The EU (Withdrawal) Bill and the Rule of Law Expert Working Group

Briefing for Members of Parliament for 14th and 15th November: Clauses 1-6 and Legal Certainty

What this Note is for:

A group of experts, convened by the Bingham Centre for the Rule of Law and The Constitution Unit, and chaired by The Rt Hon Dominic Grieve QC MP, is meeting regularly to consider how the EU (Withdrawal) Bill can be improved to make it more compatible with the UK's constitutional commitment to the Rule of Law (for full list of members see back page). This first briefing for parliamentarians outlines the most significant Rule of Law issues considered by the Expert Working Group to be raised by Clauses 1-6 (and related Schedules) of the Bill. They concern the Rule of Law requirement of **legal certainty**. **This Briefing Note seeks to:**

- **Inform Members of Parliament** about the most significant Rule of Law issues raised by Clauses 1-6 of the Bill
- **Identify a number of questions** that should be asked of the Government in relation to Clauses 1-6 during the course of debate in Parliament to seek clarification.

1. Introduction

Legal certainty is a fundamental component of the rule of law, and crucially important in relation to Brexit. It demands that, for the law to be fair, it must make clear what the rule is, to whom it applies, and what are the relevant penalties for violating the law.[1] As drafted, the Bill's lack of certainty in many provisions in Clauses 1-6 risks presenting problems for:

- The public —who will not easily be able to ascertain their rights and obligations
- Businesses—as uncertainty interferes with their ability to strategize long-term
- Parliament—due to lack of clarity over the scope and extent of future scrutiny powers and limits on executive accountability
- The Judiciary—regarding the role they play as interpreters of the law
- Lawyers—in terms of advising their clients as to rights and obligations

The full array of issues discussed by the Expert Working Group can be found in a Discussion Paper online at: https://www.biicl.org/euwithdrawalgroupmeetings. This Briefing focuses on rule of law issues identified at meetings of the Group as the most important. It covers the following matters:

- Retention of existing EU law in domestic law: Clauses 2-4
- The legal status of retained direct EU law: Clause 3
- Non-retention of the EU Charter of Fundamental Rights: Clause 5(4) and (5)
- Judicial interpretation of retained EU law: Clause 6
- Challenges to the validity of retained EU law: Schedule 1, paragraph 1

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

Though the Bill defines 'retained EU law' across Clauses 2-4, there is significant uncertainty about what exactly is going to be kept.

This is true especially in relation to EU law retained under **Clauses 2 and 4**, where it may not be obvious that the law falls within the scope of those clauses (e.g. because there is no explicit statement in the Bill's Explanatory Notes) in the same way as for 'retained directly applicable EU law' in Clause 3 (as defined below). Without greater clarity, people will not know which laws apply to them. For example, some UK laws were specifically adopted to satisfy EU standards – in which case their explanatory notes often directly reference the relevant EU obligations. This makes them readily identifiable as retained EU law. But the law retained under **Clause 2(2)(b)** also includes some domestic laws which already complied with EU law when they were adopted, so made no direct reference to EU standards. In this case it will be very difficult to identify every law to which the Clause applies.

Clause 4(1) saves rights found in the EU Treaties, but only if they "are recognised and available in domestic law" by virtue of the European Communities Act 1972 and "enforced, allowed and followed accordingly". But the boundaries and meaning of this text are unclear, as is the relationship between Clause 4 and Clause 2. As the **House of Lords Select Committee on the Constitution has noted**, there is a risk that Clause 4 will retain EU law provisions that produce rights enforceable by individuals (i.e. that have **'direct effect'** under EU law) even if they have already been retained by Clause 2 (because they exist not only in the EU Treaties, but also in EU-derived domestic legislation).[2] Often an EU Treaty article that has direct effect, and so can be used for the enforcement of rights, has also been given expression through an EU directive, for example. In the words of the **Committee on the Constitution**, the risk that "the operation of clauses 2 and 4 will result in two versions of some EU norms co-existing within the domestic legal system", could produce a great amount of legal uncertainty. Perhaps Clause 4 is intended to only retain rights that are not retained under Clause 2, but the Bill does not specify this.

