

United Kingdom Internal Market Bill: A Rule of Law Analysis of Clauses 42 to 45



Executive Summary

This Report sets out in brief the Bingham Centre's Rule of Law analysis of clauses 42 to 45 of the **UK Internal Market Bill**, to inform the consideration of those clauses by the House of Commons in Committee of the Whole House on **Monday 21st September**.

In clauses 42 to 45 of the Bill, the Government is asking Parliament to legislate in deliberate breach of the UK's international obligations. The Bill would authorise future breaches of international law by ministerial regulations, but is also itself in breach of clear obligations which the UK voluntarily and very recently assumed in Articles 4 and 5 of the Withdrawal Agreement. The precise nature of the breach was candidly explained by Secretary of State for Northern Ireland Brandon Lewis – most flagrantly, clause 45(2)(b) will disapply the direct effect and supremacy which the Government agreed to give to the WA to the extent necessary to enable it to make regulations which disapply provisions in the Northern Ireland Protocol to the Withdrawal Agreement.

As Lord Tom Bingham made clear in his well known exposition of the concept, the Rule of Law requires compliance by the State with its obligations in international law as in national law. A breach of the rule of international law is still a breach of the Rule of Law.

The Government's reliance on internal law to justify its position does not affect the fact that the Bill deliberately breaches international law and therefore the Rule of Law. Whether a UK court would be able to provide a remedy if Parliament repudiates Article 4 WA does not affect the fact that passing the Bill will put the UK in immediate breach of the WA and therefore in breach of international law. Introducing such a Bill is also a breach of the Ministerial Code, which requires ministers to comply with the law, including international law.

The nature of the breach of international law, and therefore of the Rule of Law, in this case is particularly stark. This is not a case of a provision in a Bill possibly or arguably being incompatible with one of the UK's international obligations. It is an explicit repudiation of the express terms of an agreement very recently entered into by the Government on behalf of the UK.

The Government has responded to Rule of Law concerns about the Bill by tabling an amendment which would prevent the relevant clauses from being brought into force until the House of Commons has passed a resolution to that effect. This is part of the Government's characterisation of the clauses as a "reserve power" which it will only be necessary to use in the event that the EU insists on an unreasonable interpretation of the WA/NIP.

The report considers the Government's arguments but concludes that the Government amendment does not fix the Bill's fundamental Rule of Law problem. The fact that the coming into force of those provisions will be deferred pending a further resolution of the House of Commons does not alter the fact that Parliament is being asked by the Government to legislate in breach of its treaty obligations in the Withdrawal Agreement.

The essence of the Rule of Law problem with the Bill is that it threatens a breach of treaty obligations as part of a negotiating position in relation to a future agreement. The Rule of Law is not negotiable.

The treaty itself provides a dispute resolution mechanism for resolving disagreements about its interpretation. The Rule of Law-regarding way for the UK to proceed is by invoking the dispute resolution mechanism provided for by the treaty, not legislating to disapply the treaty if its interpretation is not accepted by the other party.

The consequences of such a repudiation of a clear international law obligation are very serious, including for the UK's reputation as a global leader on the Rule of Law and as an advocate for a rules-based international order.

MPs must ask themselves if their conscience allows them to support such an unprecedented request to authorise the clear repudiation of a treaty obligation to which the UK only recently agreed.

The question for parliamentarians is whether, whatever the position under UK constitutional law, they are prepared to take the unprecedented step of voting in favour of a deliberate breach by the UK of its international obligations under the WA.

The Report concludes that the only way to avoid that consequence, and therefore to avoid Parliament being implicated in a breach of the Rule of Law, is to remove these clauses from the Bill.



About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society - too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

www.binghamcentre.biicl.org

Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. Previous Reports have been on the EU (Withdrawal Agreement) Bill and the Terrorist Offenders (Restriction of Early Release) Bill as well as on various coronavirus laws. Dr Ronan Cormacain is leading this Project.

The Report has been prepared by a team at the Bingham Centre comprising Murray Hunt, Director of the Bingham Centre, Dr Ronan Cormacain, Consultant Legislative Counsel and Senior Research Fellow at the Bingham Centre, and Dr Oliver Garner, Brexit Research Fellow at the Bingham Centre, with assistance provided by Dr Jan van Zyl Smit, Bingham Centre and Kristin Hausler, British Institute of International and Comparative law.

