**22 November 2018**

**FA Mann Lecture**

Given by The Right Honourable Dominic Grieve MP

# Brexit—Endgame of international engagement or a new start?

## INTRODUCTION

It is both a pleasure and a privilege to have been invited here this evening to give this lecture in honour of Dr Francis Mann. He belonged to that group of German émigré jurists, who, cast out of their mother country by persecution, came to find here not just a safe haven, but an environment fertile for the development of international jurisprudence, bringing together both our common law and their civil law traditions. Our country has profited immensely from this cross fertilisation. It is undoubtedly one of the reasons why London is such an important centre for dispute resolution and our legal system, and the academic study that helps underpin it, is held in such high regard.

In asking me to give tonight's talk, I sense that the organisers may have chosen to move a little outside the traditional framework for this lecture. As I noted from looking at my predecessors' contributions, they are steeped in a high level of legal knowledge and erudition. As a lawyer/politician I can make no claim to this. But the topic they were hoping I would choose, and I have chosen, lies on that overlap between those two spheres and illustrates all too clearly what happens when public sentiment and international legal constructs cease to operate in harmony together.

So, it must be understood that this evening is a backbench politician's personal view of an issue that is evolving rapidly and with no certain end in sight. So rapidly indeed that I have had to rewrite bits of it at the

last minute. So it is not an academic discourse. But I hope that I may also bring to it enough of the lawyer's rigour and detachment that Francis Mann would certainly have demanded.

## BACKGROUND

For 29 months now we have seen the development of a political and constitutional crisis in our country of unparalleled dimensions in modern times. It has precipitated the fall of one government and contributed to the failure of another to get a coherent mandate for carrying it out. It divides families, friends, generations and political parties and probably some of us present in this room. It may bring potentially profound change in our country's relationship with both our own and the international legal order with consequences that flow from this both domestically and internationally.

In voting to leave the EU, the majority, in its repeated slogan of "taking back control", was making some form of demand of the government and Parliament for a change in direction for the United Kingdom in respect of our participation in building supranational legal frameworks. The referendum was also a challenge as to what is expected of our unwritten constitution, which has become heavily entwined with the supranational frameworks the United Kingdom has helped to build.

My Brexiteer colleagues have in varying degrees signed up to the view that EU membership undermines the sovereignty of Parliament in a manner which is damaging to our independence and our parliamentary democracy and our system of Law. This certainly fits in with a national (if principally English) narrative that they trace back to Magna Carta and the emergence of the Commons as a distinct body by the end of the 13th century. To this we can add Habeas Corpus and the Bill of Rights of 1689. It emphasises the exceptionalism of our national tradition, which we can see recognised from a very early date. In the mid-15th century we have it celebrated by Chief Justice Fortescue in his "De Laudibus Legum Angliae" (In Praise of the Laws of England). There the use of torture is deprecated and trial by jury and due process praised

and with it, its uniqueness to England. There is even an excellent section in it which might have been relevant to who had the power to trigger Article 50. "The King of England" he said, "cannot alter nor change the laws of his realm at his pleasure". A statute, he said, requires the consent of the whole realm through Parliament.

This narrative has proved very enduring. It places Parliament as the central bastion of our liberties.

But it can also be used merely as an assertion of power, particularly when the executive has control over Parliament. In theory at least, our constitution is that the Queen, acting with the assent of her Lords and Commons, should enjoy an exercise of power unlimited by any other lawful authority. It is what allowed Henry VIII in his Act of Supremacy of 1534 to use parliamentary authority to coerce his subjects on matters of deepest conscience. And when the struggle between the Crown and Parliament was resolved in the latter's favour, it is what gave us the 13 clauses of the English Bill of Rights and created the powers and privileges Parliament enjoys today. It is with those powers that Parliament in 1972, at the behest of the then Conservative government, enacted the European Communities Act which gave primacy to EU law in our country. It was Parliament that chose to allow what is now the Court of Justice of the European Union to override United Kingdom Statute law and allow the superior courts of the United Kingdom to do the same, so as to ensure our conformity with EU law in all areas in which the then EEC and now the EU has competence.