Similar confusion exists regarding Clause **4(2)(b)** which excludes rights arising from an EU Directive if they are not "of a kind" recognised by the Court of Justice of the EU (ECJ) or a UK court. Again, what this phrase means is unclear. In general the courts will recognise a right if it satisfies the requirements for having direct effect (e.g. for an EU directive to have direct effect, the relevant provision must be sufficiently precise, certain and clear).[3] One reading of Clause 4(2)(b) could be that rights are saved if they meet these criteria, even if they have not previously been recognised in a court judgment pre-Brexit. But this would require a decision to be made about who and how to make that determination in future.[4] Another reading could be that there must have been an actual court judgment that a particular right has direct effect.[5] The words "of a kind" confuse the situation.

The **House of Lords Select Committee on the Constitution has highlighted concerns** about these matters, emphasising the importance of having "maximum clarity as to what counts as retained EU law."[6]

Questions the Government needs to answer:

- Q2.1 Can the Minister explain why the Bill fails to include provision for the publication of all retained EU law (i.e. legislation covered by Clauses 2 and 4)? This is done for retained direct EU legislation in Clause 13(1), and similar clarity is needed here.
- Q2.2 Can the Minister explain the meaning of the requirement in Clause 4(1) that rights saved under section 2(1) of the European Communities Act must be "recognised and available in domestic law" and "enforced, allowed and followed accordingly"?
- Q2.3.a Can the Minister explain what is meant by the phrase "of a kind" recognised by the ECJ in Clause 4(2)(b)?
- Q2.3.b Would a treaty right be considered to form part of retained EU law if it has not previously been litigated?

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

Clause 3 defines 'retained direct EU law' as that which currently applies in the UK without having needed to be implemented in domestic law (e.g. EU regulations). But the Bill does not assign a legal status to this new body of UK law. In particular, it is unclear whether it will have the status of primary or secondary legislation, or whether it should be considered as something unique or different.[7] The **House of Lords Select Committee on the Constitution flagged this** as something that should be addressed.[8] It matters because it will dictate Parliament's control over amendments to that legislation in the longer term (i.e. after the time-limited provisions in this Bill have expired); it will also determine how susceptible that law is to legal challenges. Moreover, if there is a conflict between retained direct EU law and another piece of domestic legislation after exit day, it will determine which law prevails.[9]

The Bill confers legal status on retained direct EU law only in relation to two specific issues. First, Schedule 8, paragraph 19 states that it should be **treated as primary legislation** for purposes of the Human Rights Act 1998 (which means that there will be fewer remedies available if it is found to be incompatible with the HRA). Second, Schedule 8, paragraph 3 states that it should be **treated as secondary legislation** in relation to any delegated powers that existed before exit day. Schedule 8, paragraph 5 does the same thing with respect to any delegated powers conferred on or after exit day. In both cases, the result is that the retained direct EU law will be susceptible to amendment with less legislative scrutiny. Apart from these two (arguably contradictory) statements, **the Bill does not provide certainty about the legal status of this important new body of law**.

It is important to note that within the EU legislative framework, different legal status is assigned to 'primary', 'secondary' and 'tertiary' law. However, Clause 3(2) treats them all the same. This means that hundreds, or potentially thousands, of regulations will be treated as primary law for the HRA even though they would never have been treated that way within the EU architecture. Meanwhile, more important EU primary legislation may remain amendable with limited parliamentary oversight in the longer term.

Questions the Government needs to answer:

- Q3.1 Can the Minister explain whether, beyond the specific designations in Schedule 8 paragraphs 3, 5 and 19, retained EU law is to be treated as primary or secondary legislation? What is the Minister's response to the concerns expressed by the House of Lords Constitution Committee about the lack of clarity on this point?

