

The United Kingdom Internal Market Bill and Breach of Domestic Law

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Huge controversy has already been generated over provisions in the **United Kingdom Internal Market Bill** granting Ministers the power to disapply the **Withdrawal Agreement**. Most of the debate (**Elliott, Armstrong**) has been focused on the potential **breaches of international law**. This could severely damage the reputation of the United Kingdom in the world. However, what has been relatively overlooked is that this Bill is also a flagrant attack on the Rule of Law at the UK domestic level. This remains the case even if amendments proposed by Sir Bob Neill MP (and apparently accepted by the Government) pass.

How does the Bill impact upon the Rule of Law?

Three key clauses undermine the Rule of Law

Clause 42

Clause 42(1) gives a Minister the power to make regulations on the application of exit procedures to goods moving from Northern Ireland to Great Britain. Clause 42(5) states:

"Such provision may include provision for rights, powers, liabilities, obligations, restrictions, remedies and procedures that would otherwise apply, as a result of relevant international or domestic law, not to be recognised, available, enforced, allowed or followed"

This is an astounding proposition. It baldly states that a Minister may make regulations which apply even if those regulations are in breach of the law.

Clause 43

Clause 43(1) gives the Secretary of State a power to make regulations in connection with Article 10 of the Northern Ireland Protocol of the Withdrawal Agreement. Clause 43(2)(b) states that these regulations may make provision 'disapplying, or modifying the effect of, Article 10'. It goes further and spells out the unlawful things which may be done. Most egregiously, clause 43 repeats the clause 42(5) direction that these regulations will take effect notwithstanding their incompatibility or inconsistency with any relevant international or domestic law.

Clause 45

Clause 45 concludes this trinity of breaches. The cross heading is explicit and Baroness D'Souza described it as 'shocking' in the House of Lords. It states:

"Certain provisions to have effect notwithstanding inconsistency or incompatibility with international or other domestic law"

The detail of clause 45 then goes on to say that clauses 42 and 43 (and regulations made under them) have effect 'notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent'. Given that this is a radical provision to include in a piece of legislation, clause 45 repeats itself to make the point, stating first that:

"regulations under section 42(1) or 43(1) are not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law"

And then:

"all rights, powers, liabilities, obligations, restrictions, remedies and procedures which are, in accordance with section 7A of the European Union (Withdrawal) Act 2018, to be recognised and available in domestic law, and enforced, allowed and followed accordingly, cease to be recognised and available in domestic law, or enforced, allowed and followed, so far and for as long as they are incompatible or inconsistent [with clause 42 or 43]"

To paraphrase, if the regulations enacted under clause 42 or 43 were inconsistent or incompatible with the law, then this Act deems them to have domestic effect notwithstanding this incompatibility. And the rights solemnly guaranteed by section 7A of the EU (Withdrawal Agreement) Act 2018, as inserted by section 5 of the EU (Withdrawal Agreement) Act 2020, are no longer enforceable in relation to the specific operation of clauses 42, 43 and 45.

Clause 45 is the final astounding proposition in the Bill. Unlike clauses 42 and 43, this doesn't just allow a Minister to break a law in the future, it states that clause 42 and 43 (and regulations made under them) will have effect from the moment that the UK Internal Market Bill comes into force, even if this is inconsistent with the law.

Breach of domestic as well as international law

In answering a question in the House of Lords on this Bill, the Advocate-General for Scotland Lord Keen stated:

"My Lords, the Government have not proposed any breach of UK law"

Under the terms of the Bill, this is not accurate. Clauses 42, 43 and 45 authorise a breach of 'any relevant international or domestic law' (emphasis added). The phrase 'relevant international or domestic law' is defined in clause 45(g) (emphasis added) as any other legislation, convention or rule of international or domestic law whatsoever, including any order, judgment or decision of the European Court or of any other court or tribunal. The House of Commons Library in their analysis of this Bill stated that:

"This is an extraordinarily broad range of domestic and international law, underlining the fact the Government is seeking to ensure it is near impossible to challenge the use of Ministerial powers under Clauses 42 and 43"

Lord Keen has now resigned from the Government stating that:

"I have found it increasingly difficult to reconcile what I consider to be my obligations as a law officer with your [the Prime Minister's] policy intentions with respect to the Internal Market Bill"

The Bill clearly states that any regulations made under it have effect, notwithstanding that they breach any domestic law whatsoever, including the decision of any court. This is not quite the same as a Henry VIII clause which would give the Minister the power to amend primary or secondary legislation by way of making a statutory instrument. It is broader and simply says that any domestic law which is incompatible with these provisions simply does not have effect.

Extent of disapplication of domestic law

How broad is the proposed power to act in contravention of domestic law? The express words are that it applies to any domestic law whatsoever, or in the words of the House of Lords Delegated Powers and Regulatory Reform Committee it *'is defined in the widest possible terms'*.

There is no attempt to use the *ejusdem generis* rule of statutory interpretation to limit the references to breaches of domestic law to be construed to be similar to the breaches of international law. *Ejusdem generis* means that where there is a general word following a particular word, the general word is to be construed in a similar way to the particular word. So, the Bill could have stated that regulations applied notwithstanding they were in breach of 'any international law, international convention, judgement of the European Court or any international court, or any domestic law'. This would colour the meaning of 'any domestic law' so that it would be construed to be any domestic law related to the previous international laws. But the Bill states that it applies to any 'rule of international or domestic law whatsoever'. There is a clear intention here to disapply all domestic jurisprudence which could have the effect of ruling these regulations unlawful.