The justification for requiring that supremacy should be given to EU law by the Treaty signatories was the understandable one that, without it, achieving adherence to the treaties and convergence between the practice of member states in implementing EU law would be very difficult. But it is hard to avoid concluding that the requirement has contributed to some of the feeling of hostility to the EU felt by sections of the electorate and reflected in the Referendum result. This is despite the efforts of successive governments to try and mitigate the democratic deficit in respect of EU Directives and Regulations by having them scrutinised before implementation in Parliament through the European

Scrutiny Committee in both Lords and Commons. There have also been opportunities to do this at a collective level in the EU Parliament. But as in practice it has never enjoyed any democratic legitimacy among United Kingdom voters and its list system guarantees the detachment of MEPs from their electorates, it has been unable to act as any kind of public focus for challenging and holding to account EU decision making. There has also been a habit of successive UK governments to hide behind decisions of the EU as a justification for being unwilling to address problems raised by their own electors and to fail to highlight our own role within the EU Council of Ministers in framing most EU law. So we should not be surprised that the EU has never been popular in our country. In contrast to Magna Carta, which within a century of 1215 had acquired talismanic importance as defining the rights of Englishmen even if its content and actual effect did not really support this, the ECA 1972 has in fifty years acquired a pariah status as enforcing some form of servitude, at considerable variance to reality.

It also overlooks the truth that Parliamentary sovereignty is not and has never been unfettered.

The very same sources of English exceptionalism that they celebrate contain within them the implication that even the sovereignty of the Queen in Parliament may have its limits. When Sir Edward Coke defied the King, he argued that his sovereignty was limited by rules of natural law and not just the need to govern through Parliament. He developed the idea of an "Ancient Constitution" coming from the Anglo-Saxons, reinforced by Magna Carta, and now being subverted. This was of course myth, but it had great potency.

The Bill of Rights, in asserting the primacy of Parliament, also contains the ethos by which that primacy might be limited. If the accusation against James II in the Bill of Rights is that he sought to "subvert the Lawes and liberties of the Kingdom"—rather the same accusation as I hear levelled against the EU—then what if it is the government of the Crown with a parliamentary majority that seeks to do so, what Lord Hailsham called "elective dictatorship"? On this, the Bill of Rights is silent. The drafters of the Bill saw Parliament as the upholders of rights

and liberties not subverters. But the topic has not gone away. It was raised by Americans in their Declaration of Independence, by the Chartists and the Suffragettes. It can be argued that in deciding to hold the United Kingdom's first nationwide referendum in 1975 on whether or not we should remain in the EEC, Harold Wilson was accepting that the nature of the constitutional change that was taking place required something more than just parliamentary approval, even if he also sought to accommodate Labour Party dissent. Nowadays we are told that the referendum only legitimated membership of a common market, not a European super-state. But the constraints on parliamentary sovereignty that flowed from membership of the EEC were apparent even then.

The reality is that EU membership, although more important than any other international treaty to which we have adhered, is not exceptional. Over more recent British history, but particularly since the end of the Second World War, we have embarked on policies that have developed and changed our laws, not just through domestic mechanisms, but also through international engagement. Notwithstanding our pride in our sovereignty, successive British governments in the last two centuries have sought to make the World a better, safer and more predictable place by encouraging the creation of international agreements governing the behaviour of states. When I was Attorney General, I once asked the Foreign Office to tell me as to how many we were signed up to. They were reluctant to go back beyond 1834, but since then they said they had records of over 13,200 that the UK had signed and ratified and the figure is now closer to 14,000. Over 700 contain references to binding dispute settlement in the event of disagreements over interpretation. And with the passing years these treaties, be they the UN Convention on the Prohibition of Torture or the creation of the International Criminal Court, have dealt not just with inter-state relations, but state conduct towards those subject to its power. So important has been this treaty making that the Ministerial Code, until 2015, referred specifically to the duty of civil servants and ministers to respect our international legal obligations at all times. This was then deleted by the then PM David Cameron, probably in reaction to being reminded of this point too often by me. But the deletion could only be

cosmetic in its effect. The Cabinet Office had to admit it made no difference to the obligation. It is part of Lord Bingham's eighth principle of the Rule of Law. If it were abandoned, we would be sanctioning anarchy on the international stage. UK governments have, despite some lapses, been pretty consistent in observing its principles. Not a week goes by without the PM or the Foreign Secretary informing Parliament of its determination to stand up for the international rules-based system against those who seek to undermine it.

