

United Kingdom Internal Market Bill: Consideration of Lords Amendments 7 December 2020



Executive Summary

This Report sets out in brief the Bingham Centre's Rule of Law analysis of the clauses in Part 5 of the Bill of the **UK Internal Market Bill** that were removed by the House of Lords, to inform the House of Commons consideration of the Lords Amendments to the Bill on Monday 7 December.

The Report concludes that the clauses removed by the House of Lords would seriously damage the Rule of Law and the UK's international reputation as a Rule of Law regarding nation. It recommends that members should not vote in favour of reinstating the clauses in Part 5 of the Bill.

By seeking to reinstate the clauses in Part 5 of the Bill, the Government is asking Parliament to legislate incompatibly with the Rule of Law in two respects.

First, the clauses involve a deliberate breach of the UK's international obligations. They do not merely provide for future breaches of international law by ministerial regulations. By removing the entrenched legal protection that the UK promised to provide for certain rights in the Withdrawal Agreement, and adopting measures which could jeopardise the achievement of the objectives of that Agreement, the reinstated clauses would put the Bill itself in immediate breach of clear obligations which the UK voluntarily and very recently assumed in Articles 4 and 5 of the Withdrawal Agreement.

The "parliamentary lock" introduced by the Commons therefore does not fix the Bill's Rule of Law problem, as the enactment of the Bill with the clauses reinstated would put the UK in breach of its international obligations even before these clauses are brought into force or used to make regulations. As Lord Tom Bingham made clear in his well known exposition of the concept, the Rule of Law requires compliance by the State with its obligations in international law as in national law. A breach of the rule of international law is still a breach of the Rule of Law.

Second, the clauses the Government seeks to reinstate seek to immunise those ministerial regulations from any meaningful legal challenge, placing them beyond effective review by the independent courts. While the Government asserts that the Bill preserves access to judicial review, the practical effect of the provisions in the Bill is to create a monumental ouster clause of unprecedented scope. Preventing access to courts to challenge the legality of ministerial actions is also a fundamental departure from the Rule of Law.

The consequences of such a deliberate repudiation of clear international law obligations, and of such a sweeping exclusion of access to effective legal remedies, are very serious, including for the UK's reputation as a global leader on the Rule of Law and as an advocate for a rules-based international order. The context of negotiations of a new relationship with the EU does not justify such a serious departure from fundamental constitutional norms to which the UK has long adhered. The Rule of Law is not negotiable.

Members of the Commons must ask themselves if their conscience allows them to support such an unprecedented request to approve in principle a Bill containing provisions which depart so significantly from the requirements of the Rule of Law. As Lord Judge said in the debate in the House of Lords

"The rule of law is a bulwark against authoritarian incursion, and even the smallest incursion threatens it. When those responsible for making the law—that is, us the Parliament, we the lawmakers, who expect people to obey the laws we make—knowingly grant power to the Executive to break the law, that incursion is not small. The rule of law is not merely undermined, it is subverted."



About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society - too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

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Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. Previous Reports have been on the EU (Withdrawal Agreement) Bill and the Terrorist Offenders (Restriction of Early Release) Bill as well as on various coronavirus laws. Dr Ronan Cormacain is leading this Project.

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1. Introduction

The House of Commons considers the Lords Amendments to the UK Internal Market Bill on Monday 7 December. The Government has indicated that it will ask the Commons to reinstate the clauses in Part 5 of the Bill that the House of Lords voted to remove.

The Bill deals with many important matters consequent upon the UK leaving the European Union. However, Part 5 of the Bill has particularly grave implications for the Rule of Law, and for this country's international reputation for Rule of Law leadership. This Report only deals with Part 5 and the Rule of Law concerns that Part raises, it does not touch upon the broader policy points raised by this Bill.

The clauses in Part 5 of the Bill dealt with the Northern Ireland Protocol to the Withdrawal Agreement between the UK and the EU. The problematic provisions are clauses 44, 45 and 47. These clauses are incompatible with the Rule of Law for two reasons.

