

Power Unplugged

Keir Starmer MP

David Davis, Secretary of State for Exiting the European Union and sometimes UK negotiator with the European Union, squirmed while Keir Starmer MP, his Labour opponent, filleted his fishy European Union (Withdrawal) Bill at Westminster on 7 September 2017. By turns, a governmental power grab that undermines rights at work and elsewhere, the Bill also seeks to abolish the Charter of Fundamental Rights, which would be a huge blow against human rights in the United Kingdom. We reprint the Charter in full. Some relevant passages from the Commons exchanges are emphasised in bold.

‘I beg to move, to leave out from ‘That’ to the end of the Question and add:

‘this House respects the EU referendum result and recognises that the UK will leave the EU, believes that insisting on proper scrutiny of this Bill and its proposed powers is the responsibility of this sovereign Parliament, **recognises the need for considered and effective legislation to preserve EU-derived rights, protections and regulations in UK law** as the UK leaves the EU but declines to give a Second Reading to the European Union (Withdrawal) Bill because the Bill fails to protect and reassert the principle of Parliamentary sovereignty by handing sweeping powers to Government Ministers allowing them to bypass Parliament on key decisions, without any meaningful or guaranteed Parliamentary scrutiny, fails to include a presumption of devolution which would allow effective transfer of devolved competencies coming back from the EU to the devolved administrations and makes unnecessary and unjustified alterations to the devolution settlements, **fails to provide certainty that rights and protections will be enforced as effectively in the future as they are at present, risks weakening human rights protections by failing to transpose the EU Charter of Fundamental Rights into UK law, provides no mechanism for ensuring that the UK does not lag behind the EU in workplace protections and environmental standards in the future and prevents the UK implementing strong transitional arrangements on the same basic terms we currently enjoy, including remaining within a customs union and within the Single Market.**’

The Secretary of State is keen to portray the Bill as a technical exercise converting EU

law into our own law without raising any serious constitutional issues about the role of Parliament. Nothing could be further from the truth.

I will start with clause 9. As the Secretary of State and the Prime Minister know, the article 50 negotiations are among the most difficult and significant in recent history. Under article 50, the agreement will cover all the withdrawal arrangements and take account of the future relationship between the UK and the EU – a backwards look and a forwards look on something that might last for decades. We know that phase 1 will have to cover EU citizens, Northern Ireland, UK citizens in Europe and the money, and that phase 2 will cover security, cross-border crime, civil justice, enforcement of judgments, fisheries, farming, Gibraltar – you name it, we hope it will be in the article 50 agreement. We want it to succeed; we need an agreement. It will also include our future trading arrangements – hugely important – including any transitional arrangements, if there are any, and much more.

Arguably, the arrangements will extend to every facet of national life – not my words, but I will come back to them. The article 50 agreement will be voted on, but it will then have to be implemented. It is a colossal task likely to involve a host of policy choices and to require widespread changes to our law – on any view. So how will that be done? Enter clause 9:

‘A Minister of the Crown may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provisions should be in force on or before exit day.’

It is very likely to have to be in force before exit day, because otherwise there will be a gap, so that means the whole of the agreement, including transitional measures, being implemented under clause 9. It cannot be implemented after exit day, otherwise there will be a gap.

Let us be clear about how widely clause 9 is drawn. We have had some discussion about Henry VIII. Subsection (2) states:

‘Regulations under this section may make any provision that could be made by an Act of Parliament’ – it is a true Henry VIII clause; it can modify Acts of Parliament – ‘(including modifying this Act).’

The delegated legislation can amend the primary Act itself. That is as wide as any provision I have ever seen.

What are the limits and safeguards? Under clause 9(3), the regulations may not impose taxation, make retrospective provisions – they are usually a very bad idea – create a criminal offence or amend the Human Rights

Act. Everything else is on limits under clause 9.

Given that the clause is drawn so widely, one would expect an enhanced procedure or some other safeguards – surely not just ordinary old delegated legislation.

