4

BREXIT AND THE UK CONSTITUTION

Paul Craig

SUMMARY

This chapter is, for obvious reasons, not a modification of the chapter from the previous edition. It is a completely new chapter, which considers the effect of Brexit on the UK constitution. There is discussion of the constitutional implications of triggering exit from the EU, and whether this could be done by the executive via the prerogative, or whether this was conditional on prior legislative approval though a statute. The discussion thereafter considers the constitutional implications of Brexit in terms of supremacy, rights, executive accountability to the legislature and devolution. The chapter concludes with discussion as to the paradox of sovereignty in the context of Brexit.

INTRODUCTION

The normal pattern for a new edition of a book is that changes to the chapters therein are incremental, highlighting the developments in law and politics that are relevant to the subject matter that occurred in the intervening years. This chapter is different, as attested to by the title, which has altered from 'Britain in the European Union' to that set out above. The UK will, in all likelihood, have exited the EU by the time that this book is published. The precise nature of the relationship between the UK and the EU is, however, unclear at the time of writing. This chapter will focus on the constitutional dimensions of Brexit, of which there are plenty to occupy the assiduous reader.

The discussion begins with the issue of constitutional power, which was manifest in litigation as to whether the executive could trigger notification to exit the EU, or whether it required legislative approval before doing so. The sections thereafter deal with the constitutional consequences of Brexit flowing from the European Union (Withdrawal) Act 2018. There are separate sections dealing with the effect of the 2018 Act on supremacy, rights, devolution and executive accountability to the legislature. The chapter concludes with some broader thoughts concerning constitutional politics.

It may, however, be helpful at this juncture to identify the key legal instruments that constitute the Brexit jigsaw, since it will facilitate discussion thereafter. There is a Withdrawal Agreement, which includes a transition agreement, and a Political Declaration that outlines the direction of future trade relations, the idea being that a full trade agreement will be negotiated in the years after Brexit.[1] These must be agreed to by the House of Commons pursuant to section 13 of the European Union (Withdrawal) Act 2018. If this proved to be impossible then the UK, in accord with Article 50 Treaty on European Union, leaves the EU two years after giving notification of its intent to withdraw. This is the scenario of the 'no deal Brexit'. If there is no Withdrawal Agreement, there will be no transitional agreement, and the UK will be out of the EU at the end of March 2019, unless all Member States vote for an extension of time, which is unlikely. A future trade agreement will be negotiated between the UK and the EU at some time, but the emphasis will assuredly be on the

[1] 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,

temporal dimension ‘future’, connoting in this respect not merely that it will apply in the future, but also that it could take 5-6 years to conclude such an agreement.

There are, or will be, numerous domestic statutes designed to effectuate different aspects of Brexit. The European Union (Withdrawal) Act 2018 is already in force, and is designed to bring existing EU law into UK law to prevent regulatory black holes when we leave, the idea being that such law can be amended or repealed thereafter, if we do not wish to retain it. There will be a statute to give effect to the Withdrawal Agreement in UK law, assuming that such an agreement is accepted by Parliament. There will, in addition, be several more discrete pieces of legislation, dealing with aspects of Brexit that affect diverse issues such as migration, data protection and cross-border civil litigation.

CONSTITUTIONAL POWER: THE TRIGGERING OF ARTICLE 50 TEU

Article 50(1) provides that a Member State may decide to leave the EU in accord with its own constitutional requirements. This is amplified by Article 50(2) TEU, which states, inter alia, that a Member State that decides whether to withdraw shall notify the European Council of its intentions. The referendum signalled that the UK would leave the EU. However, the modality by which this was to be done gave rise to important constitutional issues, as to whether Article 50 TEU could be triggered by the government acting pursuant to the prerogative, or whether it required prior approval from Parliament. There is a prerogative concerning the conduct of foreign relations, including the making of treaties. The government believed that it could act pursuant to

this power when notifying withdrawal from the EU pursuant to Article 50. Gina Miller, a private citizen, believed that this could only be done after Parliament had given its approval through statute. This difference of view set the scene for litigation that gripped the legal community as the case went through the courts.

The Supreme Court in *Miller*[2] upheld the Divisional Court,[3] and decided that the government could not trigger Article 50 TEU to begin withdrawing from the EU without statutory authorization from Parliament. The case concerned structural constitutional review, in which the Supreme Court demarcated the ambit of legislative and executive power, the latter being exercised through the prerogative.

LIMITS ON PREROGATIVE POWER: THE AMBIGUITIES

There are three dimensions to legal control over the prerogative: the first is as to whether it exists; the second is as to its extent; the third concerns the manner of exercise. *Miller* turned on contestation as to the second of these issues. The word 'extent' in this context captures the limits or constraints placed on an admitted prerogative. It is a matter for the courts to decide. They determine the types of constraint that should, as a matter of principle, be placed on prerogative power.

Thus, the courts have fashioned constraints that the prerogative cannot alter the law of the land or effect rights, and that it cannot be used where it would place statute law in abeyance or frustrate statutory rules. The precise meaning of these constraints can be contestable, so too can their application in a particular case. There

[2] *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[3] *R. (on the application of Miller) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

are, therefore, always two related, but distinct, issues when we consider the extent of the prerogative: what types of constraint should, as a matter of principle, be placed on prerogative power; and how does a constraint apply to the facts of a particular case.

CONSTRAINTS ON PREROGATIVE POWER: ALTERING THE LAW OF THE LAND AND RIGHTS

The first limit to prerogative power is that it cannot alter the law of the land, a proposition derived from the *Case of Proclamations*. It concerned the legality of two proclamations made by the King: one prohibited new buildings in London, the other the making of starch from wheat. The court held that the King cannot by his proclamation change 'any part of the common law, or statute law or customs of the realm'.[4] Nor could the King create any new offence by way of proclamation, for that would be to change the law. It was for the courts to determine the existence and extent of prerogative powers. The principal beneficiary was Parliament, since the case concerned the extent of monarchical regulatory power independent from the legislature. The denial of such power meant that if the King wished to attain these ends he must do so through statute.

The principles embodied in the *Case of Proclamations* were reinforced by the Bill of Rights 1688, which provided that 'the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall'[5]

[4] (1611) 12 Co. Rep. 74 at 75.

[5] Bill of Rights 1688, 1 Will. and Mar. Sess.2, c. 2, Article 1.

and that 'the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall'.[6]

The application of the principle from *Proclamations* in *Miller* raised difficult issues concerning the meaning of 'the law' that could not be changed through the prerogative, and the nature of the rights that could not be affected by use of the prerogative. The Supreme Court's reasoning was as follows.

