

Brexit Editorial, Volume 23, Issue 4 (December 2017)

It is becoming increasingly obvious that the UK is living between two worlds: one that is far from dead and one that is yet to be born. The presentation of the EU (Withdrawal) Bill¹ (the Great Repeal Bill as it was commonly known although 'Great' has been dropped officially) in July brought home the enormity of the task facing Mrs May in seeking to turn EU law into UK law and its future adaptation. The previous editorial dealt with the complications of this process.² UK public lawyers, and EU lawyers UK or otherwise, are going to be working at full capacity for the ensuing years. The UK Parliament and civil service will be at breaking point. This at a time when the Prime Minister faces splits in her Cabinet and leaks by Cabinet members against the Chancellor of the Exchequer because he is not adopting a policy of hard Brexit i.e. a complete severance from the EU with no agreement on market access or tariffs. The hard crew wish to destabilize his position. The jackals (the hard crew) are gathering for Mrs May's office in her untenable and seemingly defenceless position. Her reliance upon the Ulster Unionists for anything like a working Commons majority in financial matters and questions of confidence leaves her vulnerable and exposed at the most crucial epoch in British foreign policy since the end of the Second World War.

The prospects for successful negotiation in the Brexit discussions with Michel Barnier's team seemed remote at the beginning of the second round of discussions. We have seen desperate attempts by some Ministers to invoke the patriotism card (this at a time when the film *Dunkirk* has been released) and by others to blame the BBC for drawing too pessimistic a picture of Brexit. The key issues of financial compensation to the Union to account for the UK's present and future obligations under the treaties, the Irish border, the rights of EU and UK citizens post Brexit and the sovereignty of the ECJ after D Day (departure day on 29 March 2019) appeared intractable. The last issue has been a particularly galling *bête noire* for post

¹ For the Bill as introduced see https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_1.htm. For the annotated notes see <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf> (accessed 25 Sept. 2017).

² Vol. 23(3) (2017) *European Public Law* 437. See Hansard paper on EU (Withdrawal Bill) *Delegated Legislation, Parliamentary Scrutiny and the EU (Withdrawal) Bill* (Sept. 2017), https://assets.contentful.com/xkbace0jm9pp/4mZb6S8t3yukaqAqKYkskC/955ff1e64ba499649e2bc72f9a942059/Taking_Back_Control_FINAL.pdf All sites visited on 25 Sept. 2017.

imperialists who see the ECJ as a threat to a pristine notion of UK national sovereignty. Sovereignty, that is, of British courts over the CJEU and sovereignty of the British Parliament over the UK courts. An article by Professor Alison Young based on a lecture given at the Institute of European Public Law at the University of Hull in March 2017 published in this issue of *European Public Law* addresses the wider constitutional significance of the *Miller* judgment from last January and the judgment's implications for UK constitutionalism.³ The obiter dicta qualifications that the UK courts have placed on an overriding EU constitutional sovereignty vis a vis national constitutional fundamentals⁴ are lost on these sovereigntists who have brought their Conservative party to its knees and, one fears, the country rapidly in pursuit.

The close of the second round of formal negotiations between the UK and the EU 27 on July 20 occasioned positive statements on progress from both teams.⁵ M. Barnier, however, was clear that UK clarification on several points was essential for further progress before the next phase of negotiations on future relationships could be commenced.⁶ This was still the position in late September.

The UK general election result has weakened the position of the hard Brexiteers. Support appears to be growing for a transitional phase or 'implementation phase' as the UK government describes it. Even Liam Fox the secretary for international trade and a key Brexiteer suggested after the July negotiations such a phase lasting until 2022 covering amongst other items trade, customs and immigration. This was on the eve of his commencing UK/US preparatory trade deal negotiations in Washington DC. Reports suggest that Chancellor Hammond's influence on Davis is growing and the latter is becoming more realistic in his expectations as secretary of state for Brexit. Mrs May has opened up regular dialogue with business through the government business advisory group. Their priority seems to be a transitional period to ease the Brexit process avoiding precipitate falls. Could Brexit become Flexit? And what would flexibility entail? No votes by the UK on EU policy and law but the full discipline of the single market and customs union, the jurisdiction

³ See p. 757 below.