First, they are either on their face in knowing and deliberate breach of international law, or authorise such knowing and deliberate breaches. The international law in question is the Withdrawal Agreement, an international treaty very recently agreed between the UK and the EU, and implemented in domestic law by a very recent Act of the current Parliament, the European Union (Withdrawal Agreement) Act 2020. Such provisions in a Government Bill, asking Parliament to agree to deliberately breaching international legal obligations voluntarily entered into by the UK in a recently ratified and implemented bilateral treaty, are, quite simply, unprecedented.

Second, the clauses are also a direct attack on fundamental provisions of UK domestic law. Clause 47 grants Ministers the power to make Regulations, and deems those Regulations lawful even if they breach any UK statute or any UK common law. This seeks to limit the grounds of possible legal challenge so completely that, whatever the Government asserts about the Bill preserving the possibility of judicial review, it amounts to a sweeping ouster clause because there appears to be no conceivable legal ground on which a court could rule against the Regulations. The Mother of Parliaments is being asked to agree to the mother of all ouster clauses.

This Report analyses these provisions from the perspective of the Rule of Law, which is the Bingham Centre's particular expertise.

The Report concludes that the implications of these clauses for the Rule of Law, and for the UK's international reputation as a Rule of Law regarding nation, are so serious that it recommends that members should not support reinstating the clauses removed from the Bill by the House of Lords.

2. The Relevant Provisions of the Bill

There are three key clauses of the Bill as it was introduced in the Lords which gave rise to serious Rule of Law concerns. These were contained in Part 5 of the Bill which deals with the Northern Ireland Protocol to the Withdrawal Agreement.

Clause 44: ministerial power to override implemented treaty provisions on exit procedures

Clause 44 would give a Minister the power to make regulations about the application of exit procedures to goods moving from Northern Ireland to Great Britain,¹ including any exit procedure that is applicable by virtue of the Northern Ireland Protocol.² The power to make such regulations expressly includes the power to disapply, or modify the application of, an exit procedure,³ and

“Such provision may include provision for rights, powers, liabilities, obligations, restrictions, remedies and procedures *that would otherwise apply*, as a result of relevant

¹ Clause 44(1).

² Clause 44(2).

³ Clause 44(4).

international or domestic law, *not to be recognised, available, enforced, allowed or followed*⁴ (emphasis added).

“Relevant international or domestic law” is defined very widely to include the Northern Ireland Protocol, any other provision of the Withdrawal Agreement, any other EU law or international law, any provision of domestic legislation such as the European Communities Act 1972 or the EU (Withdrawal) Act 2018 or “any other legislation, convention or rule of international or domestic law whatsoever.”⁵

In other words, ministers would be given **an extraordinary power to override even implemented treaty provisions on exit procedures** on goods moving from Northern Ireland to Great Britain.

Clause 45: power for Secretary of State to override treaty provisions on state aid

Clause 45 would give the Secretary of State a power to make regulations in connection with Article 10 of the Northern Ireland Protocol,⁶ which concerns State Aid, including provision disapplying or modifying the effect of Article 10⁷ or prescribing how it is to be interpreted.⁸ The power is very broadly defined and again expressly includes the power to make provision that is incompatible or inconsistent with any relevant international or domestic law.⁹

In other words, the Secretary of State would be given an extraordinary power to override treaty provisions on State Aid, including in a way which removes individuals’ or businesses’ rights of action in respect of aid which they would otherwise have.

Clause 47: the “notwithstanding” clause

Clause 47 completes the problematic provisions, by providing that the clauses described above and regulations made under them are, in the words of the clause’s cross heading described as “shocking” by Former Lord Speaker Baroness D’Souza,¹⁰ “to have effect notwithstanding inconsistency or incompatibility with international or other domestic law.”

This means that regulations made under clauses 44 and 45

are not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law¹¹

and that

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 [provisions in or made under this Act]¹²

In other words, the provisions in this later Act of Parliament are intended by the Government to override the provisions in the EU (Withdrawal) Act according direct effect and supremacy to the provisions of the Withdrawal Agreement which the UK agreed to protect in UK law.

⁴ Clause 44(5).

⁵ Clause 44(7) and 47(8).

⁶ Clause 45(1).

