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What status will retained EU law have?

1. The purpose of the Bill is said to be to “provide a functioning statute book on the day the UK leaves the EU” while, as a general rule, providing that “the same rules and laws will apply” after exit day as before.¹ However the Bill does not simply convert EU law into domestic law but places limitations on the scope of EU law that is converted and on its effect. In doing so, the Bill raises questions and creates ambiguity. Parliament should seek clarity and explanation from the Government in order to ensure that the scope of retained EU law is clear.
2. By way of example, under existing EU law, Directives which have not been fully or correctly implemented, can sometimes confer rights which can be relied on directly in domestic courts.² However, under the Bill, these rights will only be retained in EU law if they have been “recognised” by a UK or EU court before exit day.³ It is unclear what is meant by “recognised”. For example, would a passing reference in a judgment to part of a Directive be sufficient for it to be “recognised”? If a small part of the Directive is mentioned, has the entire Directive been “recognised”?
3. Under the principle of supremacy, EU law “trumps” domestic law and where there is a conflict, domestic law must be disapplied in order to give effect to EU law.⁴ The Bill is explicit that after exit day, retained EU law will not be supreme if it conflicts with a new “enactment”.⁵ However, the Bill provides that modifications to pre-Brexit “enactments” might still be subject to the supremacy principle. Whether the supremacy principle continues to apply depends on whether that is consistent with the “intention” of the modification. This leaves considerable uncertainty and Ministers should be asked to clarify, including by giving examples of when a modification would or would not be consistent with the principle of supremacy.

¹ Explanatory Notes, paragraph 10.

² See paragraph 92 of the Explanatory Notes.

³ Clause 4(2)(b)

⁴ See Paragraph 53 of the Explanatory Notes.

⁵ Clause 5(1)



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4. The Bill is also unclear as to whether retained EU law should be treated as primary or secondary legislation, and whether it should be treated differently depending on the circumstances. For example, “retained direct EU legislation” is to be treated as primary legislation for the purposes of the Human Rights Act 1998 (HRA).⁶ That means that the courts cannot strike down or disapply such laws on the grounds of incompatibility with the HRA, but only make a declaration of incompatibility. However, the Bill is silent on whether “retained direct EU legislation” should be treated as primary or secondary legislation for other purposes. This may have implications for the remedies available to challenge such provisions on grounds other than incompatibility with the HRA.
5. The Government has said that one of the three fundamental principles underlying the Bill is that, by converting EU law into UK law, the Bill will ensure that individuals’ “rights and obligations will not be subject to sudden change”.⁷ In the White Paper, the Government stated that “The Government’s intention is that the removal of the Charter from UK law will not affect the substantive rights that individuals already benefit from in the UK.”⁸ The Secretary of State gave an assurance in Parliament that the intention was to ensure that all relevant substantive rights in the Charter would form part of domestic law after Brexit.⁹
6. The Bill provides that the Charter of Fundamental Rights will not form part of domestic law after exit day¹⁰ but seeks to preserve fundamental rights and principles which exist irrespective of the Charter.¹¹ Many of the rights in the Charter are also protected in the European Convention on Human Rights (‘ECHR’) and therefore (for the most part¹²) already part of domestic law through the HRA. Some other fundamental rights protected by the Charter are protected by the common law or by existing statutory provisions.

⁶ Schedule 8, paragraph 19(1)

⁷ See, for example, comments of David Davis in the House of Commons debate on the White Paper, Legislating for UK Withdrawal from the EU, HC Hansard 30 March 2017, Vol 624, col 427

⁸ Paragraph 2.25; see also HC Hansard 30 March 2017 col 429: “The fact that the charter will fall away will not mean that the protection of rights in the UK will suffer as a result.”

⁹ HC Hansard 30 March 2017, Vol 624, col 432

¹⁰ Clause 5(4)

¹¹ Clause 5(5)

¹² The HRA does not incorporate all of the rights protected by the ECHR. In particular, the right to an effective remedy for breach of Convention rights in Article 13, ECHR is not incorporated.



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7. It is welcome that there are provisions in the Bill that prevent Ministers from using their new powers to amend, repeal, or revoke the HRA or any subordinate legislation made under it.¹³ However, there are fundamental rights protected by EU law which are not protected to the same extent by the ECHR or by existing domestic law. For example, the High Court (in *David Davis and others'* challenge to provisions in the Data Retention and Investigatory Powers Act 2014) held that Article 8 of the EU Charter, which concerns data protection, “clearly goes further, is more specific, and has no counterpart in the ECHR”.¹⁴
8. Another example is the right to an effective remedy in Article 47 of the Charter. The right to an effective remedy is protected by Article 13 ECHR but that right is not incorporated by the HRA.
9. It is unclear what the status of these rights will be after exit day. Fundamental rights are also general principles of EU law which will form part of retained EU law (to the extent recognised before exit day) but the general principles will not be able to be relied on to enforce individual rights.¹⁵ The Government has given assurances that no substantive rights will be lost and it needs to demonstrate that all of the substantive rights protected by the Charter will be protected to the same extent by domestic law, including the HRA, after exit day.

This is an extract from PLP’s Parliamentary briefing on the EU (Withdrawal) Bill. The full briefing can be found [here](#).

¹³ Clause 7(6)(e)

¹⁴ *David Davis and others -v- Secretary of State for the Home Department* [2015] EWHC 2092 (Admin), paragraph 80.

¹⁵ Schedule 1, paragraph 3.