LEAVE ALLIANCE

Brexit Monograph 12

Taking back control

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Introduction

One of the less helpful ideas associated with Brexit is the assumption that, on leaving the EU, we will "restore UK control over our laws". This lends itself to a variety of slogans, around the general themes that laws should be made exclusively by Parliament.

Leaving the EU, it has been asserted, would restore parliamentary sovereignty, by allowing the return of power from Brussels to Westminster. By this means, according to the general narrative, the decisions that affect our lives will be made by politicians who we can hold to account by kicking them out at a general election.[1]

Without even the intervention of Brussels, though, this represents a somewhat rosy view of the role of parliament and elected politicians. It also assumes that power repatriated from Brussels will necessarily be returned to Westminster, as opposed to bolstering the already over-mighty executive, and that the return of powers will in any event make a significant difference to the status of parliament and its abilities to affect the course of events.

In this Monograph, we argue that just the simple process of returning law-making powers to Westminster, taking powers away from Brussels, will afford little relief to what is seen as the problem of remote law-making by unaccountable officials.

We thus look at possible alternatives and supplements to the process of repatriating powers. But first, we take a look at how Westminster's power has become diluted, even without the EU. We then explore in more detail the nature

[1] http://www.bbc.co.uk/news/uk-politics-eu-referendum-36247456

of the problem, as it presents on the ground as opposed to the narrow confines of a self-interested Westminster. Finally, we suggest measures which can address the concerns of UK citizens and provide real enhancements to the power and status of parliament.

The dilution of power

By far the bulk of legislation is passed into UK law via the Statutory Instrument (SI) route.[2,3] Most SIs are approved by negative resolution, which means they become law automatically, without a vote or debate, unless there is a majority vote against them. Such votes are extremely rare. In effect, the bird had flown, long before Brussels took a hand.[4]

As to the origins of the legislation, these can be many and varied. Laws might start as recommendations or policy decisions made by home departments, intended to implement aspects of the domestic agenda – anything from modifications to free school meals entitlement, to road closures or pension arrangements for firefighters.

On the other hand, they may be implementing EU requirements, although this is not always evident, especially as many of the SIs are hybrids, covering EU and domestic matters, with none of the origins identified. But even if they are dealing with matters bearing the stamp "done at Brussels", that does not necessarily mean that the law is of EU origin. In many instances, The EU may be acting as an intermediary, implementing recommendations from global or regional bodies, very often arising out of treaties.

As interdependence becomes the norm, with nations binding themselves to certain courses of action by way international agreements, more and more of the domestic legislative programme is determined by the need to honour treaty obligations. Portmanteau agreements such as those setting up the United Nations and its subsidiary organisations, the Council of Europe – and its European Charter of Human Rights - the OECD, the Word Trade Organisation, and many others, all encroach on parliament's legislative space.

In theory, parliament can block the ratification of treaties, but it rarely does. It has thus already ceded power to international bodies, of which the European Union is but one. And although this might be the most prominent in UK politics, it is not necessarily the most significant.

Some of the more pressing issues of the day, such as tax avoidance by multinational corporations, or the regulation of global industries such as financial services, can only be dealt with by cooperative action between nations (and blocs such as the EU), even without the benefit of treaties. In that context,

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[2] http://www.parliament.uk/business/bills-and-legislation/secondary-legislation/statutory-instruments/

[3] In 2015, there were 2,058 SIs added to the statute book, compared with 37 UK pubic acts.

[4] An interesting treatment of this issue can be read here: http://www.politics.co.uk/comment-analysis/2015/01/14/a-war-on-democracy-how-statutory-instruments-replaced-acts-o

the G7/8 and the G20 have become powerful legislative forums, spawning a host of subordinate bodies which shape domestic laws. Some highly technical standard setting, which ends up having the force of law, is not even formulated by governmental bodies.

Much of their output – and increasingly so - gives rise to actions taken by national executives, without a treaty mandate. Parliament might be free to legislate in such areas – or block action taken by the executive – but to do so could be against the national interest.

At several levels, therefore, parliamentary sovereignty is a chimera. Much of the sovereignty – perhaps better described as regulatory autonomy - has been usurped by the executive, to which loss MPs seem largely indifferent. Those that come to us via Brussels do not necessarily originate with the EU. Where they are treaty based, they would have to be implemented anyway, regardless of EU membership.

And then, where the exigencies of the day require cooperative action, with agreements made by national executives, parliaments are often relegated to impotent observers, often unaware of events until after action has been taken.