⁷ Clause 45(2)(b).

⁸ Clause 45(2)(a).

⁹ Clause 45(3)(e).

¹⁰ Hansard, House of Lords, 10 September 2020 Volume 805 Col 921, available at <<https://hansard.parliament.uk/lords/2020-09-10/debates/6112E76D-DBC2-4083-B4FB-7E76FD8D495C/RuleOfLaw>>.

¹¹ Clause 47(2)(a).

¹² Clause 47(2)(b).

3. The Bill's breaches of international law

The Government says that the provisions in the Bill which it now seeks to reinstate are merely “an insurance policy”, or a “legal safety net”: in the words of the Lord Chancellor, Robert Buckland, in his evidence to the House of Lords Constitution Committee, emergency powers which it is merely prudent and sensible to have in reserve in case they are needed in the event that the EU acts in bad faith in the negotiations.

According to this argument, there is nothing in the clauses which is actually in breach of any international legal obligation, they merely authorise possible future breaches when ministers exercise their power to make regulations which are incompatible or inconsistent with international law, an eventuality which, the Government says, it hopes to avoid.¹³

It is important to be clear, therefore, about precisely how reinstating these clauses in the Bill would breach international law, and precisely when those breaches occur. There may be different breaches by the UK in international law at different times: on the Government's introduction of the Bill, on Parliament's passing of the Bill, on its coming into force, and on the making of regulations under the clauses being considered. The precise nature and timing of the different breaches depends on the particular obligation in play.

Breaches of the Northern Ireland Protocol, Articles 5 and 10

Article 5 of the NIP deals with export procedures. Clause 44 of the Bill authorises a Minister to make regulations which are in contravention of Article 5 and therefore authorises a future breach of international law.

Article 10 of the NIP deals with state aid. Clause 45(2)(b) then states that these regulations may make provision

disapplying, or modifying the effect of, Article 10

This provision therefore also authorises a future breach of international law.

Article 10 together with Annex 5 sets out the EU law which is to govern Article 10. However, clause 45(3)(d) states that

Article 10 not to be interpreted—

- (i) in accordance with case law of the European Court;
- (ii) in accordance with any legislative act of the EU, including regulations, directives and decisions, that would otherwise be binding on the United Kingdom;
- (iii) otherwise than in accordance with the regulations;

This therefore also authorises a future breach of international law.

While actual breaches of Article 5 of the Northern Ireland Protocol concerning export procedures and Article 10 concerning State Aid might not crystallise until regulations are made under the new powers in the Bill, there are two respects in which the Bill breaches the Withdrawal Agreement in a more immediate way.

Breaches of the Withdrawal Agreement, Article 4

Article 4 of the Withdrawal Agreement provides for the direct effect and supremacy of EU law in relation to the application of the Withdrawal Agreement to and within the United Kingdom.

Article 4(1) states that

legal or natural persons shall in particular be able to *rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law*.¹⁴

¹³ See eg Lord Keen before his resignation as Advocate General for Scotland [insert ref].

¹⁴ Article 4(1) WA.

Article 4(2) of the WA states that

The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.

In this clause of the treaty, the UK agreed to enact primary legislation which gives judges the power to disapply domestic law which is inconsistent with the Agreement. The UK fulfilled this obligation through the enactment of the European Union (Withdrawal Agreement) Act 2020.

As stated in the Government's own description of its position, clauses 44, 45 and 47 seek to disapply the domestic application of the direct effect of the Withdrawal Agreement, by partially 'switching-off' new section 7A EUWA 2018, which gives effect to Article 4 WA.

This is why Secretary of State for Northern Ireland, Brandon Lewis, admitted in the House of Commons that the Bill breaches the UK's international treaty obligations, an acceptance which he has maintained despite other ministers seeking to suggest that in fact the Bill does not involve any breach of international law until either these clauses are brought into force or regulations are made under the powers the Bill gives.

Breach of the Withdrawal Agreement, Article 5

Article 5 of the Withdrawal Agreement is entitled 'Good Faith' and obliges both parties to act with mutual respect and in good faith. It then goes on to state that

[the parties] shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.

