Charter, and underlying rights, as a tool of interpretation will not matter as the same result can be achieved via the HRA or the common law."[33] However, she reminds us that Schedule 8, paragraph 19 provides that for the purposes of the HRA, retained *direct* EU legislation is to be treated as primary legislation for purposes of the HRA. This means that the only remedy for a breach of the relevant principle under the HRA will be a declaration of incompatibility. There will no longer be the possibility for a direct action based on Charter rights.
- Converted retained EU law with the status of primary legislation is incompatible with a right protected at common law, in the Charter and by the HRA. The only remaining remedy in this case is a declaration of incompatibility.
- Converted retained EU law with the status of secondary or primary legislation is incompatible with a right protected by the Charter, but not the HRA or common law. There are several instances where the Charter has been found to have a broader scope of fundamental rights protection than the HRA (i.e., the ECHR). This is true, for example, with Article 47 CFREU, both in relation to the right to an effective remedy (cf. Article 13 ECHR) and the right to a fair trial (cf. Article 6 ECHR), and Article 8 CFREU on the protection of personal data (cf. Article 8 ECHR).[34]

Professor Elliott cautions that the retention of the Charter could have "significant" complications, in particular in regard to its relationship with the HRA and in light of the fact that it would no longer make sense, post-exit, to continue to restrict application of the Charter to areas where EU law applies.[35] The extent to which this would occur in practice is unclear. For example might it be possible to retain the Charter and use it to assist in the interpretation of retained EU law in the same way that retained EU case law and recognised general principles are used under Clause 6(3)?

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[32] Merris Amos, 'Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill', *UK Constitutional Law Association* (4 October 2017), available at: https://ukconstitutionallaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/. This is, of course, subject to an express indication from the Government as suggested in relation to Clause 6(6) that it intends for the amended retained EU law to be interpreted retained EU case law or general principles.

[33] Merris Amos, 'Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill', *UK Constitutional Law Association* (4 October 2017), available at: https://ukconstitutionallaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/.

[34] Merris Amos, 'Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill', *UK Constitutional Law Association* (4 October 2017), available at: https://ukconstitutionallaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/, and cited case law examples.

[35] Mark Elliott, 'The EU (Withdrawal) Bill: Initial Thoughts', *Public Law for Everyone* (14 July 2017), available at: https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/.

Professor Amos does not recommend retention of the Charter. However, she suggests the following three options:

- Adding a clause in the Bill requiring that amendments to retained EU law must comply with the Charter (though she admits this does not provide direction as to what happens if they do not);
- Requiring that amendments to retained EU law be "read and given effect in a way which is compatible with the rights set out in the EU Charter" (i.e., the HRA model). Professor Amos suggests that where this is not possible, the court could issue a declaration of incompatibility or disapply the law (where it is primary legislation);
- Amending the HRA to add the additional rights protected by the Charter. In such cases, she suggests that courts could be given the power to disapply incompatible primary legislation.[36]

A number of **amendments** have been tabled in relation to non-retention of the Charter:

- **Amendment NC16**: adding new provisions that would require Ministers to produce a report reviewing in full the implications of removing from UK law the Charter of Fundamental Rights – and the rights for UK citizens which it has help to guarantee.
- **Amendment 46**: to omit the exclusion of the Charter
- **Amendment 8** (Dominic Grieve MP): to omit exclusion of Charter, as well as subsection (5) on retention of non-Charter-derived fundamental rights principles
- **Amendments 9 & 10** (Dominic Grieve MP): to omit Schedule 1 and allow challenges to be brought to retained EU law on the grounds that it is in breach of general principles of EU law and to allow damages to be awarded for any proven breach of such a principle. Or, alternatively to leave out paragraphs 1-3.
- **Amendment 101**: to substitute new text for paragraph 2 which is framed positively and clarifies that all the existing principles of EU law will be retained within domestic law whether they originate in the case law of the European Court, the EU treaties, direct EU legislation or EU directives. It also makes clear that the key environmental law principles in Article 191 of the Treaty are retained.
- **Amendment 105**: to leave out subsection (3), thus retaining the right of action in domestic law in relation to general principles of EU law.

