



Legislating Brexit: the Withdrawal Agreement Bill and parliamentary sovereignty

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The Prime Minister is hoping to secure the support of Parliament for her Withdrawal Agreement in the coming weeks. If she succeeds, winning the ‘meaningful vote’ on her deal, that will only mark the start of a contentious process to implement the deal in legislation. Parliament will be under pressure to legislate quickly, but it will have to confront issues of major and long-term constitutional significance. This IfG Insight paper focuses on one particularly difficult question: how to reconcile the commitments in the Withdrawal Agreement with the sovereignty of Parliament.

The Withdrawal Agreement which the Government has negotiated with the EU covers citizens' rights, the financial settlement between the UK and the EU, the 'standstill' transition period after exit day, and various other technical separation provisions. It also contains a protocol on Ireland and Northern Ireland (the 'backstop'), a set of laws that will come into force at the end of the transition period in order to keep the Irish border infrastructure-free if the UK and the EU have not negotiated a trade deal to do that job by then.

If the Government wins a vote approving the agreement, either at its first or a later attempt, it will argue that Parliament has accepted the Withdrawal Agreement in principle and so has no option but to support the statute that puts it into UK law. Many provisions of the bill, however, will be contentious. One part of the legislation, in particular, raises a significant constitutional issue which could have ramifications well beyond the implementation of the Withdrawal Agreement: how the UK makes good its commitment to "entrench" elements of the agreement in UK law, and protect them from the decisions of future Parliaments. That is the subject of this paper.

Article 4 of the Withdrawal Agreement tries to reintroduce EU law concepts into the UK

If the Government gets Parliament's approval for the deal in principle, it will bring forward the EU (Withdrawal Agreement) Bill to give effect to the treaty in UK law. The bill will need to give effect, among other things, to Article 4 of the Withdrawal Agreement. The first two paragraphs of this article read as follows:

1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.

This is an attempt to imbue the Withdrawal Agreement, and any EU rules made applicable by the Withdrawal Agreement, with two fundamental features of EU law. First, much EU law has "direct effect". This means that individuals and private parties can enforce their rights under this law before domestic courts. Second, EU law has supremacy over national law. This means that, where there is a conflict between a rule of EU law and a rule of national law, the rule of EU law prevails. National courts and national public authorities are therefore under an obligation to apply the rule of EU law, and disapply the rule of national law.

The UK's "dualist" constitution means that the treaty alone is not enough to give effect to these provisions. They need to be put into UK law using primary legislation, hence the need for the proposed EU (Withdrawal Agreement) Bill.

Giving domestic effect to the 'supremacy' of EU law raises both legal and political difficulties

It will be relatively easy for the Withdrawal Agreement Bill to ensure that private parties are able to rely on the Withdrawal Agreement in domestic courts. The bill need only to provide that the Agreement, or the relevant portion of it, is to be given legal effect and enforced in law.

However, it will be much harder for Parliament to give effect to the commitment that any laws inconsistent with the agreement "shall be disapplied". This is because parliamentary sovereignty, as it is traditionally understood, means that no Parliament can bind its successors. Any law can be undone by a future Act of Parliament.

While a member of the EU, the UK has squared parliamentary sovereignty with the supremacy of EU law through some careful legal alchemy. Section 2(1) of the European Communities Act, which provided for UK accession, made all directly applicable EU law enforceable in the UK from the point of view of domestic law and section 2(2) gave ministers the power to enact statutory instruments which would give effect to non-directly applicable EU law. Section 2(4) provided that any Act of Parliament should be construed by the courts in a way that was compatible with the rest of the Act, and have effect only subject to the rest of the Act.

The courts have interpreted those provisions to mean that it was "the duty of a United Kingdom court [...] to override any rule of national law found to be in conflict with any directly enforceable rule of Community [EU] law."¹ They have not been entirely consistent about the justification for that. Sometimes, as in the *Factortame* case, they have emphasised the fact that Parliament, in 1972, legislated to accept the superior force of EU law over domestic law. However, the High Court later offered a different analysis. It held that the courts had recognised the European Communities Act as a "constitutional statute" – that is, a statute that could not be "impliedly repealed" by a future Act of Parliament. A constitutional statute, said Lord Justice Laws, was one which "(a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights".² The view of the European Communities Act as a "constitutional" statute was seemingly endorsed by the Supreme Court last year, in the *Miller* judgment.³

The upshot of either analysis was that, if a future Act of Parliament came into conflict with EU law, and thus with the European Communities Act 1972, but did not expressly repeal any provisions of the 1972 Act then, as far as the courts were concerned, the European Communities Act prevailed, and the EU law it imported would remain in force.

