

Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018

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Introduction

The European Union (Withdrawal) Act 2018 ('the Act' or 'the Withdrawal Act') repeals the European Communities Act 1972 ('the ECA') and in so doing seeks to address comprehensively the wide-ranging impact upon the law of the United Kingdom of exit from the European Union. The Act's main purpose is to preserve existing EU law as it applies to the UK when it leaves the EU by converting it into domestic law. This is a gargantuan task: 'a legal undertaking of a type and scale that is unique and unprecedented.'¹ It is estimated that approximately 20,000 laws deriving from the EU have been given effect within domestic law.² These need to be assessed and then, as appropriate, repealed, revoked or retained, depending upon their relevance and significance. The job of retaining EU law is made more challenging both by the timescale involved and because the powers given to the Government must be sufficiently flexible to take account of a rapidly changing context, including the prospect of an implementation period for the proposed withdrawal agreement, up to 31 December 2020,³ and the as yet unknown terms of any new relationship agreement between the UK and the EU.

While the immediate *practical* pressures associated with preparing the statute book for exit are clear, the likely legacy of the Act falls to be evaluated in terms that are fundamentally *constitutional* in nature. Membership of the EU has had a monumental impact not only

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¹ Constitution Committee, *European Union (Withdrawal) Bill*, 29 January 2018, HL 69 2017–19, p.3 ('Constitution Committee Report No.3').

² Vaughne Miller, *Legislating for Brexit: directly applicable EU law*, House of Commons Library Briefing Paper, CBP 7863, 12 January 2017.

³ 'Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union.' TF50 (2017) 19 – Commission to EU 27, 8 December 2017.

upon the substantive law of the UK, but also upon the development of fundamental constitutional doctrines, principles and practices over more than four decades, affecting our understanding of parliamentary supremacy, the relationship between Parliament and Government, the constitutional authority of the courts and the creation and development of devolved government. Therefore, the implications of the Act go far beyond the immediate task of retaining and reordering the domestic effect of EU law. In this article we assess the deeper consequences which the Act signifies for four dimensions of the constitution: the rule of law and legal certainty, parliamentary supremacy, the relationship between Parliament and government and the territorial constitution.

Before addressing each in turn, we set the scene by reviewing the passage of the Act itself. This is particularly notable for the influence which Parliament brought to bear upon its terms, not only through plenary debate but also by way of significant committee reports, helping to secure important amendments which make the Act much more fit for constitutional purpose than the Bill was when it was first published. Significant constitutional challenges lie ahead and it will only be in the period after exit that the robustness of the constitution will be fully tested by the extraordinary powers which the Act contains. But the turbulent passage of the Act itself attests to the vital role Parliament can play when fundamental principles of the constitution come under challenge.

It is necessary to add one further prefatory point, concerning the relationship between the Act and the legislation that is to be enacted for the purpose of implementing any transitional agreement. It is envisaged by the Government that such legislation — without technically redefining “exit day”, which is fixed by the Act as “29 March 2019 at 11.00 p.m.”⁴ — will in substance postpone the domestic legal effect of exit by “saving” the ECA for the duration of the transitional period and postponing the creation of the category of “retained EU law” until the end of that period.⁵ These revised arrangements will, of course, only be introduced if a transitional agreement is actually reached. It follows that the legal effects of the Withdrawal Act that we set out in this article are likely to be felt either at the end of March 2019 or at the beginning of 2021, depending on whether the operation of the Act is, in effect, deferred during transition.

The passage of the European Union (Withdrawal) Act

The European Union (Withdrawal) Bill (‘the Bill’ or ‘the Withdrawal Bill’) was introduced into Parliament on 13 July 2017, shortly before summer recess. This gave parliamentary staff and commentators a quiet period in which to digest its implications and hence to inform parliamentary debate. A two day second reading debate took place in September 2017 but many of the most dramatic debates were reserved for the eight days the Bill spent in Commons Committee from 14 November until 20 December. These debates were at times fraught, with political issues surrounding Brexit inevitably intertwining with criticism of more technical elements of the Bill itself. On several issues the Government undertook to

⁴ EUWA, s. 20(1).

⁵ Department for Exiting the European Union, *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union*, Cm 9674 (2018).

think again and on one significant point it was defeated.⁶ The most turbulent period (from the Government’s perspective) occurred after the Bill’s introduction in the Lords on 18 January 2018. Second reading in the upper house took place on 30-31 January before a protracted committee stage that concluded just before Easter recess, followed by detailed consideration at a report stage that lasted until early May. It was in these lengthy committee and report stages that the most significant amendments were laid. The Lords made 15 amendments to the Bill. While most of these were eventually reversed in the Commons, the Government tabled some 170 of its own amendments in both houses, making explicit concession on eight of the Lords amendments,⁷ but also taking account of numerous parliamentary objections raised throughout the passage of the Bill.

Parliament also delivered robust and proactive scrutiny through its committees. The House of Lords Constitution Committee issued three reports, the first of which was anticipatory, published in March 2017, before even notification of intention to withdraw under Article 50 of the Treaty on European Union had been issued. In this report the Committee sought to flag up the main constitutional issues which were likely to be raised by the then-forthcoming Bill and to which Parliament ought to be attentive.⁸ Having seen the published Bill, the Committee produced a second (interim) report to coincide with the Bill’s second reading in the House of Commons,⁹ assessing the Bill in light of its earlier recommendations and drawing attention to the fact that many of the problems anticipated by the Committee had materialised in the Bill itself.¹⁰ The timing of this report is indicative of how the two houses can work together when important constitutional issues are at stake. The Lords is conscious that it lacks the democratic legitimacy of the Commons, but its committees were able to supply the ammunition of constitutional critique which was then fired with more political authority by the Commons. The Constitution Committee, following its own inquiry into the Bill, and taking account of the preceding Commons stages, published a final and detailed report on the Bill ahead of second reading in the Lords.¹¹

⁶ An amendment to s 9 was passed to give Parliament a role in approving the withdrawal agreement. S.9 now provides that the Government’s power to make regulations for the purpose of implementing the withdrawal agreement is subject to a statute of Parliament approving the final terms of withdrawal.

⁷ Institute for Government, ‘EU Withdrawal Bill: amendments and debates’, 21 June 2018 <https://www.instituteforgovernment.org.uk/explainers/eu-withdrawal-bill-amendments-and-debates>

⁸ Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers*, 7 March 2017, HL 123, 2016–17 (‘Constitution Committee Report No.1’).

⁹ Constitution Committee, *European Union (Withdrawal) Bill: interim report* 7 September 2017, HL 19, 2017–19 (‘Constitution Committee Report No.2’).

¹⁰ The Committee concluded that the Act was “highly complex and convoluted in its drafting and structure” and that it left “multiple and fundamental constitutional questions” unanswered: Constitution Committee Report No.2, p 2.

¹¹ Constitution Committee Report No.3.

Other committees were also active in assessing many aspects of the Bill — in particular, the Commons’ European Scrutiny Committee and Public Administration and Constitutional Affairs Committee, and the Lords’ EU Committee and Delegated Powers and Regulation Reform Committee. At the same time scrutiny was enabled by a number of important analyses of the Bill’s key provisions produced by the House of Commons library¹² and the devolved legislatures.¹³ As we assess the evolution of the Bill in this article, it will be apparent just how much its development was the consequence of interplay between Parliament in plenary session and the information it derived from its committees, the latter also in dialogue directly with the Government through evidence sessions and discussion seminars taking place both in public and private as part of ongoing inquiries into the Bill as a whole or particular aspects of it.¹⁴

The rule of law and legal certainty

The central tenet of the Act is that (for the most part) EU law should continue to apply in the UK following exit. This key policy is driven by the principle of legal certainty and the avoidance of the chaos that would result from suddenly excising the vast body of EU-derived law from the statute book. This task of retaining EU law is however fraught with difficulty given the myriad ways in which EU law (per the ECA) has taken effect in domestic law: primary legislation, secondary legislation (emanating not only from the ECA but many other parent Acts), the direct effect of EU treaty provisions, legislation and general principles, and the jurisprudence of domestic and EU judicial organs and regulatory agencies. To this end the Act sensibly introduces the concept of ‘retained EU law’. Nonetheless, the initial approach taken by the Bill to classifying retained EU law was criticised on three main grounds: over-inclusiveness, ambiguity and status.

