**Continuity and controversy: the Withdrawal Bill (nee the Great Repeal Bill)**

**20 April 2018**

**NICRE Conference, Brexit and the Good Friday Agreement**

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The European Union (Withdrawal) Bill 2017-2019 (Withdrawal Bill) currently before Parliament will repeal the European Communities Act 1972 (ECA). The European Communities Act 1972 was one of the most important constitutional statutes of the last half-century; arguably the most important. This makes the Withdrawal Bill itself a constitutional bill of the first importance. Before turning to the technical details of the Bill let me just recap the purposes of constitutional law. Constitutional law has two fundamental purposes: one is to organise the exercise of power in a state; the second is to stake out the claim that this power is exercised legitimately. Constitutional lawyers tend to rely on notions of human rights and the rule of law, political accountability and democracy, and the territorial division of power (federalism or devolution) as some of the key techniques in holding state power to account. The Withdrawal Bill raises issues, indeed controversies, under most of these headings. But before considering those controversies, let’s turn to the origins of the Bill itself.

Prime Minister May announced a Great Repeal Bill that would remove EU law from the UK. Despite the grandiose rhetoric of the title, with its echo of Magna Carta (the Great Charter), the Bill would always be more about continuing the impact of EU law in a new guise. This has now become the European Union Withdrawal Bill 2017-2019.

The EU Withdrawal Bill is one of several pieces of primary legislation required to give effect to the UK’s exit from the European Union. The first of these is the European Union (Notification of Withdrawal Act) 2017 which was required by virtue of the judgment in Miller, McCord, Agnew and others.

In addition to the Withdrawal Bill, the Queen’s Speech of 2017 identified seven other bills that would be passed in a special two-year session of Parliament. These are

Customs Bill

Trade Bill

Immigration Bill

Fisheries Bill

Agriculture Bill

Nuclear Safeguards Bill

International Sanctions Bill

In November 2017 the Secretary of State for Exiting the EU announced that a further bill would be required. This bill – also noted in the December 2017 Joint Report of the UK and EU - is the Withdrawal Agreement and Implementation Bill that will give effect to the Withdrawal Agreement between the UK and the EU. So this is a total of at least nine important statutes required to leave the EU.

This is only the proverbial tip of the iceberg though as regards the total amount of legislation needed. This figure is dwarfed by the number of statutory instruments that will be needed. One of the main purposes of the Withdrawal Bill is to confer powers on ministers to deal with exit related issues by statutory instrument. This is required by the sheer scale of the challenge that withdrawal represents.

The Withdrawal Bill has gone through the Commons – where the Government suffered only three formal defeats on amendments – and is now in the House of Lords being considered at report stage. This week the House of Lords has started this stage and has voted against the Government on two important divisions.

While not yet passed, it is worth noting two other developments which may require reconsideration of the Bill even at this stage. One is that there will be a Withdrawal Agreement and Implementation Bill, announced by the Secretary of State for Exiting the EU in November 2017. Most obviously this may overlap with some parts of the Withdrawal Bill. Also of note is the progress of the UK / EU negotiations and the draft agreement on the Withdrawal of the UK 19 March 2018. This provides for a transition period that will end on 31 December 2020. The Withdrawal Bill was not premised on any assumption of a transition period and so it may need some adjustment before being passed, or may need to be amended almost immediately by the Withdrawal and Implementation Bill – or both.[[1]](#footnote-1)

**The challenge of leaving the EU**

Since the UK joined the then European Economic Community in 1972, European Union law has become an integral part of the law of the UK thanks to the European Communities Act 1972. Famously EU law has been described

But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute. ….

The statute (ECA 1972] is expressed in forthright terms which are absolute and all-embracing. Any rights or obligations created by the Treaty are to be given legal effect in England without more ado. Any remedies or procedures provided by the Treaty are to be made available here without being open to question. In future, in transactions which cross the frontiers, we must no longer speak or think of English law as something on its own. We must speak and think of Community law, of Community rights and obligations, and we must give effect to them. This means a great effort for the lawyers. We have to learn a new system.[[2]](#footnote-2)

The challenge is one of scale but also quality. On the matter of scale there are differing accounts of the amount of EU law relevant in the UK.

A House of Commons Library Paper discusses directly applicable EU law[[3]](#footnote-3) and highlights that this includes

* Some provisions of the EU treaties
* 5155 Regulations
* 243 delegated regulations and 1929 Implementing regulations
* 7522 Decisions

In addition, there are 899 directives which are binding as to the result to be achieved though typically implemented through UK secondary legislation.