That alchemy may be hard to reproduce for the Withdrawal Agreement, for both legal and political reasons. The legal difficulty is that both Parliament and the courts played a role in the development of “supremacy” – Parliament by passing the European Communities Act, and the courts by recognising its special status. The Act does not give Parliament a toolkit to guarantee the ‘supremacy’ of the Withdrawal Agreement. That will depend on how judges interpret the Act which gives effect to it. This was part of the reason that the Government decided that the best way to give effect to transition was to keep in force much of the European Communities Act 1972 until transition is over. If it had promoted legislation which tried to give effect to supremacy and direct effect with new language, it could not have guaranteed that the judges would have interpreted that language in the way it intended.*

That difficulty is illustrated by the way the obligation is articulated in the Withdrawal Agreement. The EU Treaties, to which the UK has been a signatory while a member of the European Union, contain no obligation to respect supremacy.** Instead the doctrine was brought into EU law by the European Court of Justice. Whereas once the doctrine was developed by EU judges and effectively implemented by UK judges, now it has been articulated in a treaty signed by the UK Government and falls to be implemented by Parliament.

Politically, the difficulty is more obvious. The Government has said that the supremacy of EU law will end in the UK after Brexit. This was part of the Government’s promise that the UK would “take back control” of its laws. If the Government attempts, in the WAB, to preserve the principle of supremacy for the Withdrawal Agreement exactly as it worked for all EU law before Brexit, ministers could have a fight on their hands in the House of Commons. Already Jacob Rees-Mogg, a prominent pro-Brexit Conservative MP and opponent of the Government’s deal, has raised his concern that Article 4 “establishes this treaty as superior law”, querying with the Secretary of State for Exiting the EU whether this would constrain a future Parliament.⁴

The Government has already proposed that repealing the citizens’ rights provisions of the Withdrawal Agreement Bill would require an “additional procedural step”

In March the Government signed up to a slightly different version of Article 4, but only with respect to the citizens’ rights part of the agreement. It promised that any future legislation inconsistent with the citizens’ rights part of the agreement would be “disapplied” despite the fact that, on a traditional understanding of parliamentary

* It has been argued that the Supreme Court placed greater emphasis than before, in *Miller*, on Parliament’s ability to craft statutes of constitutional status. See <https://academic.oup.com/yel/article/doi/10.1093/yel/yex012/4652935> at 87–92

** The Constitutional Treaty was going to include a “primacy clause”, but this was removed after member state objections. Instead, there is now a declaration attached to the treaty which “recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.”

sovereignty, it can promise no such thing. In a white paper, the Government gave some clue as to how it would square that circle. It said that, if a future Parliament wanted to repeal the citizens' rights provisions, that future Parliament would have to take an "additional procedural step".⁵

This approach would not prevent a future Parliament from repealing a provision of the Withdrawal Agreement. However, the Government hopes that it would prevent a future Parliament from repealing the provisions without going through the (as yet unspecified) step. This section discusses options for that step.

1. Require a referendum

In the white paper on the Withdrawal Agreement Bill, the Government makes reference to Section 2 of the European Union Act (2011). This provided that a UK-wide referendum would be required for the UK to ratify certain kinds of new EU treaty. In addition, the Scotland Act 2016 inserted a "permanence" provision into the devolution statutes, which said that Parliament could not abolish the Scottish Parliament and Scottish Government without a referendum in Scotland. The Wales Act 2017 made similar provision with respect to the Welsh devolved institutions.

The Withdrawal Agreement Bill could therefore contain a clause to require a referendum before Parliament could repeal or amend the Withdrawal Agreement Act (as it would then be).