The charge of over-inclusiveness derives from the fact that retained EU law encompasses not only ‘direct EU legislation’, saved by s. 3, and (other) directly effective EU law (per ECA s. 2(1)) saved by s. 4, but also ‘EU-derived domestic legislation’ (s. 2). The categories of law provided for in ss. 3 and 4 of the Act only have (pre-exit) effect in UK law by virtue of the direct effect of EU law and the ECA’s domestic accommodation of that concept. Such EU law would therefore automatically cease to have domestic effect when the UK leaves the EU and/or Parliament repeals the ECA. In contrast, the category of law provided for by s. 2 encompasses law that has effect in the UK on a free-standing legislative basis (e.g. provisions in primary legislation that give effect to EU directives). Despite the fact that this is already domestic law that would not be lost by repeal of the ECA, s. 2(1) of the Withdrawal Act brings this category of law within the umbrella concept of ‘retained EU law’. In both

¹² A list of the Commons Library’s publications concerning the Withdrawal Bill can be found at <https://www.parliament.uk/business/publications/research/eu-referendum/legislation/>.

¹³ Scottish Parliament Finance and Constitution Committee, *European Union (Withdrawal) Bill LCM - Interim Report* 9 January 2018, SP Paper 255, 1st Report, 2018 (Session 5); National Assembly of Wales, *Scrutiny of regulations made under the European Union (Withdrawal) Bill*, February 2018.

¹⁴ See for example, Letter from Lord Callanan, Minister of State for Exiting the European Union to the Constitution Committee, 11 April 2018? [https://www.parliament.uk/documents/lords-committees/constitution/European-union-withdrawal-bill/Government-response-EU-\(Withdrawal\)-Bill-110418.pdf](https://www.parliament.uk/documents/lords-committees/constitution/European-union-withdrawal-bill/Government-response-EU-(Withdrawal)-Bill-110418.pdf). This engages in detail with Constitution Committee Report No. 3.

conceptual and practical terms it is difficult to make sense of this attempt to re-categorise a body of domestic law as ‘retained EU law’. The Lords Constitution Committee took the view that EU-derived domestic legislation under s. 2 should be removed from the category of ‘retained EU law’ but the Government disagreed, arguing that law provided for in s. 2 required to be classified in this way to ensure that no EU law which the Act seeks to retain is lost by falling in the cracks between ss. 2 and 3 and to bring this category of law within the interpretive provisions in s. 6 and the ‘correction’ power in s. 8. The latter point is arguably particularly important, since it potentially opens up *existing* domestic law, including Acts of Parliament, that does not need to be ‘saved’ by the Act to the extensive ‘correction’ powers contained therein. We consider the scope of those powers, and their constitutional implications, below.

The second issue raised by the notion of ‘retained EU law’ — namely ambiguity and conceptual clarity — arises from the sometimes puzzling and overlapping relationship between ss. 2–4. For instance, as the Constitution Committee noted, circumstances can be envisaged in which only part of a given EU instrument is reflected in domestic legislation.¹⁵ In such circumstances, those elements of the instrument would form part of domestic law under s. 2, while other elements would, if directly effective, form part of domestic law under s. 3. Another ambiguity arises in relation to s. 4 which will have the effect of retaining directly effective EU law not caught by s. 3. A significant category will be rights derived directly from EU Treaties. Once more the issue of conceptual coherence arises. Is it logical to attempt to retain within UK law treaty provisions that only make sense in relation to membership of the EU, for example those which presuppose a reciprocal arrangement between the EU and a Member State? Section 4 could apply to all directly effective treaty provisions even if in all practical senses these will have ceased to apply to the UK after exit. As with s. 2 it is understandable that the Government sees s. 4 as a “broad ‘sweeper’ provision”¹⁶ to ensure over-inclusivity in the initial act of retention, the Government thereafter using delegated powers to remove unnecessary provisions, but the notion of EU treaty provisions continuing to have some effect in UK law surely makes no sense in the context of withdrawal from the EU, and raises constitutionally fundamental questions about the acceptability of Parliament’s designing a legislative scheme that intentionally leaves so much discretion to the executive.

Section 4 is also ambiguous as to the legal effect of directives which it will incorporate into UK law, in particular whether they will have only vertical effect or possibly also horizontal effect,¹⁷ and also as to whether ss 2 and 4 may, in their over-inclusivity, also serve to overlap in the retention of directives, thereby offering two separate sources of retention of the same EU-derived legal provision — namely, existing domestic legislation implementing the EU provision (saved, if necessary, by s 2) and the EU provision itself (saved by s 4). The Constitution Committee concluded that: “The ambiguities in the interpretation and effect of clause 4 will inevitably cause legal uncertainty about a fundamental provision of the Act.

¹⁵ Constitution Committee Report No.2, para 24; and Constitution Committee Report No.3, para 21.

¹⁶ Written evidence from the Department for Exiting the European Union to the Constitution Committee, cited by Constitution Committee Report No.3, para 30.

¹⁷ Other areas of ambiguity are discussed by the Constitution Committee Report No.3, paras 33–38.

This will undermine one of the Government’s main objectives in bringing forward this Bill. The ambiguities need to be resolved.”¹⁸

The third issue — that of status — arises from uncertainty as to whether or not retained EU law is properly categorised as primary or secondary legislation. EU-derived domestic legislation under s 2 is already ascribed a status depending upon how it was incorporated into UK law, and the Bill was amended during its passage through the House of Lords to make it clear that EU-derived domestic legislation retains whatever domestic legal status it had prior to exit day.¹⁹ When the Bill was published, the Government took the view however that retained EU law under ss 3 and 4 (what the Constitution Committee called “retained direct EU law”²⁰) should be ascribed a status *sui generis* that is neither primary nor secondary legislation,²¹ albeit that the Act would ascribe such retained EU law a particular status for certain purposes²² and, via a consequential provisions clause,²³ would authorise the Government to designate particular pieces of retained EU law as primary or secondary legislation. This was seen by parliamentarians to be an entirely unsatisfactory approach.²⁴ Retained direct EU law would be transformed into domestic law by virtue of the Act and accordingly there seemed to be no good reason not to accord it a recognisable status within UK law, while failure to do so would be deeply unsettling to the constitutional categorisation of legislation in the United Kingdom as either primary or secondary in nature.

In light of this critique, the Constitution Committee took the view that all retained direct EU law should have the same legal status for all purposes, namely domestic primary legislation, since “directly effective EU law is closely analogous to domestic primary legislation.”²⁵ Another advantage of such a status would be to render this law less vulnerable to delegated powers contained in other legislation.²⁶ However, this suggestion did not find favour with the Government, which considered it ‘rigid and inflexible’ because it (for instance) would ascribe to technical pieces of EU tertiary legislation an unduly elevated domestic status.²⁷

¹⁸ Constitution Committee Report No.3, para 38.

¹⁹ See section 7(1).

²⁰ Constitution Committee Report No.3, para 41.

²¹ Written evidence from the Department for Exiting the European Union to Constitution Committee, cited Constitution Committee Report No.3, para 42.

²² For example, the original version of the Bill provided that retained direct EU legislation was to be treated as primary legislation for the purposes of the Human Rights Act 1998. The final version of the Act is more nuanced, in that it provides that only certain retained direct EU legislation should be treated as primary legislation for HRA purposes: sch 8, para 30.

²³ Section 23(1). For discussion of the Government’s positions see Constitution Committee Report No.3, paras 67-68.

²⁴ Constitution Committee Report No.3, paras 69-70.

²⁵ Constitution Committee Report No.3, paras 51-52

²⁶ See Constitution Committee Report No.3, paras 58-66.

²⁷ Lord Callanan, HL Hansard, 23 April 2018, col 1413.

Speaking at report stage, Lord Callanan, Minister of State for Exiting the European Union, implied that giving such EU law such status would mean that it could only be amended via primary legislation. However, that assumption is incorrect, since primary legislation — and measures that are deemed to be primary legislation — can of course be amended via secondary legislation provided that an Act of Parliament has authorised such amendment through a suitably worded Henry VIII clause. The intention of the Constitution Committee’s proposal was thus not to render all retained direct EU law invulnerable to amendment via secondary legislation, but was rather to make it vulnerable to such amendment only when *vires* were specifically conferred for that purpose and appropriately regulated and limited. Be that as it may, the Government accepted that the Committee had highlighted an ‘undeniably important issue’,²⁸ but chose to address it in a way that differed in two important respects from the Constitution Committee’s proposal.

First, the Act, following the Government amendments on this point, delineates different forms of retained direct EU legislation — ‘principal’ and ‘minor’ — a broad distinction being drawn, in practice, between those measures that derive from EU tertiary legislation and those, such as regulations and directly effective Treaty provisions, with less humble origins.²⁹ This is sensible as far as it goes.