⁴ *R (HS2 AAL) etc. v. Secretary of State for Transport* [2014] UKSC 3 paras 202–208; *Pham v. Secretary of State for the Home Department* [2015] UKSC [84] and [90]; predicated by *Thoburn v. Sunderland CC* [2003] QB 151.

⁵ From the UK <https://www.gov.uk/government/news/david-davis-closing-remarks-at-the-end-of-the-second-round-of-eu-exit-negotiations-in-brussels>. For EU Commission documents on the negotiations https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en and the UK <https://www.gov.uk/government/collections/article-50-and-negotiations-with-the-eu> (accessed 25 Sept. 2017).

⁶ http://europa.eu/rapid/press-release_SPEECH-17-2108_en.htm (accessed 25 Sept. 2017).

of the CJEU together with annual payments by the UK? ‘Very nice’ one can hear M. Juncker exclaim!

By early 2018 UK business leaders will wish to see some firm and clear ideas giving body to what a ‘deep and special relationship’ with the European Union means. This was Mrs May’s expression after her meeting with Juncker and Barnier in April 2017. The UK government’s two discussion papers on *Future Customs Arrangements* and *Northern Ireland and Ireland* were published in mid-August.⁷ M. Barnier and the EU 27 have made it clear there can be no cherry-picking by the UK in a future relationship. In the absence of preferred treatment clearer ideas will be demanded within the UK on what will replace our EU membership by way of EU deals and new trade deals with major trading nations and their full implications. M. Barnier will not be the only voice calling for greater clarity on the details of what Brexit actually entails.

In this state of uncertainty it is not surprising that voices have been raised calling for another UK referendum on Brexit. Former Prime Minister Tony Blair has urged a case for stopping Brexit and Vince Cable the new leader of the Liberal Democrats has opined that Brexit may not happen. These are not powerful political voices. The reactions from the usual suspects threatening widespread rioting in the streets on the first sign of any Brexit backtracking have been broadcast with their usual predictability. The leader of the Labour Party appeared ambivalent, indeed indifferent, to the EU arguing that Brexit means we cannot be a member of the single market. He seemed to abandon that text when the Labour party adopted a policy of a transitional period after Brexit in which the single market and customs union would remain. Ambivalence, however, also remained.

Referenda require statutory authorization.⁸ There could be two basic forms of referenda. One to remain in. In effect to reverse the referendum of June 2016. This would simply perpetuate the cack-handed manner in which the whole episode of EU withdrawal has been handled since 2013. Remainers may be over optimistic about the outcome. And a good deal of Article 50 time will have been consumed if the result confirms the outcome of June 2016.

An alternative is a referendum on the eventual terms of exit. If the result is a rejection of the terms what then? The hardliners would be vindicated. We would be up against the clock and leaving without agreement would be a real prospect. As things stand Mrs May has guaranteed the Commons a vote on the terms on a take it or leave it basis. Not an amendment.

⁷ <https://www.gov.uk/government/organisations/department-for-exiting-the-european-union> (accessed 25 Sept. 2017). Other position papers etc. are available on this site including *Safeguarding the rights of EU and UK citizens* Cm 9464 and *Confidentiality and access to documents*.

⁸ Political Parties, Elections and Referendums Act 2000, Part VII.

A final prospect of a government withdrawal without a referendum from Article 50 should serious economic downturn bring a realization of dire social consequences for the UK would involve at least four factors. Article 50 does not address this point and a previous editorial has discussed the question.⁹ One presumes that any withdrawal of notice is bona fide and not a delaying tactic to gain more time. The four factors are:

- (1) To withdraw from the Brexit process the government would at least need Parliamentary consent in legislation. It would require legislation with the assent of both Houses. The Supreme Court ruled that Brexit had to be commenced by legislation and a corollary would be that it will have to be terminated by legislation.
- (2) In all likelihood such a reversal would lead to a government defeat at the next election.
- (3) There would undoubtedly be legal challenges in the courts brought under breaches of legitimate expectation in denying the outcome of the 2016 referendum although the Supreme Court ruled that referendum was not legally binding.¹⁰
- (4) There would be a likelihood of serious public disorder.

