

## APPG on the Rule of Law

**Date:** Tuesday 21<sup>st</sup>  
February  
**Time:** 09.00-10.30am  
**Location:** Jubilee Room,  
Westminster Hall

### **The Retained EU Law (Revocation and Reform) Bill and the Rule of Law**

#### **Parliamentarians in Attendance**

**Attending:** Lord Anderson of Ipswich KCB KC; Sir Bob Neill MP; Joanna Cherry KC MP; Lord Pannick KC; Baroness Jones of Moulsecoomb; Lord Arbuthnot of Edrom; Lord Carlile of Berriew KC CBE; Baroness Ludford

**Apologies:** Baron Garnier KC; Baron Hope of Craighead KT PC; Baroness Hamwee; Baron Thomas of Cwmgiedd PC; Baroness Lister of Burtersett; Baroness Whitaker; Baron Lisvane KCB DL; Baron Rooker PC; Baroness D'Souza CMG PC; Baroness Altmann CBE; Baron Hunt of King's Heath OBE PC

**Panel providing expert presentations:** Dr Emily Hancox (University of Bristol); George Peretz KC (Monckton Chambers); Dr Julian Ghosh KC (One Essex Court Chambers); Professor Catherine Barnard (University of Cambridge)

#### **Meeting Aims**

- To discuss the Rule of Law concerns arising from the sunset clause, delegated powers on modification, and new instructions to the judiciary in the Retained EU Law (Revocation and Reform) Bill
- To consider existing and potential amendment proposals to address these issues during the remaining parliamentary stages

#### **Summary of presentations**

**Lord Anderson, Lords Co-Chair of the APPG on the Rule of Law** opened the meeting and introduced the panel of experts who would be giving presentations. He noted the appropriate timing as the House of Lords would be debating the Bill in Committee Stage for three days from Thursday.



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**Emily Hancox, Lecturer in Law, University of Bristol** introduced the architecture and background context of the Bill and focused on the delegated powers it contains. She outlined how the UK decided to keep most EU derived law, with exclusions such as the Charter of Fundamental Rights, upon leaving the EU. This new source of retained EU law (REUL) was, however, never a finished product and never an end goal.

She outlined the existing ways in which retained EU law can already be modified, including the fact that converted EU regulations are more difficult to modify. Dr Hancox then presented the stated aim of this Bill to remove the precedence given to those provisions of REUL that previously benefited from the doctrine of supremacy. The Bill currently provides for revocation of almost all REUL on the sunset date of 31 December 2023 with exceptions for REUL found in Acts of Parliament. The source will be rebranded to “assimilated law” and its special features will cease to function. The Bill will retain the interpretative gloss of following relevant Court of Justice of the EU (CJEU) case law but with a hint to courts that they may wish to depart.

Dr Hancox continued by claiming that the most significant part of the Bill is that it confers upon Ministers and devolved ministers, to different extents, broad powers of modification of the law. This means that it will be almost impossible to know what domestic law will look like after the end of 2023. She argued that this offends key aspects of the Rule of Law, including the requirements of legal certainty, separation of powers, and human rights protection and that it is also likely to create difficulties for the devolution settlement.

She then discussed the detail in the relevant clauses of the Bill. Clauses 1 and 3 establish the default position of revocation for “EU-derived subordinate legislation” and “retained direct EU legislation”, and rights, powers, liabilities etc retained by section 4 of the European Union (Withdrawal) Act 2018 respectively. Both categories are extremely broad, and cover law in a wide range of policy areas. There is a risk that REUL will be revoked unknowingly, which is particularly prevalent for clause 3 as the Government’s REUL dashboard is far from comprehensive on this non-legislative form of law.

The impact is hard to predict given the delegated powers. Clause 1 provides an unrestricted power to preserve specific instruments of REUL. This creates a significant imbalance between the Executive and Parliament, as scrutiny can only be provided over decisions to preserve the law, not over what is lost. This clearly offends legal certainty as there is no clear indication of what will be preserved or lost. The power to extend the sunset to a date no later than 23 June 2026 in clause 2 also creates uncertainty as it is unknown how it may

be used, and it could lead to different sunsets in different areas of law.

