The EU (Withdrawal) Bill and the Rule of Law

Expert Working Group

Meeting 6: Taking Stock and Planning Next Steps

DISCUSSION PAPER*

19 December 2017
Chair: The Rt Hon Dominic Grieve QC MP

Summary
This paper has been prepared to assist the sixth meeting of the Expert Working Group which is intended as a stock-taking and planning exercise with a focus on consideration of which Rule of Law issues will be live at Commons Report Stage and during the Bill's subsequent passage through the Lords. It outlines the **key Rule of Law issues that have emerged from the Commons' Committee Stage debate** to date, and includes reference to relevant amendments or undertakings by the Government to consider an issue raised in debate. It has therefore been organised thematically to aid discussion and planning. The **aim** is to identify the main Rule of Law issues that should be pursued, first, at Report Stage in the Commons, and then once the Bill is in the Lords. It is not meant to provide a detailed analysis of the issues, as that has been done in previous Discussion Papers. Therefore, this Discussion Paper briefly outlines the main Rule of Law concerns with the Bill regarding:

- Legal uncertainty in relation to:
  - Non-retention of certain EU law
  - The status of retained direct EU law
- Access to justice and legal challenges post-exit
- Legality and limitations on executive powers in relation to:
  - Delegated powers
  - Sub-delegation
  - Parliamentary scrutiny of SIs
  - The determination of 'exit day' and related issues
  - Regulatory institutions
- Devolution issues

In addition to this paper, an annex of relevant amendments has been distributed to Group members.

1. Legal Uncertainty

a. Non-retention

The Bill omits a number of items from retention after exit and therefore reduces the content of 'retained EU law'. This is at odds with the stated purpose of the Bill to provide legal certainty post-exit by retaining all EU law. In particular, the following have not been retained by the Bill:

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- The Charter of Fundamental Rights (amendment 8, Grieve)
- Preambles to EU directives (possibly addressed by amendment 95, McCarthy)
- Directly effective EU rights, powers, liabilities, obligations, restrictions, remedies or procedures that are not 'enforced, allowed and followed accordingly' (amendment 93, McCarthy);
- Directly effective EU rights, powers, liabilities, obligations, restrictions, remedies or procedures that arise under an EU directive and are not recognised by the CJEU before exit day (amendment 94, McCarthy)
- Directly-effective EU law and EU directives that have not been fully or correctly implemented (potentially addressed by amendment 95, McCarthy)
- Environmental principles (NC60, Creagh)
- Certain general principles of EU law (see below section 2)

During **debate of the Bill on day 1**, Sir Oliver Letwin MP raised a concern about conflict between clauses 5(2) and 6(3).[1] Clause 5(2) retains the supremacy of EU law with respect to retained EU law and pre-exit UK law. Clause 6(3) asks the courts to interpret retained EU law in accordance with retained case law, retained general principles and with regard to the limits of EU competence, but clause 6(4)(a) provides that the Supreme Court is not bound by retained EU case law. Letwin posed a scenario where a lower court has a case where the principles of Clause 6(3) apply and interprets the relevant retained EU law accordingly. Then the case goes to the Supreme Court, which has no guidance other than that it is not bound by EU law. Imagining that the Supreme Court reverses the lower court, if another similar case comes to the lower court, must the lower court again follow Clause 6(3) and apply CJEU case law notwithstanding the Supreme Court's decision, or does it apply the Supreme Court principles? Dominic Grieve's interpretation was that once the Supreme Court departs, the lower courts must follow. The real issue is that the Bill needs to provide guidance one way or the other. Dominic Raab agreed to consider the concerns raised by Letwin.[2]

On that day, Dominic Raab also agreed that the Government would table an amendment requiring Ministers "to make a statement before the House in the presentation of any Brexit-related primary or secondary legislation on whether and how it is consistent with the Equality Act 2010."[3]

On 5 December, the Government published a memorandum on the Charter of Fundamental Rights, which sets out the Government's analysis of the effect of the Bill's non-retention of the Charter.[4] It states:

> …[T]he substantive rights protected in the Charter of Fundamental Rights will… continue to be protected in a number of ways. First, as explained above, rights will continue to be protected through the EU law that is preserved and converted by the Bill. Second, eighteen of the articles correspond, entirely or largely, to articles of the European Convention on Human Rights and are, as a result, protected both internationally and, through the Human Rights Act 1998 and the devolution statutes, domestically. Finally, the substantive rights protected in many articles of the Charter are also protected in domestic law via the common law or domestic legislation.

