

The European Union (Withdrawal Agreement) Bill and the Rule of Law

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The general election on 12 December 2019 has fundamentally changed the political dynamic driving the Brexit process. The European Union (Withdrawal Agreement) Bill (WAB), which will become law before 31 January 2020, has been substantially revised (from the version which was presented in October 2019) to reflect this Government's approach to Brexit. The Bingham Centre for the Rule of Law has published [a report](#) that looks in depth at some of the main Rule of Law issues in the WAB. This version of the WAB indicates that this Government will take a different approach from the previous one in terms of dealing with some of the key constitutional issues arising from Brexit. This post examines some of the Rule of Law implications of the main constitutional issues in the WAB.

Parliament

The narrative around Parliament's involvement in the Brexit process in the 2017-19 session has become dominated by the events of 2019 after the Government defeats on the meaningful vote. From a constitutional perspective this is regrettable. The drama of 2019 risks obscuring the valuable and constructive contribution of Parliament's scrutiny of the EU (Withdrawal) Act 2018. Unlike the 2018 Act, the WAB is going to be subject to limited scrutiny, particularly from parliamentary committees. This has Rule of Law implications.

Parliamentary scrutiny serves to enhance the transparency of the legislative process which in turn makes the law more accessible, which is a key element of the Rule of Law. Parliamentary scrutiny is particularly important for the transparency of the Brexit process because Brexit Bills are complex and contain significant constitutional changes. Parliamentary committees, such as the Constitution Committee, have the expertise to provide an independent evaluation of the constitutional implications of a Bill like the WAB. However, on this condensed timetable, there is little time for their conclusions to inform the broader parliamentary and public debate. For the next phase of the Brexit process, the transparency of the legislative process will suffer if the Government seek to replicate the example of the WAB, rather than that of the 2018 Act.

The limited scrutiny of the WAB is to an extent the product of institutional design rather than Government decision-making. From the beginning of the Brexit process it was predictable that the scrutiny of the WAB would be deficient. This is for two main reasons. The first is that the Bill would only be introduced and make progress through Parliament after the Withdrawal Agreement had been finalised and politically agreed. This meant that the scope for amendments in Parliament was limited by the fact that the treaty was finalised, but more importantly, the political terms of the debate would mean that there was little appetite or time for constructive scrutiny. The second is the absence of parliamentary procedures or constitutional provisions to structure parliamentarians' engagement with the negotiation of an international agreement such as the Withdrawal Agreement.

The October WAB featured a provision (clause 31) that would have provided a structure for Parliament's supervision of the negotiations on the future relationship of the EU. This provision could have in turn, by for example requiring MPs approval of the Government's negotiating mandate, led to enhanced scrutiny by parliamentary committees. The decision not to include clause 31

in the WAB indicates that the Government does not want to be tied down by any statutory requirements to secure approval of the Commons at particular stages of the negotiations. From a Rule of Law perspective, this seems short-sighted. Clause 31 provided a means to increase the transparency and accessibility of the UK's Government role in formulating the future relationship, an international agreement which will have profound implications for the people of the UK. In absence of such a provision, Parliament and Government will have to find alternative mechanisms to ensure that parliamentarians and the public can be involved in the scrutiny of international agreements.

The courts

One of the core aims of Brexit is to free UK courts from the obligation of following the case law of the EU's Court of Justice. Clause 26 of the WAB, which was not in the October version, enables the Government to use delegated legislation to remove the obligation upon courts to follow retained EU case law. The House of Lords Constitution Committee has recommended that the power be removed from the Bill (a number of legal experts and organisations such as the Public Law Project and the Bingham Centre for the Rule of Law have also criticised the provision).

Clause 26's significance extends beyond its potential legal effect. The European Union (Withdrawal) Act 2018, put together by Theresa May's Government, provides a scheme designed to maximise legal continuity and certainty once the UK is no longer subject to EU law as a member state or through transition. Section 6 of the 2018 Act required UK courts, other than the Supreme Court and the High Court of Justiciary, to follow retained EU case law when interpreting EU retained law. If the Government decided that it does not want to keep a particular EU retained law, or judgment from the CJEU, it would be free to ask Parliament to legislate. The decision to include clause 26 of the WAB could be taken as an indication that the Johnson Government wants to move away from the legal presumption of continuity. This fits with Prime Minister's stated position that a priority for the future relationship is to avoid alignment with EU law or any form of CJEU jurisdiction. Seen in this way, clause 26 is one of the first signs of the constitutional implications of a policy of immediate divergence from EU law after the end of the implementation period.

The full constitutional implications of this approach to the future relationship will become clearer over the next 12 months. However, some of the provisions of the WAB illustrate some of the constitutional difficulties that might emerge from this approach. Clause 5 of the WAB provides that the Withdrawal Agreement will have direct effect and supremacy in UK law (giving effect to Article 4 of the Withdrawal Agreement). Domestic courts will therefore interpret the Withdrawal Agreement in the same way that they interpreted EU law when the UK was a member state. Further, under the terms of transition period, the legal effect of the European Communities Act 1972 will continue in force through clause 1 of the WAB. These provisions are necessary to faithfully implement the Withdrawal Agreement into domestic law and they send a clear message to the courts in relation to the status of EU law in both cases.

Other provisions of the WAB send a different constitutional message, albeit through provisions designed to have political rather legal effect. Clause 38 of the WAB declares that Parliament remains sovereign 'notwithstanding' the aforementioned provisions of the WAB on Article 4 and transition. This provision is somewhat misleading in the sense that after the WAB's enactment Parliament will not be free, other than in a theoretical sense, to legislate contrary to the terms of the Withdrawal Agreement. Clause 29 of the WAB provides a mechanism for parliamentary committees to flag issues with EU law made during transition. From a Rule of Law perspective this is welcome as it recognises the need for continuing parliamentary scrutiny of EU law-related legislation post-Brexit. However, this arrangement will not change the fact the UK remains bound to implement EU law during transition.

Conclusion

The WAB contains a mixture of constitutional messages. The WAB delivers an orderly Brexit through implementation of the Withdrawal Agreement but also seeks to empower Parliament and the courts to show commitment to the Government's approach to Brexit. This is also captured in clause 33, which prohibits the Government from agreeing an extension to the implementation period. It is hard to reconcile this with Article 132 of the Withdrawal Agreement which expressly provides for the potential of a single extension of up to two years. The Government understandably wants to avoid unnecessary delay and uncertainty. The previous WAB gave Parliament the right to veto a proposed extension (clause 30). That provision may have struck a better balance. However, clause 33 indicates that the Government wishes to prioritise sending a clear political message: that this Government is going to prioritise delivering divergence at the soonest possible moment.

If the Government is going to prioritise delivering immediate divergence in the next phase of the Brexit, it will be important for the Rule of Law that Government maintains a balanced approach to both the process and substance of constitutional change. One of the advantages of the previous Government's approach to the future relationship, in terms of maintaining alignment with EU law, was that it limited some of the constitutional challenges of the Brexit process. Diverging from EU law quickly will raise difficult constitutional questions on devolution, on delegated powers and on the role of the courts. These questions will require close scrutiny in Parliament and a higher level of justification from the Government to ensure that the legislative process remains accessible and transparent.

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