The majority regarded EU law as a novel source of law within the UK legal order.[7] It, and the rights emanating from it, was therefore part of the law of the land that could not be altered through recourse to the prerogative. The majority acknowledged that the EU rights brought into UK law through the ECA 1972 could vary from time to time, and that this would cease when the UK withdrew from the EU. This did not, however, mean that withdrawal, with the consequential impact on rights, could be done through the prerogative without Parliamentary authorization. There was, said the majority, no indication that Parliament had intended this. There was a vital difference between changes in domestic law resulting from variations in EU law arising from new EU legislation, and changes in domestic law resulting from withdrawal by the United Kingdom from the EU.[8]

The principal dissent was given by Lord Reed, who held that the prerogative over the making and unmaking of treaties was a fundamental part of the UK constitutional order, which could only be curtailed expressly or by necessary

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[6] Bill of Rights 1688, 1 Will. and Mar. Sess.2, c. 2, Article 2; Sir Stephen Sedley, 'The Judges' Verdicts', https://www.lrb.co.uk/2017/01/30/stephen-sedley/the-judges-verdicts.

[7] *Miller*, above, n. 2, [65].

[8] Ibid [76]-[78], [83].

implication. The ECA 1972 contained no express limitation on the Crown's prerogative power, nor were there any words through which to infer that this was the necessary implication of the statute.[9] Lord Reed denied that triggering Article 50 TEU would impact on rights. Parliament had, he said, recognized in the ECA 1972, section 2(1), that rights given effect under the ECA could be altered or revoked from time to time without the need for a statute, and he rejected the distinction drawn by the majority between such changes in rights and that resulting from withdrawal from the EU.

CONSTRAINTS ON PREROGATIVE POWER: STATUTE COVERING THE AREA OF THE PREROGATIVE

The second constraint on prerogative power is that it cannot be exercised if statute covers the same area. The seminal case was *Attorney General v De Keyser's Royal Hotel*,[10] which arose out of the Crown's decision, acting under the Defence of the Realm Regulations, to take possession of a hotel to accommodate personnel of the Royal Flying Corps. The Crown contended that the hotel owners had no legal right to compensation. The Defence Act 1842 gave broad powers to the Crown to take possession of land, subject to compensation. The Crown maintained that the taking was, however, justified by the prerogative, which was said to warrant temporary seizure of property in time of emergency, without any legal right to compensation.

Their Lordships were unpersuaded by the argument. Lord Atkinson held that it would be absurd to construe a statute so as to enable the executive to disregard limits

[9] Ibid [160], [177], [194], [197].

[10] *Attorney General v De Keyser's Royal Hotel* [1920] AC 508.

contained in it by reliance on the prerogative. Lord Parmoor was equally clear in this respect: when executive power had been directly regulated by statute, the executive could no longer use the prerogative, but had to observe the restrictions which Parliament imposed in favour of the subject.[11]

The decision in *Miller* did not turn on application of the *De Keyser* principle as such, but the Supreme Court nonetheless said some important things about it. The majority accepted the principle from *De Keyser*, and its application in subsequent cases. It held, moreover, that it was highly improbable that Parliament had the intention that ministers could subsequently take the UK out of the EU without the approval of the constitutionally senior partner, which was Parliament.[12] If that had been the intent it was, in accord with the principle of legality, incumbent on Parliament to have made this clear, and thus pay the political cost of the choice. There was, said the majority, no evidence that the ECA 1972 was intended to clothe the executive with that far-reaching choice.[13]

Lord Reed also accepted the principle in *De Keyser*, but did not believe that it was applicable to this case. It was central to *De Keyser* that Parliament had regulated the area in relation to which the executive sought to exercise the prerogative. This was not so here. The 1972 Act did not regulate withdrawal from the EU. It merely recognized the existence of Article 50 TEU, but said nothing as to who should take the decision to invoke Article 50.[14]

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[11] Ibid 575.

[12] *Miller*, above, n. 2, [85]-[90].

[13] Ibid [87]-[88].

[14] Ibid [233].

LIMITS ON PREROGATIVE POWER: VALUES AND THE RESOLUTION OF AMBIGUITIES

The preceding analysis is but a bare summation of the contending views of the majority and the dissent in *Miller*. The contrasting arguments were considerably more complex. Resolution of these intricate arguments is equally difficult, and cannot be undertaken here. I believe that the majority in *Miller* was correct, and my views in this regard can be found elsewhere.[15] It is, nonetheless, important to identify the background values that inform doctrinal precepts that informed the choices made by the courts.

The value that underlies the twin constraints on prerogative power in *Proclamations* and *De Keyser* is the sovereignty of Parliament. It is Parliament that is the legitimate legislator within the UK and the limits protect that authority from being undermined. If the executive could change the law of its own volition, it could thereby bypass legislation without the need for amendment and repeal, hence the principle in *Proclamations*. If the executive could use the prerogative where Parliament had already addressed the issue in a statute it could then avoid the legislation crafted by Parliament, hence the principle in *De Keyser*, and its extension to cases where the prerogative would frustrate the legislation. *Proclamations* protects Parliamentary sovereignty directly, by preventing recourse to the prerogative where it would change the law; *De Keyser* protects sovereignty indirectly, by precluding use of the

[15] Paul Craig, '*Miller*, Structural Constitutional Review and the Limits of Prerogative Power' [2018] PL 48. See also, the articles in the Special Issue of Public Law devoted to the *Miller* decision, and Jeffrey Jowell, ' The …' (2017-18) Supreme Court Review.

prerogative where the formal law is left intact, but the executive seeks to circumvent it by use of the prerogative.

The value underlying recognition of a prerogative power to manage international relations, including the making and unmaking of treaties was identified by William Blackstone.[16]

> This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and despatch. Were it placed in many hands, it would be subject to many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford.

For Lord Reed, 'the value of unanimity, strength and dispatch in the conduct of foreign affairs are as evident in the 21st century as they were in the 18th',[17] and Timothy Endicott voiced strong views to the same effect.[18] It can be readily acknowledged that unanimity, strength and dispatch are important values in the conduct of international relations. We accept that the executive has the primary responsibility for negotiation of treaties, which cannot be done in a collective.

The argument is, nonetheless, difficult when applied to the issue in *Miller*, which was whether Parliament should have to give statutory approval before the triggering of Article 50 TEU. It is not self-evident that unanimity, strength or dispatch should be regarded as the principal values in this determination; it is not self-evident that the executive has advantages in making this decision over Parliament; and it is

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[16] Sir W. Blackstone, *Commentaries on the Laws of England* (1765-1769), Book I, Chapter 7, "Of the King's Prerogative".

[17] *Miller*, above, n. 2, [160].

[18] T. Endicott, '"This Ancient, Secretive Royal Prerogative"', U.K. Const. L. Blog, 11 Nov 2016, https://ukconstitutionallaw.org/ .

not self-evident that the executive values would be placed in jeopardy by requiring a vote in Parliament, nor that the executive is united on these issues. Consider these issues in turn.