Clauses 12 to 17 confer broader powers on the Executive to restate, replace, make alternative provision to, and to update REUL, and to reduce burdens related to REUL. The power of “restatement” in clauses 12 and 13 extends to codifying not only the words of REUL but also its effect, including general principles and case law. The power can be exercised until the end of 2023 for REUL and until 23 June 2026 for assimilated law, and it can only be exercised once. Restatement can lead to changes in the law – resolving an ambiguity in one way may change the law in subtle ways. It is also unclear whether restatement requires the codification of interpretations or not.

Clause 15 provides an even broader power to Ministers and devolved authorities and grants significant discretion to make new law. This is subject to some limits, including that it may not increase the regulatory burden. Clause 16 provides a further power to update secondary REUL and secondary assimilated law by making modifications that the Minister or devolved authority considers appropriate “to take account of (a) changes in technology, or (b) developments in scientific understanding”. This power does not have a date at which it is switched off, and there is no real guidance as to how the power should be exercised – it is also unclear what amounts to changes or developments in technology. The power to remove or reduce burdens in clause 17 may be regarded as the least problematic delegated clause as there is more parliamentary scrutiny over Legislative Reform Orders.

In summary, Dr Hancox concluded that it is hard to predict the consequences of the Bill as it includes many delegated powers that are drafted in a broad way, leaving considerable discretion for the Executive.

**George Peretz KC** then spoke about clauses 3, 4, and 5 of the Bill. He started by outlining two reasons why it may be difficult to identify what is caught by clause 1: (1) it may be unclear which forms of tertiary EU legislation, such as Commission Decisions, apply to the United Kingdom, and he provided an example of a Decision on the exclusivity period for manufacturers of a particular drug; and (2) in domestic legislation it is easy to identify Statutory Instruments made under section 2(2) of the European Communities Act 1972, but SIs to transpose EU legislation were made under a whole range of other provisions too. Unless these instruments mention their transposition purpose in the preamble, then it is difficult to determine whether or not they are REUL – he provided an example of criminal legal aid regulations that are listed in the REUL dashboard, but which he believes should not fall under REUL. The task of working out to what extent and why REUL is caught by clause 1 is not easy, and the two

examples illustrate the huge uncertainty over what is caught and thus the anxiety that the clauses will miss things that are important.

Mr Peretz continued by claiming that nobody is quite sure what is caught by clause 3. It does catch the direct effect of directives and provisions of the Treaties, and case law, but then it is unclear how clause 3 relates to clause 5 on the abolition of general principles. Furthermore, retained EU case law could be caught by clause 3, but clause 7 deals with courts departing from such case law, so therefore it appears that the statutory drafter's starting point was that retained EU case law is not repealed. The effect of clause 5 is that REUL will no longer be read through the prism of EU law but domestic law, but nobody has articulated what the difference will be in practice. He provided examples such as the Equality Act and consumer protection legislation to raise the question of the legal consequences of courts being asked to interpret provisions differently.

Clause 4 of the Bill removes the supremacy of REUL. Mr Peretz outlined that he has sympathy for those who bridle against the retention of the doctrine of supremacy as it looks odd post-Brexit. However, he claims that "supremacy" is a misnomer – it is clear that Parliament is supreme, and instead the principle of supremacy of REUL is a hierarchy rule to preserve the status quo as it stood on 31 December 2020. This was sensible to preserve legal continuity, and also to preserve the intention of Parliament: when it passed statutes during EU membership, it had the intention that later statutes that might have been incompatible with earlier EU law should be disapplied. The effect of abolishing the principle of supremacy is not really known. It requires a research task – identifying every possible instance in which there has been qualification by a subsequent Act of Parliament – that is so enormous as to be impossible. The power to reverse the abolition of supremacy, if necessary, is a confession that there will be problems.

