

LEGISLATION

Constitutional Principle, the Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018

Paul Craig*

The European Union (Withdrawal) Act 2018 is the cornerstone of UK legislation designed to accomplish the legal dimension of Brexit. It brings the entire *acquis* of EU law into UK law in order to avoid regulatory black holes that would otherwise occur. The Act embodies a twofold legislative strategy: EU law brought into UK law thereby is to be made fit for purpose by exit day, with necessary changes being made by statutory instrument; Parliament can then decide at greater leisure thereafter whether it wishes to retain, amend or repeal this legislation. The burden placed on Parliament is unprecedented, all the more so given the exigencies of time in which the changes are to be made. This article explicates the principal provisions of the 2018 Act, and the concerns as to constitutional principle and the rule of law raised by the legislation. The tensions in the drafting process are made apparent, and uncertainties in the resulting text are revealed.

INTRODUCTION

The European Union (Withdrawal) Act 2018 (EUWA) became law with relatively few amendments forced on the government.¹ Threats from the House of Lords and the devolved assemblies were largely seen off, although the political significance of the former remain undiminished, and the constitutional ramifications of the latter remain to be seen. The Act is complex and it is not possible to consider all provisions in this article. The devolution provisions are very important,² and will be dealt with in a separate article. This article does, however, seek to provide an overview of the principal building blocks in the EUWA.

The structure of the argument is as follows. It begins with the rationale for the EUWA, followed by repeal of the European Communities Act 1972 (ECA). The focus then shifts to explication of the way in which EU law is retained post-Brexit, and the status of that law thereafter. This is followed by sections analysing exceptions to retention, and the EUWA provisions concerning interpretation of retained law. The executive is accorded broad powers to enact subordinate legislation to deal with Brexit. The complex provisions are examined, and this

*St John's College, Oxford. I am grateful for comments from Alison Young.

1 A bibliography of documentation relating to the European Union (Withdrawal) Bill can be found at <https://docs.google.com/document/d/1aGQNgOI-xkdWioRjLWhr11KKS1GXJsprqtJTyfxOGE/edit> (all URLs were last accessed on 10 December 2018); M. Elliott and S. Tierney, 'Political Pragmatism and Constitutional Principle: the European Union (Withdrawal) Act 2018' [2019] PL 37.

2 R. Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (Constitution Society, 2017); P. Bowers, The European Union (Withdrawal) Bill: Devolution, House of Commons Briefing Paper 8154, 24 November 2017.

is followed by the penultimate section that considers legislative oversight of executive power. The final section addresses Parliament's powers in relation to the final deal, and in relation to the no deal scenario.

Understanding the EUWA's complex provisions is a condition precedent to assessment of issues of constitutional principle raised by it. These issues will be considered in due course throughout the subsequent analysis, juxtaposed to examination of particular sections of the legislation. By the same token, it is helpful to adumbrate at the outset broader concerns raised by the legislation.

There are constitutional concerns as to the balance between legislative and executive power, and accountability. The practicalities of leaving the EU were always likely to place strains on this relationship, given the scale of the task at hand. The need to bring the entire *acquis* of EU law into UK law, and to do so within a narrow time frame, resulted in the grant of very broad delegated power to the executive, and apprehension as to the adequacy of legislative oversight. This was exacerbated by frequent recourse to Henry VIII powers, whereby the executive could alter primary legislation through delegated power. Disquiet as to the balance between legislative and executive power is not, however, confined to this terrain. It is also prominent in relation to the debates on the Bill, and the provisions in the EUWA, as to the role of Parliament in approving or not the deal struck by the executive, and as to what should occur in the event of no deal being approved.

There are, in addition, concerns that relate broadly to the rule of law. This is not the place for an exegesis on the meaning of this contested concept. Suffice it to say, for the present, that most agree that clarity in legislation and the ability to plan one's life cognizant of the legal consequences of one's actions is a core element of the rule of law, whatever other elements it might contain. Statutes are akin to buildings, with their own architecture, elegant or inelegant as they may be. Truth to tell, the EUWA is not an easy read, and the legislative architecture tends to the baroque and the mannered, rather than renaissance symmetry. Political constraints, coupled with temporal exigency, underpin the finished product, and are essential for an understanding of the resulting architectural form. There are, as will be seen, a plethora of rule of law concerns that arise from EUWA, including: the status of EU law that is brought into the UK legal order; the effect of the Charter of Rights, and general principles of EU law in a post-Brexit world; and the powers of national courts in relation to the interpretation and application of EU law enacted both before and after Brexit.

RATIONALE

It is important at the outset to understand the rationale for this legal cornerstone of Brexit, which began life as the Great Repeal Bill.³ The nomenclature was singularly inappropriate for a measure that repealed little, and served primarily

3 J. Simson Caird, *Legislating for Brexit, the Great Repeal Bill*, House of Commons Library Briefing Paper Number 7793, 21 November 2016.

to convert the EU legal *acquis* into UK law. The change of nomenclature was therefore warranted.

The rationale for the legislation is readily apparent.⁴ The UK has been a member of the EU since 1972, and many areas of life are regulated by EU law. Directives have already been transformed into UK law. There is, however, much EU law, such as regulations, that is directly applicable, taking effect in domestic law when enacted by the EU, without the need for further national legislation. Section 2(1) of the ECA furnished the legal foundation for direct applicability and direct effect within the UK constitutional order.

The regulatory architecture in any area is typically an admixture of treaty provisions, directives, regulations and decisions. It is, moreover, composed of EU legislative acts, in conjunction with delegated and implementing acts.⁵ It would in theory be possible to consign this regulatory material to the legal dustbin in the event of Brexit. This would, however, lead to chaos. The existing EU rules regulate matters from product safety to creditworthiness of banks, from securities markets to intellectual property and from the environment to consumer protection. There cannot simply be a legal void in these areas, and pre-existing UK law will often not exist. Consigning such legal rules to the legal scrap heap would also be irrational, since there is much that the UK helped to fashion.

This is the rationale for the EUWA. The foundational premise is that the entirety of the EU legal *acquis* is converted into UK law. Parliament can then decide, in two stages, which measures to retain, amend or repeal. Stage one is to ensure that the EU rules retained as domestic law are fit for legal purpose when we leave the EU, since there may be provisions that do not make sense in a post-Brexit world, such as reporting obligations to the Commission, which must be altered by exit day. Stage two is the period post-Brexit, when parliament can decide at greater leisure whether it wishes to retain these rules.

The temporal frame of the EUWA has, however, been affected by the Withdrawal Agreement concluded between the UK and the EU.⁶ The EUWA is framed throughout in terms of 'exit day', which is defined in section 20(1) to be 29 March 2019 at 11.00pm. This can be altered by ministerial regulation to ensure that the date and time specified for exit cohere with the date and time when the treaties cease to apply to the UK.⁷ Such ministerial regulations will have to be issued because the Withdrawal Agreement provides for a transitional period that runs to 31 December 2020, with the possibility of one extension thereafter, during which the UK remains bound by EU law. The UK will also remain bound by some aspects of EU law if there is a need to invoke the backstop in relation to Northern Ireland because a trade agreement that obviates the need for this has not yet been agreed. The references to exit day in the subsequent discussion should be read with this in mind.

4 Legislating for the United Kingdom's Withdrawal from the European Union, Cm 9446 (2017) at [1.13].

5 Arts 289–291 TFEU.

6 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 25 November 2018 (Withdrawal Agreement).

7 EUWA, s 20(4).

REPEAL OF THE ECA: SECTION 1

The EUWA's architecture rests on the shortest section of the legislation: section 1 provides that the 'The European Communities Act 1972 is repealed on exit day'. Its brevity belies its political and legal significance. In political terms, Brexiteers would settle for nothing less than the unequivocal repeal of the legislation that had taken the UK into the EEC. In legal terms, the repeal of the ECA signalled the end of the legal mechanism whereby EU law entered the domestic legal terrain. Thus, section 1 of the EUWA is self-consciously the pulling up of the drawbridge, and the shutting off of the conduit, whereby EU law became part of the domestic legal order.

There is, nonetheless, a paradox lurking here. There will be a transitional period after Brexit, which will run from March 2019 till December 2020, with the possibility of one further extension thereafter.⁸ EU law will continue to be applicable in the UK during this time. There must then be some way for EU law to take effect in national law during this time. The simplest technique would be to preserve some parts of the ECA, but hard-line Brexiteers would resist this, and some other legal mechanism will then have to be found. The drawbridge at the front of the UK castle may be firmly closed with the ECA's repeal, but the legal engineers will create a subtle back-door to ensure that law comports with political and treaty reality during the transitional period.

RETENTION OF EXISTING LAW: SECTIONS 2–4, 7

Retained EU law: legislative strategy

Sections 2–4 are very much the architectural heart of the EUWA, and constitute the mechanism whereby EU law is brought into UK law. The legislative strategy is to make separate provision for different types of EU law, which are dealt with in sections 2–4.⁹ These sections constitute the core of retained EU law, which is defined in section 6(7).

'retained EU law' means anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time).¹⁰

Section 2 of the EUWA deals with the saving of EU-derived domestic legislation. Thus section 2(1) stipulates that such legislation continues to have effect in domestic law on and after exit day as it had prior to exit day. EU-derived domestic legislation is defined in section 2(2), principally by reference to enactments made pursuant to the ECA, section 2(2), which was the legislative

⁸ Withdrawal Agreement, n 6 above, Art 126.

⁹ European Union (Withdrawal) Act 2018, Explanatory Notes (EUWA EN).

¹⁰ EUWA, ss 6(3) and (6) refer to judicial interpretation of the law in ss 2–4 by UK and EU courts prior to exit.

mechanism through which enactments to give effect to EU law were made. The main example of such legislation is a statute, or secondary legislation, enacted to bring EU directives, which are not directly applicable, into domestic law. EU-derived domestic legislation can, however, also include enactments that change UK law to render it compatible with EU regulations,¹¹ or which otherwise relate to the EU or to the European Economic Area.¹²

Section 3 of the EUWA is concerned with the incorporation of direct EU legislation, and provides that, so far as operative immediately before exit day, it forms part of domestic law on and after exit day.¹³ Direct EU legislation is defined in section 3(2). It covers, subject to certain exceptions,¹⁴ directly applicable EU regulations, decisions¹⁵ and tertiary legislation.¹⁶ Section 2(1) of the ECA gave legislative authorisation to the application of directly applicable EU law within the UK, thereby obviating the need for legislation to implement any particular EU regulation. This was fine while we remained in the EU. Brexit, and repeal of the ECA, would however mean that thousands of EU regulations that constituted the law in many important areas would be lost, unless they could be retained in UK law post-Brexit, hence section 3 of the EUWA. There is an obligation to publish the law retained via section 3. The form of the publication is not, however, specified; the obligation does not attach to modifications to such measures made before or after exit day; and there is provision whereby a minister can make an exception from the duty to publish where satisfied that the instrument has not become, or will not, on exit day, become retained direct EU legislation.¹⁷

There is, however, an important second order issue concerning the effect of the law retained via section 3. EU regulations were not only directly applicable, but also commonly had direct effect, provided that the particular article thereof was sufficiently certain, precise and unconditional. The consequence was that they were enforceable by individuals before a national court, and this superseded any rule as to whether an individual would, as a matter of domestic law, derive enforceable rights from an enactment. The logic of retaining regulations via section 3, and bringing the EU *acquis* into national law, is that measures retained by section 3 should continue to have direct effect in accord with the criteria in EU law,¹⁸ subject to anything to the contrary in the EUWA,¹⁹ and subject to later UK enactment to the contrary.

Section 4(1) is concerned with the saving for rights that had been part of UK law through section 2(1) of the ECA. EU law includes the concept of

11 EUWA, s 2(2)(c)(ii).

12 EUWA, s 2(2)(d).

13 EUWA, ss 3(1), 3(3).

14 EUWA, s 3(2)(a)(i)–(iii), Sched 6.

15 V. Miller, *Legislating for Brexit: EU Decisions*, House of Commons Briefing Paper 8205, 18 January 2018.

16 Tertiary legislation, as defined by EUWA, s 20, in effect means a delegated regulation or decision made pursuant to Art 290 TFEU, or an implementing regulation or decision made pursuant to Art 291 TFEU.

17 EUWA, Sched 5, paras 1–2.

18 This is, moreover, supported by EUWA, s 4(2)(a), the wording of which assumes that rights can attach to law retained via s 3.

19 See, for example, EUWA, Sched 1, para 4, excluding the *Francovich* damages action post-exit day.

directly effective rights as developed by the EU courts.²⁰ These rights took effect in UK law via section 2(1) of the ECA, and they are preserved post-Brexit by section 4(1). It provides that any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day are recognised in domestic law by virtue of section 2(1) of the ECA, and are enforced, allowed and followed accordingly, continue to be recognised and enforced post-Brexit.²¹ The entire body of directly effective rights is therefore brought into UK law; the rights listed in the Explanatory Notes are, therefore, merely illustrative and not exhaustive.²² Many rights, such as those concerned with the four freedoms, citizenship, and non-discrimination on grounds of nationality, will, however, have to be repealed, since they make no sense in a post-Brexit world.²³

Section 4(2) contains qualifications to section 4(1). Thus, section 4(1) does not cover rights that form part of domestic law by virtue of section 3 of the EUWA.²⁴ It also does not cover rights, powers, liabilities etc as arise under an EU directive, which are ‘not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in the case).’²⁵ This provision is ambiguous. The narrow interpretation is that rights will only be retained if they have been expressly recognised in case law of the EU or national courts ‘decided before exit day’ concerning a particular right under a particular directive. The broader interpretation is that if the relevant rights are ‘of a kind’ recognised by such courts prior to exit day, this will suffice for them to be retained thereafter, even if there has not been a decision concerning a provision of a particular directive.

Retained EU law: legal status

The EUWA retains EU law in the preceding manner, but the Bill said nothing as to the legal status of these provisions in UK law post-Brexit. It was not, therefore, clear whether the legal rules brought into UK law via sections 3 and 4 would be primary legislation, secondary legislation or *sui generis*. The legal status of EU law within the UK legal order post-Brexit is fundamental, as recognised by the House of Lords’ Constitution Committee. It duly noted that ‘whether a law counts as primary or secondary legislation is of fundamental importance in the UK legal system’.²⁶

The government’s approach was double-edged: the Department for Exiting the EU opined that EU law retained via clause 3 of the Bill should be regarded

20 P. Craig and G. de Burca, *EU Law, Text, Cases and Materials* (Oxford: OUP, 6th ed, 2015) ch 7.

21 EUWA, s 4(1).

22 EUWA EN, n 9 above at [94].

23 *ibid* at [96].