Table of Contents

Executive Summary.....	2
Introduction.....	5
The Relevant Provisions of the Bill.....	5
Clause 42: ministerial power to override implemented treaty provisions on exit procedures.....	5
Clause 43: power for Secretary of State to override treaty provisions on state aid	6
Clause 45: the “notwithstanding” clause	6
The Bill’s breaches of international law.....	6
Breaches of the Northern Ireland Protocol, Articles 5 and 10.....	7
Breaches of the Withdrawal Agreement, Article 4.....	7
Breach of the Withdrawal Agreement, Article 5.....	8
Treaty Obligations in International Law.....	8
The relevance of internal UK law.....	9
The Rule of Law and International Law	9
The Government’s amendment	10
Does the Government amendment fix the Bill’s Rule of Law problem?	10
The Rule of Law compatible alternative	11
The Question for MPs	12

Introduction

The United Kingdom Internal Market Bill was introduced in the House of Commons on 9 September 2020. It passed its Second Reading by 77 votes on Monday 14 September and began four days in Committee of the Whole House on Tuesday 15 September.

The Bill deals with many important matters consequent upon the UK leaving the European Union. However, one part of the Bill has particularly grave implications for the Rule of Law, and for this country's international reputation for Rule of Law leadership.

Part 5 of the Bill contains provisions¹ which are either on their face in knowing and deliberate breach of international law, or which authorise such knowing and deliberate breaches. The international law in question is the Withdrawal Agreement, an international treaty very recently agreed between the UK and the EU, and implemented in domestic law by a very recent Act of the current Parliament, the European Union (Withdrawal Agreement) Act 2020.

Such provisions in a Government Bill, asking Parliament to agree to deliberately breaching international legal obligations voluntarily entered into by the UK, are unprecedented.

This Report analyses these provisions from the perspective of the Rule of Law, which is the Bingham Centre's particular expertise. It focuses in particular on the Rule of Law concern about the Bill deliberately breaching or contemplating breaching international legal obligations. It considers whether the Government's proposed amendment to the provisions meet the serious Rule of Law concerns to which the clauses give rise and concludes by making a recommendation as to how to make the Bill compatible with the Rule of Law.

The Relevant Provisions of the Bill

There are three key clauses of the Bill which give rise to serious Rule of Law concerns, in Part 5 of the Bill which concerns the Northern Ireland Protocol to the Withdrawal Agreement: clauses 42, 43 and 45.

Clause 42: ministerial power to override implemented treaty provisions on exit procedures

Clause 42 would give a Minister the power to make regulations about the application of exit procedures to goods moving from Northern Ireland to Great Britain,² including any exit procedure that is applicable by virtue of the Northern Ireland Protocol.³ The power to make such regulations expressly includes the power to disapply, or modify the application of, an exit procedure,⁴ and

“Such provision may include provision for rights, powers, liabilities, obligations, restrictions, remedies and procedures *that would otherwise apply*, as a result of relevant international or domestic law, *not to be recognised, available, enforced, allowed or followed*”⁵ (emphasis added).

“Relevant international or domestic law” is defined very widely to include the Northern Ireland Protocol, any other provision of the Withdrawal Agreement, any other EU law or international law, any provision of domestic legislation such as the European Communities Act 1972 or the EU (Withdrawal) Act 2018 or “any other legislation, convention or rule of international or domestic law whatsoever.”⁶

In other words, ministers would be given **an extraordinary power to override even implemented treaty provisions on exit procedures** on goods moving from Northern Ireland to Great Britain.

¹ Clauses 42-45.

² Clause 42(1).

³ Clause 42(2).

⁴ Clause 42(4).

⁵ Clause 42(5).

⁶ Clause 42(7) and 45(4).

Clause 43: power for Secretary of State to override treaty provisions on state aid

Clause 43 gives the Secretary of State a power to make regulations in connection with Article 10 of the Northern Ireland Protocol,⁷ which concerns State Aid, including provision disapplying or modifying the effect of Article 10⁸ or prescribing how it is to be interpreted.⁹ The power is very broadly defined and again expressly includes the power to make provision that is incompatible or inconsistent with any relevant international or domestic law.¹⁰

In other words, the Secretary of State would be given an extraordinary power to override treaty provisions on State Aid, including in a way which removes individuals' or businesses' rights of action in respect of aid which they would otherwise have.