These rules are of varying importance and some may not be addressed to the UK at all; nevertheless there are thousands of rules involved. The challenge with leaving the EU and repealing the European Communities Act is that it would create a series of voids throughout the legal corpus.

The scale of the challenge is important, but it is also worth stressing the special nature of EU law which is unlike ordinary international law in several respects. First, parts of EU law can be directly effective so they can be relied on in UK courts without the need for any UK legislation to transpose them. Second, EU law is supreme; ie in the event of a conflict with national law, then UK courts are obliged to apply EU law and not national law.

There is a further complication which Lord Denning also referenced in the Bulmer case. This is that the legal culture associated with EU law is different from that of English law as traditionally conceived. Most importantly the EU approach to interpretation is one that gives much greater weight to purposive or teleological reasoning.

**The Withdrawal Bill**

The Withdrawal Bill aims to address this challenge in several steps. First, it repeals the European Communities Act 1972. Second, it provides for the continuation of the vast majority of EU law in the UK in the guise of retained EU law. Third, it provides mechanisms to amend this body of retained EU law.

First, clause 1 of the Bill is brief, simply providing that the European Communities Act is repealed on ‘exit day’. ‘Exit day’ is 29 March 2019 at 11.00 pm, as now provided for in clause 14.[[4]](#footnote-4) Clause 14 allows a Minister to alter the date of exit day so that it coincides with the date when the EU treaties cease to apply to the UK.

The second step is to provide for ‘retained EU law’ in clauses 2 – 6; Clause 2,3 and 4 set out different types of retained EU law. Clause 2 provides for ‘EU derived domestic legislation’ to have effect on and after exit day. This concept includes legislation made under the European Communities Act s 2(2) or Sch 2 para 1A; passed for a purpose mentioned in s 2(2)(a) or (b) ECA, or relating to those matters or ‘relating otherwise to the EU or the EEA’. Clause 3 provides for incorporation of ‘direct EU legislation’. This is intended to cover directly effective EU law such as regulations or decisions. Clause 4 provides for rights, powers, liabilities, obligations, restrictions, remedies and procedures under section 2(1) of the European Communities Act to continue on and after exit day.

While clauses 2-4 have the effect of continuing in force much of EU law, clause 5 contains important exclusions. The principle of EU supremacy will not apply to legislation made after exit day. Clause 5 also excludes the application of the EU Charter of Fundamental Rights.

The third aspect of the Bill’s approach is to provide for the possibility to amend retained EU law using secondary law-raking powers, ie to enable ministers to change the retained EU law without going through the process of a full act of parliament. The Bill creates a large number of delegated powers, three of the most significant of which are in clauses 7, 8, 9. These create delegated law-making powers to correct deficiencies in retained EU law, to ensure respect for international obligations and to implement the Withdrawal Agreement.

**Controversies**

The Withdrawal Bill has provoked considerable debate including an extraordinary number of proposed amendments. Somewhat remarkably given the weakened Government position in the Commons there has been only one formal defeat for the Government on an amendment in the Commons debate; the House of Lords inflicted two further defeats on 18 April 2018.

**Role of Human Rights**

One of the most striking aspects for a constitutional lawyer is the attitude taken towards human rights in the Bill. While for the vast bulk of EU law, the Bill functions as a ‘continuity bill’ - continuing EU law under the guise of retained EU law unless UK authorities amend it – there are exceptions. Many of these exceptions concern human rights.

Currently EU law protects a range of rights through different legal norms. These include general principles of law, certain parts of the EU Treaties, the EU Charter of Fundamental Rights, certain EU regulations and directives, judgments of the Court of Justice. Some of these – eg regulations and directives - will be continued as retained EU law, though subject to change. However, some EU law will not and the exceptions are disturbing.

*Charter of Fundamental Rights*

Clause 5(4) of the Bill specifies that the Charter will cease to be part of UK law on exit day. The Bill does say that if Charter rights are otherwise protected (eg in a directly effective Treaty provision or regulation) then those are carried forward.

The Government’s position is that it is unnecessary to continue the effects of the Charter because it simply repeats rights that are found elsewhere eg in other EU measures whether they be treaty articles, regulations or directives, or in general principles of law, or they are protected by the Human Rights Act (and ECHR) or the common law.