The decision to trigger Article 50 and leave the EU ranks among the most significant peace time treaty determinations ever made by the UK. It is an issue on which the country was fiercely divided, notwithstanding the referendum. The UK constitutional tradition is one of parliamentary as opposed to popular sovereignty, which is why the referendum was not legally binding, although it was clearly important in political terms. The values that matter here are those that are fundamental to a parliamentary democracy, viz that major decisions are not made without approval by Parliament.

It is not self-evident that the executive would have any advantages over Parliament when making this determination. The executive may claim epistemic advantages and experience in relation to some aspects of foreign policy. The reality is that such advantages were not relevant to the current determination, or to analogous decisions of this nature. MPs knew the issues concerning EU membership as well as the executive.

Nor is it self-evident that requiring a vote in Parliament placed the executive's strategy for triggering Article 50 TEU in jeopardy. To the contrary, the date chosen by the executive, the end of March, had no especial magic; it was not jeopardized by the parliamentary vote, which was accomplished in a matter of weeks; and if the government had not contested the issue in litigation parliamentary approval would have been secured earlier. Indeed, as matters concerning Brexit have progressed further, the divisions within the executive as to the best way to pursue Brexit have

become ever more apparent, as attested to by the many ministerial resignations that have occurred since the referendum.

Consideration of the values underlying constraints on prerogative power and the values that underpin a particular prerogative can therefore assist us in resolving the issues that arise in a case such as *Miller*. They serve to explain why for many people the intuitive answer was that the decision to leave the EU should not rest with the executive acting alone, but should rather be dependent on statutory approval by Parliament. Respect for parliamentary sovereignty underpinned the constraints on prerogative power as expressed in *Proclamations* and *De Keyser*, while the rationale for according the executive prerogative power over treaty making had scant, if any, relevance to the issue in *Miller*.

It is equally important to ensure that the constitutional principles that inform decisions in one area cohere with those in another. This was relevant here for the following reason. In *HS2* the Supreme Court affirmed that there was a category of constitutional statutes, which included the European Communities Act 1972.[19] It will not readily be accepted that a constitutional statute can be impliedly repealed. While this possibility cannot be ruled out entirely, it is generally accepted that the burden of justification should be set very high, such that in the absence of express repeal the inference would have to be irresistible.[20] The normative justification is that a statute of such importance should not be repealed or amended other than through specific decision by the sovereign Parliament.

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[19] *R. (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [207]; *H v Lord Advocate* [2012] UKSC 24.

[20] *Thoburn v Sunderland City Council* [2003] QB 151, [63].

The reasoning in *Miller* is a natural corollary of that in *HS2*. A statute worthy of the denomination constitutional should not be rendered devoid of effect through recourse to the prerogative. Thus, while the triggering of Article 50 TEU would not in itself repeal the ECA 1972, withdrawal would deprive it of substance, since we would no longer be party to the EU. The majority in *Miller* believed that this consequence should not ensue without parliamentary authorization, or to put the same point in a different way, recourse to the prerogative could only be countenanced if the executive could show specific authority for this course of action, thereby ensuring, in accord with the principle of legality, that Parliament had thought through the consequences of its action.

The requirement that triggering exit via prerogative power was dependent on proof of specific statutory authorization coheres with the reasoning in *HS2* and is sound in terms of normative principle. The 1972 ECA not only provided the vehicle for EU law becoming part of UK law, but also brought about a new constitutional order involving the supremacy of EU Law. If statutes of such importance should not generally be susceptible to implied repeal, in order thereby to safeguard the sovereign Parliament, then it follows that they should not be capable of being deprived of effect by the executive, without specific authorization from the sovereign Parliament. The range of statutes, over and beyond constitutional statutes, that should be treated in this manner remains to be seen. This argument is reinforced by the point made earlier to the effect that the triggering of Article 50 does not involve the values commonly associated with prerogative power in relation to treaty making, and that by contrast it is the very kind of determination that should be made by Parliament.

CONSTITUTIONAL CONSEQUENCE: SUBSEQUENT PARLIAMENTARY APPROVAL

The *Miller* decision demanded statutory approval before notification of withdrawal could be given under Article 50 TEU. It was then for Parliament to impose whatsoever controls or conditions it sought fit. The political reality was that Parliament was largely quiescent in this respect. Immediately after the *Miller* judgment, the PM introduced the European Union (Notification of Withdrawal) Bill 2017, which had undoubtedly been drafted earlier. The House of Commons duly passed the Bill by a large majority. There were attempts to impose substantive and procedural constraints on how the government conducted the negotiations, but they were not successful, and the Bill secured its majority without amendment. There was stronger opposition in the House of Lords, but there was never any likelihood that it would block the legislation.

This begs the question as to why Parliament was quiescent in this respect, to which the answer is eclectic. Some MPs might genuinely have felt that the issue should, for reasons of principle, be left to the executive; others, particularly, hard Brexiteers, were committed functionally to the prerogative, since they were concerned in the aftermath of the referendum at attempts to undo their victory on the floor of the House. The principal explanation as to why most MPs did not, at that stage, seek to impose statutory conditions concerning conduct of the negotiations, or a requirement of statutory approval of the withdrawal agreement, was political. They were fearful of backlash from their constituents who had voted to leave, who would be angered if they felt that their victory was in danger of being undermined by demands for such a statute. The issue did, however, arise again in relation to the European Union

(Withdrawal) Act 2018. It is to the constitutional implications of this Act that we now turn.

CONSTITUTIONAL CONSEQUENCE: SUPREMACY, AND THE EU (WITHDRAWAL) ACT 2018 ('EUWA')

THE EUWA: RATIONALE

Brexit will generate numerous pieces of legislation, as the UK seeks to navigate the legal terrain towards a post-Brexit world. The European Union (Withdrawal) Act 2018 is, however, a cornerstone of this legal map. The Act is long and complex, and cannot be examined in detail here.[21] The present focus will be on the principal constitutional dimensions of the legislation. It is, however, important to be clear at the outset as to the rationale for the European Union (Withdrawal) Act 2018, henceforth EUWA.[22]

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. The European Communities Act 1972, section 2(1), furnished the legal foundation for direct applicability and direct effect within the UK constitutional order.

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[21] For detailed analysis, see, P Craig, 'Constitutional Principle, the Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018' (2019) MLR.

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

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.[23]

It is not, in reality, possible simply to dispense with this material in a post-Brexit world, since this would 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 be a legal void in these areas, and pre-existing UK law will often not exist. Moreover, the UK helped to fashion much of this EU law.

This is the rationale for the EUWA. The foundational premise is that the entirety of EU law 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.

