

HOUSE OF LORDS

Select Committee on the Constitution

5th Report of Session 2019–21

**Private
International Law
(Implementation of
Agreements) Bill
[HL]**

Ordered to be printed 29 April 2020 and published 4 May 2020

Published by the Authority of the House of Lords

Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session “to examine the constitutional implications of public bills coming before the House; and to keep under review the operation of the constitution and constitutional aspects of devolution.”

Membership

The Members of the Constitution Committee are:

[Lord Beith](#)

[Baroness Corston](#)

[Baroness Drake](#)

[Lord Dunlop](#)

[Lord Faulks](#)

[Baroness Fookes](#)

[Lord Hennessy of Nympsfield](#)

[Lord Howarth of Newport](#)

[Lord Howell of Guildford](#)

[Lord Pannick](#)

[Lord Sherbourne of Didsbury](#)

[Baroness Taylor of Bolton](#) (Chair)

[Lord Wallace of Tankerness](#)

Declarations of interests

A full list of Members’ interests can be found in the Register of Lords’ Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>

Publications

All publications of the committee are available at:

<http://www.parliament.uk/hlconstitution>

Parliament Live

Live coverage of debates and public sessions of the committee’s meetings are available at:

<http://www.parliamentlive.tv>

Further information

Further information about the House of Lords and its committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is available at:

<http://www.parliament.uk/business/lords>

Committee staff

The current staff of the committee are Matt Korris (Clerk) and Alasdair Johnston (Committee Assistant). Professor Stephen Tierney and Professor Jeff King are the legal advisers to the Committee.

Contact details

All correspondence should be addressed to the Constitution Committee, Committee Office, House of Lords, London SW1A 0PW. Telephone 020 7219 5960. Email constitution@parliament.uk

Private International Law (Implementation of Agreements) Bill [HL]

Introduction

1. The Private International Law (Implementation of Agreements) Bill [HL] was introduced into the House of Lords on 28 February 2020 and had its second reading on Tuesday 17 March.
2. The Bill provides a new framework for the incorporation of international rules relating to private international law (“PIL”) in domestic law.
3. Private international law is the set of rules governing cases that raise cross-border issues—such as where two persons located in different countries enter into a contract. In the event of a legal dispute, private international law determines which court has jurisdiction, which laws apply to the contract, and whether and how one nation’s courts will recognise another’s judgments. In addition to contracting, such rules are required for other aspects of cross-border commercial transactions, torts, insolvency, family arrangements (including divorce, custody and child maintenance), enforcement of foreign judgments and in many other areas.

Constitutional context

4. The Bill raises an issue of constitutional significance. Clause 2 would change a long-standing convention of the constitution, which is that outside the exceptional case of making provision for EU law, international legal agreements that make changes to UK law are given domestic force by an Act of Parliament. Clause 2 seeks to empower the Government to give effect to a category of international agreements by way of statutory instrument rather than by primary legislation. While we do not doubt the Government’s good intentions, we nevertheless conclude that the proposal is unjustified by the arguments advanced and ill-considered in broader terms. While the remainder of this report explores the issues in detail, it is necessary to comment on its constitutional significance at the outset.
5. Clause 2 is of constitutional concern for two significant reasons. The first is that it exemplifies a problematic tendency of the Government to seek broad powers. In our report on *The Delegation of Powers* we concluded that “There has been an upward trend in the seeking of delegated powers in recent years and this should cease.”¹ Clause 2 is a striking example of this trend insofar as the powers are broad, indefinite, and would weaken the role of Parliament at a time when international law has taken on acute national salience. Furthermore, the arguments for Clause 2 rely heavily on the adequacy of the parliamentary treaty scrutiny process—a process we recently concluded was “limited and flawed.”²

1 Constitution Committee, *The Legislative Process: The Delegation of Powers* (16th Report, Session 2017–19, HL Paper 225), para 50

2 Constitution Committee, *Parliamentary Scrutiny of Treaties* (20th Report, Session 2017–19, HL Paper 345)

6. The second concern relates to the timing of the proposal. The process of leaving the European Union has placed enormous strain on several areas of the constitution. While still in the midst of that process, we have been affected by the extraordinary crisis of COVID-19, leading to unprecedented legal and political measures that have significant constitutional repercussions. In a period of profound constitutional challenge and change, we conclude that the case for a broad new power that rebalances the relationship between Parliament and the Government has not been made, and that clause 2 should not be part of this Bill.

