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THE PRESERVATION OF EU LAW IN THE UK AFTER BREXIT

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SOME HEALTH WARNINGS

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- This talk is not about EU law in transition period (to 31 December 2020, subject to extension)
- It *may* not be the law after transition, because Parliament may amend before then and / or we there may be a trade deal which requires such amendment
- But *future* regime may still have legal consequences *now* in some cases
- Extremely important to think *now* about legal regime which will take effect on 1 January 2021
- Hot off the press! Withdrawal Agreement Act passed last week.

THE EUROPEAN WITHDRAWAL ACT 2018: A NEW CONSTITUTIONAL STATUTE

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- The EU (Withdrawal) Act 2018 makes detailed provision about the retention, status, and amendment of EU law following Brexit.

- The 2018 Act has been amended very recently by the EU (Withdrawal Agreement) Act 2020

- The 2018 Act is a constitutional statute, whose meaning and effect are likely to be the subject of argument for many years or even decades after Brexit.

- Many uncertainties and unanswered questions about its application.

REPEAL OF EUROPEAN COMMUNITIES ACT 1972

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- Section 1 of the 2018 Act:

  The European Communities Act 1972 is repealed on exit day.

- Exit day defined in section 20(1), and can be amended under subsection (4) by regulations to coincide with EU departure date under EU law. Now 11pm 31 Jan 2020 and unlikely to change
- EU Law is largely given effect in UK law by ECA 1972, so effect will be that, subject to exceptions in 2018 Act, EU Law ceases to have effect.
- Not amended by 2020 Act but subject to section 1A and 1B for transition period so section 1 contains half truth at best!
- Exit day now replaced by “implementation period completion day” (“IP completion day”), which is when new regime I am talking about takes effect

RETENTION OF EU LAW: BASIC CATEGORIES AND STRUCTURE

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- Sections 2-7 provide for major exceptions to repeal of EU, so as to preserve most EU law in force on Exit Day.

- Three categories of retained EU law:
  - Section 2, Saving for EU-derived domestic legislation
  - Section 3, Incorporation of Direct EU legislation
  - Section 4, Saving for rights under section 2(1) ECA 1972

- Each of these is in turn subject to general exceptions in section 5 and Schedule 1

SECTION 2: SAVING FOR EU-DERIVED DOMESTIC LEGISLATION

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- Section covers “any enactment” either (a) made under, or (b) made for a purpose mentioned in section 2 of the ECA 1972. It also covers “any enactment” otherwise relating to EU law. Note that definition of “EU-derived domestic legislation” now moved to section 1B, but unaltered in substance

- Basic effect is to preserve legal status quo at IP Completion day, subject to sections 8 and 9.

- This covers both primary and secondary legislation, <u>whether or not made under ECA 1972</u>

SECTION 2: SAVING FOR EU-DERIVED DOMESTIC LEGISLATION (2)

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- As pointed out by House of Lords Constitution Committee, section 2 is "significantly broader" than it needs to be (see 9th Report of Session 2017-19, para 21)
  - Section 1 repeals the ECA 1972 and (necessarily) legislation made under it. So section 2 needs to address retention of provisions made under ECA 1972
  - Does not need to provide for retention of other legislation which takes effect apart from ECA 1972
  - Effect is to bring this other legislation, including primary legislation, within scope of powers to amend under sections 8 and 9 by the back door (see para 22 of HLCC report)

SECTION 3: DIRECT EU LEGISLATION

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- Section 3 is aimed at “direct EU legislation” i.e. EU legislation which has direct effect in UK law without, and without need for, implementing UK legislation. Primary examples:
  - EU Regulations, decisions, tertiary legislation
  - Annexes and protocols to the EEA agreement

- House of Lords Constitution Committee observes that relationship with section 2 may be “complex”, because potentially directly effective EU legislation may nevertheless be implemented by UK legislation so that section 2 applies, but:

> *25. … It is possible … to envisage circumstances in which only part of a relevant EU instrument is reflected in domestic legislation. … Thus, post-exit, certain EU instruments may persist in domestic law through the combined effect of* [sections] *2 and 3, such as some provisions of the Equality Act.*

SECTION 4: RIGHTS ETC

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- Section 4 provides for retention of “any rights, powers, liabilities, obligations, restrictions remedies and procedures” that are recognised before IP Completion day “by virtue of section 2(!) of the ECA 1972.
- This is primarily concerned with directly effective Treaty provisions, some of which should be retained because they are reciprocal rights which do not depend on EU membership. It makes sense for such rights, but less sense for rights which only exist by virtue of EU membership.
- The government has confirmed that this is a “sweeper provision”, to ensure as “starting point” that all such rights are preserved, subject to what may be extensive amendment under section 8 (see the evidence given to the House of Lords Constitution Committee, quoted in its report at para 30).
- Problematic in so far as it enables government to repeal reciprocal rights under section 7 which have nothing to do with EU membership

EXCEPTION 1: SUPREMACY OF EU LAW (1)

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- Section 5(1) provides that the principle of the supremacy of EU law does not apply to any enactment made on or after IP Completion day. Section 5(2) provides that "accordingly", the principle continues to apply "to the interpretation, disapplication or quashing of any enactment or rule of law" made before IP Completion day.

- Supremacy principles (see para Chapter 5 of HL CC Report for detailed discussion), not defined in Act, but is the principle that EU law has supremacy over all forms of domestic law.

- Basic effect is that the legal and legal effect of domestic legal acts made before IP Completion day can still be judged against compatibility with EU law. Those made after, cannot be so judged.

