

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

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## Summary

The European Union (Withdrawal Agreement) Bill (“WAB”) is a major constitutional bill which effectively re-writes the UK’s post-Brexit constitutional framework, as set out in the European Union (Withdrawal) Act 2018, in order to implement the Withdrawal Agreement and to reflect the new Government’s approach to Brexit.

Overall the WAB serves an important Rule of Law purpose by providing legal certainty through transition, protecting citizens’ rights and by ensuring that the UK does not leave the EU without a deal on 31 January 2020.

Despite this, the WAB raises some significant Rule of Law concerns, some of which are an unavoidable consequence of the complexity of the Brexit process, but there are others which are avoidable or could be mitigated.

Given the constitutional significance of the WAB, it is regrettable that political circumstances have resulted in such a rushed parliamentary timetable.

It is difficult to see how the legislative process can meet basic Rule of Law requirements of transparency and accessibility, or how parliamentarians can effectively scrutinise Brexit legislation, when the legislative timetable is this compressed.

The short timetable sets a concerning precedent for the next phase of the Brexit process. In the next 12 months, Parliament will have to scrutinise a significant amount of primary and secondary legislation covering highly complex regulatory frameworks.

The WAB’s provision on transition provide welcome clarity on how the framework created by the European Union (Withdrawal) Act 2018 will be adapted to provided legal continuity until 31 December 2020. However, the WAB’s contribution to legal certainty is undermined by clause 33’s prohibition on the Government agreeing an extension.

There is considerable uncertainty over whether it will be possible to agree, ratify and implement the future relationship by 31 December 2020. In that context, the prohibition of an extension, which is expressly provided for by the Withdrawal Agreement, seems unnecessary and at odds with the main aim of the WAB.

The WAB demonstrates that Brexit is adding new layers of complexity to the UK’s constitutional framework. Clause 5 of the WAB ensures that the Withdrawal Agreement will be subject to direct effect and supremacy, the EU’s core constitutional principles, in the UK post-Brexit. This means that so long as the WAB remains on the statute book, Parliament will not be able to legislate contrary to the provisions of the Withdrawal Agreement.

Delegated powers and statutory instruments (“SIs”) are a core part of the UK’s constitutional system. However, the extent to which they are being relied upon to deliver Brexit raises a number of Rule of Law concerns. The main concern is that the system for enacting SIs is not sufficiently accessible and therefore does not facilitate parliamentary or public engagement. Post-Brexit Parliament is likely to be asked to enact many delegated powers to enable both

**divergence from and alignment with EU law, and in that context it will be important that Parliament is equipped with the tools necessary to scrutinise Brexit SIs.**

**The UK constitution does not provide a structured role for Parliament in the process of supervising the negotiation of the international agreements. This version of the WAB does not include the provisions set out in clause 31 of the previous version of the Bill which would have provided a framework for Parliament's engagement with the negotiations on the future relationship with the EU. From a Rule of Law perspective this omission is short-sighted as increasing parliamentary engagement with the negotiations would increase the transparency and accessibility of international law.**

**The WAB's wholesale implementation of the Withdrawal Agreement will mean that the European Court of Justice (CJEU) will continue to play an important role post-Brexit. As the institution responsible for authoritative interpretation of EU law, the CJEU has an important role to play in interpreting the Withdrawal Agreement's provisions, particularly on citizens' rights.**

**Clause 26 of the WAB would permit the Government to use statutory instruments to allow certain courts to depart from retained EU case law. This power undermines the legal certainty created by the legislative scheme in section 6 of the European Union (Withdrawal) Act 2018. Section 6 adopted the sensible approach of requiring the courts to follow the relevant case law of the CJEU when interpreting retained EU law. Clause 26 indicates that the Government intends to take a different approach and use regulations to shape the courts' approach to retained EU law post Brexit. This power is both unusual and unnecessary.**

**As the Supreme Court outlined in *Cherry/Miller* in 2019, parliamentary sovereignty has a practical dimension. Relying on delegated powers, rushing through constitutional bills, and the absence of structured engagement with international negotiations will not provide Parliament with the opportunities that are needed to ensure that it is the senior partner in the UK's constitutional system post-Brexit.**

## **Rule of Law questions**

- Does the Government recognise that the timetable for enacting the WAB should not represent a precedent to be followed in subsequent stages of the Brexit process?
- Can the Government explain what measures will be taken to ensure that Parliament and the public can effectively engage with proposals to change the law resulting from Brexit?
- Can the Government explain how clause 33 of the WAB is justified in light of the Withdrawal Agreement's express provision (in Article 132) for an extension to the implementation period?
- Can the Government explain how it will ensure that there is legal certainty over how the statute book will need to be changed at the end of the implementation period?
- Can the Government confirm that despite clause 38 reaffirming parliamentary sovereignty, UK courts will be bound, through clause 5 of the WAB, to apply direct effect and supremacy to the Withdrawal Agreement after exit day?
- To what extent will the Government rely on delegated powers to implement the future relationship and diverge from EU law?
- How does the Government propose to ensure that parliamentarians have sufficient opportunity to scrutinise Brexit SIs between exit day and the end of the implementation period?
- In the absence of an equivalent to clause 31 in the previous version of the WAB, how does the Government intend to ensure that Parliament can supervise the negotiations on the future relationship with the EU?
- Will the Government set out why it is necessary to create the power set out in clause 26 to enable courts to depart from retained EU case law?