A request by the UK government for an extension of the period for the operation of the treaties under Article 50 may become a distinct possibility. Article 50 does not explicitly refer to an extension of the negotiating period but Article 50 is a part of the treaties.

THE EU CHARTER OF FUNDAMENTAL RIGHTS (CFR)

It was noted in the previous editorial that the government did not intend to incorporate the CFR into post D Day UK law. The CFR has made its impact felt in UK law.¹¹ Its rejection is part of a Eurosceptic attack on human rights' protection that is not sourced in domestic law. Although Conservative Party manifestos from 2010 have promised to repeal the Human Rights Act the manifesto of 2017 stated that the HRA would not be repealed until after Brexit is concluded and that the UK would remain signatories of the European Convention

⁹ Vol. 23(1) (2017) *European Public Law* 1.

¹⁰ HS2 above paras 124 their 'force is political rather than legal' unless their governing legislation determines otherwise and para. 125. *R (Wheeler) v. Office of the Prime Minister* [2008] EWHC 1409 (Admin) for the difficulties that this challenge would face. This litigation concerned the failure by the previous Labour government to allow a referendum for the Treaty of Lisbon. Tony Blair had promised a referendum for the subsequently aborted EU Constitutional Treaty.

¹¹ *Britain Alone!* Ch. 14 K. Beale (P. Birkinshaw & A. Biondi eds, Wolters Kluwer 2016). See *R (UNISON) v. Lord Chancellor* [2017] UKSC 51 paras 106–117.

of Human Rights (ECHR) for the duration of the next Parliament.¹² The human rights framework would then be subject to review. The duration of the next Parliament is far from clear and the legislation seeking to ensure Parliament lasts for a fixed term of five years was easily outvoted to allow the 2017 general election and the repeal of the fixed term legislation was promised in the Conservative manifesto.¹³ So while change to the HRA and ECHR is still on the Conservative back-burner, the removal of the CFR from UK law will occur on D Day.

The CFR may not be discarded as easily as the White Paper suggests. Even before it was agreed at Lisbon as a document with the same legal value (legally binding) as the EU treaties and when it was still an unincorporated treaty between Member States, English judges had consulted the CFR in deciding cases.¹⁴ This was and is consistent with English jurisprudence on international treaties. The newly appointed President of the Supreme Court, Baroness Brenda Hale, has written how the CFR does inform the content of EU rights, patently so, and one may add this will be the case after D Day. CFR (and general principles of law) case law on EU rights before D Day will be binding on UK courts in their interpretation of the EU rights unless modified by UK law or unless EU judgments are departed from as explained in the previous editorial. CFR judgments from the CJEU after D Day will not be binding on UK courts but they could possess *persuasive* authority. Clause 6(2) of the Withdrawal Bill acknowledges this and gives UK judges a discretion to have regard to EU judgments where ‘appropriate’. Having no role for the CJEU after D Day as the white paper stated¹⁵ cannot remove influence. The CJEU and European Court of Human Rights (CHR) will continue interpreting instruments that are strikingly similar and their jurisprudence will doubtless bear that mutual influence and cross-fertilization between European jurisdictions which inspired the inauguration of this journal in 1995. UK courts must continue to have regard to the judgments of the CHR (HRA s.2). So far as it is possible to do so, primary legislation and subordinate legislation, whenever enacted, must be read and given effect [by UK courts] in a way which is compatible with the Convention rights (HRA s.3). The outgoing President of the UK Supreme Court, Lord Neuberger, has urged the government to provide greater clarity and precision on how UK judges should treat CJEU judgments after Brexit to prevent the judge-baiting

¹² *Forward, Together: Our Plan for a Stronger Britain and a Prosperous Future*, The Conservative and Unionist Party Manifesto 37 (2017).

¹³ Fixed Term Parliaments Act 2011. See Editorial Vol. 22(4) (2016) *European Public Law* 589.