International trade law, including the World Trade Organisation (WTO), is a notable example of this international rules-based order that the UK has been instrumental in constructing. The UK was a founding member of the WTO. Before that Sir Stafford Cripps was the lead UK negotiator on the General Agreement on Tariffs and Trade, which aimed to implement the agreements on tariffs as swiftly as possible, in the context of global economic reconstruction following World War II. Over the years, the mechanisms for dispute resolution through the WTO have developed as a "central pillar of the multilateral trading system", which the WTO describes as its "unique contribution to the stability of the global economy".[1] Under the WTO's dispute resolution system, an expert panel makes an initial ruling that is then endorsed or rejected by the WTO's members—following the Uruguay Round agreement these rulings are automatically adopted unless all WTO members are persuaded to reject a ruling. There is an option for either party to appeal points of law to the permanent Appellate Body.

I note that this international rules-based system for trade is imperilled at the moment as the number of members on the Appellate Body has shrunk from the usual number of seven to three. This is because the US has been blocking appointments and reappointments of Appellate Body members for the last year and a half. If the number of members reaches two, the Appellate Body will stop functioning, and the next two vacancies will occur in December 2019. Prior to the establishment of the Appellate Body in 1995, disputes over international trade under GATT were addressed through negotiations between states with the aim of finding a resolution. Unlike the relative transparency and legal

[1] https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

certainty of the current dispute resolution mechanisms of the WTO, a return to the old ways of power and politics—at worst gunboat diplomacy—would be a serious blow to the international rule of law. At present, of course, the UK is represented by the EU at the WTO. But it is our intention to resume our place in it and be bound therefore directly by its rules.

But the benefits of an international rules-based system have not prevented us from agonising and complaining over its impact, particularly in areas where it places constraints on the United Kingdom's right to legislate at will on domestic matters.

I don't want to get too diverted this evening by the history of our adherence to the European Convention on Human Rights and its incorporation into our law through the Human Rights Act. But I do put it forward as an example of an international treaty that we have woven into the fabric of our constitutional framework, yet has brought in its wake intense disagreements as to its value.

A reasoned examination tells one that its impact has been beneficial, perhaps most especially in Northern Ireland. The Convention provided the human rights underpinning for the Belfast/Good Friday Agreement, the 20th anniversary of which we celebrate this year. The Agreement provides that the British Government would incorporate the Convention into Northern Ireland law "with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency". While the requirement that devolved legislatures make laws that are compatible with the ECHR is a feature of all of the UK's devolution settlements, it has a particular importance in the context of reconciliation in Northern Ireland following the Troubles. The Belfast/Good Friday Agreement was implemented in the UK through the Northern Ireland Act 1998, which forms part of the UK constitution, providing for devolution in Northern Ireland. Thus, the laws and constitution of the UK have received the benefit of the influence of the ECHR, an international treaty, and the Belfast/Good

Friday Agreement which includes an international agreement between the British and Irish governments.

More generally, over the years, the ECHR has produced a number of landmark decisions which have challenged and halted practices which were once considered acceptable in Western democracies, but which would now be seen as wholly unacceptable by the overwhelming majority of the British public. Despite difficulties over the enforcement of some of its judgments, the Strasbourg Court can show that it has been instrumental in bringing about positive changes of attitude by public authorities with a long track record of serial human rights violations. Our support for the Convention and the Court has thus been a major achievement of British soft power on the international stage.

Yet for all this, my Party, which supported its creation and the later right of personal petition, is still hinting at a review, with the possibility of replacing the HRA with a Bill of Rights that might call into question our future adherence to the Convention. It is symptomatic of the discomfort a supranational court causes.

The EU too has had a major influence on rights. The legal order under the EU Treaties is of the greatest importance, since it provides the mechanism to ensure that the agreed rules governing the inter-action of nation states and European bodies are respected. As the product of an international treaty, the EU can only be effective and be seen to be legitimate if its own operations are considered to respect the letter and spirit of the Treaties that created it. Furthermore, the nature of the project has produced a requirement, not only for there to be the supremacy of EU law over the national law of its member states in areas of EU competence, but also the creation of parts of that law by its central bodies without the need for any domestically generated primary or secondary legislation at all. It is obvious that such a source of law can operate abusively. Its founders wished that EU law should further principles of democracy and the rule of law, including the principles reflected in the European Convention on Human Rights and other international treaties on social and economic rights to which all members are signatories, as set out in the preamble of the Charter of

Fundamental Rights. But those general principles therefore need protecting. That is why they are now in a text, in the Charter of Fundamental Rights, which also covers the key obligations of member states in respect of the "four freedoms" conferred on EU citizens in the Treaties.