What are the procedures? Are they enhanced? No. The opposite. Part 2 of schedule 7 deals with clause 9. It makes it clear that unless the delegated legislation creates a public authority, or the function of a public authority, affects a criminal offence or affects a power to make legislation, it is to be dealt with by – what? The negative procedure for statutory instruments, which means the least possible scrutiny: it means that the widest possible power, with no safeguards, will be channelled into the level of least scrutiny.

That is absolutely extraordinary. Let us be clear about what it means, because I am sure that the Secretary of State and others will say that notwithstanding the number of statutory instruments for which the schedule provides, they can be called up and annulled, and Parliament will have its say. I looked up the last time a negative-procedure statutory instrument had been annulled in the House, and it was 38 years ago. I do not know how many Members have been in the House for 38 years, but many of us will not have had that opportunity. So much for ‘taking back control’.

There is no point in the Secretary of State or the Prime Minister saying, ‘We would not use these powers: take our assurance.’ If they would not use them, they are unnecessary, and if they are unnecessary they should not be put before the House for approval today.

Clause 7, ‘Dealing with deficiencies arising from withdrawal’, takes the same approach as clause 9, as does clause 8, ‘Complying with international obligations’. All those provisions are channelled into the negative procedure with the least possible scrutiny: they constitute a giant sidestep from parliamentary scrutiny on the most important issues of our day. But let me top it off. If you think that is bad – and I do – try clause 17. Subsection (1) states:

‘A Minister of the Crown may by regulations make such provision as the Minister considers appropriate in consequence of this Act.’

So anything in consequence of the Act can be done under clause 17. Again, this is a proper, robust Henry VIII provision. Let us look at subsection (2). It states:

‘The power to make regulations under subsection (1) may...be exercised by modifying any provision made by or under an enactment.’

That means amending primary legislation. In case anyone is in doubt, subsection (3) states:

‘In subsection (2) “enactment” does not include primary legislation passed or made after the end of the Session in which this Act is passed.’

So the Government can amend any legislation whatsoever – primary legislation – including legislation in this Session. Everything in the Queen’s Speech that is coming down the track could be amended by delegated legislation under clause 17. I have never come across such a wide power, although I have come across consequential powers. The Secretary of State will no doubt point to other statutes that provide for not dissimilar powers; I have looked at them, but I have never seen one as wide as this.

Members should not just take my word for it. A minute ago, the Secretary of State said that no one could suggest that this was a legislative blank cheque for the Government. Let me read out what has been said by the Hansard Society – not a political body, not the Opposition, but the Hansard Society – about clause 17.

‘Such an extensive power is hedged in by the fact that any provision must somehow relate to withdrawal from the EU, but given that this will arguably extend to every facet of national life, if granted it would, in effect, hand the government a legislative blank cheque.’

Those are the words of the Hansard Society.

What is the scope and extent of that legislative blank cheque? How many pieces of delegated legislation are we concerned with? As the Secretary of State said, the White Paper suggested that there would be between 800 and 1,000, the vast majority of which would be dealt with via the negative procedure route. I do not think that the White Paper could, or did, take into account the further instruments necessary to implement the withdrawal agreement, but there could be very many more – well over 1,000 pieces of delegated legislation, given the least possible scrutiny.

I was glad to see that the Prime Minister was here earlier. Yesterday, during Prime Minister’s Question Time, she told the House that ‘the approach’ – the Government’s approach to the Bill – ‘has been endorsed by the House of Lords Constitution Committee.’

I read the report again last night, and I have doubts about that endorsement.

As the Prime Minister and the Secretary of State will know, this morning the House of Lords published a further report on the Bill, which

reached the following conclusion:

‘The executive powers conferred by the Bill are unprecedented and extraordinary and raise fundamental constitutional questions about the separation of powers between Parliament and Government.’

The report – published by the Committee that the Prime Minister prayed in aid yesterday – went on to say:

‘The number, range and overlapping nature of the broad delegated powers...would fundamentally challenge the constitutional balance of powers between Parliament and Government and would represent a significant – and unacceptable – transfer of legal competence.’

