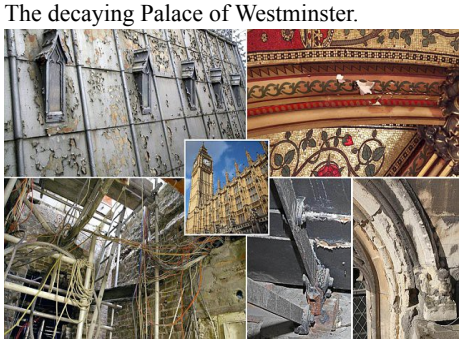
Monograph 12.Taking back control

14 September 2016

Introduction

One of the less helpful ideas associated with Brexit is the assumption that, **on leaving the EU, we would restore parliamentary sovereignty**, by allowing the return of power from Brussels to Westminster. 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.

This represents a somewhat rosy view.



The decaying Palace of Westminster.

Power repatriated from Brussels might not be returned to Westminster, it **might bolster the already over-mighty executive instead.**

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.

The dilution of power

By far the bulk of legislation is passed into UK law via t**he Statutory Instrument (SI)** route. Most SIs become law automatically, without a vote or debate, unless there is a majority vote against them.[1]

The origins of the SIs can be many and varied. Laws might start as recommendations or policy decisions made by **home departments** – 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. 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. 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 **World 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. 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). 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. It is increasingly done by national executives, without a treaty mandate.

Parliaments are often relegated to impotent observers, often unaware of events until after action has been taken.[2] **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.

1 Such votes are extremely rare.

2 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).

Parliament, over many years and in many diverse ways, has become weak, often with very little power and little relevance to the concerns of ordinary people.

At several levels, therefore, parliamentary sovereignty is a chimera[3].

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".

Here is just one example:

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.
The regulations, however, implemented EU law so there was a classic "barmy Eurocrats" story in the making, heavily exploited by the media. 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".
What made this story particularly ironic, though, is that the standard came not from the EU but the Codex Alimentarius Commission.
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 illustrates to a very great extent the nature of a debate driven to invention and exaggeration. The "leave" campaign should have had an endless supply of "horror stories" which it could attribute to the EU. But very few real world examples were offered. Of the few which were highlighted, most were not of EU origin.[4]

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

Perspectives

Within the business community, there is rarely the same degree of hostility to regulation. 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. Complaints about regulation tend to materialise – and persist – only if they are actually damaging the business. Businesses tend only to concern themselves with the **smooth running of the business.**

There is very little concern about who makes regulation. **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 that the EU gets its bad name is because, while it is often possible to fix locally-made regulation, it is much harder when Brussels appears to be the source. And, if the blockage is Brussels, then rarely is it thought necessary to go any further.

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.**

MPs take the brunt of constituents' complaints when things go wrong. They will often 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.

3 A horrible or unreal creature of the imagination; a vain or idle fancy:

4 The Government balance of competence exercise (completed in December 2014): (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.

Ultimately, the overall sense of "rightness" is judged by the capability of the system to remedy errors – real or perceived. **Ultimately 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.**[5]

Correcting Errors:

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 of European integration: "if it stops moving forward, it will fall over". Having finalised an instrument, the Commission is very often reluctant to go back on it.

Arguably, this is enough 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.

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 then there are the many **treaty obligations or other agreements** all of which place the law-making agenda outside the control of parliament.

There are two needs: 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.

Domestically, **the real problem is that no remedy lies in Westminster, because of the weakness of parliament.**

There are always the law courts. But officialdom is permitted to make a bad decision, based on bad law, as long as the correct procedures are followed. It is hard to imagine anything more likely to foster a sense of injustice.

Internationally, there are mechanisms for suspending or removing treaty requirements where **"safeguard measures" and waivers** permit a party to remove themselves from part of a treaty (temporarily or permanently) without prejudicing the application of the whole.

This could perhaps be introduced into domestic legislation too. It could be incorporated into **the Article 50 settlement. Article 112 of the EEA Agreement** permits an Efta state[6] unilaterally to invoke safeguard measures, which have the effect of suspending any of the Agreement provisions.

If the national parliament could trigger a waiver, it 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 EFTA agreement already contains waivers.

But the inclusion of waivers or safeguard measures as **a core part of the Article 50 settlement**, should be a minimum requirement, with a resolution built into 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:

5 "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". - Hillary Clinton.

6 Liechtenstein.

In too 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. This could be of great use in the more contentious areas such as **immigration and security**, where specific issues are mandated by international agreements (Article 112 of the EEA).

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.