It seems to me therefore to be rather ironic that the Charter should have been on the receiving end of so much vilification in the United Kingdom long before Brexit. I can see that criticism can be made of its use to claim rights that might be considered to fall outside the scope of the Treaties. I experienced this as Attorney General when I appeared in the Supreme Court for the Government in *Chester and McGeoch* in 2013, where an attempt was made to use the Charter to claim prisoner voting rights in EU elections. But this attempt failed. One can also see that the CJEU may be accused at times of applying the Charter and its principles in a manner which shows insufficient regard for the intention of the signatories. But the critics of the Charter's existence ignore the point that without it and the general principles of EU law it embodies, the risk would have been much greater of seeing EU law being created or applied that did not respect the limits of the Treaties or interfered with fundamental rights and left individuals and legal entities without any means of redress. Recognition of these benefits has been lost in the repeated denunciations of the Charter as an alien document.

Furthermore, on a practical level, general principles of EU law have been the principal driver in recent years in promoting the development of equality law and social rights. It is due to EU law that there are rights to protection against pregnancy discrimination, to equal pay for work of equal value and to protection against discrimination at work on grounds of sexual orientation, religion and age. The Equality Act 2010 may be a piece of parliamentary legislation that would have been supported nationally in any event, but it owes its origins to changes brought about by EU law. It is noteworthy that, despite some expressions of concern about the burden on business, there has never been any serious resistance to these developments. And, of course, it is still happening. In the recent Supreme Court decision of *Walker v Innospec*, Mr Walker relied on a Framework Directive, interpreted in

line with general principles of EU law of non-discrimination, to disapply a provision of national law which restricted the extent to which same sex spouses could receive pension payments from pensions earned by their deceased spouse. At a political level, I have not heard one word of criticism about this decision

I have to accept, of course, that there are some of my colleagues in Parliament who take the view that, at most, the only human rights that should be protected are those in the ECHR and even then, some wish any rights protection to be purely domestic and not subject to any international treaty obligation capable of interpretation by an international court. As a Conservative, I have always been cautious about the ability or desirability to widen the scope of fundamental rights, and some economic and social rights place positive duties on the state that may in theory be important aspirations but are in practice hard to fulfil and involve a difficult balance between competing policy areas. But, that said, it seems clear that there have grown up in the last half century areas of law, particularly around equality and privacy, that are seen as fundamental rights by an overwhelming section of the public.

## THE PROCESS OF BREXIT

This background highlights for me, the intense contradictions in what is sought from Brexit.

On the one hand, Brexiteers celebrated the referendum result as the necessary step to restoring Parliamentary sovereignty and nationhood—in Boris Johnson's words our "Independence Day". But we were then immediately told that Parliament's new-found sovereignty should not extend to legislating for, or even just approving, the triggering of the Article 50 process, as the people had spoken and nothing more was needed. It was argued by some that the government had been turned into the agent of the people and was required to trigger Article 50 irrespective of how this might conflict with previous statute law or the consequences it might have for the acquired rights of the Queen's subjects.

Now this is revolutionary. It runs entirely contrary to principles of constitutional law that, in the words of Professor Dicey, and as cited in the *Miller* case, "the judges know nothing about any will of the people except in so far as it is expressed by an Act of Parliament and would never suffer the validity of a statute to be questioned on the ground of its having been passed or kept alive in opposition to the wishes of the electors".

In fairness to the Government, it did not seek to argue that the holding of the EU referendum of itself gave it authority to trigger Article 50. It sought instead to contend that it was entitled to do this under the Royal Prerogative because its action was confined to our international relations and the domestic changes that might follow to UK laws enjoyed under UK statutes were an incidental consequence of it that Parliament had not expressly or impliedly restricted. The High Court rejected this argument as "flawed at a basic level" in *Miller*. The Supreme Court was rather kinder, but still held that statutory authority was needed. Part of the reason for the Court's decision was that the European Communities Act is a constitutional statute, that provided in the UK constitution for our legal relationship with the EU. I confess that I see the outcome of the *Miller* case as one small bit of silver lining to the Brexit cloud, as the impact of the *Miller* judgment is the biggest boost to Parliament against the growth in power of the executive in the last century.

