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Dominic Grieve: Only a watertight withdrawal bill can put Brexit into effect

Disentangling UK and EU laws is a major hurdle for the Government as it bids to leave the union

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- DOMINIC GRIEVE QC MP

In the loop: Brexit Secretary David Davis updates the Commons yesterday on progress on the Brexit talks *PA*

Very few MPs disagree with the need for a withdrawal bill to enable us to disentangle our 50-year relationship with the legal structures of the European Union and to enable us to function effectively outside of it. Having campaigned to remain in the EU, I voted to trigger Article 50, in response to the clearly expressed wish of the electorate. It must now be my

duty as an MP to try to ensure that Brexit is as smooth as possible and that there is a sound legislative framework in place to bring this about. A chaotic departure is in no- one's interest.

The challenge which the Government faces in bringing this about is considerable. Half a century of shared development and the growth of a common body of European law has affected many aspects of our domestic, economic, financial, social and legal order. EU law has evolved its own structures and rules to aid its interpretation and conferred rights on individuals and companies to challenge its application, based on general principles of law that are distinct from those which apply to us under our own law, in a purely domestic context.

The Government has correctly recognised that this EU law cannot all be changed into domestic law at once. This is why the bill seeks to incorporate this law into our own statute book to ensure continuity, except where there is an immediate intention to bring in something different, such as in respect of immigration.

Unfortunately, the withdrawal bill is not, at present, up to addressing these issues. Even more worryingly, it seeks to confer powers on the Government to carry out Brexit in breach of our constitutional principles, in a manner that no sovereign Parliament should allow.

The first objection lies in the way in which the Government is seeking to maintain legal continuity while bringing the current subordination of our legal system to the supremacy of EU law to an end. Once EU law ceases to be supreme it is unclear how this vast body of law, which will then be incorporated into our own domestic law, will be interpreted by our own courts. Some clauses of the bill seek to confirm that all direct EU legislation operating before exit day survives and that all rights and remedies available under EU law persist, unless specifically abolished. The bill then seeks elsewhere to restrict the ability to enforce these rights, preventing our domestic courts from limiting or quashing the incorporated EU law on the basis that it is incompatible with the general principles on which EU law is based. In particular, the Charter of Fundamental Rights of the EU, whose principles form the bedrock of how EU law should be applied, ceases to apply

after exit day.

The Charter has been criticised because of a tendency of the Court of Justice of the EU to interpret it in ways that are considered to wrongly expand its scope. But it and the general principles of EU law it reflects are essential safeguards for individuals and businesses that might be adversely affected by the application of EU law and they cannot and should not be removed in this fashion.

We are thus creating uncertainty as to how EU law will apply after incorporation. This is not a satisfactory position and it needs to be addressed during the passage of the legislation, as a lack of legal certainty is contrary to one of the fundamental principles of the Rule of Law. It was, I believe, the reason why the president of our own Supreme Court, Lord Neuberger, recently expressed concern at the way the bill was drafted and at the difficult burden that this lack of clarity would place on our judiciary.

Second, in order to try to address uncertainties in the legislation, the Government is seeking the power to remedy any deficiency in the bill by statutory instrument, a "Henry VIII" clause allowing for ministerial rule by decree on any matter that can be connected to a failure of the incorporation of EU law to operate effectively. The judge of the effectiveness of the operation of the law will be the minister himself. Even before the bill was published, the House of Lords select committee on the constitution highlighted its concern at the creation of sweeping powers of this kind. As published in this bill, it allows for the possibility of vast areas of law being changed without full parliamentary process. It is essential that these powers should both be reduced and better defined in scope and made subject to a credible system of affirmative parliamentary scrutiny to ensure that they are only used where legitimately needed.

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It is the final oddity of the withdrawal bill that it seeks to provide a legal framework for a complete severance of our country from the EU, when the Government is also committed to trying to negotiate a continuing

relationship with the EU after Brexit. It is therefore unclear what further legislation might be needed before we leave the EU to provide for this, or how it might impact on the withdrawal bill itself. As presently drafted, no further reference to Parliament will in theory be needed before the final ending of our EU membership. Parliament should ensure that the withdrawal bill cannot be brought into force until the final agreement being negotiated by the Government has become crystallised. Otherwise we are simply leaving it to the executive to decide what is best. This is an abdication of our responsibility.

Scrutinising detail is not obstructing the referendum result. The electorate did not vote to "take back control" to see our domestic constitution and liberties vandalised. If the Government listens on this, we can all work together to effect this major constitutional change properly.

Dominic Grieve QC is the Conservative MP for Beaconsfield

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