Consultation

7. During the Bill's second reading Lord Mance observed that the Lord Chancellor's advisory committee on private international law had not been consulted about the Bill.³ The Explanatory Notes to the Bill do not refer to any consultation that was undertaken prior to its introduction. **The Government should set out the consultation it undertook on the Bill and explain why it did not consult its own advisory committee on private international law about these measures.**

Delegated powers and international agreements

8. International PIL agreements are normally implemented in domestic law through an Act of Parliament. Sometimes primary legislation simply gives legal force to the international agreement reproduced in a schedule.⁴ At other times, the statute enacts provisions that give effect to the international rules, but using UK statutory language.⁵ Clause 2(1) of the Bill provides a power for an "appropriate national authority"⁶ to make regulations for the purpose of, or in connection with, implementing any international agreement relating to private international law. Clause 2(4) creates a Henry VIII power to make consequential amendments and clause 2(6) gives effect to schedule 6, which sets the procedures for, and restrictions on, the use of these powers.
9. The Delegated Powers and Regulatory Reform Committee (DPRRC) observed that the "wide" power in clause 2 means "For the first time there will exist a *general* power to implement international agreements on private international law by statutory instrument, thereby obviating the need for an Act of Parliament. This will be so regardless of the nature or importance of the agreement."⁷
10. **This is a significant new power that would change the way this type of international agreement is implemented in UK law and how Parliament scrutinises them. It therefore needs careful consideration.** The Government advanced a number of arguments attempting to justify this power, which we consider below.

Timely action

11. In its Delegated Powers Memorandum the Government states that passing primary legislation to implement each new international agreement would

3 HL Deb 17 March 2020 [col 1445](#)

4 See, for example, the [Civil Jurisdiction and Judgments Act 1982](#)

5 See, for example, the [State Immunity Act 1978](#) and [Arbitration Act 1996](#)

6 An "appropriate national authority" is defined as a Secretary of State, a Scottish Minister, or a Northern Ireland department.

7 Delegated Powers and Regulatory Reform Committee, [Eighth Report](#) (Session 2019–21, HL Paper 40), para 7

create “unnecessary delay”.⁸ It says the Government’s commitment to “the UK remaining at the forefront of international developments in PIL” requires a “swift implementation mechanism”⁹ and not “being able to implement new PIL agreements quickly would damage the UK’s reputation as a leading member of the Hague Conference on Private International Law and a reliable international partner.”¹⁰

12. However, the Government offers no evidence to support this argument. The UK has become a party to only 13 Hague Conventions over the course of nearly 60 years.¹¹ In respect of some of the Conventions the UK has signed, full ratification and implementation has taken years to complete. The Hague Convention of 13 January 2000 on the International Protection of Adults, signed by the UK, was ratified for Scotland in 2003 but has not been ratified for England and Wales or for Northern Ireland.¹²
13. While there may or may not be an increase in the number of PIL agreements that are made in the coming years, there is nothing to suggest that PIL agreements will be produced at a rate that would preclude implementing them via primary legislation, nor that there are exceptional circumstances so urgent that resort to a fast-track bill would be impossible. It is therefore difficult to give weight to the Government’s argument that reputational damage will result from not having the power.

Scope and technicality

14. The Government states that international agreements on PIL are “generally narrowly defined, predictable in scope and content, and widely considered beneficial by Parliament and stakeholders,” and that they concern a “highly technical”, “narrow” and “specialised field of law”.¹³ It suggests that it “will therefore not be possible to amend the substantive rules contained in the agreement itself when implementing it via regulations in domestic law, and for that reason implementation of many PIL agreements is likely to consist of stating that the provisions of the agreement ‘shall have the force of law’.”¹⁴
15. PIL agreements are by their nature highly technical and reciprocal—they depend on each party to the agreement adopting the same or similar approaches to interpretation. However, this argument does not make the case for using secondary rather than primary legislation. While the implementing legislation should not detract from or vary the rules of an international agreement, it may supplement them, or limit or extend the territorial scope of application. This has been the case in respect of previous PIL agreements.¹⁵
16. The Explanatory Notes state: “International agreements on PIL rarely contain provisions about criminal offences, but it may be necessary when

8 Private International Law (Implementation of Agreements) Bill [HL], [Delegated Powers Memorandum](#), para 15

9 *Ibid.*, para 26

10 *Ibid.*, para 28

11 Private International Law (Implementation of Agreements) Bill [HL], [Explanatory Notes](#), Annex B. The list is reproduced in the Annex at the end of this report.

