

‘Brexit: Emergent Understandings of Consequences  
and Impacts: University of Glasgow’

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*Constitutional Effects of Brexit*

# 1. EU Withdrawal Bill (EUWB)

- Introduced into House of Commons July 2017
- **Its main tasks:**
  - 1) Repeal ECA: clause 1 EUWB
  - 2) convert existing EU law to UK law: clauses 2- 5 EUWB
  - 3) provide for process of repealing/amending converted or 'retained' ex-EU law by secondary legislation to make it fit for domestic use: Clause 7 EUWB
  - 4) Provide arrangements for devolution: Clauses 10 and 11 EUWB

## Main criticisms of EUWB:

# Provisions for replicating EU Law domestically

- **Clause 2** “*EU-derived domestic legislation*” ie EU law which already implemented by domestic legislation will be saved and have effect in same way it currently does.
- **Clause 3** – “*Direct EU legislation*” (including EU regs) is converted into domestic law under Cl 3 EUWB, and then becomes “retained direct EU legislation”.
- **Clause 4** – Any “rights, powers, liabilities, obligations, restrictions, remedies and procedures which are recognised and available on Brexit day”. A general sweep up provision, which applies to DA and DAE EU law not captured by Cl 3
- **Clause 5** Exceptions
- No retention of EU Charter (clause 5(4)).
- ... No right to bring a cause of action for breaching general principles of EU law (Schedule 1, paragraph 3).
- No right to bring a claim for *Francovich* damages (Schedule 1, paragraph 4).

Main criticisms of EUWB:

Status of “retained EU law”

- Directly Effective EU law will be domesticated by clauses 3 and 4. Yet Bill does not assign this retained EU law domestic taxonomical status. Primary legislation, secondary legislation or something else?
- *House of Lords Constitution Committee central recommendation:* all retained direct EU law should have same legal status: domestic primary legislation.

## Main criticisms of EUWB

### Repairing former EU law:

- ***Repairing former EU law by secondary Legislation***
- UK Govt acknowledge 800-1000 SIs needed to ‘correct’ statute book.
- Authority for this 2ndary legislation found in clauses 7-9 EUWB, see eg Cl 7(1):
- *“(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate*
- *(a) any failure of retained EU law to operate effectively, or*
- *(b) any other deficiency in retained EU law,*
- *arising from the withdrawal of the United Kingdom from the EU”.*
- At Report stage in Commons Govt amended Clause 7 to include further kinds of deficiencies UK ministers could correct in retained EU law.

## Main criticisms of EUWB

### Henry VIII Clauses

- Notably these sections (ie Clause 7 and its subsections) include 'Henry VIII' clauses, *eg*
- *Clause 7 (5):-*
- *Regulations under (Clause 7) ss (1) may make any provision that could be made by an Act of Parliament.*

## *Main criticisms of EUWB*

# Parliamentary scrutiny and introduction of sifting committee

- **Parliamentary scrutiny**
- How will Parliament find time to scrutinise all these amendments?
- Govt introduced an amendment which would require ministers, before introducing SI under the bill, to make statement to HC explaining why SI is appropriate.
- **Sifting Committee**
- Govt adopted amendments tabled by Charles Walker, Chair of Procedure Committee, establishing a new committee of HC to sift through SIs, to see if subject to negative or affirmative procedure (latter requires approval by both HP). (see EUWB Sched 7 Part 1 s 3)

## *Main Criticisms of EUWB:*

# Charter of Fundamental Rights

- Cl 5(4) EUWB provides Charter not part of domestic law post Brexit
- Govt's rationale for refusing to convert Charter in Explanatory Notes §§99-100:
- “The Charter did not create new rights, but rather codified rights and principles which already existed in EU law. By converting the EU acquis into UK law, those underlying rights and principles will also be converted into UK law, as provided for in this Bill..”
- But Government interpretation disputed – eg *Benkarbouche remedy would no longer be possible post Brexit.*
- NB Scottish Continuity Bill would not exclude the Charter.



# *Main criticisms of EUWB*

## Withdrawal Bill in the House of Lords (HL)

- Jan 2018 HL membership: Tories 248 out of total 794 Lords seats, Labour on 197, Lib Dems 100, indep. Crossbenchers 183.
- EUWB passed second reading in HL 31 January without vote – after 20 hours debate over two days, during which 190 peers spoke.
- Committee stage in HL began 21 February. Now, after HL added extra day, expected to finish 28 March.
- HL yet to press amendments to vote. But this likely at Report stage.
- HL probably conclude consideration of EUWB by May, before sending any proposed amendments to HC. If this TT adhered to, EUWB should receive Royal Assent by summer recess. Would allow 7 months for all necessary 2<sup>nd</sup> legislation before exit day. However, Govt does not control timetabling in Lords, so TT could be optimistic.

## 2. BREXIT WITHDRAWAL AGREEMENT (WA)

- **a) Introductory**
- Produced at EU Council. March 19 2018 - Text colour-coded. Parts in green fully agreed; those with yellow agreement in principle subject to drafting points; parts with no highlighting still to be discussed.
- Still large parts neither green nor yellow.
- Still to be ratified
- 23 March EU Council adopts guidelines for post-Brexit relationship with UK

# Transition period

- This is part of Withdrawal Agreement (Part 4 Arts 121-126)
- *Must transition be time-limited?* A 121 draft WA states transition shall 'end on 31 December 2020'.
- How such period might be extended not necessarily simple. Without express provision for extension, UK must negotiate extension as 3C, probably mixed agreement, ie unanimity of all EU MS and ratification by parlts.
- So if UK thinks 31 December 2020 too soon for transition period to expire, should be pressing that point now.
- Once UK outside EU, may not be legally possible for EU to amend agreement. So a new cliff edge created, and no reason to believe UK any more prepared for cut-off date of December 31 2020 than for March 29 2019.