Second, however, the ‘principal’ and ‘minor’ categories are not, by operation of the Act, mapped onto the established domestic distinction between primary and secondary legislation (except in respect of the Human Rights Act 1998).³⁰ Rather, s. 7 of the Act, by establishing a distinction between principal and minor forms of retained direct EU legislation, means for instance that Parliament, when legislating in the future, will be able (should it so wish) to provide that delegated powers can be used only in respect of retained direct minor EU legislation, or that such powers, if used in respect of retained direct principal EU legislation, are to be subject to stricter limits or greater parliamentary oversight.

The upshot is that some of the difficulties that would have arisen from the original Bill’s failure to assign a domestic legal status to retained EU law were ameliorated by amendments, the key issue of susceptibility to amendment via secondary legislation having been clarified. Nevertheless, it is arguable that the Act, even in its final form, does not go as far as would have been desirable in terms of legal certainty. Indeed, the fact that retained direct EU law remains *sui generis* vis-à-vis the established domestic distinction between primary and secondary legislation leaves open some difficult questions that it will now necessarily fall to the courts to resolve. A key merit of the Constitution Committee’s recommendation — that retained direct EU law be treated as primary legislation enacted on exit day — was that it spoke both to questions of hierarchical status and temporality, both of which can be crucial when considering the validity of a domestic legal norm with respect to

²⁸ Lord Callanan, *ibid*, col 1411.

²⁹ Withdrawal Act, s 7(6).

³⁰ Schedule 8, para 30 provides that, for the purposes of the Human Rights Act, direct principal EU legislation is to be treated as primary legislation and that, in general, direct minor EU legislation is to be treated as secondary legislation.

other such norms. The Act's failure to provide clarity on either of these matters means that there is continuing uncertainty about, for instance, whether — and, if so, in what circumstances — retained direct EU legislation can be challenged via judicial review on the ground of its incompatibility with (other) provisions of domestic law, including (common law) grounds of judicial review.

The combined effect of the vagueness and ambiguities that surround ss 2-4 is likely to produce considerable pressure on the courts as they confront the disputes that will inevitably arise around the meaning and scope of retained EU law. This difficulty was further compounded in the original version of the Bill by a lack of clarity concerning the weight domestic courts ought to give to the jurisprudence of the Court of Justice of the European Union ('CJEU'). The Act provides greater, and welcome, clarity in this regard. It draws a distinction between pre- and post-exit CJEU case law. The general effect of s. 6 is that while domestic courts are not bound by post-exit CJEU jurisprudence, questions about the "validity, meaning or effect" of retained EU law must be decided "in accordance with any retained case law and any retained general principles of EU law". "Retained case law" is defined in s. 6(7) as including both "retained domestic case law" (pre-exit domestic case law that relates to retained EU law) and "retained EU case law" (pre-exit CJEU case law that relates to retained EU law).³¹

This is a fairly clear position: pre-exit CJEU case law is, in general, binding — which will aid the goal of legal continuity after exit. Difficulties arose however in relation to the status of post-exit CJEU case law. Here the guidance offered to the courts in the original version of the Bill was so vague as to be in effect an abdication of Parliament's constitutional obligation to give clear direction to the courts as to its intention. The original clause 6(2) provided: "A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU *but may do so if it considers it appropriate to do so.*"³² Senior judges made clear that they were troubled by the vagueness of this instruction.³³ The Constitution Committee offered a detailed alternative approach. The Act, it said, "should provide that a court or tribunal shall have regard to judgments given by the CJEU on or after exit day which the court or tribunal considers relevant to the proper interpretation of retained EU law... [and that]... in deciding what weight (if any) to give to a post-exit judgment of the CJEU, the court or tribunal should take account of any agreement between

³¹ For an explanation of qualifications to this general position see Constitution Committee Report No.3, para 130.

³² Emphasis added. Related uncertainty also attended clause 6(3) which was concerned with retained EU law which is modified under exit day. For a discussion of the issues surrounding this provision as well as related issues relating to pending cases and the status of CJEU case law during any transition period see Constitution Committee Report No.3, paras 143-156.

³³ See evidence to the Constitution Committee by Lord Neuberger in which he expressed a concern that courts could be drawn inappropriately into policy areas: Constitution Committee Report No.3, paras 134-35 and 137, and a request by Baroness Hale for "Parliament to tell the courts 'what we should be doing ... [and] saying how much we should be taking into account' CJEU judgments". Constitution Committee Report No.3, para 134.

the UK and the EU which the court or tribunal considers relevant.³⁴ The Government introduced an amendment in light of this recommendation which replaced the ‘appropriateness’ test with the following formulation, now found in section 7(2) of the Act:

“A court or tribunal *may* have regard to anything done on or after exit day by the European Court, another EU entity or the EU *so far as it is relevant to any matter before the court or tribunal.*” (emphasis added)

This provision largely meets the Constitution Committee’s recommendations,³⁵ and was a key win for Parliament, demonstrating the instrumental effect parliamentary committees have had in clarifying key provisions of the Act and in doing so speaking on behalf of the courts in their call for clarity. The importance of clarity in relation to the Act — both as regards the post-exit role of CJEU jurisprudence and more generally — is hard to overstate: following the UK’s departure from the EU, the Act will, for a considerable time to come, form the constitutional basis of a significant element of domestic law. At the same time, given the legal and constitutional conundrums that were raised by the UK’s joining the EU in the first place, it is unsurprising that the Act, as it seeks (to some extent at least) to disentangle domestic and EU law, raises a number of difficult issues. In such circumstances, it is imperative that inevitable complexity is not exacerbated by avoidable ambiguity. It would be going too far to suggest that all such ambiguity had been excised by the time the Bill became an Act; but the final product is certainly a considerable improvement on the original version.

Supremacy in question

When the Act’s repeal of the ECA takes effect³⁶ — either on 29 March 2019 or at the end of a transitional period — the underlying basis upon which EU law has been accorded primacy in UK law by domestic courts will be removed. It is well established both in case law and in statute that the basis upon which the primacy of EU law has led to the disapplication of statutes is the 1972 Act itself.³⁷ It is therefore somewhat confusing that the Withdrawal Act perpetuates the idea of the “supremacy” of EU law. Section 5(1) of the Act provides: “The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.” That much would seem obvious anyway, since it is hard to see how the principle of the supremacy of *EU law* could apply to (necessarily) *domestic* law made following exit from the EU. However, s 5(1) is qualified by s 5(2): “Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant

³⁴ Constitution Committee Report No.3, para 142.

³⁵ although it provides that the court ‘may’ rather than ‘shall’ have regard. It does not seem however that much turns on this distinction: the crucial steer to the courts is in the Government’s adoption of a relevance test.

³⁶ Section 1.

³⁷ *R v Secretary of State for Transport, ex parte Factortame Ltd (No. 2)* [1991] 1 AC 603, *Thoburn v Sunderland City Council* [2003] QB 151, *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*; *Libya v Janah* [2017] UKSC 62, and European Union Act 2011 s 18.

to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.”

It is entirely appropriate that the Government should seek to give retained direct EU law (per ss 3 and 4) priority over pre-exit, but not post-exit, domestic law. To do otherwise would be a source of confusion and may have deleterious retroactive effects. However, the use of the term “supremacy” to that end is problematic. The Constitution Committee identified three difficulties with the Bill’s supremacy provision.³⁸ Two are concerned with the scope of the provision: first, whether it is intended to protect all retained EU law – that is, EU-derived domestic legislation under section 2 and retained direct EU law under ss 3 and 4 – or only the latter category; and, second, how it would interact with the common law, given that applying the notion of law being “made” on a particular date is difficult to apply to the common law as distinct from legislation. These significant questions remain unanswered by the text of the Act, and it will now no doubt fall to the courts to resolve them in due course.

The third issue alighted upon by the Constitution Committee concerns the very concept of supremacy. “We find it impossible to see in what sense ‘the principle of the supremacy of EU law’, set out in clause 5, could meaningfully apply in the UK once it has left the EU... there is no meaningful sense in which ‘the principle of supremacy *of EU law*’ can apply to retained EU law, given that the latter is not EU law.”³⁹ The notion of supremacy sits uncomfortably if not incompatibly with the doctrine of parliamentary sovereignty.⁴⁰ To that end the Committee recommended an alternative approach: “that retained direct EU law should be made to prevail over pre-exit domestic law by providing in the Act that retained direct EU legislation under clause 3 and all law that is converted into domestic law by clause 4 is to be treated as having the status of an Act of the UK Parliament enacted on exit day.”⁴¹ This approach would have brought what is now s 5 into line with the doctrine of parliamentary sovereignty by making clear that retained direct EU law is, after exit day, domestic rather than EU law, and hence subject to the doctrines and principles of the UK constitution. The Government however rejected this proposal, maintaining the formula of “supremacy” in relation to pre-exit EU-derived law,⁴² and sought to play down the significance of this: “The

³⁸ Constitution Committee Report No.3, paras 80-103.