[1] European Union (Withdrawal) Bill, Hansard Vol. 631, 14 November 2017.
[2] ibid, column 320.
[3] ibid.
[4] Department for Exiting the European Union, 'Charter of Fundamental Rights of the EU Right by Right Analysis' (05/12/2017).

…

> The Government has made clear that we are willing to look again at some of the technical detail about how the Bill deals with the general principles of EU law. Specifically, we will look at whether and how some challenges based on the general principles might continue after exit, in a way which best fits with our longstanding constitutional traditions and which minimises uncertainty for businesses and individuals. The rights landscape is complex and our approach is to seek to maximise certainty and minimise complexity and not remove any substantive rights that UK citizens currently enjoy. Our commitment to look into this particular issue, working constructively with Parliament, is very much in line with that approach.[5]

b. The Status of Retained EU Law

The Bill does not assign a default legal status to retained direct EU law. Though it discusses legal status in relation to challenges under the Human Rights Act (**Sch 8, para** 19) and in relation to amendment powers (**Sch 8, paras 3 and 5**), no clarity has been provided beyond those two situations. In written evidence to the Constitution Committee, the Department for Exiting the European Union stated that "whether converted law is to be treated as primary or secondary legislation for the purpose of other statutes will be considered on a statute-by-statute basis and set out in further legislation or in regulations made under clause 17(1) of the Bill as necessary".[6] This level of uncertainty and broad scope of Executive discretion to determine questions of law is problematic for the rule of law. As discussed at the first meeting of the Expert Working Group, clarity regarding legal status is important because it informs the applicable amendment procedure, determines the extent to which the law is subject to legal challenge, and resolves conflicts of law.[7]

There is a related concern about the status of subordinate UK legislation that implements EU law and contains substantive policy standards and protections, and will be EU-derived domestic legislation under cl 2. As the Constitution Committee observed, while the status of such EU-derived subordinate legislation may be clear, "there is a question over whether that law is all embodied in the appropriate legislative form".[8] The Committee further stated that "while EU law embodied in secondary legislation made under section 2(2) of the ECA will technically be secondary legislation, that is a consequence of the fact that it simply implemented law agreed at an EU level—it does not mean that the law it encompasses is not important enough to be worthy of primary legislative status".[9] The propriety of such substantive policy standards and protections being capable of amendment by subordinate legislation was debated on day 2 of committee.

The need for some SIs implementing EU law to be accorded special status can be illustrated with reference to some examples of workers' rights, which the Government has repeatedly undertaken to protect in UK law post-exit. Agency workers' rights and limitations on working time are two examples of new employment rights that were incorporated as UK law by secondary legislation as a result of EU law. In the case of the Working Time Regulations, the

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[5] ibid, Executive Summary, p. 4 and para 17.
[6] Department for Exiting the European Union—Written evidence to the HL Constitution Committee (EUW0036).
[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), § 4(b), available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/written/69633.html.
[8] Constitution Committee, *9th Report of Session 2016–17: The 'Great Repeal Bill' and delegated powers* (7 March 2017), paragraph 57.
[9] ibid, paragraph 58.

UK Government negotiated concessions at the EU level in relation to the Working Time Directive of 23 November 1993, then the UK challenged the Directive's legal basis in Case C-84/94 *UK v. EU Council* [1996] ECR I-5755, and only after that decision implemented the Directive in the UK Regulations in 1998.[10] Amongst other things, this EU law established workers' right not to work more than 48 hours per week on average. Similarly, the rights of agency workers to enjoy the same basic terms and conditions after 12 weeks, and protection from unfair dismissal were incorporated into UK law by the Agency Workers Regulation 2010 as a result of Directive 2008/104/EC of the European Parliament and of the Council.[11]

There is a further concern that cl 2 of the Bill may act as a Henry VIII power by stealth when read in conjunction with other Brexit legislation, such as the Trade Bill and Sanctions Bill, because cll 2 and 14 include primary UK legislation that implements EU law within the category of 'retained EU law'.

During **debate on day 2**, Dominic Grieve identified the two issues of how parliament conducts scrutiny and the issue of the modification of EU law by primary or secondary legislation, and he invited the Government to address both of those elements.[12] Solicitor General Robert Buckland agreed.[13] To date no amendment has been tabled which seeks to assign a legal status to retained EU law. At an earlier meeting of the Group, Professor Paul Craig indicated that he was considering drafting such an amendment.

2. Access to Justice and Legal Challenges Post-Exit

Access to justice is a central and necessary part of the rule of law. It gives people the opportunity to exercise their legal rights and make their concerns heard. In particular, the ability to challenge the actions of the state before a court of law is a fundamental component of the rule of law because it emphasises the notion that everyone, including the government, is subject to the law and it promotes accountability of the state. The Bill has implications for access to justice in a number of ways.