Clause 45: the “notwithstanding” clause

Clause 45 completes the problematic provisions, by providing that the clauses described above and regulations made under them are, in the words of the clause's cross heading described as “shocking” by Former Lord Speaker Baroness D’Souza,¹¹ “to have effect notwithstanding inconsistency or incompatibility with international or other domestic law.”

This means that regulations made under clauses 42 and 43

are not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law¹²

and that

all rights, powers, liabilities, obligations, restrictions, remedies and procedures which are, in accordance with section 7A of the European Union (Withdrawal) Act 2018, to be recognised and available in domestic law, and enforced, allowed and followed accordingly, cease to be recognised and available in domestic law, or enforced, allowed and followed, so far and for as long as they are incompatible or inconsistent with [provisions in or made under this Act]¹³

In other words, the provisions in this later Act of Parliament are intended by the Government to override the provisions in the EU (Withdrawal) Act according direct effect and supremacy to the provisions of the Withdrawal Agreement which the UK agreed to protect in UK law.

The Bill's breaches of international law

Some of those defending the Bill against criticisms that it is in breach of the Rule of Law have sought to argue that there is nothing in the Bill which is actually in breach of any international legal obligation, it merely authorises possible future breaches when ministers exercise their power to make regulations which are incompatible or inconsistent with international law.¹⁴

It is important to be clear, therefore, about precisely how these clauses in the Bill breach international law, and precisely when those breaches occur. There may be different breaches by the UK in international law at different times: on the Government's introduction of the Bill, on Parliament's passing of the Bill, on its coming into force, and on the making of regulations under the clauses being considered. The precise nature and timing of the different breaches depends on the particular obligation in play.

⁷ Clause 43(1).

⁸ Clause 43(2)(b).

⁹ Clause 43(2)(a).

¹⁰ Clause 43(3)(e).

¹¹ Hansard, House of Lords, 10 September 2020 Volume 805 Col 921, available at <<https://hansard.parliament.uk/lords/2020-09-10/debates/6112E76D-DBC2-4083-B4FB-7E76FD8D495C/RuleOfLaw>>.

¹² Clause 45(2)(a).

¹³ Clause 45(2)(b).

¹⁴ See eg Lord Keen before his resignation as Advocate General for Scotland [insert ref].

Breaches of the Northern Ireland Protocol, Articles 5 and 10

Article 5 of the NIP deals with export procedures. Clause 42 of the Bill authorises a Minister to make regulations which are in contravention of Article 5 and therefore authorises a future breach of international law.

Article 10 of the NIP deals with state aid. Clause 43(2)(b) then states that these regulations may make provision

disapplying, or modifying the effect of, Article 10

This provision therefore also authorises a future breach of international law.

Article 10 together with Annex 5 sets out the EU law which is to govern Article 10. However, clause 43(3)(d) states that

Article 10 not to be interpreted—

- (i) in accordance with case law of the European Court;
- (ii) in accordance with any legislative act of the EU, including regulations, directives and decisions, that would otherwise be binding on the United Kingdom;
- (iii) otherwise than in accordance with the regulations;

This therefore also authorises a future breach of international law.

While actual breaches of Article 5 of the Northern Ireland Protocol concerning export procedures and Article 10 concerning State Aid might not crystallise until regulations are made under the new powers in the Bill, there are two respects in which the Bill breaches the Withdrawal Agreement in a more immediate way.

Breaches of the Withdrawal Agreement, Article 4

Article 4 of the Withdrawal Agreement provides for the direct effect and supremacy of EU law in relation to the application of the Withdrawal Agreement to and within the United Kingdom.

Article 4(1) states that

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*.¹⁵

Article 4(2) of the WA states that

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.

In this clause, the UK agreed to enact primary legislation which gives judges the power to disapply domestic law which is inconsistent with the Agreement. The UK fulfilled this obligation through the enactment of the European Union (Withdrawal Agreement) Act 2020.

As stated in the Government's own description of its position, clauses 42, 43 and 45 seek to disapply the domestic application of the direct effect of the Withdrawal Agreement, by partially 'switching-off' new section 7A EUWA 2018, which gives effect to Article 4 WA,

This is why Secretary of State for Northern Ireland, Brandon Lewis, admitted in the House of Commons that the Bill breaches the UK's international treaty obligations, an acceptance which he has maintained despite other ministers, such as Lord Keen before his resignation, seeking to suggest that in fact the Bill does not involve any breach of international law.

