

APPG on the Rule of Law – 1 April 2019

Report of the Meeting

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On Monday 1 April 2019, the APPG for the Rule of Law met to discuss the implications of the events in the weeks leading up to 29 March 2019, the previously designated Exit Day for the United Kingdom to leave the European Union. The theme of the meeting was shaped around the Rule of Law implications of two issues: the extension of Article 50, and the implementation of the Withdrawal Agreement ('WA'). Baroness Hamwee, standing in for Dominic Grieve QC MP, chaired a panel of expert speakers, and a wide audience from a variety of sectors: Parliamentarians, legal professionals, NGO and charity representatives, and academics and researchers.

Professor Kenneth Armstrong of the University of Cambridge began the discussion with the constitutional and political implications of extending Article 50. Professor Armstrong acknowledged that on the face of it, Article 50 appears simple. However, implementing the Article, and taking into account domestic timeframes – including the strain that leaving the European Union would put on the UK domestic legal and constitutional order – are much more difficult to anticipate and calculate. While the EU often appears overly legal and inflexible, and the UK (especially with its uncodified constitution) as pragmatic and more political, Professor Armstrong believed it is useful to think of the EU and the UK confronting the same Rule of Law issue: how can we ensure that the exercise of political authority is consistent with legal authority? Within the UK, constitutional convention and practice are being asked to do more 'heavy lifting' than usual, since the EU (Withdrawal) Act 2018 did not anticipate the possible necessity of an Article 50 extension. In his concluding remarks, Professor Armstrong put forth 'good reasons' and 'less good reasons' for elevating Rule of Law questions to the constitutional level. A good reason comprises the need for reflection of compatibility with constitutional norms. Alternatively, a less good reason constitutes the failure to put in place adequate legislation to anticipate issues, thus escalating problems to a constitutional level.

The second speaker was **Professor Charlotte O'Brien** of the University of York, who focused on citizens' rights in the UK after Brexit, with reference to the settled status scheme. Professor O'Brien believes that there are administrative justice risks that may impede important Rule of Law principles, such as the principles of legal clarity, accessibility, equal application of the law, legal rights should be decided by law, not discretion, and adequate protection of fundamental rights. She identified three areas that are particularly problematic in relation to the settled status scheme. Firstly, the existence of a hard deadline. Failure for citizens to register on time will mean any underlying rights acquired through residence or employment may be wiped out overnight and negated, with thousands of EU migrants undocumented. Particular

groups are at risk for missing deadlines, including the elderly and the digitally excluded. Secondly, there is a large risk of misclassification. An individual will have to show residency for 5 years to achieve settled status, however producing this evidence may present issues (e.g. if someone is not a homeowner or named individual for Council Tax purposes) causing people to lose out. Lastly, there is at the moment no right of judicial appeal, only administrative review within the Home Office, which is problematic.

Professor O'Brien stated that the implementation of the WA might be able to prevent a hard deadline, but there is a more limited class of people who are protected within the Agreement: those with punctured periods of work will have difficulty proving status. She also recognised the overlapping issues with immigration that the scheme will cause.

The third speaker, **Swee Leng Harris** of the Legal Education Foundation and the Bingham Centre for the Rule of Law, discussed the categorisation difficulties with the 'retained EU law' category. Section 2 of the EU (Withdrawal) Act created two categories of legislation – 'EU derived domestic legislation', which encompasses primary and secondary UK legislation implementing EU law. The second is 'direct EU legislation,' which is directly applicable EU law. These categories are further broken down by s.7 of the EU (W) Act making a distinction between 'retained direct principal EU legislation' and 'retained direct minor EU legislation.' Schedule 8 to the Act provides further distinctions. She noted that the actual definition of retained EU law hasn't been legally commenced yet. According to Ms Harris, this will create great uncertainty and present major fundamental legislative changes. At the end of the implementation period, there may end up being a new category of law. There have also been changes made to the scope of delegated powers, which affords widely drafted significant powers to the Executive. These consequences will prove challenging when it comes to ensuring that future legislative changes to retained EU law conform to the Rule of Law, particularly the principle of law, not discretion.

The final speaker was **Dr Ronan Cormacain**, Consultant Legislative Counsel. Dr Cormacain looked at the legislative drafting issues that implementing the WA faces. He noted that in international agreements, certain words can be used to create 'ambiguities' where the different parties feel like they are getting what they want. However, in domestic legislation, such ambiguities cause problems. The Rule of Law requires certainty and precisions; citizens need to know what their rights and obligations are and what they need to do to comply with the law. Thus legislating to implement the WA must be technologically feasible (i.e. it must be capable of being used on the ground), and there can be no disconnect between what the law says on paper and what it actually does. The huge volume of Statutory Instruments currently going through Parliament have also demonstrated that it has been difficult to disentangle UK domestic legislation from EU law that has accrued over decades. A concentrated effort to ensure

conformity with Rule of Law principles is needed to make the statute book fit for future purpose.

Following the speakers' contributions, discussions took place which highlighted various concerns about implementation of the WA and the Rule of Law. Dominic Grieve QC MP noted

that when the WA Bill began, it was thought it would implement the WA and transition period. However, he feared that the Bill's contents may exceed its original intention, in that there have been worries that some might use it as an opportunity to redefine the role of Parliament in respect of the Future Relationship. The speakers agreed that it seems infeasible that this could actually be done, but Professor Armstrong did highlight that there are indeed gaps in the WA that will have to be addressed. He believes that there should have been an 'implementation protocol' that would have provided more concrete steps by which to properly implement the two instruments (the WA and the Future Relationship).

Alison Pickup, the Legal Director of the Public Law Project, asked how we can prove and ensure better accessibility through the law. Brexit processes are currently complicating the law. She asked how the public can better understand what the law is, if the Brexit process is adding in additional amendments and different types of EU law, and making changes via Statutory Instrument. Accessibility is a key Rule of Law principle. Swee Leng Harris answered that publication of retained EU law and its 'journey' from original legislation, to potential changes through SIs, and its consolidated version is aiming to be established through the National Archives. Ms Harris also made an important point that changes in the law may not be policy choices on the content of the law, but there are policy choices in how that law is implemented. Therefore, it is crucial that lawmakers are aware of these possible deficits in accessibility of the law.

Overall, the meeting of the APPG was a success, and provided a meaningful forum by which interested parties could air concerns and contribute answers to what is undoubtedly a time of great uncertainty for the UK Parliament.