By the Government introducing a law in Parliament which would authorize the deliberate breaching of the WA, the UK is arguably in breach of its negative obligation under Article 5 to refrain from measures jeopardising the attainment of the objectives of the Agreement. Parliament passing the Bill containing these clauses would certainly put the UK in breach of this Article 5 good faith obligation.

It is therefore clear that the Government, by reinstating these clauses in the Bill, and Parliament, if it passes them, are not only contemplating the possibility of future breaches of its obligations in future regulations which may or may not be made, but also place the UK in breach of its obligations under both Articles 4 and 5 of the Withdrawal Agreement.

Treaty Obligations in International Law

International law governs the making, interpretation and termination of international treaties.

Most importantly, the Vienna Convention on the Law of Treaties 1969, which the UK signed in 1970 and ratified in 1971,¹⁵ provides in Article 26:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

This Article reflects the very long-standing principle of international law *pacta sunt servanda* – agreements must be kept. That is a basic principle of customary international law and, as such, is also part of English common law. The importance of this principle to the very existence of a rules-based international order cannot be stressed enough. The International Court of Justice in 1974 restated the importance of the Vienna Convention rule stating:

The International Law Commission's Articles on State Responsibility, which codify customary international law on States' responsibility for internationally wrongful acts, include the following principles:¹⁶

¹⁵ See United Nations Treaty Collection - Vienna Convention on the Law of Treaties – Ratifications. available at <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en>.

- Every internationally wrongful act of a State entails the international responsibility of that State.¹⁷
- There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.¹⁸

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.¹⁹

The relevance of internal UK law

The Government invokes the constitutional doctrine of parliamentary sovereignty to argue that it is constitutionally permissible for it to ask Parliament to legislate in breach of the UK's treaty obligations, and for Parliament to pass such legislation.

However, the Government's reliance on internal law to justify its position does not in any way affect the above analysis that the provisions in the Bill, if reinstated and enacted, will put the UK in breach of its international treaty obligations.

The Vienna Convention on the Law of Treaties, which the Government accepts governs the position in international law, provides in Article 27:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

The Articles on State Responsibility similarly provide:

“The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law”.²⁰

Whether a UK court would be able to provide a remedy if Parliament repudiates Article 4 WA does not affect the fact that passing the Bill will put the UK in immediate breach of the WA and therefore in breach of international law.

The Rule of Law and International Law

The Rule of Law is one of the cornerstones of the constitutional legal order of the UK. Lord Tom Bingham, one of the UK's most esteemed judges, defined it as follows

All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.²¹

Put simply – we are all subject to the law. Although this is not a uniquely British idea, it is an idea which has been rooted in our constitution for centuries, and which we have exported to many countries around the world. The ideal of Magna Carta – that no-one is above the law – is a source of global inspiration.

¹⁶ United Nations, General Assembly, Responsibility of States for Internationally Wrongful Acts, adopted 2001, deriving from work of the International Law Commission, available at <
https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>.

¹⁷ Article 1.

¹⁸ Article 2.

¹⁹ Article 12.

²⁰ Article 3.

²¹ Tom Bingham, *The Rule of Law* (Penguin UK 2011).

The Rule of Law requires the State to act in accordance with the law and does not distinguish between national law and international law for this purpose: in Lord Bingham's words: "the rule of law requires compliance by the state with its obligations in international law as in national law."

In his book, *The Rule of Law*, Lord Bingham explained the reason for including this principle in any contemporary account of the Rule of Law:²²

"... although international law comprises a distinct and recognisable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual states and in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends ; and observance of the rule of law is quite as important on the international plane as on the national perhaps even more so. ...the rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large."

The UK has long been a global leader in advocating for a rules-based international order. Its credibility as such depends on it leading by example. Lord Bingham again:²³

"However much any of us as individuals might relish the opportunity to live our lives free of all legal constraints ... we know quite well that acceptance of these constraints is the necessary price to be paid for their observance by others and that a society in which no one was subject to such constraints would not be a very congenial one. ... The same is true in the international sphere. However attractive it might be for a single state to be free of legal constraints that bind all other states, those states are unlikely to tolerate such a situation for very long and in the meantime the solo state would lose the benefits and protections that international agreement can confer. The rule of the jungle is no more tolerable in a big jungle."

