
GARDEN COURT
CHAMBERS

Session 1 - After Brexit: How to use retained EU law in your Public Law practice from 2021 onwards

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11 February 2021

After Brexit: How to use retained EU law in your Public Law practice

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EU Retained Law – Context

Two questions

? What is EU retained law?

? Where do we find it?

What is EU retained law?

! It's a **brand new species of law** that was conceived by the Brexit aspiration of "*taking back control*"

! Its **not the same as EU law** (which continues to evolve without the UK)

Snapshots, photocopies, cut-and-paste…

EU Retained law is the law emanating from the European Union Institutions and Courts as it was at 11pm on 31 December 2020.

- A "snapshot" taken of EU law which magically becomes (transposed) into UK law.
- As it all the EU law has been photocopied and "**rebranded**" as UK law.
- As if the "*acquis communautaire*" "**cut and pasted**" into our law.

!?Narnia?!

What's the point of Retained EU law?

If the whole point of Brexit is to no longer be under the influence of EU law – the "*take back control*" idea articulated by those who advocated the change, then -

The point of the EU (Withdrawal) Act 2018 (as Amended), which creates EU retained law, was to provide some **continuity** and to avoid the situation where the body of EU law which has applied for many years in the UK

– the "***acquis communautaire***" – woven into our national legal system,

did not just disappear, leaving a void or vacuum, overnight (as our clocks chimed 23:00 on 31.12.20)

The point of Retained EU law is….

So the point of EU law is….

to provide:

- Legal certainty
- Continuity of the Rule of law

(as opposed to a legal “vacuum”)

If leaving the EU was about diverging from EU law,

…then why are we retaining it…..?

Over time:

- The UK is going to "pick and choose" the bits of EU law that it wants to keep
  - Whilst being be free to ***diverge*** from EU law and develop those EU-origin-principles as the UK sees fit…; and
- The UK is going to jettison the bits of EU law that it wants to discard,
  - And ***diverge*** (within the limits of international politics….)

Back-to-basics: “Dualist” constitutional arrangements….

…..and International Treaties

- Unlike many other (including European) jurisdictions, the UK is essentially “**dualist**” in nature.

- Because of our **dualist** arrangements, if the UK signs a Treaty, is does not alter the laws of the UK state **unless/until it is incorporated into our national law by legislation**.

- This is constitutional requirement. (Until incorporating legislation is enacted, the national courts have no power to enforce Treaty rights or obligations - on behalf of government or a private individual).

Since 01.01.1973 until 11pm 30.12.2020

FLOOD ALERT!

- Ever since the **European Communities Act 1972**, Parliament voluntarily gave effect to the UK's obligations and duties under the former European Community, and later EU, Treaties in national law.

- In Bulmer v Bollinger [1974] Lord Denning famously referred to the **incoming tide of what is now EU law**, observing that it "*flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforth to be part of our law. It is equal in force to any Statute.*"

The "floods" of European law have seeped into our jurisprudence since 01.01.73

Supremacy of EU law

From when the UK joined the EU,

European law had **supremacy** over UK law

where there was a conflict

in areas where the European law had **competency** (confirmed in Factortame I)

“Taking back control”… by filtering

Brexit has started a **process** of **legal filtering** of the EU law (water) as it crops up in our domestic/national law (in our jurisprudential estuaries, rivers, lakes, streams, pipes, baths, showers, taps, sinks…)

To discard or change the EU-origin law so that it is “pure” British law.

Legal taxonomy (a difficult bit…)

Difficult…because in order to understand the new status of different elements of EU retained law, and how it can be discarded or changed, one has to understand the EU-legal origins; and there is lots of different "types" of EU law in our domestic law.

The most basic sub-divisions are:

1. Preserved legislation
2. Converted legislation

This involves understanding the **"taxonomy"** of EU law.

What exactly is retained EU law?

Oliver Persey, Garden Court Chambers

11 February 2021

What exactly is retained EU law?

Where to look

European Union (Withdrawal) Act 2018 (**as amended**) (**'EUWA'**)

- Sections 2-4: the three core types of retained EU law
- Section 6: retained case law
- Section 5 and Schedule 1: Exceptions to savings and incorporation

What types of retained EU law are there?