This position of the Government is bordering on the self-contradictory. If the rights exist elsewhere anyway then it is not obvious why the Charter should be excluded from continuation. If however – which seems more likely – the Charter contains rights or details of right snot found elsewhere, then the Government proposal will result in a reduction of rights.

*General principles of law*

The Government position is that general principles of EU law will continue but their role in the future will be attenuated.

The Government position is that UK courts should not be able to disapply retained EU law because they have not been able to disapply EU law – only the CJEU can invalidate EU law. This does create a paradoxical situation that currently there is relief against EU norms that violate rights (eg in the Charter) or general principles of law albeit it requires Luxembourg, but after exit day there will not be such a possibility.

*EU secondary legislation*

Numerous EU regulations and directives provide important protections for rights and equality – the General Data Protection Regulation is one recent prominent one, but there are also regulations and directives covering workers’ rights, environmental rights, consumer protection and equality. The last category is especially important for this jurisdiction.

These regulations and directives will be continued under clauses 2 and 3. The controversy in relation to them is the power given to ministers to amend retained EU law using powers under clauses 7, 8 and 9. The Government had undertaken that it would not use these powers to reduce protections in these areas, but this was by no means made clear in the text of the original legislation. There was no specific protection for rights in these areas.

Following recommendations from Miller MP, Chair of the Women and Equalities Committee, an important amendment was made in the Commons to offer some protection for equalities legislation. Schedule 7, paragraph 22 requires ministers using the powers in 7(1), 8, 9 to explain if they are being used to amend, revoke or repeal the Equality Act 2010, Equality Act 2006, or measures taken under them; explaining the changes and stating that the Minister has had due regard to the need to eliminate discrimination, harassment, victimisation or anything else prohibited by the Equality Act 2010.

This issue resurfaced in the House of Lords, and at report stage in the Lords, the Government experienced its third defeat. On 18 April 2018, the Lords approved an amendment which makes it more difficult for Ministers to uses delegated law-making powers to make changes affecting specified fundamental areas of EU law – employment rights, equality rights, health and safety, consumer standards, environmental protection. The amendment will require either an act of parliament or an elaborate subordinate legislation process before amendments can be made in these areas. This amendment, if it makes its way into the final text will provide important safeguards, though it is perhaps a pity that it did not also include rights in the area of data protection.

**Delegated legislation**

A major feature of the Bill is the creation of delegated law-making powers. The most important of these are the correcting power (cl 7), the power to ensure compliance with international obligations (cl 8) and the power to implement the Withdrawal Agreement (cl 9), though these are not the only delegated law-making powers.

Delegated law-making powers create several challenges to constitutional principle as they erode the separation of powers in conferring parliament’s law-making competence on the executive. Typically, delegated legislation is made without full parliamentary scrutiny; and even where Parliament does scrutinise delegated legislation, it does not have the possibility to amend it. A further feature of delegated legislation is that it is not subject to the Sewel convention. So a Westminster bill dealing with a matter within the devolved competences of one of the devolved legislatures normally requires, by convention, the consent of the devolved legislature.[[5]](#footnote-5) This convention however does not apply to secondary legislation.

These features mean that delegated law-making powers are troubling for notions of the separation of powers, democratic and political accountability. The scale and complexity of modern governance makes such powers inevitable but constitutional principle requires they be circumscribed.

Commentators, especially Parliamentary committees, have identified a range of problems with these powers. One leading scholar describes a key parliamentary report on this issue as ‘excoriating’.[[6]](#footnote-6)

First, several of them are the most extreme form of delegated law-making power, a Henry VIII clause. This means that ministers will be able to use these powers to amend others laws including Acts of Parliament (primary legislation).

Second, some of them are worded – especially as introduced – very widely.

Third, the ‘trigger’ for the use of the powers is that a minister judges their use ‘appropriate’.

Fourth, it is not clear why some of these powers are needed. For example, clause 9 – in some ways the most wide-ranging of these powers - is supposed to be used to implement the Withdrawal Agreement. But the Government has already promised, in November, that it would be introducing a Withdrawal Agreement and Implementation Bill. In this scenario it seems unnecessary to have a power like that in clause 9. Presumably the Withdrawal Agreement and Implementation Bill will address major issues and can also create delegated law-making powers if needed.