Take a hypothetical example. Consider if regulations were made under clause 43 which gave state aid to a company in a way which would be corrupt under ordinary domestic law. Clause 45 completely removes all legal grounds for challenging those regulations as it states that those regulations have effect notwithstanding anything in domestic law with which they are inconsistent. Golanski recently argued that corrupt pardons violate the Rule of Law, and the same logic applies to corrupt regulations. Jessica Simor QC expands this point on the potential breadth of illegality of these regulations:

"State aid contingent on support for a particular political party; the exclusion of the bribery act; the imposition of a nationality requirement in relation to imports; the imposition of a discriminatory charge; the exclusion of FOI, individual tax benefits; secret guidance etc"

As she points out, we only have to look at Hungary for examples of how emergency laws have been used to add to the bank balances of politicians' friends.

Moving from the hypothetical to actual, consider the recent planning decision made by Housing Secretary Robert Jenrick. As a result of judicial review proceedings, the planning court approved a consent order stating that 'The first defendant [secretary of state] accepts that the decision letter was unlawful by reason of apparent bias and should be quashed.' If similar circumstances arose in relation to state aid regulations made under this Bill, then under the terms of this Bill, the fact that those regulations breached domestic law (in this case bias) would be irrelevant. Those regulations would continue to apply even though they were not compatible with domestic law.

The difference between breach of the law and making new law

There is a counter-argument that since (a) parliament is sovereign, and (b) an old parliament cannot bind a new parliament, that these clauses simply make new law which takes priority over an old law. In other words, that these clauses are an unremarkable application of the rule that where an old law is inconsistent with a new law, the new law is to be followed.

In my view this counter-argument does not apply here. Firstly, the standard way to deal with old law that is unwanted is to repeal it. But this Bill does not repeal the old law which may conflict with the new law. Secondly, the more nuanced way to deal with old law is to not repeal it but to disapply it with respect to the new law. This means that the old law continues to apply generally, but doesn't apply to the particular circumstances set out in the new law. But this Bill doesn't disapply the old law, it instead makes the sweeping statement that the new law is lawful notwithstanding that it is inconsistent or incompatible with the old law. Thirdly and most crucially, this Bill does not identify specific provisions of old law and then seek to disapply them in the new law. Instead it

says that any old law which is incompatible does not have effect in relation to the new law. At one fell stroke it seeks to disapply the entirety of the statute book and the common law from these clauses. The courts in *Thoburn* and *HS2 Alliance Action* have already stated that Parliament cannot impliedly repeal 'constitutional' statutes. This Bill seeks to give a Minister the power to make Regulations which by implication will disapply the entire corpus of English law.

Immunising the regulations from the law

The Supreme Court in *R (Public Law Project) v Lord Chancellor* restated the constitutional principle that 'the lawfulness of statutory instruments (like other subordinate legislation) can be challenged in court.' Clause 45 is an attempt to place any future regulations beyond legal challenge on the basis of incompatibility or inconsistency with the Withdrawal Agreement and international law. Crucially it also attempts to put them beyond the reach of challenge under any domestic law. It literally says that even if the regulations are incompatible or inconsistent with the law, they still have effect. There are those, such as Finnis and Larkin, who have argued that breaching international law does not amount to a breach of the Rule of Law. However, there can be no doubt that breaching domestic law does amount to a breach of the Rule of Law. This is because at the heart of the Rule of Law is the simple requirement that everyone is subject to the law.

This Bill manifests an attempt to immunise these regulations from judicial scrutiny. This goes further than the ouster clause in *Privacy International*, which merely stated that courts couldn't question a point. It instead attempts to brazenly deem the regulations lawful, regardless of any inconsistency or incompatibility with domestic or international law, simply by dint of sovereignty of parliament. The most recent amendments tinkering with the judicial review time limits will have little effect if the declared intent of the Bill is to make it impossible to challenge the legality of the regulations. Putting regulations beyond challenge is in fundamental opposition to the Rule of Law. It is what Peter Van Lochem has described as 'legislation against the rule of law'. I developed this point previously in arguing that 'it is a necessary pre-requisite for the Rule of Law to be effective, that legislation is prepared which is in accordance with the Rule of Law'.

The Sir Bob Neill MP amendments

According to press reports, the Government has accepted an amendment proposed by Sir Bob Neill in order to head off a defeat in the House of Commons. The amendment would mean that clauses 42, 43 and 45 don't come into force until the Commons passes a motion specifically authorising it. This does not fundamentally change the nature of the Rule of Law problems with this Bill, it merely adds an additional level of parliamentary consent before authorising a breach of the law.

Conclusion

Brandon Lewis MP, Secretary of State for Northern Ireland has unambiguously stated in Parliament that 'this [Bill] does break international law in a very specific and limited way'. As Garner has argued, these clauses constitute an immediate breach of international law as well as authorise future breaches of international law. Equally damning is the breach of UK domestic law contained in the Bill. The wording of the Bill is clear - the Government can make regulations which have effect even if they are incompatible with domestic law. Putting anything above the law is the antithesis of the Rule of Law.

In a proudly Rule of Law compliant country like the United Kingdom, an argument which ends with the conclusion that 'it's okay for Parliament to break the law' cannot be sustained.

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