RETAINED EU LAW (REVOCATION AND REFORM) BILL

BAR EUROPEAN GROUP – MATRIX CHAMBERS 19 OCTOBER 2022

NOTES FOR REMARKS BY LORD ANDERSON KBE KC

1. Schona's theme was setting fire to legal certainty. My theme will be setting fire to the role of Parliament in making legislation.

2. First thing: a big thank you to the BEG for this invitation but also to the Bar Council for getting to grips with this Bill before just about anyone else. They published their proposed amendments to the Bill yesterday, for which George Peretz KC and his working group deserve a lot of the credit, and they are already proving useful to me and others in raising awareness of this extraordinary Bill with the relevant Lords Committees and with colleagues on the crossbenches.

3. Their preference and mine is for this Bill to be withdrawn, on the basis that it is totally inappropriate to give Government the power to repeal and replace, by statutory instrument, 2,400 laws arrived at by the democratic processes of the EU. You don't need 2,400 Acts of Parliament to do it properly, but you do need to give Parliament the chance to approve or amend the policy behind proposed new laws. The Bar Council cites the Financial Services and Markets Bill as a better template: much more specific powers, lists of matters to consider when rules are made, and provision for engagement with the FCA and other regulators in the making of rules.

4. Supporters of the Bill have compared it to the European Communities Act 1972, which admitted the Community *acquis* to our law *en bloc*. But the comparison is a bad one. Parliament knew precisely what it was doing when it passed the ECA. The acquis was there for all to see, and it was well understood that joining the EEC would require us to give domestic effect to its laws, arrived at by the lawmaking processes of the European Communities, later Union, and limited by the powers set out in the Treaties. This Bill, by contrast, asks Parliament to sign a blank cheque in relation to 2,400 pieces of retained EU law. We have literally no idea what “alternative provision” the Government will “think appropriate” under the powers in clause 15. Indeed under clause 15(3) a new rule need not even seek to achieve the same or similar objective as the rule it replaces; and it must not be considered to “*increase the regulatory burden*” under clause 15(5) – so, the objective is explicitly *deregulatory.* I would challenge anyone to identify a more extensive delegation of power that has ever been sought from Parliament: this seems to me a quite remarkable Executive power-grab, with implications also for the devolved authorities in Scotland and Wales which are unhappy for reasons communicated in letters dated 22nd and 23rd September.

5. The Bar Council’s amendments, which I expect to be influential, would mitigate the damage.

    a. They suggest limiting the range of provisions that would be sunsetted, and requiring consultation and reports before other provisions can be added.

b. They would prevent clauses 3-5 (sunsetting, abolition of supremacy and abolition of general principles) from entering into force until a proper analysis has been performed.

c. They would direct the courts under clause 7 to have regard to legal certainty, and the principle that significant changes to the law should be made by Parliament, before departing from retained EU case law.

d. And before any retained EU law was "restated" under clause 13 or revoked, replaced or updated under clauses 15 and 16, there would have to be consultation and proper time for Parliament to consider and debate.

6. All those amendments are sound ones and I would happily put my name to any of them. But none of them, I suggest (and this is certainly no criticism of the Bar Council, which I suspect agrees with what I am going to say) is equal to the constitutional gravity of what is proposed by clause 15 in particular. Time for Parliament to consider, to debate and recommend is all very well: but the thing about statutory instruments, even when they are introduced under the affirmative procedure, is that ***Parliament has no power to amend them and has not for many years used the power that it does notionally have to prevent their passage into law*****.** (This power was last used in the Commons in 1979, and when its use was last threatened by the Lords in 2015, we were threatened by the Strathclyde Report with the clipping of our wings).

7. That is OK if the SIs are merely implementing policies contained in statute, but not OK if, as is increasingly the case, they contain matters of policy or principle made under powers in “skeleton Bills”. That makes Parliament into a rubber-stamp for the enactment of policy.