¹⁴ *R v. Secretary of State for the Home Department ex p Howard League for Penal Reform* [2002] EWHC (Admin) 2497; per Munby J paras 46 and 51.

¹⁵ Cm 9446 para. 2.13.

populist press editorials that greeted the *Miller* judgment at the end of 2016 and early 2017.¹⁶

Hale also raises the thorny issue of existing EU directives that are wrongly implemented by UK regulations. An additional question concerns multilateral agreements such as the Brussels II revised regulation on jurisdiction, recognition and enforcement of judgments in the family justice sphere.¹⁷ Other parties will have to agree to keep us in the club if the rules are to be mutually enforceable.

PAPERS ON JUDICIAL COOPERATION AND DISPUTE RESOLUTION POST BREXIT AND DATA PROTECTION

Towards the end of August the UK government published *Providing a cross-border civil judicial cooperation framework agreement* covering post Brexit civil, family and commercial subjects.¹⁸ Its conclusion (paragraph 25) states:

The UK is clear that international civil judicial cooperation is in the mutual interest of consumers, citizens, families and businesses in the EU and in the UK. With this in mind, we are seeking a close and comprehensive framework of civil judicial cooperation with the EU. That framework would be on a reciprocal basis, which would mirror closely the current EU system and would provide a clear legal basis to support cross-border activities after the UK's withdrawal.

Full of constructive intent but thin in detail.

On the following day the paper on *Enforcement and Dispute Resolution* was published.¹⁹ This outlines various approaches for dispute resolution and enforcement which have been adopted in treaties between the EU and third countries 'without the CJEU having direct jurisdiction over those countries'. Nonetheless the paper acknowledges the importance of CJEU interpretations of the treaty provisions both prior to and post the date of agreement and even raises the possibility of a reference to the CJEU. The agreements will seek to 'maximize certainty'. This is in stark contrast to the UK June paper on EU citizens which stated emphatically there would be no role for the CJEU. The CJEU will give the final ruling on the consistency of any such treaties with EU law.

The final UK 'partnership' paper before the third round of negotiations began contained the government's proposals for the exchange and protection of personal

¹⁶ *Supreme Court President Demands Clarity over the ECJ*, Fin. Times (9 Aug. 2017).

¹⁷ Baroness Hale, <https://www.supremecourt.uk/docs/speech-170707.pdf> (accessed 25 Sept. 2017).

¹⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf (accessed 25 Sept. 2017).

¹⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf (accessed 25 Sept. 2017).

data after Brexit.²⁰ This states the UK's new Data Protection Bill ... 'will further strengthen UK [data protection] standards, ensuring they are up to date for the modern age, and it will implement the EU's new data protection framework in our domestic law.' [para 2] At the point of exit UK law will be aligned with EU law. UK law will 'fully implement' the most up to date EU framework in the data protection regulation and directive [para 45]. Once again, the influence of EU law will continue in our domestic law.

As I wrote above. Between two worlds. One that is far from dead. And one whose content is completely unknown. Interesting times.

On 22 September, before the fourth round of divorce negotiations began, Mrs May published her Florence speech in which she indicated a two year transition period after D Day in which the UK would be subject to EU law (what of the CFR?) and the CJEU and within the single market and customs union (i.e. within the existing legal framework) but without a role in the legislature. Security arrangements would remain.²¹ Various financial commitments were offered. The speech was interpreted as an attempt to regain control after her foreign secretary published his own account of post Brexit Britain widely seen as throwing his hat into the ring for a future leadership contest. The speech by May was viewed as conciliatory but offering no firm idea on what the final objectives of Mrs May's Brexit policy are. M. Barnier seemed initially unimpressed. He will report on progress on divorce negotiations to the President of the European Council where his report will be discussed by the Council in October.

The Editor.
29 September 2017.

²⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639853/The_exchange_and_protection_of_personal_data.pdf (accessed 25 Sept. 2017).

²¹ See *Security, law enforcement and criminal justice: A future partnership paper* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security_law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF (accessed 25 Sept. 2017).