## Introduction

- 1) The European Union (Withdrawal Agreement) Bill (WAB) is a Bill of paramount constitutional importance. The aim of this report is to examine a number of Rule of Law issues raised by the WAB.
- 2) This report uses the [Rule of Law checklist](#) adopted by the Venice Commission in 2016 to inform its analysis of the WAB. These Rule of Law standards provide a guide to the core elements of the Rule of Law, for which consensus can be found amongst the 47 States of the Council of Europe. The Venice Commission's Rule of Law checklist contains standards on:
  - a. Legality;
  - b. The legislative process;
  - c. Legal certainty;
  - d. Access to justice;
  - e. Human rights; and
  - f. Equality before the law.
- 3) The WAB's primary purpose is to implement the Withdrawal Agreement, an international treaty between the UK and the EU designed to govern the UK's departure from the EU. One of the core aims of both the Withdrawal Agreement and the WAB is to protect the Rule of Law in the UK and in the EU in the period after exit day. At the highest level, the WAB performs a critical function in maintaining the Rule of Law in the UK by ensuring that the UK does not leave the EU without an agreement. Instead of the legal chaos that would accompany a "no deal" exit from the EU,<sup>1</sup> the legal framework created by the combination of the EU Withdrawal Act 2018, the Withdrawal Agreement and the WAB will provide an indispensable degree of legal certainty and continuity.
- 4) The WAB raises a number of important Rule of Law questions. It represents more than a technical implementation of the Withdrawal Agreement. The WAB represents a crucial element of the UK's post-Brexit constitutional framework. The significant changes made by the WAB to the EU (Withdrawal) Act 2018 demonstrate the extent to which the Withdrawal Agreement necessitates significant changes to constitutional provisions in order for the UK to leave the EU with an agreement. Further, the Withdrawal Agreement provides a degree of flexibility as to how key elements are to be implemented by the UK through domestic legislation (for example it is for the UK to decide how the Independent Monitoring Authority should be established and the precise nature of its statutory powers). There are significant provisions of the WAB that do not implement the Withdrawal Agreement, and some of which that are arguably in tension with that Agreement. For example, the prohibition on extending the implementation period (clause 33) is in tension with Article 132 of the Withdrawal Agreement which grants the Joint Committee express power to extend to the implementation period by up to two years. Similarly, the assertion of parliamentary sovereignty (clause 38) is a contradiction of obligations the UK has signed up to in the Withdrawal Agreement to accord primacy and direct effect to certain rights and obligations, including over subsequent legislation.
- 5) The Withdrawal Agreement leaves significant choices to be made by Parliament, both in terms of the implementation of the treaty articles and in terms of the constitutional arrangements made to adapt to life outside of the EU. In this sense, the WAB sets the direction of the post-Brexit constitution. There will be significant further legislation to implement Brexit after exit day

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<sup>1</sup> Nyasha Weinberg, [No Deal Brexit, Business and the Rule of Law, the Bingham Centre for the Rule of Law](#) (2019)

and much of that legislation will fit within the schema established by the WAB and the EU (Withdrawal) Act 2018. In order to evaluate the constitutional (and Rule of Law) implications of Brexit, it is vital to unpick how the WAB, together with other Brexit enactments, establishes the UK's post-Brexit constitutional framework.

- 6) This report examines a number of aspects of the WAB which raise Rule of Law issues:
  - Parliamentary scrutiny of the EU (Withdrawal Agreement) Bill;
  - Transition and 'IP completion day';
  - Parliamentary sovereignty and the Rule of Law;
  - Retained EU case law and the UK courts;
  - Parliamentary scrutiny of EU law and the Joint Committee after exit day;
  - Delegated powers;
  - Prohibiting an extension to transition;
  - Parliament's role in supervising the negotiations on the future relationship;
  - The CJEU and Dispute Resolution; and
  - EU citizens' rights.
- 7) During the WAB's parliamentary stages it is vital for the Rule of Law that parliamentarians use the opportunity to press the Government to develop their justification for the Bill's provisions.

### **Parliamentary scrutiny of the EU (Withdrawal Agreement) Bill**

- 8) The parliamentary process for scrutinising the WAB raises important Rule of Law issues relating to the accessibility of the legislative process. Legislating for Brexit is a fundamentally difficult undertaking. Constructing legislation to prepare the statute book for the moment when the status of a significant body of law fundamentally changes is not only a major technical legislative challenge, but it is also an exercise in legal and constitutional reform. This combination, of a gargantuan exercise in legislative engineering and far-reaching legal and political reform, makes Parliament's task of scrutinising Brexit extremely challenging because both the technical and the constitutional elements of legislating for Brexit need to be carefully scrutinised. However, identifying, evaluating and separating the technical elements of Brexit Bills from the policy and constitutional changes is a time consuming and labour intensive task which relies on cross-party committees and impartial expertise.
- 9) The WAB must be read alongside the Withdrawal Agreement, the EU (Withdrawal) Act 2018, as well as the other legislation enacted to prepare for Brexit (such as the Taxation (Cross-border Trade) Act 2018). In seeking to provide stability for the statute book caused by the need to avoid legal cliff edges on exit day and at the end of transition, as well as uncertainty over the outcome of the negotiations, Government and Parliament have had to create a web of complex legislative provisions and delegated powers to deal with Brexit. To an extent this degree of complexity is necessary to provide legal certainty during such an unprecedented constitutional process. However, it is important to acknowledge that Brexit legislation has given rise to concerns in relation to the accessibility and intelligibility of the law – the most basic requirements of the Rule of Law.
- 10) The Rule of Law requires that the legislative process is transparent, inclusive, accountable and democratic.<sup>2</sup> The principle of the accessibility of the law extends beyond the content and clarity

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<sup>2</sup> Venice Commission of the Council of Europe, [The Rule of Law Checklist](#) (2016) p 21.

of the law itself and also relates to the way in which statutes are enacted. The legislative process in Parliament represents the primary opportunity for public debate on the substance of a proposed legislative change before it takes effect. Public scrutiny of a major constitutional bill is a basic pre-requisite for any democratic system based on the Rule of Law. Parliamentary scrutiny ensures that the constitutional and legal implications of a Bill are publicly explained and justified by the Government of the day. The constitutional value of public deliberation on a Bill is especially significant when the Bill in question, such as the WAB, is technically complex and contains measures which will have long-term constitutional implications.