³⁹ Constitution Committee Report No.3, para 80.

⁴⁰ See Richard Ekins, ‘Constitutional practice and principle in the Article 50 litigation’ (2017) 133 *Law Quarterly Review* 347 for an interesting account of parliamentary sovereignty in the context of the *Miller* case.

⁴¹ Constitution Committee Report No.3, para 93. This proposal provoked much discussion amongst commentators. See, in particular, P. Craig, ‘The Withdrawal Bill, Status and Supremacy’, U.K. Const. L. Blog (19th Feb. 2018), S. Laws, ‘Giving “Deemed” Domestic Law Status to Retained EU Law’, U.K. Const. L. Blog (28th Feb. 2018), P Craig, ‘European Union (Withdrawal) Bill: Legal Status and Effect of Retained Law’, U.K. Const. L. Blog (8th Mar. 2018); A Young, ‘Status of EU Law Post Brexit: Part One’, U.K. Const. L. Blog (2nd May 2018); and A Young, ‘Status of EU Law Post Brexit: Part Two’, U.K. Const. L. Blog (4th May 2018).

⁴² Section 5(2) remained unamended [‘...the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.’]

principle [of supremacy] ultimately only applies in a strictly limited and diminishing way. Over time, Parliament will pass new legislation which will not be subject to the principle. The Government believes that this approach strikes the right and sensible balance.”⁴³

The Committee also commented that if the supremacy principle were to continue, what is now s 5(3) should be amended to provide clarification concerning its operation. The Government chose not to do so and therefore, in effect, legislation amended after exit day can continue to be treated as “supreme”: “Clause 5(3) sets out that when a pre-exit enactment or rule of law is modified it can continue to be subject to the supremacy principle, if that is consistent with the intention of the modification. The Government maintains that this is an entirely sensible approach in order to deliver certainty and continuity.”⁴⁴ However, this view notwithstanding, the scope of the supremacy principle remains unclear: it can bite upon pre-exit domestic law that is modified post-exit provided that the application of the supremacy principle “is consistent with the intention of the modification”.

It is convenient at this point to point out a further set of provisions, concerning the Charter of Fundamental Rights, which lack clarity. The Act on the one hand removes the Charter rights from domestic law on exit day⁴⁵ but on the other provides that this “does not affect the retention in domestic law ... of any fundamental rights or principles which exist irrespective of the Charter.”⁴⁶ The uncertainty which attends this division is exacerbated by the fact the Act expressly excludes any right of action in domestic law based on a failure to comply with general principles of EU law.⁴⁷ There were attempts in the Lords to make different provision in relation to the Charter, for example an amendment proposed by Lord Pannick which would have transferred the Charter into domestic law, excluding the preamble and Chapter V (which concerns certain rights of citizens living in the EU). But this amendment was rejected and no equivalent provision was adopted in the Commons.

That the Withdrawal Act is itself so opaque when it comes to the whole question of supremacy is as unfortunate as it is fitting. It is fitting because that question has itself been mired in theoretical uncertainty ever since the UK joined what went on to become the EU. Indeed, while, as noted above, the importance of the ECA in assigning supremacy to EU law is widely acknowledged, the constitutional theory that makes it possible, in the first place, for domestic legislation to accord such priority to EU law — including over other Acts of Parliament — has remained the subject of controversy and debate throughout the period of the UK’s membership of the EU.⁴⁸ It is unfortunate that the Withdrawal Act takes an *EU law*

⁴³ Letter from Lord Callanan, Minister of State for Exiting the European Union to the Constitution Committee, 11 April 2018 op. cit.

⁴⁴ Ibid.

⁴⁵ Section 5(4).

⁴⁶ Section 5(5)

⁴⁷ Sched 1 para 3.

⁴⁸ For more detailed discussion, see Mark Elliott, “Sovereignty, Primacy and the Common Law Constitution: What Has EU Membership Taught Us?” in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution After Miller: Brexit and Beyond* (Hart Publishing, 2018) and

concept that is (viewed in domestic constitutional-theoretical terms) already problematic and shoehorns it into a *domestic* legislative regime to which — as a domestic regime — it seems so ill-suited. The paradoxical consequence is that while the Act is intended to effect a break with the European legal order by reconceptualising EU law as domestic law, the supremacy principle — a central feature of that legal order’s architecture — is at the heart of the Act. It might be retorted that any resulting uncertainty, theoretical or otherwise, is a merely transitory problem that will ebb as retained EU law is, over time, replaced by purely domestic law. However, the sheer volume of retained EU law suggests that it will remain a highly significant component of domestic law for a long time to come — and so too, therefore, will the EU supremacy principle, whatever it turns out to mean shorn of the context of EU membership in which it has so far domestically operated.

Government and Parliament

Since the task of adapting the statute book for Brexit is so huge, the timescale so tight,⁴⁹ the political terrain so volatile and the agreements that might emerge from ongoing negotiations between the UK and EU so unforeseeable, it was inevitable that the Act’s approach would be to vest significant delegated powers in the executive. Nonetheless, the extent to which it does so led the Constitution Committee to warn in stark terms about the constitutional risks attached to such a transfer of discretionary legislative power to the Government:

“the number, range and overlapping nature of the broad delegated powers would create what is, in effect, an unprecedented and extraordinary portmanteau of effectively unlimited powers upon which the Government could draw. They would fundamentally challenge the constitutional balance of powers between Parliament and Government and would represent a significant—and unacceptable—transfer of legal competence. We stress the need for an appropriate balance between the urgency required to ensure legal continuity and stability, and meaningful parliamentary scrutiny and control of the executive.”⁵⁰

The general power to deal with deficiencies in the law arising from withdrawal, to which we turn shortly, is set out in section 8. The original version of the Bill contained more specific provisions concerning the amendment of UK law to ensure continued compliance with international obligations and the implementation of any withdrawal agreement. However, during the passage of the Bill through the Lords, the Government took the view that the

Martin Loughlin and Stephen Tierney, “The Shibboleth of Sovereignty” (2018) *Modern Law Review*, forthcoming.

⁴⁹ The timescale is, of course, less tight if a transitional period during which EU law proper (as distinct from “retained EU law”) continues to apply in the UK. However, the Government’s legislative strategy has understandably been to design the Withdrawal Act so as to accommodate full exit on 29 March 2019, while readying, via the proposed Withdrawal Agreement Bill, modifications to the Withdrawal Act so as to defer its principal effects until the end of any agreed transitional period.

⁵⁰ Constitution Committee Report No.2, para 44. See also Constitution Committee Report No.1, para 47.

international obligations-related power was no longer needed and so the clause⁵¹ was removed by amendment in the Lords.⁵² Meanwhile, although an extensive Henry VIII power concerning the implementation of any withdrawal agreement did make it into the Act,⁵³ it proved controversial given that authority over the terms and even the date of withdrawal seemed to be passing from Parliament to the executive. As a result, in this regard the Act differs in significant respects from the original Bill: the power is now “subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union”.⁵⁴ The Government has also committed to introducing a Withdrawal Agreement Bill to legislate for the outcome of the negotiations with the European Union.⁵⁵ As such, the sting has largely been drawn from power conferred by section 9 of the Withdrawal Act.

The main provision therefore is s 8. Section 8(1), which in its enacted form is precisely the same as the provision set out in the original version of the Bill, provides as follows:

“A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate—

- (a) any failure of retained EU law to operate effectively, or
- (b) any other deficiency in retained EU law,

arising from the withdrawal of the United Kingdom from the EU.”

When the Bill was first published, this provision drew fierce and sustained criticism. Concern arose in relation to four principal matters, relating to the breadth of the power generally; the limited extent of matters excluded from its scope; the broad range of circumstances in which the negative resolution procedure could be used; and the creation of a new ‘made affirmative’ procedure that offered little in the way of parliamentary scrutiny. We address each of these matters in turn, and consider the extent to which the constitutional concerns created by the original version of this provision remain pertinent in the light of the amendments that were made during the passage of the legislation.

