

British-European Relations Post-Brexit: A Legal Kaleidoscope



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International and Transitional Framework by Pavlos Eleftheriadis

The Constitutional Status of the Northern Ireland Protocol

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A few weeks after the Brexit referendum I wrote an article called 'The Coming Constitutional Instability' (since published at [2017] *Public Law* 347). My point was simple. For more than forty years the UK had developed its fundamental constitutional rules alongside the EU. The structures that held everything together over that time were about to be removed, leaving the United Kingdom with an extremely unstable edifice. The European Communities Act 1972 caused an important and beneficial transformation to the British constitutional settlement, according to which some decisions of Parliament, namely the welcoming of European legal sources, had higher legal significance than others.

This was not a legal 'revolution', as claimed by some scholars, because the unwritten constitution has always had higher legal rules in order to give effect to the virtues of the rule of law. For example, the rule that parliament is sovereign, as set out in the Bill of Rights 1688, must be a legal rule, otherwise the courts could not have enforced it. This simple logical fact was missed by Austin, Dicey and their followers, who saw British law merely the result of an immutable 'fact' of sovereignty on the basis of the - now defunct - 'command theory of law'.

European membership not only allowed for a structured constitutional order, but also allowed transnational institutions have a say in the running of the United Kingdom on the basis of the 'new legal order' of the European Union. This reciprocal arrangement was just what the Parliament wanted at the time. By joining the EEC the UK accepted the direct effect and primacy of European law as one element of the law of the UK. Hence, membership in the European Communities was a constitutional *amendment* in all but name.

The outline of these transformations became explicit a few years later through the judgment of *Factortame*. A framework of higher law was confirmed by the Supreme Court in *Buckinghamshire (HS2)* and *Miller (No 1)*, under the doctrine of 'constitutional

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statutes'. Fortunately, the senior judges have rejected Dicey's erroneous simplifications for the rival views of Maitland and others (you can find more on this in my extensive discussion of Miller (No 1) in Eleftheriadis, '[Two Doctrines of the Unwritten Constitution](#)' (2017) 13 *European Constitutional Law Review* 525).

However, withdrawal from the EU ends this constitutional settlement. In this sense Brexit has unsettled and destabilised the constitution, not only because the referendum played a toxic role in constitutional law by attacking some fundamental assumptions about the priority of parliamentary democracy, but also by allowing us to return – through the revival of Dicey's seemingly indestructible doctrines – to the fluid structure of the unwritten constitution envisaged by the erroneous doctrine of 'immutable sovereignty'. Recent developments in the law and politics of the United Kingdom confirm this pessimistic reading of the British constitution.

The Separation Framework

We have to recall that the UK's withdrawal from the EU has taken place under an agreement with the EU. This Withdrawal Agreement (henceforth 'WA') was a result of fraught negotiations. Disagreements within the UK government and the failure to approve the original agreement led to the resignation of Theresa May as PM. While Parliament could not decide on any course of action, disaster loomed. If Britain had left without a Withdrawal Agreement, there would have been no framework for a transitional period of adjustment, leading to a chaotic and damaging immediate separation – called generally 'hard Brexit' or even 'kamikaze Brexit'.

A new PM, Boris Johnson, built great political capital on the fact that he – to the surprise of almost all informed observers - achieved a new agreement in October/November 2019, by moving the relevant trade border between Britain and Ireland. He won the general election of December 2019 partly due to this diplomatic achievement, promising to 'get Brexit done'. The new Withdrawal Agreement broke the deadlock in the House of Commons by changing the status of Northern Ireland. This gave the UK and the EU time to prepare by way of a 11 month transition. The WA covers separation issues only: finance, EU citizens' rights and the status of Northern Ireland. The rest, the 'trade agreement' proper, is being negotiated at the moment.

The WA sets out a binding framework of Britain's withdrawal from the EU has three dimensions: public international law, EU law and domestic constitutional law in the UK.