- EU-derived domestic legislation (section 1B(7) and section 2 EUWA)
- Retained direct EU legislation (section 3 EUWA)
- ‘Rights etc.’ (section 4 EUWA)
- Retained case law and general principles (section 6 EUWA)- not going to discuss today

EU-derived domestic legislation

S1B (7) In this Act *"EU-derived domestic legislation"* means any **enactment** **so far** as—
(a) made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972,

(b) **passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act,**

(c) relating to—(i) anything which falls within paragraph (a) or (b), or

(ii) any rights, powers, liabilities, obligations, restrictions, remedies or procedures which are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, or

(d) relating otherwise to the EU or the EEA,

but does not include any enactment contained in the European Communities Act 1972 or any enactment contained in this Act or the European Union (Withdrawal Agreement) Act 2020 or in regulations made under this Act or the Act of 2020.

Retained Direct EU Legislation

Direct EU legislation:

- any EU Regulation, EU Decision or EU tertiary legislation, as it has effect in EU law immediately before IP Completion Day and so far as (i) it is not an exempt EU instrument (for which see section 20(1) and Schedule 6), (ii) it is applicable to and in the United Kingdom by virtue of Part 4 of the Withdrawal Agreement, (iii) it neither has effect nor is to have effect by virtue of section 7A or 7B of the 2018 Act; (iv) its effect is not reproduced in an enactment to which section 2(1) applies.

Retained Direct EU Legislation- key points

Direct EU legislation:

- EU legislation that could be **directly** relied upon before 11pm 31 December 2020
- Only the English language versions
- Exclusions: there are many. Crucially, EU directives are *excluded*

‘Rights etc.’

Savings for Rights under ECA, s 2

- Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP Completion Day are recognised and available in domestic law by virtue of section 2(1) of the ECA , and are enforced, allowed and followed accordingly…

….continue on and after IP Completion Day to be recognised and available in domestic law and to be enforced, allowed and followed accordingly, s 4 2018 Act. (NB inc Rights arising under EU Treaties, principles in Court judgments)

As regards Saved Rights , see also ss 5, 5A and Schedule 1

‘Rights etc.’

But….this does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they

- form part of domestic law by virtue of section 3 (incorporation of Direct EU legislation),
- are, or are to be, recognised and available in domestic law (and enforced, allowed and followed accordingly) by virtue of section 7A or 7B, or
- *arise under an EU Directive* (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided *before IP Completion Day* (whether or not as an essential part of the decision in the case).

‘Rights etc.’- the key takeaways

- Saves *directly effective* rights that aren’t saved elsewhere e.g. in treaties and directives
- ‘Of a kind’?
- Watch out for the SIs

Retained EU Law: Principles, Tools and Changes

Adrian Berry, Garden Court Chambers

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Supremacy of EU Law, s 5 2018 Act

- The principle of the Supremacy of EU law *does not apply* to any enactment or rule of law passed or made on or after IP completion day.

- The principle of the Supremacy of EU law continues to apply on or after IP completion day *so far as relevant* to the *interpretation, disapplication or quashing* of any enactment or rule of law passed or made before IP Completion Day.

- This does not prevent the principle of the Supremacy of EU law from applying *to a modification* made *on or after* IP completion day of any enactment or rule of law passed or made before that day *if the application of the principle is consistent with the intention of the modification*.

Charter of Fundamental Rights, s 5 2018 Act

- The Charter of Fundamental Rights is not part of domestic law on or after IP Completion Day

- This *does not affect the retention in domestic law on or after IP Completion Day in accordance with the 2018 Act of any fundamental rights or principles which exist irrespective of the Charter*

- References to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained *fundamental rights or principles*.

- See also Schedule 1 for further provision about exceptions to savings and incorporation

Challenging Retained EU Law, s 5 and Sch 1, 2018 Act

- There is no right in domestic law on or after IP completion day to challenge any retained EU law on the basis that, immediately before IP completion day, *an EU instrument was invalid*.

- But this does not apply so far as the European Court has decided before IP completion day that the instrument is invalid, or the challenge is of a kind described, or provided for, *in regulations made by a Minister of the Crown*.

- Regulations may (among other things) provide for a challenge which would otherwise have been against an EU institution to be against a public authority in the United Kingdom. (see *Challenges to Validity of EU Instruments (EU Exit) Regulations 2019* (SI 2019/673))

General Principles of EU Law, S 5 and Sch 1, 2018 Act

- No general principle of EU law is part of domestic law on or after IP completion day if *it was not recognised as a general principle of EU law by the European Court in a case decided before IP completion day* (whether or not as an essential part of the decision in the case).