- 11) The EU (Withdrawal) Act 2018 took close to 12 months to complete its passage through Parliament. The EU (Withdrawal) Act 2018 is, like the WAB, a complex constitutional bill, which covered a wide range of policy areas. Over the course of the period when the EU (Withdrawal) Act 2018 was being scrutinised in Parliament, the Government's public justification and explanation of the reforms was significantly developed. The parliamentary process also led to a number of significant amendments designed to improve the clarity of the post-Brexit legislative framework. The net result of this parliamentary scrutiny, led by committees in the UK Parliament and the devolved legislatures, was that the EU (Withdrawal) Act 2018's legal effect was better understood by a number of key stakeholders prior to the Bill's enactment.
- 12) With the UK due to leave the EU on 31 January 2020, it is clear that the changed political context means that the timetable of the 2018 Act cannot provide a model for the WAB. Nevertheless, there are measures that could have been taken to mitigate the impact of such a compressed timetable upon parliamentary scrutiny. A version of the WAB, or at the least draft clauses, could have been published earlier in 2019 to facilitate scrutiny. The House of Lords Constitution Committee first asked to see a copy of the Bill in draft in December 2018, and repeated its request during 2019, but to no avail. This version of the WAB was only published on 19 December 2019 and contains significant changes from the version which was published on 21 October 2019. There will be very little time for meaningful scrutiny and debate of this version of the WAB.
- 13) The short timetable for scrutinising the WAB and the absence of measures taken to mitigate the lack of time could set a negative precedent for both the Brexit process and constitutional reform more generally. The next phase in the Brexit process is likely to require wide-reaching constitutional and legislative reform before the end of the transition period on 31 December 2020. The events of the 2017-19 parliamentary session led some to associate parliamentary scrutiny of Brexit with delay or attempts to prevent the UK leaving the EU at all. However, it is important that this attitude is not used to undermine the broader constitutional value of parliamentary scrutiny of the Brexit process, not least to the Rule of Law. It is vital for the accessibility of the post-Brexit constitution and statute book that opportunities for public and parliamentary debate on Brexit legislation are maximised before the end of the implementation period.

## **Transition and 'IP completion day'**

- 14) Part 1 of the WAB contains provisions designed to give effect to the transition period, which is set out in Part Four of the Withdrawal Agreement. Implementing transition is clearly beneficial from a Rule of Law perspective as it provides a high degree of legal certainty and continuity between exit day, 31 January 2020, and the end of the transition period, 31 December 2020. Despite this, the provisions on the transition period in the WAB do give rise to a number of Rule of Law issues.
- 15) Clauses 1-4 ensure that the European Union Communities Act 1972 (the ECA), which enables EU law to have effect in domestic law, will continue to act as a 'conduit pipe' for EU law during the transition period. This is vital for legal certainty and ensures that EU law will continue to operate

in the UK as if the UK were a Member State after exit day until the end of transition. The WAB achieves this through changes to the legal effect of section 1 of the EU (Withdrawal) Act 2018.

- 16) The provisions on transition in clauses 1-4 introduce a statutory deadline into the UK's legal systems: IP completion day. IP completion day is in effect the new exit day. Clauses 1(5) and 2(6) will mean that the legal effect of the ECA now effectively ceases on IP completion day rather than on exit day. The WAB provides for a number of further significant constitutional changes to take place on IP completion day. Clauses 25, 26 and 27 of the WAB would remove the concept of exit day from core sections in the EU (Withdrawal) Act 2018 and replace it with IP completion day. Sections 5 and 6 of the EU (Withdrawal) Act 2018 concerning the status of retained EU law and the non-retention of the Charter of Fundamental Rights would only take effect only once the transition period has. Also worthy of note is that clause 27 extends the life of the delegated power to correct deficiencies in retained EU law (section 8 of the EU (Withdrawal) Act 2018) and provides that the power shall exist for two years after IP completion day. Further, clause 27 would expand the scope of the power in section 8 so as to also enable changes arising from the end of transition.
- 17) In essence, IP completion day represents the moment when in domestic constitutional and legal terms Brexit will take effect. As such it is one of the most important legislative concepts introduced by the WAB, and is central to the operation of the legislative framework that would be created by the combination of the EU (Withdrawal) Act 2018 and the WAB.
- 18) From a Rule of Law perspective the distinction between exit day and IP completion day is confusing. Repealing the ECA 1972 on exit day is politically symbolic but appears to have led to potentially avoidable legislative complexity.
- 19) Before IP completion day, there are likely to be further changes to the UK's relationship with EU law through international agreements on the future relationship and domestic legislation. As such, it is at least possible that the concept of IP completion day and its effect could be modified by future legislation, much in the same way that the meaning of exit day will be changed by the WAB.
- 20) IP completion day is defined by clause 36 (1) of the WAB as 31 December 2020. However, Article 132 of the Withdrawal Agreement expressly provides for the possibility that the end of transition could be extended by up to two years. That is a sensible precautionary provision from a Rule of Law perspective, as it provides an insurance policy against the risk of the legal uncertainty that will arise if no agreement has been reached about the future relationship by the end of the transition period. However, clause 33 of the WAB (discussed in detail below) stipulates that the Government cannot agree to an extension under Article 132. This potentially undermines the WAB's ability to provide legal certainty and clarity.