The Lord Chancellor, Rt Hon Robert Buckland MP, told Andrew Marr that Brandon Lewis was right to say that if the provisions go through there will be a difference between domestic law and international law.¹⁶

¹⁵ Article 4(1) WA.

¹⁶ The Lord Chancellor referred to Article 4 of the Protocol, but presumably meant Article 4 of the Withdrawal Agreement.

Breach of the Withdrawal Agreement, Article 5

Article 5 of the Withdrawal Agreement is entitled 'Good Faith' and obliges both parties to act with mutual respect and in good faith. It then goes on to state that

[the parties] shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.

By the Government introducing a law in Parliament which would authorize the deliberate breaching of the WA, the UK is arguably in breach of its negative obligation under Article 5 to refrain from measures jeopardising the attainment of the objectives of the Agreement. Parliament passing the Bill containing these clauses would certainly put the UK in breach of this Article 5 good faith obligation.

It is therefore clear that the Government, by introducing these clauses in the Bill, and Parliament, if it passes them, are not only contemplating the possibility of future breaches of its obligations in future regulations which may or may not be made, but also place the UK in breach of its obligations under both Articles 4 and 5 of the Withdrawal Agreement.

Treaty Obligations in International Law

International law governs the making, interpretation and termination of international treaties.

Most importantly, the Vienna Convention on the Law of Treaties 1969, which the UK signed in 1970 and ratified in 1971,¹⁷ provides in Article 26:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

This Article reflects the very long-standing principle of international law *pacta sunt servanda* – agreements must be kept. That is a basic principle of customary international law and, as such, is also part of English common law. The importance of this principle to the very existence of a rules-based international order cannot be stressed enough. The International Court of Justice in 1974 restated the importance of the Vienna Convention rule stating:

'One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith [T]he very rule of *pacta sunt servanda* in the law of treaties is based on good faith'.¹⁸

Even more specifically on the point raised by the clauses in this Bill, the predecessor court to the ICJ stated:

a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.¹⁹

The International Law Commission's Articles on State Responsibility, which codify customary international law on States' responsibility for internationally wrongful acts, include the following principles:²⁰

- Every internationally wrongful act of a State entails the international responsibility of that State.²¹

¹⁷ See United Nations Treaty Collection - Vienna Convention on the Law of Treaties – Ratifications. available at <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en>.

¹⁸ *Nuclear Tests* (1974) ICJ Rep page 278.

¹⁹ Permanent Court of International Justice, *Exchange of Greek and Turkish Populations*, Advisory Opinion of 21 February 1925, Series B No. 10, page 20.

²⁰ United Nations, General Assembly, Responsibility of States for Internationally Wrongful Acts, adopted 2001, deriving from work of the International Law Commission, available at <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>.

²¹ Article 1.

- There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.²²

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.²³

The relevance of internal UK law

The Government invokes the constitutional doctrine of parliamentary sovereignty to argue that it is constitutionally permissible for it to ask Parliament to legislate in breach of the UK's treaty obligations, and for Parliament to pass such legislation.

However, the Government's reliance on internal law to justify its position does not in any way affect the above analysis that the provisions in the Bill, if enacted, will put the UK in breach of its international treaty obligations.

The Vienna Convention on the Law of Treaties, which the Government accepts governs the position in international law, provides in Article 27:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

The Articles on State Responsibility similarly provide:

“The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law”.²⁴

Whether a UK court would be able to provide a remedy if Parliament repudiates Article 4 WA does not affect the fact that passing the Bill will put the UK in immediate breach of the WA and therefore in breach of international law.

The Rule of Law and International Law

The Rule of Law is one of the cornerstones of the constitutional legal order of the UK. Lord Tom Bingham, one of the UK's most esteemed judges, defined it as follows

All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.²⁵

Put simply – we are all subject to the law. Although this is not a uniquely British idea (see elements of it in ancient Greece,²⁶ France²⁷ and Germany²⁸ for example), it is an idea which has been rooted in our constitution for centuries, and which we have exported to many countries around the world. The ideal of Magna Carta – that no-one is above the law – is a source of global inspiration.