- There is *no right of action in domestic law* on or after IP completion day based on a failure to comply with any of the general principles of EU law. (NB see Sch 8, para 39, re transitional provision for 3 years after IP completion day, in limited circumstances)

- No court or tribunal or other public authority *may, on or after IP completion day disapply or quash any enactment or other rule of law, or quash any conduct or otherwise decide t*hat it is unlawful, because it is incompatible with any of the general principles of EU law (but note power to interpret).

Francovich Damages, s 5 and Sch 1, 2018 Act

- There is no right in domestic law on or after IP completion day to damages in accordance with the rule in *Francovich*

- But see Sch 8, para 39 re two year extension from IP day

Interpretation, s 5, 5A, and Sch 1, 2018 Act

- References in section 5 and Schedule 1 to the principle of the supremacy of EU law, the Charter of Fundamental Rights, any general principle of EU law or the rule in Francovich are to be read as references to that principle, Charter or rule *so far as it would otherwise continue to be, or form part of, domestic law on or after IP completion day* as retained EU law

- Accordingly (among other things) the references to the principle of the supremacy of EU law in section 5(2) and (3) do not include anything which would bring into domestic law any modification of EU law which is adopted or notified, comes into force or only applies on or after IP completion day.

- The fact that anything which continues to be, or forms part of, domestic law on or after IP completion day by virtue of section 2, 3 or 4 has an effect immediately before IP completion day which is time-limited by reference to the implementation period does not prevent it from having an indefinite effect on and after IP completion day by virtue of section 2, 3 or 4.

Interpretation of Retained EU Law, s 6 2018 Act

- A court or tribunal is *not bound* by any principles laid down, or any decisions made, on or after IP Completion Day by the European Court, and cannot refer any matter to the European Court *on or after that day*

- A court or tribunal *may have regard* to anything done on or after IP Completion Day by the European Court, another EU entity or the EU *so far as it is relevant* to any matter before the court or tribunal.

- Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP Completion Day and so far as they are relevant to it in accordance with any retained case law and any retained General Principles of EU law, and having regard (among other things) to the limits, immediately before IP Completion Day, of EU competences.

Interpretation of Retained EU Law, s 6 2018 Act

- But….the Supreme Court is not bound by any retained EU case law, and a relevant court or relevant tribunal [Court of Appeal] is not bound by any retained EU case law so far as is provided for by Regulations.

- No court or tribunal is bound by any retained domestic case law that it would not otherwise be bound by.

- In deciding whether to depart from any retained EU case law the Supreme Court must apply the same test as it would apply in deciding whether to depart from its own case law.

Rules of Evidence, s 15, Sch 5 of the 2018 Act

Where it is necessary in legal proceedings to decide a question as to—

- the meaning or effect in EU law of any of the EU Treaties or any other treaty relating to the EU, or
- the validity, meaning or effect in EU law of any EU instrument,

the question is to be treated as a question of law.

A Minister of the Crown may by regulations make provision enabling or requiring judicial notice to be taken of a relevant matter, or provide for the admissibility in any legal proceedings of specified evidence of (i) a relevant matter, or (ii) instruments or documents issued by or in the custody of an EU entity.

Regulations may provide that evidence is admissible only where specified conditions are met (for example, conditions as to certification of documents).

Regulations under this paragraph may modify any provision made by or under an enactment. "enactment" does not include primary legislation passed or made after IP completion day.

Human Rights Act 1998: Sch 8 of the 2018 Act

- Any retained direct principal EU legislation is to be treated as primary legislation.
- Any retained direct minor EU legislation is to be treated as primary legislation so far as it amends any primary legislation but otherwise is to be treated as subordinate legislation.
- "retained direct principal EU legislation" means:

  (i) any EU Regulation so far as it forms part of domestic law on and after exit day by virtue of section 3, and was not EU tertiary legislation immediately before IP Completion day, or

  (ii) any Annex to the EEA agreement so far as it (as modified by or under this Act or by other domestic law from time to time) forms part of domestic law on and after IP Completion Day] by virtue of section 3, and refers to, or contains adaptations of, any EU Regulation

- "retained direct minor EU legislation" means any retained direct EU legislation which is not retained direct principal EU legislation

After Brexit: How to use retained EU law in your Public Law practice

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Perplexed? Psychology of learning….