Far from being an endorsement, that is an explicit and damning criticism of the Government’s approach.

Interventions

... It is not as if this point is being made for the first time today: these are the points that have been made since the White Paper was published – the moment we dealt with it. That was in March, the Bill was published in July, and there have been numerous reports since then, and I raised at the time the significant issues I am raising now, and there has been no move from the Government.

Chris Bryant (Labour)

The key point about clause 9 is that the Government have asked Parliament to allow them to alter the Bill themselves by secondary legislation once it has been enacted. If we look through the history of the 20th century, we will not find a single Bill that has ever sought to do that – not in time of war and not in time of civil emergency. In fact, every single emergency powers Act has expressly said that there shall not be a power for Ministers to alter primary legislation.

... Keir Starmer

I am on my feet answering the last intervention, which powerfully makes the point that this Bill is unprecedented in its scope. That is significant because the Secretary of State will point to some of the safeguards under the Bill for the exercise of some of these powers, but if delegated legislation can amend the Bill’s powers once enacted then notions of exit day, how far the delegated legislation goes and which procedures are used could be amended by the delegated legislation. So it is a very real point.

... **Let me turn from parliamentary involvement to the protection of rights.** Many rights and protections derived from the EU are protected in delegated legislation under the European Communities Act 1972. Because they are underpinned by EU provisions, they have enjoyed **enhanced protection** – 44 years' worth. **They include some very important rights: the working time rights of people at work; the rights of part-time and fixed-term workers; the transfer of undertakings provision, which affects everybody who is at work if their company is taken over, so that their contracts are preserved, which is something we all believe in; and all health and safety provisions have been handled by delegated legislation under the 1972 Act, too.** It did not matter that it was just delegated legislation, because they had enhanced protection because of the 1972 Act and our membership of the EU. **The same is equally true of important environmental rights and protections for consumers.** Under this Bill, the Secretary of State says they survive, and I accept that, and he does have a commitment to rights at work, but **they do not survive with their enhanced status;** they survive only in delegated form. **From the date of this Bill, they are amendable by delegated legislation. All of those rights at work, environmental provisions and consumer rights are unprotected from delegated legislation.**

Victoria Atkins (Conservative)

On health and safety protections, the right hon. and learned Gentleman knows, of course, that there is a 1974 statute – the Health and Safety at Work etc. Act 1974 – which gives not just employees safety protections, but members of the public who are affected by conditions in the workplace. Surely that in itself acts as the primary protection to workers in this country under health and safety provisions?

Keir Starmer

No, I am afraid it does not. The Manual Handling Operations Regulations 1992, the Management of Health and Safety at Work Regulations 1999 and the Workplace (Health, Safety and Welfare) Regulations 1992 all post-date that, and in any event that does not deal with all the other rights I have mentioned.

Caroline Lucas (Green)

The right hon. and learned Gentleman is making an excellent speech. On environmental standards, does he agree that there is another problem – a governance gap? With the lack of the European Court of Justice and the

Commission, there is nothing to enforce those environmental standards, and therefore we need a new legal architecture; judicial review is not enough.

I am very grateful for that intervention, because one thing that is not on the face of the Bill is any enforcement provision for rights currently enforced in one or other way through EU institutions, or even reporting obligations. It is fair to say that there is the provision in the Bill for the creation of public authorities – by, guess what, delegated legislation – and maybe that could be used for remedies, but it is by no means clear on the face of the Bill, and that is an important deficiency.

Let me complete this point: does it matter that these rights have lost their enhanced protection? Yes, it does. Taking back control obviously carries with it that this Parliament can change those rights, as the Secretary of State rightly set out, but this is to change them by delegated legislation, not primary legislation; that is an important distinction.