Introducing a Bill which deliberately breaches international law is also a breach of the Ministerial Code, which requires ministers to comply with the law, including international law. As Lord Bingham also pointed out in his account of the Rule of Law, this recognition in the Ministerial Code that ministers must comply with international law flows from the acceptance that the Rule of Law requires States to comply with their international obligations as well as national law.

Parliament should be in no doubt about the enormity of what the Government is asking it to do by agreeing to legislate in deliberate breach of international law, and therefore the Rule of Law, and its implications for the UK's hard earned reputation for global Rule of Law leadership.

The "parliamentary lock"

The Government amended the Bill in the Commons in response to concerns expressed at Second Reading by many members, including a significant number of Conservative backbenchers, about Parliament being asked by the Government to authorise knowing and deliberate breaches of international law.

The effect of the Government's amendment was that clauses 44, 45 and 47 could not be brought into force until the date of their commencement has been approved by a Resolution of the House of Commons and referred to in a motion tabled in the House of Lords.

Alongside the amendment, the Government also published a Statement on the notwithstanding clauses in the Bill, in which it commits to asking Parliament to support the use of the provisions in clauses 44, 45 and 47 of the Bill "only in the case of, in our view, the EU being engaged in a material

²² Tom Bingham, *The Rule of Law* (2010), chapter 10, "The Rule of Law in the International Legal Order", pp. 110-111.

²³ *The Rule of Law*, p. 112.

breach of its duties of good faith or other obligations, and thereby undermining the fundamental purpose of the Northern Ireland Protocol.”

The statement provides five examples of such behaviour, including insistence on paperwork requirements (export declarations) for goods going from Northern Ireland to GB, and insistence that the EU’s state aid provisions should apply in GB in circumstances where there is no link or only a trivial one to commercial operations taking place in Northern Ireland.

The Government also confirms that “in parallel with the use of these provisions it would always activate appropriate formal dispute settlement mechanisms with the aim of finding a solution through this route.”

Does the “parliamentary lock” fix the Bill’s Rule of Law problem?

The Government referred to this provision in the Bill as providing a “parliamentary lock” on the bringing into force of the provisions in the Bill that are in breach of the Withdrawal Agreement. It sought to characterise these provisions in the Bill as “reserve powers”, or a “legal safety net”, which will only need to be used in the event that the EU insists on “unreasonable interpretations” of the Northern Ireland Protocol which cannot be resolved under the dispute resolution procedure provided under the Withdrawal Agreement/in the negotiations about the future relationship. It is described by the Lord Chancellor as an insurance policy - a “break the glass in emergency provision” - which will only be needed in the event of the negotiations not ending in agreement.

The Government’s argument, that these clauses are in the nature of emergency powers, which will only be needed if agreement is not reached in the ongoing negotiations, and that it will now be for the House of Commons to decide whether and when they are brought into force, merits careful consideration. The Government is right that the Northern Ireland Protocol left some matters for further discussion between the UK and the EU, and it is also the case that the phased negotiation between the UK and the EU over the UK’s withdrawal is a most unusual, indeed unprecedented international negotiation generating binding treaty obligations at the same time as ongoing negotiations about the future relationship continue.

On close analysis, however, we do not consider that the “parliamentary lock” meets the serious Rule of Law concerns set out above.

Even with what the Government describes as the “parliamentary lock”, the Bill will remain in breach of international law in significant ways.

Deferring the coming into force of these provisions pending a further resolution of the House of Commons does not diminish the Government’s breach of the good faith obligation in Article 5, by seeking powers which make the attainment of the objective of the Withdrawal Agreement more difficult, nor Parliament’s complicity in that breach if it passes the Bill containing those clauses.

The Bill will also still amount to a breach of the Article 4 obligation on enactment, because the protection for the direct effect and supremacy of rights in the Withdrawal Agreement will then be vulnerable to defeasance by a resolution of the House of Commons, which is a weaker protection than that which the UK undertook to provide in Article 4 (and did provide in s. 7A of the EU (Withdrawal) Act 2018, as inserted by the EU (Withdrawal Agreement) Act).