The brand new topic of EU retained law is difficult because:

- **Abstract**
- The structure **is difficult to visualise** (emanating from a jungle of complex legislation starting with the
  - European Union (Withdrawal) Act 2018 (as amended); and the
  - European Union Withdrawal Agreement Act 2020
- We learn law by **legal problem-solving**; by applying the principles of how courts have dealt with similar problems previously. Currently we lack blue-prints!
- We are a profession reliant on **legal precedent** and **there are none**!
- In order to work out what EU retained law is, one has to engage in **legal taxonomy** and look at the origins of a piece of law.
- Law is an enterprise structured by hierarchy, yet the legal consequences of Brexit are a **rupturing of the hierarchy** which existed since the European Communities Act 1972, and we have yet to work out how the new "pecking order" of species of laws works ***practically***, on the ground.

We are all enjoying different stages of our Retained EU law adventure (…sunlit uplands…?)

s8 – European Union (Withdrawal) 2018

Deficiencies (1)

"Dealing with deficiencies arising from withdrawal"

*S8 (1) A Minister of the Crown may by regulations make such provision as **the Minister considers appropriate to prevent, remedy or mitigate**—*

*(a) any failure of retained EU law to **operate effectively**, or*

(b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU.

Deficiencies (2)

Section 8 is the power to make Regulations to deal with deficiencies in EU law

There is already a morass of Regulations dealing with deficiencies; which

Raises questions of (for example):

- Have these new Regulations been made lawfully under the enabling power?
- Are the new Regulations lawfully made within the properly enabled scope of s8?
- Are the new Regulations too broad?

s8 – European Union (Withdrawal) 2018

Deficiencies (3) – ***wide drafting alert!***

Section 8 **very widely drafted** to give Minsters of the Crown wide powers:

For example: s8(2)(a) & (b):

(2) Deficiencies in retained EU law are where the Minister considers that retained EU law—

*(a) contains anything which has **no practical application** in relation to the United Kingdom or any part of it or is **otherwise redundant** or **substantially redundant**,*

*(b) confers functions on, or in relation to, EU entities which **no longer have functions** in that respect under EU law in relation to the United Kingdom or any part of it, …*

Deficiencies (4) – ***“appropriate”? alert***

s8(2)(d) ***makes provision for***, *or in connection with, other arrangements which—*

(i) involve the EU, an EU entity, a member State or a public authority in a member State, or

(ii) are otherwise dependent upon the United Kingdom’s membership of the EU, and which no longer exist or are ***no longer appropriate****,*

Deficiencies (5) – ***law of a "similar kind"? alert***

s8(3) *There is also a deficiency in retained EU law where the Minister considers that there is—*

(a) anything in retained EU law which is ***of a similar kind*** *to any deficiency which falls within subsection 2, or*

(b) a deficiency in retained EU law of a kind described, or provided for, in regulations made by a Minister of the Crown.

The section 8 “take-home”

Henry VIII alert!

Ministers are given **very wide and elaborate powers** to alter EU law by **statutory instrument** rather than by primary legislation.

There are Henry VIII powers here!

Henry VIII powers

- They allow the government to change an Act of Parliament, or repeal it, after it has been passed, without going through parliament a second time;
- Henry VIII Powers take their name from the 1539 Statute of Proclamations whereby the King (Henry VIII) was able to legislate by “decree” and that his decrees/proclamations (basically his announcements) should be obeyed as though they were made by parliament;
- Arguably, it makes pragmatic sense in some areas eg does Parliament need to get “bogged down” in e.g. food labelling issues/changes?
- Such delegated legislation is looked at by the House of Lords Select Committee in Delegated Powers and Regulatory Reform;
- The fundamental issue is that the Government can decide that rights based on EU norms are not compatible with Brexit-Britain and change can be put into effect without parliamentary debate and scrutiny.
- Use of such powers is expedient and convenient for relatively quick amendments **but without parliamentary oversight.**

Henry VIII powers

The Executive (i.e. Ministers) have effectively given themselves **huge law-making powers** by delegated legislation and Henry VIII powers, and by by-passing Parliament.

The legal challenges will revolve around the nitty-gritty of whether these powers have been exercised lawfully.

Practicalities ☺

- Don’t assume that your Judge has ever studied EU law;
- Assume that your Judge is as perplexed as you are;
- Judicial psychology – Judges NEVER admit to not being knowledgeable!
- Meticulous research, planning and “handing it on a plate”;
- Be sensitive to the possibility of lack of MoJ resources hampering Judges grapple with EU retained law problems.

Bonne chance! Buena suerte! Good luck!!

Thank you

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