



Constitutional entrenchment and parliamentary sovereignty

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IfG–Bennett foreword

In February 2022, the Institute for Government and the Bennett Institute for Public Policy launched a Review of the UK Constitution, to offer an evidence-based and non-partisan analysis of the strengths and weaknesses of the constitution, and where necessary make recommendations for change.

To address the bold scope of this project, we have complemented our own in-depth research with a breadth of perspectives from some of the UK's foremost constitutional experts. In this series of expert guest papers, we publish the views and proposals of academics and practitioners, who take a range of stances from constitutional conservation through to major reform. While these papers respond to the pressing constitutional questions of the day, they all also look to construct long-term solutions that will inform political decision making as well as public debate.

Given the range of views expressed, we do not necessarily endorse all of the ideas found in these papers, but we can commend the rigour with which the arguments have been constructed and sincerely thank the authors for their thoughtful contributions.

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Introduction

Parliamentary sovereignty is a key principle of the UK constitution. Traditionally understood, the Westminster parliament can make legislation on any subject matter it wishes.* There are no legal limits on its law-making power. Consequently, Acts of Parliament cannot be struck down as unconstitutional by the courts. There is, however, one limit on parliament's power. It cannot enact legislation that would bind a future parliament, either as to the content of legislation or as to the manner in which legislation is made. Were any one parliament to attempt to do so, it would always be possible for a future parliament to reverse this requirement. That is the principle of parliamentary sovereignty, as traditionally understood.

Two consequences flow from this traditional understanding. First, it explains why the UK has a predominantly political as opposed to a predominantly legal constitution, as any limits on parliament's power to enact legislation come from political pressure and not from the law. Parliament may have the power, legally, to enact legislation requiring the slaughter of all blue-eyed babies. However, political pressure means that it would never do so. This pressure comes from the consciences of MPs and the wishes of the electorate.

Second, it explains why it is argued that the UK does not have, and currently could not have, a constitution that places legal limits on the powers of the UK parliament. Legislation, enacted by the King-in-Parliament, is the highest form of law in the UK. All Acts of Parliament are at the same level. There can be no 'constitutional statutes' that are more important than other statutes, in terms of either placing limits on other statutes or being immune from repeal by future statutes. Parliamentary sovereignty, as traditionally understood, prevents entrenchment. Any provision trying to protect a principle from future repeal by parliament can just be overturned, even if this provision is regarded as constitutionally important.

To change this would require parliamentary sovereignty to end and be replaced by constitutional sovereignty. This would require a constitution to be made through a process other than ordinary legislation. For example, this may include a process that involves citizens, either consulting on constitutional principles or voting for the constitution after a referendum, or it may require that aspects of the constitution found in the constitutional document could only be changed by a two-thirds majority, or with the consent of the devolved legislatures. We see these as examples of entrenchment because they are ways of making it more difficult to change constitutional provisions than merely using an ordinary Act of Parliament and harder for them to be overturned. A constitution may also give power to the courts to strike down as unlawful, legislation that breaches constitutionally protected provisions.

* This paper only discusses the power of the UK parliament in Westminster. The Scottish parliament, Senedd Cymru and the Northern Ireland assembly have legally limited powers to enact primary legislation. Moreover, the devolved legislatures do not have the power to alter the UK constitution, or to modify the powers of the Westminster parliament to enact legislation.

This paper investigates whether there are other means through which a form of entrenchment could be provided through the enactment of ordinary legislation, either for a constitution document, or specific provisions deemed to be important enough as to require entrenchment. It looks first at challenges to our traditional understanding of parliamentary sovereignty, particularly as regards the accommodation of the primacy of EU law (during the UK's membership of the EU) and of aspects of the Withdrawal Agreement post Brexit. UK law has begun to recognise that some Acts of Parliament are more important than others. The courts refer to these as 'constitutional statutes'. The courts have also recognised that provisions found in constitutional statutes may be harder for parliament to overturn than other, ordinary, Acts of Parliament. However, these examples do not provide conclusive evidence of a move away from the importance of parliamentary sovereignty in the UK constitution.

Second, it uses these examples to set out how different aspects of the constitution could be made harder to overturn. This may be through developing the law, providing a clear account of which statutes are constitutional. It may also be through finding political mechanisms that may make it harder for Acts of Parliament to be made that would harm aspects of the constitution that either parliament or the government wishes to protect, or are regarded by the courts as worthy of protection (for ease of reference, I will refer to these as 'constitutional principles'). These may restrict the actions of parliament or the executive, making it harder to introduce legislation to parliament that may harm constitutional principles.

This paper will argue that the most effective way of making constitutional principles harder to overturn is through a combination of legal and political mechanisms. It will argue that, if parliament and the courts worked together, supplemented by the reinforcement of political entrenchment by the executive, this may provide an alternative means of entrenching constitutional principles. While these mechanisms may stop short of ensuring full legal constitutional entrenchment, as seen in countries with codified constitutions that empower the courts to strike down unconstitutional legislation, they may provide a means of enabling parliament to make long-term commitments. This paper will refer to this as an 'entrenchment effect' – a means of making it harder to overturn constitutional principles without requiring a process other than the enactment of legislation and one which does not empower courts to strike down legislation that breaches fundamental constitutional principles.

If this entrenchment effect is to be legitimate and provide a constitutional identity for the UK, it is important that any constitutional principles entrenched in this manner take account of the wishes of the electorate. This would include ensuring there was broad consultation as to the content of the constitutional principles that should be made harder to overturn. This would be best achieved if any form of entrenchment effect was initiated by parliament through legislation, following a wide consultation process that facilitated genuine engagement with the electorate.

Is parliament still sovereign?

The sovereignty of parliament is a well-established principle of the UK constitution. There are no examples of where the courts have struck down an Act of Parliament as unlawful or unconstitutional. The courts also frequently refer to parliamentary sovereignty as a key principle of the UK constitution.¹ Also, it is clear that the UK government and parliament assume that the UK parliament is sovereign. So much so that this is referred to in legislation.* The sovereignty of parliament was also used to explain why it would be legal for the UK parliament to enact legislation that breached the UK's obligations in international law.**

Nevertheless, some academic commentators argue that parliamentary sovereignty is no longer the guiding principle of the UK constitution.² This is because of the way in which UK law had to adapt during the UK's membership of the EU, with some of these adaptations being still required to protect aspects of the Withdrawal Agreement between the UK and the EU post Brexit. Also, they point to the impact of the Human Rights Act 1998, as well as the development of the notion of constitutional statutes by the courts.

None of these developments conclusively demonstrates that the UK parliament is not sovereign. Indeed, some would argue that they illustrate that the British parliament still is sovereign, perhaps enjoying even greater sovereignty through being able to enact provisions that may restrict the activities of future parliaments.³ Consequently, they may illustrate how UK law could make constitutional principles harder to overturn while maintaining the sovereignty of the UK parliament, as currently understood in UK law (though this may be different from how this is traditionally understood).

Legislation that appears to challenge parliamentary sovereignty

The UK parliament has enacted legislation that has made it harder to overturn EU law and aspects of the UK's Withdrawal Agreement with the EU, and human rights protected by the European Convention on Human Rights (Convention rights).

Two principles of EU law – direct effect and supremacy – posed a potential challenge to parliamentary sovereignty during the UK's membership of the EU. Direct effect means that provisions of EU law can be relied upon in national courts even if they are not stated in national law. The supremacy of EU law provides that, when EU law conflicts with national law, courts are required to give effect to EU law provisions.

* See, for example, section 38(1) of the European Union (Withdrawal Agreement) Act 2020, which states: "It is recognised that the Parliament of the United Kingdom is sovereign."

** This justification was used for the provisions in the United Kingdom Internal Market Bill 2022, which would have empowered ministers to enact delegated legislation that contravened the UK's obligations under the Northern Ireland Protocol. See the statements of Suella Braverman, then Attorney General, in response to oral questions about the bill and a letter from the Attorney General to the chair of the Justice Committee setting out the government's legal position on the bill (House of Commons, *Hansard*, vol 680, 'Written Statements', 24 September 2020, col 1128; Braverman S, letter, 10 September 2020, retrieved 7 March 2023, <https://committees.parliament.uk/publications/2605/documents/26041/default>).

During the UK's membership of the EU, to the extent that there was a conflict between EU law and national legislation, the provisions of national legislation were disapplied. However, the legislation continued to have legal validity and would continue to be applied in situations where there was no conflict with EU law.

There are two aspects of the Withdrawal Agreement that, post Brexit, continue to enjoy direct effect and supremacy: the Northern Ireland protocol; and provisions protecting the citizenship rights of the citizens of the EU and the European Economic Area (EEA). All other elements of retained EU law currently only have supremacy over UK law enacted prior to the UK's exit from the EU and can be modified by future legislation.⁴

However, this does not mean that it is impossible, as a matter of UK law, for the UK parliament to legislate contrary to the provisions of the Northern Ireland protocol or citizenship rights. This is because of the way in which UK law provides that the Northern Ireland protocol and citizenship rights have direct effect and supremacy. The courts would prevent the UK parliament from accidentally overturning these principles. However, if parliament made it clear that it wished to overturn the Northern Ireland protocol or citizenship rights, then courts would give effect to this clear expression of the will of parliament.*

The Human Rights Act 1998 provides for two main ways through which courts can protect human rights from being restricted or removed by legislation. First, the Act states that all legislation is to be read and given effect in a manner compatible with the human rights protected by Convention rights, so far as it is possible to do so.⁵ Second, where this is not possible, courts may issue a declaration of incompatibility.⁶

The courts have used these provisions to interpret legislation to prevent it undermining Convention rights. Courts have even used this to read words into legislation – for example reading in exceptions to legislation to make sure that provisions in Acts of Parliament do not harm Convention rights. Some academic commentators argue that this undermines the sovereignty of parliament.⁷ This is because, rather than trying to find out what parliament intended when it made an Act of Parliament, courts are focusing instead on how to interpret an Act of Parliament to protect Convention rights.

Other academic commentators point out that, when they do this, the courts are trying to implement parliament's intention.⁸ After all, parliament made the Human Rights Act 1998, which tells courts that they are meant to interpret legislation to protect Convention rights so far as it is possible to do so. Also, the courts will not interpret legislation to protect Convention rights if to do so would clearly contradict the will of parliament, or where to do so would mean the courts were making a policy choice that is better made by parliament.⁹

Declarations of incompatibility may be given by the courts when it is not possible to read legislation in a manner compatible with Convention rights. However, these do not affect the validity, force or effect of legislation declared incompatible with these rights.

* See, for example, the Northern Ireland Protocol Bill 2022–23, which clearly and specifically states that the provisions of the European Union (Withdrawal) Act 2020, designed to provide for the direct effect and supremacy of the Northern Ireland protocol, do not apply to aspects of the Northern Ireland protocol.

A declaration of incompatibility places political pressure on the government to change this legislation, either through initiated legislation or using a special procedure to change that legislation through delegated legislation.¹⁰ The courts cannot strike down legislation that contravenes Convention rights.

It is hard to see how declarations of incompatibility undermine the sovereignty of parliament. It may also be hard to see how this provides any form of protection for human rights, given that no legal obligation is placed on the government or parliament to amend or repeal legislation that has been declared contrary to Convention rights. However, as stated recently by Lord Reed, the president of the Supreme Court, a declaration of incompatibility is a “judicial finding that an Act of Parliament is incompatible” with Convention rights. This imposes a limit on the ability of parliament to make laws as “it would impose pressure on parliament to avoid the opprobrium which such a finding would entail”.¹¹ In other words, the fact that a court, often the Supreme Court, concludes that legislation is incompatible with Convention rights may place the government and parliament under more political pressure to change the law than if this statement were made by an institution other than the courts.