Does it matter? Would anybody have a go – surely not in the 21st century? Well, in June 2014 the current Foreign Secretary called for an end to ‘back-breaking’ employment regulations, specifically the collective redundancies directive. The current International Development Secretary during the referendum campaign called for the Government to halve the amount of protection given to British workers after Brexit. And the International Trade Secretary – I am addressing the question of whether it is conceivable that a Conservative Government might change this; I am reading out the statements of three Cabinet members. In February 2012 the International Trade Secretary ... wrote:

‘To restore Britain’s competitiveness we must begin by deregulating the labour market. Political objections must be overridden. It is too difficult to hire and fire and too expensive to take on new employees. It is intellectually unsustainable to believe that workplace rights should remain untouchable while output and employment are clearly cyclical.’

The Secretary of State for Exiting the European Union has a proud record on human rights and protections of people at work, but these are the statements of Cabinet colleagues, and this power in this Bill allows these rights to be overridden by delegated legislation.

Intervention

... I was suggesting that workplace rights, environmental rights and consumer rights should only be capable of being taken away by primary

legislation. If there is any doubt, I can assure the hon. Gentleman that when I say primary legislation I mean legislation in this House; I thought that was taken as read.

Nicky Morgan (Conservative)

Does not the last intervention point to the fundamental misunderstanding that some have about this Bill – and I am afraid the Secretary of State mentioned it earlier? The point is whether the UK is going to become a rule-taker rather than a rule-maker. Our membership of the European Union has allowed us to influence the directives and regulations which have then been taken on board in this House and through our laws. What we are doing in this Bill – I will expand on this in my remarks – is not repealing, but reintroducing European legislation into this country, contrary to the intentions of those who wanted to leave the European Union.

Keir Starmer

I am grateful for that intervention and agree with it. May I move on to other rights, because they are dealt with more severely? Clause 5(4) singles out the Charter of Fundamental Rights for extinction. There are thousands of provisions that are being converted into our law and will have to be modified in some cases to arrive in our law, but only one provision in the thousands and thousands has been singled out for extinction – the Charter of Fundamental Rights. As the right hon. and learned Member for Beaconsfield (Dominic Grieve) argued in an article published yesterday, the principles of the charter provide ‘essential safeguards for individuals and businesses’. That has been particularly important in the fields of Lesbian, Gay, Bisexual and Transgender (LGBT) rights, children’s rights and the rights of the elderly.

The Secretary of State asks why this matters. I have here the High Court judgment in the case of David Davis MP, Tom Watson MP and others the Secretary of State for the Home Department. This was in 2015, when the present Prime Minister was Home Secretary. David Davis the Back Bencher was bringing to court the now Prime Minister. He will recall that he was challenging the provisions of the Data Retention and Investigatory Powers Act 2014. He was concerned that they would impinge on the ability of MPs to have confidential communications from their constituents. He continued to make that point in debates that we were having a year or two ago. In his argument, he cited the Charter. His lawyers made the argument that the Charter was important because it went further

than the European Convention on Human Rights and therefore provided added protection.

I will not read out paragraph 80 of the judgment, although I am sure that the Secretary of State is familiar with it. As he knows, the Court found in his favour – he was right: the Charter did enhance his rights – and rejected the arguments of Mr Eadie, the distinguished QC representing the then Home Secretary, now the Prime Minister. So when the Secretary of State asks whether this move will make any difference, the answer is yes. We can see that from his case. I suspect that if he were still on the Back Benches, he would now be talking to me and others over a cup of coffee about how we should fiercely oppose clause 5(4) and ensure that it came out of the Bill.

Dominic Grieve (Conservative)

The right hon. and learned Gentleman makes an important point. Reading the mind of my right hon. Friend the Secretary of State, I think he asked why this mattered because he would insist that the general principles of EU law being preserved would replace the Charter. However, if they are not justiciable because we do not find a cause of action in our courts, the ability to assert those rights would evaporate.

Keir Starmer

That is exactly the point that was made earlier. To say that the changes do not matter because we can find that right elsewhere, but then to remove the right to do anything about an effective remedy, would mean that the exercise had achieved absolutely nothing ... I spent 20-plus years as a human rights lawyer interpreting and applying provisions such as the Charter and acting for many people to whose lives it made a real difference, as the Secretary of State will know.