## **Parliamentary sovereignty and the Rule of Law**

- 21) The Withdrawal Agreement is given effect in domestic law by clause 5 of the WAB. This creates a 'conduit pipe' provision analogous to section 2(1) of the ECA 1972. This holds that all legal rights, powers, liabilities, obligations and restrictions created by or arising by or under the Withdrawal Agreement are given automatic legal effect within the United Kingdom.
- 22) Clause 38 of the WAB contains a statutory recognition that the UK Parliament is sovereign, asserts that sovereignty subsists notwithstanding the continuing direct applicability and direct effect of some EU law and some aspects of the Withdrawal Agreement itself, and states that nothing in the Bill derogates from the sovereignty of the UK Parliament.
- 23) This method of implementation and invocation of parliamentary sovereignty risks obscuring the important constitutional dimension of aspects of the Withdrawal Agreement to which parliamentarians would be agreeing to give effect in domestic law. There is the potential that

this will result in Parliament missing the full implications of the primacy and direct effect of EU law. The WAB does not explicitly confirm the statement in Article 4 of the Withdrawal Agreement that 'the provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States'. This includes the primacy and direct effect of these provisions.

- 24) The inclusion of clause 38 on Parliamentary sovereignty may be an attempt to address any disquiet parliamentarians may have over the constitutional implications of clause 5 of the WAB and Article 4 of the Withdrawal Agreement. However, clause 38 is arguably in tension with the obligation the UK has assumed in Article 4 of the Withdrawal Agreement. The implication of clause 38 is that Parliament would be free, if it so wished, to legislate incompatibly with the Withdrawal Agreement, for example by diluting the protections of the rights of EU Citizens in the UK. Parliament will wish to ask the Government about the implications of clause 38, in order to provide the reassurance that will be sought by EU citizens, and by the European Parliament when it comes to consider whether the Withdrawal Agreement achieves the EU's objectives.
- 25) The WAB will introduce a new category of law in the UK of 'relevant separation agreement law'. This is defined in clause 26. This could raise issues regarding the relationship of this new category with the category of 'retained EU law' created by the EU (Withdrawal) Act 2018. The WAB seems to address this issue in clause 26 on 'Interpretation of retained EU law and relevant separation agreement law'. This mandates 'any question as to the validity, meaning or effect of any relevant separation agreement law' to be decided 'in accordance with the withdrawal agreement'. This provision also serves a coherence function to ensure consistency in the interpretation of the implementation of the Withdrawal Agreement, the EEA EFTA separation agreement and the Swiss citizens' rights agreement.
- 26) The broad definition of 'separation agreement law' is relevant with regard to the impact of the extensive provision of delegated powers. Subsection (3) of inserted section 7C states that 'relevant separation agreement law' includes any of the provisions of section 7A, 7B, 8B or Part 1B or Part 1C of Schedule 2 or Part 3 or section 20 of the WAB. This also expressly includes 'anything which is domestic law by virtue of any of them'. This covers regulations that are made pursuant to any of these subsections. The courts will interpret any UK law, including statutory instruments made under powers in the WAB and any other Act, that give legal effect to obligations in the Withdrawal Agreement in the light of the combined effect of Article 4 of the Withdrawal Agreement and clause 5 of the WAB.<sup>3</sup>

## Retained EU case law and the UK courts

- 27) Clause 26 of the WAB creates a new power that enables the Government to make regulations, after consulting the senior judiciary, determining the extent to which, or the circumstances in which, certain courts and tribunals are not bound by retained EU case law. This is a significant change to an important part of the legal framework in the EU Withdrawal Act 2018 which was designed to give effect to the Government's policy of maximising legal continuity and legal certainty. The interpretation of retained EU case-law is governed by section 6 of the 2018 Act, the effect of which is that only the Supreme Court of the UK and the High Court of Justiciary in Scotland can depart from retained EU case-law; all other courts and tribunals are bound by it. The WAB provides that lower courts and tribunals are not bound by retained EU case law to the extent that they are authorised to depart from it by regulations made by the Government.

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<sup>3</sup> J. Simson Caird and E. Paterson, '[Could the UK Courts Disapply Domestic Legislation to Enforce the Protocol on Ireland and Northern Ireland?](#)', U.K. Const. L. Blog (19th Feb. 2019)

- 28) This delegated power raises a number of Rule of Law concerns. First, it seems to risk a disproportionate interference with the legal certainty provided by the post-Brexit constitutional framework. The Bingham Centre shares the concerns about the legal uncertainty created by this new power explained by Sir Bob Neill MP in the House of Commons during Committee and in the briefing of the Public Law Project.<sup>4</sup> The clause undermines the policy of promoting legal certainty and continuity which underpins the 2018 Act. It is also unclear why this power is needed when the Government and Parliament can already, through either primary or secondary legislation, decide to amend retained EU case law. Second, by creating such a specific power, it would also suggest that the Government is sending a message to the judiciary that it is for the Government to tell courts how retained EU case law should be interpreted. This raises additional concerns from a separation of powers perspective. There are strong Rule of Law reasons for removing clause 26(1)(b) and (d) from the Bill.