24 EUWA, s 4(2)(a).

25 EUWA, s 4(2)(b).

26 House of Lords, Select Committee on the Constitution, European Union (Withdrawal) Bill (HL 69, 2018) at [39].

as *sui generis*, neither primary, nor secondary legislation;²⁷ the Solicitor General indicated that the government intended to use clause 17(1) to allow a Minister to decide whether, in a particular instance, EU retained law should be treated as primary or secondary legislation.²⁸

The House of Lords' Constitution Committee, HLCC, was rightly critical of this reasoning. It concluded that there was no reason why retained law should not be treated in accord with traditional modes of domestic classification, and that classification of EU law as 'sui generis' or 'unique' was highly problematic.²⁹ It was also dismissive of the suggestion that classification of EU law as primary or secondary legislation should reside at the discretion of a minister, stating that such a power would be 'extraordinary and egregious'.³⁰

The HLCC's preferred solution was to treat all section 3 retained law as primary statute in a post-Brexit world because it was not possible to distinguish between such measures; it would mean that such legislation could only be amended by later primary statute, or Henry VIII powers; and it would facilitate resolution of the supremacy issue.³¹ The Constitution Committee's approach was preferable to that in the Bill, but there were difficulties with its preferred approach.³²

It would lead to constitutional anomalies for EU law that was retained in part through section 3 and in part through section 2. An EU directive might be transformed into primary law, but was often adopted as a statutory instrument via section 2(2) of the ECA. All directives are fleshed out through delegated and implementing acts via Articles 290–291 TFEU, commonly as regulations. These regulations become part of UK law via section 3. The HLCC's recommendation would mean that the primary directive would continue to have the status of a statutory instrument under UK law, while the delegated and implementing acts made pursuant thereto would be primary legislation, which would be contrary to principle.

Classification of all section 3 measures as primary statute would, moreover, mean that they could not be struck down under the Human Rights Act 1998 (HRA), nor would they be amenable to common law judicial invalidation on non-HRA grounds. This limitation of judicial review would attach to many thousands of measures that bear no affinity to primary statute in the UK, nor would they be regarded as legislative acts in the EU.

Furthermore, to regard all section 3 measures as primary legislation would devalue the currency of such legislation in UK political and constitutional tradition. The UK parliament commonly enacts circa 35–40 primary statutes per annum, and approximately 2,000 statutory instruments. Approximately 20,000–25,000 EU measures will become part of UK law pursuant to the EUWA. If there were 20,000 measures and they all became statutes, this would

27 *ibid* at [42].

28 *ibid* at [67].

29 *ibid* at [44].

30 *ibid* at [67].

31 *ibid* at [52].

32 P. Craig, 'The Withdrawal Bill, Status and Supremacy' UK Const L Blog 19 February 2018 at <https://ukconstitutionallaw.org/2018/02/19/paul-craig-the-withdrawal-bill-status-and-supremacy/>.

be 571 years of primary legislation, as judged by the figure of 35 per year. This would be constitutionally unbalanced, more especially because the great majority of the section 3 measures brought into UK law would not be regarded as legislative acts in EU law, but would rather be treated as delegated or implementing acts.³³

The EUWA was amended by the addition of section 7, which bears the title ‘status of retained law’. The reality is, however, that this section is not primarily about the legal status of retained law, but how retained law can be modified by other UK domestic law. Thus, while section 7(1) confirms that section 2 retained law continues to have the same status in domestic law post-Brexit that it had pre-Brexit, the remainder of section 7 is concerned not with the legal status of retained law under sections 3 and 4, but how this can be modified by other UK legislation. Section 7 is complex in this respect.

Section 7(2) distinguishes, in relation to section 3, between ‘retained direct principal EU legislation’ and ‘retained direct minor EU legislation’. The former category covers EU retained law as defined in section 3, which is not tertiary legislation.³⁴ Tertiary legislation is itself defined to mean provisions made pursuant to Articles 290 and 291(2) TFEU.³⁵ Retained direct principal EU legislation would, therefore, almost certainly be a legislative act under Article 289 TFEU for the purposes of EU law, but it is not characterised as primary legislation under the EUWA. Retained direct minor legislation is said to mean any retained direct EU legislation, which is not retained direct principal EU legislation. Such measures would almost certainly be delegated or implementing acts in EU law, but they are not classified as subordinate legislation under the EUWA. EU directly effective provisions that have not been implemented into UK law are treated similarly to direct principal EU legislation.³⁶

The complex rules on modification can be summarised as follows.³⁷ Law that has been retained pursuant to sections 3 and 4 EUWA can be modified by primary legislation. It can also be modified by subordinate legislation, if it is made under a power which permits such modification by virtue of Henry VIII clauses, which enable subordinate legislation to override primary legislation; any other provision made by or under the EUWA; any provision made by or under an Act of Parliament passed before, and in the same session as, the EUWA; or any provision made on, or after, the passing of the EUWA by or under primary legislation. Direct principal EU legislation and directly effective provisions of EU law can in addition be modified by subordinate legislation where this is ‘supplementary, incidental or consequential in connection with

33 For further discussion see, P. Craig, ‘European Union (Withdrawal) Bill: Legal Status of EU Retained Law’ UK Const L Blog 26 February 2018 at <https://ukconstitutionallaw.org/>; S. Laws, ‘Giving “Deemed” Domestic Law Status to Retained EU Law’ UK Const L Blog 28 February 2018 at <https://ukconstitutionallaw.org/>; P. Craig, ‘European Union (Withdrawal) Bill: Legal Status and Effect of Retained Law’ UK Const L Blog 8 March 2018 at <https://ukconstitutionallaw.org/>.

34 EUWA, s 7(6).

35 EUWA, s 20.

36 EUWA, s 7(4).

37 EUWA, ss 7(2)–(4). This is subject to the exception that delegated legislation made under a Henry VIII clause cannot repeal any enactment contained in Northern Ireland legislation by an Order in Council, EUWA, Sched 8, para 3(2).

any modification of any retained direct minor EU legislation', or where a modification of principal direct EU legislation is needed to 'confirm or approve transitional, transitory, or saving provisions'.³⁸ Direct minor EU legislation can also be amended by subordinate legislation generally, subject to the qualification that account has to be taken of provisions of direct principal EU legislation under which the direct minor EU legislation was originally enacted, and of directly effective EU law incorporated into UK law through section 4.³⁹

It would have been preferable if section 7 had done what the title specified, which was to determine the status of the law retained pursuant to sections 3 and 4 EUWA. The status of the relevant laws and the means of amendment are related, but conceptually distinct. The elision of these two issues prompted the inquiry noted by Alison Young:

is the means through which a provision is amended a consequence of its status, or is the status of a measure to be determined according to the means through which it can be amended or modified?⁴⁰

The reality is that section 7 does not address the status issue as such, other than for law retained via section 2. The remainder of section 7 is concerned primarily with the second issue, the way in which the law can be modified. This is regrettable, more especially so since the definitions of EU retained direct principal legislation, and retained direct minor legislation, would map out as legislative acts and delegated/implementing acts under EU law, and could readily have been accorded the status of primary and subordinate legislation within UK law.⁴¹ Section 7(5) does contain references to other sections of the EUWA that are pertinent in some way to the status of retained law, as exemplified by the fact that retained direct principal legislation is to be treated as primary legislation for the purposes of the Human Rights Act 1998.⁴² It would, nonetheless, have been preferable if the EUWA had specified the legal status of section 3 and 4 retained law more generally.

This is more especially so since the legal status of a measure is important in circumstances other than amendment, and hence the failure to address the issue will generate problems in the future. There may, for example, be issues concerning the interpretive fit between retained direct EU legislation and legislation enacted on or after exit day.⁴³ If EU direct legislation were regarded as delegated legislation, then the later domestic legislation would override it in the event of a conflict. If, however, retained direct principal EU legislation were

38 EUWA, Sched 8, paras 5(3), 5(4), 10(3), 10(4).

39 EUWA, Sched 8, para 5(2), 10(2).

40 A. Young, 'Status of EU Law Post Brexit: Part One' UK Const L Blog 2 May 2017 at <https://ukconstitutionallaw.org/2018/05/02/alison-young-status-of-eu-law-post-brex-it-part-one/>.

41 The rules retained via s 3 keep the appellation 'direct EU legislation' within domestic law, even when they have been modified or amended by later statute or subordinate legislation, EUWA, s 20.

42 EUWA, Sched 8, para 30(1).

43 Young, n 40 above; Lord Pannick, HL Deb vol 790 col 1415 23 April 2018; Bingham Centre for the Rule of Law, 'The EU (Withdrawal) Bill, A Rule of Law Analysis of Clauses 1-6' 21 February 2018 at <https://www.biicl.org/binham-centre/publications/reports>.

to be characterised as primary legislation, then the initial judicial impulse would be to see whether the respective provisions could be interpreted compatibly. If this were not possible then the later measure would impliedly overrule the earlier, to the extent of the inconsistency.

It is desirable that the status accorded to EU law in the UK post-Brexit matches, as far as possible, the status accorded to that law pre-Brexit. This is central to the schema of the EUWA, which is intended to provide continuity as to the legal rulebook in the UK, pending any legislative change. It is also desirable that the status accorded to EU law in the UK post-Brexit coheres with what we would recognise in our constitutional order as the divide between primary and secondary legislation. There was a distinction between primary and secondary norms in the pre-Lisbon world, and the distinction is even more evident post-Lisbon, with the formal divide between legislative, delegated and implementing acts. It is possible to make a rational and workable divide between retained EU law that should be classified as primary legislation, and that which should be classified as statutory instruments.⁴⁴ It would have been preferable if this approach had been followed in the EUWA.

EXCEPTIONS TO SAVING AND INCORPORATION: SECTION 5

Sections 2–4 constitute the heart of the EUWA, but they are expressly subject to section 5, which is entitled exceptions to savings and incorporation, these being further delineated in Schedule 1.

Supremacy of EU law

Sections 5(1)–(3) EUWA address the supremacy of EU law:

- (1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.
- (2) Accordingly, the principle of the supremacy of EU law continues 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.
- (3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification.

The HLCC was very critical of these provisions for three reasons. The first was uncertainty as to the scope of application of section 5(2). Thus, while

⁴⁴ P. Craig, 'European Union (Withdrawal) Bill: Legal Status of EU Retained Law' UK Const L Blog 26 February 2018 at <https://ukconstitutionallaw.org/2018/02/26/paul-craig-european-union-withdrawal-bill-legal-status-of-eu-retained-law/> and P. Craig, 'EUWB: Legal Status and Effect of Retained Law' at <https://ukconstitutionallaw.org/2018/03/08/paul-craig-european-union-withdrawal-bill-legal-status-and-effect-of-retained-law/>.

the government's intention was that this would apply to law retained via sections 3 and 4, and would not apply to EU law that had already been incorporated into domestic law via section 2, this was not clear from the wording of section 5(2).⁴⁵ The HLCC's second critique was that the government's avowed intent was that the supremacy principle preserved in section 5(2) would be applicable in relation to any enactment or rule of law passed or made before exit day, including thereby common law rules as well as statutes. This was, said the HLCC, problematic because the common law emerges and develops. It was therefore difficult to regard it as having been 'made' on a particular date.⁴⁶ The HLCC's third critique was more far-reaching. It stated that 'maintaining the "supremacy principle" following exit amounts to a fundamental flaw at the heart of the Bill,'⁴⁷ since 'following exit, there will be no "EU law" within the domestic legal system',⁴⁸ it will have been converted into UK law via sections 2–4 EUWA.

There is undoubtedly force in the preceding HLCC analysis. It is, nonetheless, important to keep the issue covered by section 5(2) in perspective.⁴⁹ Post-Brexit it is unlikely that we are going to discover a closet full of inconsistencies between EU law and pre-existing UK law. The UK has always been rather good at implementing EU law, and if there were such inconsistencies there would have been a Commission enforcement action under Article 258 TFEU, or an individual would have sought a preliminary reference under Article 267 TFEU.

There must, nonetheless, be some way of dealing with the issue should it arise. The HLCC's solution was to invest all EU direct retained law with the status of primary legislation. This was not adopted in the EUWA, and would have been problematic for the reasons set out above. The issue could, however, have been addressed without resort to the language of the supremacy of EU law. Thus, a replacement for clause 5(2) could have read as follows: if, on or after exit day, there is any inconsistency between measures that have been made part of UK law through sections 2, 3 or 4, and a UK enactment or rule of law in force before exit day, priority shall be accorded to the former over the latter. The EUWA, nonetheless, retained the language of supremacy in section 5(2). It means that if there is a conflict between pre-exit domestic legislation and retained EU law, the latter takes precedence; it also means that pre-exit domestic law should be interpreted, as far as possible, in accordance with EU law.⁵⁰

Section 5(1) will, moreover, require modification in the light of the Withdrawal Agreement. Article 4(1) invests its provisions, and the provisions of EU

45 HLCC n 26 above at [81]–[83].

46 *ibid* at [86]–[87].

47 *ibid* at [89].

48 *ibid* at [88].

49 The scope of EUWA, ss 5(2)–(3) is limited by Schedule 1, para 5(2).

50 This probably includes the *Marleasing* principle, which would, in any event, feature as part of retained case law for the purposes of s 6(3). For further discussion see, A. Young, 'Status of EU Law Post Brexit: Part Two' UK Const L Blog 4 May 2017 at <https://ukconstitutionallaw.org/2018/05/04/alison-young-status-of-eu-law-post-brexit-part-two/>.

law made applicable by the agreement, with the same legal effects as they would have in the EU and the Member States. Direct effect and the supremacy of EU law therefore continue to apply post-exit day during the transitional period, which is presently scheduled to run until 31 December 2020.