(a) International law

The WA is an international agreement under public international law thus binding on the UK. Its effects are determined by the relevant incorporating legislation. It intervenes in the law of the WTO, because it ensures that the UK can use the EU's agreements in international trade during the transitional period *vis a vis* third countries.

(b) EU Law

The WA is also a *sui generis* part of the EU Treaties, since it effectively amends them, by virtue of the special process of Article 50.

(c) Constitutional Law

It is also incorporated into the UK legal order by virtue of the European Union (Withdrawal Agreement Act) 2020, which received Royal Assent on 23 January 2020.

The WA creates two phases to Brexit that are not legally symmetrical. The first is the transition, where EU law (as well as the WA) applies fully. The second is the post-transition status, where EU law does not apply, except as received through domestic law. But the WA applies from day one to both phases. This is explicit in Article 185, about entering into force, and Article 131 of the WA, which deals with the jurisdiction of the CJEU and other EU bodies during the transition.

I now wish to address now the constitutional obligations of the UK under the WA. I don't believe they are well understood in public debate.

A key provision

A key provision of the WA is that which provides for the direct effect and supremacy of the WA over UK law. Article 4 of the WA provides, in so far as it is relevant:

Article 4 Methods and principles relating to the effect, the implementation and the application of this Agreement

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.

Paragraph 1 provides for both for direct effect and primacy for the WA. This is the only possible meaning of the phrase 'same legal effects as those which they produce within the Union and its Member States'. This impression is strengthened by paragraph 2 which provides for the power of domestic courts to disapply 'inconsistent or incompatible domestic provisions'. This power must be achieved through 'domestic primary legislation'.

The significance of this may not be immediately obvious. It means that as far as the WA is concerned, the UK has an obligation to give it the same effect that European law had on the basis of the *Factortame* principle of primacy. Just like normal EU law, the WA ought to prevail over contrary UK acts of parliament, as explained by the Supreme Court in *HS2* and *Miller(No 1)*.

It is now beyond doubt that the ECA 1972 was a 'constitutional statute', one with constitutional significant because it changed how we make laws in the UK. It follows that the WA, if it is to have the *same legal effect as EU law*, it must be implemented by virtue of another constitutional statute. The primary legislation giving effect to this explicit obligation is the European Union (Withdrawal Agreement) Act 2020, which creates this constitutional framework in its s. 26.

The Withdrawal Act 2020 as a ‘constitutional statute’

There are very strong grounds for saying that the European Union (Withdrawal Agreement) Act 2020 is a constitutional statute. First, it followed the general election of December 2019, for which it was part of the winning party’s electoral manifesto. Second, it contains an explicit recognition of the constitutional change brought about by the WA. It is found in s. 26 of the 2020 Act, titled: ‘Interpretation of retained EU law and relevant separation agreement law’. Buried in that lengthy section is the introduction of a new s. 7C of the 2018 Withdrawal Act, according to which:

7C Interpretation of relevant separation agreement law

(1) Any question as to the validity, meaning or effect of any relevant separation agreement law is to be decided, so far as they are applicable—

(a) in accordance with the withdrawal agreement, the EEA EFTA separation agreement and the Swiss citizens’ rights agreement, and

(b) having regard (among other things) to the desirability of ensuring that, where one of those agreements makes provision which corresponds to provision made by another of those agreements, the effect of relevant separation agreement law in relation to the matters dealt with by the corresponding provision in each agreement is consistent.

In effect, just like the ECA 1972 did for EU law in general, the 2020 Act recognises the primacy of the WA over domestic law (or perhaps more accurately ‘separation agreement law’) as a matter of the *constitutional law* of the EU. The ‘validity, meaning or effect’ of any present and future ‘separation law’, including primary law of the UK, is to be assessed on the basis of the Withdrawal Agreement. This also means, incidentally, that by way of the reference made to the Belfast Agreement in the Northern Ireland Protocol, that Agreement and the rights it creates there, enjoys new constitutional protection in the UK.