To this end, Section 1 EUWA repeals the European Communities Act 1972, which was the legal vehicle through which EU law became part of UK law. Sections 2-4 EUWA then deal with different types of EU law, preserving, or converting it, into UK law. Section 2 EUWA provides for the saving of EU-derived domestic legislation, which is principally EU directives that were implemented in UK law pursuant to section 2(2) of the ECA 1972; section 3 EUWA is concerned with the incorporation

[23] Arts 289-291 TFEU.

of direct EU legislation, which primarily covers EU measures, regulations and decisions, that were directly applicable in the UK legal order without the need for separate national implementing legislation; and section 4 EUWA preserves directly effective EU rights.

THE EUWA: SUPREMACY OF EU LAW

The European Court of Justice asserted the supremacy of EU law over national law from the inception of the European Economic Community, the predecessor of the current EU Treaty arrangements, such that if there is a conflict between the two EU law prevails. National courts have not unconditionally accepted the ECJ's supremacy doctrine, and have suggested a range of possible limits.[24] It is, nonetheless, the case that all Member States accept that if there is a clash between EU law and national law in an area where the EU undoubtedly has competence, and there are no issues relating to, for example, fundamental rights or national constitutional law, then EU law will be accorded priority.

It was felt that when the UK joined the EU, our tradition of parliamentary sovereignty, whereby the latest statute has priority over earlier law, would pose problems in this regard. The UK courts, nonetheless, accommodated the precepts of traditional parliamentary sovereignty and the demands of EU membership. They accepted that EU law would take precedence in the event of a clash with national

[24] P Craig and G de Búrca, *EU Law, Text, Cases and Materials* (Oxford University Press, 6th ed, 2015), Chap. 9.

law,[25] but also made clear that the decision concerning supremacy resided with the UK courts as a matter of national constitutional law.[26] The Supreme Court held, moreover, that the supremacy of EU law would not necessarily pertain if there was a clash between EU law and a UK constitutional statute. What would have happened if Parliament had expressly stated an intent to depart from a particular provision of EU law was, moreover, never tested.

The EUWA provisions dealing with supremacy are set out in sections 5(1)-(3). These sections do not have any sacrosanct status. The principle of parliamentary sovereignty means that a later Parliament could, if it so wished, repeal or amend these provisions.

> (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.

Section 5(1) embodies the logic of Brexit, by providing that the supremacy of EU law does not apply to any enactment or rule of law made on or after the UK leaves the EU. It will, moreover, require modification in the light of the Withdrawal Agreement. Article 4(1) invests its provisions, and the provisions of EU law made applicable by the agreement, with the same legal effects as they would have in the EU

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[25] *R. v Secretary of State for Transport ex parte Factortame Ltd (No. 2)* [1991] 1 AC 603; *R. v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1.

[26] *Thoburn v Sunderland City Council* [2003] QB 151; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

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.

Section 5(1) is qualified by section 5(2), which provides for the continuance of the supremacy principle 'so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day'. It means that if there is a conflict between pre-exit domestic legislation and EU law retained under sections 2-4 EUWA, the latter takes precedence; it also means that pre-exit domestic law should be interpreted, as far as possible, in accordance with EU law. Section 5(1) is further qualified by section 5(3), which allows the supremacy principle to continue to operate in relation to modification made after exit to laws enacted prior thereto, provided that this is consistent with the intention underlying the modification.

The House of Lords Constitution Committee 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 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).[27] 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

[27] House of Lords, Select Committee on the Constitution, European Union (Withdrawal) Bill (HL 69, 2018) [81]-[83].

as having been 'made' on a particular date.[28] 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,'[29] since 'following exit, there will be no "EU law" within the domestic legal system',[30] it will have been converted into UK law via sections 2-4 EUWA.

There is undoubtedly force in this critique, but there must, however, be some way of dealing with the issue should it arise.[31] 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.

CONSTITUTIONAL CONSEQUENCE: RIGHTS AND THE EU (WITHDRAWAL) ACT 2018

RIGHTS AND EU LAW: PRE-BREXIT

[28] Ibid [86]-[87].

[29] Ibid [89].

[30] Ibid [88].

[31] The Constitution Committee's solution was to invest all EU direct retained law with the status of primary legislation, but this would have been problematic, P Craig, 'The Withdrawal Bill, Status and Supremacy', U.K. Const. L. Blog (19th Feb. 2018), https://ukconstitutionallaw.org/2018/02/19/paul-craig-the-withdrawal-bill-status-and-supremacy/.

Brexit also has implications for the protection of rights. A condition precedent to consideration of this issue is to have some understanding of the way in which the EU impacted on rights while the UK was in the EU. It is important in this respect to distinguish between two ways in which this occurred.

Direct Effect

Direct effect is a cornerstone of EU law. It connotes the idea that individuals can bring actions in national courts in order to vindicate rights secured to them by the Treaty, or regulations, directives or decisions made thereunder.[32] The general test is that a Treaty article will have direct effect provided that it is intended to confer rights on individuals and that it is sufficiently clear, precise and unconditional.

Direct effect also attaches to rules made pursuant to the Treaty. There are various types of such rules. Regulations are defined in TFEU, Art. 288 as having general application. They are binding in their entirety and directly applicable in all member states. The ECJ had no reluctance in concluding that regulations were capable of having direct effect, provided that they were sufficiently certain and precise, which was normally the case.[33]

There has been more difficulty over directives. These are, according to TFEU, Art 288, binding as to the result to be achieved while leaving the choice of form and methods to the states to which they are addressed. Moreover, while regulations are

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[32] Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; Case 2/74, *Reyners v Belgian State* [1974] ECR 631; Case 43/75, *Defrenne v Sabena* [1976] ECR 455.

[33] Case 93/71, *Leonosio v Italian Ministry of Agriculture and Forestry* [1973] CMLR 343; Case 50/76, *Amsterdam Bulb v Produktschap voor Siergewassen* [1977] ECR 137.

binding on all states, directives are only binding on the specific states to which they are addressed. Directives have proved to be a particularly useful device for legislating in an enlarged European Union. They enabled the EU to specify the ends to be attained, often in great detail, while leaving a choice of form and methods of implementation to the individual member states. The ECJ held that directives are capable of having direct effect,[34] but that this only operated against the state, vertical direct effect, and not against an individual, horizontal direct effect.[35] The correctness of this distinction, and the rationale for this limitation of direct effect, are by no means self-evident.[36] The existence of this limitation has, moreover, generated a very complex case law, since the ECJ has created exceptions and qualifications to the idea that directives do not have horizontal direct effect.[37]

Direct effect had two important constitutional implications. First, it enabled individuals to derive rights that are enforceable in their own national courts from an international treaty and legislation made thereunder. The general position in public international law is that individuals do not derive such rights, even where they are the

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[34] Case 41/74, *Van Duyn v Home Office* [1974] ECR 1337, para. 12.

[35] Case 152/84, *Marshall v Southampton & South West Hampshire Area Health Authority (Teaching)* [1986] ECR 723; Case C-91/92, *Faccini Dori v Recreb Srl* [1994] ECR I-3325.