But a glance at the news headlines and the response in Parliament might not have left one with that impression. Both High Court and Supreme Court judgments were accompanied by the vilification of the judiciary of a kind one might more readily have expected from a country sliding into tyranny rather than recovering its sovereignty. The irony is that, far from the judgment inhibiting the Brexit process, it gave it a structure where previously there had been every appearance of chaos. Parliament approved the legislation giving the Government authority to trigger Article 50.

The consequences of that trigger are however with us.

Firstly, the negotiations have not gone as intended. In her Lancaster House, Florence and Mansion House speeches, the Prime Minister set out a vision for the future of our country. She said she wanted to reconcile a desire to maintain access to the Single Market for goods and services and a deep and special relationship with the EU, with the political requirement that, in order to enable us to exercise immigration controls and secure the right to negotiate third country free trade agreements, we should be free of the constraints of the EU treaties and above all the jurisdiction of the CJEU. She also wished us to continue participating in a series of EU regulated fields in science, medicine, security, data sharing and justice, but again with a special status and not just as an observer and with a separate arbitral mechanism from the CJEU to resolve disagreements on interpretation. Far from ending international engagement, we have thus been taking on the task of creating a whole new set of such engagements for the future.

The problem is that we are not negotiating with a sovereign entity as some of my colleagues seem to believe. The EU is an international treaty organisation underpinned by a complex rule book. Those rules exist because the 28 member states cannot trust each other spontaneously; they trust each other because they work on the basis of agreed common rules with common enforcement, common supervision and under a court that should make sure those rules are applied in a common manner. It has shown considerable flexibility accommodating divergence amongst its member states when collective agreement to do so exists. But it has much less flexibility to do this in its dealings with third countries, which is what we are about to become.

To this, we have the added problem of our relations with Ireland, a country of such importance to us bilaterally that we still, by statute, give it a special status and do not treat it as a "foreign country"—see s.2(1) Ireland Act 1949. The Belfast/Good Friday Agreement with Ireland is of prime importance to us to help secure peace and detoxify the issue of Northern Ireland's status in the UK and has set our bilateral relations with Ireland on a very positive footing.

The Agreement may not require both countries to be in the EU, but it certainly presupposes it, as Ireland is the state most vulnerable to economic damage from the creation of a hard border between us and the EU and from any resumption of violence in Northern Ireland. It should come as no surprise therefore that the EU, which sees itself as the defender of its smaller states, has made the avoidance of a hard border a precondition to any withdrawal agreement.

When the Prime Minister, who is a committed Unionist, acknowledged its consequences by agreeing the Joint Declaration in Brussels last December, she accepted a fetter on our future status outside the EU that was in direct contradiction with some of her other aims. She also has accepted a clause in the Withdrawal Act, inserted in the House of Lords, prohibiting the establishment of any border agreement involving physical structures. It is impossible to see how an open border can be maintained without our being in some form of Customs Union so that there are no tariffs and no need for Border inspections. It would also be necessary to maintain a high level of regulatory alignment so that cross border activity is not jeopardised. Yet progressive regulatory dis-alignment to turn our country into a kind of Singapore of the North East Atlantic seems to be the long-term ambition of some Brexiteers.

Most recently, there has been a shift by the EU to accepting the idea that a "backstop" could extend to the whole UK and not just Northern Ireland. It would only come into effect at the end of transition if no agreement on the future relationship had been reached by then to ensure a soft border. This is certainly some progress, as without it Northern Ireland would be carved economically out of the UK. A Northern Ireland only backstop is a proposal so incompatible with the Union and our sovereignty that I have not found a single MP willing to consider it.

But now that we have the final draft of the Withdrawal Agreement, we can see that the "backstop" provisions are in any event rather more complicated than simply being UK-wide. Article 6 of the Protocol on Ireland/Northern Ireland provides for both the UK and EU to be a single customs territory, which is a UK-wide customs arrangement.