The Internal Market Bill 2020

It is in light of this constitutional framework under the 2020 Act that we should see the proposed Internal Market Bill 2020, recently published by the UK Government. The Bill creates new powers for the Secretary of State to override the Northern Ireland Protocol in the areas of the free movement of goods (c.42) and state aid (c.43). Yet, another very important aspect of this Bill is that it protects the effects of clauses 42 and 43 by changing the *constitutional status* of the Withdrawal Agreement, only a few months after the 2020 Act. This is a present violation of article 4 of the Withdrawal Agreement (and of the 'good faith' obligations of Article 5), even if the powers of the Secretary of State are never exercised.

The relevant clause here is clause 45 which states that if the Secretary of State makes regulations contrary to the NI Protocol, then such regulations under section 42(1) or 43(1):

'are not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law'.

and that:

'section 7C of that Act ceases to have effect so far and for as long as it would require any question as to the validity, meaning or effect of any relevant separation agreement law to be decided in a way which is incompatible or inconsistent with a provision mentioned in paragraphs (a) to (f) of subsection (1)'.

In other words, this Bill is proposing to change back the constitutional process created by the 2020 Act. It is a constitutional amendment in all but name.

The change in the effect of the WA is therefore a current violation of Article 4 of the WA. The breach is in the constitutional framework set up for withdrawal, according to which the agreements reached for separation, including the Northern Ireland status and the protection of EU citizens, enjoy higher constitutional status in the UK. Simply put, the Internal Market Bill removes that higher status.

The British government's quick and expedient change of heart is extraordinary, given the circumstances. Perhaps there is another explanation, but from the facts as we know them it is hard to describe this series of events as anything other than an act of willing deception. The UK promised to the EU that it will amend its own constitutional settlement, so as to protect the NI Protocol and the EU citizens from contrary domestic

law in the future. The UK Government undertook to do so, under the model of the European Communities Act 1972 (which, incidentally, continues to apply during the transitional period). The EU relied on that promise. This is how the UK avoided hard Brexit in October 2019. Moreover, the Conservative Government derived great benefits from the avoidance of the 'cliff edge' and won the December 2019 election on the basis of 'Getting Brexit Done' under the Withdrawal Agreement. But when it became politically expedient, the UK Government appears to have decided to go back on its word, by amending the constitutional protection to the NI Protocol it had established by way of the 2020 Act. Hard as it is to write this, the facts above suggest a process of calculated deception by the British Government.

Conclusion

If this analysis is correct, then the Internal Market Bill does not merely allow a future violation of the UK's legal obligations under international law, if the NI Protocol is amended by the Secretary of State's new powers. No, the violation occurs merely with the passing of the Bill, because its intended effects are constitutional. Clause 45 changes the overall framework because it removes the higher protection of the Northern Ireland Protocol, promised in Article 4 of the WA. This appears to be on its face a very surprising act of constitutional trickery by the British Government. The 2020 Act is a constitutional statute, yet only a few months after its enactment it is being reduced to an ordinary statute in order to alleviate the effects of the agreement.

Where does this leave the unwritten constitution? What are the UK courts to do about this, if these matters arise before them? I do not have a ready answer. I believe, however, that we are merely at the beginning of this episode. It is entirely understandable that the EU will use the legal means available to them to force the UK to keep its side of the bargain by bringing proceedings before the CJEU. The appropriate mechanism is Article 131 of the Withdrawal Agreement, not the rules concerning the NI Protocol. Since the violation concerns Article 4 and will have taken place during the transitional period, the jurisdiction of the Court of Justice of the EU continues to apply in full. Parallel domestic proceedings are also possible, under the ECA 1972, which continues to apply during the transitional period. The question before them will be fundamentally the same as that put before the courts in *Factortame*: is the language used by a subsequent Act sufficient to remove the status of the

Withdrawal Act as a constitutional statute? There is no easy answer, but the viability of the unwritten constitution depends on it.