If Parliament did legislate to create a "referendum lock" of this kind, it could create a "single lock" or a "double lock". A single lock would be a provision that a referendum was required to repeal the substantive parts of the Withdrawal Agreement Bill, albeit contemplating that a future Parliament could remove the referendum lock by a simple majority in the House of Commons, if it did so expressly. A double lock, a more radical option, would be a provision that a referendum was required to repeal the substantive parts of the bill and in addition, that a referendum would be required to repeal the referendum lock itself.

It is important to be clear on exactly what a referendum under the Withdrawal Agreement Bill would cover. It would not be on whether the UK remained a signatory to the Withdrawal Agreement. It would not be on whether the UK remained bound by the backstop, the Protocol on Ireland and Northern Ireland. The agreement, as written, offers no way for the UK to exit these arrangements unilaterally, so no Government, Parliament or majority of the electorate in a referendum could decide to do so without the UK violating its commitments. The obligation in international law is here to stay. A referendum of the kind discussed in this section would, instead, be on whether the UK would continue to meet that international obligation, by keeping in force the legislation which implemented its commitments.

This could have serious implications for the UK's commitment to the rule of law. The UK has, historically, been committed to the rule of international law, just as it has been committed to the rule of law at home. Governments have generally subscribed to the

maxim, memorably articulated by Lord Bingham, that “the rule of the jungle is no more tolerable in a big jungle”.⁶

2. Require express repeal

As discussed above, the courts have used the doctrine of “express” and “implied” repeal to give effect to the supremacy of EU law. They have suggested that Parliament is free to legislate contrary to EU law, but must make clear that it is doing so deliberately, not by accident. This position evolved through case law as the courts interpreted the European Communities Act, but the Government could now try to put a provision requiring express repeal onto the face of the bill as the “additional procedural step”. However, as will be discussed below, some judges have argued that Parliament cannot legislate to prevent implied repeal.

3. Require a supermajority

By and large, the House of Commons votes by simple majority: 50 per cent of those present, plus one. However, some judges and academics have suggested that this could be altered in some circumstances. Parliament could provide in the Withdrawal Agreement Bill that particular parts of the bill, once law, could only be repealed by, say, a two-thirds majority (or ‘supermajority’) of the House of Commons.

There are precedents of a sort for supermajority voting in the Commons. The Fixed-term Parliaments Act 2011 provides for two ways for Parliament to call a general election, and one of them is that two thirds of the House of Commons votes for a general election. This is what happened in 2017. However, the Act is not an exact precedent, because it only required a supermajority for passing a certain kind of motion, and not for passing legislation. There is also a precedent for a supermajority requirement in another UK legislature. Section 11 of the Scotland Act 2016 provides that a two-thirds majority of the Scottish Parliament is needed to change certain laws, such as electoral law.

A supermajority lock, like a referendum lock, can be single or double. Parliament could provide that a supermajority is required to repeal the substantive parts of the Withdrawal Agreement Bill, contemplating the possibility that the supermajority requirement could be repealed by a simple majority. Or Parliament could provide that a supermajority was required not only to repeal the substantive parts of the bill, but also to repeal the requirement for a supermajority.

The courts have never ruled on whether it would be possible to impose a supermajority requirement on legislation. However, there has been some occasional mention of the possibility. In *R (Jackson) v Attorney General*, for instance, Lady Hale speculated that “if the sovereign Parliament can redefine itself downwards to remove or modify the requirement for the consent of the Upper House”, as it did when it passed the Parliament Acts limiting the role of the House of Lords, then “it may very well be that it can also redefine itself upwards, to require a particular parliamentary majority or a popular referendum for particular types of measure.” Lord Steyn, likewise, said that

“Parliament could for specific purposes provide for a two-thirds majority in the House of Commons and the House of Lords. This would involve a redefinition of Parliament for a specific purpose. Such a redefinition could not be disregarded.”⁷

However, these comments were obiter. This means that they were not part of the reasoning required to decide the case before the court, and so will not be binding on future courts. Whether Parliament can in fact impose supermajority requirements is a question, as Lady Hale put it, “for another day”.⁸ The final verdict will depend on what the courts say when that day arrives.