However, many provisions of EU law would apply to Northern Ireland indefinitely under Article 6 paragraph 2, to govern areas such as industrial, environmental and agricultural goods (listed in annex 5 to the Protocol). Article 7 of the Protocol provides for the "internal market" of the UK—clarifying that the Protocol need not prevent access for goods moving between Northern Ireland and the rest of the UK—but the reality underpinning this is that, if the rest of the UK diverges from the EU regulations on goods, then this may result in "friction" i.e. regulatory checks for goods traded between Northern Ireland and the rest of the UK. There are "level playing field" requirements for the UK to maintain regulations in areas such as competition, taxation, environmental and labour law, so the UK's control over its laws in those areas will be limited under Article 6(2), (the detailed level playing field conditions are set out in Annex 4 to the Protocol). Yet, because Great Britain would not have a common commercial policy with the EU in matters such as sanitary and phytosanitary regulations, there will nonetheless be regulatory checks for Great Britain-EU trade.[2]

So it is that the backstop risks satisfying no one, and enraging the stakeholders it aims to please. The DUP has said that it will not support the deal, presumably because it recognises the risk that, if the backstop ends up coming into force, then the UK might one day choose to diverge from EU regulations in a way that increases checks on goods in the Irish Sea. Hardline Brexit supporters who see themselves as "free trade" advocates are furious that the UK might be locked into something like the "Turkey" customs arrangement for trade. Their anger is justified by the backstop requiring that Great Britain adhere to the EU's tariff arrangements with the rest of the world,[3] severely restricting, in practice, the UK's ability to strike new trade deals with third countries because the UK will have little bargaining power without the ability to set its own tariffs. This backstop customs arrangement for the UK looks even worse when one understands that the UK would not automatically get access to the markets of the third countries with which the EU has trade agreements. Rather, the UK

[2] https://www.ft.com/content/6b6f8a98-e811-11e8-8a85-04b8afea6ea3

[3] https://www.politico.eu/article/brussels-wants-permanent-post-brexit-customs-union/

would grant preferential access to the UK market to third countries in trade agreements with the EU, but would not itself have the benefit of preferential access to the markets of those third countries.[4]

It is hard not to conclude that, far from Brexit restoring sovereignty, we are here substituting the relative simplicities of a bilateral treaty with Ireland that was endorsed by referendums on both sides of the border, with a complex web of controls which makes the EU the effective guarantor of the Irish border to the manifest detriment of the UK's freedom of action in future.

We have also seen contradictions in the internal logic of the Brexit project demonstrated more generally in the passage of the EU Withdrawal Act. The Bill was supposed to be a process bill and to have little to do with the form Brexit should take either as to the terms of withdrawal or the future relationship with the EU. It was introduced to convert and entrench EU law into domestic law to ensure continuity, save in those areas such as Agriculture, Immigration and Trade, where primary legislation is being brought in before exit day to replace EU law. No one could reasonably suggest that, in the circumstances of our leaving the EU, it was not essential to get something of this sort on the statute book.

But the Withdrawal Bill, as passed, betrays all the neurosis now evident in respect of legal principles perceived to be of "foreign" origin. Thus, the Government was happy to retain EU law and to keep its supremacy after exit day for those laws enacted prior to exit day or modified after. It was also content to create some of the most extensive powers to change primary legislation by statutory instrument. Some of this was inevitable in order to try and bring Brexit about within the time constraints it has set itself. But their draconian nature emphasises the incongruity between the claimed recovery of parliamentary sovereignty and the reality of a massive accrual of Executive discretion.

[4] https://www.politico.eu/article/brussels-wants-permanent-post-brexit-customs-union/; https://www.ft.com/content/6b6f8a98-e811-11e8-8a85-04b8afea6ea3

In contrast, the safeguards that accompanied EU law have been almost entirely abandoned, the general principles of EU Law and the Charter of Fundamental Rights reduced to no more than interpretative aids to "retained" EU law. This was done on the grounds that to retain any free-standing effect would offend parliamentary sovereignty, even if our own Supreme Court interpreted it rather than the CJEU. Apart from the promise of a new Environment Bill to preserve the EU's environmental principles, the Withdrawal Act leaves large areas of rights law, such as equality and privacy, with no protection from diminution, even if the Government has insisted it has no such intention. There were also a few concessions made, such as the need to negotiate replacement arrangements for the reunification of child refugees with their families. But in broad terms, a working structure of rights derived from international law and obligations linked to EU membership will be dismantled under the Withdrawal Act.