The Human Rights Act 1998 was designed to, and does, make it more difficult for the UK parliament to enact legislation that breaches Convention rights. However, this does not impose a domestic legal limitation on the law-making powers of the Westminster parliament. Nor do the provisions of the Human Rights Act 1998 bind future parliaments. In a similar manner, while legislation to uphold directly effective provisions of EU law may make it harder to inadvertently overturn these provisions in future legislation, parliament can still do so provided that it makes this intention sufficiently clear.

Constitutional statutes

As noted earlier, the UK courts have recognised that some statutes are ‘constitutional’ – although it is not often clear how the courts have reached this conclusion or which statutes will be recognised as constitutional statutes in future court decisions. Unlike ordinary Acts of Parliament, constitutional statutes cannot be impliedly repealed. To understand what this means, we need to think about how conflicts may arise between two Acts of Parliament. Imagine we have an Act of Parliament that states that women have a right to equal pay. What would happen if a future parliament made another Act of Parliament, which stated that male firefighters were to be paid more than female firefighters? These two provisions contradict each other. One says that male and female firefighters should receive the same pay and the other says that men should receive higher pay than women. In the UK, this conflict would be resolved by stating that the later Act of Parliament impliedly repealed the earlier Act by enacting provisions that contradicted the earlier Act. The courts would apply the later Act and male firefighters would be paid more.

The outcome would be different if our imaginary Act of Parliament setting out equal pay for men and women was classified by the court as a constitutional statute. As alluded to above, implied repeal does not apply to constitutional statutes. The courts would

conclude that, merely setting out that male firefighters were to receive higher pay, was not clear enough to indicate that parliament wished to overturn a constitutional statute designed to protect equal pay. The courts would require clear or express language. For example, the later Act of Parliament might use express repeal, with a provision setting out that the later Act was overturning the earlier Act protecting equal pay. The later Act could also state that its provisions to give more pay to male firefighters was to have effect 'notwithstanding' the earlier legislation setting out a requirement of equal pay. The courts would see this as clear enough to show that parliament wished to overturn or limit an earlier constitutional statute.

Challenges to parliamentary sovereignty from common law principles developed by the courts

The courts have developed other principles of interpretation that may make it harder for parliament to overturn constitutional principles. One such principle of interpretation is the principle of legality. This means that the courts will interpret legislation to prevent fundamental common law rights from being overturned or eroded. As a principle of interpretation, it is still possible for parliament to enact legislation that removes or limits fundamental common law rights. But to do so, it must make it clear that it wishes to do so.

In the words of Lord Hoffmann, "the principle of legality means that parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words."¹² Courts will read a general provision so as not to include an ability to limit or remove a specific fundamental common law right. Courts will also choose an interpretation of an ambiguous word that does not harm or limit fundamental common law rights.

It is hard to provide a definitive list of these rights. They may include human rights. For example, the courts recognise the right to freedom of expression as a fundamental common law right. However, not all rights we would regard as human rights are protected as fundamental common law rights. Also, some fundamental common law rights are designed to protect aspects of the constitution rather than human rights – for example, parliamentary sovereignty and parliamentary accountability may also be fundamental common law rights.¹³

The courts have been particularly concerned when parliament enacts legislation that would remove the ability of an individual to go to court to challenge the legality of a decision made by an administrative body. These are known as 'ouster clauses' – provisions in legislation that remove judicial review. Some justices of the Supreme Court have stated that courts will not give effect to a clause that removes judicial review when this would prevent the courts from checking that an administrative body had acted within the scope of its powers or that it had acted within the law.^{*14}

* This statement has been made by Lord Carnwath. It is 'dicta', in that it is not required to decide the case. As such, it need not be followed by other courts.

There are some judicial statements that appear to go further, suggesting that in exceptional circumstances courts may refuse to give effect to an Act of Parliament. For example, in *Jackson v Attorney General*, Lord Steyn stated that:

“[I]n exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.”¹⁵

It is important to recognise, first, that to date this statement has only referred to legislation that threatens the rule of law by removing judicial review or the role of the courts completely, or legislation that would fundamentally undermine the right to vote. Second, the courts are not required to follow these statements in future cases. Third, it is also clear that these statements do not say that parliament does not have the capacity to enact legislation, but that courts would either not recognise or not enforce such legislation. Fourth, as the courts have made clear, this only applies in exceptional circumstances.¹⁶

Consequences for constitutional entrenchment

The above illustrations show that, while parliamentary sovereignty may have been challenged, it is still widely regarded as a key principle of the UK constitution. None of the examples discussed above shows that there are legally enforceable limits over the power of the Westminster parliament to enact legislation on any subject matter it wishes, such that the courts could strike down legislation that contravened these limits.

However, it could be argued that, while this means the Westminster parliament is supreme, it has a different type of parliamentary sovereignty from how this is traditionally understood – particularly from how this appears to be understood by the government and parliament. As traditionally understood, parliament is sovereign because any one incarnation of parliament has the ability to pass legislation on any subject matter, just by enacting an Act of Parliament. If any parliament tried to limit a future parliament, a future parliament could overturn this, merely by enacting legislation. The courts also cannot strike down legislation as unconstitutional.

An alternative understanding of parliamentary sovereignty is to argue that parliament is only sovereign when it has the ability to limit the law-making powers of a future parliament. In other words, parliament can entrench legislation by requiring that it can only be overturned if a future parliament uses a specific manner and form to overturn it, rather than merely making an ordinary Act of Parliament. This argument can be made most strongly as regards the way in which the UK parliament legislated to ensure the supremacy of directly effective EU law when the UK was a member state of the EU, as well as with regard to the way in which the provisions of the Withdrawal Agreement are currently protected from repeal in UK law. Parliament indicated that legislation was to be given effect subject to the directly effective provisions of EU law or was to be given effect subject to the Northern Ireland protocol and the provisions in the Withdrawal Agreement relating to the rights of EU, EEA and Swiss citizens residing in the UK.

This may provide a means through which parliament can establish that provisions are 'constitutional' and need a special procedure to be overturned. However, as will be discussed in more depth below, the extent to which this has been achieved to date provides for a weak entrenchment effect that may be easy for future parliaments to overturn. It is not clear whether parliament could provide for a stronger means through which to limit a future parliament's ability to enact legislation.

It may also be possible for parliament to set out in legislation that courts have to interpret all legislation so as to be compatible, as far as possible, with certain constitutional principles. This may make it harder in practice for legislation to have the effect of harming or restricting these constitutional principles. Parliament would have to demonstrate that this was its clear intention and that these constitutional principles had not been accidentally removed.

Parliament may also set out in legislation that courts can issue a declaration of incompatibility when it is not possible to interpret legislation in a manner compatible with these constitutional principles. This aims to create political pressure to prevent parliament from legislating contrary to these principles and also to remedy any situation in which future legislation did undermine them.

Courts may also develop means through which to protect certain constitutional principles from being inadvertently removed by parliament in future legislation. Courts could classify a statute as constitutional, meaning that its provisions can only be overturned by specific wording or express repeal. Courts may also develop other principles of interpretation, reading legislation so as to preserve fundamental constitutional principles identified by the courts. Courts may also, in exceptional circumstances, decide that they will not give effect to legislation that breaches what they would regard as fundamental principles of the constitution.

This paper will explore these possibilities further. It will assess how far these mechanisms can achieve an 'entrenchment effect', providing a means of making it harder to overturn constitutional principles without removing parliament's ability to do so in the future, thereby preserving the sovereignty of parliament. It will explore how these effects can be achieved at the initiation of parliament, the courts and even the executive. It will also explain when these entrenchment effects are ones that make it harder, legally, for parliament to amend legislation designed to protect, or which are regarded by the courts as protecting, constitutional principles, as well as setting out when this entrenchment effect focuses on placing political pressure on parliament.

It will argue that the strongest form of an entrenchment effect is achieved when this is initiated by parliament and accepted by the courts, combined with a strengthening of mechanisms that place political pressure on parliament.

Parliamentary entrenchment effects

There are two types of entrenchment effect that may be initiated by parliament. A **legal** entrenchment effect arises when courts enforce legislative provisions that make it legally more difficult for parliament to enact legislation on a subject matter contrary to principles it wishes to protect from future repeal. A **political** entrenchment effect occurs when legislative provisions reinforce political limits on parliament's law making capacity, even if these limits are unable to be enforced by the courts.

Legal entrenchment effects tend to be more effective in practice given that the Westminster government is drawn from members of the political party that has a majority in parliament. This may make it harder for any political entrenchment effect to limit the Acts of any government with a large parliamentary majority.

This section will set out examples of previous potential legal and political entrenchment effects. It will argue that both are more effective when the entrenchment effect found in legislation is recognised and acted upon by the judiciary. In addition, political entrenchment effects are also more likely to succeed when supplemented by mechanisms designed to facilitate political entrenchment in practice. This may be either through developing a political culture that prevents MPs from acting in a manner that undermines constitutional principles, or through establishing bodies that can oversee political entrenchment.

Legal entrenchment effect

Current UK law examples

The strongest examples of a legal entrenchment effect are found in legislation to implement EU law and provisions of the Withdrawal Agreement between the UK and the EU.¹⁷ These achieve a legal entrenchment effect by providing instructions to courts as to how to read and give effect to legislation. Both of these legal entrenchment effects are reinforced by the UK's obligations in international law. When the UK was a member of the EU, the EU used enforcement mechanisms to ensure member states upheld their obligations under the EU treaties. These enforcement mechanisms are weaker post Brexit.

The entrenchment effect is achieved in two stages (see Example 1 below). First, legislation provides for direct effect of the provisions of EU law during the UK's membership of the EU, or now of the Withdrawal Agreement. Second, after being incorporated into domestic law, supremacy of these provisions is achieved by requiring that all enactments – which includes Acts of Parliament – are to be read and given effect subject to these directly effective provisions. The courts have interpreted this to mean that, when future legislation appears to contradict directly effective provisions of EU law, its provisions can be disapplied.¹⁸

A similar entrenchment effect could be achieved by providing a list of provisions that parliament wished to protect from future erosion and requiring that all Acts of Parliament must be read and given effect subject to these provisions.

Example 1

European Communities Act 1972

Section 2(1): "All such rights, remedies, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom and shall be so recognised and available in law, and be enforced, allowed and followed accordingly..."

Section 2(4): "[A]ny enactment passed, or to be passed... shall be construed and have effect subject to the foregoing provisions of this section..."

European Union (Withdrawal) Act 2018

Section 7A (1) sets out that section 7A (2) applies to "(a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement, as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom".

Section 7A (2): "The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be – (a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly."

Section 7A (3): "Every enactment (including an enactment contained in this Act) is to be read and have effect subject to subsection (2)."

This formula is repeated in section 7B. The provisions of section 7A incorporate the Northern Ireland Protocol and the citizenship protections of EU citizens. Section 7B incorporates the protection of the citizenship rights of citizens of the EEA, the European Free Trade Association (EFTA) and Switzerland.

While this may achieve an entrenchment effect, it is important to note the following weaknesses. First, an entrenchment effect may not be achieved merely through the inclusion of words stating that legislation is to be read and given effect, subject to a series of entrenched constitutional principles. There is consensus that the provisions of the European Communities Act 1972 incorporated directly effective EU law into domestic law during the UK's membership of the EU, but there is no clear academic consensus as to how this was achieved. This may make it difficult to replicate in future. It may also not be clear whether an entrenchment effect is achieved until this provision is tested in the courts.*

* *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] 2 AC 85 and *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 provide competing arguments as to how the entrenchment effect was achieved.