4. Make repeal ‘nuclear’

Parliament could try to provide that any future attempt to repeal or amend the WAB, or parts of it, should be read as a ‘nuclear’ decision which automatically blows up more than the specific bill provisions at which it is aimed. This approach could come in two guises.

First, Parliament could provide that any legislation that repeals a bit of the Withdrawal Agreement Bill is to be read by the courts as repealing all of it. This approach, if successful, would mean that if a future Parliament wanted to do something it thought was prohibited by the bill, it could not legislate to do so “notwithstanding the bill”, and so leave the rest of the law in force. However, it is doubtful that the courts would uphold such a stringent restriction on future Parliaments.

The Withdrawal Agreement Bill could also try to create a link between future repeal, and the UK being a party to the treaty. For instance, the bill could provide that a future Parliament would only be able to repeal or amend the bill if the UK was no longer a party to the Withdrawal Agreement, or if the relevant part of the Withdrawal Agreement had ceased to be in force.

It is still unclear whether any of these proposed steps would actually constrain a future Parliament

The UK may add one of these steps to the bill to provide reassurance of the strength of its commitment to its agreement with the EU. However, it is not clear whether an entrenchment provision of this kind would have any legal force at all. Parliament may or may not be able, as a matter of law, to impose an “additional procedural step” on its successors. This depends on which theory of parliamentary sovereignty is correct, and experts are divided on this question.

On one side are the proponents of a traditional view of parliamentary sovereignty, normally associated with the Victorian jurist A V Dicey. According to this theory, whatever legislation gets through the Houses of Parliament with a bare majority, and receives Royal Assent, is law. Whether Parliament has previously stipulated some extra ‘procedural step’ has no legal effect, because Parliament is always sovereign and cannot give up its sovereignty. If the traditional theory is right, the Parliament cannot give effect to what the Government has promised.

Ranged against the traditionalists are proponents of the 'manner and form' theory of parliamentary sovereignty. According to this theory, associated with Sir Ivor Jennings, Parliament can constrain the 'manner and form' in which Parliament passes future laws, but not the content or substance of those laws. If this theory is right, the Government may be able to do what it has promised to do. The UK courts have never definitively ruled on this question.*

There are elements of judicial support for both approaches. The traditionalists can point to Lord Justice Maugham's judgment in *Ellen Street Estates v Minister of Health*.⁹ "The legislature cannot bind itself as to the form of subsequent legislation," he said, "and it is impossible for Parliament to enact that in a subsequent statute dealing the same subject matter there can be no implied repeal." They can also point to the judgment of Lord Justice Laws in *Thoburn v. Sunderland City Council*, the judgment which suggested the doctrine of "constitutional statutes" in the first place, wherein he said that Parliament "cannot stipulate as to the manner and form of any subsequent legislation". This means that Parliament cannot impose constraints of any kind on its successors' ability to legislate.¹⁰

Proponents of "manner and form" can point to Lady Hale's remark in *Jackson* that "it may very well be that [Parliament] can [...] redefine itself upwards, to require a particular parliamentary majority or a popular referendum for particular types of measure." Some commentators, too, have argued that it would be a "remarkably bold court" that concluded such entrenchment was not constitutionally possible, even a court that was "overreaching, to interfere with Parliament's self-definition of its legislative sovereignty."¹¹

Ultimately, the courts could be forced to decide which view of the constitution is correct. That could come about if a future Parliament attempted to legislate contrary to the parts of the Withdrawal Agreement Bill that the current Parliament had attempted to entrench, but refused or failed to go through the "additional procedural step" it specified (for instance, because there was no appetite for a referendum, or the Government of the day did not have a big enough majority to meet a supermajority requirement, or because the Government of the day did not realise it was repealing part of the Withdrawal Agreement Bill at all, contravening any requirement for "express repeal". In these circumstances, the new legislation could be challenged in court. It would mean an almighty constitutional confrontation.

The EU could also open a dispute with the UK using the dispute resolution mechanism in the Withdrawal Agreement, for being in breach of its treaty obligations. Though this would have no immediate impact on UK law, it could colour how the UK courts approached the domestic case.

* There have been Commonwealth cases on the possibility of such constraints in other legislatures, which provide support to the view that such constraints are possible. However, these cases did not concern the UK Parliament.