The fact that the coming into force of those provisions will be deferred pending a further resolution of the House of Commons therefore does not alter the fact that, by reinstating these clauses, Parliament is still being asked by the Government to legislate in deliberate breach of its treaty obligations.

The essence of the Rule of Law problem with the Bill is that it threatens a breach of treaty obligations as part of a negotiating position in relation to a future agreement. This is clear

from the Government's statement on its proposed use of the notwithstanding clauses, which comes close to saying that if the UK does not get what it wants in relation to specific issues, it will unilaterally repudiate aspects of the Withdrawal Agreement and the NI Protocol. Threatening to breach international obligations in this way is not compatible with the Rule of international law: As Sir Bob Neill memorably commented in the House of Commons at an earlier stage in the Bill's passage, "The Rule of Law is not negotiable".

The Rule of Law compatible alternative

The Government says that it needs the clauses in the Bill in the event that the EU insists on unreasonable interpretations of the WA/NIP.

However, the Withdrawal Agreement itself provides a dispute resolution mechanism for resolving such disagreements about the interpretation of the Withdrawal Agreement.

In that agreement, the UK agreed that during the transition period, the Court of Justice of the European Union would have jurisdiction over disputes concerning the interpretation and application of the Withdrawal Agreement itself.²⁴

After the transition period, the dispute settlement procedure set out in Articles 167 onward apply.

Moreover, the UK agreed to the exclusivity of the dispute settlement procedures provided for in the Agreement: for any dispute arising under the Agreement, the parties are only to have recourse to the procedures provided for in the Agreement.²⁵

The Rule of Law-regarding way for the UK to proceed if it has concerns about the EU's interpretation of the Agreement is therefore by invoking the dispute resolution mechanism provided for by the Withdrawal Agreement itself, not legislating to disapply the treaty if the UK's interpretation of it is not accepted by the other party.

4. The Bill's breaches of domestic law

When clause 47 was first introduced in the House of Commons it had a number of elements which amounted to an unacceptable breach of domestic law²⁶. The former Attorney General Dominic Grieve has argued that the Bill contains an unacceptable ouster clause.²⁷ Clause 47 of the Bill contains restrictions on the availability of legal remedies which are so extensive as to make that clause not just a simple ouster clause, but the mother of all ouster clauses.²⁸

Ouster clauses

An ouster clause is a provision in primary legislation which attempts to oust the jurisdiction of the courts. It deems that provision (or decisions made under or in accordance with that provision) as not susceptible to judicial challenge. An ouster clause attempts to make the subject matter of the clause non-justiciable, putting it outside or beyond the reach of the courts.

Clause 47 and the mother of all ouster clauses

Clause 47 contained an attempt to so completely exclude judicial scrutiny that we hesitate before calling it a simple ouster clause. It is not that it seeks to simply oust the jurisdiction of the courts (which it does, except in relation to judicial review cases). It goes further and makes application to courts completely pointless by deeming what is done under the clause completely lawful in all circumstances.

²⁴ Article 131 Withdrawal Agreement.

²⁵ Article 168 Withdrawal Agreement.

²⁶ R. Cormacain, 'The United Kingdom Internal Market Bill and Breach of Domestic Law', U.K. Const. L. Blog (23rd Sept. 2020) (available at <https://ukconstitutionallaw.org/>)

²⁷ See comments made at *The Implications of the Internal Market Bill for the rule of law in the United Kingdom*, Webinar hosted by the International Bar Association 7 October 2020, available at <https://www.ibanet.org/Implications-of-the-Internal-Market-Bill.aspx>

²⁸ For further legal analysis see R Cormacain *The UK Internal Market Bill and the Mother of all Ouster Clauses*, UK Human Rights Blog, 15 October 2020, available at <https://ukhumanrightsblog.com/>

Clause 47(1) stated that clauses 44, 45 and 47, and regulations made under clauses 44 and 45 have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent

The phrase ‘relevant international or domestic law’ is defined in clause 47(8) and includes

any other legislation, convention or rule of international or domestic law whatsoever, including any order, judgement or decision of the European Court or of any other court or tribunal.