[36] W. van Gerven, 'The Horizontal Direct Effect of Directive Provisions Revisited: The Reality of Catchwords', in T. Heukels and D. Curtin (eds), *Institutional Dynamics of European Integration, Liber Amicorum for Henry Schermers* (1994); P. Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 ELR 349.

[37] Craig and de Búrca, above, n. 24, Chap. 7.

beneficiaries of the rules laid down in an international treaty.[38] There are instances where individuals have been held to have such rights, but they are exceptional and there has been nothing on the scale of the direct effect doctrine as developed by the ECJ. This meant that law derived from sources other than Parliament and the common law would, as recognized by the Supreme Court in *Miller*,[39] avail individuals before their own national courts in a way which had not been so on this scale hitherto.

The second reason why direct effect was of constitutional significance resided in the connection between this concept and the supremacy of EU law. Direct effect allowed the supremacy doctrine to be applied at national level, and thereby made it far more potent than it would otherwise have been. It enabled the supremacy of EU law to be enforced by individuals through their own national courts. The national courts become EU courts in their own right, being able to pass judgment on national primary legislation in the context of an action brought by an individual. Where the ECJ had already considered a legal issue, national courts were encouraged to apply the ruling in analogous cases without the need for further recourse to the ECJ, unless they sought clarification of the earlier ruling.[40] This is exemplified by the *Equal Opportunities Commission* case,[41] where not only did the House of Lords make a declaration that provisions of a UK statute were incompatible with EU law, but it did

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[38] I. Brownlie, *Principles of Public International Law* (8th edn, James Crawford, 2012), Chaps. 4, 16. And see Chapter 3 above (Feldman).

[39] *Miller*, above, n. 2, [65].

[40] Cases 28–30/62, *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v Nederlandse Belastingadministratie* [1963] ECR 31; Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, [14].

[41] *R. v Secretary of State for Employment ex parte Equal Opportunities Commission* [1995] 1 AC 1.

so without making a reference to the ECJ, having satisfied itself that the existing ECJ precedents meant that the national statute was indirectly discriminatory.

Fundamental Rights

In the UK, most rights-based claims are brought under the Human Rights Act 1998 (HRA 1998).[42] While the UK remained in the EU, it was however open to claimants to use rights-based arguments derived from EU law. The European Union promulgated a Charter of Fundamental Rights in 2000, but the ECJ developed a fundamental rights' jurisprudence prior to this.

The original EEC Treaty contained no list of traditional fundamental rights. The catalyst for the creation of such rights was the threat of revolt by some national courts. Individuals who were dissatisfied with an EC regulation argued before their national court that it was inconsistent with rights in their national constitutions. The ECJ denied that EC norms could be challenged in this manner. However, in order to stem any national rebellion it also declared that fundamental rights were part of the general principles of EC law, and that the compatibility of an EC norm with such rights would be tested by the ECJ.[43] Fundamental rights, as recognized in the ECJ's case law, were conceptualized as one type of general principle of law.

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[42] See Chapter 3 above.

[43] Case 11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, 1134.

It became clear that national laws could also be challenged for compliance with fundamental rights, where the national action fell within the scope of EU law.[44] The supremacy doctrine applied with the consequence that national norms, including primary legislation, which were inconsistent with EC law could be declared inapplicable in the instant case. This is by way of contrast with the Human Rights Act 1998 where the courts are limited, in cases involving primary legislation, to making a declaration of incompatibility under section 4.

The Charter of Fundamental Rights of the European Union was promulgated in 2000.[45] It includes economic and social rights, as well as traditional civil and political rights. The Charter is legally binding and has the same legal value as the TEU and the TFEU.[46] The Member States are bound by the Charter only when they are implementing EU law,[47] which has been interpreted by the CJEU to mean that they are bound whenever they act within the scope of EU law.[48]

RIGHTS DERIVED FROM EU LAW: POST-BREXIT

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[44] Case 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; Case 5/88, *Wachauf v Germany* [1989] ECR 2609; Case 63/83, *R. v Kent Kirk* [1984] ECR 2689; Case C-260/89, *Elliniki Radiophonia Tileorassi AE v Dimotki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925; Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd v Grogan* [1991] ECR I-4685.

[45] Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

[46] TEU, Art. 6(1).

[47] Charter, Art. 51(1).

[48] Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105.

Direct Effect

It might be thought that since direct effect is a concept of EU law, it will, therefore, no longer be applicable in the UK in a post-Brexit world. There is some force in this, but the legal reality is that the concept of direct effect will continue to be applicable in a post-Brexit world as a matter of UK law. This is so for two related reasons.

First, section 3(1) EUWA stipulates that 'direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day.' Direct EU legislation is defined to include EU regulations and decisions that took effect in the UK legal order prior to Brexit via the ECA 1972.[49] Many such regulations and decisions 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 such regulations and decisions via section 3 EUWA, 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,[50] subject to anything to the contrary in the EUWA,[51] and subject to later UK enactment to the contrary.

Secondly, section 4(1) EUWA preserves in UK law directly effective rights derived from EU law, which had taken effect within the UK legal order via section

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[49] EUWA 2018, s. 3(2).

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

[51] See, eg, EUWA Sched 1, para 4, excluding the *Francovich* damages action post-exit day.

2(1) ECA. This preserves, inter alia, directly effective rights derived from Treaty articles. It is then open to the UK Parliament to amend, repeal or retain such rights in accord with the process in the EUWA. Many such directly effective rights, such as those pertaining to free movement of workers or services, will be repealed, since they make no sense in a post-Brexit world. This does not alter the fact that, until such repeal or amendment occurs, the directly effective rights function as part of the UK legal order.

Fundamental Rights

The position in relation to fundamental rights derived from EU law in a post-Brexit world is more complex and uncertain.

First, the Charter of Fundamental Rights is not part of domestic law on or after exit day.[52] 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. 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. It is, moreover, uncertain whether all Charter rights and principles will be retained through a combination of sections 4 and 6 EUWA.[53]

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[52] EUWA, s. 5(4).

[53] 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, 14-15.

Secondly, section 5(5) EUWA states that the exclusion of the Charter does not, however, 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'.[54] The key phrase, 'exist irrespective of the Charter', is open to various interpretations.[55] Fundamental rights existed prior to the Charter, and, as noted above, they were conceptualized as general principles of law. Their status in this respect was not altered by the enactment of the Charter, which was, in any event, said to be merely declaratory of existing rights, and not constitutive of new rights.[56] On this view all Charter rights and principles could be regarded, in the language of section 5(5) EUWA, as 'existing irrespective of the Charter', since the Charter was declaratory of existing law. The Explanatory Notes attached to the EUWA incline to this view.[57] If this is the legal effect of sections 5(4)-(5) EUWA then it calls into question the legislative strategy, which was to exclude the Charter from the front door, while including all rights and principles therein via the back door.