The breadth of s 8 is encapsulated in the word “appropriate” which creates a far-reaching and subjective remedial power. Other terms — “failure” and “deficiency” — exacerbate the broad scope of the power, appearing somewhat open-ended, particularly when left to the subjective opinion of ministers. Such imprecise wording could also present courts with considerable difficulties in policing the boundaries of legality in the exercise of such

⁵¹ Clause 8 in the original version of the Bill.

⁵² Letter to House of Lords by Lord Callanan, 23 April 2018.

⁵³ See section 9.

⁵⁴ Section 9(1).

⁵⁵ Department for Exiting the European Union, *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union*, Cm 9674 (2018).

powers.⁵⁶ Parliamentary critics focused in particular upon the ‘appropriateness’ criterion, which self-evidently renders the power wider and more flexible than a ‘necessity’ test. In the light of such concerns, the Bill was amended during the Report stage in the House of Lords such that the power would be exercised only so as to “make such provision as is necessary” to address deficiencies in retained EU law arising from Brexit. However, this amendment did not ultimately survive, and so the formula contained in the original version of the Bill — which turns upon what Ministers consider to be appropriate — is the one found in s 8(1) of the Act.

The upshot is a power that is undeniably broad, albeit that it is certainly not infinitely broad. For one thing, merely framing a ministerial power in subjective terms does not immunise it against all judicial scrutiny,⁵⁷ while the Supreme Court’s decision in the *Public Law Project* case suggests that we cannot assume that extremely broadly framed powers will be taken by the courts to be as wide as their language suggests.⁵⁸ Features of the Act that were added through amendments may also have the effect of, in practice, curtailing ministerial latitude when it comes to the exercise of these powers. For instance, in contrast to the original version of the Bill, the Act now provides that whenever s 8(1)⁵⁹ is used to make a statutory instrument in circumstances where the instrument or a draft has to be laid before Parliament, a ministerial duty to make an ‘explanatory statement’ arises.⁶⁰ Such statements must address a range of matters,⁶¹ including why the Minister considers there to be ‘good reasons’ for the instrument (or draft), why it is a ‘reasonable course of action’, the effect of any relevant impact upon certain equalities-related legislation and, where relevant, why there are good reasons for the creation of any criminal offence and associated penalties. Such requirements broadly reflect those that were added to the Sanctions and Anti-Money Laundering Act 2018⁶² following a recommendation made by the Constitution Committee.⁶³ The explanatory statements regime was similarly added to the Withdrawal Act after the Committee recommended amendments along those lines.⁶⁴

⁵⁶ Constitution Committee Report No.3, para 172.

⁵⁷ See, e.g., *Lord Alton of Liverpool v Secretary of State for the Home Department* [2008] EWCA Civ 443, [2008] 1 WLR 2341.

⁵⁸ *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531.

⁵⁹ The same requirements also apply to statutory instruments made under certain other provisions of the Act: see sch 7, para 28(1).

⁶⁰ Withdrawal Act, sch 7, para 28(1).

⁶¹ As set out in sch 7, para 28.

⁶² See s 2 of that Act.

⁶³ House of Lords Constitution Committee, *Sanctions and Anti-Money Laundering Bill*, 17 November 2017, HL 39 2017-19, paras 11-12.

⁶⁴ Constitution Committee Report No.1 para 102; Constitution Committee Report No.3, paras 208-211.

Along with general concerns about the breadth of the power under what became s 8 of the Act, a second — related but more particular — concern arose upon publication of the Bill regarding the paucity of matters that were specifically exempted from its ambit. The Government sought to justify the limited nature of specific exclusions by indicating that the powers it contains are only intended to be used to make technical rather than policy changes. The Government offered the assurance that the Act “does not aim to make major changes to policy or establish new frameworks in the UK beyond those which are necessary to ensure the law continues to function properly from day one”.⁶⁵ But in the absence of a statutory restriction to this effect, there was a clear possibility that the section could be used to bring about significant policy changes, and on this basis the Constitution Committee recommended that the s 8 power should be “more tightly circumscribed” such that it could not be used to effect “major policy changes”.⁶⁶ While no such *general* distinction between policy and technical changes made its way into the Act, the scope for using s 8 to make changes of the former type was narrowed, albeit modestly, by other amendments; in particular, the Act itself, unlike the original version of the Bill, provides that the s 8 power cannot be used to create new public authorities,⁶⁷ or amend the devolution statutes for Scotland and Wales⁶⁸, a point to which we return in the next part of the article.

A third area of concern relates to Parliament’s role in relation to the making of regulations. In the original version of the Bill, the default position was that most regulations under s 8 were to be made by way of negative resolution procedure, with affirmative procedure required only in relation to a very narrow range of matters.⁶⁹ This was so despite the fact that s 8 confers a general Henry VIII power, such that regulations under s 8(1) “may make any provision that could be made by an Act of Parliament”.⁷⁰ Self-evidently, the broader the power (in terms of the range of uses to which it can be put) and the deeper the power (in terms of its availability not merely to make technical changes but also to make substantial changes to policies set out in primary legislation), the more pressing concerns become about parliamentary oversight and control of its exercise. Having been unsuccessful in arguing that s 8 powers should only apply to technical changes, the Constitution Committee offered an ancillary recommendation that at the very least “the Act should provide for the application of the affirmative procedure in relation to any measure which involves the making of policy.”⁷¹ While this recommendation was also unsuccessful, another of the Committee’s recommendations in this area met with greater success. Thus, while there is only a very limited range of circumstances in which the affirmative procedure must necessarily be used

⁶⁵ Explanatory Notes to the European Union (Withdrawal) Bill, para 14. And see assurances given to the Constitution Committee by the Solicitor General. Constitution Committee Report No.3, para 183

⁶⁶ Constitution Committee Report No.3, para 184

⁶⁷ Withdrawal Act, s 8(7)(d).

⁶⁸ Withdrawal Act, s 8(7)(g). The Northern Ireland Act 1998 was already protected to a certain extent from the reach of these powers in the original clause.

⁶⁹ Schedule 7, para 1(1) and 1(2).

⁷⁰ Withdrawal Act, s 8(5).

⁷¹ Constitution Committee Report No.3, para 219.

when statutory instruments are made under s 8(1),⁷² the Bill now makes provision for a ‘sifting’ process in respect of statutory instruments that do not automatically fall within the affirmative procedure.⁷³ Where the Government does not voluntarily subject such measures to the affirmative procedure, committees of each House — within a tight timeframe of ten sitting days⁷⁴ — can recommend its use. The sifting procedure also applies to regulations in relation to transitional and consequential matters under section 23.⁷⁵

Importantly, however, such recommendations are not binding upon Ministers: they can choose, in the face of such recommendations, to press ahead with the negative procedure, albeit that they are required (before the instrument is made) to make a statement explaining why they do not agree with the sifting committee⁷⁶ (or, if no such statement is made, to make a statement explaining that failure).⁷⁷ The result is that while the Act equips Parliament to exercise a degree of *influence* in this area, the non-binding nature of sifting committees’ recommendations denies Parliament anything approaching true *control* in this regard.⁷⁸ Of course, the sifting provisions in the Act were designed to ensure that Ministers would pay a political price for choosing to ignore parliamentary recommendations about the appropriate level of scrutiny — hence the requirement to make a statement explaining why such a recommendation is not being followed. And, during the passage of the Act, the Government indicated that it recognised this. The Leader of the House of Lords, Baroness Evans of Bowes Park, told the House of Lords that she agreed with the then Secretary of State for Exiting the EU that ‘there is likely to be a “political cost which will be significant” to going against a sifting committee recommendation’; that ‘Ministers will be required to make and provide to Parliament a Written Statement explaining themselves if they disagree with a recommendation from one or both of the sifting committees’; and that, as a result, ‘Your Lordships can be assured that there will be no hiding place from the light of your scrutiny.’⁷⁹ However, the Government has now indicated that it will publish explanations of refusals to follow sifting committees’ recommendations only in the Explanatory Memoranda that

⁷² Those circumstances are set out in sch 7, para 1(2).

⁷³ Withdrawal Act, sch 7, para 3.

⁷⁴ Withdrawal Act, sch 7, para 3(4) and (10).

⁷⁵ Schedule 7, paragraphs 15-17. This serves to mitigate criticism of s.23. The equivalent provision in the published Bill (clause 17) was criticised on the basis that it seemed to permit potentially very broad regulations to be made under the cover of ‘consequential’ measures. Constitution Committee Report No.3, para 219, paras 205-06. An additional safeguard is that powers under section 23 are subject to a ten year sunset clause.