By and large, MPs often do not even know the origins of the laws, of which they complain. This is typified by the absurd posturing over the so-called "banana regulation" and the "straight cucumber" law. Although attributed to the EU, the one originates from the Codex Alimentarius Commission and the other from the United Nations Economic Commission Europe (UNECE).

Even were some powers to be recovered from "Europe", the actual changes would be slight because, despite the perception to the contrary, the "regulatory space" occupied by the EU is relatively modest. Much of the law apparently originating from the EU actually stems from "higher" global bodies.

On that basis, it would appear somewhat over-optimistic to expect withdrawal from the European Union to resolve all the issues relating to the loss of parliamentary sovereignty. If anything, the limited regulatory space left to the EU confers on withdrawal a somewhat symbolic element. Parliament, over many years and in many diverse ways, has allowed its powers to ebb away, to the extent that it has become a weak institution, with very little power and little relevance to the concerns of ordinary people.[5]

Even where there remains some degree of regulatory autonomy, the need to ensure regulatory convergence between trading partners and to avoid two-tier codes suggests that voluntary harmonisation would drive much of the regulatory programme.

[5] Much of this related to the implementation of EU law, but not entirely so. For an analysis, see here: https://thebrexitdoor.com/2015/10/19/statutory-instruments-how-parliament-gave-away-its-power/

The pursuit of a greater degree of parliamentary sovereignty, directed exclusively at recovering powers from the EU, therefore, is likely to yield slim pickings. And, inasmuch as UK legislation can be as unsatisfactory as some EU law, there is no particular guarantee that the regulatory environment will be noticeably improved.

The nature of the problem

EU law is often presented in pejorative terms, with British businesses "strangled by EU red tape", amounting to "outrageous interference" by cohorts of "crazed Eurocrats" dedicated to producing "barmy EU rules".[6,7]

Media treatment is exemplified by the account of Michelle "Clippy" McKenna, a small-scale manufacturer in Sale, Manchester, marketing jams made from home-grown Bramley apples. Because apple preserves contained less than 60 percent sugar, it could not be called jam under UK law, hampering the development of Ms McKenna's business.[8]

The regulations, however, implemented EU law so there was a classic "barmy Eurocrats" story in the making, heavily exploited by the media.[9,10] But, as the story developed, the European Commission explained that EU law allowed a reduction in the 60 percent threshold. However, when Defra proposed lowering it, the media and a prominent MP complained that the EU was "ruining British jam".[11,12]

What made this story particularly ironic, though, is that the standard came not from the EU but the Codex Alimentarius Commission.[13] The EU was simply adopting it. Thus, in the regulatory chain, there were four parties: the WTO, Codex, the EU and the UK government. Outside the EU, the UK would have still been required to adopt the same law.

This failure properly to identify the origins of law is not unusual. At the height of the EU referendum campaign, "leave" activists asked to present examples of EU laws which presented a burden on business, would often revert to the absurd renditions of EU law. One prominent activist, now the Foreign

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[6] https://blogs.ec.europa.eu/ECintheUK/are-british-businesses-really-being-strangled-by-eu-red-tape/

[7] https://blogs.ec.europa.eu/ECintheUK/daily-express-11-barmy-eu-rules/

[8] Jam and Similar Products (England) Regulations 2003, http://www.legislation.gov.uk/uksi/2003/3120/pdfs/uksi_20033120_en.pdf

[9] Council Directive 2001/113/EC, http://eur-lex.europa.eu/LexUriServ/site/en/consleg/2001/L/02001L0113-20040712-en.pdf

[10] See: *The Daily Telegraph*, 22 February 2012, http://www.telegraph.co.uk/foodanddrink/foodanddrinknews/9099121/Couple-left-in-a-jam-by-EU-regulations.html and *Daily Mail*, 23 February 2012, http://www.dailymail.co.uk/news/article-2104836/Clippys-Apple-Preserves-Clippy-McKennas-spread-doesnt-qualify-jam.html

[11] For a full analysis, see here: http://www.eureferendum.com/blogview.aspx?blogno=84464

[12] https://www.thesun.co.uk/archives/politics/296890/british-jam-is-toast/

[13] Codex Standard for Jams (Fruit Preserves) and Jellies – S tan 79-1981, See: http://std.gdciq.gov.cn/gssw/JiShuFaGui/CAC/CXS_079e.pdf