Charter of Rights and general principles of law

The EUWA Provisions

The EUWA strategy of bringing the EU legal *acquis* into UK law does not apply to the EU Charter of Rights. The EUWA provides as follows:

First, the Charter of Fundamental Rights is not part of domestic law on or after exit day.⁵¹ Secondly, the exclusion of the Charter is, however, said not to affect ‘the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter’.⁵² Thirdly, general principles of EU law can be part of domestic law after exit day, provided that they were thus recognised by the CJEU before exit day.⁵³ Fourthly, there is, however, no right of action in domestic law, on or after exit day, based on a failure to comply with general principles of EU law;⁵⁴ and no court, tribunal or other public authority may, on or after exit day disapply or quash any enactment or other rule of law, or quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any general principle of EU law.⁵⁵ These complex EUWA provisions are unsatisfactory, when viewed from the perspectives of principle and application.

The Charter and Rights: Principle

From the perspective of principle, the treatment of the Charter is an unwarranted exception to the EUWA strategy of bringing the entire *acquis* of EU law into domestic law.⁵⁶ The official explanation for not retaining the Charter was that it did not create new rights, but merely affirmed existing EU rights and principles, and therefore by converting the EU *acquis* into UK law, those underlying rights and principles would be converted into UK law, as provided for in the EUWA. References to the Charter in the domestic and CJEU case law which is being retained are to be read as if they referred to the corresponding fundamental rights.⁵⁷

51 EUWA, s 5(4).

52 EUWA, s 5(5). References to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles.

53 EUWA, Sched 1, para 2.

54 EUWA, Sched 1, para 3(1).

55 EUWA, Sched 1, para 3(2).

56 Bingham Centre Report, n 43 above, 33–38; N. Bamforth, M. Campbell, P. Craig, S. Fredman and A. Young, ‘The EU Charter after Brexit, Oxford Human Rights Hub’ at <http://ohrh.law.ox.ac.uk/>; A. Lang, V. Miller and J. Simson Caird, ‘EU (Withdrawal) Bill: The Charter, general principles of EU law, and ‘Francovich’ damages’ House of Commons Briefing Paper, Number 8140, 17 November 2017.

57 EUWA EN, n 9 above at [106].

There is, however, a marked difference between retention of particular rights singularly, in a disaggregated manner, as compared to their inclusion in a separate rights-based document. If the latter had been done in relation to the Charter, it would then have been for Parliament to decide whether it wished to retain, amend or repeal it. It is, moreover, uncertain whether all Charter rights and principles will be retained through a combination of sections 4 and 6 of the EUWA.⁵⁸ There are considerable uncertainties in this respect, as is apparent from the analysis of the Joint Committee on Human Rights.⁵⁹

Retention might well give rise to difficulties, since it would be odd for a legal system to have two domestic bills of rights, and there would be problems of fit between the Charter and the HRA. The decision to exclude the Charter was nonetheless regrettable, since if it had been treated as other parts of the EU *acquis*, Parliament could then have decided whether, for example, to modify the HRA by incorporating Charter rights that are not presently included in it, or whether to retain a modified Charter as the principal rights-based instrument.

The Charter and Rights: Application

From the perspective of application, the EUWA provisions generate complex legal issues for litigants and courts alike. The decision not to incorporate the Charter may well have been influenced by dislike in some circles of rights-based instruments that constrain governmental freedom of action. The cost of this, in terms of future legal uncertainty, is nonetheless considerable.

The relationship between sections 5(4)–(5) of the EUWA is crucial: the Charter is not part of UK law, but this does not affect the retention in UK law in accordance with the EUWA of any fundamental rights or principles that exist independently of the Charter. It is, therefore, necessary, in accord with section 5(5), to identify the rights or principles that might still be retained in UK law post-exit, notwithstanding that the Charter is not retained. They would form part of UK law principally via sections 4 and 6 of the EUWA.

The EU Charter of Rights was, as recognised in the Explanatory Notes,⁶⁰ said to be declaratory of existing EU law, and not constitutive of new powers or competences.⁶¹ This was reaffirmed by the Lisbon Treaty.⁶² Whether this was so may well be debatable.⁶³ There are then three possible interpretations of the rights that can be retained via section 5(5).⁶⁴

58 HC Briefing Paper 8140, n 56 above, 14–15.

59 Joint Committee on Human Rights, 'Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis' HL 70, HC 774 (26 January 2018).

60 EUWA EN, n 9 above at [106].

61 Charter of Fundamental Rights of the European Union [2007] OJ C303/1; Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17. The Charter was reissued with the Lisbon Treaty, [2010] OJ C83/2, Preamble, Art 51(2).

62 Art 6(1) TEU; Declaration 1 concerning the Charter of Fundamental Rights of the European Union.

63 P. Craig, *EU Administrative Law* (Oxford: OUP, 3rd ed, 2018) 508–511.

64 The definition of retained EU case law in EUWA, s 6(7) precludes reliance on such case law that is excluded via s 5 or Sched 1. The key issue is, however, as to the very ambit of s 5(5).

The broadest interpretation would be that all Charter rights and principles can be regarded, in the language of section 5(5) of the EUWA, as existing irrespective of the Charter, since the Charter was declaratory of existing law. A narrower view would be that section 5(5) legitimates recourse to the fundamental rights and principles as recognised in the CJEU's jurisprudence, prior to the Charter. This jurisprudence was not touched or overruled by the Charter. This interpretation of section 5(5) would require elaboration of the rights recognised in that jurisprudence. A further possible interpretation of section 5(5) would be intermediate between the first and the second: it would sanction retention in UK law not only of the rights recognised in the CJEU's fundamental rights' case law, but also Charter rights for which provision was also made in the Treaty. Rights of this latter kind would, in the language of section 5(5), exist irrespective of the Charter, and special provision was made for Treaty rights that were replicated in the Charter.⁶⁵ Many are identified in the Explanatory Notes as rights that will be retained pursuant to section 4 EUWA.⁶⁶

The Explanatory Notes incline to the broad view.⁶⁷ If this is the intent and legal effect of sections 5(4)–(5) then it calls into question the legislative strategy, which is to exclude the Charter from the front door, while including all rights and principles therein via the back door. The effect of the rights retained pursuant to section 5(5) in the domestic legal order is also problematic. The Explanatory Notes state that 'EU law which is converted will continue to be interpreted in light of those underlying rights and principles'.⁶⁸ However, when we leave the EU, the rights preserved via section 5(5) will be part of UK law. They will, therefore, be applicable to all UK law, not merely to other EU law that is 'converted' pursuant to sections 3–4.⁶⁹

General Principles of EU Law: Status and Effect

The law post-exit is further complicated by the EUWA provisions on general principles of law, which are regarded as part of UK law, provided that they were so recognised by the CJEU prior to exit day. These principles cannot, however, be used as a cause of action, nor can they be the ground for annulment of any enactment or rule of law post-exit.⁷⁰ There are important issues concerning the scope and effect of these provisions.

In relation to scope, the EUWA starting point is that general principles of EU law are retained in UK law post-Brexit. This presumptively means all such general principles recognised by the CJEU, including due process, proportionality, legitimate expectations, fundamental rights, equality and the

65 Charter, n 61 above, Art 52(2). See Craig, n 63 above, 522–528 for analysis of the interpretive difficulties flowing from Art 52(2).

66 EUWA EN, n 9 above at [94].

67 *ibid* at [107].

68 *ibid* at [107].

69 The point in the text is not affected by s 6(7), which defines retained EU case law in terms of its applicability to retained EU law in ss 2–4. The effect of rights preserved in UK law via s 5(5), and the extent to which EU case law referring to those rights can be relied on, are separate issues.

70 EUWA, Sched 1, paras 2–3.

precautionary principle.⁷¹ The legal effect of such principles, whatever it might be, will attach to all UK law, not merely to EU law retained pursuant to sections 2–4. The general principles thus retained become part of UK law post exit, as do the legal norms retained via sections 2–4. There is nothing in the EUWA to suggest that the general principles are only pertinent to the terrain covered by sections 2–4, and the limit placed on the legal effect of general principles in Schedule 1, paragraph 3 is predicated on the assumption that general principles are applicable to all UK law.

There are, moreover, issues concerning the scope of application of particular general principles of law, such as fundamental rights and proportionality. Prior to the Charter, fundamental rights were conceptualised in EU law as one type of general principle of law. This raises issues concerning the relationship between Schedule 1, paragraph 2 and section 5(5), since the former, by its wording, retains fundamental rights as a general principle of law, a status that was not overridden by the Charter. It would seem to follow that whatever the interpretation of section 5(5), the Charter rights that were hitherto recognised as fundamental rights in the CJEU case law, will be part of UK law via Schedule 1, paragraph 2 as general principles of law. There are equally difficult issues concerning proportionality. It is a general principle of law and therefore comes within Schedule 1, paragraph 2. Proportionality is not, however, at present recognised as a general ground of review in UK law. It therefore remains to be seen whether whatever legal effect is afforded to it in relation to EU law is retained via sections 2–4.

This leads directly to consideration of the legal effect of general principles. Their legal force is emasculated through Schedule 1, paragraph 3, since they cannot ground a cause of action, nor can they form the basis for annulment or disapplication of an enactment, rule of law or other conduct post-exit. The rationale for this limit is explicable, given that in the EU hierarchy of norms general principles of law sit below the Treaties and above all else. They can therefore be used to interpret and invalidate EU legislation. This would not fit with the UK constitutional tradition of parliamentary sovereignty. This explains the limits in Schedule 1, paragraph 3, so far as UK primary legislation is concerned, although it does not do so insofar as it precludes recourse to general principles of law in judicial review actions that relate to executive conduct and the like. There will, furthermore, be considerable difficulties in disaggregating the meaning of a right that has been elaborated in part via Charter case law and in part independently thereof as a general principle of law.

It would seem, therefore, that general principles of law can only operate as interpretive guides to legislators, administrators and courts. It will be for the courts, acting pursuant to section 6(3) of the EUWA, to decide what interpretive weight to accord to general principles of law that have become part of the UK legal order as a result of Schedule 1, paragraph 2. The UK courts remain free, moreover, to develop principles of judicial review as they have done hitherto. They could, therefore, if they so wish, use a general

71 T. Tridimas, *The General Principles of EU Law* (Oxford: OUP, 2nd ed, 2006); Craig, n 63 above.

principle of law as the catalyst for developing domestic grounds of judicial review.

Legal challenge to the validity of retained law

The EUWA is designed, *inter alia*, to provide certainty as to the UK legal rulebook when the UK leaves the EU. This is the rationale for the limitations placed on legal challenges to retained law: there is no right in domestic law on or after exit day to challenge retained EU law on the basis that, immediately before exit day, an EU instrument was invalid.⁷² This is not applicable if the CJEU has decided before exit day that the instrument is invalid; or if the challenge is of a kind described, or provided for, in regulations made by a Minister of the Crown.⁷³ There were governmental statements to the effect that such regulations would enable challenge to secondary legislation via judicial review. It remains to be seen whether such regulations are made, and there is, in any event, the recurring problem that law retained via section 3 is not classified as primary/secondary legislation.⁷⁴ There are, moreover, as will be seen, tensions between Schedule 1, paragraph 1, and section 6(3).

Legal Challenge based on *Francovich*

The EUWA stipulates that there is no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*.⁷⁵ It will, therefore, not be possible to claim damages post-exit, on the ground that the UK failed to apply EU law as it was obliged to do, even if the failure occurred pre-exit. The same is true in relation to other facets of the *Francovich* principle. Thus, misapplication or misinterpretation of EU law of a kind that could have founded such a damages claim will no longer be available. This does not alter the point made earlier, which is that the legal rules retained in UK law via sections 2–4 *prima facie* come with the attendant rights. Thus, insofar as such legal rules satisfied the conditions for direct effect in EU law, individuals would continue to derive rights therefrom in the UK legal order, subject to anything to the contrary in the EUWA or later UK legislation.

INTERPRETATION OF RETAINED LAW: SECTION 6

Sections 2–4 EUWA delineate the contours of the law that is retained from the EU. Section 6 addresses the way in which that law is to be interpreted by UK courts.

⁷² EUWA, Sched 1, para 1(1).

⁷³ EUWA, Sched 1, para 1(2).

⁷⁴ HC Briefing Paper 8140, n 56 above, 25–26.

⁷⁵ EUWA, Schedule 1, para 4.

Post-exit case law from EU courts

Section 6(1) embodies the logical consequence of leaving the EU: a court or tribunal is not bound by any principles laid down, or any decisions made, on or after exit day by the CJEU, and cannot refer any matter to it on or after exit day. The logic of section 6(1) is, however, qualified by the logic of the Withdrawal Agreement, which provides, *inter alia*, for a transitional period until 31 December 2020, with the possibility of one further extension thereafter, and for further linkage to EU law if a trade agreement has not been finalised to obviate the need for the backstop. The CJEU has continued jurisdiction and its decisions are binding during these periods.⁷⁶

Section 6(2) deals with the extent to which the UK courts may have regard to any post-exit EU case law. Many thousands of EU laws will be retained pursuant to sections 2–4 of the EUWA. These rules will continue to exist in the EU and will be interpreted by the EU courts. While the logic of exit from the EU demands that we should not be bound by such post-exit CJEU rulings, hence section 6(1), such rulings may be uncontroversial and helpful for UK courts when interpreting the same rules that have been retained in UK law.

The basic idea of section 6(2) is, therefore, to accord the UK courts discretion to take cognizance of such rulings, and anything done by other EU entities, that may affect such retained law. The precise wording of this section was, however, controversial. The formulation in the Bill was that a UK court could have regard to such EU jurisprudence, if it considered it appropriate to do so. This was criticised by members of the judiciary who felt that the word ‘appropriate’ gave insufficient guidance to the courts.

Section 6(2) was, therefore, changed and now provides that, subject to sections 6(3)–(6), ‘a court or tribunal may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal’. The key criterion is, therefore, relevance. There will, inevitably, be instances where UK judges disagree as to application of this criterion, but this would be so for any alternative criteria. The UK courts should, for the reason set out above, have discretion to draw on such case law, and the criterion of relevance is preferable to that of appropriateness.

It might be argued, by way of response, that section 6(2) is otiose, since UK courts can, if they so wish, refer to case law from any court, and require no statutory authorisation. There is some force to this point. The reality is that reference to EU jurisprudence in a post-Brexit world is different. We will be retaining the self-same provisions in UK law, and therefore it is more likely that UK courts might derive assistance from EU case law. This is more especially so where the UK commits to a regime of ‘equivalence’ with EU regulations, which will be jeopardised if UK law departs to any significant degree from the interpretation afforded to the EU rules. The statutory authorisation to draw on CJEU case law post-exit will, moreover, give the UK courts legitimacy

⁷⁶ See, for example, Withdrawal Agreement, n 6 above, Arts 4, 86–87, 89, 90, 131, 158, 160, 174; Protocol in relation to Northern Ireland, Arts 14, 15.

when they do so, and help to shield them from criticism from those who might disapprove of such linkage.