## **Parliamentary scrutiny of EU law and the Joint Committee after exit day**

- 29) The transition period provided by the WAB and the Withdrawal Agreement provides legal certainty but at the cost of democratic engagement with the legislative process. By implementing Part 4 of the Withdrawal Agreement, the WAB will mean that EU laws will apply in the UK as if the UK were still a Member State, until the end of transition, even though the UK will have no representation in the EU's institutions after 31 January 2020. Clause 29 seeks to address this democratic deficit by facilitating some parliamentary supervision of the EU laws made during the transition period.
- 30) Clause 29 would enable the European Scrutiny Committee in the Commons, and the EU Select Committee of the House of Lords, to flag EU legislation made during transition and trigger an obligation for the Government to make arrangements for a motion on that legislation to be debated in the relevant chamber. This is a positive measure from a Rule of Law perspective, as it will enhance the transparency of the legislative process by raising awareness of significant EU laws which may take effect in the UK when we are no longer a Member State.
- 31) While the scrutiny provided by these committees during transition is valuable in terms of the transparency of the legislative process, it is important to emphasise that the mechanism created by clause 29 would not have any legal effect on the validity of EU law during the transition period. However, the ability of the committees to flag EU law could influence the UK Government's position when divergence becomes possible. Parliamentarians may wish to consider whether there is a case for the mechanism in clause 29 to be strengthened, for example by requiring the Government to provide each committee with information on the UK government's position on the relevant EU provisions or requiring the Government to make representations to the Joint Committee if a particular motion on EU legislation is approved by either chamber.
- 32) The mechanism in clause 29 raises important Rule of Law questions relating to the scrutiny of EU law in the UK Parliament post-Brexit after the end of the transition period. At this stage, before the start of negotiations on the future relationship, it is not clear to what extent the UK will align itself with EU law after the end of the transition. To the extent that the UK decides, either through international agreements or domestic legislation (as was proposed in the Financial Services Bill in the 2017-19 parliamentary session) to remain aligned in certain areas, it may be worthwhile for the UK Parliament to maintain scrutiny structures that facilitate parliamentarians'

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<sup>4</sup> HC Deb 8 Jan 2020 cols 414-426



engagement with EU law that will take effect, either directly or indirectly, in the UK.<sup>5</sup> If the UK decides to align without such parliamentary scrutiny structures in place, there is a risk that parliamentarians in the UK will have no practical means of engaging with EU legislation, which paradoxically will only serve to heighten the sense of democratic deficit that was such a motivating force for many who supported Brexit.

- 33) This provision also raises the issue of Parliament's role in supervising the Joint Committee established by the Withdrawal Agreement. The Joint Committee will have an impact on UK law, as a number of the delegated powers in the WAB can be used to implement decisions made by the Joint Committee (for example clause 18's power for the Government to implement provisions in Part 3 of the Withdrawal Agreement covering Other Separation Issues). Arguably, such is the potential significance of the Joint Committee, for example in relation to extending transition or the Protocol on Ireland and Northern Ireland or amending the Withdrawal Agreement itself, that Parliament should be granted formal powers to supervise the UK government's position before the Joint Committee. Parliament may wish to ask the Government why the Bill gives no formal role to Parliament in overseeing the Joint Committee.
- 34) Clause 30 creates an obligation upon the UK Government to keep Parliament informed of certain dispute procedures in the Joint Committee. Parliamentarians may wish to consider whether ex post-facto reporting is sufficient to ensure effective supervision of the UK Government's position before the Joint Committee. Clause 34 of the WAB requires that a Government Minister, rather than anyone else, must act as the UK's co-chair of the Joint Committee. This ministerial oversight is positive but parliamentarians may wish to consider whether in the absence of a scrutiny reserve, or a similar mechanism to provide ex ante supervision, there will be effective facilitation of parliamentary oversight.

## Delegated powers

- 35) The WAB gives the Government a number of significant delegated powers in order to implement the Withdrawal Agreement, and it also makes changes that have significant effects on other delegated powers, particularly those in the EU (Withdrawal) 2018 Act. Overall, the powers in the WAB are less significant than those created by the EU (Withdrawal) Act 2018; the principal reason being that the powers in the WAB are constrained to an extent by the fact that almost all are expressly designed to implement the terms of the Withdrawal Agreement.<sup>6</sup>
- 36) The delegated powers in the WAB reinforce the significance of the delegation of legislative power to Government for the Brexit process. In that sense, the powers in the WAB raise a broader systemic question over whether the Brexit process will result in a transfer of legislative power from Parliament to Government. Such a transfer could potentially result in a weakening of Parliament's ability to scrutinise the legislative changes designed to deliver Brexit. The overall reliance on delegated powers raises important questions over whether Parliament has retained sufficient control over the ability to make significant legislative changes. It could be argued that most of the powers enacted to deal with Brexit concern subject areas that were outside Parliament's control as a Member State of the EU, and thus in reality there is no real loss of power. On the other hand, one of the principal objectives of leaving the EU is to return these areas of competence to national parliamentary control. If this is to have any practical meaning, it

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<sup>5</sup> See the Bingham Centre for the Rule of Law's Written evidence to the House of Commons EU Scrutiny Committee – on [Post Brexit Parliamentary Scrutiny](#) 30 August 2019 ; Jack Simson Caird's Oral evidence to the House of Commons EU Scrutiny Committee – on [Post Brexit Parliamentary Scrutiny](#) 4 September 2019

<sup>6</sup> The House of Lords Select Committee on the Constitution, [European Union \(Withdrawal Agreement\) Bill: Interim Report](#) (2019: HL Paper 21) para 32.

is hard to see how such extensive reliance on delegated powers is sufficient to empower Parliament.