It is also possible that this legal entrenchment effect succeeded because of the specific nature of EU law. This entrenchment effect occurred either because of the need for the UK to ensure it upheld its international obligations, or because of the specific enforcement mechanisms of the EU had the UK failed to adhere to these obligations. If this were the case, then it would not be possible to replicate this entrenchment effect in a context other than the UK's membership of the EU. Although there is case law confirming that UK legislation was to take effect subject to the Northern Ireland protocol, this only applied to a conflict between legislation enacted prior to the Northern Ireland protocol's incorporation into UK law.¹⁹

Second, this entrenchment effect is weak because even if the entrenchment effect succeeds in removing implied repeal, it may still be possible to repeal provisions entrenched in this manner through using specific words, or expressly stating that parliament intended to repeal these provisions.* It might even be possible, for example, for legislation to state that its provisions were to take effect 'notwithstanding' directly effective provisions of EU law, or the provisions of the Withdrawal Agreement. However, as no legislation has used a 'notwithstanding' clause to achieve this effect, there are no cases setting out how the court would interpret such a provision.

It was not clear whether this would have been sufficient to enable parliament to legislate contrary to directly effective EU law when the UK was a member of the EU. This is because of the enforcement mechanisms in the hands of the EU institutions, which would have made it, in practice, very difficult for any legislation that was contrary to directly effective EU law to have survived potential legal challenge. The EU would have used these enforcement mechanisms to try to prevent the UK from acting contrary to EU law. It may have been, therefore, that it would have been impossible for the UK to legislate contrary to directly effective provisions of EU law without leaving the EU. However, this was never tested in the courts. In addition, while this may provide a stronger form of entrenchment in practice, this may be difficult to replicate for other provisions that parliament may wish to entrench given the unique nature of EU law. Even with regard to the EU, it would always have been legally possible for the UK parliament to have initiated the UK's withdrawal from the EU merely by enacting legislation to empower the government to inform the EU of the UK's intention to withdraw from the EU treaties. There was no legal requirement to hold a referendum to leave the EU.

Post Brexit, this entrenchment effect is even weaker as the mechanisms of EU law are not as effective to prevent the UK from acting contrary to its obligations set out in the Withdrawal Agreement. This can be illustrated by the provisions of the Northern Ireland Protocol Bill 2022–23, which are intended to achieve the outcome that certain

* See, for example, section 1(1) of the European Union (Withdrawal) Act 2018, which states: "The European Communities Act 1972 is repealed on exit day." See also the provisions of the Northern Ireland Protocol Bill 2022–23.

provisions of the Northern Ireland protocol no longer have effect in UK law.* These provisions specifically and expressly repeal or restrict sections of the European Union (Withdrawal) Act 2018. It remains to be seen whether these provisions will be included in the final Act of Parliament if the bill proceeds. What is clear is that it will be more difficult for the EU to use the enforcement mechanisms under the Withdrawal Agreement to stop the UK from overturning provisions of the Northern Ireland protocol.

A second, weaker example of an entrenchment effect is illustrated by section 3 of the Human Rights Act 1998 (see Example 2 below). This occurs through providing specific instructions to courts as to how they are to read and give effect to future legislation.

Example 2

Human Rights Act 1998

Section 3(1): “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.”

This provision makes it harder for parliament to enact legislation that contravenes Convention rights – rights incorporated into UK law by the Human Rights Act 1998. The courts will read legislation to protect Convention rights. However, it does not make it impossible for parliament to enact legislation that contravenes Convention rights. There are situations in which it would not be possible for courts to interpret legislation to protect Convention rights. When this is the case, all courts can do is to issue a declaration of incompatibility. While this may place parliament under a political or moral obligation to change the law, this does not affect the legal force or validity of any legislation declared incompatible with Convention rights.

Nor is the wording of section 3(1) sufficient to entrench its provisions. Future legislation could be enacted to remove this obligation to read legislation so as to protect Convention rights. This may occur merely by enacting legislation that sets up an alternative interpretative obligation on the courts. The proposed Bill of Rights Bill 2022–23 would, if brought into force, expressly repeal section 3 of the Human Rights Act 1998, removing this interpretive obligation from the courts.**

* Clause 2 of this bill specifically states that “section 7A (2) of the European Union (Withdrawal) Act 2018... does not apply to (a) any rights, powers, liabilities, obligations or restrictions from time to time created or arising by or under” or “(b) any remedies or procedures from time to time provided for by or under excluded provision of” the Northern Ireland protocol or other parts of the EU Withdrawal Agreement. Clause 2(3) of the bill amends section 7A of the European Union (Withdrawal) Act 2018 to include a new section 7A (3A), which states that the section “is subject to the Northern Ireland Protocol Act”. The bill then sets out excluded provisions, as well as empowering ministers to make regulations to include further excluded provisions.

** Clause 1(1) of this bill states that: “This Act reforms the law relating to human rights by repealing and replacing the Human Rights Act 1998.” No other general provision of interpretation is included in the bill. The nearest equivalent is clause 4, which provides a specific requirement for courts to give “great weight to the importance of protecting the right” of freedom of expression whenever “a question has arisen in connection with” that right. If the bill becomes an Act of Parliament, this will repeal section 3, replacing it with a weaker provision, which only applies to freedom of expression in a limited range of legal proceedings before the court. It would not apply to criminal proceedings, where disclosures of information would be a breach of confidence, or to proceedings relating to immigration decisions or to national security.

Section 3(1) may also be repealed by a notwithstanding clause – that is, a clause setting out that provisions of a future Act take effect notwithstanding Convention rights, or notwithstanding section 3(1) of the Human Rights Act 1998.

As with our discussion of the European Communities Act 1972 and the European Union (Withdrawal) Act 2018, the extent to which this entrenchment effect is achieved depends upon how this provision is interpreted by the courts. First, courts determine when it is and is not possible to interpret and give effect to legislation in a manner compatible with Convention rights. This determines the extent to which Convention rights are protected from accidental repeal or modification in future legislation.

Manner and form requirements

Most constitutions make it harder to overturn constitutional protections by requiring the legislature to use procedures that are more stringent than those used to enact ordinary legislation. For example, a constitution may require that it can only be amended if two thirds of the legislature vote in favour of this amendment, or if a referendum approves it. We refer to these as 'manner and form' requirements. Would it be possible for the UK parliament to enact legislation that included a manner and form requirement? If so, this may mean that parliament could entrench constitutional principles by setting out a specific, more stringent way in which legislation in the future needs to be made if it is to overturn these principles.

It is hard to answer this question. There are examples of legislation that has imposed a manner and form requirement, including the need for a referendum. These are set out in Example 3 below. However, while these manner and form requirements limit the government, they do not limit the ability of parliament to enact legislation.

Example 3

European Union Act 2011

Section 2(1): "A treaty which amends or replaces the TEU [Treaty on European Union] or the TFEU [Treaty on the Functioning of the European Union] is not to be ratified unless (a) a statement related to the treaty was laid before parliament in accordance with section 5, (b) the treaty is approved by Act of Parliament, and (c) the referendum condition or the exemption condition is met."

Section 2(2): "The referendum condition is that (a) the Act providing for the approval of the treaty provides that the provision approving the treaty is not to come into force until a referendum about whether the treaty should be ratified has been held throughout the United Kingdom or, where the treaty also affects Gibraltar, throughout the United Kingdom and Gibraltar, (b) the referendum has been held, and (c) the majority of those voting in the referendum are in favour of the ratification of the treaty."

Northern Ireland Act 1998

Section 1 (1): "It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1."

Section 1(2): "But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a United Ireland, the Secretary of State shall lay before parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland."

The first example of a referendum requirement limited the powers of the government to ratify a treaty, setting out that certain treaties that the UK may enter into with the EU could not be ratified without a referendum. This legislative provision was never used and was repealed as part of the Brexit process.* It also did not place a limit on parliament, but on the government. It would have been possible for parliament to have legislated to overturn this requirement, or to have ratified a treaty without holding a referendum, setting out that the ratification of this treaty was to occur notwithstanding section 2 of the European Union Act 2011.

The second example empowers the secretary of state to organise a referendum when "it appears likely to him that a majority of those voting" would vote for Northern Ireland to no longer be part of the UK.²⁰ Should this be the outcome of the referendum, the secretary of state is required to provide parliament with an account of how the government will implement this wish, as agreed between the government of the UK and of Ireland.

Again, this places an obligation on the UK government and not on the UK parliament. This provision is also required by the Belfast Agreement, an international agreement between the UK and Ireland. If either government were to fail to talk to the other about how to implement the outcome of a referendum that wished Northern Ireland to secede from the UK and join Ireland, the other government would be able to use mechanisms of international law to ensure this obligation is fulfilled.

Neither of these examples shows that the UK parliament could successfully enact legislation requiring a referendum to change certain constitutional principles. First, the referendum requirements only bind the government and not parliament. Second, neither of these referendum requirements is 'doubly entrenched'. Constitution provisions are 'doubly entrenched' when legislation requires a referendum to change constitutional principles and also requires that the requirement to hold a referendum can itself only be changed by a referendum. It is therefore possible for ordinary

* The European Union Act 2011 was repealed by the European Union (Withdrawal) Act 2018, Schedule 9.

legislation to be used to remove the requirement for a referendum. This weakens any entrenchment effect. There is no example of a requirement for a referendum in UK law that has been doubly entrenched.

Parliament can enact legislation whose provisions only come into force if they are first approved by a referendum. This was the case for the referendum on alternative voting (see Example 4 below). Again, this does not place a legally enforceable obligation on parliament but on the government, placing this obligation on a minister to enact delegated legislation to bring a legislative provision into force, or to repeal the legislative provision.

Example 4

Parliamentary Voting System and Constituencies Act 2011

Section 8 (1): "The Minister must make an order bringing into force section 9, Schedule 10 and Part 1 of Schedule 12 ('the alternative vote provisions') if—

(a) more votes are cast in the referendum in favour of the answer 'Yes' than in favour of the answer 'No', and

(b) the draft of an Order in Council laid before parliament under subsection (5A) of section 3 of the Parliamentary Constituencies Act 1986 (substituted by section 10(6) below) has been submitted to Her Majesty in Council under section 4 of that Act."

Section 8(2): "If more votes are not cast in the referendum in favour of the answer 'Yes' than in favour of the answer 'No', the Minister must make an order repealing the alternative vote provisions."

This does have the effect of providing the electorate with a veto and could be a good means of ensuring that there is an engagement of the electorate to approve any provision that parliament may wish to entrench. However, if this engagement is to be genuine and effective, it would need to be accompanied with clear and effective information to help the electorate understand the constitutional principles in question.

Moreover, it does not provide a means of entrenching constitutional provisions approved of by the referendum. If the referendum outcome had been in favour of establishing the alternative vote system, then the government would have been under an obligation to bring this system into force. However, a future parliament could enact legislation overturning the system just by enacting an Act of Parliament. It would not need to hold a further referendum.

Referendums are not the only form of manner and form requirement. There are also examples of where the UK parliament has enacted legislation requiring more than a simple majority vote – for example, requiring that two thirds of the House of Commons must vote in favour of a specific outcome. This is set out in Example 5 below.

Example 5

Fixed-term Parliaments Act 2011, section 2

Prior to the Fixed-term Parliaments Act 2011, the dissolution of parliament, giving rise to a general election, was achieved by an order of the monarch at the request of the government. The only restriction on the power of the monarch came from legislation setting the maximum term for any parliament at five years. The Fixed-term Parliaments Act 2011 changed this, setting the dates of future general elections, which provided for an expectation that each parliament would be in place for a fixed five-year term.