Pre-exit law from UK and EU courts

The focus in section 6(3) of the EUWA is on the use of EU and domestic case law decided prior to exit, when interpreting retained EU law:

Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it—

- (a) in accordance with any retained case law and any retained general principles of EU law, and
- (b) having regard (among other things) to the limits, immediately before exit day, of EU competences.

Retained case law is defined by section 6(7). It covers retained domestic case law, and retained EU case law. Retained domestic case law means any principles laid down by, and any decisions of, a court or tribunal in the UK, as they have effect immediately before exit day and so far as they relate to anything to which sections 2–4 apply, provided that they are not excluded by section 5 or Schedule 1, and subject also to the caveat that the principles and decisions have not been modified by the EUWA or other domestic law. Retained EU case law is defined in the same way, thus covering principles and decisions of the EU courts as they have effect in EU law immediately before exit day and so far as they relate to anything to which sections 2–4 applies. This is subject to the same exclusions based on section 5 or Schedule 1, and the same caveat that the principles and decisions have not been modified by the EUWA or other domestic law. Retained general principles of EU law are defined in the same terms.

Section 6(3) therefore legitimates reference to EU and domestic case law decided prior to exit, and to general principles of law elaborated prior to exit, on or after exit day when determining the validity, meaning or effect of law that has been retained pursuant to sections 2–4 insofar as it is unmodified and insofar as the retained case law is relevant. Section 6(6) further provides that section 6(3) does not prevent the validity, meaning or effect of any retained EU law that is modified on or after exit day from being decided as provided in section 6(3) if doing so is ‘consistent with the intention of the modifications’.

Sections 6(3) and (6) are, however, subject to section 6(4). It states that the Supreme Court is not bound by any retained EU case law; nor is the High Court of Justiciary in the circumstances defined in the Act; and no court or tribunal is bound by any retained domestic case law that it would not otherwise be bound by. Section 6(5) further provides that in deciding whether to depart from any retained EU case law, the Supreme Court, or the High Court of

Justiciary, must apply the same test as it would apply in deciding whether to depart from its own case law.

There are important questions concerning the scope of sections 6(3) and section 6(6). The paradigm use of section 6(3) may well be, as indicated in the Explanatory Notes, to legitimate purposive interpretation of retained EU law in accord with case law and general principles of law decided prior to exit, where the meaning of the particular retained law is unclear.⁷⁷ When we move beyond this, the application of this section becomes more contestable. Thus, the Explanatory Notes also state that section 6(3) ‘means applying an interpretation that renders the provision of EU law compatible with the treaties and general principles of EU law’.⁷⁸ It may seem odd for retained law to be interpreted to be consistent with the Treaties that we have just departed from. This is, however, a consequence of the fact that law retained via sections 2–4 was made pursuant to the Treaties, combined with the fact that the retained case law to which section 6(3) refers would, perforce, have been decided against the backdrop of the constituent Treaties. Difficult cases will, moreover, come before the courts concerning section 6(6), which extends section 6(3) to cases where the retained EU law has been modified, provided that this is ‘consistent with the intention of the modifications’. Leaving aside the nice issue as to whether a modification can have an intention, there will assuredly be room for considerable argument as to the divination of that intention when the retained EU law is modified.

There are also important questions concerning the fit between Schedule 1, paragraph 1(1) and section 6(3). The former states, as we have seen, that there is no right in domestic law, on or after exit day, to challenge any retained EU law on the basis that, immediately before exit day, an EU instrument was invalid, where that has not already been decided by the EU courts. Section 6(3) is however framed, *inter alia*, in terms of the validity of retained EU law: the courts are instructed to decide questions as to the validity of any retained EU law in accordance with retained case law and retained general principles of EU law, the assumption being that the issue can arise on or after exit day. The validity challenge is based on retained case law and the principles contained therein; it is not dependent on this body of law having actually been applied to the particular norm of retained EU law that is before the court in the instant case. The tension between the two provisions is palpable. Schedule 1, paragraph 1(1) is designed to foster legal certainty by proscribing challenges post-exit that EU retained law was invalid before exit. Section 6(3) instructs courts to decide challenges to the validity of unmodified retained EU law in the light of retained case law; the very fact that the retained EU law is unmodified and the very definition of retained case law mean that the invalidity must have existed prior to exit, which is the very type of challenge that Schedule 1, paragraph 1(1) seems designed to prevent.

⁷⁷ EUWA EN, n 9 above at [111].

⁷⁸ *ibid* at [111].

**EXECUTIVE POWER TO MAKE REGULATIONS: SECTIONS 8, 9, 23,
AND SCHEDULE 8**

The EUWA contains a number of provisions that give the executive powers to make regulations, the principal provisions of the Act being sections 8, 9, 23, and Schedule 8.

Section 8: regulations to remedy deficiencies

The EUWA accords extensive power to the executive to remedy deficiencies in retained EU law so that it is fit for purpose on exit day.

The Expansive Dimension: Ministerial Power and the List

Section 8(1) accords a minister broad powers to deal with deficiencies arising from withdrawal. He or she can, by regulations, make such provision as the ‘Minister considers appropriate to prevent, remedy or mitigate’ any ‘failure of retained EU law to operate effectively’, or ‘any other deficiency in retained EU law’, arising from the withdrawal of the United Kingdom from the EU.⁷⁹ This power is reinforced by section 8(5), which contains a Henry VIII clause: regulations made under section 8(1) can make any provision that could be made by an Act of Parliament, subject to the limits set out in section 8(7). The list of possible deficiencies in section 8(2) augments the ministerial discretion accorded by section 8(1):

- (2) Deficiencies in retained EU law are where the Minister considers that retained EU law—
- (a) contains anything which has no practical application in relation to the United Kingdom or any part of it or is otherwise redundant or substantially redundant,
 - (b) confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to the United Kingdom or any part of it,
 - (c) makes provision for, or in connection with, reciprocal arrangements between—
 - (d) the United Kingdom or any part of it or a public authority in the United Kingdom, and
 - (e) the EU, an EU entity, a member State or a public authority in a member State, which no longer exist or are no longer appropriate,
 - (f) makes provision for, or in connection with, other arrangements which—
 - (g) involve the EU, an EU entity, a member State or a public authority in a member State, or
 - (h) are otherwise dependent upon the United Kingdom’s membership of the EU, and which no longer exist or are no longer appropriate,

⁷⁹ EUWA, s 8(1)(a)–(b).

- (i) makes provision for, or in connection with, any reciprocal or other arrangements not falling within paragraph (c) or (d) which no longer exist, or are no longer appropriate, as a result of the United Kingdom ceasing to be a party to any of the EU Treaties,
- (j) does not contain any functions or restrictions which—
- (k) were in an EU directive and in force immediately before exit day (including any power to make EU tertiary legislation), and
- (l) it is appropriate to retain, or
- (m) contains EU references which are no longer appropriate.

Lest there be any doubt, section 8(3) further provides that there is also a deficiency in retained EU law where the minister considers that there is anything in retained EU law which is similar to the deficiencies listed in section 8(2), or there is a deficiency in retained EU law of a kind described, or provided for, in regulations made by a minister. It is therefore open to a minister to create new heads of deficiency in such regulations, subject to the limits set out below, and such regulations partake of the Henry VIII power in section 8(5).

The expansive dimension to ministerial power is further reinforced by section 8(9), which provides that the power in section 8(1) can be triggered by a deficiency arising from withdrawal ‘taken together with the operation of any provision, or the interaction between any provisions, made by or under this Act’. Section 8(6) is also pertinent. It empowers the making of regulations under section 8(1) to shift functions currently exercised by EU entities or public authorities in member states to be exercisable instead by a public authority in the UK, or to be replaced, abolished or otherwise modified.

The Limiting Dimension: Qualifications to Ministerial Power

There are, however, temporal and substantive limits to the regulations made under section 8(1).⁸⁰ Section 8(8) contains a sunset clause, which precludes the making of regulations under section 8(1) two years after exit day. The substantive limits are found in section 8(7). Regulations under section 8(1) may not: impose or increase taxation or fees; make retrospective provision; create a relevant criminal offence; establish a public authority; be made to implement the withdrawal agreement; amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it; or amend or repeal the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998, subject to certain limited qualifications.

Section 9: regulations implementing withdrawal

Section 9 also accords the executive wide-ranging executive power to deal with implementation of the Withdrawal Agreement. Thus, section 9(1) provides that a minister can, by regulations, make such provision as the minister considers

⁸⁰ EUWA, s 8(4) provides that retained EU law is not deficient merely because it is not modified.

appropriate for the purposes of implementing the Withdrawal Agreement if the minister considers that such provision should be in force on or before exit day. This power is subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the EU. Section 9(2) contains another Henry VIII clause, stating that regulations under section 9 can make any provision that could be made by an Act of Parliament. However, section 9 powers are subject to a sunset clause, and cannot be exercised after exit day,⁸¹ and section 9(3) imposes the same qualifications to exercise of ministerial power as those contained in section 8(7).

Section 23: consequential and transitional regulations

The EUWA accords the executive broad powers to make consequential and transitional provisions. Section 23(1) provides that a minister may by regulations make such provisions as the minister considers appropriate in consequence of the EUWA. This power has a Henry VIII dimension to it, insofar it can be used to modify primary legislation until the end of the session in which the EUWA is enacted.⁸² The power is subject more generally to a 10 year sunset clause.⁸³ A minister is also empowered to make such transitional provisions as are felt to be appropriate,⁸⁴ which can be used, *inter alia*, to deal with issues flowing from repeal of the ECA.⁸⁵

Schedule 8: pre-existing and future powers to make regulations

The ministerial powers to make regulations discussed thus far are ‘purpose built’ for the EUWA. It, however, also contains provisions enabling ministers to use pre-existing statutory powers in order to make regulations under the EUWA, and to deploy such statutory powers that will be made in the future, including Henry VIII powers. The provisions set out below are, moreover, expressly said not to preclude the conferral of wider powers.⁸⁶

Thus, any power to make, confirm or approve subordinate legislation that was conferred before the EUWA was enacted, which can be used to amend or repeal an enactment in primary legislation, is to be read, ‘so far as the context permits or requires’, as being capable of being exercised to modify any retained direct EU legislation, or anything retained via section 4.⁸⁷ Where a pre-existing power to make subordinate legislation is not capable of amending primary legislation, it can still be used to modify direct minor EU legislation, so far as the context permits or requires, and so far as is consistent with retained

81 EUWA, s 9(4).

82 EUWA, ss 23(2)–(3).

83 EUWA, s 23(4).

84 EUWA, s 23(6).

85 EUWA, Sched 7, paras 23(3)–(4).

86 EUWA, Sched 8, paras 8(1)(a), 12(1)(a).

87 EUWA, Sched 8, para 3(1), subject to limits for Northern Ireland in para 3(2).

direct principal EU legislation, or anything retained via section 4.⁸⁸ It can, in addition, be used to modify retained direct principal EU legislation, or anything retained via section 4, so ‘so far as the modification is supplementary, incidental or consequential in connection with any modification of retained direct minor EU legislation’.⁸⁹

There is, in addition, provision for the application of future powers to make subordinate legislation to EU law retained via the EUWA. Thus, any power to make, confirm or approve subordinate legislation conferred after passage of the EUWA can be used to modify retained direct minor EU legislation, provided that it is consistent with retained direct principal EU legislation or anything retained via section 4.⁹⁰ It can also be used to modify retained direct principal EU legislation, or anything retained by section 4, so far as the modification is supplementary, incidental or consequential in connection with modification of retained direct minor EU legislation.⁹¹ There is provision enabling the use of powers to make transitional, or saving provision, to be exercised to modify any retained direct EU legislation, or anything retained by virtue of section 4.⁹² The EUWA in effect further stipulates that future Henry VIII powers to make subordinate legislation that amends or revokes primary legislation can be exercised in relation to retained direct principal EU legislation,⁹³ and that it can also be used to modify such legislation other than by amendment or revocation.⁹⁴

LEGISLATIVE OVERSIGHT OF EXECUTIVE POWER: SCHEDULE 7

The preceding provisions accord the executive very considerable power to make regulations pertaining to withdrawal. This accretion of ministerial power was to some extent inevitable, given the volume of retained EU law, combined with the temporal exigency of ensuring that it was fit for purpose on exit day. There was, nonetheless, justified disquiet at the expansion of executive power, coupled with the need to ensure adequate opportunity for parliamentary scrutiny of draft regulations.⁹⁵ The relevant rules on such scrutiny are contained in Schedule 7. It is long and complex, in part because of the need to address the devolved legislatures, as well as the Westminster parliament.⁹⁶ The present analysis focuses on the procedures in the UK parliament. The relevant provisions will be explicated and then evaluated. Consideration of the position of the devolved legislatures will, as stated earlier, be undertaken in a separate article.

88 EUWA, Sched 8, paras 5(1)–(2).

89 EUWA, Sched 8, para 5(3).

90 EUWA, Sched 8, para 10(2).

91 EUWA, Sched 8, para 10(3).

92 EUWA, Sched 8, para 4.

93 EUWA, Sched 8, para 11(1).

94 EUWA, Sched 8, para 11(2).

95 See, for example, HLCC, n 26 above at [207]–[233]; House of Commons Procedure Committee, Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: Interim Report HC 386 (November 2017); House of Lords, Select Committee on the Constitution, The ‘Great Repeal Bill’ and Delegated Powers HL 123 (2017).

96 EUWA, Sched 7 covers 22 pages of the statute book.

EUWA Regulations: general procedural obligations

Schedule 7 contains different rules for legislative oversight of regulations made under separate sections of the Act. There are, however, also procedural obligations that pertain to all regulations made under sections 8(1), 9, 23(1), and Schedule 2, paragraphs 1(2) and 12(2), to which the following duties attach before the draft regulation is laid before each House of Parliament.⁹⁷

First, the minister must make a statement to the effect that in the minister's opinion the draft regulation does no more than is appropriate; that there are good reasons for it; and that the provision made by the draft regulation constitutes a reasonable course of action. Secondly, the minister must explain whether the proposed instrument amends, repeals or revokes any equality legislation, and if it does, the minister must explain the effect of this. Thirdly, it is for the minister to explicate the effect, if any, of the proposed regulation on retained EU law. Fourthly, if a draft regulation creates a criminal offence it is incumbent on the minister to explain why there are good reasons for doing so. If the minister fails to make such a statement as required before the instrument or draft is laid, the minister must make a written statement thereafter explaining why this was not done.