Secretary, urged supporters to help Britain get rid of "pointless regulations", complaining that: "you cannot sell bananas in bunches of more than two or three bananas".[14]

This fictional account of a law belies the fact that the "banana regulation" is a long-established marketing standard which pre-dates the EEC. Currently, it implements a global standard produced by Codex. Its purpose is to facilitate the international trade in a product which had in 2013 a total traded value of US$9 billion, with a retail value of approximately US$25 billion.[15]

Reliance on the fictional account illustrates to a very great extent the nature of a debate driven to invention and exaggeration. One 'oft-quoted "horror story" was the 2001 Clinical Trials Directive, an instrument that was indeed flawed but which, by the time the complaints were being aired, was being replaced by the 2014 Clinical Trials Regulation.[16]

Another obsession has been the Procurement Directives, wrongly claimed to have added £1.7 billion to the cost of public procurement, with no recognition that the Directives implement the WTO Agreement on Government Procurement, with the enthusiastic support of the UK government.[17]

Given that loss of control was a key element of the EU referendum, one might have thought that the "leave" campaign would have had an endless supply of "horror stories" which it could attribute to the EU. But it was not to be. Very few real world examples were offered. Of the few which were highlighted, most were not of EU origin.

A similar paucity had already been experienced in the Government balance of competence exercise, completed in December 2014. In the most extensive analysis ever undertaken of the UK's relationship with the EU, with 32 reports produced drawing on nearly 2300 pieces of written evidence, authenticated complaints about EU regulation were relatively rare.[18] A clue as to what might be the real objection to the EU, however, came in the analysis of the Single Market, where it was noted that:

> … it [the Single Market] has brought with it constraints on policy-making of varying kinds, and a regulatory framework which some find difficult to operate within or find burdensome, even if the obligations are not necessarily any greater than would have been imposed nationally.[19]

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[14] http://www.telegraph.co.uk/news/2016/05/17/boris-johnson-accused-of-making-it-up-as-he-goes-along-after-cla/
[15] http://www.eureferendum.com/blogview.aspx?blogno=86067
[16] http://www.eureferendum.com/blogview.aspx?blogno=86027
[17] http://www.eureferendum.com/blogview.aspx?blogno=86077
[18] https://www.gov.uk/government/news/final-reports-in-review-of-eu-balance-of-competences-published
[19] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227069/2901084_SingleMarket_acc.pdf

In essence, it is not necessarily the outcome of specific regulation – or even the fact of regulation - which provokes antagonism. It is the perception of having lost control, ceding authority to the "unelected" (and often "faceless") bureaucrats in Brussels.

Perspectives

While the perception of EU regulation as a negative force has been a driver of the anti-EU movement, within the business community, there is rarely the same degree of hostility to regulation. Much of it is treated as a normal and unavoidable part of the business environment. Generally, the concern in business is to ensure the necessary degree of compliance so as to avoid conflict with enforcement agencies, or adverse consumer reaction attendant on publicly reported non-compliance.

From experience of working with trade bodies, this author has found that business owners are often far more focused on the running of their businesses than they are the provenance of the regulations affecting them. And, as for forthcoming or proposed regulation, it was very difficult to get them interested in it at all. Not until it was in force and specific action was required did people tend to focus.

The upshot is that businesses tend only to concern themselves with regulation when it directly and immediately affects them, and then only to the extent necessary to ensure the smooth running of the business. Complaints about regulation tend to materialise – and persist – only if they are in force and are actually damaging the business.

The point to take from this is there is very little concern about who makes regulation, and under what circumstances. What matters is whether it is possible to remove or mitigate the effect of regulation that is actually damaging the business.

Then, the approach is to tackle the nearest or most accessible representative of officialdom and work from there. The reason then that the EU gets its bad name is because, while it is often possible to fix locally-make regulation, it is harder to achieve satisfaction when Brussels appears to be the source. And, if the blockage is Brussels, then rarely is it thought necessary to do any further. One might thus have a situation where the EU cannot respond to complaints because a measure implements a globally determined requirement, yet Brussels will get the blame for its apparent intransigence.

Accountability, therefore, is not measured directly in terms of power to make legislation, but in relation to the ability to fix things when they go wrong. As for the legislators – and especially MPs who may take the brunt of constituents' complaints when things go wrong – they will see the EU as the blockage and look to the removal of the EU (i.e., Brexit) as a means of restoring their ability to secure remedies to problems brought to them by their electorates.