Suggested Questions for Discussion

- Q5.1 Is retention of the Charter post-exit desirable/feasible?
- Q5.2 Is it possible to retain the Charter and use it to assist in the interpretation of retained EU law in the same way that retained EU case law and recognised general principles are used under Clause 6(3)?
- Q5.3 What would be the relationship between the Charter and the HRA post-exit?

[36] Merris Amos, 'Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill', *UK Constitutional Law Association* (4 October 2017), available at: https://ukconstitutionallaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/.

- Q5.4 Is it feasible/desirable to amend the Bill so as to require that amendments to retained EU law be "read and given effect in a way which is compatible with the rights set out in the EU Charter"?

6. Redress for breaches of retained EU law and challenges to the validity of retained EU law: Schedule 1, paragraphs 1 and 4; Schedule 8, paragraph 27

The prohibition of a right of action in domestic law for an alleged failure to comply with EU general principles under Schedule 1, paragraph 3 was discussed above in section 5. This section focuses on challenges to the validity of retained EU law under paragraph 1 of Schedule 1, and the right to damages for breaches of EU law in paragraph 4.

The EU Treaties allowed for challenges to the validity of EU legislation to be brought before the CJEU.[37] **Paragraph 1(1) of Schedule 1** prohibits post-exit challenges to the validity of retained EU law. However, there are some circumstances under sub-paragraph (2) where such challenges are permitted:

- Where the CJEU has decided pre-exit that the law at issue is invalid; or
- If the challenge has been permitted by regulations made by a Minister.

Sub-paragraph (2) permits such regulations to provide for actions to be taken against a UK public authority where such an action would have otherwise been available against an EU institution.

Paragraph 4 eliminates the possibility for individuals to obtain damages against the state for failure to implement EU directives (i.e. *Francovich* damages).[38] The Explanatory Notes further explain that "[t]his provision does not affect any specific statutory rights to claim damages in respect of breaches of retained EU law (for example, under the Public Contracts Regulations 2015) or the case law which applies to the interpretation of any such provisions".[39] In addition, **Schedule 8, paragraph 27(3)** retains *Francovich* damages claims in proceedings in the UK begun, but not finally decided before exit day. However, Francovich will not apply to cases that have not been filed before exit day, even where the circumstances giving rise to the dispute occurred prior to exit day. Finally, **Schedule 1, paragraph 5** emphasises that any reference to the rule in *Francovich* are to be read as referring to the rule as it stood at exit day.

The right to seek *Francovich* damages is an important aspect of access to justice within the EU legal order and the pre-exit domestic legal order, especially when one considers that, in many cases, a claim relying on EU law may attract more effective enforcement than a similar domestic

[37] Article 263, Consolidated version of the Treaty on the Functioning of the European Union, OJ C-83/47, 30 March 2010.
[38] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357, judgment of 19 November 1991.
[39] European Union (Withdrawal) Bill Explanatory notes (Bill 5-EN), para 156

cause of action.[40] For example, the availability of damages in public law environmental claims will be reduced as a result of the non-retention of *Francovich* claims.

Amendments tabled in relation to these issues include:

- **Amendment 62**: to remove the proposal to end rights in UK domestic law after exit day in relation to damages in accordance with the rule in Francovich (see also amendment 126 and 127, which are consequential on amendment 62).
- **Amendments 139-141**: to restore the right to obtain damages after exit day in respect of governmental failures before exit day to comply with European Union obligations.

Suggested Questions for Discussion

- Q6.1 How will the Minister determine which types of challenges should be permitted under paragraph 1(2) of Schedule 1?
- Q6.2 Does the presumption against retrospectivity require that the Bill should also permit *Francovich* damages in situations where the breach of EU law has occurred prior to exit day, but no proceedings have been formally initiated?
- Q6.3 In the absence of *Francovich* damages, will judicial review proceedings offer appropriate remedies? Particular concerns have been raised in relation to environmental law and workers' rights.[41]

[40] David Hart QC, 'On first looking into the Brexit Bill', *UK Human Rights Blog* (15 July 2017), available at: https://ukhumanrightsblog.com/2017/07/15/on-first-looking-into-the-brexit-bill/#more-35589.
[41] House of Commons Library, 'European Union (Withdrawal) Bill', Briefing Paper No 8079 (1 September 2017), p. 48 (specifically notes 111 and 112).