Section 8 regulations: the default position – the negative resolution procedure plus sifting

The default position is that regulations to address deficiencies from withdrawal made under section 8(1) are subject to the negative resolution procedure; it is for either House of Parliament to vote the measure down in order to prevent it from becoming law.⁹⁸ There are, however, conditions that are applicable before this procedure can be invoked.⁹⁹ A minister cannot make an instrument so that it is subject to that procedure unless 'condition 1' is met, combined with either 'condition 2 or 3'.¹⁰⁰

Condition 1 is that a minister must make a written statement to the effect that it is the minister's opinion that the instrument should be subject to annulment by resolution of either House of Parliament; and the minister must lay before each House of Parliament a draft of the instrument, combined with a memorandum setting out the statement and the reasons for the minister's opinion.

Condition 2 is that a sifting committee of the House of Commons and a sifting committee of the House of Lords, have within the relevant period, each made a recommendation as to the appropriate procedure for the instrument. Condition 3 is that the relevant period has ended without condition 2 being met.¹⁰¹

⁹⁷ EUWA, Sched 7, para 28. There are analogous obligations where the draft regulation creates a sub-delegated power, Sched 7, para 30.

⁹⁸ EUWA, Sched 7, para 1(3).

⁹⁹ EUWA, Sched 7, para 1(4).

¹⁰⁰ EUWA, Sched 7, paras 3(2)–(5).

¹⁰¹ EUWA, Sched 7, paras 3(10)–(11), the basic period being 10 days.

If either sifting committee recommends that the affirmative resolution procedure should be used, whereby parliament would have to approve the measure, rather than the negative resolution procedure proposed by the minister, then if the minister wishes to persist with the latter procedure he or she must make a statement explaining why the minister disagrees with the committee before the instrument is made, or failing that must make the statement thereafter.¹⁰²

Section 8 regulations: the exception – the affirmative procedure

There are instances where the affirmative resolution procedure is mandated, requiring a resolution of each House of Parliament. These are specified in Schedule 7, paragraph 1(2):

(2) Provision falls within this sub-paragraph if it—

- (a) provides for any function of an EU entity or public authority in a Member State of making an instrument of a legislative character to be exercisable instead by a public authority in the United Kingdom,
- (b) relates to a fee in respect of a function exercisable by a public authority in the United Kingdom,
- (c) creates, or widens the scope of, a criminal offence, or
- (d) creates or amends a power to legislate.

The affirmative procedure is also mandated for regulations coming within section 8(3)(b), which deals with the situation where a minister considers that there is a deficiency of a kind specified in a regulation. This will be relatively rare, since the minister will only have to use section 8(3)(b) for deficiencies that do not otherwise fall within the list in section 8(2), and are not covered by section 8(3)(a).

Section 8 regulations: the qualification – urgent cases

The rules on use of the affirmative procedure are qualified in cases of urgency. These qualifications operate in cases where the affirmative procedure would be applicable because mandated by Schedule 7, paragraph 1(2), or because an instrument subject to the negative procedure has been moved to the affirmative procedure as a result of sifting. The affirmative procedure can be dispensed with if the minister makes a declaration that for reasons of urgency it is necessary to make the regulations without a draft being laid and approved.¹⁰³ If this occurs, the regulation must, however, be laid before each House of Parliament after it has been made. It ceases to have effect unless approved by resolution of each House of Parliament in 28 days, although this does not affect the validity of anything done previously under the regulations, nor does it prevent the making of new regulations.¹⁰⁴

¹⁰² EUWA, Sched 7, paras 3(6)–(8).

¹⁰³ EUWA, Sched 7, paras 5(2), 34.

¹⁰⁴ EUWA, Sched 7, paras 5(3)–(6).

There are also rules concerning urgency where the negative resolution procedure is applicable. The effect is to displace the sifting process. Thus, if the minister affirms his or her belief that the negative resolution procedure is appropriate, and then makes a declaration that the regulation must be made urgently, the sifting process is displaced.¹⁰⁵

Section 9 regulations: default negative procedure, exception for affirmative procedure

Schedule 7 specifies the legislative scrutiny procedures for situations other than regulations made under section 8. Thus, for example, a regulation changing the date of exit is subject to the affirmative resolution procedure.¹⁰⁶ Space precludes explication of all such procedures. The procedures concerning the making of regulations under section 9, concerning implementation of the Withdrawal Agreement, do, however, warrant mention here. The legislative approach mirrors that for regulations made under section 8. Thus, the default position is that such regulations are subject to the negative resolution procedure, which is subject to the same rules concerning sifting committees as set out above.¹⁰⁷ The affirmative resolution procedure, whereby the regulation is approved by each House of Parliament, is however mandated for certain types of regulation, such as those that create or amend a power to legislate.¹⁰⁸ There are, moreover, provisions concerning urgency that replicate those applicable to section 8 regulations.¹⁰⁹

Schedule 8 regulations: the applicable legislative procedures

We noted above that ministers can use the power to make subordinate legislation in pre-existing or future legislation in the context of the EUWA. The provisions concerning legislative oversight of such subordinate legislation are complex. The position in brief is as follows. If the subordinate legislation derived from existing legislation amends or revokes retained direct principal EU legislation, it is subject to the same procedure ‘if any’ before parliament, as would apply to that legislation if it were amending or repealing an enactment contained in primary legislation; the same is true in relation to ‘modification’ of retained direct principal EU legislation, and anything contained in section 4 that does not constitute a ‘connected modification’.¹¹⁰ When a power is exercised pursuant to pre-existing legislation and amends retained direct minor EU

¹⁰⁵ EUWA, Sched 7, paras 5(7)–(8).

¹⁰⁶ EUWA, Sched 7, para 14.

¹⁰⁷ EUWA, Sched 7, paras 10(3), 17.

¹⁰⁸ EUWA, Sched 7, para 10(2) contains the full list. The list subjects a regulation that ‘creates, or widens the scope of, a criminal offence’ to the affirmative resolution procedure, but this does not sit easily with s 9(3), which states that regulations cannot be made under s 9 if they ‘create a relevant criminal offence’.

¹⁰⁹ EUWA, Sched 7, para 19.

¹¹⁰ EUWA, Sched 8, paras 4(1)–(2). A connected modification is defined as supplementary, incidental, consequential, transitional, or transitory or saving to another modification of retained direct

legislation it is subject to the same scrutiny procedure ‘if any’ before parliament as for amending subordinate legislation.¹¹¹ There is separate provision as to the applicable procedures for connected modification of retained EU law.¹¹²

Regulations enacted under section 2(2) ECA: affirmative procedure, subject to qualification

The discussion thus far has not touched on the legislative procedures required in relation measures retained via section 2, which covers those measures already incorporated into UK law via section 2(2) of the ECA. The default position is that revocation or amendment of such measures pursuant to a statutory power that existed prior to the 2017–2019 session of Parliament must follow the affirmative procedure unless a higher procedure would apply.¹¹³ There is, in addition, an enhanced scrutiny procedure that is applicable to certain statutory instruments to be laid before parliament, which are made after exit. These requirements are applicable to statutory instruments that amend or revoke subordinate legislation under section 2(2) ECA, which are made by a minister or another authority; are made under a power conferred before the beginning of the 2017–2019 session; and are not subject to a procedure in another legislature.¹¹⁴

Evaluation: accountability and the balance of executive and legislative power

The EUWA gives new meaning to the phrase the ‘devil is in the detail’, given that Schedules 7–8 occupy 34 dense pages of the statute. The ensuing evaluation will be divided into the ‘upside’, the ‘downside’ and the ‘technical’ side.

The upside is that amendments were made by government that enhanced executive accountability and facilitated legislative scrutiny. The principal such changes are the general procedural obligations imposed on a minister when introducing subordinate legislation,¹¹⁵ and the sifting committees introduced for review of draft subordinate legislation dealing with deficiencies in retained law.¹¹⁶ These changes owe much to arguments advanced by the HLCC and those who submitted evidence to it.¹¹⁷

The downside is that the EUWA nonetheless accords very considerable power to the executive in the making of subordinate legislation, and limits legislative oversight. This is so for a number of reasons. First, the government resisted attempts to introduce legislative scrutiny over and above the affirmative

EU legislation or anything that is retained EU law by virtue of s 4 or anything else done under the power, Sched 8, para 4(10).

111 EUWA, Sched 8, paras 4(1)–(2).

112 EUWA, Sched 8, para 4(5).

113 EUWA, Sched 8, para 13.

114 EUWA, Sched 8, para 14.

115 EUWA, Sched 7, para 28. There analogous obligations where the draft regulation creates a sub-delegated power, Sched 7, para 30.

116 EUWA, Sched 7, paras 3(2)–(5).

117 HLCC, n 95 above.

procedure, notwithstanding the existence of such procedures in other spheres.¹¹⁸ Secondly, the role accorded to sifting committees is weaker than that recommended by, for example, the House of Commons Procedure Committee.¹¹⁹ The relative weakness of this legislative oversight is further attested to by the fact that the minister can disagree with the view of the sifting committee where the latter has argued that the affirmative procedure should apply, the only obligation on the minister being to give reasons, either before or after the instrument is made in accord with the negative procedure.¹²⁰ Thirdly, the general procedural obligations are relatively weak where they apply, as exemplified by the fact that failure by a minister to furnish the requisite reasons for an instrument before its passage, generates only an obligation to do so after its passage and failure at that stage leads to no formal sanction at all.¹²¹ Much will therefore depend on ministerial attitude to parliament. Fourthly, the general procedural obligations and the rules on sifting only apply insofar as specified in the EUWA. They are not, therefore, applicable to, for example, subordinate legislation made under pre-existing or future legislation, which is used to bring about change to retained EU law. Finally, the EUWA contains, as noted above, many Henry VIII powers, which will enable subordinate legislation to alter primary legislation, or the equivalent, which is retained direct principal EU legislation.¹²²

The technical side connotes, in part, the sheer weight of detail for any assiduous MP to master when overseeing executive power. This was to some extent inevitable, given the EUWA's purpose. It will, nonetheless, be a formidable burden for those having to navigate this terrain. The technical dimension, however, also encompasses terms that are conceptually problematic. Thus, the EUWA defines 'modify' to include amendment, repeal or revocation.¹²³ There is, however, not infrequent reference to 'modification' of retained law, that is distinct from 'amendment' or 'revocation'. There is no difficulty in distinguishing modification from revocation, but the line between modification and amendment is very problematic. The problems are exacerbated by the further distinction between modification and connected modification.

PARLIAMENTARY APPROVAL OF WITHDRAWAL: SECTION 13

It is fitting to end this article with consideration of section 13, which deals with parliamentary approval of withdrawal. It was the provision that caused most drama during the passage of the Bill, since it concerned Parliament's role in deciding whether the withdrawal agreement should be ratified, and what role it should have if the executive was minded to leave without an agreement. The

118 Legislative and Regulatory Reform Act 2006, ss 12–18.

119 House of Commons Procedure Committee, n 95 above.

120 EUWA, Sched 7, paras 3(6)–(8).

121 EUWA, Sched 7, paras 28(4)–(8).

122 For more general consideration of concerns as to delegation of power, see, House of Lords, Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers*, HL 225 (2018); M. Elliott and S. Tierney, 'House of Lords Constitution Committee Reports on Delegated Powers' UK Const L Blog 20 November 2018 at <https://ukconstitutionallaw.org/>.

123 EUWA, s 20(1).

House of Lords had moved an amendment to the Bill, such that Parliament would have had a greater say in both respects.¹²⁴ This amendment did not survive when the Bill returned to the Commons.

Sections 13(1)–(6): assuming agreement is reached

Sections 13(1)–(6) are premised on the assumption that a Withdrawal Agreement, and some framework future trade relationship, are agreed. Section 13(1) provides as follows:¹²⁵ The Withdrawal Agreement may be ratified only if a minister has laid before each House of Parliament a statement that political agreement has been reached, a copy of the negotiated Withdrawal Agreement, and a copy of the framework for the future relationship; these two documents must be approved by resolution of the House of Commons;¹²⁶ there must be a motion tabled by a minister for the House of Lords to take note of the two documents, and the House of Lords has either debated the motion, or not done so within five days after the Commons resolution; and there must be an Act of Parliament that contains provision for implementation of the Withdrawal Agreement.

If the House of Commons decides not to pass the resolution, then a minister makes a written statement within 21 days as to how the government proposes to proceed with negotiations for the UK's withdrawal from the EU under Article 50(2) TEU.¹²⁷ A minister must then make arrangements for 'a motion in neutral terms, to the effect that the House of Commons has considered the matter of the statement', to be moved in the Commons by the minister within seven days, with an analogous procedure applicable in the House of Lords.¹²⁸

Sections 13(7)–(12): assuming that there is no deal

Sections 13(7)–(9) apply if the Prime Minister makes a written statement before the end of 21 January 2019 that an agreement cannot be reached either on the terms for withdrawal or on the framework for the future relationship between the EU and the UK after withdrawal.¹²⁹ A minister must, within 14 days thereafter, make a written statement as to how the government proposes to proceed, and must make arrangements for a motion in neutral terms, to the effect that the House of Commons has considered the statement, to be considered in a further seven Commons sitting days, with a motion also in the House of Lords to take note of the ministerial statement.¹³⁰

124 L. Maer, European Union (Withdrawal) Bill 2017–19: Commons Consideration of Lords Amendments, House of Commons Briefing Paper 8328, 5 June 2018.

125 EUWA, s 13 does not affect the operation of Part 2 of the Constitutional Reform and Governance Act 2010 (ratification of treaties) in relation to the withdrawal agreement, s 13(14).

126 This should be done, if possible, before the European Parliament votes on the withdrawal agreement, s 13(2).

127 EUWA, ss 13(4)–(5).

128 EUWA, s 13(6).

129 EUWA, s 13(7).

130 EUWA, s 13(8).

Sections 13(10)–(12) replicate the same requirements, the principal difference being that there has been no statement by the Prime Minister before the end of 21 January 2019, but that nonetheless there is, by that date, no agreement in principle on the terms of withdrawal, or on the substance of the framework of the future relationship between the UK and the EU.