During debate of the Bill on day 1, there was discussion of **amendments 303 and 304** to **clause 6** tabled by Cheryl Gillan MP (see below) concerning the binding of UK courts to CJEU principles or decisions post-exit if they relate to an act before exit day, and similarly, permitting them to refer matters to the CJEU in those circumstances. There was much discussion concerning the principle of legitimate expectations and Dominic Raab undertook to take the issue away for further consideration[14].

Schedule 1, paragraph 1(1) of the Bill removes the right to challenge the validity of retained EU law on or after exit day. **Subparagraph (2)** permits legal challenges in some instances, for example where the CJEU has invalidated an instrument prior to exit day, or where a Minister has by regulation permitted certain challenges. Relatedly, **subparagraph (3)** permits challenges that would have been permitted against EU institutions to be made against a UK public authority. David Davis has stated that "individuals will continue to be able to challenge

[10] House of Commons Library, *Briefing Paper Number CBP 7732: Brexit: employment law*, (10 November 2016), 3 and 6-8.
[11] House of Commons Library, *Briefing Paper Number CBP 7732: Brexit: employment law*, (10 November 2016), 10.
[12] European Union (Withdrawal) Bill, Hansard, Vol 631, 15 November 2017, column 419.
[13] ibid.
[14] European Union (Withdrawal) Bill, Hansard Vol. 631, 14 November 2017, col 290.

secondary legislation and administrative action under our domestic law by way of well-established grounds of judicial review."[15] However, because it is unclear whether retained direct EU law has the status of primary or secondary legislation, it is unclear whether judicial review will be available. There is also cause for concern about the fact that ministers, and not Parliament, are empowered to determine which types of legal challenge will be permitted.

In addition, **Schedule 1, paragraphs 2 and 3** exclude general principles of EU law that have not been recognised as such by the CJEU in a case prior to exit day, as well as legal actions post-exit based on an alleged failure to comply with any general principles of EU law. Subsection (3) also prohibits courts, tribunals or public authorities from disapplying a law, quashing conduct or declaring certain conduct unlawful because of incompatibility with EU general principles.

Finally, **Schedule 1, paragraph 4** eliminates the possibility for individuals to obtain damages against the state for failure to implement EU directives (i.e. *Francovich* damages).[16] On day 3 Robert Buckland made the following statements from the dispatch box:

> Let me turn briefly to amendments 139 and 302, which take a slightly different approach. They would maintain the right to Francovich damages in domestic law, but only in relation to pre-exit causes of action. Amendment 335 would similarly maintain the right to Francovich damages in domestic law for causes of action occurring during any transitional period. The Bill sets out elsewhere—at paragraph 27 of schedule 8—that the exclusion of the right to Francovich damages would apply only in relation to claims that are brought after exit day.
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> I would like to assure my right hon. Friend Mrs Gillan, and indeed all Members, that we will consider further whether any additional specific and more detailed transitional arrangements should be set out in regulations.[17]

A more specific concession was made in relation to paragraph 3 of schedule 1 when Solicitor General Robert Buckland stated on day 3:

> "The rights landscape is indeed complex, and we are seeking with this Bill to maximise and not remove any substantive rights that UK citizens currently enjoy. In view of my commitment to look at this again, I invite my right hon. and learned Friend not to press amendment 10 and to agree to work with us in this shared endeavour. The Government will bring forward our own amendments on Report for the purposes of clarifying paragraph 3 of schedule 1."[18]

3. Legality and Limitations on Executive Powers

a. Delegated Powers

The Bill's provisions on delegated powers raise a number of rule of law concerns, particularly regarding three components of the rule of law, especially clauses 7, 8, 9, and 17. First, **legality** requires the objectives, content and scope of delegated powers to be defined explicitly in a legislative act.[19] Second, **legal certainty** requires all legislation (including delegated

[15] House of Commons Library Briefing No. 8140, 'EU (Withdrawal) Bill: the Charter, general principles of EU law, and 'Francovich' damages, 17 November 2017, p. 25.
[16] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357, judgment of 19 November 1991.
[17] European Union (Withdrawal) Bill, Hansard Vol. 631, 21 November 2017, col 979.
[18] European Union (Withdrawal) Bill, Hansard Vol. 631, 21 November 2017, col 972.
[19] Council of Europe, European Commission on Democracy through Law, 'The Rule of Law Checklist' (March 2016), para 49, available at:

legislation) to be accessible, its effects foreseeable and its content stable so that any changes are preceded by a 'fair warning'.[20] Third, the rule of law seeks to **prevent the abuse of power** by ensuring that there are clear restrictions on discretionary powers in law and mechanisms to 'prevent, correct and sanction the abuse of discretionary powers'.[21] The delegated powers in the Bill are extremely broad and have been criticised by the House of Lords Constitution Committee[22] and the Delegated Powers and Regulatory Reform Committee.[23] These issues were explored more fully in our Discussion Paper on the Bill's delegated powers.