- Q3.2 Can the Minister explain why Clause 3(2) treats EU regulations, decisions and tertiary legislation as equivalent, despite them differing in legal status in the EU legal order?
- Q3.3 Can the Minister explain what should be done in case of conflict between retained direct EU legislation and domestic legislation which enters into force after exit?
- Q3.4 Can the Minister explain whether retained EU law should continue to be treated as such once it has been amended using powers outside the Bill structure, and, if so, how long it is to be accorded such status?

4. Non-retention of the EU Charter of Fundamental Rights: Clause 5(4) and (5)

Under Clause 5(4) of the Bill, the EU Charter of Fundamental Rights will not be retained after withdrawal. The Explanatory Notes state 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).[10] In fact, **the Charter includes a fuller set of rights than those safeguarded in the European Convention on Human Rights (ECHR) and made part of UK law by virtue of the Human Rights Act**. For example, Article 8 provides the right to the protection of personal data and has no corresponding right in the ECHR.[11] Therefore, it is likely that **legal challenges akin to that mounted by David Davis MP and Tom Watson MP** in relation to the Data Retention and Investigatory Powers Act 2014 and the processing and retention of personal data would not be possible after exit.[12]

In addition, the principles in the Charter are fundamental to the interpretation of EU law, and would be a valuable tool in the interpretation of retained EU law by the courts after withdrawal. Because Clause 5(4) does not retain the Charter, it cannot play this role. Given that there is a substantial overlap in substance between the Charter and EU general principles, and the fact that some general principles will be retained and used as interpretive aids for the courts, it is difficult to understand why the Charter is completely excluded from savings.

Questions the Government needs to answer:

- Q4.1 Can the Minister explain the non-retention of the Charter in Clause 5(4)?
- Q4.2 Can the Minister confirm that some rights in the Charter, such as the right to the protection of personal data, will no longer be available to UK citizens' under these provisions?
- Q4.3 Why has the Charter not been retained to assist in the interpretation of retained EU law in the same way that EU General Principles are retained in Clause 6(3)? Why does the same principle not apply to retention of the Charter?

5. Judicial interpretation of retained EU law: Clause 6

Clause 6 addresses how UK courts and tribunals should approach the interpretation of retained EU law after exit day. Subsection (2) states that the courts do not need to refer to anything done by the ECJ unless the UK court considers it "appropriate" to do so. **Lord Neuberger, the former President of the UK Supreme Court**, has specifically asked for clarity on this subject.[13]

UK courts have always had the discretion to consider foreign case law to assist in interpreting legal issues before them. However, it is not clear whether the Government intends Clause 6 to

operate in this way, or whether "appropriate", in this instance, means something different. **Leaving the judiciary without clarity** regarding their competence over retained EU law is a distinct rule of law problem that should be resolved.

Questions the Government needs to answer:

Q5.1 Can the Minister explain the meaning of 'appropriate' in Clause 6(2)?

6. Challenges to the validity of retained EU law: Schedule 1, para 1

Currently, individuals and businesses are able to challenge the validity of EU law before the UK courts and tribunals. However, **paragraph 1(1) of Schedule 1** prohibits these types of challenges after exit in relation to retained EU law except, as provided in sub-paragraph (2)(b), where the challenge has been permitted by regulations made by a Minister.[14]

Decisions of such constitutional importance, such as whether one has the right to bring a legal challenge to enforce his/her rights, should be made by Parliament and not a Minister of the Crown.

Questions the Government needs to answer:

- Q6.1 Can the Minister explain how it can be justified for the Bill to provide a minister, and not Parliament, with the power to determine which types of legal challenges to retained EU law will be permitted on or after exit day, under Schedule 1, paragraph 1(2)(b)?

