The United Kingdom Internal Market Bill Briefing for the House of Lords

Introduction

1. Public Law Project ('PLP') is an independent national legal charity. We work through a combination of research, policy work, training and legal casework to promote the rule of law, improve public decision-making and facilitate access to justice.

2. PLP takes no position on the UK's decision to leave the EU. Rather, our work on Brexit seeks to ensure that Parliament is appropriately sovereign, that the executive is held to account and that the interests of disadvantaged groups are protected.

3. PLP shares the serious concerns raised by many other commentators about the provisions of the United Kingdom Internal Market Bill ('the Bill') which seek to authorise Ministers to act in contravention of the UK's obligations under the Withdrawal Agreement, an international treaty which has been ratified by the UK and implemented into domestic law by the European Union (Withdrawal Agreement) Act 2020, as recently as January 2020. The significant implications of such a decision for the Rule of Law have been well ventilated. Parliament should be under no illusions as to the serious and far-reaching ramifications of enacting this legislation.

4. In this briefing we highlight three key areas of concern with the Bill, as they relate to PLP's areas of expertise:

   (a) The introduction of delegated powers which purport to authorise Ministers to act in contravention of domestic and international law;
   (b) The insufficient Parliamentary scrutiny provided by Clause 56(4); and
   (c) The attempt to immunise Ministerial use of delegated powers from legal challenge.

Clauses 44 and 45: Delegated powers to contravene the Withdrawal Agreement and other international law

5. By Clauses 44 and 45 of the Bill, the Government seeks to take a power to make Regulations which disapply, modify or otherwise contravene the UK's international law obligations under the Withdrawal Agreement and the Northern Ireland Protocol.

6. The enactment of the Bill risks multiple breaches of international law. The creation of legal powers permitting the circumvention of the UK's obligations appears to breach the good faith obligation under Article 5 of the Withdrawal Agreement, as well as the principle of *pacta sunt servanda* in Article 26 of the Vienna Convention on the Law of Treaties.[1] Clause 47 and the attempted immunisation of powers exercised under Clauses 44 and 45 from judicial review disregards the UK's obligations under Article 4 of the Withdrawal Agreement.[2]

7. The very serious concerns about the implications for the Rule of Law of a decision to breach an international treaty to which the UK signed up less than a year ago have

[1] House of Commons Library, 'The United Kingdom Internal Market Bill 2019-21' (14 September 2020), 17-18
[2] See [14]

been raised by many other commentators. PLP shares those concerns, which extend far beyond the immediate subject matter of this Bill and call into question the Government's commitment to the Withdrawal Agreement, and potentially to other international treaties to which the UK is party.

8. PLP wishes to draw Members' attention to certain features of the mechanism which the Bill adopts to enable such a result. While the Government has sought to justify this step on the basis of the principle of Parliamentary sovereignty,[3] through Clauses 44 and 45 it in fact seeks to give Ministers, rather than Parliament, the power to make rules which are inconsistent with the UK's obligations under the Withdrawal Agreement, with only post hoc scrutiny of the exercise of those powers by Parliament.

9. PLP has previously raised concerns about the breadth of delegated powers, including Henry VIII powers to amend primary legislation, which have been given to Ministers in order to legislate for Brexit, in the EU (Withdrawal) Act 2018, the EU (Withdrawal Agreement) Act 2020 and in the Immigration and Social Security Coordination (EU Withdrawal) Bill currently before the House of Lords, among others.[4]

10. The powers which the Government seeks from Parliament through Clauses 44 and 45 represent a step-change. If enacted, they would give Ministers power through secondary legislation to legislate in a way which would otherwise be unlawful, whether as a result of domestic or international law provisions. There is very little in the clauses as drafted which circumscribes that power.

11. PLP's work scrutinising Brexit delegated legislation and the use of powers granted under the Coronavirus Act 2020 have illustrated the inadequacy of existing systems for scrutiny of secondary legislation.[5] The procedure adopted by the Bill for scrutiny of these extraordinary delegated powers during the 'initial period' (the first six months) is made affirmative (cl44(6)(a); 45(4)(a)). This means that Ministers will be able to make Regulations which contravene relevant domestic and international law, which will come into effect immediately, and only subsequently be scrutinised by Parliament. After the first six months, any further use of the powers will be subject to draft affirmative and will have to be approved by a resolution of each House before they can be made.