Clause 9 poses two particular problems. First, it provides Ministers with the power to amend the Withdrawal Bill itself in Clause 9(2). Second, the lack of Parliamentary oversight and control over the Withdrawal Agreement.

During debate on 12 and 13 December, there was much discussion regarding the need to insert and/or better define safeguards into the Bill which would address some of the concerns discussed above.

b. Parliamentary Scrutiny of Statutory Instruments

A number of parliamentary committees have issues reports which consider the parliamentary scrutiny of statutory instruments made under the Bill, including the House of Lords Select Committee on the Constitution (HLCC), the House of Lords Delegated Powers and Regulatory Reform Committee (HLDPRRC), and the House of Commons Procedure Committee (HCPC). The reports of the HLCC, HLDPRRC and HCPC make a number of recommendations for improving the Bill's provisions regarding delegated powers, including recommendations relating to parliamentary scrutiny of delegated legislation under the Bill. From a rule of law perspective, the need for such scrutiny is heightened when, as in this case, delegated powers are broadly defined and difficult for courts to review. Recommendations on scrutiny include:

- Widening the categories of delegated legislation that would be scrutinised under the affirmative procedure (requiring approval by both Houses) rather than the negative procedure (in which the delegated legislation remains law unless a House votes to annul it within a certain period).
- Ensuring that Parliament, rather Ministers, determine whether a particular instrument should receive more than the applicable minimum level of scrutiny provided under the Bill. The reports all agree that there should be a sifting mechanism by which Parliament considers whether a particular piece of delegated legislation contains policy decisions that should trigger an enhanced form of parliamentary scrutiny. For the HCPC, this sifting mechanism should be based on the model operated by the European Scrutiny Committee.

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http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf. The Checklist was officially adopted by the Parliamentary Assembly of the Council of Europe in Resolution 2187 (2017) on 11 October 2017 and is available at: http://bit.ly/2z68orN (shortened link).

[20] ibid, paras 57-59.

[21] ibid, para 64.

[22] Constitution Committee, Third Report of Session 2017-19, 'European Union (Withdrawal) Bill: Interim Report', HL Paper 19 (7 September 2017), available at: https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/19/19.pdf.

[23] DPRRC, Third Report of Session 2017-19, 'European Union (Withdrawal) Bill', HL Paper 22 (28 September 2017), available at: https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/22/22.pdf.

In addition, Charles Walker MP, Chair of the HCPC, laid amendments which provide for a committee to sift and upgrade negative SIs under clauses 7-9 of the Bill to the affirmative scrutiny procedure, but the amendments do not include a power which would require ministers to take the committee's representations into account, and enable ministers to lay a revised Order in response, as the HCPC had suggested.[24] In addition, the amendments envision only that the House of Commons would participate in the scrutiny of statutory instruments and do not include a role for the House of Lords to sift and upgrade, as is the case in all of the eleven existing strengthened scrutiny variants.[25]

Beyond the procedure itself, there is debate as to whether the Bill is the appropriate place to designate which House should have responsibility for scrutiny, as opposed to simply referring to 'Parliament', which would then enable Parliament to this determination.

c. Sub-delegation and tertiary legislation

The main delegated powers in the Bill would allow Ministers to confer legislative power on public authorities (existing or newly created) or on Ministers themselves.[26] This is known as sub-delegation. These powers present concerns for the rule of law requirements of accessibility of the law, legality and legal certainty because of their scope and the way in which sub-delegated legislation (i.e. tertiary legislation) becomes law. More details on these issues is available in our related Discussion Paper. Sub-delegation and tertiary legislation is expressly provided for in **Clause 7(5)(a)** and arguably implied in **Clauses 8(2) and 9(2)**. By contrast, **Schedule 2, paras 1(4)(b), 13(4)(d) and 21(4)(d)** expressly exclude sub-delegation by the devolved authorities.

d. Temporal limits on powers in the Bill, and determination of 'exit day'

A number of key provisions in the Bill depend on the meaning of 'exit day', for example, sunset clauses in relation to some delegated powers. The Government has laid amendment 381 which would amend clause 14 to specify that 'exit day' means 29 March 2019 at 11.00 p.m.. This amendment has been criticised for being too inflexible and tying the Government's hands. By contrast, amendment 6 laid by Dominic Grieve would amend clause 14 so that exit day would be the same day for the purposes of every provision in the Act.