Thirdly, general principles of EU law can be part of domestic law after exit day, provided that they were thus recognized by the CJEU before exit day.[58] 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;[59] and no court, tribunal or other public

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[54] 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.

[55] Craig, above, n. 21.

[56] Charter of Fundamental Rights of the European Union [2010] OJ C83/02, Preamble [5].

[57] European Union (Withdrawal) Act 2018, Explanatory Notes, [107].

[58] EUWA, Sched. 1, para 2.

[59] EUWA, Sched. 1, para 3(1).

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.[60] It would seem, therefore, that general principles of law can only operate as interpretive guides to legislators, administrators and courts.

CONSTITUTIONAL CONSEQUENCE: EXECUTIVE ACCOUNTABILITY AND THE EU (WITHDRAWAL) ACT 2018

DELEGATED LEGISLATION: THE BASIC PROBLEM

A central feature of constitutional law concerns executive accountability to the legislature. This issue can arise in a number of different contexts, and it can be addressed in a number of different ways. Thus, Prime Minister's question time can, in principle, foster accountability, by rendering the political leader subject to questions from the opposition leader that are not published in advance. Select committees provide for more in-depth scrutiny of government policy, and their reports furnish valuable evidence concerning failures or shortcomings in this respect.

Executive accountability to the legislature is, however, placed under particular strain in relation to the enactment of delegated or secondary legislation. The paradigm in democratic systems is for legislation to be enacted by the legislature. Primary legislation cannot, however, cover all issues. The primary legislation is then complemented by delegated legislation, which fleshes out the principles contained in

[60] EUWA, Sched. 1, para 3(2).

the enabling statute. This is because the legislature may not be able to foresee all ramifications of the legislation when the initial statute is made. It may well have neither the time, nor the expertise, to address all issues in the original legislation. The measures consequential to the original statute may have to be passed expeditiously, which precludes the use of procedures for primary legislation.

There are endemic problems as to how to legitimate such delegated legislation, which is drafted by the executive. The numbers help to place matters in perspective. There are approximately 2,500 pieces of delegated legislation per year, as compared to roughly 40 primary statutes. The reality is that most such delegated legislation receives scant scrutiny by the legislature. The great majority of such measures are subject to what is known as the negative procedure, whereby they enter into force unless annulled pursuant to a motion in the House of Commons, which hardly ever occurs. A minority of such measures are subject to the affirmative procedure, whereby it is for the government to secure a majority in favour of the measure for it to be enacted, although once again governmental failure is rare.

DELEGATED LEGISLATION AND BREXIT: THE PROBLEM COMPOUNDED

Brexit did not change the nature of the problem of securing effective scrutiny of delegated legislation. It did, however, take it to a whole new level in quantitative terms. The reason is not hard to divine. The EUWA strategy was, as we have seen, to bring the entire corpus of EU law into UK law, and then to proceed in two stages: stage one, was to make the necessary changes so that the law was fit for purpose by exit day; stage two, was then to decide thereafter, at greater leisure, whether to retain, amend or repeal the legislation.

The precise number of EU measures thereby domesticated is in the order of 20-25,000. There was a very short time to complete stage one, meaning that it could only be done through changes made by delegated legislation. The EUWA, therefore, gave ministers sweeping powers to propose delegated legislation, the great majority of which are subject only to the negative procedure. The problem was further compounded by liberal recourse to what are known as 'Henry VIII' clauses, which provide that delegated legislation can alter primary statute. The EUWA contains a number of provisions that give the executive powers to make delegated regulations, the principal provisions of the Act being sections 8, 9, 23, and Schedule 8. Space precludes detailed elaboration of all such complex provisions,[61] and thus the focus will be on section 8 EUWA, which is the principal provision dealing with the remedying of deficiencies in laws arising from withdrawal.

Section 8(1) accords a minister broad powers to deal with deficiencies arising from withdrawal.[62] 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.[63] 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

[61] For detailed analysis, see Craig, above, n. 21.

[62] There is a sunset clause in EUWA, s. 8(8), which precludes recourse to s. 8(1) two years after exit day.

[63] EUWA, s. 8(1)(a)-(b).

Parliament, subject to the limits set out in section 8(7).[64] 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—
> (i) the United Kingdom or any part of it or a public authority in the United Kingdom, and
> (ii) 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,
> (d) makes provision for, or in connection with, other arrangements which—
> (i) involve the EU, an EU entity, a member State or a public authority in a member State, or
> (ii) are otherwise dependent upon the United Kingdom's membership of the EU, and which no longer exist or are no longer appropriate,
> (e) 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,
> (f) does not contain any functions or restrictions which—
> (i) were in an EU directive and in force immediately before exit day (including any power to make EU tertiary legislation), and
> (ii) it is appropriate to retain, or
> (g) contains EU references which are no longer appropriate.

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,

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[64] EUWA, s. 8(7) provides that 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.

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 EUWA imposes certain procedural obligations on the exercise of this ministerial power. Thus, 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.[65]

The EUWA makes provision for legislative scrutiny of draft regulations made pursuant to section 8(1). 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.[66] There are, however, conditions that are applicable before this procedure can be invoked.[67] A minister cannot make an instrument subject to that procedure unless 'condition 1' is met, combined with either 'condition 2 or 3'.[68]

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

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[65] EUWA, Sched. 7.

[66] EUWA Sched 7, para 1(3).

[67] Ibid para. 1(4).

[68] Ibid paras. 3(2)-(5).

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 has ended without condition 2 being met.[69]

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.[70]

The creation of sifting committees is undoubtedly positive in terms of enhancing legislative accountability.[71] This should not, however, serve to conceal the fact that the balance of power remains firmly with the executive. Thus, even if the sifting committee differs from the ministerial view, and recommends use of the affirmative procedure, the minister can persist with the negative procedure, provided only that he or she furnishes reasons for disagreeing with the committee, and these reasons may be given before or after the instrument is made.

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[69] Ibid paras. 3(10)-(11), the basic period being 10 days.

[70] EUWA Sched 7, paras 3(6)-(8).

[71] The changes to the Bill owe much to arguments advanced by the House of Lords Constitution Committee, and those who submitted evidence to it, House of Lords, Select Committee on the Constitution, European Union (Withdrawal) Bill (HL 69, 2018).

The provisions in EUWA concerning delegated legislation raise concerns as to constitutional principle and the rule of law. The practicalities of leaving the EU were always likely to place strains on the relationship between the legislature and the executive, given the very 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 very narrow time frame, has resulted in the grant of very broad delegated power to the executive, and led to apprehension as to the adequacy of legislative oversight. This is exacerbated by the frequent recourse to Henry VIII powers, whereby the executive can alter primary legislation through delegated power. There are, in addition, concerns as to the ability or people to plan their lives cognizant of the legal consequences of their action, which is a core element of the rule of law, whatsoever other elements it might contain. This will not be easy in a post-Brexit world, as individuals try to understand and navigate their way among the plethora of complex legal rules that apply within their area.