I want to move on the question of devolved powers. At the moment, EU law limits the powers of the devolved institutions. On withdrawal, the default position ought to be that the devolved institutions would have power over matters falling within the devolved fields, but clause 11 prevents that and diverts powers that ought to go to Edinburgh, Cardiff or Belfast to London, where they are to be hoarded. That is fundamentally the wrong approach, but it is totally consistent with the Government's approach of grabbing powers and avoiding scrutiny.

On that topic, let me deal with **exit day**, a crucially important day in the Bill. It is the day on which the European Communities Act will be repealed. **It is also the day on which the role of the European Court of**

Justice will be extinguished in our law, and that matters hugely, whatever anyone's long-term view, particularly for transitional arrangements. I heard the Secretary of State say this morning that he wanted transitional arrangements that were as close as possible to the current arrangements. I think he knows, in his heart of hearts, that that will almost certainly involve a role for the European Court of Justice – although he will say that it would be temporary.

Exit day, the day on which the role of the Court is extinguished, is crucial. Without it, we might not be able to transition on the terms that the Secretary of State was suggesting this morning. He knows that. Control over exit day is therefore hugely important. Who will have that control? People talk about bringing back control, and they might think that Parliament would have control over this important issue. But no. Enter clause 14, which states that

“exit day” means such day as a Minister of the Crown may by regulations appoint.’

This will be in the sole power of a Minister. Anyone simply passing this Bill must be prepared to be a spectator on the question of what the transitional measures should be and how they operate. That is a huge risk to our national interests.

Wes Streeting (Labour)

The Secretary of State said earlier that it was ‘silly’ of me to raise the transitional arrangements in relation to our continuing to be in the single market and the customs union. If the Bill is enacted and we are outside the purview of the ECJ and not subject to EU law, we will effectively be ruling out membership of the single market and the customs union during the transition. How will that bring stability and certainty to British businesses? Why is this provision in the Bill?

Keir Starmer

This is the conundrum that the Secretary of State and the Bill have created. If exit day is in March 2019, it is difficult to see how we could transition on terms similar to those we are now on. What could we do? We could choose to push exit day two years down the line. No? Well, if we did not do that, but we recognised that the ECJ was necessary to the process, we would end up repealing what was once this repeal Bill, only to have to bring it back in again. That is the extent of the absurdity of the powers in the Bill.

Joanna Cherry (Scottish National Party)

The right hon. and learned Gentleman is making an outstandingly concise and forensic speech dissecting the difficulties in the Bill. He has drawn our attention to the problem with the definition of ‘exit day’. Does not that problem also feed into the delegated legislative powers? Clause 7(7) states that Ministers cannot make regulations ‘after the end of the period of two years beginning with exit day’. If exit day is going to disappear down the line, as the shadow Secretary of State has suggested, would not the power to make delegated legislation continue for even longer than the Government are now proposing?

Keir Starmer

It certainly could. The only way out of that would be to have multiple exit days. Members might think I am joking, but someone who drafted the Bill has thought of that, and it is conceivable that there could be multiple exit days, all chosen by a Minister and not by Parliament. The combined effect of the Bill’s provisions would be to reduce MPs to spectators as power pours into the hands of Ministers and the Executive. This is an unprecedented power-grab – ‘rule by decree’ is not a mis-description – and an affront to Parliament and to accountability. The name of the Bill was changed from the great repeal Bill to the European Union (Withdrawal) Bill. The word ‘great’ should have been preserved, however. The title should have been changed to the great power grab Bill. Labour voted for the article 50 legislation, because we accept the referendum result. As a result, the UK is leaving the EU. That we are leaving is settled. How we leave is not. This Bill invites us to surrender all power and influence over that question to the Government and to Ministers. That would betray everything that we are sent here to do. Unless the Government make very significant concessions before we vote on Monday, Labour has tabled a reasoned amendment and will vote against the Bill.

Source: Hansard