The Act also provided for means of dissolving parliament and holding a general election before the end of this five-year term. One of these empowered the House of Commons to vote on a motion “that there should be an early parliamentary general election”, with section 2(1)(b) setting out that a vote on this motion would only succeed if “the number of members who vote in favour of the motion is a number equal to or greater than the two thirds of the number of seats in the House (including vacant seats)”.

This seems to provide for a more effective entrenchment effect. If we can require two thirds of the House of Commons to vote for an early parliamentary general election, could this not also be used to make it harder for future parliaments to repeal constitutional principles set out in earlier legislation, with this legislation stating that these provisions can only be repealed when two thirds of the members of the House of Commons vote in favour of their repeal?

This conclusion seems to be reinforced by the impact of this requirement in 2019. The then prime minister, Boris Johnson, tried, and failed three times, to achieve sufficient votes to achieve an early parliamentary general election. This seems to suggest that the Fixed-term Parliaments Act 2011 was able to make it more difficult for a future parliament to act. However, this may have been due to the political circumstances in place at the time. It was not difficult for Theresa May, the then prime minister, to achieve sufficient votes in the House of Commons to hold an early general election in 2017, when polls at the time suggested that was a very advantageous time for the Conservatives to hold an election.

A more fundamental problem is that, as with our other examples, the requirement of a vote of two thirds of the members of the House of Commons was not used as a requirement for the valid enactment of legislation, but as a limit on the power to dissolve parliament and call a general election. Moreover, as the events of 2019 also demonstrate, it was possible for parliament to enact separate legislation to call an early parliamentary general election, by-passing the two-thirds provision and directly triggering a general election under the Fixed-terms Parliaments Act 2011.²¹ Legislation was later enacted by the Johnson government to repeal the Act. This legislation restores the power of the monarch to dissolve parliament and call a general election when requested to do so by the government. There is no requirement for a prior parliamentary vote to approve the dissolution of parliament, let alone a vote in favour of dissolution by two thirds of the members of the House of Commons.²²

As there is no example of a manner and form requirement that specifically limits how a future parliament can enact legislation, it is hard to predict whether any future legislation setting out a manner and form requirement could legally entrench constitutional provisions. It would depend upon whether courts would enforce a manner and form requirement.

There are statements in court decisions that suggest that the courts would be willing to uphold a manner and form requirement. The strongest support is found in a case looking at the provisions of the Parliament Acts 1911 and 1949, which enable legislation to be made without the consent of the House of Lords.²³ The court suggested that, as parliament is sovereign, it has the ability to redefine itself. Prior to the Parliament Acts 1911 and 1949, an Act of Parliament could only be made when it was agreed to by the House of Commons, the House of Lords and the monarch. This is why the UK constitution states that legislation is made by the King-in-Parliament. The Parliament Acts 1911 and 1949 mean that an Act of Parliament can be enacted by the House of Commons and the monarch alone. When this occurs, it has the same effect as if the King-in-Parliament referred to the House of Commons and the monarch, rather than referring to the House of Commons, the House of Lords and the monarch.

The simple answer to whether a court would be prepared to uphold a manner and form requirement, striking down legislation that was not enacted in the manner required, is that we do not know. We only know that there are statements made by some members of the judiciary that this may have been what happened when parliament enacted the Parliament Acts 1911 and 1949.²⁴ But these statements are not binding on the courts. Also, this manner and form requirement made it easier, rather than harder, for parliament to enact legislation. It removed the requirement to obtain the consent of the House of Lords.

Furthermore, if a manner and form requirement were to be enacted in order to bind future parliaments, it would need to be doubly entrenched. In other words, any provision setting out that specific provisions of the UK constitution could only be overturned by a two-thirds majority vote in the House of Commons, or a referendum

requirement, would itself need to be protected such that it could only be removed by a two-thirds majority or a referendum requirement. Otherwise, this provision may be vulnerable to being repealed by a simple majority in future legislation. To date, no referendum or other manner and form requirement has been doubly entrenched and there are no judicial statements about the effect of doubly entrenched provisions. It is even more difficult to predict, therefore, whether a doubly entrenched manner and form requirement would successfully bind a future parliament.

Political entrenchment effect

Human Rights Act 1998

The clearest example of a political entrenchment effect initiated by legislation is the power granted to the courts to issue a declaration of incompatibility when it is not possible to interpret legislation in a manner compatible with Convention rights.²⁵

A declaration of incompatibility does not affect the legal validity, force or effect of legislation declared incompatible. However, political pressure may mean that the government feels it has no choice but to initiate legislation or delegated legislation to amend legislation to protect Convention rights. Parliament may also feel that it has no choice but to vote in favour of this Act of Parliament or delegated legislation. This political limit may be even stronger if the government and parliament wish to avoid contravening the UK's obligations under international law imposed by the European Convention on Human Rights. Evidence demonstrates a strong record of intervention to correct breaches of Convention rights.*

There are three factors that may explain why parliament and the government generally comply with declarations of incompatibility.

First, these declarations provide a role for courts, both domestic and international. Courts have constitutional authority; therefore, a conclusion by a court that legislation is incompatible with Convention rights carries greater weight than the same conclusion made by a pressure group or an academic paper. Evidence suggests that most MPs regard the determination of rights as a legal issue, within the purview of the courts. Therefore, they are more likely to accept the conclusion of the court that legislation is incompatible with Convention rights. While this does not mean that it would be impossible for parliament to refuse to modify legislation to ensure its compatibility with Convention rights, it may make it more difficult to continue to leave incompatible legislation unamended.

Where problems may arise is if the government is not willing to introduce legislation or delegated legislation in response to a declaration of incompatibility. There is little parliament can do to force the government to act. It is also difficult for backbench MPs to successfully introduce bills to parliament or for these bills to become Acts

* Ministry of Justice, 'Responding to human rights judgments: 2021 to 2022', CDP 763, December 2022 provides the most recent figures. Since the Act came into force on 2 October 2000, there have been 46 declarations of incompatibility. Of those, 10 have been overturned on appeal, five related to provisions that had already been remedied, eight were remedied by a remedial order (that is, delegated legislation enacted under section 19 of the Human Rights Act 1998), 16 were remedied by primary or secondary legislation and one was addressed by other measures. There are six ongoing declarations of incompatibility. The government is proposing to remedy four of these by a remedial order. The other two are currently subject to appeal.

of Parliament, meaning, again, that it is difficult for parliament to respond to protect human rights if the government does not wish to do so. In other words, whether these declarations of incompatibility succeed depends upon whether MPs and the electorate can successfully place political pressure on the government to respond.

Second, the Human Rights Act 1998 incorporates the European Convention on Human Rights into UK law. This helps to provide a more effective sanction for breaches of Convention rights than would otherwise be the case. Once an individual has exhausted their domestic remedies, they can petition the European Court of Human Rights (ECHR) in Strasbourg (also known as the Strasbourg Court). This is a different legal organisation from the EU, meaning that these mechanisms are still in place post Brexit. The ECHR will determine whether the UK has breached its obligation under international law.* The Council of Ministers, established by the ECHR, oversees the implementation of judgments by signatory states to the Convention. This provides a political process through which the UK can provide evidence of its compliance with a judgment of the ECHR. A failure to ensure legislation complies with Convention rights may see the UK losing its standing on the international stage. This, in turn, may weaken the UK's ability to enter into other treaties. These sanctions and mechanisms for their enforcement provide a further incentive to ensure that breaches of Convention rights that occur through legislation are swiftly remedied.

Third, the Human Rights Act 1998 has a series of internal political mechanisms both to prevent legislation from being enacted that breaches Convention rights and to remedy breaches when they occur. A minister in charge of a bill is required to make a statement to parliament either that the provisions of the bill comply with Convention rights, or that the government wishes to proceed with the bill even if it is unable to make this statement.²⁶ These statements are made in writing and are published on the first page/face of the bill.

In addition, explanatory memorandums attached to the bill, alongside impact statements, set out whether legislation may harm Convention rights. This draws the attention of MPs to issues of Convention compatibility, which may provide a means of facilitating debate on Convention rights and amendments to bills in order to protect these rights.

The Parliamentary Joint Committee on Human Rights also plays an important role. It scrutinises bills as to their compatibility with Convention rights, in addition to reporting on adverse judgments against the UK with regard to these rights.

There is also a fast-track procedure through which the government can use delegated legislation to remedy breaches of Convention rights, following either a declaration of incompatibility or a decision of the Strasbourg Court.²⁷

* This obligation is found in Article 46 of the European Convention on Human Rights.

While these mechanisms do not make it impossible for parliament to legislate contrary to Convention rights, they provide a means through which to prevent legislation from being enacted that undermines these rights. The government will face political scrutiny for having included provisions in proposed legislation that contravene Convention rights. The government should also face political pressure to introduce primary or secondary legislation to modify legislation found in breach of Convention rights, either by domestic courts or by the ECHR.

However, this form of political entrenchment is completely dependent upon political will, in terms of both ensuring that these mechanisms provide an effective means of providing stronger protection to Convention rights and ensuring that these mechanisms are preserved. As the Bill of Rights Bill 2022 demonstrated, this need not always be the case. What was particularly concerning about this bill was the extent to which it proposed measures that restricted the protection of human rights, often against the report of the Independent Review of Human Rights and the majority of opinion expressed by those who responded to the government's inquiry on human rights reform.²⁸

This would suggest that political entrenchment only succeeds to the extent that those in government and parliament more widely wish to uphold constitutional provisions through political entrenchment. This, in turn, may depend upon the political context, which may well depend upon the Convention right in question. Mechanisms to enhance this form of political entrenchment may not be sufficient to protect constitutional rights. While these may be initiated by legislation enacted by one parliament, they may be easily reversed in the future if a parliamentary majority no longer wishes to protect these rights. Again, this may well be dependent upon the political context. While it may be the case that some Convention rights are widely approved of, others, for example the rights of prisoners or immigrants, may be less popular. Therefore, any government wishing to remain in power, or an opposition party seeking to come into power, may be more reluctant to remedy breaches of these less popular rights for fear of losing votes at the next general election.

Recognition of constitutional principles in legislation

A second example of a means through which legislation can enhance political entrenchment is through recognising constitutional principles in legislation (see Example 6 below).

Example 6

Scotland Act 1998

Section 63A (1): "The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements."

Section 63A (2): "The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government."

Constitutional Reform Act 2005

Section 1: "This Act does not adversely affect the existing constitutional principle of the rule of law."

Legislation may specifically refer to the importance of constitutional provisions – such as the permanence of the devolved legislatures or constitutional principles such as the rule of law. These are not meant to provide a legal protection of these principles. However, statements in legislation that express the importance of key constitutional principles may help to increase political pressure on the government and the legislature to maintain them. Legislation setting out the importance of the devolved legislatures and recognising that these institutions should only be removed following a referendum, may make it politically harder for a future parliament to enact legislation to remove them, even if the courts would not be able to legally enforce the requirement for a referendum.

Political entrenchment may be further reinforced when legislative provisions provide a means through which a constitutional commitment can be further reinforced by the courts. For example, legislation setting out the constitutional principle of the rule of law was used by Lord Carnwath to interpret other legislative provisions in a manner that upheld the rule of law, specifically to ensure that legislation did not prevent the courts from checking that administrative bodies acted within the scope of their powers and the law.²⁹

However, whether legislative attempts to shore up political entrenchment will achieve this further entrenchment effect is dependent upon how courts interpret a specific legislative provision. This is dependent upon the wording of the legislative provision and its constitutional context.