- 37) In terms of the scope of the powers in the WAB and any other Brexit Bills introduced before the future relationship is finalised, it is worth considering whether the powers should be amended to include a prohibition on their being used to implement the future relationship with the EU. The advantage of such a measure is that it would amount to a commitment to ask Parliament for powers specifically dedicated to implementing the future relationship, after that agreement (or agreements) has been negotiated. It is at least arguable that it is constitutionally inappropriate for the Government to decide to diverge from, or align with, EU law via statutory instruments unless the power in question makes it crystal clear that is what it is designed to achieve. Parliamentarians may also wish to consider whether the discretion afforded to the Government should be narrowed so that the powers to make secondary legislation can only be used if the Ministers considers it 'necessary' rather than 'appropriate'. Further, for some major Brexit delegated powers which may potentially exist for some time, such as the correcting power in section 8 of the EU (Withdrawal) Act 2018, parliamentarians may wish to consider whether they should be subject to regular review and renewal through a form of sunrise provision, requiring powers to be renewed by votes in both Houses every parliamentary session.
- 38) The parliamentary procedure for scrutinising the Statutory Instruments (SIs) made under the powers in the WAB should be altered so that all negative SIs are subject to the procedure that applies to negative SIs made under section 8 of the EU (Withdrawal) Act 2018.
- 39) The Government may argue that changes to the powers in the WAB are not needed because they will only be used for 'technical' changes. However the Government made the same argument in relation to section 8 power in the 2018 Act. In the time since the 2018 Act has been in force, the correcting power has already been shown to enable significant changes to the law. The Public Law Project has been conducting extensive research on this area and has cited the Capital Requirements (Amendment) (EU Exit) Regulations 2018 as an example of significant change:

"Amongst other things, the SI transfers enforcement functions to HM Treasury, the Prudential Regulation Authority, and the Financial Conduct Authority. This is, to an extent, 'gap-filling' but it is still serious law-making and governmental change."<sup>7</sup>

Sinclair and Tomlinson have argued that the Government has used Brexit SIs 'to make substantive changes to public policy, rather than just correct technical deficiencies arising due to Brexit'.<sup>8</sup>
- 40) The prospect of further significant Brexit delegated powers in the WAB support the case for expanding the sifting remit of the European Statutory Instruments Committee. However, it should be acknowledged that the process of examining section 8 instruments has shown that sifting is a major challenge. To do so for more SIs would be a big challenge in terms of resources and may also require changes in the Government's approach to consultation, early engagement and provision of more accessible explanatory material.
- 41) After exit day on 31 January 2020, the Government is likely to introduce Bills asking for more delegated powers to legislate for Brexit. Brexit Bills introduced in this session, notably the Agriculture Bill, the Fisheries Bill, the Trade Bill and the Immigration and Social Security Co-ordination (EU Withdrawal) Bill, will all contain delegated powers which could enable the

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<sup>7</sup> A. Sinclair and J. Tomlinson, '[Eliminating Effective Scrutiny: Prorogation, No Deal Brexit, and Statutory Instruments \(Part 2\)](#)', U.K. Const. L. Blog (17th Sept. 2019)

<sup>8</sup> A. Sinclair and J. Tomlinson, '[Brexit Delegated Legislation: Problematic Results](#)', U.K. Const. L. Blog (9th Jan. 2020)

Government to diverge from EU standards. However, some Brexit Bills, such as the Financial Services Bill, could contain powers that enable the UK to maintain alignment with EU law post-transition. In both cases, important legislation that will shape the UK post-Brexit will be enacted via SIs and Parliament will therefore want to ensure that structures are in place to enable effective scrutiny of the implementation of the UK's decision to maintain alignment or diverge.

- 42) As well as committee structures and sifting mechanisms, parliament may also wish to consider using formal codified scrutiny standards to raise the standard of the Government's explanatory material which accompanies SIs.<sup>9</sup> For example, such a code could require the Government to expressly state how an instrument would alter any EU legislation to which it relates. Scrutiny of detailed and complex Brexit SIs is a technically demanding task, especially when it is often done within short timeframes. As such, high quality explanatory material is crucial to ensure that the legislative process is transparent and accessible so that parliamentary scrutiny can be effective.

## Prohibiting an extension to transition

- 43) Clause 33 of the WAB prohibits a Minister of the Crown from agreeing in the Joint Committee to an extension of the implementation period. Article 132 of the WA states that the Joint Committee may before 1 July 2020 adopt a single decision extending the transition period for up to one or two years. This could be argued to give rise to a Rule of Law issue as clause 33 does not represent a good faith implementation of international law. The narrow framing of the provision as relating to the conduct of UK Ministers in response to a proposed extension may mean that the provision does not go as far as violating the terms of the Withdrawal Agreement. The clause does, however, raise questions over the extent to which the domestic implementation is faithful to the purposes for which this clause was created.
- 44) Furthermore, it may be argued that the provision impacts upon the doctrine of *effet utile* of EU law by depriving the provision of its effectiveness. The dates for transition were first proposed in anticipation of a withdrawal on 29 March 2019, and even with the then anticipated 21 months to negotiate the future relationship it was thought prudent by both sides to include a mechanism in Article 132 to facilitate an extension if required. Excluding the possibility of an extension, to allow for political circumstances, such as the European Parliament failing to approve the future relationship by 31 December 2020 does not seem prudent. An accelerated timetable will make it harder for the detail of the future relationship to be scrutinised effectively. The fact that any concerns may be raised over the compatibility of a clause of the WAB with the Withdrawal Agreement is detrimental for legal certainty and increases the possibility of litigation and even resistance in the European Parliament when it is called upon to approve ratification.
- 45) Parliamentarians should consider whether the benefits of clause 33, in terms of condensing the time to negotiate the future relationship, outweigh the negatives of creating a degree of tension between domestic law and the Withdrawal Agreement as well as potentially increasing the risk of leaving the implementation period without an agreement on the future relationship.<sup>10</sup> Clause 30 in the previous version of the WAB arguably struck a better balance in that it enables the Commons to veto a request for an extension and therefore facilitates democratic control, but does not seek to rule out the possibility of an extension.

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<sup>9</sup> R. Hazell and D. Oliver, '[The Constitutional Standards of the Constitution Committee: How a Code of Constitutional Standards Can Help Strengthen Parliamentary Scrutiny](#)', U.K. Const. L. Blog (22nd Nov. 2017).