# Transition: Substantive Areas

- **1. UK will not have voting or representation rights during transition**, barring very limited areas where input, as in [fishing quotas](#).
- *highly problematic as democratic proposition*. UK will have all obligations and none of voting rights. Even creation of joint committee to “seek appropriate ways and methods of preventing problems that might arise” will not really resolve this.
- Peretz point on ECHR and voting rights.
- **2. EU citizens moving to the U.K. during the transition** to have “the same rights and guarantees” as those who arrive before the Brexit date in March 2019.
- They will have until 30 June 2021 to apply for temporary status document and eligible to apply for settled status after 5 years. They will be able to bring any existing non-EU family members to UK under EU family reunion provisions.

# Transition: Substantive Areas (cont)

- **3. Fisheries:** British negotiators also softened position on fisheries access, but have secured an agreement that U.K. will be consulted on fishing allocations for 2020 and share of U.K.'s catch will not change.
- **4. Trade deals:** UK can negotiate trade deals during transition period, as long as do not take effect until afterwards.
- **5. Existing EU trade deals with 3C:** Draft states EU will tell its trading partners to treat UK as part of EU. But no guarantee EU's trading partners will accept.
- **6. Ireland:** text largely in white. But UK accepted "backstop" of Northern Ireland staying in EU's SM and CU back in December. Unless UK reneges from that position, that backstop part of exit agreement.

# Implementing WA: UK domestic law, transition and the withdrawal agreement

- *Problem is EUWB not conceived with transitional period in mind, because focus appears on actual Brexit, rather than intermediate approach of transitional period.*
- *s14 EUWB expressly sets exit date 29 March 2019, and also repeal of ECA on exit day.*
- EUWB also provides for conversion of much EU law into domestic law, although specifically excludes certain elements, such as continued supremacy of EU law. How will EUWB function alongside WA with its intended transition period?

## Implementing WA: UK domestic law, transition and the withdrawal agreement (cont)

- *On other hand, how will domestic law regulate for transitional period? A 122 draft Agreement states: 'Unless otherwise provided in this Agreement, Union law shall be applicable to and in UK during the transition period.'*
- *A 122(3) continues, 'During the transition period, EU law applicable pursuant to para 1 shall produce in respect of and in UK the same legal effects as those which it produces within EU and its MS and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union.'*

# Implementing WA: UK domestic law, transition and the withdrawal agreement (cont)

- *There will thus need to be continued direct effect and supremacy of EU law and observance of the binding jurisdiction of the ECJ.*
- *Q is how possible if, acc to EUWB, ECA repealed on exit day, much EU law converted into domestic law, ministers given powers to amend 'retained EU law', and Charter excluded from application? These moves incompatible with transition period.*
- *So looks as if EUWB can't come into force in acc with own provisions. However, if ECA, gateway whereby EU law penetrates UK law, not repealed on exit day, this would provoke some, who might maintain Britain had not really left EU.*



# So what is likely to happen?

- ***Parliament Approving WA by Resolution***
- 13 Dec 2017 Davis proposed approving of WA take *form of resolution* in both HP. This will cover “both the Withdrawal Agreement and the terms for our future relationship”. UK SC noted in *Miller* that a Resolution does not have legislative effect, but nevertheless “an important political act”.
- ***When?*** Davis says Resolution put to HP “as soon as possible” after WAs concluded. Time between publication of WA and decision on Resolution affects how WAs scrutinised in HC. Might not be time for SCs to take evidence and comment.
- ***CRAG (Constitutional Reform and Governance Act 2010)***: Proposed Parlt approval process for WA separate from CRAG 2010. CRAG enables HC, by passing resolutions, to indefinitely block ratification of a treaty.

# Implementing WA – legislation is necessary

- Parliament must legislate to implement WA. UK dualist.
- Davis explained Govt intends, if Resolution passed in HP, “Withdrawal Agreement and Implementation Bill” (WAI Bill).
- Implies introduction of WAIB conditional on both HP approval through Resolution.
- WAI Bill must be passed before exit day 29 March 2019. If not, any provisions in WA that need legal effect, like transit arrangements or citizens’ rights, no legal basis.
- Because of req to implement elements of WA before exit day, scrutiny of WAI Bill, a major constitutional bill, in practice part of part process of approving, as well as implementing, the WA. Will need devolved consent.

# LITIGATION OVER BREXIT

- **1. *Miller*: on whether UK Govt could use prerogative to trigger A 50**
- **2. A 50 Scotland case – may be PR to determine if A 50 may be unilaterally revoked**
- **3. Continuity Bills may be challenged in Sct**
- **4. May be (crowdsourced) legal action over whether a 2<sup>nd</sup> referendum is necessary under terms of EU Law Act 2011**
- plans by "Best for Britain" to bring judicial review proceedings in attempt to require government to hold further referendum on Brexit.
- basis for this referendum requirements in EU Act 2011 which apply to new treaties amending or replacing either TFEU or TEU.
- **5. A further challenge by "Crowdjustice" is currently before the High Court.**
- This challenge argues that Parliament has never delegated the withdrawal decision to the people and has never made the withdrawal decision itself.
- Consequently, Article 50 notification predicated on a decision that has no basis in law.
- **6. Amsterdam court made PR to CJEU on whether UK citizens living in other EU countries will lose their EU citizenship as a consequence of Brexit. 7 Feb 2018.**