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[1] Tom Bingham, *The Rule of Law* (Penguin Books, 2011), p. 37.
[2] 'European Union (Withdrawal) Bill: interim report', 3rd Report of Session 2017-19, HL Paper 19, para 27, available at: https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/19/19.pdf.
[3] Case 41/74 *van Duyn v Home Office* and Case 8/81 *Becker v Finanzamt Munster-Innenstadt*.
[4] Professor Paul Craig, Written evidence to the House of Lords Select Committee on the Constitution's inquiry into the European Union (Withdrawal) Bill, EUW0002 (6 September 2017), s12(b), available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/written/69633.html.
[5] EU (Withdrawal) Bill Explanatory Notes (Bill 5-EN), para 92.
[6] 'European Union (Withdrawal) Bill: interim report' (n 2), para 31.
[7] House of Commons Library specialist 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/.
[8] 'European Union (Withdrawal) Bill: interim report' (n 2), para 29.
[9] Craig (n 4), s4(b).
[10] European Union (Withdrawal) Bill Explanatory notes (Bill 5-EN), para 99.
[11] This was pointed out by the EU Court of Justice in Joined Cases C-203/15 and C-698/15 *Secretary of State for the Home Department v Watson*, para 129.
[12] Joined Cases C-203/15 and C-698/15 *Secretary of State for the Home Department v Watson*.
[13] C. Coleman, 'UK judges need clarity after Brexit – Lord Neuberger' (*BBC*, 8 August 2017), available at: http://www.bbc.co.uk/news/uk-40855526.
[14] Such challenges are also prohibited under subparagraph (2)(a) if the ECJ decided pre-exit that the law at issue is invalid.

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Expert Working Group on the EU (Withdrawal) Bill and the Rule of Law

The Expert Working Group exists to identify the most pressing rule of law problems with the Bill and inform debate on the Bill from that perspective. The Group is coordinated by the Bingham Centre for the Rule of Law, with additional support from the UCL Constitution Unit.

Chair: The Rt Hon Dominic Grieve QC MP (former Conservative Attorney General)

Members:

- David Anderson QC (Visiting Professor in EU Law at King's College, London; former Independent Reviewer of Terrorism Legislation)
- Professor Catherine Barnard (Professor of EU Law, University of Cambridge)
- Joel Blackwell (Hansard Society)
- Andrea Coomber (Director of JUSTICE)
- Professor Paul Craig (Professor in English Law, University of Oxford)
- Professor Sionaidh Douglas-Scott (Co-Director, Centre for Law and Society in a Global Context, Queen Mary University of London)
- Ruth Fox (Director, Hansard Society)
- Professor Graham Gee (Professor of Public Law, Sheffield University)
- Paul Hardy (DLA Piper; former Legal Adviser to the House of Commons European Scrutiny Committee and the House of Lords EU Committee)
- Swee Leng Harris (Co-ordinator, APPG on the Rule of Law)
- Jo Hickman (Director, Public Law Project)
- Murray Hunt (Director, Bingham Centre for the Rule of Law; former Legal Adviser to the Joint Committee on Human Rights)
- Sir Paul Jenkins KCB QC (Hon) (former Head of the Government Legal Service)
- The Rt Hon Lord Judge (former Lord Chief Justice)
- Sir Stephen Laws KCB QC (former First Parliamentary Counsel)
- Lord Lisvane KCB DL (former Clerk of the House of Commons)
- Amy Mount (Head of Greener UK Unit at Green Alliance)
- Professor John McEldowney (Professor of Law, University of Warwick)
- Lord Norton of Louth (Professor of Government, Hull University; former Chair of House of Lords Constitution Committee)
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- Sir Paul Silk KCB (Former Clerk to the National Assembly for Wales)
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Throughout the passage of the Bill we will be publishing briefings and other papers on our website:
https://binghamcentre.biicl.org/withdrawalbillworkinggroup.
If you would like to be added to the mailing list to receive such briefings directly, please contact Justine Stefanelli at j.stefanelli@binghamcentre.biicl.org.