12 HL Deb 17 March 2020 [cols 1442–1143 & 1451](#)

13 Private International Law (Implementation of Agreements) Bill [HL], [Delegated Powers Memorandum](#), para 14

14 *Ibid.*, para 35

15 See, for example, section 3 of the [Carriage of Goods by Sea Act 1971](#) that supplements the relevant Hague Convention, or the additional provision in the [Child Abduction and Custody Act 1985](#) which went beyond giving effect to a relevant Hague Convention.

implementing some agreements, for example in the field of family law, to create enforcement provisions involving criminal offences.”¹⁶ This acknowledges the need, on occasion, to supplement an agreement in the implementing legislation, and in important areas that affect the fundamental rights of the citizen. Primary legislation should be used for such constitutional measures.

Prior parliamentary scrutiny of treaties

17. The Government suggests that, as Parliament will scrutinise the substance of a PIL agreement under the Constitutional Reform and Governance Act 2010 (CRAG),¹⁷ it will have had sufficient opportunity to comment on and approve the treaty and therefore implementation using the clause 2 power is appropriate.¹⁸
18. This argument is undermined in two respects. First, clause 2(8) enables the Government to give force to international “model laws” that are not treaties and thus not subject to scrutiny under CRAG. Second, as we concluded in a recent report, the “current mechanisms available to Parliament to scrutinise treaties through CRAG are limited and flawed”.¹⁹ It does not allow for the amendment of treaties and so precludes Parliament from considering any measures the Government might bring forward to supplement the agreement. Further, Parliament would not be able to consider any decisions the Government might deem necessary to implement the treaty. The scrutiny of PIL agreements under CRAG is therefore no substitute for the scrutiny of primary legislation.
19. **We are not persuaded by the arguments the Government has made in support of this power. If the balance between the executive and Parliament is to be altered in respect of international agreements, it should be in favour of greater parliamentary scrutiny and not more executive power.** We consider the other issues with the clause 2 power in the remainder of this report.

Criminal offences

20. Schedule 6 states that the powers in clause 2 may be used to “create, extend or increase the penalty for a criminal offence” but forbids the creation of criminal offences that impose sentences of imprisonment of more than two years.²⁰ The Delegated Powers Memorandum states: “We do not anticipate using the power to create, extend or increase the penalty for a criminal offence very often, however it may be needed, in very limited circumstances, in order to implement effective enforcement provisions for some potential future PIL agreements.”²¹

16 Private International Law (Implementation of Agreements) Bill [HL], [Explanatory Notes](#), para 59

17 Constitutional Reform and Governance Act 2010, [sections 20–25](#)

18 Private International Law (Implementation of Agreements) Bill [HL], [Delegated Powers Memorandum](#), paras 32–34

19 For a detailed consideration of treaty scrutiny issues, see Constitution Committee, [Parliamentary Scrutiny of Treaties](#) (20th Report, Session 2017–19, HL Paper 345)

20 Private International Law (Implementation of Agreements) Bill [HL], [schedule 6, para 1\(1\)\(b\) and para 3\(1\)\(c\)](#). Similar limits are found for Scotland and Northern Ireland in paras 4 and 5 respectively.

21 Private International Law (Implementation of Agreements) Bill [HL], [Delegated Powers Memorandum](#), para 41

21. We have concluded previously that the creation of criminal offences through delegated powers is constitutionally unacceptable.²² That PIL agreements may require the creation of criminal offences subject to imprisonment underlines the case for using primary legislation to implement them.