CONSTITUTIONAL CONSEQUENCE: BREXIT AND DEVOLUTION

The long term effect of Brexit on the UK devolution settlement remains to be seen, and is not readily predictable at the time of writing. It is, nonetheless, clear at this juncture that Brexit has had a negative effect on the relationship between the centre and the devolved regions, in particular Scotland and Wales. This is apparent in relation to the negotiations and the EUWA.

BREXIT, NEGOTIATIONS AND DEVOLUTION

The devolved administrations were very much side-lined in the Brexit negotiation process. The UK entered the EU, and Brexit is destined to take the UK out. The flip side to this conception of indivisibility was that the plan was meant to be beneficial to all parts of the UK, including Scotland, Wales and Northern Ireland, and they were to be accorded voice in its shaping. Thus, in the Prime Minister's Lancaster House speech she stated that the 'devolved administrations should be fully engaged in this process';[72] this would occur through the Joint Ministerial Committee on EU Negotiations, 'so ministers from each of the UK's devolved administrations can contribute to the process of planning for our departure from the European Union';[73] and the net result would be a Brexit that works for the whole of the United Kingdom.

There was, however, a gap between this rhetoric and reality. Truth to tell the substantive fault lines between Westminster and the devolved assemblies were significant, and the procedural engagement a good deal less than the reader would divine from the official Westminster documentation, with the consequence that while the devolved bodies exercised voice, its impact at Westminster was muted.[74] The Scots had voted to remain in the EU, and were clear that if Brexit was to occur then it

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[72] Prime Minister Theresa May sets out the Plan for Britain, including the 12 priorities that the UK government will use to negotiate Brexit, January 17 2017, 5 (hereafter referred to as the Lancaster House speech), https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech ; The United Kingdom's Exit from and New Partnership with the European Union, Cm 9417 (2017) [3.1].

[73] Ibid 6.

[74] P. Craig, 'Brexit, A Drama: The Interregnum' [2017] Yearbook of European Law 3, 17-20; S. Douglas-Scott, 'Brexit and the Scottish Question', in F. Fabbrini (ed.), *The Law and Politics of Brexit* (Oxford University Press, 2017) Chap. 6.

should be a soft version thereof. The Welsh voted to leave, but also favoured a soft version of Brexit. This did not cohere with thinking emerging from Westminster, where the Prime Minister, under pressure from Brexiteers, was inclining to a hard version of Brexit. The tensions surfaced when the Prime Minister gave her Lancaster House speech, in which she opted for hard Brexit, two days before a Joint Ministerial Committee meeting, without having discussed Scotland's policy document released a month earlier. It prompted an angry response from Michael Russell, the Scottish Minister responsible for JMC discussions, who spoke in terms of Scotland being treated with contempt in the negotiating process.[75] Similar tensions were to surface throughout the negotiations, with the devolved administrations feeling that their views were largely ignored.

BREXIT, THE EUWA AND DEVOLUTION

The devolved administrations also expressed their discontent with the way in which they were treated by the EUWA 2018. The legislation was enacted, it will be recalled, in order to bring EU law into UK law, in order that it could be made fit for purpose by exit day, such that it could then be determined thereafter whether to repeal, amend or retain the relevant provisions. The complexity of the 2018 legislation resulted in part from the fact that it had to deal with EU rules that would, in a post-Brexit world, be the responsibility of Scotland, Wales or Northern Ireland, rather than Westminster. This necessarily entailed the detailed replication of provisions in the EUWA concerning Westminster, as they pertained to the other areas.

[75] https://news.gov.scot/news/jmc-meeting-on-brexit

There was, however, very considerable disquiet in the devolved administrations concerning an issue of principle. The logic of the EUWA was, they contended, that when subject matter currently dealt with by the EU was repatriated, it should fall within the power of the devolved administrations, if power of that kind had been devolved to them. It would then be for the devolved administration to decide what to do with the EU law thus retained. The UK government was unwilling to accept this. Thus, while it repeatedly stated that power over most such matters would be returned to Scotland, Wales and Northern Ireland, it also insisted that Westminster must hold the initial key as to the fate of such provisions. The government feared that there might otherwise be serious impediments to the internal market within the UK, which could only be prevented by uniform rules for the relevant area made by Westminster.[76]

The Scottish and Welsh governments were unconvinced, and were highly critical of the provisions in the European Union (Withdrawal) Bill 2017. A joint press release from the Scottish and Welsh leaders stated that while the Bill lifted from the UK Government and Parliament the requirement to comply with EU law, it did the opposite for the devolved legislatures, since it imposed new restrictions, which made no sense in the context of the UK leaving the EU.[77] The Bill operated asymmetrically, such that the UK parliament regained the ability to legislate without restriction, whereas in devolved areas the devolved administrations would only be allowed to do so if the UK government granted permission by Order in Council. The devolved

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[76] The United Kingdom's Exit from and New Partnership with the European Union, above, n. 72, [4.01]-[4.06].

[77] https://news.gov.scot/news/eu-withdrawal-bill .

administrations recognized that there might be a need for common frameworks in certain areas, but contended that these should be agreed between the UK Government and the devolved administrations, rather than be imposed by Westminster.[78]

The critique from the devolved administrations had some effect and there were amendments to the Bill before it became an Act. The bottom line is, nonetheless, that Westminster retains control.[79] It is, therefore, not open to the devolved administrations to modify retained EU law, so far as the modification is of a description specified in regulations made by a Minister of the Crown. Before seeking approval from the Westminster Parliament, such draft regulations must have been presented to the relevant devolved administration and there must be a consent decision, or the passage of 40 days without such a decision. It is, however, clear that, for these purposes, a 'consent decision' includes the refusal of consent. Thus, a draft regulation made by a Westminster Minister specifying that a devolved administration cannot modify certain types of retained EU law must be presented in draft to the devolved administration, and a consent decision must be secured, before proceeding with the making of such regulations in the UK Parliament, but the requirement to secure a 'consent decision' is met even if the consent is refused. The ministerial power is subject to a two-year sunset clause.

Scottish disquiet concerning the devolution provisions in the EU (Withdrawal) Bill led the Scottish Parliament to reject the measure. The Sewel convention provided that the UK government will not legislate for devolved matters in Scotland without the consent of the devolved legislature. This was embodied in the Scotland Act 2016,

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[78] https://news.gov.scot/news/eu-bill-doesnt-reflect-reality-of-devolution.