<sup>10</sup> This could give rise to similar Rule of Law issues as a no deal exit. For a Rule of Law analysis of the implications of no deal see: Nyasha Weinberg, '[No Deal Brexit, Business and the Rule of Law, the Bingham Centre for the Rule of Law](#)' (2019).

## Parliament's role in supervising the negotiations on the future relationship

- 46) The previous version of the WAB, from the 2019-20 parliamentary session, contained a number of clauses designed to enable the House of Commons to scrutinise the negotiations over the future relationship with the EU. Clause 31 from the previous version of the WAB contained measures which enabled Parliament to have oversight of the Government's negotiating objectives for the future relationship (subsection 13C (4)), to supervise progress of the negotiations with the EU (subsection 13C (6)), and a legal veto over the future relationship itself (subsection 13C (9)). The House of Lords' Constitution Committee welcomed the inclusion of these provisions on the basis that they provide an 'upstream role' for Parliament, without providing a time limit on the Commons' timetable for approving the treaty.<sup>11</sup> The Committee noted that the provisions are in line with their recommendations in their report on Parliamentary scrutiny of Treaties.
- 47) This version of the WAB contains no provisions to provide Parliament with a means of scrutinising the negotiations on the future relationship. The new political circumstances after the General Election appear to have led the Government to change its position on the value of their inclusion. From a Rule of Law perspective, it is important to emphasise that the value of the provisions in clause 31 was not contingent on the likelihood of the Government coming under political pressure to change position because of the composition of the House of Commons. In the aftermath of the EU referendum, it quickly became clear that the institutional structure of the House of Commons was not designed to supervise international negotiations of such constitutional significance, given that the legislative process does not provide a means for meaningful input from Parliament. Bills presented before the conclusion of negotiations are likely to rely heavily on delegated powers and those presented after a treaty has been approved provide limited opportunity for engagement from parliamentarians or the public.
- 48) During the Article 50 negotiations, for example, it was notable that prior to the publication of the Joint Report in December 2017 there was no obligation on the government to present its negotiating position to the House of Commons. The Bingham Centre's evidence to the House of Commons' Liaison Committee argued that the absence of specific rules, either in the standing orders or on the statute book, to facilitate scrutiny of international negotiations should be addressed post-Brexit. Institutional structures, as well as informal parliamentary practices, often develop around formal legal or procedural powers.<sup>12</sup> As such it is regrettable that the Government has decided to drop the provisions in clause 31 as they had the potential to increase parliamentary (and public) engagement with the negotiations.
- 49) Raoul Ruparel, former special adviser on Europe to Prime Minister Theresa May, writing for the Institute for Government, argued that a key lesson from the Article 50 process was that the next stage should involve 'a more structured process through which to engage with Parliament and stakeholders'.<sup>13</sup> Ruparel adds that 'the government should be cautious about side-lining Parliament for short-term benefit'.<sup>14</sup> The treaty on the future relationship will have long-term constitutional and policy obligations which will outlive the current Government, and as such it is

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<sup>11</sup> The House of Lords Select Committee on the Constitution, [European Union \(Withdrawal Agreement\) Bill: Interim Report](#) (2019: HL Paper 21) para 98.

<sup>12</sup> The Bingham Centre for the Rule of Law, [written evidence on the effectiveness and influence of the select committee system inquiry: scrutinising Brexit](#) to the Liaison Committee 1 May 2019.

<sup>13</sup> Raoul Ruparel, [Getting the UK ready for the next phase of Brexit negotiations](#), IFG (December 2019) p6-7.

<sup>14</sup> *Ibid.*

vital that structures are in place to ensure that the process for creating the treaty is effectively scrutinised and debated.

- 50) Post-Brexit the negotiation of international agreements with foreign governments is going to be a major element of national political life. The existing statutory framework under the Constitutional Reform and Governance Act 2010 is not sufficient to ensure that the UK's democratic legislatures have meaningful input into the process. One of the aims of Brexit was to increase democratic engagement with the laws that apply in the UK. It would be regrettable if the transfer of competence from the EU to the UK results in a new democratic deficit in relation to the absence of structured parliamentary involvement in the creation of international law. Clause 31 from the previous WAB would have provided a structure for engagement on the future relationship, which could then be used for other international agreements, for example with the United States. In Rule of Law terms, requiring the Government to publish negotiating objectives prior to the opening of formal negotiations, as well publishing reports on the progress in achieving those negotiations, when coupled with a formal veto on the final agreement, could result in a significant improvement in the transparency and democratic credentials of the treaty making process.
- 51) There is a real risk that the combination of the short timeframe available to negotiate the future relationship, the reliance on delegated powers to implement Brexit (through a number of Bills due to be introduced in the current session) and the absence of provisions such as those in clause 31 of the previous WAB will mean that Parliament does not play a significant role in supervising the negotiations on the future relationship.

## **EU citizens' rights**

- 52) The wholesale implementation of the Withdrawal Agreement, through clause 5 of the WAB, ensures that Part 2 of the Withdrawal Agreement on Citizens Rights' has direct effect and supremacy. This gives those rights special constitutional status in domestic law. Part 3 of the WAB supplements those rights with provisions designed to implement specific elements of the scheme established by Part 2 of the Withdrawal Agreement. Part 3 contains a range of delegated powers for Ministers to make provisions through regulations 'as they see appropriate' within the areas covered. These powers, as the Constitution Committee explains, are limited in scope by the relevant Articles of the Withdrawal Agreement which they seek to implement.<sup>15</sup> The WAB does not contain a list of the substantive rights that are protected for citizens, which are found in the Withdrawal Agreement.
- 53) Detailed commentary on the provisions in the WAB relating to citizens rights' will no doubt be provided by other organisations but there are two broad Rule of Law points are worth making. The first is that there is a lack of clarity over how these provisions will interact with relevant provisions of the Immigration and Social Security Coordination Bill that will be introduced in this session. The government's briefing notes on the Queen's Speech state that this Bill will give 'EU citizens and their family members who apply a right of appeal against EU Settlement Scheme Decisions'. As the issue of adjudication of citizens' rights concerns implementation of the Withdrawal Agreement, it would have been more appropriate to include this right of appeal in the WAB.
- 54) The second point is that the provisions establishing the Independent Monitoring Authority (IMA) should be closely scrutinised by Parliament for compatibility with the Withdrawal Agreement

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<sup>15</sup> The House of Lords Select Committee on the Constitution, [European Union \(Withdrawal Agreement\) Bill: Interim Report](#) (2019: HL Paper 21) para 44.