Legal certainty

22. The implementation of PIL agreements by statutory instrument may have unintended consequences for legal certainty. As statutory instruments, they may be quashed under the Human Rights Act 1998 or the common law.
23. PIL agreements are generally interpreted subject to compliance with certain international human rights norms, both in the UK and abroad, and UK courts can use section 3 of the Human Rights Act 1998 to interpret a statutory instrument so as to render it compatible with the European Convention on Human Rights. If a claimant successfully argued that regulations to implement a PIL agreement violated a legitimate expectation, infringed a common law right or in some other way were *ultra vires*, a court could issue a quashing order. The legal effect of such an order, both prospectively and retrospectively in respect of cases previously decided, is a difficult area of unsettled administrative law.
24. Giving legal effect to each new PIL agreement by primary legislation avoids such uncertainty. The legal remedies available to a claimant would be limited to a declaration of incompatibility under the Human Rights Act 1998, or a finding that any such act is contrary to the limited range of EU law rights arising from the Withdrawal Agreement provisions given direct effect and primacy by the European Union (Withdrawal Agreement) Act 2020.
25. **The clause 2 powers are a matter of significant constitutional concern. It is inappropriate for a whole category of international agreements to be made purely by delegated legislation. Such an approach risks undermining legal certainty.**
26. **While a private international law agreement may be technical in nature, and its text not easily changed after negotiations have concluded, this does not mean the form in which it is translated into domestic law should not be scrutinised in the form of primary legislation. This includes any criminal offences it creates and any supplementary provisions it contains or which could be added.**
27. **The Delegated Powers and Regulatory Reform Committee concluded “clause 2 represents an inappropriate delegation of power and we recommend that it should be removed from the face of the Bill.”²³ We agree. The deletion of clause 2 from the Bill would not affect the important and necessary measures in the Bill of implementing the Hague Conventions into UK law. It would simply remove a power for the Government to implement future PIL agreements without primary legislation and its attendant scrutiny.**

22 Constitution Committee, *The Legislative Process: The Delegation of Powers* (16th Report, Session 2017–19, HL Paper 225), para 50

23 Delegated Powers and Regulatory Reform Committee, *Eighth Report* (Session 2019–21, HL Paper 40), para 15

ANNEX: HAGUE CONVENTIONS IN THE UK

Hague Conventions to which the UK is a contracting party:²⁴

- (1) Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.
- (2) Convention of 5 October 1961 on Abolishing the Requirement of Legalisation for Foreign Public Documents.
- (3) Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
- (4) Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations.
- (5) Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.
- (6) Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations.
- (7) Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.
- (8) Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.
- (9) Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption.
- (10) Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.
- (11) Convention of 13 January 2000 on the International Protection of Adults.
- (12) Convention of 30 June 2005 on Choice of Court Agreements.
- (13) Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

In addition, the UK has signed:

- (14) Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons.

²⁴ Private International Law (Implementation of Agreements) Bill [HL], [Explanatory Notes](#), Annex B.

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Beith
 Baroness Corston
 Baroness Drake
 Lord Dunlop
 Lord Faulks
 Baroness Fookes
 Lord Hennessy of Nympsfield
 Lord Howarth of Newport
 Lord Howell of Guildford
 Lord Pannick
 Lord Sherbourne of Didsbury
 Baroness Taylor of Bolton (Chair)
 Lord Wallace of Tankerness

Declarations of interest

Lord Beith
Honorary Bencher of the Middle Temple

Baroness Corston
No relevant interests

Baroness Drake
No relevant interests

Lord Dunlop
No relevant interests

Lord Faulks
No relevant interests

Baroness Fookes
No relevant interests

Lord Hennessy of Nympsfield
No relevant interests

Lord Howarth of Newport
No relevant interests

Lord Howell of Guildford
No relevant interests

Lord Pannick
Represented Ms Gina Miller, in R (Miller) v Secretary of State for Exiting the European Union [2017], and in R (Miller) (Appellant) v The Prime Minister (Respondent) & Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) [2019]

Lord Sherbourne of Didsbury
No relevant interests

Baroness Taylor of Bolton (Chair)
No relevant interests

Lord Wallace of Tankerness
No relevant interests

A full list of members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Jeff King, University College London, and Professor Stephen Tierney, University of Edinburgh, acted as legal advisers to the Committee. They both declared no relevant interests.