This is clearly demonstrated by legislation referring to the Sewel convention, which has also been recognised as a principle of the UK constitution (see Example 7 below).

Example 7

Scotland Act 1998

Section 28 (8): “[I]t is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.”

In the first *Miller* decision, a majority in the Supreme Court concluded that this provision did not mean that the Sewel convention could be legally enforced.³⁰ First, the wording of the legislation made it clear that parliament was merely ‘recognising’ the existence of the convention. If parliament had wanted to ensure the courts enforced this convention, they would have worded the provision differently – for example, by setting out that “parliament cannot legislate with regard to devolved matters without the consent of the Scottish parliament”. Second, courts were concerned about the word ‘normally’. The Supreme Court regarded this as a predominantly political as opposed to a legal term. What would be ‘normal’ would be dictated by politics. Consequently, it was not suited for enforcement by the courts. Nevertheless, the court did recognise the constitutional importance of the Sewel convention, particularly its “important role in facilitating harmonious relationships between the UK parliament and the devolved legislatures”.³¹

However, this recognition of the political importance of the convention, alongside its recognition in legislation, has not necessarily made it harder to breach the Sewel convention. This is particularly true with regard to legislation enacted to implement Brexit, where legislation was enacted that was within the competences of the devolved legislatures without the consent of one, or more, of the devolved legislatures.³² This suggests that political entrenchment initiated by legislation is more effective when combined with legal enforcement mechanisms, particularly as other political pressures – such as the achievement of Brexit – may compete with the political importance of the Sewel convention.

Not only are there no legal means through which the Sewel convention can be enforced, but also there are few effective political mechanisms that can help to ensure the convention is upheld when there is political divergence between the Westminster government and the devolved governments. The mechanisms that do exist are ineffective, as the balance of power is tipped in favour of the Westminster parliament and because there is less political pressure placed on the UK parliament, should it legislate without the consent of the devolved legislatures. This is clearly evidenced by Brexit. The political pressure to achieve Brexit was greater than the political pressure to ensure the Sewel convention was adhered to. This also demonstrates the weaknesses of political means of entrenchment.

Advisory referendums

A final means through which legislation may achieve a political entrenchment effect is through advisory referendums. Should parliament wish to, it can determine that a particular policy will only be implemented by future legislation if it is approved by a referendum. This occurred, most notably, with regard to devolution and the UK's membership of, and subsequent withdrawal from, the EU. There is no legal requirement to hold an advisory referendum. Nor is there a legal requirement to implement the outcome of one. Nevertheless, an advisory referendum may provide a strong political incentive to implement its outcome.

This is clearly illustrated by the Brexit referendum. This entrenchment effect occurs because it is hard to ignore a clear expression of the will of the electorate. This is even more so when the will of the electorate is expressed through a referendum where parliament has chosen to empower the people to decide this issue, as well as establishing mechanisms to ensure the fairness and accuracy of assessing the will of the electorate. These mechanisms may make it harder for parliament as a whole to ignore the outcome of a referendum.³³

Advisory referendums may also be reinforced by political statements of the government that initiated the legislation to hold a referendum making a clear commitment to adhere to the outcome of the referendum – as was the case with the Brexit referendum. This political commitment is different from a legally enforceable requirement for a minister to enact delegated legislation to bring legislation into force, as was the case for the alternative vote provisions. However, as the Brexit referendum illustrates, it is politically very difficult for a government to go back on its specific commitment to implement a policy change approved of by a referendum, even when this is contrary to the outcome the government desires.

It may also be possible for legislation to state that its provisions are not to be abolished without a referendum, without providing for this referendum requirement to be legally enforceable. Again, this is best illustrated by legislation relating to devolution, which states that “it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum”.³⁴

As the legislation merely declares that there should be a referendum, its provisions would not be interpreted by the courts as limiting the powers of the Westminster parliament to legislate to remove the Scottish parliament without a referendum. It would also be legally possible for this provision to be overturned in future legislation without a referendum. This is because the provision does not state that it can only be overturned by a referendum.

Nevertheless, it may provide a means of reinforcing a political commitment to the permanence of the Scottish parliament, as well as reinforcing democracy and self-determination. This reinforcement of constitution principles may provide a means of making it politically difficult, if not impossible, to abolish the Scottish parliament

without a referendum. The political consequences of ignoring this commitment, especially as regards the Scottish parliament, would most likely give rise to a constitutional crisis.

Conclusions

There is some support for the argument that it may be possible for parliament to bind its successors as to the manner and form in which to enact future legislation. However, this is only found in statements that do not bind the courts. It is therefore unclear whether courts would enforce these manner and form requirements.

It would also be easy for future parliaments to overturn the examples we have of manner and form requirements in legislation. This is because these provisions are not doubly entrenched. Double entrenchment would require that a provision requiring a specific manner and form requirement could itself only be overturned using this manner and form requirement. For example, a provision stating that a referendum was required in order to ratify a treaty would also have to state that this provision could only be overturned following a referendum, or some means other than the enactment of an Act of Parliament by a simple majority vote. As we have no examples of double entrenchment provisions, it is hard to know whether parliament believes it could enact these provisions without breaching parliamentary sovereignty. It is also hard to know whether the courts would be prepared to uphold doubly entrenched provisions given that these place a greater restriction on parliamentary sovereignty.

What is clear is that any form of entrenchment mechanism initiated by legislation, be it legal or political, is more effective if it is supplemented by the courts. The strongest way is through a legal entrenchment mechanism similar to those found to implement EU law and aspects of the Withdrawal Agreement between the UK and the EU. This is further reinforced when there are other legal mechanisms – for example, through international law – that strengthen this entrenchment effect, as is the case with the protection of Convention rights under the Human Rights Act 1998. This international law context can reinforce both legal and political entrenchment. However, even with these mechanisms it is still relatively easy for parliament to avoid entrenchment by expressly repealing legislation or withdrawing from the international treaties that provide for enforcement mechanisms in international law. It would appear to be political will, and not legal mechanisms, that reinforces even legal entrenchment effects.

Consequently, any entrenchment effect is only as strong as the continuing commitment to these constitutional provisions by the government as well as the legislature and the courts. This, in turn, is more likely to be reinforced when it includes a commitment that is communicated to and endorsed by the people. Entrenchment effects also get stronger over time, as there is more evidence of a clear political and cultural commitment to uphold these constitutional provisions. In this way, legislation designed to reinforce political entrenchments may provide a further supplementary means of entrenchment without undermining parliamentary sovereignty.

Judicial entrenchment effects

Courts may reinforce legal and political entrenchment effects initiated by parliament through legislation. The judiciary can also initiate legal entrenchment effects. This section will assess four main ways in which the courts can achieve an entrenchment effect.

Legal entrenchment effects may provide a strong protection of potential constitutional rights. However, there are problems with these forms of entrenchment, particularly in terms of their certainty and democratic legitimacy. The current methods of legal entrenchment effects are best understood as a form of constitutional safeguard, rather than a means through which to entrench a constitution. This is not to underestimate their impact; rather it is to recognise that the most legitimate role for the courts is in supplementing entrenchment effects led by parliament through legislation or by providing a constitutional safeguard in situations where political safeguards fail. The courts perform this role when they protect constitutional principles from being inadvertently undermined by parliament. Courts may also protect constitutional principles in exceptional circumstances when parliament is no longer functioning as an effective democratic institution.

Modification of parliamentary sovereignty

When deciding cases, judges may make statements about the law or constitutional principles that are not required to help them to decide a case. We refer to these as 'dicta'. They are not binding on other courts and are not regarded as being part of the law. However, they may help to guide the development of the law in future. Dicta are distinguished from 'ratio', which is an account of the law that is binding on other courts.

Dicta suggest that parliamentary sovereignty is a principle of the common law. Consequently, it can be modified by the courts. In a similar manner, judicial statements suggest that courts determine the content of the rule of law, as well as the relative importance of both the rule of law and parliamentary sovereignty in the UK constitution, through developing principles of the common law. None of these statements, however, are required to be followed by the courts.

These statements suggest two ways in which courts could achieve a legal entrenchment effect. First, courts could modify the doctrine of parliamentary sovereignty, moving from a doctrine that did not allow parliament to bind its successors, to one that allowed parliament to bind its successors as to the manner and form in which legislation is enacted. Second, it may be possible for courts to change the common law to prioritise the rule of law over parliamentary sovereignty. This modification would enable them to effectively entrench the rule of law, arguing that Acts of Parliament that breached the rule of law were not recognised as valid law and, therefore, would not be enforced by the courts.

While it may be possible for courts to unilaterally modify the nature of parliamentary sovereignty by changing the common law, this would not achieve an entrenchment effect in and of itself. It would require parliament to enact legislation, including a manner and form requirement that courts would then enforce were this to be breached by a future parliament. Moreover, courts can only develop the common law as and when individuals bring a case to court. Whether the courts would be able to achieve this, therefore, would depend upon the right case coming before the courts. It is difficult to imagine how this may take place without a legislative provision that appears to provide for a manner and form requirement.

Any initiation of a potential legal entrenchment effect by the courts would be extremely difficult, if not impossible, to achieve without prior legislation. However, if members of the judiciary were to state, in dicta, that courts would be prepared to enforce manner and form requirements, this may indicate to parliament that parliamentary sovereignty could be modified to permit the legal entrenchment of constitutional principles. This, in turn, may encourage parliament to enact legislation including a manner and form requirement, knowing that this may be upheld by the courts.

The most recent example of dicta suggesting that courts may prioritise the protection of the rule of law over that of parliamentary sovereignty is a statement from Lord Carnwath that courts may refuse to give legal effect to legislation that purported to remove judicial review over decisions of the executive that were beyond the scope of its powers, or which were contrary to the law.³⁵ Lord Carnwath appeared to conclude that, in this situation, courts would not apply this legislative provision because to do so would undermine the rule of law.

However, Lord Carnwath's statement does not mean that courts will always prioritise the rule of law, or any other constitutional principle, over parliamentary sovereignty. His statement only applies to those situations in which parliament enacts legislation that gives limited powers to an administrative body, but which also appears to remove the ability of the courts to check that this administrative body is acting within the scope of its powers. Also, Lord Carnwath's statement did not receive universal support from other judges deciding the same case. Nor has his statement been repeated by judges deciding other cases. It is hard to predict, therefore, whether the statement will be followed by the courts in the future.

Lord Carnwath's statement is also best understood as setting out a constitutional safeguard. He is pointing to a situation in which courts may be willing to refuse to give effect to legislation to protect the rule of law, rather than stating more generally that the rule of law should always override the sovereignty of parliament.

It may be possible for the courts to state that, whenever the rule of law conflicts with parliamentary sovereignty, they will always enforce the rule of law. This may provide the means of ensuring that, should parliament legislate in the future in a manner that breaches the rule of law, courts would not enforce this legislation. However, to date, there have been no clear statements to this effect in ratio as opposed to dicta. In

other words, while there are statements that may suggest the courts may be willing to prioritise the rule of law in future, there has been no case in which the courts have refused to apply legislation because it breached the rule of law.

However, there are a number of problems with this form of entrenchment.

First, it is unclear that this would achieve a legal entrenchment effect. To refuse to apply legislation in a specific case is not the same as quashing legislation. The Act of Parliament that is disapplied remains in place and may still apply in other situations where its application would not undermine the rule of law. Even if courts were to strike down or quash legislation in this manner, parliament may re-enact the statutory provision or Act of Parliament struck down by the courts. Tension would also arise if courts were to stop short of striking down or quashing legislation, but nevertheless refuse to give effect to legislation, or to apply a specific legislative provision in a particular case. Any of these actions of the courts would be likely to provoke a constitutional crisis. A successful entrenchment effect through these means, therefore, could only really be achieved if this is accepted by parliament – and there is no guarantee that would happen.