Fifth, there are issues about the scrutiny of these powers in Parliament. Traditionally, delegated law-making powers are subject to either negative or affirmative resolution in Parliament. Affirmative resolutions means Parliament must approve the delegated legislation; negative resolutions means the delegated legislation can be vetoed by Parliament. A major limitation on Parliament though is that it cannot amend the delegated legislation.

As the Withdrawal Bill has gone through Parliament the original proposals have been amended. Take the correcting power in clause 7. As originally drafted this contained a list of acceptable uses of this power, but the list was illustrative not exhaustive. This has now been amended to provide that the list is exhaustive, though there is a new clause providing it can be used for purposes similar to those in the list. This is a welcome feature as it limits the possibility to use clause 7 to enact wider policy decisions. Also a ‘sifting’ mechanism has been agreed so as to give Parliament a say on what procedure should be used in respect of the delegated law-making powers.

These are important concessions but they are also limited in some ways. A minister for instance is not bound to accept the recommendation as to which approval method to use. The Government has been very resistant to any idea of changing the ‘appropriate’ use requirement to one that would be stricter eg a ‘necessary’ requirement.

**Devolution**

The Bill’s arrangements regarding devolution have given rise to some of the most serious debates, centring largely on clause 11. The issue here reflects two existing constitutional principles. The first is that the devolved legislatures in Scotland, Wales and Northern Ireland are limited in their legislative competence - they do not enjoy the legislative supremacy or sovereignty of the Westminster Parliament. The second is the supremacy of EU law over domestic law. These two principles converge in the devolution statutes which detail the legislative competence of the devolved legislatures. In all of the statutes establishing the devolved legislatures, there is an explicit prohibition on legislating incompatibly with EU law.[[7]](#footnote-7)

This is where clause 11 of the Withdrawal Bill comes in. It substitutes ‘retained EU law’ for ‘EU law’ in the devolution acts. As originally introduced this meant that the devolved legislatures’ competence would not be automatically extended, but that a government minister could, by order in council, remove this limit on their competence. The Government view is that there needs to be common rules in certain areas; while at the moment these are set at a European level, in the future these will need to be set at a UK level to protect the integrity of the UK single market. The Government combines this default stance with the power to release certain areas back to the devolved authorities through order in council.

The devolved authorities in Scotland and Wales have been vociferous in criticising this provision, labelling it a power-grab. Their view is that the UK’s exit from the EU should result in their enjoying full competence in the devolved areas without the limits formerly emplaced by EU law. They have indicated that they will advise against any consent being given to the Withdrawal Bill unless this clause is amended to their satisfaction. The Withdrawal Bill, everyone agrees, is subject to the Sewel convention; their consent therefore is a political though not a legal requirement.[[8]](#footnote-8)

In addition the Scottish Parliament and the Welsh National Assembly have introduced and passed their own versions of the Withdrawal Bill: UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill and the Law Derived from the European Union (Wales) Bill.

These bills have passed their stages in those assemblies but they have not yet received Royal Assent. On 17 April 2018 the Attorney General for the UK and the Advocate General for Scotland announced that they were referring these bills to the Supreme Court for a decision as to whether they are within the legislative competence of the devolved assemblies.[[9]](#footnote-9)

Meanwhile there have been ongoing political discussions between London, Cardiff and Edinburgh on clause 11 and the Government has indicated its willingness to amend clause 11. These discussions have taken place under the auspices of the Joint Ministerial Committee and in particular the EU Negotiations format. The JMC includes the UK Government, Scottish Government, Welsh Government and NI Executive.

**Northern Ireland**

The public position of the Scottish and Welsh First Ministers and the bills passed by the Scottish and Welsh legislatures contrast starkly enough with the position in Northern Ireland. The absence of a functioning assembly and executive mean that this jurisdiction’s voice is not heard in the same way in the public and parliamentary debates. In Westminster only the DUP and independent unionist Sylvia Hermon are represented. At the JMC NI is represented by a senior civil servant, rather than executive ministers.

Of course, even if there were a functioning assembly and executive here they would not speak with one voice and the power-sharing mechanisms would likely stymie public expressions of the institutions.