12. The justification for the use of the made affirmative procedure in Clause 44 is said in the Delegated Powers Memorandum to be to give effect to the Government's commitment to ensure unfettered access by 1 January 2021 (§82) and 'the need to provide businesses and citizens certainty after the end of the Transition Period' (§83). In respect of Clause 45, the procedure is said to be justified on the basis that "The use

[3] See statement of the Attorney General, "HMG Legal Position: UKIM Bill and Northern Ireland Protocol", published 10 September 2020: https://www.gov.uk/government/publications/hmg-legalposition-ukim-bill-and-northern-ireland-protocol.

[4] See, for example, "Preliminary Briefing on the European Union (Withdrawal Agreement) Bill", 23 October 2019: https://publiclawproject.org.uk/resources/withdrawal-bill-agreement-public-law-projectbriefing/; Briefing on the Immigration and Social Security Coordination (EU Withdrawal) Bill, May 2020, https://publiclawproject.org.uk/wp-content/uploads/2020/05/Public-Law-Project-Immigrationand-Social-Security-Bill-Briefing-for-second-reading.pdf

[5] See e.g. A. Sinclair and J. Tomlinson, 'Brexit Delegated Legislation: Problematic Results', U.K. Const. L. Blog (9th Jan. 2020) (available at https://ukconstitutionallaw.org/); 'Plus ca change: Brexit and the flaws of the delegated legislation system', 13 October 2020 (available at www.publiclawproject.org.uk); Alexandra Sinclair, COVID-19 and delegated legislation, Legal Action April 2020 (https://www.lag.org.uk/article/207899/covid-19-and-delegated-legislation)

of the made affirmative is suitable for a limited period of time when the regulations may need to be brought into force quickly, or amended quickly to take into account changes in EU law once the Protocol comes into force." (§97)

13. These justifications are inadequate to explain the use, for a 6-month period, of a procedure which allows Ministers to change domestic law in a way which is incompatible with international law or other provisions of domestic law, with the potential for only very limited Parliamentary scrutiny before the provisions come into effect.

Clause 56(4): inadequate Parliamentary scrutiny

14. Clause 56(4) was introduced by the Government in response to concerns regarding the unprecedented breadth of Clauses 44, 45 and 47 in apparently authorising the circumvention of any domestic and international law.

15. Sir Robert Neill MP sought assurances that Clauses 44, 45 and 47 would not be brought into effect by "statutory instrument, which does not give enough scrutiny for such a constitutionally significant issue, but by a specific resolution".[6] He also noted that if it were stipulated that secondary legislation be treated as primary legislation, then the standard of Parliamentary scrutiny should be that of primary legislation, querying "whether even the affirmative resolution procedure proposed for these matters will provide sufficient scrutiny".[7]

16. Clause 56(4) does not provide the "Parliamentary lock" Sir Robert sought. It provides for a motion in the Commons as to the earliest date on which Clauses 44, 45 and 47 may come into force. It does not guarantee a debate in either house on the content of any draft regulations before they are made, let alone scrutiny of the kind which would be afforded to primary legislation. The clause also circumvents any debate in the House of Lords. It provides only for 'a motion to the effect that the House of Lords takes note of the specified day'. This means that the Lords, which has considerable expertise in constitutional matters, will have no formal role in scrutinising the decision to commence these constitutionally important provisions. There is no change to the scrutiny procedure for the regulations themselves.

17. Intentionally legislating to breach the Withdrawal Agreement is objectionable in principle; however, if such measures are to be taken it is for Parliament rather than Ministers to do so. In *R v. Home Secretary ex p Simms*, Lord Hoffmann stated that Parliament's sovereignty and legislative freedom were subject to "ultimately political, not legal" constraints. In principle, Parliament can therefore legislate as it wills, even against fundamental rights, but it "must squarely confront what it is doing and accept the political cost".[8] As the Delegated Powers and Regulatory Reform Committee has noted, Parliament alone should be responsible for "matters of the highest public

[6] HC Deb 14 September 2020, vol 680, col 63
[7] HC Deb 29 September 2020, vol 681, col 210
[8] [2000] 2 AC 115 at 131

interest, involving questions of law, politics, diplomacy and integrity".[9] Parliament should not delegate a power to act unlawfully to Ministers.

Clause 47: immunising Ministerial use of delegated powers from legal challenge

18. The concerns arising from these extraordinary delegated powers are further amplified by Clause 47 which seeks to immunise Clauses 44 and 45, and any regulations made under them, from legal challenge on the grounds of incompatibility with (broadly defined) relevant domestic and international law, including the Withdrawal Agreement.

