

Institution: University of Edinburgh		
Unit of Assessment: 18 – Law		
Title of case study: Case Study 2: Limiting Executive Discretion after Brexit		
Period when the underpinning research was undertaken: 2016-2019		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s): Stephen Tierney	Role(s) (e.g. job title): Professor of Constitutional Theory	Period(s) employed by submitting HEI: 01-Oct-1999 to present
Period when the claimed impact occurred: 2017-2020		
Is this case study continued from a case study submitted in 2014? N		
1. Summary of the impact		
<p>Tierney's research has enabled UK lawmakers to limit executive discretion in planning for Brexit. Through his role as one of two legal advisers to the House of Lords Constitution Committee, together with Mark Elliott (Cambridge), Tierney's work shaped the European Union (Withdrawal) Act 2018 in two crucial ways: (i) clarifying the status of 'retained EU law' and case law of the Court of Justice of the European Union; and (ii) constraining delegated powers exercised by the UK Government, through ensuring rigorous scrutiny by parliamentary committees. These reforms curbed executive discretion and built vital safeguards for Parliament into the Brexit process.</p>		
2. Underpinning research		
<p>The impact is underpinned by a programme of research on the UK constitution conducted by Tierney and Elliott, culminating in analysis of the European Union (Withdrawal) Act 2018 (EUWA) from the perspective of UK constitutional theory. Tierney's main contribution concerns the supremacy of the UK Parliament, set out first (with Loughlin, LSE) in 'The Shibboleth of Sovereignty' (3.1), and developed further (with Elliott) in 'Political Pragmatism and Constitutional Principle' (3.2).</p> <p>In this work, Tierney focused on the risks that the European Union (Withdrawal) Bill, later passed following significant amendments as the EUWA, posed to Parliament and especially to the appropriate limits of delegated powers. Three strands of research come together in his critique.</p>		
<p>i. Parliamentary supremacy: Tierney and Loughlin addressed the amorphous nature of parliamentary sovereignty as a constitutional doctrine and, in parallel, the unclear status of Court of Justice (ECJ) case law within UK law (3.1). For his contribution, Tierney emphasised the lack of conceptual clarity that has afflicted the status of EU law within the UK, where parliamentary sovereignty competed with EU law supremacy, and argued that the original version of the Bill exacerbated this ambiguity, leaving UK courts without clear guidance for resolving post-Brexit disputes.</p>		

- ii. **Rule of law:** Tierney and Loughlin argued that the conceptual problems affecting the status of EU law within UK law intensify through post-Brexit retention of EU law within the national legal system. Tierney and Elliott emphasised that the Bill failed to distinguish properly between ‘pre-departure’ and ‘post-departure’ EU law (3.2). They warned that, as a result, ‘retained EU law’ would compete for status with other post-Brexit UK law if the role of each category was not clearly delineated. That work exposed, once again, how UK courts would struggle to make sense of the complexity. Tierney further underlined the threat to the proper functioning of the constituent parts of the UK if rule of law parameters built into the devolution framework were not respected (3.3). In particular, he highlighted how the Bill promised extensive delegated powers for the devolved territories without any effective system for managing these in relation to UK powers.
- iii. **Separation of powers:** Tierney and Elliott offered detailed doctrinal critique of the rise of executive law-making powers within the UK constitution; the dangers to Parliament of the shift in power to the executive; and the risks that this creates for the balance of powers within an unwritten constitution (3.2). This exposition built upon analysis of the history and supremacy of Parliament (3.1). Tierney investigated how committees can be used to ensure that secondary law (law made by government ministers) is subjected, first, to a filter to assess its significance and, second, to heightened substantive scrutiny, offering detailed, practical suggestions for how the Bill could be improved (3.2). These mechanisms, he argued, would help to rebalance powers under the Bill in favour of Parliament, particularly through the adoption of ‘sifting committees’ whereby Parliament can ensure heightened scrutiny of particularly important draft legislation.

3. References to the research

3.1: Loughlin, M. and Tierney, S. (2018) ‘The Shibboleth of Sovereignty’, *Modern Law Review*, vol. 81, no. 6, pp. 989-1016. <https://doi.org/10.1111/1468-2230.12376>

3.2: Elliott, M. and Tierney, S. (2018) ‘Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018’, *Public Law*, Jan, pp. 37-60. <https://doi.org/10.17863/CAM.35219>

3.3: Tierney, S. (2019) ‘The Territorial Constitution and the Brexit Process’ *Current Legal Problems*, vol. 72, no. 1, pp. 59-83. <https://doi.org/10.1093/clp/cuz007>

4. Details of the impact

The Brexit process is a huge undertaking requiring rapid legal change. The House of Lords Constitution Committee issued three reports on the European Union (Withdrawal) Bill (5.1, 5.2, 5.3), causing the Government to accept critical amendments, many in direct response to the Committee’s recommendations and alleviating serious constitutional problems in the original text. The constitutional danger was that the executive would have considerable unchecked power. Tierney and Elliott’s research on constitutional risks informed the Committee’s work in concrete ways and resulting recommendations accepted by the Government had a substantial impact on the constitutional efficacy of the final Act. Tierney was appointed as legal adviser to the Committee in 2015, an ongoing appointment since then. Elliott was co-adviser from 2016 to 2019. As the Committee’s only legal advisers, Tierney and Elliott played a central role throughout the Bill’s process through Parliament. Their research underpinned advice on the Bill’s constitutional defects and achieved reform in three main respects.