EXCEPTION 1: SUPREMACY OF EU LAW (2)

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- Three problems:
  - Scope of Supremacy principle The Act now defines “retained EU law” as including e.g. domestic secondary legislation implementing EU law. But other domestic legislation cannot now be struck down on basis of incompatibility with mere domestic implementing legislation (if that does not reflect pre-existing EU law). Ambiguous how this will work post-exit
  - Relationship of supremacy principle with common law is at best unclear
  - Conceptual incoherence: Supremacy of EU law is an EU law principle, but it only has effect in domestic law by virtue of section 2 ECA 1972: see the discussion in the *HS2* case *(*2014] 1 WLR 324), on basis of presumed Parliamentary intention. So not clear how it “continues” to have effect once we leave the EU law.

    Matters because this will insulate retained EU law from certain kinds of domestic challenge.

EXCEPTION 2: CHARTER OF FUNDAMENTAL RIGHTS (1)

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- Section 5(4) provides that the Charter of Fundamental Rights is not part of UK law after exit
- Section 5(5) says that this does not affect the operation of EU law "fundamental rights or principles which exist irrespective of the Charter"
- Paradox. The explanatory notes to the 2018 Act says:

  The Charter did not create new rights, but rather codified rights and principles which already existed in EU law. … Given that the Charter did not create any new rights, subsection (5) makes clear that, whilst the Charter will not form part of domestic law after exit, this does not remove any underlying fundamental rights …

- This reflects judgments of CJEU which will remain binding e.g. *NS (Afghanistan) v SSHD* [2012] 3 WLR 1374. Indeed, pre-exit, Charter is only effective in UK law because of legal reality or fiction that Charter does no more than restate existing principles.
- So there is a strong argument that the exclusion of the Charter has no legal consequences. But the position is unclear, and not clearly settled by the Act

EXCEPTION 2: CHARTER OF FUNDAMENTAL RIGHTS (2)

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- House of Lords Constitution Committee observes:

  119. The primary purpose of this Bill is to maintain legal continuity and promote legal certainty by retaining existing EU law as part of our law, while conferring powers on ministers to amend the retained EU law. If, as the government suggests, the Charter of Fundamental Rights adds nothing to the content of EU law which is being retained, we do not understand why any exception needs to be made for it. If, however, the Charter does add value, then legal continuity suggests that the Bill should not make substantive changes to the law which applies immediately after exit day.

OTHER EXCEPTIONS

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- Schedule 1, para 1, no right on or after IP Completion day to challenge any retained EU law on the basis that the EU instrument was itself invalid

- Schedule 1, para 2, no general principle of EU law is part of domestic law if not recognised as such by CJEU case law prior to IP Completion day

- Schedule 1, para 3, no right of action in domestic law on basis of failure to comply with general principle of EU law (NB this does not exclude reliance on general principles pursuant to some other right of action

- Schedule 1, para 4, no right of action based on *Francovich* principle

SECTION 6: INTERPRETATION OF RETAINED LAW STATUS OF CJEU JUDGMENTS POST-EXIT

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- Section 6 is concerned with status of CJEU case law post-exit.

- Section 6(1) provides that a UK court “is not bound by” CJEU decisions made on or after IP completion day. Section 6(2) however provides that a court may “have regard” to such judgments
  - So courts will have to develop case law (analogous to section 2 HRA 1998 case law) on extent to which they will have regard to such case law

- Courts are however bound by EU case law decided before IP Completion day, where it touches the meaning and effect of EU law provisions (section 6(4).
  - There is an exception to that for the Supreme Court, which may depart from a CJEU judgment which would otherwise be binding under section 6(5) applying the same test as it applies to departing from its own decisions

SECTION 6: INTERPRETATION OF RETAINED LAW STATUS OF CJEU JUDGMENTS POST-EXIT (2)

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- Now subject to new power (section 26 2020 Act, inserting section 6(5A) into 2018 Act) for Ministers to make secondary legislation designating other courts as courts which *may* depart from EU case law decided before exit day

- Highly controversial power, for good summary see joint PLP and Clientearth briefing note:

  https://publiclawproject.org.uk/wp-content/uploads/2020/01/PLP-and-ClientEarth-joint-briefing-on-clause-26-of-WAB_.pdf

SECTION 7: STATUS OF RETAINED EU LAW (1)

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- Section 7 makes detailed provision about the status of different forms of “retained EU law” and the amendment thereof. The basic principle (subsection (1)) is that legislation will have the same status it had before exit: e.g.
  - Retained primary legislation will have the status of primary legislation
  - Retained secondary legislation will have the status of secondary legislation
  - But very unclear what that means for directly effective EU law retained under section 3 or 4

- Subsections (2) – (4) make detailed provision about how such legislation can be amended. Key point is that all retained EU law, even that in primary legislation, can be amended by regulations made under sections 8 and 9 of the 2018 Act.

SECTION 7: STATUS OF RETAINED EU LAW (2)

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- Why does status matter? Two reasons
  - (1) Implications for how retained EU law can be amended by government
  - (2) Very important for legal challenge, including under the HRA 1998:
    - (a) Retained EU law that is set out in primary legislation will be immune from challenge under the HRA 1998 other than for declaration of incompatibility
    - (b) Retained EU law that is in secondary legislation not so immune
    - (c) “Profound ambiguities” (see HLCC Report, para 51) about status of retained EU law preserved under sections 3 and 4 (directly effective EU law).

Thank you for listening

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