And yet, almost in the next breath, the Withdrawal Agreement itself would require that the UK create in UK law yet another category of imported "foreign" law: the law relating to the Withdrawal Agreement. Article 4 of the final draft of the Agreement provides that:

> 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.

In these words we can see exactly the kind of "direct effect" and "supremacy" of the Withdrawal Agreement that were features of the EU law that affronted Brexiteers' notions of sovereignty. The UK Government undertakes to pass primary legislation to, in essence, give the same effect to the Withdrawal Act and relevant EU law in UK law that EU law presently enjoys.[5] Given this undertaking, it is a good job that Parliament inserted itself into the process for approval and ratification of the Withdrawal Agreement through the amendment that became section 13 of the Withdrawal Act. The UK's implementation of Article 4 of the Withdrawal Agreement will be done in the shadow of the backstop's provisions for a UK-wide customs arrangement and deeper alignment between Northern Ireland and the EU. All of this raises questions about the UK Parliament's freedom to legislate in the future in a manner inconsistent with the primary legislation that will implement Article 4.

In the White Paper on the Withdrawal Agreement Bill, the Government had already indicated willingness to entrench legislative provisions on citizens' rights, meaning the rights of EU nationals in the UK. The Government states in the White Paper that it wants the Bill to "reflect the principle that the rights conferred on individuals by the Withdrawal Agreement will take precedence over any inconsistent provision in domestic law".[6] Thus, having removed the principle of the ongoing "supremacy" of EU law through the Withdrawal Act, the Government plans to establish a new category of law that will prevail over UK law, being the law concerning EU citizens' rights under the Withdrawal Agreement. Because of the status of the Withdrawal Act as a constitutional statute, this change to the position on the "supremacy" of EU law needs to be made through clear and express language in the Agreement Bill, otherwise there is a risk of legal uncertainty if the new Bill merely amends the Withdrawal Act by implication.

The Government further intends to provide for a procedural entrenchment mechanism in relation to the citizens' rights provisions

[5] The best commentary on this so far: https://twitter.com/AdamJTucker/status/1063450299095019521
[6] Department for Exiting the European Union, Legislating for the Withdrawal Agreement between the United Kingdom and the European Union (July 2018), paragraph 46(b).

in the Agreement Bill, which are likely be a constitutional innovation. The White Paper on the Agreement Bill states at paragraph 46(d) that:

> If a future Parliament decides to repeal any part of the primary legislation implementing the citizens' rights part of the Agreement, the Bill will provide that Parliament must activate an additional procedural step. This approach is consistent with other procedural steps introduced by Parliament, such as the referendum locks of the European Union Act 2011, and creates an additional layer of reassurance to EU citizens in the UK that their rights will be protected.

Nonetheless, this will be a constitutionally innovative approach to entrenching at least part of the EU (Withdrawal Agreement) Act. The UK constitutional principle of parliamentary sovereignty that a Parliament cannot bind the hands of a future Parliament, limits the extent to which the Agreement Bill/Act can be entrenched. However, the specific example does not perfectly correlate with the issue at hand because the European Union Act 2011 concerned using referendums as a constraint on Executive power to enter into treaties, whereas the present issue is the power of Parliament to make new laws.

The Withdrawal Agreement also provides for EU law to apply "to and in the United Kingdom during the transition period" under Article 127, and that EU law "shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union."

The transition period will be able to be extended until "31 December 20XX" under Article 132 as presently drafted, although one assumes that the precise year will be specified in any final agreement.

Finally in this brief survey, the proposed arbitration mechanism to settle disputes over the Withdrawal Agreement seems to be derived more from a rejection of supranational law and institutions and antagonism towards judges and courts, as exemplified in the work of

the so called "Judicial Power Project" at Policy Exchange which is dear to some of my colleagues, than any rational basis.

The previous Brexit Secretary, Dominic Raab, welcomed arbitration in that he believed it offers greater national executive control of the process than a court such as the CJEU, to which references could be made directly by our own courts, rather than as he has planned, by a joint committee appointed by both parties to resolve disputes over interpretation.

But one does wonder if, in reality, this distinction is valid. It would certainly prevent individuals bringing claims, as it is expressly stated that only the EU/UK Joint Committee can make a reference—see clause 170. But on the other hand, it produces an ad hoc tribunal which is unlikely to develop its own jurisprudence. And in many areas the only jurisprudence applicable is going to be EU law, as interpreted by the CJEU.