This is breath-taking in its width. The reference is to any other domestic law whatsoever, meaning that, at one fell swoop, the entire corpus of UK law is disapplied from these regulations. No matter what the source or longevity of a law, stretching back from the Human Rights Act 1998 to habeas corpus to Magna Carta 1215, if it is inconsistent with regulations that a Minister makes under these powers, it has no effect. It is an appalling proposition that a Minister has the power to simply ignore every single law currently in effect in the UK, with no possibility whatever of legal recourse.

The Lord Chancellor, Robert Buckland MP, giving evidence to the House of Lords Constitution Committee on 14 October 2020²⁹ stated that

regulations made under Clauses 44 and 45 are of course capable of being judicially reviewed under ordinary public law grounds. That includes what I think everybody is familiar with— grounds of vires, rationality, and legitimate expectation. All those questions are entirely legitimate questions that can be raised by applicants who seek to challenge these particular provisions

It is difficult to reconcile these words, however, with the complete disapplication of the entire corpus of UK law as set out in the text of the Bill. We share the incredulity of Lord Pannick who in response to this statement by the Lord Chancellor said

I have some difficulty with that, Lord Chancellor.... [This clause] purports, as I said, to prevent the court from finding these regulations unlawful because they are incompatible or inconsistent with any rule of domestic law. Why is it, then, that these regulations could be challenged for uncertainty, retroactivity, matters of that sort? Surely that falls plainly within the language of this very broad exclusion.

Joshua Rozenberg in commenting upon this exchange asked, ‘does the government even understand its own legislation?’³⁰

Additional attempts to eliminate all possible scrutiny of Regulations

Clause 47 went further in its attempts to inoculate any Regulations a Minister may make from any kind of check, balance, restriction or scrutiny.

Clause 47(2)(a)

Section 6(1) of the Human Rights Act 1998 makes it unlawful for a public authority to breach a right set out in the European Convention on Human Rights. Clause 47(2)(a) disapplies s. 6(1) in relation to making regulations under clauses 44 or 45. So even if the action of making these regulations is in breach of human rights, it is still deemed to be lawful.

Clause 47(2)(c)

Section 7C of the European Union (Withdrawal) Act 2018 requires that in determining the meaning of UK legislation governing withdrawal from the EU, it should be interpreted in accordance with the Withdrawal Agreement. But clause 47(2)(c) states that section 7C ceases to have effect so far and for as long as it would require an interpretation which would be inconsistent or incompatible with clauses 44, 45 and 47, and regulations made under them. The net result is that in determining the meaning of domestic obligations under the Withdrawal Agreement, there is no obligation to interpret these in accordance with the Withdrawal Agreement. This is Orwellian in its reversal of simple

²⁹ Transcript available at <https://committees.parliament.uk/oralevidence/1029/pdf/>

³⁰ Blog post, available at <https://rozenberg.substack.com/>

linguistic logic – if you want to know what the Withdrawal Agreement means, the one thing you cannot look at is the Withdrawal Agreement.

Clause 47(3)

Legislative drafters often joke about laws deeming that a dog is a cat. Clause 47(3) deems that, for the purposes of the Human Rights Act 1998, a regulation under these provisions is to be treated as if it were primary legislation. Even though the two things are from fundamentally different parts of the legislative hierarchy, they are to be treated as being the same thing. The reason for this is clear – secondary legislation in breach of human rights can be declared void by a court, primary legislation cannot be declared void. The most that can happen, under s. 4 of the Human Rights Act 1998, is that a court can issue a declaration that the law is incompatible with a Convention Right. Even though a dog is a dog, it is now deemed to be a cat.