In this regard it is notable the Withdrawal Bill makes little if any allusion to the argument that Northern Ireland is constitutionally distinct within the United Kingdom. The Bill recognises the devolution arrangements (though Scottish, Welsh politicians and others might doubt it recognises the practice and principles of devolution fully) but there is little recognition that Northern Ireland is a different constitutional context again. The original bill did provide some distinctive protection for the Northern Ireland Act; so for instance the powers in cl 7 could not be used to modify the Northern Ireland Act (apart from specified exceptions). There was no similar protection though in cl 8 or 9. This was presumably intended to offer some support to the Government position that it intended to respect the Belfast or Good Friday Agreement in all its parts. However the 1998 Agreement is in some ways wider than the Northern Ireland Act 1998 - arguments have been made that respecting the Agreement should be written into the Bill but so far to no avail.

There is a strong argument that Northern Ireland is not just an example of devolution or even devolution plus in the UK but rather is a distinctive constitutional settlement including recognition of self-determination, citizenship rights, consociational institutions, north-south and east-west institutions and significant safeguards for human rights and equality. There is an amendment tabled in the House of Lords (amendment 88) which would provide further protection for the Northern Ireland Act and more specifically North South cooperation.[[10]](#footnote-10)

**Conclusion**

As we started – the Withdrawal Bill is a major constitutional proposal.

Something along the lines of the Withdrawal Bill is inevitable if the UK is to leave the EU without causing a legal landscape pockmarked with voids. The Bill, especially as originally introduced, raises some significant concerns about respect for core constitutional principles like human rights, the separation of powers, the territorial division of powers. As originally introduced the Bill well merits the term power-grab. By excluding the continuation of the Charter and reducing the scope of the general principles, the Bill would weaken the human rights binds on government. By adopting sweeping delegated law-making powers it would expand the legislative power of ministers at the expense of the democratically elected Parliament. By keeping retained EU law as a limit on devolved legislative competence, it would enhance Westminster at the expense of devolved authorities who expected to see their competence effectively expanded.

The Bill has proven controversial and is still not approved. It was the subject of staggering numbers of proposed amendments in both houses of Parliament. There is no agreement that Sewel motions will be forthcoming. The Bill has provoked the devolved legislatures in Scotland and Wales to pass their own versions of the Withdrawal Bill which complicates the picture or even creates a potential clash. These devolved bills are themselves now the subject of referrals to the Supreme Court to determine if they are within their competence.

Despite the lengthy list of amendments the Government has so far experienced only three formal defeats. The first was on Dominic Grieve’s amendment to clause 9(1) of the Bill, stipulating that the implementing power in clause 9 can only be used if Parliament has passed a statute approving the Withdrawal Agreement. The second and third came on 18 April during the report stage in the House of Lords. One of these requires a minister to outline steps taken to negotiate staying in the EU customs union. The other offers greater protection for retained EU law in the areas of employment, equality, health and safety, consumer protection, environmental protection.

These have been the only formal defeats but it is worth noting that there have been other concessions from the Government notably in relation to concerns about delegated law-making powers and devolution arrangements.

The bill is still being debated in the House of Lords at the report stage and this is an important opportunity to press for further amendments including on Human Rights (eg Amendment 15) and Northern Ireland (Amendment 88).

1. Swee Leng Harris, *Legislating for transition / implementation: implications for the EU (Withdrawal) Bill* (Hansard Society, London 2018). [↑](#footnote-ref-1)
2. *Bulmer v* *Bollinger* [1974] Ch 401, 418. [↑](#footnote-ref-2)
3. Vaughne Miller, *Legislating for Brexit: directly applicable EU law* (House of Commons, London 2017). [↑](#footnote-ref-3)
4. As introduced into the House of Lords, 18 January 2018. [↑](#footnote-ref-4)
5. This convention is now recognised in legislation: Wales Act 2017, s 2; Scotland Act 2016, s 2. [↑](#footnote-ref-5)
6. Mark Elliott. [↑](#footnote-ref-6)
7. Scotland Act 1998, s 29(2)(d). [↑](#footnote-ref-7)
8. *R (Miller and Deir Tozetti Dos Santos) v* *Secretary of State for Exiting the European Union; Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review; Reference by the Court of Appeal (Northern Ireland) - In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5, (24 January 2017). [↑](#footnote-ref-8)
9. *Devolved Brexit legislation referred to the Supreme Court* [2018] (17 April 2018) <https://www.gov.uk/government/news/devolved-brexit-legislation-referred-to-the-supreme-court> [↑](#footnote-ref-9)
10. https://publications.parliament.uk/pa/bills/lbill/2017-2019/0079/18079-R-I.pdf [↑](#footnote-ref-10)