

Immigration and Social Security Co-ordination (EU Withdrawal) Bill: A Rule of Law Analysis

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Executive Summary

The Immigration and Social Security Co-ordination (EU Withdrawal) Bill will end freedom of movement for EU citizens.

Although the broad policy thrust of the Bill is clear, there is a conspicuous lack of detail. This undermines the Rule of Law value of legal certainty. Parliament is being asked to sign a blank cheque, leaving it to the Government to fill in the details later.

The inclusion of very broad Henry VIII powers allowing the Secretary of State to make regulations amending Acts of Parliament has the effect of diminishing parliamentary scrutiny of legislation and allows for the will of Parliament to be thwarted.

Finally, the Bill is silent on how the changes it makes in relation to Irish citizens will affect rights of Northern Irish citizens under the Good Friday Agreement.



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 a new 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.

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Introduction

The UK is often described as having two immigration systems: the EU law of free movement which regulates the immigration of EEA nationals (including EU nationals) and domestic immigration law which regulates the immigration of all other nationals. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill will change this.

Following the UK's withdrawal from the European Union, this Bill will repeal the free movement legislation at the end of the transition period. From 2021, EEA and Swiss citizens and their family members who come to the UK will be subject to UK immigration laws and will be required to have permission to enter and remain under the Immigration Act 1971. Therefore, from that date EEA and Swiss citizens will be subject to the same domestic legislation as all other nationals.

There are four main Rule of Law concerns over this Bill:

- A lack of detail in the Bill leading to legal uncertainty over what exactly is being enacted
- Very broad Henry VIII powers which will allow the Secretary of State to override Acts of Parliament
- Lack of safeguards for Northern Ireland citizens affecting their rights under the Good Friday Agreement
- Failure to improve the intelligibility of an already over-complex area of law.

(1) Legal certainty

Tom Bingham said that the law must be fixed, clear and certain.¹ Legal certainty² and foreseeability of laws³ is part of the Venice Commission Checklist on the Rule of Law. There are two very strong practical reasons for this. Firstly, so that people know what their rights and responsibilities are, and secondly, so that parliamentarians know what they are making into law. Sir Stephen Laws, a former First Parliamentary Counsel of the UK has stated that 'an element of predictability and permanence is an essential contributor to the role of law in preserving social cohesion and doing justice'.⁴ Predictability means that we can predict the legal effect of our actions by looking at the words of the Act.

Lack of detail – the blank cheque

The headline policy of this Bill is clear and admirably well drafted. Part 1 is entitled 'Measures relating to ending free movement', and clause 1 states that it ends rights to free movement of persons under retained EU law. There can be no doubt about the broad thrust of this Bill.

However, bar a few specific provisions, there is a complete absence of detail about the workings of this policy. There are 6 consequential repeals in Schedule 1 of the Bill. Considering the voluminous nature of immigration legislation, 6 consequential repeals does not even scratch the surface. Preliminary research by the Immigration Law Practitioners' Association⁵ has identified three important legal protections which are not in any way addressed in the Bill:

- Protections for victims of trafficking in anti-trafficking Directive 2011/36/EU
- Protections for asylum seekers in the Receptions Condition Directive 2013/22/EU
- Protections for victims of crime in the Victims' Rights Directive 2012/29/EU

¹ Tom Bingham, *The Rule of Law* (Penguin UK 2011).

² Venice Commission "The Rule of Law Checklist" (Council of Europe 2016), available at <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf>. Benchmark B.

³ Ibid. Benchmark B3.

⁴ Stephen Laws, 'Plus ca Change - Continuity and Change in UK Legislative Drafting Practice' (2009) 11 *European Journal of Law Reform* 139, 140.

⁵ Written Submission by Immigration Law Practitioners' Association at Public Bill Committee Stage, available at <<https://publications.parliament.uk/pa/cm5801/cmpublic/Immigration/memo/IB21.pdf>>.

There are bound to be many more areas of important detail that this Bill simply fails to address. It is clear that this is official policy. In a memorandum from the Home Office to the Delegated Powers and Regulatory Reform Committee, the Home Office stated

The Bill does not set out the detail as to how the domestic immigration framework will apply to EEA citizens at the end of the transition period.⁶

Without specific detail in the Bill, Parliament is being asked to sign a blank cheque for the Government to cash in in any way it thinks fit.