8. That lack of oversight is compounded by the fact that such scrutiny as we *are* able to give deters the courts from intervening. They take their cue from Lord Sumption in the *Bank Mellat* case who said

   “when a statutory instrument has been reviewed by Parliament, respect for Parliament’s constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament’s review. This applies with special force to legislative instruments founded on considerations of general policy”.

9. Concerns about excessive delegated powers have been expressed in Parliament for more than 100 years. But they have been sharpened first by the debates on the EUWA 2018 – though the power in section 8 to correct “deficiencies” in REUL pales into insignificance compared to this Bill – and then by the Covid regulations that Adam Wagner has written about in his new book “Emergency State”. The *Constitution Committee* has been vocal; and influential cross-benchers such as *Lord Judge* and Lord *Lisvane* have often spoken on the theme.

10. A head of steam is now building on this issue in that unlikely hotbed of revolution: the House of Lords. A significant development was the

choreographed publication in December 2021 of reports by two extremely sober House of Lords Committees, each of them chaired by a Conservative peer:

a. the Secondary Legislation Scrutiny Committee, whose report was called "*Government by Diktat: a call to return power to Parliament*"; and

b. the Delegated Powers Committee, a body with no Commons equivalent which scrutinises Bills for improper delegations and whose report was called "*Democracy Denied: The Urgent Need to Rebalance the Power Between Parliament and the Executive*".

Those titles were shocking, and intended to shock. Another SLSC report published last week drew attention to the increasing failure to provide impact assessments, which deprive us of the ability to conduct even such scrutiny as lies within our power, because we lack the right information at the right time.

11. *Growing militancy* to the idea that we should be used as a rubber-stamp: you saw that in:

a. the unprecedented 14 Government defeats in a single evening earlier this year on the *Police and Crime Bill*, which were not so much about the specific public order provisions in issue as about the fact that they were being introduced only at report stage in the Lords and

b. Queen' Speech debate in May, where Lord Judge after reference to Wat Tyler and Oliver Cromwell said: "*What is the point of us being here if, when we identify a serious constitutional problem, we never do anything about it except talk?*" – and went on to encourage us to throw out exorbitant delegated powers, whether contained in a Bill or exercised by a statutory instrument.

c. I was one of several peers who agreed with him and predicted that it might be the Brexit Freedoms Bill as we then thought of it, by its sheer scale and audacity, which brought the issue to a head.

d. The Delegated Powers Committee in July described the NI Protocol Bill as "*a skeleton bill that confers on Ministers a licence to legislate in the widest possible terms*", adding: "*This Bill represents as stark a transfer of power from Parliament to the Executive as we have seen throughout the Brexit process. The Bill is cavalier in its treatment of Parliament …".*

   Those concerns were echoed in last week's debate on NI Protocol Bill, and indeed in another debate today on the Energy Prices Bill.

12. So that is the background on which this Bill lands. We have potentially two battlegrounds:

a. The Bill itself, where I hope we will not only adopt amendments such as those drafted by the Bar Council but tackle head-on the sidelining of Parliament.

b. Potential statutory instruments under clause 15, where we may have no alternative but to flex our muscles as we last did in 2015.

13. Predictions of constitutional crisis are often overdone but I see it as a real possibility here – if not in relation to the Bill itself then in relation to regulations made under it on sensitive policy areas. This is a Bill which has the potential to sideline Parliament over great swathes of policy, and to entrench executive dominance over the enactment of policy to an unprecedented extent.

14. As to the politics, it seems to me that the two key constituencies are Conservative backbenchers in the Commons and the Labour front bench in the Lords. That is because any defeat of the government in the Commons will rely on Conservative backbench support; and because high-minded crossbenchers can achieve nothing in the Lords without the support of the opposition parties. As the scent of power becomes stronger in Labour nostrils, it may be that the evils of executive rule-making do not strike them quite as forcibly as one might wish.

15. But for both groups, much may depend on the practical consequences of the Bill for policy areas of particular concern to them – whether environmental protection, employment, consumer protection or animal welfare. That is why is will be useful, as the parliamentary process

proceeds, to be able to spell out in very practical terms what this extraordinary executive power grab could mean.

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