⁷⁶ Withdrawal Act, sch 7, para 3(7).

⁷⁷ Withdrawal Act, sch 7, para 3(8).

⁷⁸ The sifting regime in the Act thus falls short of that which the Constitution Committee recommended. It argued that sifting committees “should be empowered to decide the appropriate scrutiny procedure for an instrument, subject to the view of the House”: Constitution Committee Report No.3, para 227.

⁷⁹ HL Deb, 18 June 2018, col 1924.

accompany regulations made under the Act.⁸⁰ The House of Commons Procedure Committee has understandably taken a very dim view of this: in a letter to the Government, its Chair said that the proposed approach did not meet ‘the widely-held expectation of a political cost to the Government from disagreement’ and amount to presenting sifting committees with ‘a *fait accompli*’.⁸¹

A fourth issue with s 8 is that the Act introduces a new ‘made affirmative’ or ‘urgent deficiency’ procedure,⁸² which allows an instrument which would otherwise be subject to affirmative procedure to be made and come into force without any opportunity for parliamentary debate. An instrument may be made without a draft being laid before Parliament if it “contains a declaration that the Minister of the Crown concerned is of the opinion that, by reason of urgency, it is necessary to make the regulations without a draft being so laid and approved.”⁸³ Such an instrument ceases to have effect after 28 days unless it is approved by affirmative procedure in both Houses within this period.⁸⁴ In other words, if the Government wishes to maintain such a measure after 28 days then regular affirmative procedure is required. The Government justified this procedure in relation to instruments that must be made urgently and in light of the particular circumstances of exit. Despite the fact that the life of such regulations was tightly time bound, the Constitution Committee still called for this novel procedure to be “far more tightly drawn and controlled in the Act.”⁸⁵ This procedure has not been withdrawn. It also appears that the statement procedure is not required when these instruments are first made. The statement procedure provided for in Schedule 7 para 28 applies when draft instruments are to be laid before Parliament. But para 5(8) provides that instruments can be made without being laid in cases of “urgency”.

This part of the Act demonstrates perhaps more than any other the influence Parliament brought to bear on the Bill. Section 8 in its published form was in effect an open-ended power. It has now been more tightly circumscribed, while related powers have either been considerably weakened or withdrawn altogether. The way in which each of the main criticisms levelled at section 8 were responded to by the Government demonstrates how detailed and constructive committee scrutiny can help foster meaningful dialogue between

⁸⁰ Letter from Chris Heaton-Harris MP, Parliamentary Under-Secretary of State for Exiting the EU, to Charles Walker MP, Chair of the House of Commons Procedure Committee, 16 August 2018 ([https://www.parliament.uk/documents/commons-committees/procedure/Letter-to-Chairman-from-Parliamentary-Under-Secretary-of-State-DEXEU-concerning-the-Committee-report-on-Scrutiny-of-delegated-legislation-under-the-European-Union-\(Withdrawal\)-Act-2018.pdf](https://www.parliament.uk/documents/commons-committees/procedure/Letter-to-Chairman-from-Parliamentary-Under-Secretary-of-State-DEXEU-concerning-the-Committee-report-on-Scrutiny-of-delegated-legislation-under-the-European-Union-(Withdrawal)-Act-2018.pdf)).

⁸¹ Letter from Charles Walker MP to Chris Heaton-Harris MP, 13 September 2018 (<https://www.parliament.uk/documents/commons-committees/procedure/Letter-from-Chair-to-Parliamentary-Under-Secretary-DEXEU-concerning-Committee-report-on-scrutiny-of-delegated-legislation-under-European-Withdrawal-Act-2018.pdf>).

⁸² Withdrawal Act, sch 7, para 5.

⁸³ Schedule 7, para 5(2) and 5(8)

⁸⁴ Schedule 7, para 5(4)

⁸⁵ Constitution Committee Report No.3, para 222

Parliament and Government, often founded upon the recognition of a common interest in producing legislation that is both workable in practice and constitutionally legitimate. The Act does still accord broad delegated powers to the Government — parliamentary committees accepted that the circumstances of Brexit would make this inevitable⁸⁶ — but co-operative dialogue surrounding section 8 and related provisions persuaded the Government to rein-in the Bill’s delegated powers and subject these to more extensive scrutiny, resulting in to the likelihood of much firmer parliamentary control.

Devolution and the Territorial Constitution

One of the most fraught debates during the passage of the Act concerned how to empower the devolved administrations to prepare their respective territories for exit, and how to deal with the repatriation of powers from the EU which fall wholly or in part within devolved competence. Section 11 addresses the former issue and does so by conferring upon the devolved administrations power to make regulations which are similar in scope to those accorded to UK ministers by sections 8 and 9,⁸⁷ all in the context of devolved competence,⁸⁸ tailoring these powers to the respective powers of each of the devolved territories.⁸⁹ Powers under section 11 may also be exercised by UK ministers “acting jointly with a devolved authority”.⁹⁰ Upon publication of the Bill, the exercise of the powers under section 11 were tightly restricted by a general obligation to gain the consent of UK ministers. The Bill was amended to narrow consent constraints to those situations where consent is already required under the devolution statutes.⁹¹ Otherwise, there is only a duty to consult with the Secretary of State in relation to matters touching upon reciprocal arrangements between the UK and the EU.⁹² As noted above, another amendment to the Bill provides that section 8 powers cannot be used to amend the devolution statutes.⁹³

Section 12 proved to be the more significant and controversial provision. This section amends the main devolution statutes in order to regulate devolved competence in relation to retained EU law. In its initial form, s. 12 provided that an Act of a devolved legislature could not modify retained EU law unless the modification would have been within the legislative competence of the devolved legislature before exit day. This left to the discretion of the UK Government, through Orders in Council, the power to determine when and how to release areas of legislative competence to the devolved administrations. The UK Government argued that these powers were required until common frameworks, designed to protect the UK’s

⁸⁶ Constitution Committee Report No.3, para 158.

⁸⁷ Section 11 and schedule 2, para 1(1).

⁸⁸ Schedule 2, paragraph 2(1).

⁸⁹ Schedule 2, paragraphs 8-11.

⁹⁰ Schedule 2, paragraph 1(2).

⁹¹ Schedule 2, paragraphs 5-7.

⁹² Schedule 2, paragraph 4

⁹³ Section 8(7)(g).

internal market, were put in place.⁹⁴ Nonetheless, this provision was heavily criticised as out of step with the spirit of the devolution settlements. The Scottish and Welsh administrations argued that unless powers returning from Brussels fell automatically to the devolved territories their powers to make policy would be unduly restricted, while a risk existed of common frameworks being imposed upon them.⁹⁵ As a consequence, they threatened to refuse consent to the Bill if these provisions were not substantially amended.⁹⁶

Section 12 was entirely rewritten in light of criticism of the provision, which included concerns voiced also by parliamentary committees.⁹⁷ The final terms of section 12 impose a far more tightly contained restriction upon devolved competence. There is now a presumption that retained EU law within devolved competence will remain within the remit of the devolved legislatures. The UK Government retains a power to restrict devolved competence by way of regulations but the onus is on Whitehall to specify precise powers it intends to protect from modification by Belfast, Cardiff and Edinburgh. Before laying regulations to “freeze” certain areas within exclusive UK competence, UK ministers are required to seek agreement from the devolved governments. Draft regulations must be published and devolved legislatures given 40 days to make a “consent decision” before a draft is laid before Parliament. A copy must be sent to the administration in question.⁹⁸ If devolved consent is not given and Parliament nonetheless decides to approve a particular regulation, the minister will have a further duty to make a statement explaining why it has decided to lay the draft regulation without the devolved legislature’s consent.⁹⁹ Section 12 also provides that these powers are time-limited. The power to make regulations under section 12 will end two years after exit day and the regulations themselves are subject to a five year sunset clause.¹⁰⁰

⁹⁴ Explanatory Notes to the European Union (Withdrawal) Bill, para 39.

⁹⁵ Joint statement Welsh and Scottish Government, 13 July 2017, <https://news.gov.scot/news/eu-withdrawal-bill>. See also evidence by Richard Rawlings to the Constitution Committee and other comments: Constitution Committee Report No.3, paras 244-47.