The Rule of Law requires the State to act in accordance with the law and does not distinguish between national law and international law for this purpose: in Lord Bingham's words: “the rule of law requires compliance by the state with its obligations in international law as in national law.”

In his book, *The Rule of Law*, Lord Bingham explained the reason for including this principle in any contemporary account of the Rule of Law:²⁹

“... although international law comprises a distinct and recognisable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual

²² Article 2.

²³ Article 12.

²⁴ Article 3.

²⁵ Tom Bingham, *The Rule of Law* (Penguin UK 2011).

²⁶ Aristotle wrote that it is better for the law to rule than one of its citizens.

²⁷ See the French constitutional concept of *état du droit*.

²⁸ See the German constitutional concept of *rechtsstaat*.

²⁹ Tom Bingham, *The Rule of Law* (2010), chapter 10, “The Rule of Law in the International Legal Order”, pp. 110-111.

states and in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends ; and observance of the rule of law is quite as important on the international plane as on the national perhaps even more so. ...the rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large.”

The UK has long been a global leader in advocating for a rules-based international order. Its credibility as such depends on it leading by example. Lord Bingham again:³⁰

“However much any of us as individuals might relish the opportunity to live our lives free of all legal constraints ... we know quite well that acceptance of these constraints is the necessary price to be paid for their observance by others and that a society in which no one was subject to such constraints would not be a very congenial one. ... The same is true in the international sphere. However attractive it might be for a single state to be free of legal constraints that bind all other states, those states are unlikely to tolerate such a situation for very long and in the meantime the solo state would lose the benefits and protections that international agreement can confer. The rule of the jungle is no more tolerable in a big jungle.”

Introducing a Bill which deliberately breaches international law is also a breach of the Ministerial Code, which requires ministers to comply with the law, including international law. As Lord Bingham also pointed out in his account of the Rule of Law, this recognition in the Ministerial Code that ministers must comply with international law flows from the acceptance that the Rule of Law requires States to comply with their international obligations as well as national law.

Parliament should be in no doubt about the enormity of what the Government is asking it to do by agreeing to legislate in deliberate breach of international law, and therefore the Rule of Law, and its implications for the UK’s hard earned reputation for global Rule of Law leadership.

The Government’s amendment

The Government has introduced an amendment³¹ to the Bill in response to concerns expressed at Second Reading by many members, including a significant number of Conservative backbenchers, about Parliament being asked by the Government to authorise knowing and deliberate breaches of international law.

The effect of the Government’s amendment would be that clauses 42, 43 and 45 could not be brought into force until the date of their commencement has been approved by a Resolution of the House of Commons and referred to in a motion tabled in the House of Lords.

Alongside the amendment, the Government has also published a Statement on the notwithstanding clauses in the Bill, in which it commits to asking Parliament to support the use of the provisions in clauses 42, 43 and 45 of the Bill “only in the case of, in our view, the EU being engaged in a material breach of its duties of good faith or other obligations, and thereby undermining the fundamental purpose of the Northern Ireland Protocol.”

The statement provides five examples of such behaviour, including insistence on paperwork requirements (export declarations) for goods going from Northern Ireland to GB, and insistence that the EU’s state aid provisions should apply in GB in circumstances where there is no link or only a trivial one to commercial operations taking place in Northern Ireland.

The Government also confirms that “in parallel with the use of these provisions it would always activate appropriate formal dispute settlement mechanisms with the aim of finding a solution through this route.”

Does the Government amendment fix the Bill’s Rule of Law problem?

The Government refers to its amendment as providing a “parliamentary lock” on the bringing into force of the provisions in the Bill that are in breach of the Withdrawal Agreement. It seeks to

³⁰ *The Rule of Law*, p. 112.

³¹ Amendment 66, inserting new sub-section (3A) into clause 54 of the Bill which concerns commencement.

characterise these provisions in the Bill as “reserve powers”, or a “legal safety net”, which will only need to be used in the event that the EU insists on “unreasonable interpretations” of the Northern Ireland Protocol which cannot be resolved under the dispute resolution procedure provided under the Withdrawal Agreement/in the negotiations about the future relationship. In the words of the Lord Chancellor, in his interview on the Andrew Marr Show on 13th September, “it is all about insurance planning ... a break the glass in emergency provision” which will only be needed in the event of the negotiations not ending in agreement.