A stellar example of the problems that will be generated is the fact that specific provision is going to be made to take tax out of the general abolition. The VAT Act is unreadable without general principles of EU law and going back to the Directive; therefore it is unsurprising that this exception will be carried out, most likely by the forthcoming Finance Bill. Mr Peretz speculated that the reason for this is because the uncertainty generated by these clauses of the REUL Bill would hit the Government in cash terms when it comes to the area of VAT.

**Dr Julian Ghosh KC** gave a presentation on the instructions to the judiciary contained within the Bill. His contribution was informed by the appendix he authored to the 12<sup>th</sup> edition of *Wade & Forsyth on Administrative Law*. He argued that the instructions given to the courts (1) are unnecessary; (2) will politicise the courts in a way that

will attract unfair accusations that judges are not following the will of Parliament; and (3) will leave a mess offending legal certainty.

He continued by outlining the five instructions to the judiciary in the relevant Bill clauses. First, clause 3(2) removes the section 4 2018 Act rights, as discussed by the other panellists. The scope of section 4 is uncertain and controversial; this clause states that anything that was enforceable is repealed and therefore vested rights disappear. He argued that the wording of clause 3(2) must mean that if you have a section 4 right that has already been protected by a court order then this is unaffected, but otherwise rights will be gone. This offends the Human Rights Act and Article 1, Protocol 1 of the ECHR. Dr Ghosh concluded that the easiest remedy would be for clause 3(2) to be removed via amendment.

The second instruction is found within the series of obligations for the courts in clause 7 of the Bill. This includes a duty to consider departing from prior decisions in retained EU case law. Dr Ghosh was critical of the conditions for such consideration of "change of circumstances" and that "foreign judgments are not binding". The latter is self-evident, and as regards the former there are many jurisdictions that keep legislation in a post-colonial context and courts grapple with interpreting this legislation in these changed circumstances in a way that is juristically consistent with the new constitutional reality. He provided an example of a tax case in which Jamaican legislation was construed differently from identical wording in British legislation. He argued that all REUL should be construed in light of the new constitutional architecture, and courts will do that without needing clause 7.

The third instruction is that courts must consider departing from retained EU case law if it restricts the development of domestic case law. Dr Ghosh argued that it is not clear what this obligation means, as decisions by UK courts in retained EU case law are themselves domestic. He stated that courts grapple with legal disputes by developing principles and techniques of construction, and Parliament should not be concerned with all of this as the legislature states an objective and then the business of deciding the case falls to the courts. If Parliament does not like the answer, it can change it through further legislation. Courts will look at learning from other courts when they are grappling with construction, and for Parliament to interfere with this is intellectually clunky. It would be the equivalent of the Scottish Parliament telling Scottish courts that they cannot look at English case law. He suggested that what politicises courts is that the loser in a case can accuse judges of not respecting Parliament if the court does rely upon relevant case law of the CJEU and that the claim that the court should have considered departing could in itself become a ground of appeal.

The fourth instruction is that courts may depart from a previous decision if it “considers it right to do so” having regard (among other things) to “the extent to which the retained domestic case law is determined or influenced by retained EU case law from which the court has departed or would depart”. This would change the grounds on which the Court of Appeal can depart from its own case law, but on woolly premises. Again, Dr Ghosh stated that this was unnecessary, and that if the loser in a dispute does not like the outcome then they might claim that the courts should not have followed the judgment and argue that the previous decision is hurting domestic case law. The final instruction is that courts will only be bound by retained EU case law if it is embedded in domestic decisions. Dr Ghosh strongly argued that this would destroy the integrity of the system. He concluded by claiming that a provision that states that a court should only consider itself bound by a decision if bound by a case embedded within it is unintelligible.

**Professor Catherine Barnard** delivered the final presentation on a topic that is not evident within the wording of the REUL Bill: the implications for the Level Playing Field (LPF) arrangements in the EU-UK Trade and Cooperation Agreement (TCA). The UK Government has delivered a commitment to keep legislation that is required to fulfil its international obligations. In a recent document on intellectual property, this explicitly mentioned the Withdrawal Agreement and the Northern Ireland Protocol, but not the TCA.