Lack of detail – blanket removal of unspecified rights

In Schedule 1, paragraphs 5 and 6 purport, within a solitary page, to remove all rights, powers, liabilities, obligations, restrictions, remedies and procedures which derive from EU law. As a headline policy, again this is clear and sensible and gives proper effect to the decision to leave the EU. However, it is only a headline policy, again, there is no detail on what rights precisely are being removed. This is lazy law-making. If people are going to have their rights removed, it is incumbent on Government to list precisely what those rights are and then specifically to remove them. This will enable the people affected to know exactly what is happening to their rights, and allow parliamentarians to know precisely what they are voting for.

The normal procedure when repealing laws is to list what laws are being repealed in a repeal schedule. Then it is very clear to everyone what laws are being got rid of. A blanket reference to 'any' EU rights does not have anything of the specific about it. The Venice Commission Checklist references this point when it asks

“does new legislation clearly state whether (and which) previous legislation is repealed or amended?”

This Bill fails this test as there is no clear statement of the rights that are being revoked.

As Adrian Berry, Chair of the Immigration Law Practitioners' Association remarked, in giving evidence to the Public Bill Committee on this Bill

How is the ordinary person, never mind the legislator, to know whether the law is good or not in a particular area if you draft like that? You need to make better laws. Make it certain, and put on the face of the Bill those things that you think are going to be disapplied because they are inconsistent with immigration provisions. There must be a laundry list in the Home Office of these provisions and it would be better if they are expressed in the schedule to the Bill.⁷

(2) Power of Secretary of State to thwart will of Parliament

Benchmark B4 of the Venice Commission Checklist requires that the supremacy of the legislature is ensured. One of the central arguments made in favour of Brexit was that Parliament take back control of its laws. It is therefore rather ironic that a Bill taking back control hands that control from Parliament to the Government.

A Report on the constitutional standards laid down by the House of Lords Select Committee on the Constitution⁸ states that:

- Delegations of legislative power should be framed as narrowly as possible
- The scope of a Henry VIII power should be limited to the minimum necessary to meet the pressing need for such an exceptional measure

⁶ Home Office, 5 March 2020, available at < [https://publications.parliament.uk/pa/bills/cbill/58-01/0104/2020-03-04%20DPmemo%20-%20ImmSSCBill%20Final_%20\(003\).pdf](https://publications.parliament.uk/pa/bills/cbill/58-01/0104/2020-03-04%20DPmemo%20-%20ImmSSCBill%20Final_%20(003).pdf)>.

⁷ Hansard HC 9 June 2020, vol 677, col 52.

⁸ J Simson Caird, R Hazell, D Oliver “The Constitutional Standards of the House of Lords Select Committee on the Constitution” (UCL, 2017)

- Delegated powers should not be framed in such a way that gives little indication of how they should be used.

A previous Report⁹ by the Bingham Centre set out standards to ensure effective Parliamentary scrutiny of delegated powers in the context of Brexit. It argued that:

- Skeleton bills inhibit parliamentary scrutiny and should be avoided.
- Politically sensitive matters should in principle be dealt with through primary rather than secondary legislation.
- Delegated powers should be sought only when their use can be clearly anticipated and defined.

Power of Secretary of State to amend Acts of Parliament

Clause 4 of this Bill contains a huge Henry VIII power. A Henry VIII power is a power granted to Ministers to change primary legislation by way of regulations. The specifics of the power in clause 4 is that the Secretary of State

1. can make regulations to amend,
2. any Act of Parliament passed before, or in the same session as this Bill,
3. where the Secretary of State considers it “appropriate to do so in consequence of, or in connection with, any provision of this Part”.

It is worth unpicking the elements of this power. The Secretary of State can make secondary legislation, and that secondary legislation can amend an Act of Parliament. Not only can it amend any previous Act of Parliament, but also any other Act that Parliament may subsequently pass in the same session. So, if next year the Secretary of State does not like a provision in an Act of Parliament passed within the next few months, the Secretary of State can repeal it. This is not simply ‘fixing’ a technical Brexit point; this is an executive power to thwart a decision of this Parliament.

Furthermore, although this power may be exercised to make transitional or temporary provisions, it is not limited to that. It is a power to do anything the Secretary of State considers “appropriate” in consequence, or even just “in connection” with any provision of this Part of the Bill.

This is not a narrowly framed power. This is an open-ended power for the Secretary of State to make law which ought to be the preserve of Parliament. As Adrian Berry stated in his evidence

What the Bill does is take away [Parliament’s] powers to make primary legislation and give them to Ministers by way of regulations.¹⁰

Power of Secretary of State to set immigration fees

Clause 4(5) makes a specific provision in relation to this Henry VIII power. The Secretary of State may make regulations relating to the imposition of fees, even if this would overturn an Act of Parliament made before, or in the same session in this Bill. So, if Parliament were to pass an Act, later in this session, capping the immigration fees that could be charged to EU nurses, for example, the Secretary of State could make regulations cancelling that and setting whatever fee thought appropriate.