Evaluation

There are a number of points to be made about the preceding provisions, the first and most obvious being that the sovereign Parliament made the choice embodied in section 13. Parliament could readily have accorded itself greater power, in line with the amendment proposed by the House of Lords, which would have afforded the House of Commons far greater power over the terms of the withdrawal agreement and framework agreement on future relations, and would also have secured equivalent powers in the event of a no-deal Brexit becoming likely. There were, to be sure, arguments advanced by some MPs against giving Parliament such authority, the principal one being that it would impede the government in its negotiations with the EU. Whatsoever one thinks about this contention, the fact remains that Parliament was unwilling to exert its undoubted sovereign power to ensure that it had a real say on the terms of the deal or no deal. This is regrettable given that, whatever one's views on Brexit, the decision assuredly ranks as one of the most important peace-time decisions to be made by Parliament.

Secondly, Parliament's power rested, in part, on parliamentary rules of procedure. The key issue concerned the extent to which the motion put to the House of Commons could be amended. Substantive motions generally can be amended, while neutral motions generally cannot. The government accepted that the initial vote under section 13(1) would be a substantive motion, which could, therefore, in principle be amended. It sought, however, to persuade the House of Commons to desist from such amendments. This was because the House of Commons could not alter the terms of the Withdrawal Agreement, and because the government sought a clear answer as to whether the negotiated deal was accepted. The government strategy, as revealed in a memorandum on the subject,¹³¹ was therefore that before any amendments were considered, the Commons would first have to decide to reject the Government's motion on the Brexit deal. If the Commons decided to agree the Government's motion, then no further amendments would be voted on, and thus the Brexit deal would

¹³¹ Letter from Dominic Raab, Secretary of State for Exiting EU at [https://www.parliament.uk/documents/commons-committees/procedure/2017-19/Letter-from-the-Secretary-of-State-DEXEU-to-the-Chairman-on-section-13\(1\)-of-the-EU-\(Withdrawal\)-Act-2018.pdf](https://www.parliament.uk/documents/commons-committees/procedure/2017-19/Letter-from-the-Secretary-of-State-DEXEU-to-the-Chairman-on-section-13(1)-of-the-EU-(Withdrawal)-Act-2018.pdf); Parliamentary Approval of the Withdrawal Agreement and the Framework for Future Relations under section 13 of the European Union (Withdrawal) Act 2018 at <https://www.parliament.uk/documents/commons-committees/procedure/2017-19/Memorandum-from-the-Government-on-parliamentary-approval-of-the-Withdrawal-Agreement.pdf>; J. Simson Caird, 'Brexit and the Meaningful Vote: Down the Procedural Raab-it Hole?' UK Const L Blog 22 October 2018 at <https://ukconstitutionallaw.org/>; G. Cowie, A User's Guide to the Meaningful Vote, House of Commons Briefing Paper 8424, 25 October 2018.

be approved ‘clean’. The government strategy was, as Simson Caird notes, for the ‘Commons to say “yes” or “no” before it can say “if” or “but”’.¹³² The volatile nature of the topic was attested to by the fact that the Prime Minister delayed the initial vote under section 13, which was scheduled for 11 December 2018, because it was certain that it would lose. Parliament’s power was, nonetheless, augmented by the Grieve amendment, which ensured that the House of Commons could amend any motion brought to it, if the government were defeated on the first vote, thereby enabling the Commons to present an alternative plan to that proposed by the government.

Thirdly, it is possible that application of section 13 could generate litigation,¹³³ and there may be another avenue through which Parliament can exercise power, at least where there is a Withdrawal Agreement. The conditions for ratification stipulate, *inter alia*, that there must be an Act of Parliament that ‘contains provision for the implementation of the withdrawal agreement’.¹³⁴ Parliament could therefore refuse to enact the statute, with the consequence that the Withdrawal Agreement could not take effect in national law, whatever its effect in international law. The danger is that this might be interpreted, in the context of Article 50(3) TEU, as failure to secure a Withdrawal Agreement, with the consequence that the UK would exit without an agreement at the end of two years.

Fourthly, it is inevitable that Parliament will be making whatever choices it has pursuant to section 13 with highly imperfect knowledge of the consequences of its choice. This is because the ‘framework for the future relationship’ between the UK is, at present, very general and is not binding.¹³⁵ The document is 36 pages in total, as compared to the 599 pages of the Withdrawal Agreement. It is, however, the framework for the future trade relationship that will be more important in the medium and long term, since it will determine the real nature of the trading and security relationship between the UK and the EU. Parliament will, therefore, be making its decision in circumstances where the more important agreement, as judged by its impact on the UK going forward, is little more than outline architectural structure, with the detailed contours unclear. This may suit ardent Brexiteers, but it renders exercise of sovereign parliamentary power something of a chimera.

CONCLUSION

The European Union (Withdrawal) Act 2018 was never going to be a simple piece of legislation. The very decision by a Member State to leave the EU was unprecedented. The EUWA had to do something equally unprecedented. It had to deal with the legal consequences of Brexit, given that the UK and EU

¹³² Simson Caird, n 131 above.

¹³³ R. Craig and G. Phillipson, ‘Could the ‘Meaningful Vote’ End up in Court?’ UK Const L Blog 24 October 2018 at <https://ukconstitutionallaw.org/>.

¹³⁴ EUWA, s 13(1)(d).

¹³⁵ The definition of this phrase is circular and does nothing to assuage these concerns, EUWA, s 13(15).

legal orders have been inter-related since 1972. There was, therefore, always going to be an irreducible degree of complexity in the resulting legislation. This has, however, been exacerbated by the politically charged nature of the exercise, combined with temporal limits within which to secure passage of the legislation. This had consequential implications for consideration of a plethora of issues, such as the status of retained law, the position of the Charter and rights post-exit, legislative oversight of executive power, and legislative power in relation to the final agreement, or as to what should eventuate in the absence of an agreement. Many of these difficult issues will perforce fall to be decided by the courts in a post-Brexit world. Moreover, lest we forget, the European Union (Withdrawal) Act 2018 will merely be the tip of the statutory iceberg of legislative instruments that will be required to give effect to Brexit.

So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights

Catherine Barnard*

The UK's relationship with the Charter of Fundamental Rights of the European Union can at best be described as strained, at worst, actively hostile. The Charter was, for the UK, an unwanted child, unloved at birth, grudgingly tolerated during life, and willingly surrendered at the death of the UK's membership of the EU. This article charts the UK's approach to the Charter from its inception to its demise in the EU (Withdrawal) Act 2018. It considers, in particular, the UK's so-called opt out from the Charter in Protocol 30 and the confusion that has been generated as a result. It then argues that the Charter will have a legacy effect in the UK, primarily through the renaissance of the general principles of law.

INTRODUCTION

The birth of the Charter of Fundamental Rights in 2000 was difficult for the UK. Its transformation into a legal text in 2009 proved even more problematic. The UK got its way on drawing some of the teeth of the Charter through the so-called 'opt-out' Protocol 30, but then miscommunicated the message. During the life of the UK's membership of the EU, the Charter was tolerated. Few British courts made mention of it in their judgments, even fewer made mention of it in references to the Court of Justice. At the end of the UK's relationship with the EU, the Charter was unceremoniously dumped, thus breaking the mould applied in respect of all other parts of EU law, namely its continuity as 'retained EU law' on (Br)Exit day. Attempts were made in the House of Lords to rescue the Charter but they were ultimately unsuccessful.

*Professor of EU and Employment Law, Trinity College, Cambridge. Thanks go to Mark Elliott and Alison Young and to the anonymous referees for their helpful comments.

However, the general principles of law, including the protection of fundamental rights, live on, at least those that were in existence on Brexit day.

This article traces the birth, life and death of the Charter in the UK. It argues that the Charter will continue to have a legacy in the UK; developments under the Charter may continue to shape the judicial interpretation of EU retained law for years to come. This may not have been the intention of the Brexiters.

THE BIRTH: THE CHARTER-UNWANTED AND UNLOVED BY THE UK

The origins of the Charter

The Charter,¹ first solemnly proclaimed in December 2000, was intended to codify existing rights, making them more visible² – rather than creating new rights.³ A large number of the rights were derived from the European Convention on Human Rights, the Community Social Charter 1989 and the Council of Europe's Social Charter 1961.⁴ Others were derived from the constitutional traditions common to the Member States, as general principles of Union law.

The Rights/Principles dichotomy

The UK, with its absence of a written Constitution, let alone a codified Bill of Rights, has always been suspicious of 'rights' documents, despite the fact it was the prime mover behind the drafting of the European Convention on Human Rights. It was particularly concerned about the unique feature of the Charter: that social and economic rights were included in the same document as civil and political rights.⁵ The UK reasoned that while civil and political rights are essentially negative and do not require state resources, economic and

1 On the background to the Charter, see G. de Búrca, 'The drafting of the European Charter of Fundamental Rights' (2001) 26 *EL Rev* 126, K. Lenaerts and E. de Smijter, 'A "Bill of Rights" for the European Union' (2001) 38 *CML Rev* 273.

2 The Cologne Presidency conclusions, 3–4 June 1999 at http://www.europarl.europa.eu/summits/kol2_en.htm#an4 (all URLs last accessed 19 December 2018) at para 44: 'The European Council takes the view that, at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident.' Annex IV added 'The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens.'

3 See, for example, the Preamble to the Protocol 'WHEREAS the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles'.

4 5th Recital to the Preamble to the Charter 2007.

5 See Cologne Presidency Conclusions 1999, Annex IV, n 2 above, 'In drawing up such a Charter account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers

social rights are positive and do. The UK has therefore been most reluctant to talk about economic and social *rights*, preferring instead the word ‘principles’. Principles were not intended to be justiciable; rather, they were ‘factors to be taken into account by courts when interpreting legislation but which do not in and of themselves create enforceable rights’.⁶

To make this point abundantly clear, the UK was behind the move to amend the horizontal provisions of the Charter before it acquired legal effect in the Lisbon Treaty in 2009. A new provision, Article 52(5), was introduced which provided that the provisions of the Charter containing principles ‘may be implemented by legislative and executive acts’ of the Union and the Member States when implementing Union law. Such provisions ‘shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality’. In other words, principles are not directly effective in the national courts.

However, Article 52(5) failed to make clear which provisions contain rights and which principles.⁷ It was thought that the Solidarity Title of the Charter on social rights might contain principles. This would fit with the Constitutional traditions of some Member States, such as Spain and Ireland.⁸ The revised Explanations⁹ were intended to address this problem, giving examples of Charter articles which contained principles, including Article 25 on the rights of the elderly, Article 26 on the integration of persons with disabilities and Article 37 on environmental protection. The Explanations also said that some articles may contain elements of rights and principles, such as Article 23 on equality between men and women, Article 33 on family and professional life and Article 34 on social security and social assistance.

Unfortunately for the UK, two of the provisions in the Solidarity Title which caused British business most concern, Article 28 on the ‘Right of collective bargaining and action’ and Article 30 on ‘the right to protection against unfair dismissal’, appeared to be drafted in terms of rights, not principles, and so were potentially justiciable.¹⁰ The UK has no ‘right to strike’. Instead, trade unions enjoy an *immunity* from being sued in tort where certain conditions are satisfied. From a trade union perspective, a rights-based system is more favourable because, put in simple terms, in such (‘Continental’) systems, strikes are seen as lawful and so the state has to justify any limits on the ‘right’.

(Article 136 TEC), insofar as they do not merely establish objectives for action by the Union.’ For discussion of the difficulty of equating the two groups of rights, see Lord Goldsmith, ‘A Charter of Rights, Freedoms and Principles’ (2001) 38 CML Rev 1201, 1212.

6 House of Lords Constitution Committee, *European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution* 6th Report, HL Paper 84 (2007–8) paras 60–61. See also Goldsmith, *ibid*, 1212.

7 See also House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment* 10th Report, HL Paper 62 (2007–8) paras 5.15, 5.18–5.20.

8 For a detailed analysis, see the AG’s Opinion in Case C-176/12 *Association de médiation sociale (AMS)* EU:C:2014:2 at [48].

9 OJ [2007] C 303/17.

10 See, for example, the UK’s submissions to the Court in the *Viking* case discussed in B. Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’ (2007) 13 ELJ 279, 300. See also Case C-438/05 *International Transport Workers’ Federation v Viking* [2007] ECR I-10779 at [44], where the Court of Justice said the ‘right to take collective action, including the right to strike, must therefore be recognised as a fundamental right’.

By contrast, in an immunity-based system, strikes are seen as presumptively unlawful and trade unions have to justify the legality of strike action by fitting themselves into the four corners of the immunity provided by the statute.¹¹ To avoid any problems with social rights being seen as ‘rights’, the UK (and Poland) negotiated the Protocol 30 ‘opt-out’.

Protocol 30 and the UK ‘opt-out’

The Scope of the ‘Opt Out’

When negotiating the IGC mandate for the Lisbon Treaty, one of the UK Government’s ‘red lines’ was to protect the UK from the consequences of the change of status of the Charter of Fundamental Rights.¹² The principal and most public demonstration of this desire was the adoption of Protocol 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

The Protocol offered protection to Poland and the UK in three ways. First, according to Article 1(1),

The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

Second, Article 2 provided:

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

In other words, where there is reference to national law and practice, this is a reference to national law and practice in Poland and the UK.

Articles 1(1) and 2 suggest that the Protocol was clarificatory of existing provisions of the Charter and not an opt-out. The closest the UK came to an opt-out was Article 1(2) which provided that ‘[i]n particular, and for the avoidance of doubt, nothing in Title IV . . . creates justiciable rights applicable to . . . the United Kingdom except in so far as . . . the United Kingdom has provided for such rights in its national law’. This provision suggested that were the Court to find Articles in the Solidarity Title to contain rights, not

11 Although, see a certain softening of that stance by the Court of Appeal in *Govia v ASLEF* [2016] EWCA Civ 1309.

12 As then British Prime Minister, Tony Blair said to the Liaison Committee of 18 June 2007 (reported in the House of Commons’ European Scrutiny Committee’s 35th Report, para 52): ‘First we will not accept a treaty that allows the charter of fundamental rights to change UK law in any way . . .’

principles, they would not apply to the UK except to the extent that the UK has provided for such rights in its law.