Lord Callanan, Parliamentary Under-Secretary of State for Business, Energy, and Industrial Strategy, made three commitments to the House of Lords during 2<sup>nd</sup> reading: (1) the REUL Bill will not weaken environmental protection; (2) it will protect workers’ rights, but he only explicitly mentioned in the areas of health and safety; and (3) it would preserve the substance of REUL to ensure international obligations are operational within domestic law ([HL Deb. vol.872 col. 986, 6 February 2023](#)). Professor Barnard argued that, through the lens of employment law and workers’ rights, this is already problematic: there is EU legislation in the area of health and safety that was passed under a different legal basis to those explicitly concerned with employment rights. She wondered whether the Government would be prepared to protect such legislation.

She further considered whether we can take the commitments made by Lord Callanan to mean that the Government will abide by its commitments in the TCA. There are three limbs to the LPF arrangements: the most relevant one consists of the “non-regression” commitments in Article 387 TCA. The Parties commit not to weaken or reduce rules on existing employment law in a manner that could affect trade or investment: this includes fundamental rights at work, employment standards, and information and

consultation obligations. Areas covering huge swathes of such employment law fall within the scope of the REUL Bill.

Professor Barnard outlined the possible optimistic view that all employment law could be safe because the non-regression commitments mean that the Government will keep it outside of the sunset clause. She, however, is less optimistic. She claims that the Government knows they only have to act in a way that does not affect trade and investment. For example, if the Government decides to restate employment law using delegated powers it can decide to change the law not by repealing everything, but through “salami slicing”. For example, in the area of paid annual leave – she presented a scenario in which the Government may decide to salami slice some components of this right, such as the accrual of leave during sick leave or maternity leave, from the retained Working Time Directive through a Statutory Instrument under clause 15 in November 2023. This would “put a gun to the head” of Parliament by presenting the ultimatum that if they block this SI then they will lose all of the Directive.

The other dimension is that such a scenario would be daring the EU to use its powers in the TCA to address LPF failings. However, the EU is worried about the scope of those powers as they are seen as a “nuclear option”. The question arises over whether they would use the powers for something that is salami slicing rather than wholesale deregulation. If the EU were to decide to use these powers, then there is a different dispute resolution mechanism for LPF than the TCA’s general dispute resolution mechanisms. An expert panel would be established that could find for or against the UK, and then a full panoply of tariffs may be applied. But Professor Barnard suggested that this would be a game of chicken: there have only been two panel decisions on analogous provisions. The EU-South Korea panel decision is the most well-known, but this concerned what is found in the second limb of the LPF arrangements in the TCA.

She concluded with the bottom line that the Government commitments to the House of Lords are so uncertain and so unclear as to give little or no protection to many legal categories of REUL.

The meeting concluded with a Q&A session chaired by **Lord Anderson**

### Further Reading

- Christopher Forsyth and Julian Ghosh, [\*Wade & Forsyth's Administrative Law\*](#) (12<sup>th</sup> edn, OUP, 2022).
- Samuel Willis, '[Public Law Project House of Lords Second Reading Briefing – Retained EU Law \(Revocation and Reform\) Bill](#)', February 2023.

- Catherine Barnard and Joelle Grogan, '[UK in a Changing Europe commentary: The Retained EU Law \(Revocation and Reform\) Bill](#)', 5 January 2023.
- Ellen Lefley, '[JUSTICE Retained EU Law \(Revocation and Reform\) Bill, House of Lords Second Reading Briefing](#)', January 2023.
- Dr Oliver Garner and Julian Ghosh KC, '[Bingham Centre for the Rule of Law Joint written evidence submission to the House of Commons Public Bill Committee on the Retained EU Law \(Revocation and Reform\) Bill 2022](#)', 16 November 2022.
- Dr Ruth Fox, '[Hansard Society Briefing: Five Problems with the Retained EU Law \(Revocation and Reform\) Bill](#)', 24 October 2022.