## LOOKING AHEAD

In view of the turmoil and paralysis that Brexit has engendered, it is difficult to predict its outcome, in terms of how our exit will shape our future approach to international obligations and engagement. There are some very mixed signals.

The Government has been insistent that our departure should be seen as a process of smooth adjustment out of one legal order into a new one that suits our national needs better. Although our leaving international treaties is unusual—the last example to spring to mind is our decision to leave the International Labour Organisation of the UN on the basis it no longer fulfilled any useful purpose—a rules-based system has to provide for such an eventuality. The Government has also resisted, up to now, calls from some Brexiteer politicians to ignore our EU treaty obligations in carrying out Brexit. That may seem a reckless suggestion, but it certainly reflects the most common complaint I receive from those who wanted and still want to leave, which is why

has it not already been done? And it is worth noting that some influential voices, with colleagues such as Anthony Browne at Policy Exchange, are suggesting that we should leave the EU on the terms offered and then renege on and violate them afterwards.

The reality is, of course, that we are embarked on an exceptionally complex piece of international treat-making that would not exactly be compatible with breaching current obligations. The Prime Minister's desire for us to continue participating in areas of justice and home affairs, including the European Arrest Warrant and the Schengen information system, the Dublin agreements on the management of asylum claims, the recast Brussels regulations to maintain the mutual recognition of judgments, and the fact that we are giving effect to the General Data Protection Regulations of the EU in the Data Protection Bill, highlights just a bit of this challenge. So do the efforts of my colleague Liam Fox to replicate the 54 trade treaties that we already enjoy through the EU and to secure our re-admittance to the WTO, an exercise which is demonstrating the potential complexity of what was stated to be an easily accessible fall-back position in the event of No Deal.

Finally in this list, we have today's 26-page political declaration. But a glance at it shows the magnitude of the task ahead. It offers no guarantee of anything and the deeper the relationship to be achieved the stronger must be the rules that underpin it. Taken to its full conclusion, it offers a relationship which binds us in many respects as much, with none of the influence that we previously enjoyed within the EU to shape our future. In his recent lecture given in Cambridge, Sir Ivan Rogers paints a picture of our country mired in a purgatorial process of redefining its key international obligations and unable to bring the process to a satisfactory conclusion domestically let alone internationally. Even if this is considered pessimistic, it points to the sustained effort that is going to be needed.

These complexities do raise for me the risk that frustration at delay and failure could precipitate a knock-on effect on international engagement. For all the Government's assurances of its continuing desire to maintain

the United Kingdom at the heart of upholding and building an international rules-based system, our current floundering is not likely to impress parties to other international negotiations or agreements. It also manifests itself in a desire by some to smash more of the china because the first smashing has not generated the sense of satisfaction and empowerment desired. I still have colleagues in my Party who talk of our continuing adherence to the ECHR as "unfinished business", seemingly oblivious to the consequences that would flow from our having to leave the Council of Europe, which will be a key forum for European engagement once we leave the EU. The coarsening of discourse which has followed on Brexit does not lend itself to rational analysis and debate of where the national interest lies.

## CONCLUSION

The message that we should "Take back control" is a powerful idea in conditions where the decline in general confidence in institutions, both national and supranational, has become so marked. But in an increasingly interdependent World, what constitutes the benefit of exclusive control becomes very hard to identify. As a consequence, it is also very hard to achieve without a high level of collateral consequences. The risk therefore is that it is largely a mirage that leaves individuals in practice fewer opportunities to enjoy a good quality of life. It is also a uniquely disruptive form of change that precipitates the very reverse of "quiet government", which we have long been enjoined to pray for and which the United Kingdom has traditionally aspired to deliver to its citizens. But that makes it all the more important that those of us who believe that our engagement in rules-based systems has delivered great benefits, both to ourselves as a nation and to humanity in general, should speak out in its defence. We are in danger of losing the very things which are the most valuable legacy of our forebears. That requires us to try to approach the problems Brexit has unleashed with common sense and moderation and a willingness to accept this project might be proving to be mistaken. We will have to see how Parliament, as the bastion of our liberties, responds to this challenge in the weeks to come.

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