19. This provision is itself directly incompatible with the Withdrawal Agreement. Article 4 of the Withdrawal Agreement provides that individuals will be able to rely upon provisions of the Withdrawal Agreement and the Northern Ireland Protocol that meet the conditions for direct effect. Article 4(2) requires the UK to ensure that its judicial and administrative authorities have the power to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation. Accordingly, s7A EUWA 2018 was enacted to give domestic effect to that provision and ensures that these provisions are directly enforceable in UK courts. S7A(3) provides that all domestic legislation, including primary legislation, is to be read, and has effect, subject to the directly effective provisions of the Withdrawal Agreement.

20. Clause 47 of the Bill, however, provides that regulations made under Clauses 44 and 45 'have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent'.

21. "Relevant international or domestic law" is defined very broadly and includes "any… legislation, convention or rule of international or domestic law whatsoever" which itself includes "any order, judgment or decision of… any… court or tribunal".

22. Clause 47 therefore not only appears to seek to ensure that actions taken by ministers under Clauses 44 and 45 will prevail above other legislation, including primary legislation implementing international treaty obligations, but also that they cannot be questioned on the basis of any other rule of law. It is thus an attempt to immunise Ministers' use of the delegated powers in Clauses 44 and 45 from judicial review.

23. Such a clause gives rise to significant concerns. As currently drafted, the clause is general and vague in nature. It is likely to give rise to considerable uncertainty in terms of its scope and application, which is particularly concerning given that it involves potentially serious inroads into the constitutionally important safeguard of judicial review. The Justice Minister has stated that "if a challenge were brought on the basis of procedural impropriety or all the other familiar grounds, those are not ousted."[10] While this indication that the Government does not intend to oust judicial review is welcome it is not clear on the face of the Bill and it needs to be so.

[9] Delegated Powers and Regulatory Reform Committee, *24th Report; United Kingdom Internal Market Bill* (HL 2019-21, 130) para 38
[10] HC Deb 14 October 2020, vol 682, col 152WH

24. Any attempt to exclude executive powers from the possibility of judicial review should be approached with extreme caution. The government must act in a manner which is lawful and in accordance with Parliament's wishes. Judicial review is necessary to ensure that this is the case. Through Clause 47 the government is attempting to put into place a serious constitutional anomaly: a ministerial power exercisable without the possibility of any judicial oversight. Not only is such an action unprecedented, it is also profoundly concerning given the breadth and significance of powers given to ministers under Clause 44 and 45.

25. Clause 47 has been further amended to make specific provision in relation to compatibility with the Human Rights Act 1998. Clause 47(2)(a) exempts a Minister making Regulations under clauses 44 and 45 from the duty to comply with the Human Rights Act. Clause 47(3) provides for regulations made under clauses 44 and 45 to be treated as if they were primary legislation for the purposes of the Human Rights Act 1998. The effect of this is that the only remedy for a challenge to any such regulations on grounds of incompatibility with Convention rights would be a declaration of incompatibility, which the Grand Chamber of the European Court of Human Rights has confirmed is not an 'effective remedy' for the purposes of the Convention. [11]

26. More significantly however, these amendments only underline the constitutional novelty, and seriousness, of what Parliament is being asked to do: give Ministers an unfettered power to make Regulations which are incompatible with domestic and international legal obligatinos, incompatible with HRA, and are subject to scrutiny only after they have been made.

27. The apparent intention behind Clause 47 is to insulate the Government from scrutiny and render its use of extraordinary delegated powers unchecked. Not only does the Bill seek to exclude the scope for meaningful oversight by Parliament, but also the possibility of legal oversight by the courts. It goes to unprecedented lengths and concern has been expressed that it will "pit our courts against our Government".[12] The point of judicial review "is to ensure that bodies which perform public functions should do so in accordance with the requirements of the law",[13] which is essential for upholding the sovereignty of Parliament, the separation of powers and the rule of law. At least in its current form, Clause 47 represents a serious violation of these constitutional fundamentals.

If you would like to discuss points raised in this briefing, please do not hesitate to contact: Alison Pickup, Legal Director, a.pickup@publiclawproject.org.uk

[11] *Burden v UK* 13378/05, [2008] ECHR 357 at 40
[12] HC Deb 29 September 2020, vol 681, col 231
[13] Lord Woolf, "Droit Public – English Style" [1996] Public Law 61