(i) Retained EU law

Tierney and Elliott identified glaring inconsistencies in the status of ‘retained EU law’, highlighting problems for legal certainty and rule of law (5.3, based on 3.1). In particular, the Bill did not distinguish between technical matters and retained law of real substance. The Government accepted that the Committee highlighted “undeniably an important issue” (5.5) and

it reshaped the status of retained EU law significantly, delineating 'principal' and 'minor' areas of law to which different forms of parliamentary scrutiny apply.

(ii) Court of Justice case law

Tierney and Elliott highlighted the vague status that ECJ case law would have after Brexit (5.3), emphasising how confusing this would be for Parliament's own supremacy and for UK judges who could be drawn into political controversy – issues at the heart of rule of law (3.2). The original provision offered courts an open-ended instruction to 'have regard to anything done... by the European Court... if it considers it appropriate to do so'. Tierney and Elliott recommended that this provision be changed to 'taking account of matters relevant to the proper interpretation of retained EU law', which the Committee adopted (3.2). In light of the Committee's recommendations, the Bill was amended and the EUWA, section 7(2), adopts this relevancy test (5.4).

(iii) Delegated powers

The Bill conferred extensive delegated powers to correct 'failures' or 'deficiencies' in retained EU law, heralding a fundamental shift in power from Parliament to Government. Tierney and Elliott advanced three main criticisms (based on 3.1).

Breadth of power: The Government agreed to accept a duty to provide an 'explanatory statement' when making secondary law, facilitating proper parliamentary scrutiny (5.1, 5.3). Significantly, explanatory statements have since been accepted for other bills. For example, a similar provision was inserted into the Sanctions and Anti-Money Laundering Act 2018 following the Committee's recommendation, again informed by Tierney and Elliot (5.6).

Limited exclusions: Tierney and Elliott criticised the unlimited range of discretionary powers in section 8 of the Bill (5.3), signalling that they could be used in constitutionally inappropriate ways to create new public authorities or amend the devolution statutes for Scotland and Wales (3.3). The Government accepted this criticism and the Bill was amended to ensure that section 8 cannot be used for such purposes. Tierney and Elliott also questioned an international obligations-related power in clause 8 of the Bill. The Committee adopted this advice, leading to the removal of clause 8 through an amendment tabled in the Lords (5.7).

Delegated powers: Tierney and Elliott gave detailed advice on improved scrutiny of delegated powers. The Committee adopted their approach, asserting that the original provision (clause 17 of the Bill) seemed to permit very broad regulations to be made under the cover of 'consequential' measures (5.3). Key reforms are that stronger scrutiny is now in place for regulations that make policy changes and the creation of a 'sifting committee' to determine what these measures are (5.4). Another key recommendation was that delegated powers should be subject to a time limit. The Government agreed to a 10-year 'sunset clause' (5.3).

These changes ensured for Parliament a significantly greater role in controlling the executive's delegated law-making power after Brexit. The Clerk to the Constitution Committee confirmed: "*The work of Professor Tierney and Professor Elliott on the European Union (Withdrawal) Bill assisted the Constitution Committee's scrutiny of this important legislation and the influence it was able to bring to bear on the final form of the law*" (5.8).

5. Sources to corroborate the impact

5.1: Constitution Committee, *The 'Great Repeal Bill' and delegated powers*, 7 March 2017, HL 123, 2016–17 ('Constitution Committee Report No.1'), para. 42 (Section 4.iii *Breadth of power*). <https://web.archive.org/web/20200924115252/https://publications.parliament.uk/pa/ld201617/lds/elect/ldconst/123/123.pdf>

5.2: Constitution Committee, *European Union (Withdrawal) Bill: interim report* 7 September 2017, HL 19, 2017–19 ('Constitution Committee Report No.2').

<https://web.archive.org/web/20191217102756/https://publications.parliament.uk/pa/ld201719/lds/elect/ldconst/19/19.pdf>

5.3: Constitution Committee, *European Union (Withdrawal) Bill*, 29 January 2018, HL 69, 2017–19, ('Constitution Committee Report No.3'), para. 52 (Section 4.i), paras. 208-211 (Section 4.iii *Breadth of power*), paras. 184, 187 (Section 4.iii *Limited exclusions*), paras. 198-200, 205-206, 219 (Section 4.iii *Delegated Powers*).

<https://web.archive.org/web/20200924115421/https://publications.parliament.uk/pa/ld201719/lds/elect/ldconst/69/69.pdf>

5.4: European Union (Withdrawal) Act 2018, Section 7(2) (Section 4.ii), Schedule 7, paras. 15-17 (Section 4.iii *Delegated powers*).

<http://web.archive.org/web/20201112041309/https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted>

5.5: Lord Callanan, House of Lords Hansard, 23 April 2018, col. 1411.

<http://web.archive.org/web/20210125193101/https://hansard.parliament.uk/Lords/2018-04-23/debates/5481ABDF-ABEB-49C7-9404-6B4B85E24400/EuropeanUnion%28Withdrawal%29Bill>

5.6: House of Lords Constitution Committee, *Sanctions and Anti-Money Laundering Bill*, 17 November 2017, HL 39, 2017-19, paras. 11-12 (Section 4.iii *Breadth of power*).

<https://web.archive.org/web/20200924115529/https://publications.parliament.uk/pa/ld201719/lds/elect/ldconst/39/39.pdf>

5.7: Letter from Lord Callanan, Minister of State for Exiting the European Union, to the Constitution Committee.

5.8: Testimonial letter from the Clerk to the Constitution Committee, 20 January 2020.