

Taking Back Control: Brexit, Parliament and the Rule of Law

Over the next six months of the Brexit process, the UK Parliament will make a number of decisions that will have a profound impact on the UK's constitution and its legal systems. In a Bingham Centre for the Rule of Law Report published this week, *The Withdrawal Agreement and the Political Declaration: A Preliminary Rule of Law Analysis*, we argue that the next six months represents a major test for the Rule of Law in the UK.

The Rule of Law does not itself provide answers to the question of what form Brexit should take. The Rule of Law does though supply a set of standards that Government and Parliament can and should use to ensure that Brexit is compatible with the UK's own constitutional values. The parliamentary process provides an opportunity for MPs and Peers to use those standards to scrutinise the details of the legal arrangements proposed by the Government.

This post highlights a number of the Rule of Law issues that are likely to arise during Parliament's scrutiny of the legal implications of the Withdrawal Agreement, the Political Declaration and the EU (Withdrawal Agreement) Bill.

Parliamentary scrutiny and the Rule of Law

The basic conditions of Parliament's role in the final months of Brexit are set out in legislation. Section 13 of the EU (Withdrawal) Act 2018 requires that the Withdrawal Agreement and the Political Declaration are approved by a Commons resolution and that the European Union (Withdrawal Agreement) Bill is enacted by Parliament before exit day.

These basic rights do not guarantee that Parliament will be able to effectively scrutinise the legal implications of these proposals. There will be huge political pressure on parliamentarians to approve what is presented by the Government with minimum fuss, and with exit day fast-approaching, there is a clear risk that in practice the opportunities for scrutinising the detail will be limited. Effective parliamentary scrutiny not only enhances the accessibility of the law, it also enables parliamentarians to determine whether the substance of the proposed changes conforms to the Rule of Law and other constitutional values.

The Bingham Centre's report outlines three steps that could maximise the ability of Parliament to examine the legal implications of Brexit ahead of these far-reaching constitutional decisions. The first would be to publish the European Union (Withdrawal Agreement) Bill in draft form alongside the Withdrawal Agreement and the Political Declaration. The basic principle being that MPs should be able to evaluate the potential domestic legislative effect of the Withdrawal Agreement before the decision on approval in principle is taken.

The second would be for the Government to publish explanatory material that outlines the legal implications of the Withdrawal Agreement, the Political Declaration and the EU (Withdrawal Agreement) Bill. Each of these three elements of the Brexit process will raise complex legal questions and any explanatory material which outlines their legal implications in a politically neutral manner could be instrumental in supporting effective scrutiny.

The third would be to ensure that parliamentary committees can report before the major parliamentary decisions are taken. The UK Parliament's constitutional and legal expertise is concentrated in its committees (for example the Procedure Committee and

the Exiting the EU Committee in the Commons and the Constitution Committee and the Delegated Powers Committee in the Lords). If parliamentary committees were able to report on the Withdrawal Agreement, the Political Declaration and the European Union (Withdrawal Agreement) Bill this would enhance parliamentarians' ability to identify the major legal implications of approving the Government's proposals.

The Withdrawal Agreement and the EU (Withdrawal Agreement) Bill

The Withdrawal Agreement and the EU (Withdrawal Agreement) Bill will both address a number of significant constitutional issues, including: Citizens' Rights, transition, the Protocol on Ireland and Northern Ireland, and dispute resolution.

The Withdrawal Agreement is a treaty which can deliver a degree of legal certainty, a core value of the Rule of Law, for the UK after exit day. The parliamentary process, set out in Section 13, enables the Commons to approve or reject the Withdrawal Agreement, it does not allow the text of the Withdrawal Agreement to be changed. However, approving the Withdrawal Agreement will raise a number of legal questions about how the treaty should be implemented by the EU (Withdrawal Agreement) Bill, including:

- How will the EU (Withdrawal Agreement) Bill seek to provide constitutional protection for Citizens' Rights?
- How will the EU (Withdrawal Agreement) Bill change the legal effect of the EU (Withdrawal) Act 2018?
- How will the Protocol on Ireland and Northern Ireland be implemented by the EU (Withdrawal Agreement) Bill?
- How much weight will domestic courts be instructed to give the judgments of the Court of Justice when interpreting and enforcing the provisions in the Withdrawal Agreement?

At this stage it is not possible to know the answers to these questions. The more important point is to recognise the important role of Parliament in scrutinising the answers that are eventually provided by the Government when the EU (Withdrawal Agreement) Bill is introduced. All of the above questions raise complex constitutional issues that could have far-reaching consequences for the Rule of Law.

Even if there is political agreement on the content of the Withdrawal Agreement as negotiated by the UK and the EU, it is important from a Rule of Law perspective that parliamentarians carefully examine the constitutional and legislative tools used to implement the treaty's contents. On issues such as Citizens' Rights and the Ireland and Northern Ireland Protocol, the devil will be in the domestic legislative detail.

The Political Declaration

The Political Declaration (the Framework on the Future Relationship) poses the most risks for Parliament's ability to scrutinise the Rule of Law implications of Brexit. The Political Declaration is a political agreement rather than a legal treaty, and yet under the terms of section 13 of the EU (Withdrawal) Act 2018 and Article 50 TEU, the Commons is being asked to approve the terms of departure without sight of the detailed legal text that will govern the long term economic relationship between the EU and the UK.

While the Political Declaration may not be legally binding, it could still have significant legal implications. For example, the substance of the Political Declaration could influence how the Government uses the delegated powers already enacted by Parliament to prepare for Brexit, by modifying the extent to which retained EU law contains deficiencies. It will also provide vital context to inform how the legal provisions in the Withdrawal Agreement, such as the Protocol on Ireland and Northern Ireland, could work in practice.

To minimise the risk of legal confusion arising during the debate on the Political Declaration, the Government should outline, when it is presented to Parliament, the potential legal implications of its approval. The Government should also explain what role Parliament will play in the process of approving and implementing the Treaty on the Future Relation between exit day and the end of transition on 31 December 2020.

Conclusion

Parliament has two main roles in the final months before exit day. The first is to take the big political decisions that will shape the UK's relationship with the EU after exit day. The second is to supervise a process of constitutional and legal change through the legislative process. To ensure that the Brexit process does not damage the Rule of Law, Parliament must give equal attention to both.

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