The Government faces a trade-off in picking its “additional procedural step”

There is a key trade-off involved in selecting an “additional procedural step”. The step could be big and hard to do, or small and easy to do.

If it is big and hard to do, like a referendum, there is a benefit: the entrenchment of the Withdrawal Agreement will be more effective, as future governments and Parliaments will be reluctant to incur the burdens of taking that step.

Yet there is also a cost. If a future Parliament did want to change the relevant law, but was reluctant to incur those burdens, then it might try to bypass the extra step and try its luck by changing the law with a bare majority in the House of Commons, in the ordinary way. In that case, it is more likely that the future legislation would be challenged before the courts, forcing a constitutional confrontation over the correct conception of parliamentary sovereignty.

The Government could instead rely on the approach it has previously used for EU law

If the Government wanted to avoid the hassle of major constitutional innovation, it could decide to abandon the idea of an “additional procedural step” altogether. It could decide, instead, to use the same words in the Withdrawal Agreement Bill as Parliament used in the European Communities Act 1972, in the hope that the courts would react to the Withdrawal Agreement Bill provision in the same way they reacted to the ECA provision, and disapply any subsequent legislation that was incompatible with the Bill. This would mean including in the bill a provision that any future Act of Parliament should be construed by the courts in a way that was compatible with the rest of the Withdrawal Agreement Bill, and should only have effect subject to the Bill. The Government would have to defend the obvious parallel between the Withdrawal Agreement Bill and the European Communities Act, which could be difficult politically.

In addition, Parliament could introduce an extra element of assurance by using a tool from the Human Rights Act 1998. Section 19 of the Act says:

(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

The Withdrawal Agreement Bill could likewise provide that a minister in charge of any future bill must make a statement to the effect that it is compatible with the Withdrawal Agreement. This would be similar to the system in Switzerland, whereby the government must confirm that any new legislation is compatible with the country's bilateral treaties with the EU.¹²

The Government's handling of Article 4 could set the terms for the status of EU law in the UK constitution long after Brexit

The Government is focussed, for now, on giving legal effect to the Withdrawal Agreement, not the future relationship treaties. But these will be negotiated over the coming years and questions on supremacy and direct effect will inevitably arise again during those negotiations. The Government has proposed an economic partnership that involves substantial alignment with rules of EU law – a “common rulebook” covering technical regulations on goods and some competition and state aid rules. Any relationship involving extensive alignment with rules of EU law will raise the question of the domestic status of those rules, whether the relationship looks anything like the Government's Chequers proposal or not.

The way that the Government implements the supremacy obligation in the Withdrawal Agreement could, therefore, set an important precedent for the legal status of EU law in the future relationship. In addition, if the UK-wide customs union in the Withdrawal Agreement is given effect in the Withdrawal Agreement Bill, and this customs union becomes a major plank of the UK's future relationship with the EU, then the Government's approach to supremacy in the Bill will be the basis of the UK's long-term constitutional settlement by default.

The Government's handling of Article 4 could set a powerful precedent for all legislation in Parliament

Governments to date have generally accepted that any legislation they pass can be amended or overturned by their successors. Permanence and policy stability have, with the exception of the devolution settlements, been conferred by building a political consensus for change, not by legislative entrenchment.

However, it is possible that, if the Government sets a precedent of trying to entrench the Withdrawal Agreement Bill, parliamentarians will try to entrench future legislation in the same way, by adding “additional procedural steps” that could inhibit a subsequent government from implementing a radically different programme. By setting a precedent for entrenchment, therefore, Article 4 could open up a new constitutional battleground in British politics, with potentially significant implications for the balance of power between the courts and Parliament.

The passage of the bill will be fraught. Parliament will be under immense pressure to pass the Withdrawal Agreement Bill quickly in order to provide certainty about the transition period and citizens' rights, and in order to allow the Government and business to abandon planning for a no deal exit in March 2019. But Parliament needs to ensure that, notwithstanding that time pressure, it does not ignore the constitutional significance of this legislation. It will require careful scrutiny by both the House of Commons and the House of Lords. The way this legislation is framed could have a long-term impact on the UK's constitutional settlement. Parliament has to get it right.

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