In fact, at first, the UK need not have worried. In the rather opaque judgment of the Court of Justice in *AMS*¹³ the Court seemed to confirm that social rights were in fact principles. The case concerned Article 27 of the Charter on the ‘right to information and consultation’. A trade union sought to rely on Article 27 to challenge a private employer’s refusal to establish a worker consultation mechanism pursuant to Directive 2002/14.¹⁴ One of the questions raised was whether the claimants could invoke Article 27 of the Charter to disapply a national rule which excluded certain categories of employees from the threshold for triggering the application of the Information and Consultation provisions. The Court thought not, noting in particular, at paragraph 44, the limitations on the right contained in Article 27:

‘Workers’ right to information and consultation within the undertaking’, provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by European Union law and national laws and practices’.¹⁵

It therefore ruled:

It is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation.¹⁶

In other words, Article 27 was not directly effective and therefore could not be invoked in a dispute to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied.

In this respect Article 27 could be contrasted with Article 21 in so far as the principle of non-discrimination, laid down in Article 21(1) of the Charter, was sufficient in itself to confer on individuals a right which they could invoke as such. This tends to suggest that those Articles of the Charter which are directly effective are rights, those that are not are merely principles, and those principles are found in the Solidarity Title.

However, the comfort offered by *AMS* may have been somewhat short-lived, as shown by the decision in *Bauer*.¹⁷ The Court ruled that Article 31(2) of the Charter enshrined the ‘right’ of all workers to an ‘annual period of paid

¹³ n 8 above.

¹⁴ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L 80/29.

¹⁵ n 8 above at [44].

¹⁶ *ibid* at [46].

¹⁷ Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal and Völker Willmeroth als Inhaber der TWI Technische Wartung und Instandsetzung Völker Willmeroth e. K. v Maria Elisabeth Bauer and Martina Broßonn* EU:C:2018:871.

leave’,¹⁸ not a principle. Further the Court found that Article 31(2) of the Charter was directly effective and had horizontal application:

The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter ...¹⁹

The Court concluded that Article 31(2) of the Charter therefore required the national court to disapply conflicting national legislation which otherwise the employers could rely on to avoid payment of an allowance.

However, *AMS* may not be entirely dead. In *Bauer* the Court distinguished between Article 31(2) which provides in ‘mandatory terms’ that “‘every worker” has “the right” “to an annual period of paid leave”” without, unlike Article 27, referring to “the cases and ... conditions provided for by Union law and national laws and practices””.²⁰ As the Court emphasised in paragraph 44 of *AMS*, this caveat denied Article 27 direct effect (and presumably Article 28 as well since it is subject to the same condition). So *Bauer* adds nuance to the picture: some social rights may in fact be rights but only if they are subject to the limitations laid down in the general derogations clause in Article 52, not a specific limitation in the Article itself.

Is Protocol 30 an Opt-Out?

As discussed above, Protocol 30 was mainly about clarification, with the exception of Article 1(2). It was certainly never drafted as an opt-out and was intended to be a document that all Member States could sign up to.²¹ However, when Protocol 30 was drafted the then British Prime Minister, Tony Blair, trumpeted his triumph in securing an opt-out from the Charter, a victory initially lauded by the Eurosceptic press. For example, in June 2007 the *Daily Mail* said: ‘Mr Blair’s final appearance on the European stage produced a clear negotiating success as Britain won a legally-binding opt-out from the controversial charter.’²² The *News of the World* said: ‘EU chiefs have agreed to give Britain an opt-out on the Charter of Fundamental Rights which could bring in new laws which would destroy jobs.’²³ The *Daily Express* also repeated

18 *ibid* at [54].

19 *ibid* at [85].

20 *ibid* at [84].

21 This section draws on C. Barnard, ‘The ‘Opt-Out’ for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?’ in S. Griller and J. Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty* (New York, NY: SpringerWien, 2008) 257.

22 B. Brogan, ‘Deal but at What price?’ *Daily Mail* 23 June 2007.

23 J. Lyons ‘EU Traitor’ *The News of the World* 24 June 2007.

Tony Blair's views that he has 'already signed up to the charter in principle, but insists he has secured an opt-out that means it won't apply here.'²⁴

And it was not just the press but the judges too who believed these claims. For example, Mostyn J said in *R (on the application of AB v Secretary of State for the Home Department) (AB)*:

I was sure that the British government (along with the Polish government) had secured at the negotiations of the Lisbon Treaty an opt-out from the incorporation of the Charter into EU law and thereby via operation of the European Communities Act 1972 directly into our domestic law.²⁵

Yet, despite the rhetoric, the reality was different, as the UK government did admit. For example, in evidence to the House of Lords Select Committee, the Department for Work and Pensions (DWP) said categorically, 'The UK Protocol does not constitute an "opt-out". It puts beyond doubt the legal position that nothing in the Charter creates any new rights, or extends the ability of any court to strike down UK law'.²⁶ Likewise, Jim Murphy, then Minister for Europe, wrote to the House of Commons' European scrutiny committee to say: 'The UK-specific Protocol which the Government secured is not an "opt-out" from the Charter. Rather, the Protocol clarifies the effect the Charter will have in the UK'.²⁷ The House of Lords' EU Select Committee confirmed 'The Protocol is not an opt-out from the Charter. The Charter will apply in the UK, even if its interpretation may be affected by the terms of the Protocol'.²⁸

The right wing press responded angrily when it learnt the truth. For example, the *Daily Mail* said: 'As the Scrutiny Committee forcibly pointed out, the Government's opt-outs do not stand up to even cursory scrutiny'.²⁹ The *Sun* said:

When Tony Blair agreed the outline EU Treaty last June, he boasted Britain had an 'opt-out' from the Charter of Fundamental Rights – which includes the right to strike. But the Commons European Scrutiny Committee report publishes a letter from Labour's Europe Minister Jim Murphy in which he concedes we do NOT.³⁰

The point that the Charter was clarificatory and not an opt-out was subsequently confirmed by the Court of Justice in the *NS* case:

²⁴ Q&A *Sunday Express* 24 June 2007.

²⁵ *R (on the application of AB v Secretary of State for the Home Department)* [2013] EWHC 3453 at [10]. See also Cranston J in *R (on the application of Saeedi) v Secretary of State for the Home Department* [2010] EWHC 705 at [155].

²⁶ House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment* n 7 above, para 5.86.

²⁷ House of Commons' European Scrutiny Committee, n 12 above.

²⁸ House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment* n 7 above, paras 5.87.

²⁹ E. Heathcoat, 'Blatant deception and a betrayal of trust' *Daily Mail* 17 October 2007.

³⁰ G. Wilson, '10 days to save Britain' *The Sun* 9 October 2007.

119. Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article . . .

120. In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.³¹

However, the Court did not rule on the interpretation of Article 1(2) of Protocol (No 30). Nevertheless, the Court's judgment in *NS* enabled Mostyn J in *AB* to conclude that:

The constitutional significance of [NS] can hardly be overstated. The Human Rights Act 1998 incorporated into our domestic law large parts, but by no means all, of the European Convention on Human Rights. Some parts were deliberately missed out by Parliament. The Charter of Fundamental Rights of the European Union contains, I believe, all of those missing parts and a great deal more. Notwithstanding the endeavours of our political representatives at Lisbon it would seem that the much wider Charter of Rights is now part of our domestic law. Moreover, that much wider Charter of Rights would remain part of our domestic law even if the Human Rights Act were repealed.³²

In fact, as we shall see, following the Brexit vote, it is the European Communities Act 1972 and the Charter which have been repealed by the EU (Withdrawal) Act, not the Human Rights Act 1998. Indeed, the Government has signalled a strong willingness for the European Convention to continue to be part of domestic law. In the Chequers' White Paper it said that 'The UK is committed to membership of the European Convention on Human Rights (ECHR)',³³ a sentiment repeated in the Political Declaration accompanying the Withdrawal Agreement of the UK from the EU:

The future relationship should incorporate the United Kingdom's continued commitment to respect the framework of the European Convention on Human Rights (ECHR), while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR.³⁴

31 Case C-411/10 *NS* and C-493/10 *ME* EU:C:2011:865 at [119].

32 *AB* n 25 above at [14].

33 The Future Relationship Between The United Kingdom And The European Union Cm 9593 (July 2018) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf, 52.

34 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom_.pdf, para 7.

In conclusion, the opt-out was not much of an opt-out but the press was led to believe that it was. This miscommunication created a further stratum of resentment against the British political classes and the EU. They were part of an Alice in Wonderland world where nothing was as it seemed.

THE LIFE OF THE CHARTER IN THE UK

After a difficult birth, it is tempting to suggest that the life of the Charter in the UK was one of neglect. A search of Westlaw reveals 3533 cases making reference to the Charter.³⁵ This figure includes all the cases where the Court of Justice, including the General Court, made mention of the Charter. A search against ‘courts of England and Wales and Charter of Fundamental Rights’ produced 855 results. A perhaps more reliable search is of the Article 267 preliminary references made by UK courts which raised issues where the Charter was engaged. A search against ‘Charter of Fundamental Rights’ and ‘the UK’ in the Curia website using the dates 1 December 2009 – 1 December 2018 produced 25 results of the 177 preliminary references made by the UK in that period. Of those 25 cases which were heard by the Court of Justice, in only six did the referring Court ask an express question concerning an issue with the Charter (see Annex I). In all other cases it was the Court of Justice which raised the Charter of its own volition.

The references from the UK involving the Charter came from a range of courts: six from the High Court, eight from the Court of Appeal, six from the Supreme Court and five from various tribunals. Those references concerned issues as diverse as asylum (eg, NS discussed above), processing of personal data, and the validity of the Tobacco Products Directive. However, it was the High Court and the Court of Appeal which made express reference to the Charter in their questions, and more so in recent cases, (three references apiece). By contrast, in two Supreme Court references, *UD v XB*³⁶ and *Alemo-Herron*,³⁷ the questions referred to the Court of Justice on points of EU law made no mention of the Charter, only the ECHR.

These low numbers suggest either that national courts are confidently applying the Charter without a need for a preliminary reference or, more likely, the Charter is not having a significant impact on UK courts’ interpretation of national law implementing EU law. An examination of recent Supreme Court decisions supports the latter view. For example, in *Pham v Secretary of State for the Home Department*³⁸ the Supreme Court merely mentioned that the Charter had been referred to in Counsel’s observations. In *HS2 Action Alliance Limited v The Secretary of State for Transport and another*,³⁹ the Supreme Court noted, almost as an aside, that parliamentary parties are recognised as playing a

³⁵ Search conducted on 2 December 2018.

³⁶ EU:C:2018:835.

³⁷ EU:C:2013:521.

³⁸ *Pham (Appellant) v Secretary of State for the Home Department (Respondent)* [2015] UKSC 19 at [42].

³⁹ *R (on the application of HS2 Action Alliance Limited) (Appellant) v The Secretary of State for Transport and another* [2014] UKSC 3 at [106].

legitimate role in democratic decision-making in other member states besides the United Kingdom, and that their role at European level is expressly recognised in Article 10(4) TEU and Article 12(2) of the Charter which is drafted in similar terms to Article 10(4) TEU.

Even in well-known Supreme Court cases where the Charter is mentioned and plays a role, the discussion of the Charter is, in fact, remarkably brief. Two recent examples illustrate this: *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*⁴⁰ and *UNISON v Lord Chancellor*.⁴¹ In *Benkharbouche*, a case about state immunity in the context of an employment rights dispute involving an embassy, the single judgment was given by Lord Sumption. It was 79 paragraphs long, with the Charter being discussed briefly in paragraph 78 (although the Charter's application was not in question on appeal; the Court of Appeal's judgment was more detailed). Lord Sumption said:

The scope of article 47 of the Charter is not identical to that of article 6 of the Human Rights Convention, but the Secretary of State accepts that on the facts of this case if the Convention is violated, so is the Charter. A claim to state immunity which is justified in international law, would be an answer in both cases⁴² . . . It follows that there is no separate issue as to article 47 of the Charter. The only difference that it makes is that a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied; whereas the remedy in the case of inconsistency with article 6 of the Human Rights Convention is a declaration of incompatibility.⁴³

In *UNISON*, a case concerning the legality of the Order requiring fees to be paid by applicants to Employment Tribunals, only twelve paragraphs of the 117 of the judgment of Lord Reed (with whom Lords Neuberger, Mance, Kerr, Wilson and Hughes agreed⁴⁴) concerned issues connected with the Charter. Specifically, Lord Reed said:

EU law has long recognised the principle of effectiveness: that is to say, that the procedural requirements for domestic actions must not be 'liable to render practically impossible or excessively difficult' the exercise of rights conferred by EU law: see, for example, *Impact v Minister for Agriculture and Food*⁴⁵ . . . It has also recognised the principle of effective judicial protection as a general principle of EU law, stemming from the constitutional traditions common to the member states, which has been enshrined in articles 6 and 13 of the European Convention on Human Rights and which has also been reaffirmed by article 47 of the Charter of Fundamental Rights of the European Union.⁴⁶

40 *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62.

41 *R (on the application of UNISON) (Appellant) v Lord Chancellor* [2017] UKSC 51.

42 Citing *Mahamdia v People's Democratic Republic of Algeria* (Case C-154/11) [2013] ICR 1, Advocate General at [17]–[23], endorsed by the Court at [55].

43 *Benkharbouche* n 40 above at [78].

44 Lady Hale also agreed but gave an additional judgment to discuss the discrimination elements of the claim and referred to the Charter there too.

45 Case C-268/06 [2008] ECR I-2483 at [46].

46 *UNISON* n 41 above at [106].

Lord Reed concluded that the fees imposed by the Fees Order were in practice unaffordable by some people, and that they were so high as in practice to prevent even people who could afford them from pursuing claims for small amounts and non-monetary claims. He said ‘it follows that the Fees Order imposes limitations on the exercise of EU rights which are disproportionate, and that it is therefore unlawful under EU law’.⁴⁷

In conclusion, the Charter seems to have had relatively little impact on the UK courts. This may be because of its relatively recent introduction into UK law, a confusion about whether it is legally binding and the status of the opt-out and, perhaps, a greater familiarity with the ECHR. But it is perhaps fair to say that its loss will not be acutely felt by the judiciary in the UK.