(clause 15 and Schedule 2).<sup>16</sup> This body will play an important role ensuring that rights in the Withdrawal Agreement are given effect in practice. This is vital for the Rule of Law. As such parliamentarians should examine whether the provisions on the IMA can be improved or enhanced. For example, paragraph 25 of Schedule 2 of the WAB provides that the IMA may carry out inquiries in response to requests from the Secretary of State and devolved Ministers. However such a privilege for the executive is not foreseen by Article 159 of the Withdrawal Agreement which prescribes the IMA. This states only that the IMA may conduct inquiries ‘on its own initiative’ and ‘receive complaints from...citizens and their family members for the purposes of conducting such inquiries’. Parliament will wish to consider whether that provision is compatible with the IMA’s independence, which is required by the Withdrawal Agreement.

- 55) The Schedule also establishes standards for the conduct of inquiries that are absent from the Withdrawal Agreement. Paragraph 25 of Schedule 2 states that the IMA may have discretion not to carry out an inquiry even if satisfied the UK may have failed to comply. The IMA may decide not to do so if, among the reasons, it considers there are no general or systemic failings in the implementation or application of the citizens’ rights provisions in the Withdrawal Agreement. The Withdrawal Agreement does not mention any discretion not to engage in monitoring, nor that a lack of systemic failing could be a reason not to do so. The statement in Article 159 of the Withdrawal Agreement that the IMA concerns ‘alleged breaches’ suggests instead that monitoring should extend to any and all individual examples of such breach.

## The CJEU and Dispute Resolution

- 56) The WAB does not make explicit provision regarding the jurisdiction of the European Court of Justice (CJEU) over ‘relevant separation agreement law’. The conduit pipe of clause 5 incorporates the requirements in Article 4 of the Withdrawal Agreement that the implementation must be interpreted in conformity with relevant case-law of the CJEU.
- 57) These provisions do not mandate the jurisdiction of the CJEU. They do, however, require specific actions from UK courts in relation to CJEU decisions. Clause 26 ensures that after exit day any question on the validity, meaning or effect of relevant separation agreement law must be decided in accordance with the Withdrawal Agreement.
- 58) The WAB makes provision for the continuing jurisdiction of the CJEU during the transition period through saving the effects of the ECA 1972 until IP completion day in clause 1. This states that references to the ‘Treaties’ shall include Part 4 of the Withdrawal Agreement. This incorporates Article 131 in Part Four of the Withdrawal Agreement which states that the CJEU will have jurisdiction during the transition period. Ostensibly this also includes the power under Article 87 of the Withdrawal Agreement for the Commission to bring a case before the CJEU within 4 years after the transition period if it considers the UK to have failed in fulfilling an obligation. It would have been desirable for legal certainty if this had been implemented more explicitly as this provision is outside of Part 4 of the Withdrawal Agreement. Parliament will wish to consider whether the Bill gives effect to Article 87 of the Withdrawal Agreement.
- 59) The WAB explicitly covers two further instances of CJEU jurisdiction beyond the transition period. Clause 26 makes references to Article 158 of the Withdrawal Agreement, which allows UK courts to make preliminary references to the CJEU on questions concerning Part Two of the Withdrawal Agreement on citizens’ rights up to 8 years after the end of the transition period. It also makes reference to Article 160 of the Withdrawal Agreement which maintains CJEU

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<sup>16</sup> See [Public Law Project Briefing on the Independent Monitoring Authority \(IMA\) and EU Citizens’ Rights Project](#), 07 January 2020.

jurisdiction over provisions concerning the pre-commitment of the UK towards the budget that applies beyond 31 December 2020.

- 60) A final example of jurisdiction continuing beyond the transition period is not, however, included explicitly in the WAB. No reference is made to the role of the CJEU and the other EU institutions in Article 12 of the Protocol on Northern Ireland. This jurisdiction may be regarded as implemented by the general provisions of the WAB. However, it would have been more desirable for legal clarity if all the instances of the CJEU's jurisdiction and the different time-frames and subject-matters were made explicit in the WAB. Parliament will also wish to consider whether the Bill gives effect to Article 12 of the Northern Ireland Protocol.
- 61) Clause 30 creates duties for Ministers to report to Parliament on disputes under the Withdrawal Agreement. Clause 30(5) creates a general obligation for a Minister, at the end of a 'reporting period', to lay a report before Parliament on the number of times consultations to resolve a dispute in the Joint Committee have commenced. Clause 30(3) creates specific reportage obligations within 14 days in the event that a dispute necessitates the establishment of an arbitration panel. Clause 30(4) establishes the same obligation in the event that the CJEU gives a ruling on a question of EU law in relation to a request made by the Joint Committee.
- 62) These obligations may be welcomed from the perspective of legal certainty. They enable Parliament to be kept informed of the most authoritative interpretations of the Withdrawal Agreement and thus domestic 'relevant separation agreement law'. It is important, however, that such scrutiny does not lead to undue pressure upon any arbitration panel resolving a dispute that could compromise the independence and impartiality of the body and its ruling.

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