Second, any legal entrenchment effect achieved by the judiciary acting alone would give rise to problems of legal certainty and constitutional legitimacy. The rule of law is contestable. There are reasonable disagreements as to whether the rule of law places limits on the content of laws that can be enacted, or merely on the way in which legislation is made – for example, that it be clear, published and not applied retrospectively. There are also reasonable disagreements as to the principles that should be protected from legislative erosion by the rule of law, and as to the relative importance of these principles.

Third, courts are not able to initiate an entrenchment effect whenever they wish to do so. They are dependent upon the right case appearing before the court. In other words, it is likely that the courts would be in a situation in which legislation had been enacted that appeared to break the law and an action for judicial review had been brought before the courts to determine this issue. Even if courts wish to make dicta that may persuade parliament to refrain from enacting legislation that breaches the rule of law in the future, as the courts may decide not to enforce these provisions, they are dependent upon a case being brought before them in which they can make these statements. In other words, courts are more reactive than proactive.

Fourth, entrenchment by the courts alone is less legitimate than entrenchment effects that are achieved through other means. Even if the judiciary were to entrench the rule of law or other constitutional principles in this manner, there would be no role for the people, either directly or indirectly through parliament. This may undermine the ability of these principles to become part of the constitutional culture, or as a statement of constitutional identity. They would just be principles asserted by the judiciary. While this may lend weight to the principles, if the government, the legislature and the electorate have little trust in the judiciary or believe that it has created constitutional

principles that are not accepted by the general public, these principles may be rejected. They may be regarded as principles the judiciary sees as important, but which do not otherwise reflect what the rest of society regard as important. This, in turn, would undermine the effectiveness of this form of legal entrenchment effect.

Exceptional circumstances

Members of the judiciary have also made statements in cases suggesting that, in exceptional circumstances, the courts may refuse to apply legislation. This may provide a more realistic means through which the judiciary can provide an entrenchment effect, protecting constitutional principles from being overridden by legislation. However, this possible entrenchment effect is limited in both its application and scope. It too is best understood as a constitutional safeguard rather than as a means of initiating constitutional entrenchment.

There are only a few examples of dicta regarding the ability of the courts to refuse to apply legislation in exceptional circumstances. This means that it is difficult to determine both the constitutional principles that may be protected in this way and the exceptional circumstances required for the courts to refuse to apply legislation. It would appear that exceptional circumstances are limited to those situations where a strong executive has been able to enact legislation in a manner that was unchecked by parliament. It may be that this would only occur where the political institutions in the UK are no longer acting in the manner required to sustain a reasonably functioning democracy. Lord Steyn, for example, referred to legislation enacted by a strong government and a complaisant House of Commons.³⁶ Lord Hodge referred to situations in which a government abusively sought to entrench its own power.³⁷ It also only applies to legislation that removes provisions that are necessary to uphold democracy. Lord Steyn and Lord Hope referred to legislation that removed judicial review or abolished the courts.³⁸ Lord Hodge referred to the curtailment of the franchise that was specifically designed to ensure the government initiating such legislation remained in power.³⁹

However, there are problems with relying on the exceptional circumstances doctrine as a means of providing a legal entrenchment effect. As the scope of the doctrine is currently unclear, this may give rise to legal uncertainty. Moreover, there are issues of constitutional legitimacy if courts alone can determine which constitutional principles should be entrenched, and when this is possible. It may also fail to provide a stable means of entrenchment without the support of parliament.

As already noted, this doctrine is best understood as providing a form of constitutional safeguard. It is not clear when, and if, courts would refuse to give effect to legislation. However, this is likely only to occur in exceptional circumstances when, arguably the UK constitution is no longer functioning as an effective democracy. It applies, therefore, in those situations in which parliament is unable to effectively check the actions of a government that is abusing its powers. This also explains why, to date, statements by the judiciary have focused on protecting constitutional principles that underpin a properly functioning democracy – the ability of courts to protect individual rights and the protection of the franchise to ensure democracy is working effectively.

Exceptional circumstances arise when there is a constitutional crisis. In these situations, it would be legitimate for the courts to act to protect constitutional principles that protect democracy and the ability of the courts to protect individual rights. However, this may also backfire. If the protection of these principles by the courts is deemed to be illegitimate by the government, the legislature and the people, then this may result in a change to the UK constitution that removes the independence of the judiciary, or which limits their role in the UK constitution.

It is also reactive. It relies upon exceptional legislation being enacted, either to enable the court to issue dicta as to the content of constitutional principles and the extent to which they would be protected by the courts in exceptional circumstances, or because the courts are facing a constitutional crisis. The only way this can have a proactive effect is through dicta sending a message that, should parliament enact legislation in the future, courts may be prepared to refuse to enforce this legislation. This may create a form of political entrenchment, providing an incentive for parliament and the government to ensure that these constitutional principles are upheld in order to avoid a constitutional crisis.

Constitutional statutes

Constitutional statutes provide one example of where courts have, arguably, created an entrenchment effect by making it more difficult for parliament to overturn future legislation. To modify a constitutional statute, parliament must provide clear and specific language, which makes it apparent that this is its intention. It may be that this is only possible when parliament uses express repeal, setting out a clear intention to repeal a constitutional statute. This protects constitutional statutes from accidental or inadvertent modification or repeal. The designation of a statute as a constitutional statute is currently made by the courts. The courts also determine that clear and specific language is needed to ensure that they recognise that the intention of parliament really is to overturn or modify a constitutional statute.

This would appear to provide an effective means of entrenching constitutional provisions. Courts could recognise legislation, or specific provisions of legislation, as constitutional, thereby making them immune from being accidentally overturned by parliament.

However, this is only a weak form of entrenchment. It is still possible for parliament to overturn constitutional statutes, although this may be harder to achieve in practice. It will be clear to MPs that a bill initiated by the government intends to overturn a constitutionally important provision. Depending upon the political circumstances, this may make it more difficult for the government to obtain the votes it needs to enact its proposed legislation.

Although there are judicial statements that include a broad range of possible constitutional statutes – for example, the Human Rights Act 1998 and the statutes establishing devolution – to date, the courts have only applied this in practice to the European Communities Act 1972. This raises questions as to whether courts concluded

that specific and express provisions were needed to modify this Act because it was a constitutional statute, because of the specific wording of this legislation or because of the fact that this statute incorporated EU law into UK law and the UK's membership of the EU was reinforced by the enforcement mechanisms of the EU institutions.

Therefore, it is not clear whether merely recognising that a statute is constitutional would suffice to provide a form of entrenchment by making the statute more difficult to amend or repeal. Further problems arise as the courts have recognised that there is a hierarchy of constitutional statutes. Some constitutional statutes are more important than others.⁴⁰ However, to date, the courts have not explained which constitutional statutes are more important than others or explained what it means for a constitutional statute to be more important.

While it may be that a constitutional statute cannot be accidentally repealed by an ordinary statute, it may be that a later constitutional statute can repeal an earlier constitutional statute merely by legislating in a manner that contradicts the earlier constitutional statute. This may well depend upon the relative importance of these constitutional statutes, as determined by the courts. Sometimes a later constitutional statute will be more important and, therefore, override an earlier constitutional statute. Sometimes the earlier constitutional statute may be deemed more important, overriding the later statute. However, this is all speculation due to the lack of a clearer account by the courts.

This gives rise to uncertainty. It may not be clear to parliament that it is enacting a constitutional statute. This is because the courts determine whether a statute is constitutional by applying a range of criteria. It is difficult to predict how they may apply to an Act of Parliament, or even whether it is possible for some provisions of an Act of Parliament to be constitutional while other provisions of the same Act of Parliament are not constitutional. It may also not be clear whether the constitutional statute will be recognised as more important than earlier constitutional statutes. This weakens the ability of parliament to provide a more effective scrutiny over constitutional statutes and over provisions in bills that may modify earlier constitutional statutes.

This uncertainty is also present in the case law, which may make it harder for the courts to protect constitutional statutes. Not only is there no definitive list of constitutional statutes, but also there are disagreements as to how they are identified. Lord Justice Laws, whose statements created the distinct classification of statutes as constitutional, referred to statutes that governed the relationship between the state and the individual, or the relationship between institutions of the state.⁴¹ This, however, appears to be too broad. Would this include, for example, legislation implementing the budget? Constitutional legislation could be limited to those statutes that relate to the creation of a constitutional identity, or that have a strong normative value, or which form part of the pillars of the constitution. However, even if these refinements are followed by the courts, there may still be problems of applying these requirements in practice. This

uncertainty is further complicated by the existence of a hierarchy among constitutional statutes. How do judges determine which constitutional statute is more important when two constitutional statutes contradict each other?

As discussed above with regard to other forms of legal entrenchment initiated by the courts, there are issues of legitimacy. Should courts alone be able to determine the identity and relative importance of constitutional legislation? Does this only become legitimate when it gives rise to a form of political entrenchment, where parliament accepts the existence of constitutional statutes and legislates accordingly, knowing that legislation will be regarded as a constitutional statute and given effect as such by the courts?

It may be possible for parliament to play a role, through designated statutes as constitutional statutes. This could be done *ex ante*, with the minister in charge of a bill setting out at first reading that the bill was an example of a constitutional statute. It would also be possible for parliament to enact legislation providing a list of current statutes that it wished to see classified as 'constitutional statutes', setting out the date from which they should be considered as constitutional by the courts. This could help to remedy the problems of legitimacy and legal certainty. A further example is provided by the Brown Commission. This commission proposed a reduction in the general role of the second chamber in order to preserve the primacy of the House of Commons. However, the role of the second chamber should be stronger for a narrow list of legislation recognised as constitutional.⁴² One way of implementing this suggestion could be that the House of Commons requires only a simple majority to overturn an amendment from the House of Lords in relation to ordinary legislation but would require a two-thirds majority for constitutional legislation. However, even if this were to occur, the entrenchment effect would still be relatively weak, so much so that some have argued that this would not amount to entrenchment at all.⁴³

While the courts alone may provide a stronger protection of constitutional statutes, this is only really effective as a form of backstop. It can prevent a future parliament from inadvertently repealing earlier legislation that the courts believe contains important constitutional principles that should not be accidentally removed or eroded. Stronger entrenchment may arise if parliament decides to enact legislation that designates statutes as constitutional or, as discussed in the previous section, legislates in a manner that aims to provide a stronger entrenchment for constitutional statutes. In addition, the designation of statutes by the court as 'constitutional' may prompt the government and parliament to recognise and accept these constitutional provisions, creating a political culture that may help to politically entrench constitutional statutes.

Principles of interpretation

Interpretation provides the weakest form of legal entrenchment effect. While it is possible for courts to develop principles of interpretation designed to protect constitutional rights, it is also possible for parliament to enact legislation that clearly overrides constitutional rights, preventing judicial interpretations designed to protect these rights.

The strongest potential means through which constitutional rights may be partially entrenched through statutory interpretation is the principle of legality, where courts interpret legislation to protect fundamental common law rights. However, this too is limited in terms of its application, its scope and its potential entrenchment effect.