If exit day is not specified by amendment 381, the Bill provides that a **Minister by regulation** will determine exit day. Given the importance of this date, it is questionable whether it is appropriate to provide Ministers with this power rather than Parliament.

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[24] House of Commons Procedure Committee, 1st Report of Session 2017-19, 'Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report', HC Paper 386, p. 16. See also Hansard Society, 'European Union (Withdrawal) Bill Briefing for Days 6 and 7 House of Commons Committee Stage Debate, available at: https://assets.contentful.com/xkbace0jm9pp/3LeMZztWXuKugIAcAkESWG/343a1b1e0376ca6420b9384cf8faf722/EU_W_B_Briefing_FINAL.pdf,

[25] Hansard Society, ibid, p. 5.

[26] Clauses 7, 8 and 9 allow sub-delegation because they are Henry VIII powers and sub-delegation is not among the exclusions listed in these clauses. Schedule 7 makes provision for the scrutiny of regulations made under these clauses that create or amend legislative powers. Similar provisions apply to the Schedule 2 powers in devolved settings that correspond to the UK-wide powers in Clauses 7, 8 and 9. The power to make consequential regulations in Clause 17(1) is also a Henry VIII clause, but it is unclear whether sub-delegation is envisaged. The House of Lords Delegated Powers and Regulatory Reform Committee report (para 83-91) also expresses concern about Schedule 4, which indicates that Ministers may sub-delegate a power to levy fees to public authorities exercising functions conferred upon them by regulations made under Clause 7, 8 or 9 or the equivalent provisions in devolved settings.

In addition, there has been discussion regarding the desirability of including a **sunset clause for the Bill itself** within the Bill's provisions. For example, Lord Pannick suggested that a clause be included by which the Bill's "provisions cease to have effect on March 29, 2019 unless both houses of parliament approve the withdrawal agreement, or approve the absence of an agreement, or extend the period."[27]

The Bill was amended in Committee so that the powers in Clause 9 are now subject to the passing of primary legislation on the withdrawal agreement (Dominic Grieve's **amendment 7**). Lord Pannick's suggestion would go further, suggesting that the Bill itself cease to have effect absent Parliamentary approval of the withdrawal agreement.

e. Regulatory Institutions

The rule of law is a practical concept. This means that, in addition to ensuring that the law itself is rule of law compliant and that the state is accountable for its actions, the rule of law requires that the law is implemented and enforced in practice.

Much of the implementation and enforcement of EU law has been undertaken by EU institutions, and at the moment **Clause 7** simply allows a Minister to transfer functions or establish an institution if they think it "appropriate". There is no obligation to ensure that regulatory functions are in fact transferred to an appropriate UK institution, or to establish new UK institutions when necessary. As a result, implementation and enforcement obligations and powers might be retained from EU law in UK law, but with no institution in the UK to carry them out.

4. Devolution

Clarity and accessibility of the law and legal certainty are all fundamental components of the Rule of Law. Where the law in question is constitutional in nature, because it defines who has the power to make laws on different subjects, it is particularly important that it leaves no room for uncertainty about who has the power to change the law. There are two main concerns with the provisions for devolution in clauses 10 and 11, and schedule 3.

First, upon exit, the devolved legislatures' competence over amendment retained EU law will interact with Westminster competence, which risks incoherent governance as a result. For example, **Clause 11** of the Bill limits the devolved legislatures' ability to amend retained EU law. After Brexit, they will not have power to modify "retained EU law" in a way which would not have been compatible with EU law immediately before exit. The effect of Clause 11 is that it gives Westminster competence over retained direct EU legislation, while the devolved legislatures have competence only over EU-derived devolved legislation. The problem is that the Westminster competence may interact and interlock with the EU-derived devolved legislation, which creates much legal uncertainty for the devolved nations. The new test for devolved legislative competence is accompanied by a corresponding restriction on executive competence (**Schedule 3, Part 1**).

Second, the Bill overlays the reserved powers model of devolution with a released powers model that may function like a reserved powers model, in which case the underlying logic of

[27] *The Times*, 7 September 2017 (subject to a paywall).

the different models would be in tension if not in conflict. This restriction on legislative competence can be relaxed in relation to particular areas by Order in Council where it is determined that a common approach established by EU law does not need to be maintained. In short, it means that areas of legislative competence which are returning from the EU go to Westminster, not the devolved parliaments, unless the UK Government agrees that legislative competence in particular areas can be released.