[79] EUWA, s. 12.

which amended section 28 of the Scotland Act 1998, by providing that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. The UK Parliament, nonetheless, overrode the will of the Scottish Parliament, and the Bill was duly enacted as legislation. The Scottish government did not regard this with equanimity, Michael Russell stating that 'the UK Government acted in an unprecedented and constitutionally improper way in ignoring the views of the Scottish Parliament on legislative consent for the EU (Withdrawal) Act'.[80] Russell made clear that Scotland would, as a result, not consider proposals for regulations made under the EUWA, and that it would press for clarification or amendment to the Sewel Convention. The fallout from these events continues to unfold, and has clearly had a negative impact on the relationship between the centre and the devolved administrations.

The Supreme Court is, however, reluctant to become embroiled with the interpretation of the Sewel Convention. This is evident from *Miller*, where the Supreme Court held that that, while the Sewel Convention was undoubtedly politically important, it was not legally enforceable. Courts of law 'cannot enforce a political convention'.[81] Judges were 'neither the parents nor the guardians of political conventions; they are merely observers'.[82] The fact that the Sewel Convention had

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[80] https://beta.gov.scot/publications/strengthening-the-sewel-convention-letter-from-michael-russell-to-david-lidington/ .

[81] *Miller*, above, n. 2, [141].

[82] Ibid [146].

been enshrined in legislation by section 2 of the Scotland Act 2016 did not thereby render a political convention legally enforceable.[83]

CONCLUSION: BREXIT AND THE PARADOX SOVEREIGNTY

This chapter has been concerned with Brexit and the UK constitution. There will be no attempt to summarise the preceding discussion. It is, however, worth dwelling, by way of conclusion, on the sovereignty paradox that underpins Brexit. The leave campaign was driven, inter alia, by the desire to repatriate power and restore UK sovereignty. It was embodied in language, oft-repeated by ardent Brexiteers, to the effect that the UK would now be able to govern itself, and make its own decisions freed from the need to comply with constraints imposed by EU law. There is both an external and an internal paradox to this sovereignty discourse.

The external paradox is that even if UK takes the hardest of hard Brexit strategies, there will, nonetheless, be very significant constraints on the sovereign choices available to the UK Parliament. This flows, in part, from the fact that many trading standards are set at the global level, largely as a result of negotiation between the EU and the USA, and these will continue to apply to the UK in a post-Brexit world. It flows, in part, also from the fact that there will, even in the event of hard Brexit, be very great pressures on the UK not to diverge from EU trading rules broadly conceived. The reason is not hard to divine. A very great many companies will continue to trade with the EU in a post-Brexit world. When they do so they will

[83] The Supreme Court however side-stepped the argument that notification would necessitate amendment to the legislation relating to Scotland, Northern Ireland and Wales.

have to comply with EU rules, or rules that are regarded are strictly equivalent thereto. While it is therefore open to a sovereign UK Parliament to enact rules that are substantively different, it would be economically irrational, since the price of doing so would be to impose a double regulatory burden on UK firms. If, by way of contrast, the UK opts for a soft form of Brexit, then sovereignty will be diminished because the UK will be a rule-taker, not a rule-maker. It will be bound to follow EU rules and have no voice at the table in the making of such provisions.

The internal sovereignty paradox is that while Brexit was advocated, inter alia, because it would reinforce UK sovereignty, the abiding theme behind pretty much all post-referendum Brexiteer strategy has been to deny either Parliament or the people any further say in the events that have unfolded. Consider these in turn.

UK constitutional orthodoxy is that sovereignty resides in Parliament. We have parliamentary, not popular sovereignty. It was the return of powers to Parliament that underpinned the Brexit campaign. Yet at every stage Brexiteers have sought to deny Parliament any say in the decision to leave, and the terms on which this is done. The exclusion of Parliament was manifest in the desire to trigger notification of exit via the prerogative without recourse to Parliament; it was evident in the unwillingness to accept any amendments to the notification of withdrawal legislation when it went through Parliament; it was a key feature of many of the skirmishes concerning the EUWA, including most prominently debates about the extent to which Parliament should have a say about the terms of the withdrawal agreement with the EU; and it surfaced yet again in the post-EUWA exchanges between the legislature and the executive concerning the way in which the limited powers accorded to Parliament

concerning the terms of any such deal might be exercised, with the executive seeking to limit very significantly the impact of any such legislative oversight.[84]

UK popular sovereignty was manifest in the referendum itself. This has been the principal argument deployed by Brexiteers to limit parliamentary sovereignty, with repeated iteration of the idea that the will of the people would thereby be undermined. This is not the place for detailed exegesis concerning the relationship between parliamentary and popular sovereignty. Suffice it to say the following in the present context. Parliamentary sovereignty is the principle that underpins the UK constitution, and this in no way precludes respect for the results of popular sovereign choice expressed through a referendum. The idea that such respect demands unquestioning quiescence from Parliament as to what should happen thereafter does not withstand examination. The idea that any questioning of the results of the referendum, or what the vote meant, is akin to undermining the popular will is equally untenable. This is evident, most ironically, by Brexiteer reaction on the night of the referendum when they thought that they had lost the vote. The immediate reaction of the UKIP leader, Nigel Farage, was that UKIP would live to fight another day. There was no sense in which he regarded what was then thought to be the will of the people, to remain in the EU, as the reason to disband or alter UKIP's campaign. It is, moreover, very doubtful whether prominent Brexiteer MPs would have regarded a vote to remain as meaning the end of their opposition to the EU. Lastly, and most importantly, opposition to a second referendum that is grounded on the idea that the people have spoken, and that this per se precludes the need for any second popular

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84 https://www.parliament.uk/business/committees/committees-a-z/commons-select/procedure-committee/ .

vote, is not sustainable. There may well be issues to be resolved concerning the questions to be asked and the timing of any such event. This does not alter the central underlying fact: when the people voted they had no real idea as to the terms on which the UK would leave, and scant understanding of the effect that this might have on their jobs, and livelihood. This is evident, at one stage removed, in the parliamentary context, in which rival groups of MPs take different messages from the referendum as to what precisely the people really voted for. It can be readily accepted that the result of the referendum should be treated with constitutional respect. It should not be revisited without good cause. Uncertainty as to what form of Brexit the people voted for has, however, become more, rather less evident over time, and this has become all the greater as the details of the rival versions of Brexit on offer have become more sharply defined.

The internal sovereignty paradox concerning parliamentary and popular sovereignty is, in reality, little more than political realpolitik: Brexit is sold on the basis that sovereignty will be augmented; parliamentary involvement over the terms thereof is, however, repeatedly curtailed and circumscribed on the basis that it will undermine the will of the people; and popular sovereignty is, in turn, circumscribed by unwillingness to give the people any further voice lest they give an answer that does not accord with the Brexiteer vision. The take away message is stark and simple: when you have the answer you want, do not allow the question to be asked again, even though the people have far more detailed knowledge concerning the nature of disengagement than they did before. This strategy is readily understandable in terms of political realpolitik. We should, however, see it in those terms, and not allow it to be shrouded in some veneer of respect for sovereignty.

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