⁹⁶ Scottish Government, Legislative Consent Memorandum – European Union (Withdrawal) Bill <http://www.parliament.scot/S5ChamberOffice/SPLCM-S05-10-2017.pdf> and Welsh Government, Legislative Consent Memorandum – European Union (Withdrawal) Bill <http://www.assembly.wales/laid%20documents/lcm-ld11177/lcm-ld11177-e.pdf>

⁹⁷ House of Commons Public Administration and Constitutional Affairs committee, *Devolution and Exiting the EU and Clause 11 of the European Union (Withdrawal) Bill: Issues for Consideration* 29 November 2017 and Constitution Committee Report No.3, para 250.

⁹⁸ Section 12(2), (4) and (6).

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* However, time limits on the use of powers conferred by the Withdrawal Act are likely to be adjusted if there is a transitional period, so that the clock does not begin to run until the end of that period: Department for Exiting the European Union, *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union*, Cm 9674 (2018), pp. 21–22.

The final form of section 12 satisfied the Welsh Government which recommended legislative consent to the Bill.¹⁰¹ The changes had been negotiated through the Joint Ministerial Committee on European Negotiations (JMC (EN)) and an intergovernmental agreement was issued endorsing the amendments.¹⁰² This also contains a political commitment by the UK Government not to introduce legal changes for England where the devolved administrations are prevented from legislating by section 12.¹⁰³ The Scottish Government however advised the Scottish Parliament to refuse consent¹⁰⁴ and in the end its legislative consent to the Bill was not forthcoming.¹⁰⁵ One cause for complaint was that very little opportunity was afforded the Commons to debate the final form of section 12. When the Bill returned from the Lords for final Commons consideration, attention focused almost entirely upon the ‘meaningful vote’ issue. Only some 15 minutes was made available to discuss the devolution provisions. SNP MPs accordingly staged a dramatic walk-out from the chamber in protest.¹⁰⁶ The lack of time available to Parliament to consider and debate the potentially huge practical as well as constitutional implications of the new draft represents a serious procedural shortcoming in the passage of the Bill, and remains one of the most glaring constitutional defects in the Bill’s passage.

In the course of parliamentary debate it became clear that Northern Ireland was a special case, given that the Belfast Agreement also involves the Republic of Ireland and that its terms are underpinned by reference to the joint commitment of the UK and Ireland to EU law; an important legal backdrop to the cross-border arrangements for which the Agreement provides. The Constitution Committee voiced a particular concern that this Agreement — through the Northern Ireland Act 1998 — could in fact be vulnerable to the powers contained in s.9 of the Withdrawal Act.¹⁰⁷ A new provision, section 10, makes clear that UK ministers must exercise powers under the Act in a way that is compatible with the terms of the Northern Ireland Act 1998 (although this stops short of explicitly restricting the use of

¹⁰¹ Supplementary Legislative Consent Memorandum (Memorandum No.2) European Union (Withdrawal) Bill, <http://www.assembly.wales/laid%20documents/lcm-ld11525/lcm-ld11525-e.pdf>. And see NDM6722 <http://www.record.assembly.wales/Motion/6722>

¹⁰² Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks, 25 April 2018.

¹⁰³ Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks, p1.

¹⁰⁴ Statement by Michael Russell, MSP, Scottish Parliament Official Report, 24 April 2018, cc13-14

¹⁰⁵ The Scottish Parliament has now passed the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Act 2018 the legal competence of which has been challenged by the UK Government before the Supreme Court. A Welsh act was also passed – Law Derived from the European Union (Wales) Act 2018 but this has been repealed (<http://senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=22283>) following the decision by the National Assembly to consent to the Withdrawal Bill.

¹⁰⁶ ‘SNP MPs walked out of the Commons in a row with the Speaker’, BBC News, 13 June 2018 <https://www.bbc.co.uk/news/av/uk-politics-uk-leaves-the-eu-44458756/snp-mps-walked-out-of-the-commons-in-a-row-with-the-speaker>

¹⁰⁷ Constitution Committee, Report No.3, paras 196-97.

s.9 powers to amend the Northern Ireland Act or any other devolution statute).¹⁰⁸ These must also respect the interim agreement between the UK and the EU secured in December 2017 which makes particular reference to the Northern Ireland border and citizenship issues.¹⁰⁹

The devolution provisions illustrate again how the Government was willing to transform the published bill radically in light of criticism and in order to secure (at least partial) devolved consent. Nonetheless, the Act promises to add considerably to the complexity of the devolution settlements and the nature of intergovernmental arrangements in the UK. Section 11, although less politically controversial than section 12, replicates the problems of executive discretion presented by section 8. There will be a considerable strain upon the resources of devolved legislatures as they attempt to monitor the use of s 12 powers by devolved executives, while also tracking developments at UK level which may impact upon devolution. The passage of the Act without the consent of the Scottish Parliament certainly raises an important issue of constitutional principle, but what has been underexplored is how the entire formula of section 12 is likely to transform and make more obscure what has hitherto been a fairly straightforward ‘reserved powers’ model for Scotland (and increasingly for Wales per the Wales Act 2017). Any attempt to detect which powers are devolved and which are reserved in relation to retained EU law will now involve the intricate interplay of the devolution statutes, the Withdrawal Act, regulations made under both and the legal status of any agreed common frameworks. This regime at sub-state level will surely exacerbate the problems of legal certainty to which we drew attention in relation to sections 2-4. While stressing high level constitutional concerns with ss 11 and 12 it is important also to note that greater problems in the longer term may involve practical issues of complexity and confusion.

Conclusions

The Withdrawal Act highlights a number of respects in which the UK constitution has been placed under strain by the legal and political complexities of Brexit. If the referendum that took place in June 2016 was about whether the UK should “take back control” of its own affairs from the EU, the passage of the Act forced confrontation of difficult questions about who should have charge of the process of re-establishing that “control”, as well as about the form that the post-exit legal and constitutional landscape will take. The passage of the legislation thus implicated a series of interlocking legal, political and constitutional issues concerning the respective balances of power between the executive and Parliament and between UK and devolved institutions, along with a set of highly technical matters regarding the position of “retained EU law” as an element of the post-exit domestic legal system.

¹⁰⁸ Section 10(1)(a). It is however the case the devolved statutes, including the Scotland Act 1998 and Government of Wales Act 2006 are not expressly protected from regulation-making powers under s.9 of the Act.

¹⁰⁹ ‘Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union’ op. cit. See also s.10(1)(b)

In its original form, the Withdrawal Bill was open to criticism on four principal constitutional grounds. It raised but provided few clear answers to a series of hard questions about the conceptual nature and place of “retained EU law”, to an extent that risked considerable confusion and which may have jeopardised the rule-of-law axiom of legal certainty. At the same time, by maintaining the notion of the “supremacy of EU law”, the Bill took a concept that, at best, sat uneasily with the principle of parliamentary sovereignty throughout the UK’s membership of the EU and clumsily sought to graft it onto a post-exit, purely domestic legal order to which it has no obvious application. Meanwhile, the Bill would have supplied the executive arm of government with extraordinary powers to rewrite the statute book in the name of addressing “deficiencies” arising from exit. And, at least on one view, it affronted basic principles governing the operation of the territorial constitution by diverting repatriated powers away from the devolved capitals and keeping them in London until decisions were taken to reallocate them. In these ways, the Bill raised fundamental questions about and arguably presented challenges to a trinity of key constitutional principles — the rule of law, the sovereignty of Parliament and the separation of powers — as well as to the value, lying at the heart of the modern devolution settlements, of territorial governance and autonomy.

Against this background, any constitutional evaluation of the Act necessarily occurs at two levels. It must be concerned with the substance of the Act, and the extent to which the constitutional difficulties raised by the original version of the Bill were solved by the time that the Bill became an Act. But it must also be concerned with the processes whereby any such resolutions were achieved, and, in particular, with the adequacy or otherwise of the processes that sought, as the legislation progressed through Parliament, to render it more consistent with the demands of constitutionalism.