The Government’s argument, that these clauses are in the nature of emergency powers, which will only be needed if agreement is not reached in the ongoing negotiations, and that it will now be for the House of Commons to decide whether and when they are brought into force, merits careful consideration. The Government is right that the Northern Ireland Protocol left some matters for further discussion between the UK and the EU, and it is also the case that the phased negotiation between the UK and the EU over the UK’s withdrawal is a most unusual, indeed unprecedented international negotiation generating binding treaty obligations at the same time as ongoing negotiations about the future relationship continue.

On close analysis, however, we do not consider that the Government amendment meets the serious Rule of Law concerns set out above.

Even with the Government’s amendment, the Bill will remain in breach of international law in significant ways.

Deferring the coming into force of these provisions pending a further resolution of the House of Commons does not diminish the Government’s breach of the good faith obligation in Article 5, by seeking powers which make the attainment of the objective of the Withdrawal Agreement more difficult, nor Parliament’s complicity in that breach if it passes the Bill containing those clauses.

The Bill, as amended, will also still amount to a breach of the Article 4 obligation on enactment, because the protection for the direct effect and supremacy of rights in the Withdrawal Agreement will then be vulnerable to defeasance by a resolution of the House of Commons, which is a weaker protection than that which the UK undertook to provide in Article 4 (and did provide in s. 7A of the EU (Withdrawal) Act 2018, as inserted by the EU (Withdrawal Agreement) Act).

The fact that the coming into force of those provisions will be deferred pending a further resolution of the House of Commons therefore does not alter the fact that Parliament is still being asked by the Government to legislate in deliberate breach of its treaty obligations.

The essence of the Rule of Law problem with the Bill is that it threatens a breach of treaty obligations as part of a negotiating position in relation to a future agreement. This is clear from the Government’s statement on its proposed use of the notwithstanding clauses, which comes close to saying that if the UK does not get what it wants in relation to specific issues, it will unilaterally repudiate aspects of the Withdrawal Agreement and the NI Protocol. Threatening to breach international obligations in this way is not compatible with the Rule of international law: As Sir Bob Neill memorably commented in the House of Commons recently, “The Rule of Law is not negotiable”.

The Rule of Law compatible alternative

The Government says that it needs the clauses in the Bill in the event that the EU insists on unreasonable interpretations of the WA/NIP.

The Withdrawal Agreement itself provides a dispute resolution mechanism for resolving such disagreements about the interpretation of the Withdrawal Agreement.

In that agreement, the UK agreed that during the transition period, the Court of Justice of the European Union would have jurisdiction over disputes concerning the interpretation and application of the Withdrawal Agreement itself.³²

After the transition period, the dispute settlement procedure set out in Articles 167 onward apply.

³² Article 131 Withdrawal Agreement.

Moreover, the UK agreed to the exclusivity of the dispute settlement procedures provided for in the Agreement: for any dispute arising under the Agreement, the parties are only to have recourse to the procedures provided for in the Agreement.³³

The Rule of Law-regarding way for the UK to proceed if it has concerns about the EU's interpretation of the Agreement is therefore by invoking the dispute resolution mechanism provided for by the Withdrawal Agreement itself, not legislating to disapply the treaty if the UK's interpretation of it is not accepted by the other party.

The Question for MPs

The question for parliamentarians therefore is whether, whatever the position under UK constitutional law, they are prepared to take the unprecedented step of voting in favour of a deliberate breach by the UK of its international legal obligations only recently voluntarily entered into with the EU in the Withdrawal Agreement.

MPs must ask themselves if their conscience allows them to support such an unprecedented request to authorise the clear repudiation of a treaty obligation to which the UK only recently agreed.³⁴

The only way to avoid Parliament being implicated in a serious breach of the Rule of Law, is to remove these clauses from the Bill.

³³ Article 168 Withdrawal Agreement.

³⁴ See [Parliament must tell this overreaching executive: "Not in our name"](#), Prospect online, 11 September 2020.



Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
E binghamcentre@biicl.org

www.binghamcentre.biicl.org

The Bingham Centre for the Rule
of Law is a constituent part of the
British Institute of International and
Comparative Law (www.biicl.org).

Registered Charity No. 209425