Parliamentary scrutiny of these powers to make regulations

Clause 4(6), (7) and (8) set out three different procedures for parliamentary scrutiny of regulations made by the Secretary of State.

Procedure 1

- This applies to the “first statutory instrument” containing regulations under clause 4(1).
- It must be laid before Parliament when it is made, but the Bill is silent about when it comes into effect – the normal rule is they come into effect 21 days after being made.

⁹ J Simson Caird and Ellis Patterson “Brexit, Delegated Powers and Delegated Legislation: a Rule of Law Analysis of Parliamentary Scrutiny” (Bingham Centre, 2020)

¹⁰ Hansard HC 9 June 2020, vol 677, col 53.

- They cease to have effect within 40 days, unless Parliament passes a resolution to approve them (not counting days when Parliament is dissolved or prorogued, or hasn't sat for more than 4 days).
- Even if Parliament does not approve it, things already done under it are still valid.¹¹

The net result of this is that the Secretary of State could make regulations which become law, without Parliament first having authorised them. Depending upon the vagaries of Parliament sitting, these could remain law for several weeks before Parliament has a chance to debate them. In the unlikely event of Parliament refusing to approve them, they would still be law in the period before Parliament rejected them.

Procedure 2

- This applies to any other statutory instrument which uses a Henry VIII power.
- That statutory instrument does not have effect unless a draft of it is first laid before, and approved by a resolution of each House of Parliament.

Procedure 3

- This applies to any other statutory instrument which does not use a Henry VIII power.
- That statutory instrument takes effect, subject to a right of Parliament to annul it.

These procedures do not give effective powers to Parliament to scrutinise legislation.

The transparency of the primary law-making process achieves benefits for the Rule of Law as it allows for technical scrutiny of the legislation and for political accountability. Technical scrutiny may help ensure that various Rule of Law standards are maintained, for example “that the law is as clear as possible, that the principle of legality is respected, and that the legislative process is as accessible as possible”¹². Secondly, the primary legislative process allows for assessment and deliberation on the effect of the legislative proposal; this enhances political accountability and the legitimacy of the legislation. On the other hand if the Bill contains little substance but is structured around powers allowing modification of primary legislation, it will be more difficult to apply Parliamentary scrutiny to the subsequent statutory instruments. A Bill which is mainly centred around broad powers for the Secretary of State also makes it more difficult to assess the effect of the legislative proposal which in turn makes it more difficult to hold the Government politically accountable.

(3) Status of Northern Ireland citizens

Tom Bingham stated that respect for the Rule of Law also included respect for our international obligations. Benchmark A3 of the Venice Commission Checklist requires states to abide by obligations under international law.

The Good Friday Agreement is an international agreement between the UK and Ireland. Even more importantly, it brought hard-won peace to Northern Ireland. Under that Agreement, a citizen of Northern Ireland can choose to be British, Irish, or both. This respect for national aspiration is a fundamental building block of the peace process in Northern Ireland.

Clause 2 of the Bill makes changes to the Immigration Act 1971 by granting Irish citizens the right to enter or remain in the UK without first seeking leave. There are three exceptions (a) if the Irish citizen is subject to a deportation order, (b) if their exclusion is conducive to the public good, or (c) the Irish citizen is an ‘excluded person’.

On the face of the Bill, there is nothing to stop these three exceptions being applied against persons who are Northern Ireland residents who have exercised their right to assert their Irish citizenship. What is the legal protection to stop a person in this category being subjected to a deportation order? In the light of the Windrush scandal, should such a person rely on Home Office or Ministerial assurances that nothing bad will happen to them?

¹¹ Clause 4(10).

¹² Simson Caird (note 9).

If the only way a person in this position can protect themselves is to take British citizenship, this is fundamentally at odds with the structures of the Good Friday Agreement.

(4) Intelligibility of law

Tom Bingham said that law must be clear. The Venice Commission on the Rule of Law stated that legislation must be written in an intelligible manner.

Any consideration of immigration legislation would not be complete without a reminder of the horrendous complexity of that law. This Bill is short, but, as pointed out by the Law Commission for England and Wales, immigration law is overly complex and unworkable, its structure is confusing and its wording impenetrable.¹³ Any changes to immigration law brought about as a result of this Bill should simplify the law, not make it even more unintelligible.

¹³ Law Commission for England and Wales “Simplification of the Immigration Rules: Report” HC 14 Law Com No 388 (2020).

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