The principle of legality only applies when courts are faced with ambiguous or general words. The most the courts can do when faced with clear words intended to limit constitutional rights is to limit any restriction of such rights, ensuring that restrictions are necessary.⁴⁴ In terms of its scope, the principle of legality is limited to the protection of fundamental common law rights. It is difficult to determine these rights with precision, particularly given that most common law rights are understood as negative liberties as opposed to positive rights. Moreover, these rights have to be found in the common law and not in legislation.⁴⁵ It may also be the case that courts can point to a fundamental common law principle, but that this does not have sufficient precision to be a fundamental common law right, particularly when the right has been fleshed out by legislation.⁴⁶

In terms of its effect, the principle of legality does not provide as strong a protection as that found in section 3 of the Human Rights Act 1998. Section 3 enables courts to read words into legislation, as well as to read words down. Courts read words down when they limit the scope of application of general words. For example, if legislation prevented gatherings on street corners, the courts could read down the scope of its application so that it would not prevent gatherings where individuals were exercising their right to peaceful protest. The courts will assume that parliament's general provision was not meant to prevent the right to peaceful protest. If parliament had wished to limit the right to peaceful protest, it would have specifically stated its intention to limit this right – for example, by stating that the prevention of gatherings on street corners extended to gatherings intended as a form of peaceful protest.

To date, the principle of legality has been used either to resolve ambiguities, with courts preferring interpretations that uphold fundamental common law rights, or to read down general provisions so that they do not apply in a manner that would restrict or remove fundamental common law rights. Not only can clear statutory language prevent the application of the principle of legality, but also, moreover, legislation can be used to specifically reverse an interpretation of the court that protected individual rights. Parliament needs only to use clear legislation setting out its intention to limit a fundamental common law right.

Consequently, the principle of legality may best be used as a constitutional safeguard, helping to protect constitutional rights that have not been included in an attempt by parliament to entrench constitutional provisions. Again, it helps to ensure parliament does not accidentally or inadvertently legislate so as to remove fundamental common law rights.

Conclusions

The courts may be able to provide the strongest form of legal entrenchment through modifying the doctrine of parliamentary sovereignty, or its relative importance as regards the rule of law. This may provide a strong means of entrenchment, enabling courts to disapply or refuse to give legal effect to legislation breaching constitutional provisions. However, it is not clear whether this entrenchment effect could extend to striking down legislation. It is likely that this would only be the case in extreme circumstances where a government abused its power to remove all democratic protections, or to remove all ability of the courts to hear cases in order to protect individual rights. It is also not clear whether this form of entrenchment, as well as the entrenchment that may occur using constitutional statutes, applies more generally, or is triggered by specific wording in legislation.

Moreover, as discussed above, entrenchment initiated by the courts alone has less legitimacy than that initiated by parliament. The courts are not democratically elected or democratically accountable. It is more legitimate for parliament to have a say in the determination of constitutional principles that should be entrenched, particularly if this entrenchment is to have a stronger effect than those discussed in this section. This is not to challenge the legitimacy of the development of constitutional statutes and the principle of legality or of judicial statements as to the greater importance of the rule of law than parliamentary sovereignty or of how, in exceptional circumstances, courts may refuse to enforce legislation. These statements serve a different function. They are there to provide a constitutional safeguard either when parliament inadvertently legislates contrary to what the courts would regard as constitutional principles, or when democratic institutions have failed to such an extent that legislation has been enacted that would undermine the foundations of democracy.

Judicial means of achieving an entrenchment effect, therefore, are more effective and more legitimate when combined with legal entrenchment effects initiated by parliament in legislation. This also helps to provide greater certainty, legitimacy and stability to legal entrenchment effects. These may also help to enhance the political entrenchment effect. It may help those in parliament to realise that these constitutional principles are important and should not be limited or eroded.

Executive entrenchment effects

The executive cannot, alone, enact measures that can create a legal entrenchment effect. First, the executive has limited powers, deriving from either legislation or the prerogative or, more controversially, a third source of powers. Second, it is also clear that legislation overrides and limits executive powers. Any entrenchment effect initiated by the executive acting alone, therefore, would be vulnerable to legislative override.

Nevertheless, the executive can play a role in developing, strengthening and enforcing political entrenchment effects. The executive plays a dominant role in the UK constitution. The government initiates most legislation and controls the parliamentary timetable in the House of Commons, enabling it to ensure its legislation progresses through the House.

The predominantly political constitution of the UK means that constitutional principles are supposed to be protected through self-restraint and mutual respect. We rely on the consciences and political accountability of MPs to ensure that legislation that undermines constitutional principles is neither initiated nor enacted. We also rely on ministers respecting the scrutiny of parliament and the courts, thereby restraining from initiating legislation that would transgress constitutional principles shared by the legislature and protected by the courts. However, when these limits break down, it becomes possible for the government to initiate and push through legislation that undermines fundamental rights and constitutional principles. The development of exceptional circumstances, constitutional statutes and principles of interpretation, such as the principle of legality, by the courts can provide a legal means of limiting but not removing this danger.

It may be possible for the executive to initiate means through which to reinforce self-restraint. This may provide an effective political form of entrenchment. Rather than relying purely on self-restraint, mechanisms may establish procedures or means of political accountability designed to prevent the executive or legislature from enacting measures that would undermine constitutional principles.

This section will evaluate three examples of measures or constitutional principles in which the executive plays a dominant role in either their creation or enforcement, explaining how these may provide a means of bolstering political entrenchment. However, as with the discussion of legal entrenchment effects initiated by the judiciary, it will be argued that these entrenchment effects are more legitimate and effective if parliament also plays a role in the development and enforcement of the constitutional principles. There are also considerable weaknesses as to the enforcement of these measures. They rely upon the executive that implements them, and future executives, to commit to adhering to the principles.

Ministerial code

The ministerial code is currently not enforced by the courts, although its interpretation may be relevant to legal proceedings.⁴⁷ Nor is it set out in legislation. This subsection will investigate whether bolstering the means of enforcing the ministerial code, without placing this on a statutory footing, may provide a means of reinforcing principles of self-restraint, preventing legislation from being initiated that may undermine constitutional principles.

The contents of the ministerial code are derived from the *Questions from Procedures for Ministers*, a codification of practices and behaviour. Since its first publication as the ministerial code in 1997,⁴⁸ it has normally been reissued by the prime minister when

he or she takes office. It may also be amended during a prime minister's term of office. Therefore, although its contents have emerged through practice, it has become a document that is open to modification by the executive alone.

Some provisions of the code set out constitutional principles. These include paragraph 1.1, which states that "Ministers of the Crown are expected to maintain high standards of behaviour and to behave in a way that upholds the highest standards of propriety". It could be possible for the government to modify or add to this provision, listing key constitutional principles that ministers are expected to maintain. Furthermore, 1.3 of the code states that its provision "should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life". This includes the seven principles of public life – the 'Nolan principles' – of selflessness, integrity, objectivity, accountability, openness, honesty and leadership. It may be possible for the executive to modify the ministerial code further, adding in an overarching duty on ministers to protect long-standing principles of the UK constitution. These principles could be added as a further annex to the ministerial code.

However, problems currently arise with the way in which the ministerial code is enforced. The prime minister has a discretionary power as to whether to investigate an alleged breach of the code.⁴⁹ The independent adviser on ministerial interests, who is appointed by the prime minister, may advise the prime minister, and may also now initiate investigations. Although the prime minister is expected to give consent to investigations initiated by the independent adviser, they may refuse to give consent where there are reasons of public policy for doing so. All the independent adviser can do in this situation is to seek these reasons, although these need not be given if this would undermine the same public interest reason used to refuse to consent to the investigation.⁵⁰ Furthermore, the prime minister is under no obligation to appoint an independent adviser.

The prime minister also determines whether the code has been breached and, if so, the appropriate punishment for the breach. Although there are legal cases that have recognised and interpreted provisions of the code, when relevant to a legal decision, there are no cases where courts have enforced the code.⁵¹ In practice, depending on the personality of the prime minister, the code operates more as a series of guidelines for the discretionary power of the prime minister to hire and fire ministers, rather than a clear set of binding, enforceable constitutional principles.

This does not mean that the ministerial code cannot be used to strengthen aspects of political entrenchment. However, this mechanism of political entrenchment may face a series of hurdles. The prime minister would have to want to modify the ministerial code in this manner, determining the content of the constitutional principles that they wished to protect. For this to be successful, it would have to generate a culture for all governments, of whatever political persuasion, to restrain from initiating legislation that undermined these principles or from acting in a manner that would undermine them. This would have to be accepted and followed by all future prime ministers and their governments.

This political entrenchment effect would also be weak given the principle of parliamentary sovereignty. While a modified ministerial code would expect a minister to refrain from introducing legislation that harmed constitutional principles, this may be hard to maintain when the minister feels a pressing need for this legislation and where one of the key constitutional principles may well be that parliament is sovereign and can legislate on any issue it wishes.

Cabinet Manual

The *Cabinet Manual* was produced by the Cabinet Office, initiated by the Brown government, and published under the Cameron government in 2011.⁵² It has not since been updated. In a similar manner to the ministerial code, it collates laws, conventions and rules that relate to and affect the operation of government. It is broader in scope than the ministerial code as it does not just apply to ministers. In addition, it was drafted in a manner that provided input from sources other than the executive. A draft of the manual was published and commented on by parliamentary committees, helping to provide greater legitimacy to its provisions than those of the ministerial code. However, it remains an account of what the executive understands as the relevant conventions, practices, rules and laws. It is also designed to provide guidance rather than rigid rules.

The *Cabinet Manual* is not enforced in the same way as the ministerial code. It is more a set of guidelines and descriptions of existing rules, laws, practices and conventions. It can help to provide clarity as to how government and parliament should operate. However, particularly as the manual becomes more out of date, it is harder to argue that it accurately sets out what should happen. Conventions modify over time as practices change. If the manual is to provide an accurate reflection of these changes, it needs to be regularly updated, preferably using the same practice of providing a draft of the manual for comment prior to its publication. It would also be helpful if it was updated before each parliamentary session and for it to be laid before parliament.⁵³

As the *Cabinet Manual* is regarded as an authoritative account of rules and conventions, it may provide a means of reinforcing political entrenchment. This may occur through setting out principles that may help to reinforce aspects of self-restraint or providing a list of principles that can be used by the legislature, and potentially even the public, to hold the government to account. Political entrenchment may also occur through establishing independent bodies that can hold the executive to account for breaching the provisions of the manual. This process could be initiated by the government. However, to ensure that the content of any new version of the manual is accurate and to ensure legitimacy, it would be better if a draft of the updated version was circulated to relevant parliamentary committees for comment.

For this process to enhance political entrenchment, there needs to be ownership of the principles by those governed by the *Cabinet Manual*. The manual may provide an account of practices that can enhance constitutional principles – for example, with regard to requiring a political debate before the deployment of troops overseas, which enhances democracy and parliamentary accountability.⁵⁴ However, as this example

also demonstrates, there is no guarantee that the manual will be followed. This, in turn, means that we have to regard the manual either as inaccurate, or as guidance that can be ignored. Nor are there effective mechanisms for ensuring that its principles are adhered to. It may serve as a reminder of these constitutional principles but may not provide an effective means of ensuring they are followed. Consequently, this may be best used as a means of reinforcing other legal methods of entrenchment.

Memorandums of understanding

Memorandums of understanding can be used as a means of forming an agreement between governments. The most relevant memorandum of understanding for the purposes of political entrenchment is the agreement between the governments of the UK, Scotland, Wales and Northern Ireland. This sets out principles of intergovernmental communication, consultation and co-operation. It is supplemented by documents setting out intergovernmental relations between the four executives. These provide the means for ensuring communication, consultation and co-operation, designed to facilitate mutual trust. The most recent agreement on intergovernmental relations sets out commitments to regular inter-ministerial groups, and inter-ministerial standing committee meetings, alongside a Prime Minister and Heads of Devolved Governments Council.