As to the former, we have shown in this article that the Act is an improvement on the Bill as it was originally introduced into Parliament. But that is so only to a limited extent. In each of the areas of difficulty identified above, the progress made during the passage of the Bill arguably did not go as far as would have been desirable in constitutional terms. Thus, for instance, while some of the difficulties regarding the status of retained direct EU legislation were partly addressed through the introduction of the distinction between “principal” and “minor” forms of such law, the basic conceptual relationship between retained EU law and established categories of domestic law remains incompletely addressed by the Act. Similarly, the Act, like the original version of the Bill, remains unclear as to how the principle of the supremacy of EU law will apply, and what its implications for the traditional notion of parliamentary sovereignty will be, when EU law is excised from the domestic legal system upon the UK’s departure from the EU. As far as the separation of powers is concerned, the Act represents progress when compared to the Bill as introduced, the ministerial powers created by s 8 being subject to greater limits, and the arrangements for parliamentary scrutiny of their exercise being more thorough, than the Bill’s framers had originally contemplated. Nevertheless, sight should not be lost of the still-extraordinary nature the powers — judged by reference both to their breadth and their potency — that the Act confers, supplemented by equivalent powers allocated to the devolved executives. Moreover, as noted above, the Government has indicated that it intends to approach the sifting process in a way that removes some of the political sting from ministerial refusals to adopt parliamentary committees’ recommendations as to the appropriate level of scrutiny. Meanwhile, the rewriting of what became s. 12 of the Act in an attempt to accommodate concerns raised by

the Scottish and Welsh Governments certainly resulted in arrangements that are more sensitive to the realities of the UK's modern, multi-layered constitution. There are different ways to view the final formulation. The fact that the Act was ultimately passed in spite of the Scottish Parliament's unwillingness to grant legislative consent arguably flouts a fundamental principle at the heart of the territorial constitution. On the other hand, the acceptance of the provision by the National Assembly of Wales may suggest that it achieves the only feasible balance between respecting devolved prerogatives while planning for the uncertainties of Brexit. Whichever view is taken, the relationship between devolution and Brexit promises to be a minefield of complexity for years to come.

As to the adequacy of the processes whereby the Bill was, at least to some extent, improved upon in constitutional terms, two main points fall to be made. The first concerns the way in which the relationship between UK and devolved institutions was managed, in particular in relation to the destination of repatriated powers falling within devolved areas of competence. Throughout the passage of the Bill, channels of intergovernmental discussion were kept open but these tended to substantiate longstanding criticism of the opacity of UK intergovernmental relations and of the dominant position of central government within the system.¹¹⁰ Nonetheless these deliberations did eventually result in the final formulation of s. 12. A greater source of concern was that this radically new provision – with all the possible complexity which is likely to attend its use – was presented to Parliament as a *fait accompli*, with almost no time made available to debate its terms as the closing stages of the Bill's passage took place in the Commons. Although this was a consequence of Parliament's demand to debate the 'meaningful vote' issue at length, it also highlights how a lack of proper coordination of parliamentary time allowed vital issues surrounding the territorial constitution to be side-lined at a crucial moment in the Bill's passage.

This issue is but one which directly implicates Parliament – the body before which the Bill was placed, and which ultimately produced the Withdrawal Act. The task that Parliament faced in considering this legislation was an undeniably daunting one, not least because of the astonishing complexity both of the Bill itself and of the underlying legal and constitutional issues that it engaged. In such circumstances, floor-of-the-House scrutiny was always going to be of limited utility, the prospect of detailed engagement with the interminable but crucial minutiae of the Bill being distinctly limited. By contrast, parliamentary committees supplied much more effective scrutiny, engaging with precisely the points of detail that were so unsuited to plenary consideration. Indeed, it was in relation to such matters that the Government was most ready to concede ground, acknowledging the force of parliamentary committees' critiques of the Bill and – sometimes – being prepared to accept, or at least respond constructively to, their suggestions.

From a popular perspective, however, the mettle of Parliament – and its capacity to stand up to the executive and assert its sovereign constitutional authority – was most obviously tested in relation to the 'meaningful vote' issue. As the Bill progressed through Parliament, the notion that such a vote should take place on the terms of withdrawal gathered a considerable

¹¹⁰ An added problem of course was that the devolved institutions in Northern Ireland were suspended during the whole period of the Bill's passage, meaning that any direct input into the process from Northern Ireland could only come from representatives at Westminster.

head of steam and ultimately became the key political battleground between the Government and (elements of) Parliament. The adequacy of the provision¹¹¹ ultimately made by the Act on the meaningful vote issue is questionable, not least because the timing of any such vote is likely to mean that Parliament is presented with little more than a *fait accompli*, the choice being between acceptance of whatever deal the UK Government and the EU have agreed or the stark alternatives of a ‘hard Brexit’ by operation of Article 50(3) TEU.

However, important though the question is, our primary concern here is not with the adequacy or otherwise of the ‘meaningful vote’ provision made by the Act. Rather, for our purposes, and by way of conclusion, the important point is the way in, and the time at, which Parliament confronted this matter which is pivotal to the whole question of control over the Brexit process and to where institutional authority lies to determine what Brexit ultimately amounts to. Only the most charitable observer could suggest that by enacting the ‘meaningful vote’ provisions in summer 2018 — only eight months before the two-year period set by Article 50 expired — Parliament had put itself in anything approximating to the driving seat. Back at the beginning of 2017, when the Supreme Court gave judgment in the *Miller* case,¹¹² that certainly was the position in which Parliament found itself, the Government having been denied legal authority to activate the withdrawal process absent primary legislation permitting it to do so. It is hard to resist the inference that, whether they were prepared to admit it or not, legislators who sought to assert parliamentary control through the medium of a ‘meaningful vote’ requirement in the Withdrawal Act were doing little more than closing the stable door long after the horse had bolted: something that undoubtedly occurred when Parliament hastily enacted legislation in the immediate aftermath of *Miller* giving the Prime Minister the broadest of discretionary powers to trigger Article 50:¹¹³ something that she, in turn, wasted no time in doing.

None of this is to suggest that Parliament should, either in early 2017 following *Miller* or subsequently, have sought to frustrate the Government in seeking to give effect to the outcome of the referendum. Rather, it goes to the question of where institutional authority and responsibility lies. Events from the *Miller* case through to the completion of the Withdrawal Act’s passage provide a vivid illustration of the resilience of executive power. In the immediate aftermath of the referendum, the Government made it clear that it intended to trigger Article 50 and that it planned to do so without seeking parliamentary authorisation. When this assertion of executive authority was rebuffed by the Supreme Court in *Miller*, Parliament was handed a golden opportunity to stake its claim in relation to the Brexit process. It could, for instance, have legislated so as to allow the Government to trigger Article 50 only once it had obtained parliamentary approval of its negotiating objectives. Instead, Parliament presented the Government with a blank cheque that was promptly cashed, thereby investing the executive with just the sort of broad, discretionary authority that *Miller* had seemingly denied it. The broader constitutional implications of the *Miller*

¹¹¹ See section 13.

¹¹² *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

¹¹³ European Union (Notification of Withdrawal) Act 2017.

case are doubtless substantial; but Parliament's response to it rendered it, in political terms, little more than a hiccup in an executive-dominated Brexit process.

The Brexit story so far thus reveals an old truth about the British constitution: that while executive authority is in principle rightly limited by law, as the *Miller* case (whatever one's view as to the correctness of the decision) illustrates, the true limits of executive authority are in the gift of a Parliament whose legal capacity to vest power in the executive is unlimited, and whose political willingness to do so often knows few bounds.¹¹⁴ That much is apparent, at a general level, from the way in which Parliament reacted to *Miller* and, in more particular terms, from the extravagance of the powers vested in Ministers by the Act (even if they are not quite as outlandish as those that were first contemplated by the Bill). Brexit may have been proposed as a means of reclaiming national sovereignty, and *Miller* may have been intended to strike a blow for parliamentary sovereignty. Yet it is the executive that will set the United Kingdom's negotiating position with the EU and which will be effectively free to reach agreement on the terms of Brexit; it is the executive that will take the lead when it comes to recasting the domestic statute book post-exit; and it is also the (UK) executive that will be pivotal in determining how and when repatriated powers in devolved areas flow to Belfast, Cardiff and Edinburgh.

That these things are being done pursuant to authority conferred by a supreme legislature places their legality beyond doubt. But that very fact should give us pause to reflect critically on how Parliament has wielded its sovereign authority in this context. With great power goes great responsibility — including a responsibility to legislate in a way that is faithful to the requirements of constitutional principle and that ensures executive accountability. It is against this background that the victories secured by Parliament, as it sought to bend the Withdrawal Bill to the demands of constitutionalism, must be viewed. Those victories are certainly not trivial, and the Act that was ultimately made is a considerable improvement upon the Bill that was originally introduced. Nevertheless, they should not blind us to the fact that to the extent that “control” is being newly exerted in the wake of referendum, it is the executive that finds itself in the driving seat.

¹¹⁴ For an insightful account of the nature of executive authority under the constitution, see Timothy Endicott, 'Lawful Power' (2017) 15 *New Zealand Journal of Public and International Law* 1-19.