Effectively, the focus of campaigners is wrong. To a very large degree, it doesn't matter who makes the law. Those who complain so bitterly about foreign-made law themselves have little idea of its origin and even less idea of how it is made – the exact mechanisms used. If they cared, they would know. The fact that they don't is more than adequate testimony to the rectitude of the thesis.

Ultimately, democracy – the overall sense of "rightness" - is judged by the capability of the system to remedy errors – real or perceived. Where timely corrections are made, in response to individual or collective concerns, people are likely to be more satisfied than they might be with a system which is more efficient overall, but less capable of addressing its errors. To that extent, government is invisible and its efforts unappreciated and unrewarded until it makes mistakes. Its reputation will then depend on how well it deals with those mistakes.

The essence of this was summed up by Hillary Clinton in a speech in 2009 on the Human Rights Agenda for the 21st Century. Then, she declared: "When injustice anywhere is ignored, justice everywhere is denied. Acknowledging and remedying mistakes does not make us weaker, it reaffirms the strength of our principles and institutions".[20]

Correcting errors

In his report on the negotiations for the UK's entry into the EEC, Sir Con O'Neil observed that almost every conceivable Community policy and rule or enactment is the resultant of a conflict of interests between the members, and has embedded in it features representing a compromise between these interests. Open it up at any point, he wrote, and the whole laborious basis of the compromise will fall apart.[21]

This still applies and, for this reason, and the tendency to regard the *acquis communautaire* as an entity in its own right – valued for what it represents rather than as a prosaic tool to achieve certain ends – the European Union is slow to respond to claims of error or inadequacies in its law-making. One sees a strong attachment to the bicycle theory European integration: "if it stops moving forward, it will fall over".[22] Having finalised an instrument, the Commission is very often reluctant to go back on it in response to externalities.

Arguably, these phenomena are sufficient to validate the decision to withdraw from the EU. A system which is insufficiently responsive to its own errors, elevating its own maintenance requirements above the needs of the people it serves cannot be considered democratic – in the full sense of the word.

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[20] http://www.state.gov/secretary/20092013clinton/rm/2009a/12/133544.htm

[21] See p.40 https://www.amazon.co.uk/Britains-Entry-into-European-Community/dp/0714651176/

[22] http://www.economist.com/node/596938

However, simply leaving the EU does not necessarily resolve anything – and certainly not in terms of returning powers to Westminster. On current form, the power will revert to Whitehall, exercised by Statutory Instrument, over which parliament has little effective control. And where the UK government is responding to its many treaty obligations or other agreements, the law-making agenda will remain outwith the control of parliament. Apart from small enhancements around the edges, very little will have changed.

The logic of the situation, therefore – assuming that the perception of a democracy is largely (or even in part) determined by the capacity of the system to remedy its own mistakes – is that any Brexit settlement must embody, *inter alia*, two specifics. The first is a mechanism for negating or remedying the effects of flawed or inappropriate legislation (whatever its source). The second is putting parliament at the heart of whatever mechanism is designed to achieve this effect. Inevitably, this will require domestic changes, as well a measures incorporated into the Article 50 settlement.

On the domestic front – and indeed in respect of European law – one commonly used, if expensive, mechanism is resort to the Courts via the process of judicial review. The limitation of this, though, is that success relies on the plaintiff being able to demonstrate that the minister (or relevant official body) has acted outside the law (*ultra vires*) or that there has been a significant procedural defect. There is no mechanism for challenging the law itself. Officialdom is permitted to make bad decision, based on bad law, as long as the correct procedures are followed.[23] It is hard to imagine anything more likely to foster a sense of injustice.

The greater disutility in resorting to judicial review it that is shifts the focus from parliament to the law courts. The aggrieved are not beating a path to Westminster, demanding that MPs should be held accountable for the laws they have (nominally) approved. But resort to the courts rather than to MPs is the symptom. The real problem is that no remedy lies in Westminster.

At an international level, however, there are remedies - mechanisms for suspending or removing treaty requirements where, for diverse reasons, a contracting party finds conformity difficult or politically inappropriate. Most common of these are the so-called "safeguard measures" and waivers. Either, when used in accordance with defined procedures, permits a party to remove themselves from part of a treaty (temporarily or permanently) without prejudicing the application of the whole.