A memorandum of understanding does not create legally binding obligations. However, the document setting out intergovernmental resolutions does set out a dispute resolution mechanism. This may provide a means of adding in a form of accountability, although it is difficult to regard it as an enforcement mechanism. It may serve as a means of trying to find a consensus, although this will depend upon the political circumstances surrounding any disagreement.

A memorandum of understanding could be used to reinforce political entrenchment in two ways.

First, it may provide a further means of reinforcing commitments to constitutional principles. The memorandum of understanding referred to above includes the Sewel convention, for example, reiterating the commitment to this principle.⁵⁵ This may help to reinforce knowledge of conventions and increase awareness of an expectation that these conventions will be adhered to, especially given their high constitutional importance. The more the executive refers to constitutional principles in important documents, the more this may create a general culture where these principles are adhered to.

Second, it provides mechanisms that may facilitate the upholding of constitutional principles. This is through establishing institutions that can facilitate communication and mutual respect. For example, this may provide a means of reaching consensus over proposed legislation that may otherwise cause problems under the Sewel convention. The dispute resolution procedure may also help to provide a means of resolving potential clashes over legislation that engages the Sewel convention. However, for this to be achieved, these mechanisms will need to be taken seriously and approached in a manner that is able to reach a real compromise. It also dependent upon the current and future executives believing that these principles are ones that should be adhered to.

However, the lack of legal enforcement of the principles contained in the memorandum of understanding, and the mismatch of the balance of power between Westminster and the devolved legislatures and governments, mean that these mechanisms have not worked effectively in practice. There is now evidence of a lack of trust, and of legislation being enacted in breach of the Sewel convention through the Brexit process.⁵⁶ This would suggest that this form of entrenchment may reinforce an existing commitment but may not be sufficient to prevent breaches of this commitment, particularly when there are no effective political sanctions, where there is an imbalance of power between the institutions adhering to a particular constitutional principle, or where both sides may be willing to either refuse to grant consent, or to act without consent, for political purposes.

Conclusions

Although the executive may initiate forms of political entrenchment, these may lack legitimacy if they are used to protect principles that preserve the interests of the particular political party in government, rather than reflecting constitutional principles shared by parliament and the electorate. They are also dependent upon the specific commitments of a particular government, yet also require that these commitments are generally adopted and adhered to by future governments. This may be hard to achieve. They require a long-term commitment that is not purely motivated by political expediency or party interests.

However, they may provide a means of reinforcing legal entrenchment mechanisms, either initiated through legislation enacted by parliament or through recognising constitutional principles developed and protected by the courts. The UK's political constitution relies to a large extent upon conventions, practices and codes that are not legally enforced. As such, any form of political entrenchment will need the engagement of current and future members of the government. Yet this engagement and reinforcement of constitutional principles through documents produced, at least in part, by the executive may be a means of bolstering other forms of legal and political entrenchment. However, this depends upon how far they are adopted and enforced by other institutions, as well as whether they help uphold self-restraint by the executive.

Conclusion

Given the current understanding of parliamentary sovereignty in the UK constitution, it would probably be impossible to provide a strong legal entrenchment of constitutional principles, enabling courts to strike down legislation that contravened these principles, without either changing our understanding of, or removing, parliamentary sovereignty. The first may not succeed. It will depend upon whether this change to parliamentary sovereignty is accepted by parliament, the government and the courts. The latter requires a radical upheaval of the UK constitution. Such a radical change itself requires something other than an Act of Parliament if this is to be legitimate. For example, it could involve a constitutional convention process, where there was engagement with

citizens as to the constitutional principles the UK desired to protect. It may involve the enactment of legislation with a majority higher than a simple majority. It may also require the approval of a constitution by a referendum.

This paper has, instead, explored means through which the UK constitution may create an entrenchment effect for constitutional principles, focusing on how these forms of entrenchment effect have been achieved to date in the UK constitution. It recognises that there may be both legal and political entrenchment effects. Legal entrenchment effects are enforced by the courts. Political entrenchment effects are upheld through political means, either through creating or supporting a change in political culture or establishing political means of accountability to protect constitutional principles.

This paper has also explained how these effects can be initiated by different institutions of the constitution. Legal entrenchment mechanisms can be initiated through the enactment of legislation by parliament, or through the development of the common law by the courts. Parliament and the courts can also enhance political entrenchment mechanisms, which may be further supplemented by measures initiated by the executive.

If we are to achieve an effective and legitimate entrenchment effect, this can best be achieved through a combination of legal and political entrenchment. It would also be more legitimate for this form of entrenchment to be initiated by parliament, supplemented by the courts using the common law to provide a form of constitutional safeguards that operate in exceptional circumstances. Any such legislation should be subject to a wide process of public consultation and education. This can serve to create a broader constitutional culture.

The strongest form of legal entrenchment has been that used to entrench aspects of EU law during the UK's membership of the EU and aspects of the Withdrawal Agreement post Brexit. This relies upon a specific wording, requiring all laws to be read and given effect subject to directly effective provisions of EU law or the Withdrawal Agreement. This could be used to entrench constitutional principles by requiring legislation to be read and given effect subject to these constitutional provisions. The courts have disapplied provisions of UK law that could not be read and given effect subject to directly effective provisions of EU law. In a similar manner, it is likely that the courts would disapply UK law in order to preserve constitutional principles were similar wording to be used to protect these principles in legislation.

However, we noted that this may only have been achieved because of the EU's enforcement mechanisms to ensure member states complied with EU law, or because courts recognised this entrenchment effect through categorising this legislation as a constitutional statute. Merely enacting legislation with similar wording may not achieve an entrenchment effect. It may also have occurred due to, at the time, a political, cultural and legal acceptance of these limits. When the political will changed, the UK was able to withdraw from these international commitments. Also, we noted that refusing to apply a legislative provision is not the same as quashing legislation.

Even though this is the strongest form of legal entrenchment it would appear to be possible to achieve currently in the UK constitution, this is still a weak form of entrenchment. While it may prevent parliament from inadvertently legislating contrary to constitutional principles, it does not prevent parliament from expressly overturning these principles.

It may be possible to achieve a stronger form of legal entrenchment through requiring a manner and form of enacting legislation to overturn constitutional principles that is more difficult to achieve than the way in which ordinary legislation is enacted. However, there are two problems with this possible form of stronger legal entrenchment.

First, to date, manner and form requirements for a two-thirds majority vote, or a referendum, have only been used to place limits on the powers of the executive. Even the, now repealed, Fixed-term Parliaments Act 2011, which required two thirds of the members of the House of Commons to vote in favour of an early parliamentary general election, effectively limited the power of the government to seek the dissolution of parliament and the calling of a general election. It is not clear whether a manner and form requirement placed on the legislature would achieve the same effect. It would depend upon whether the courts accepted this requirement. This would only be determined as and when the courts were faced with a conflict between legislation that had not been enacted in the requisite manner and form and an entrenched constitutional principle. Any form of legal entrenchment effect, therefore, may be unstable and, ultimately, may not succeed.

Second, as demonstrated by the successful early parliamentary general election in 2019, under the provisions of the Early Parliamentary General Election Act 2019, any manner and form requirement must be doubly entrenched if it is to be fully effective. Double entrenchment occurs when, not only is there a requirement for a special procedure to enact legislation that modifies or amends constitutional principles, but also this provision itself can only be amended by using a special procedure. For example, a protection of the rule of law would require not only a two-thirds majority to enact legislation that contravened the rule of law, but also a requirement that the provision requiring a two-thirds majority could itself only be overturned by a two-thirds majority. Otherwise, it may be possible to overturn the requirement for a special procedure, such as a two-thirds majority, through legislation enacted through a simple majority. It is even less clear that the courts would protect a doubly entrenched manner and form requirement, giving rise, again, to uncertainty as to whether a legal entrenchment effect would succeed.

A weaker, but nevertheless possible, form of legal entrenchment could be achieved through parliament recognising legislation as a constitutional statute. For example, it would be possible for parliament to enact legislation setting out a list of constitutional statutes, as well as explaining that these constitutional statutes could only be expressly repealed. Merely enacting legislation that contradicted these constitutional principles would not suffice. It would also be desirable for parliament, through legislation, to

add constitutional statutes to this list in the future. This would reinforce the ability of the courts to ensure that parliament did not inadvertently overturn constitutionally important legislation.

If these forms of legal entrenchment are to work effectively, they need to be supplemented by forms of political entrenchment. First, legislation and other documents can be used to express clear constitutional principles, creating a culture of awareness and respect for these principles. This may take the form of legal recognition in legislative provisions, similar to those provisions designed to reinforce the Sewel convention or the permanence of the Scottish parliament and the Senedd Cymru. Constitutional principles could also form the content of other documents. For example, they could be listed in the *Cabinet Manual*. The content of the manual could be subject to oversight by parliamentary committees, such as the Public Administration and Constitutional Affairs Committee in the House of Commons and the Constitution Committee in the House of Lords. It could also be laid before parliament, with a debate and a vote, at the beginning of each parliamentary session to reinforce the recognition and acceptance of these principles.

Second, legislation including these constitutional principles could make it clear that it is unlawful for members of the executive or administration to act contrary to these principles. Not only would this help to reinforce the current provisions of judicial review, but also this may help to ensure that ministers make sure they only exercise their powers according to these constitutional principles.

However, if this political entrenchment is to work effectively, it needs to be bolstered by more effective enforcement mechanisms, particularly through the development of independent institutions that are able to effectively hold MPs and ministers to account if they act in a manner that breaches these constitutional principles – but it depends upon the willingness of the government to constrain its discretion. For example, the government could initiate legislation to require the prime minister to appoint an independent adviser on ministerial interests, as well as setting out the ability of this adviser to investigate complaints and to impose effective sanctions for breaches of constitutional principles. The powers of the parliamentary commissioner for standards could similarly be placed on a statutory basis, perhaps bolstering the ability of the parliamentary commissioner to make recommendations to the Parliamentary Committee on Standards, and for this committee to make recommendations to parliament, such that the recommendations should normally be followed and implemented by parliament unless there are exceptional reasons not to do so. This may provide a better means of holding ministers and MPs to account for their actions. Legislation could also provide for the protection of the independence of the institutions, in terms of both their appointment and their ability to set their own principles for oversight.

In addition, these methods of entrenchment can be supplemented by legal entrenchment and the legal protection of constitutional principles through the development of the common law by the courts.

First, the courts can continue to use principles of interpretation and the principle of legality to prevent ambiguous or broadly worded legislative provisions from undermining constitutional principles. This could play a particularly important role in ensuring that broadly worded powers granted to the executive cannot be used to enact measures that would undermine constitutional principles. These can also limit the prerogative powers of the executive.⁵⁷

Second, courts can continue to use the doctrine of exceptional circumstances to provide a constitutional safeguard. This can be used to ensure that fundamental aspects of the constitution are not eroded – for example, to ensure the continued role of the court in the protection of individual rights, particularly through the ability of individuals to challenge decisions of the administration through judicial review, and the protection of the right to vote. This provides a means, in particular, of protecting these principles when political mechanisms break down, such that parliament is no longer able to provide effective checks over the government.

Existing mechanisms can be used to provide a form of entrenchment of constitutional principles through combining legal and political mechanisms, but they depend upon a government that is willing to initiate legislation to this effect. However, for any entrenchment effect to operate effectively, it needs to be combined with a means of involving the electorate in the recognition of these principles of good constitutional government. Only then can we create a constitutional culture that ensures that those exercising power do so in a manner that respects constitutional principles, enforced not only through legal and political means, but also through public accountability and the ballot box.

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