THE DEATH OF THE CHARTER

The EU (Withdrawal) Act 2018

When the death of the Charter came, it came suddenly. The Brexit White Paper⁴⁸ made no reference to the Charter. However, in the Repeal Bill White Paper⁴⁹ the UK Government made clear that the Charter would not survive post Brexit day. It explained that ‘The Charter only applies to member states when acting within the scope of EU law, so its relevance is removed by our withdrawal from the EU.’ It noted that some rights will naturally fall away as we leave the EU, such as the right to vote or stand as a candidate in European Parliament elections. But more importantly, the Government said ‘It cannot be right that the Charter could be used to bring challenges against the Government, or for UK legislation after our withdrawal to be struck down on the basis of the Charter. On that basis the Charter will not be converted into UK law by the Great Repeal Bill.’

The Government also noted that ‘the Charter was not designed to create any new rights or alter the circumstances in which individuals could rely on fundamental rights to challenge the actions of the EU institutions or member states in relation to EU law’. Instead, it noted, as we have already seen, that the Charter was intended to make the rights that already existed in EU law more visible by bringing them together in a single document.⁵⁰ It concluded that the Government’s intention was that the removal of the Charter from UK

⁴⁷ *ibid* at [117].

⁴⁸ HM Government, *The United Kingdom’s exit from and new partnership with the European Union* CM 9417 (February 2017) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589189/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Print.pdf.

⁴⁹ Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* CM 9446 (March 2017) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604514/Great_repeal_bill_white_paper_print.pdf, 2.21–2.25.

⁵⁰ See the sixth recital in the Preamble to Protocol 30, ‘the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.’

law will not affect the substantive rights that individuals already benefit from in the UK: ‘Many of these underlying rights exist elsewhere in the body of EU law which we will be converting into UK law. Others already exist in UK law, or in international agreements to which the UK is a party.’ This argument was elaborated further in the UK government’s review of the Charter where it concluded that:

First . . . rights will continue to be protected through EU law that is preserved and converted by the [Act]. Second, eighteen of the articles correspond, entirely or largely, to articles of the European Convention on Human Rights and are, as 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.⁵¹

The Charter was removed by section 5(4) of the EU (Withdrawal) Act 2018. This provides simply that ‘The Charter of Fundamental Rights is not part of domestic law on or after exit day’.⁵²

There were attempts to save the Charter in the UK. Most notably Lord Pannick QC laid ‘Amendment 15 [which] seeks to include the European Charter of Fundamental Rights as part of retained EU law, with the exception of the preamble and Chapter V.’⁵³ This was voted through by the Lords but rejected by the Commons. So, according to the Act, the Charter is no longer applicable in the UK after Exit day.

The legacy of the Charter

However the picture is, in fact, more complicated than first appears. The Charter will continue to be relevant in the UK for the following reasons.

First, all the case law of the Court of Justice (retained EU case law) handed down prior to Brexit day will continue to be binding on UK courts and tribunals. Section 6(7) of the EU (Withdrawal) Act provides that “‘retained EU

51 See, Charter of Fundamental Rights of the EU Right by Right Analysis, 5 December 2017 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf.

52 cf the attempts in Scotland to save the Charter: Section 5 of the Continuity Bill provides that that the general principles of EU law and the Charter of Fundamental Rights would be part of Scots law on or after exit day so far as they have effect in EU law immediately before exit day and relate to EU law which sections 2, 3 and 4 would save or incorporate into Scots law. This was considered in the *AG’s Reference* [2018] UKSC 64 at [102]. As the Supreme Court noted, the Lord Advocate correctly conceded that this section was a modification of the UK Withdrawal Act, s 5(4). It said, ‘This inconsistency, whether analysed as an implied repeal or a disapplication of those provisions of the UK Withdrawal Act, clearly amounts to a modification and section 5 therefore would not be law.’

53 Hansard, European Union (Withdrawal) Bill 23 April 2018 at [https://hansard.parliament.uk/lords/2018-04-23/debates/5481ABDF-ABEB-49C7-9404-6B4B85E24400/EuropeanUnion\(Withdrawal\)](https://hansard.parliament.uk/lords/2018-04-23/debates/5481ABDF-ABEB-49C7-9404-6B4B85E24400/EuropeanUnion(Withdrawal)). For further details, see J. Cooper, ‘The Fate of the Charter of Fundamental Rights in UK Law After Brexit is Sealed’ 20 June 2018 at <http://ohrh.law.ox.ac.uk/the-fate-of-the-charter-of-fundamental-rights-in-english-law-after-brexit-is-sealed/>, cf n.56.

case law” means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before exit day’.⁵⁴ So, decisions such as *NS* which refer to the Charter will still have effect in UK law.

Second, some Directives implemented by the UK by Brexit day refer to the Charter. Take, for example, Directive 2004/113 on equal treatment between men and women in the access to and supply of goods and services.⁵⁵ The Preamble makes reference to Article 6(2) EU which provides that the European Union is to respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law. In *Test Achats*⁵⁶ the Court added ‘Those fundamental rights are incorporated in the Charter, which, with effect from 1 December 2009, has the same legal status as the Treaties.’ The Charter will be particularly relevant in interpreting the UK legislation implementing that Directive particularly following s.6(7) of the EU(W)A.

However, any reference to the Charter will be transformed into a reference to general principles. Section 5(5) of the EU (Withdrawal) Act 2018 provides:

Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).

Post Brexit, it is only those general principles which have been recognised as general principles of EU law by the Court of Justice ‘in a case decided before exit day (whether or not as an essential part of the decision in the case)’ which can be invoked in British courts after exit day.⁵⁷

As Cuyvers puts it, general principles are the ‘dark matter of EU law. They unify the law, fill gaps, and lend weight and legitimacy to the EU legal order as a whole’.⁵⁸ They are also ‘hard to pin down and describe, as often it is their flexibility and fluidity that allows them to successfully fulfil the different roles that they play.’ The list of general principles has long included proportionality, equality, legal certainty but also, crucially for our purposes, fundamental rights.⁵⁹ The general principles also include the principle of effective judicial protection. As the Court of Justice put it in *Kadi v Council*,

54 Subject to the caveats that so far that the principles and case law—(a) relate to anything to which section 2, 3 or 4 applies, and (b) are not excluded by section 5 or Schedule 1, (as those principles and decisions are modified by or under this Act or by other domestic law from time to time).

55 OJ [2004] L373/37.

56 Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-773 at [16].

57 EU (Withdrawal) Act 2018, Sched 1, para 2.

58 A. Cuyvers, ‘General Principles of EU Law’ in A. Cuyvers, *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Leiden; Boston: Brill, 2017). See also T. Tridimas, *The General Principles of EU Law* (Oxford, OUP, 3rd ed, forthcoming).

59 Case 11/70 *International Handelsgesellschaft* [1970] ECR 1125 at [4]; Case 4/73 *Nold* [1974] ECR 491 at [13]. For a more recent statement, see Case C-402/05 *Kadi v Council* EU:C:2008:461 at [283], ‘In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court

the principle of effective judicial protection is a general principle of [Union] law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union’.⁶⁰

In other words, as we saw in *Test-Achats* and again in *Kadi*, there is a feedback mechanism between the general principles, the ECHR and the Charter. The Charter will inform the shape of the general principles of EU law.

But there is a potential problem: as we saw in *Bauer*, in recent years the Court makes extensive reference to the Charter not fundamental rights as general principles of law. Where does that leave the general principles post Brexit? Are they somehow frozen in 2009? I would argue not. It could be said, as the UK has done in, for example, its Repeal Bill White Paper discussed above, that the Charter is merely declaratory of existing principles. Therefore, it could be said that all Charter rights are in fact general principles and so should continue to apply to the UK. That would make Section 5(5) of the EU (Withdrawal) Act 2018 particularly significant.

Third, given the proximity between the Charter and general principles, it seems likely that advocates before British courts will still call on the case law under the Charter to help inform the contours of the general principles of law post Brexit. This argument is strengthened by the fact that, in respect of post Brexit case law, section 6(2) of the EU (Withdrawal) Act 2018 provides that British courts and tribunals ‘may have regard to anything done on or after exit day by the European Court . . . so far as is relevant to any matter before the court or tribunal’. And, as we saw above, the British courts have already recognised general principles of law, notably the principle of effective judicial protection, as Lord Reed noted in *Unison*. Indeed, looking at the Article 267 preliminary references listed in Annex I, the majority of cases concerned Article 47 of the Charter on a right to an effective remedy and a fair trial. The second most commonly involved Charter right in references to the Court of Justice by British courts was Article 7 on the right to respect for private and family life, home and communications, the right at issue in *AB*, discussed above, which Mostyn J had noted as being so important, and which has also been recognised by the Court of Justice as a fundamental right.⁶¹

Fourth, like the Charter, general principles apply to Member States when (1) interpreting EU law, (2) when Member States are derogating from EU law and (3) when Member States are generally acting within the sphere of EU law.⁶² In the post-Brexit world, this presumably means that general principles will apply in situations (1) and possibly (3) in respect of retained EU law. Post

draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories.’

60 *Kadi v Council* *ibid* at [335].

61 Case 136/79 *National Panasonic v Commission* EU:C:1980:169 at [17]–[18].

62 J. Coppel and A. O'Neill, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) 29 CML Review 669.

Brexit, they cannot, however, be used to strike down the validity of UK law, as the Supreme Court had done in *UNISON*. Schedule 1, paragraph 2 provides:

No court or tribunal or other public authority may, on or after exit day—
 (a) disapply or quash any enactment or other rule of law, or
 (b) quash any conduct or otherwise decide that it is unlawful,
 because it is incompatible with any of the general principles of EU law.

But it is not as simple as this would suggest.⁶³ Take the case of *Walker v Immospec*.⁶⁴ The case concerned the challenge by Mr Walker, a gay man married to another man, to the validity of paragraph 18 of Schedule 9 to the Equality Act which provided an exception to the general non-discrimination rule implied into occupational pension schemes. Under this exception, it was lawful to prevent or restrict access to a benefit payable in respect of periods of service before 5 December 2005, the date that civil partnerships were introduced in the UK. If Mr Walker had been married to a woman, she would have been entitled to a survivor's pension of about £45,700 per annum. Under the rules, his husband would have been entitled to a pension of only about £1,000 per annum. He argued that the UK rules contravened the Framework Directive 2000/43. The Supreme Court interpreted the Framework Directive in line with the background case law (the case law which continues post exit since it was decided prior to exit day) and general principles of EU law. Under section 5(2) of the EU (Withdrawal) Act 2018,⁶⁵ EU-derived law has supremacy post exit day and can be used to disapply legislation enacted prior to exit day (and legislation enacted prior to exit day that is modified post exit day if there is the intention that this legislation should still be subject to EU law). In other words, in this case EU-derived law has been interpreted in line with general principles. This re-interpreted law will then be used to disapply some provisions in Acts of Parliament.

Finally, the UK-EU Withdrawal Agreement (ie the Article 50 divorce text) makes repeated reference to Union law which, according to Article 2, includes the Charter of Fundamental Rights. Specifically, Article 4(3) makes clear that 'The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law' – which will include the Charter. Further, Article 4(4) says that 'The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period'. In respect of post-Brexit case law, Article 4(5) provides: 'In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law

⁶³ I am grateful to Alison Young for this point.

⁶⁴ [2017] UKSC 17.

⁶⁵ This provides: 'the principle of the supremacy of EU law continues 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'.

of the Court of Justice of the European Union handed down after the end of the transition period’ – which again, presumably will include the Charter.

Does the loss of the Charter rights deprive individuals of protection?

The story told so far is that, despite the loss of the Charter, in fact individuals will continue to enjoy some of the rights under the Charter as general principles of law in different, sometimes indirect, ways. However, despite the government’s claim that ‘it does not intend that the substantive rights protected in the Charter of Fundamental Rights will be weakened’,⁶⁶ the evidence does not support this assertion. First, as we saw above, general principles will not be used to strike down any UK legislation subject to the points above. Second, general principles will not have horizontal application in the context of a *Mangold*⁶⁷ / *Küçükdeveci*⁶⁸ type dispute (where the general principle of age discrimination was used to disapply conflicting provisions of national law). Schedule 1, paragraph 3(1) provides: ‘There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.’

Third, there is no longer any remedy in damages for breach of any rights, including presumably, a fundamental EU right. Schedule 1 paragraph 4 provides: ‘There is no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*.’ More generally, the remedies for breach of a Convention right are weaker than for a breach of a Charter right, as Lord Sumption observed above in *Benkharbouche*: in the case of conflict between EU law and English domestic law EU law must be disapplied; whereas the remedy in the case of inconsistency with article 6 of the Human Rights Convention is merely a declaration of incompatibility.

CONCLUSIONS

The UK’s relationship with the Charter of Fundamental Rights of the European Union⁶⁹ can at best be described as strained, at worst, actively hostile. The Charter was, for the UK, an unwanted child, unloved at birth, grudgingly tolerated during life, and willingly surrendered at the death of the UK’s membership of the EU. For some, the Charter, and its interpretation by the Court of Justice, have been the cause of the development of the post referendum mantra that the jurisdiction of the Court of Justice must end in the UK. The confusion over the Charter and the Convention, the Court of Justice and the Court of Human Rights bedevilled discussion in the referendum and beyond,⁷⁰ but it

66 Charter of Fundamental Rights of the EU Right by Right Analysis, n 51 above.

67 Case C-144/04 *Mangold v Rudiger Helm* [2005] ECR I-9981.

68 Case C-555/07 *Seda Küçükdeveci* [2010] ECR I-365.

69 OJ [2012] C 326/391. The 2000 version of the Charter is published in OJ [2000] C 364/01.

70 See, for example, <https://whorunsbritain.blogs.lincoln.ac.uk/2016/04/18/eu-referendum-myths-prisoners-voting-rights-and-eu-membership/>.

is the Charter, and the jurisdiction of the Court of Justice, which have been buried, not the Convention and the Court of Human Rights.

While the Charter is gone, however, it is not quite forgotten. As we have seen, it lives on through the general principles and also through judicial interpretation. However, courts will have to work hard to give the Charter some meaning and the remedies provisions post Brexit will remain considerably weaker. Aufwiedersehen, perhaps, not adieu.

SUPPORTING INFORMATION

Additional supporting information may be found online in the Supporting Information section at the end of the article.

Annex I: UK cases referred to the Court of Justice where the Charter was invoked