In respect of certain categories of administrative laws of domestic origin, there would seem to be no constitutional barrier to including in their provisions a mechanism for suspending any parts, or the entire law, either in respect of any individual or group, for a temporary period, upon the order of a Minister who is subject to a resolution from parliament (requiring a minimum number of MPs),

[23] http://www.publiclawproject.org.uk/data/resources/113/PLP_2006_Guide_Grounds_JR.pdf

pending a review of its application. This then leaves it open for the law to be repealed or amended, before the expiry of the suspension (and any extension that may be allowed).

At international level, we already see such provisions, especially in the WTO agreements where waivers are a commonly used device. Generally, waivers are regarded as safety valves, which defuse conflicts which might otherwise result in a member withdrawing from the agreements as a whole.

For the UK, to restore an element of parliamentary control, there seems no reason why the formal device of a resolution should not compel the executive to apply for a waiver, or invoke safeguard measures, where relevant to securing a remedy for a proven injustice or to prevent unnecessary damage to business interests.

This might be especially appropriate if the UK adopts the Efta/EEA option as part of the Article 50 settlement. With Article 112 of the EEA Agreement permitting an Efta state unilaterally to invoke safeguard measures, which have the effect of suspending any of the Agreement provisions, a system which enabled the national parliament to trigger the Article (albeit at one stage removed), would do much to restore the balance of power between executive and parliament.

It would also resolve some of the inherent tension between the increasing scope of international law, and the national legislator. The latter is being progressively sidelined by strengthening relationships between the executive and international standard-setting bodies. The resolution mechanism would reverse that tendency and put parliament back in control.

The adoption of the Efta/EEA option notwithstanding, the inclusion of waivers or safeguard measures as a core part of the Article 50 settlement, and any subordinate or consequential agreement (such as a free trade agreement) should be a minimum requirement, with a resolution mechanism built-in to the Westminster parliament's rules, permitting MPs to intervene in the interests of their electors, when they judge it is necessary to do so.

Conclusions

Control is relative. That much was evident from the crash of the new fly-by-wire Airbus A320-111 on 26 June 1988 during Mulhouse–Habsheim Airport airshow. A suggested cause of the crash was that the fly-by-wire system, which has the ability to override pilot inputs, misunderstood the unusual air show flight path and thus prevented the pilots from increasing engine power in order to climb and avoid impact with the ground.[24]

When MPs and others, therefore, call for controls over UK laws to be restored to parliament, that degree of control is going to be relative. Parliament has

[24] https://en.wikipedia.org/wiki/Air_France_Flight_296

never had total control over the creation and promulgation of law, or control over its implementation and continued existence.

What matters, therefore, is not control, *per se*, but the degree of control where it matters. For MPs, one might argue, the control has to be such as to allow parliament as an institution readily to intervene in the interests of constituents, and in general, so that they can maintain effective yet accountable government.

Clearly, across the broad sweep of law making, there is little interest in the formulation of the raft of technical standards that subsequently become law. One cannot imagine even the most strident advocates of representative democracy manning the barricades because a remote technical committee working under the aegis of a United Nations agency based in Rome decides that the sugar content of jam should be 60 rather than 53 percent. Where parliament then might express an interest is when that standard materially affects the ability of a UK business to trade, for no good reason.

In the case of Michelle "Clippy" McKenna and her jam standard, implemented by the EU and then the UK government, there was already a mechanism for resolving the issue. But, in many instances, defects in laws which become apparent only after they take effect cannot be easily resolved. And the higher up the global standard-making ladder they go, the more difficult it is for parliament to secure remedies on behalf of UK citizens.

Thus, what we propose in this Monograph is the adaptation of the "safeguard measures" and waiver mechanisms. These should allow parliament to be brought back into the loop, and take an active part on the protection of UK interests in areas where it is at present excluded. Fortuitously, these mechanisms can also redressing the balance of power between parliament and the executive, in respect of domestic legislation.

It is argued that such mechanisms would satisfy the demands for a return of powers to Westminster, with the merit of not interfering with the processes of global standard-setting which are so vital to the development and expansion of international trade.

Nor is the extent of such a mechanism confined to trade matters. It could be of great use in the more contentious areas such as immigration and security, where specific issues are mandated by international agreements.

In any event, no domestic laws or international agreements can be allowed to stand in circumstances where they are beyond the reach of ordinary citizens and their elected representatives, no matter what damage they might cause, or how inappropriate they are or have become. Had the EU been conscious of that principle, and allowed it to take effect, the UK might be remaining in the EU.

ends.