Clause 47(4)

This provision states that ‘no court or tribunal may entertain any proceedings for questioning the validity or lawfulness of regulations ... other than proceedings [for judicial review]’. So if a litigant has a contractual claim against the Government, and part of this claim is that regulations under this Bill are unlawful, the court has no power to hear that part of the claim. Or if in criminal proceedings the defendant alleges that the regulation under which they have been prosecuted is *ultra vires*, a court has no power to even listen to that part of the defence. This ouster is stricter than simply excluding all but judicial review cases, it also excludes judicial review cases unless that judicial review is ‘for the purpose of questioning the validity or lawfulness of regulations’ (see definition of the cases to which this applies in clause 47(8)). So if the course of judicial review proceedings an applicant wishes to challenge the validity of these regulations, the court can only hear that argument if the purpose of the judicial review is to challenge the validity of the regulations.

This is a straightforward ouster of the jurisdiction of all courts, other than courts hearing judicial review cases of the validity of the regulations. It is also a denial of the right to a fair trial and a denial of access to justice if a court is barred by the legislature from hearing a particular legal argument.

Clause 47(5)

Under cl 47(5), the standard time limits for judicial review are not to be extended ‘under any circumstances’. As ousters go, this isn’t so draconian, as it merely prohibits the exercise of any judicial discretion over whether a time limit should be extended. The reason for the discretion is that there can sometimes be circumstances where the imposition of a strict time limit causes injustice. This clause takes away the judicial power to avoid those injustices.

Squaring the Rule of Law and domestic law with these provisions

The Lord Chancellor has claimed that the Government’s amendments to the Bill make clear that it is intended to preserve access to court for judicial review challenges. In fact, these provisions render the ability to apply to a court for judicial review nugatory as any regulations made under them are deemed lawful no matter what, and any provision of UK law whatsoever with which those regulations are incompatible simply does not have effect.

These provisions are incompatible with the Rule of Law as they attempt to put any regulations made under them beyond the reach of the law. They are anathema to our ideals of separation of powers as Parliament and the Executive can do what they want without any check provided by the Judiciary. Parliament should follow the example set in the 1960s when its predecessor refused to overturn the *Anisminic* decision by passing a new ouster clause.

Parliament’s role in safeguarding the Rule of Law

Judges clearly have a role in safeguarding the constitution. Both *Miller* cases show that they are prepared to take politically unpopular decisions where it is necessary to do so to uphold our constitutional values.

Lord Keen, the former Lord Advocate for Scotland had a role as a Law Officer to protect the Rule of Law. In his resignation letter he wrote that it was ‘increasingly difficult to reconcile what I consider to be my obligations as a Law Officer with your policy intentions with respect to the UKIM Bill’.

Ought it to be left to the courts to safeguard the Rule of Law by finding a way around these clauses? To leave it to the courts would be wrong. It would set up a monumental constitutional clash between sovereignty of Parliament and the Rule of Law. It is clear from comments made by Lord Neuberger, former President of the Supreme Court, that judges do not want to be called in to resolve problems like these.³¹

These clauses are in fundamental opposition to the Rule of Law and damage our standing internationally. Michael Howard argues that this is not a problem that should be left to judges to fix, but that Parliament should fix it by rejecting these clauses.³²

The courts are not the sole guardians of British constitutional values, that role also falls to Parliament, and the House of Commons should not be shy of fulfilling that important constitutional role.

Conclusion

The question for Commons Members on consideration of the Lords Amendments is whether they are prepared to allow clauses with such serious implications for the Rule of Law to be reinstated in the Bill. Those clauses involve a deliberate breach by the UK of its international legal obligations only recently voluntarily entered into with the EU in the Withdrawal Agreement, and seek to put ministerial regulations beyond the reach of meaningful judicial review. Members should ask themselves if their conscience allows them to support in principle such an unprecedented request to authorise the clear repudiation of a treaty obligation to which the UK only recently agreed and such sweeping restrictions on the availability of legal remedies.³³

³¹ See comments made at *The Implications of the Internal Market Bill for the rule of law in the United Kingdom*, Webinar hosted by the International Bar Association 7 October 2020, available at <https://www.ibanet.org/Implications-of-the-Internal-Market-Bill.aspx>

³² See BBC report at <https://www.bbc.co.uk/news/uk-politics-54190242>.

³³ See Parliament must tell this overreaching executive: “Not in our name”, Prospect online, 11 September 2020.



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