

The post-Brexit Breakdown of the Rule of Law in the UK

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In a seminal article, the legal philosopher Joseph Raz suggested that the Rule of Law has two central aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it. Raz goes on, usefully, to identify some of the most important implications of this second principle.

First, all laws should be prospective, open, and clear. If it is to guide people they must be able to find out what it is. For the same reason its meaning must be clear. An ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it. Second, laws should be relatively stable. They should not be changed too often. If they are frequently changed people will find it difficult to find out what the law is at any given moment and will be constantly in fear that the law has been changed since they last learnt what it was. Third, the making of particular laws should be guided by open, stable, clear, and general rules. Fourth, the independence of the judiciary must be guaranteed.

The sad reality is that Brexit has contributed to an emerging breakdown of the Rule of Law in the United Kingdom, if by the Rule of Law we mean the principles that Raz identified. And by Brexit, I do not mean only the simple act of the United Kingdom exercising its undoubted legal right to leave the European Union, but the ideology of Brexit. In retrospect at least, the ideology of Brexit was not one simple idea but an amalgam of separate and sometimes contradictory principles, and it is obvious that the success of the referendum was due to the Leave campaign's ability to persuade voters to vote leave for entirely different reasons. The famous slogan: 'Take Back Control' left open what a post-Brexit society should become. As a result, of course, what Brexit meant had to be worked out after the referendum, and here is where the tensions with the Rule of Law began in earnest, because 'taking back control' became, in effect, the only principle and anything that stood in the way of achieving that result was to be sacrificed, including the Rule of Law.

If that seems an exaggeration, may I remind you of a few examples of the legal and constitutional chaos that Brexit brought in its wake? To mention only a few highlights: the attempt to use the Royal Prerogative to trigger Brexit negotiations in order to avoid the embarrassment of having to secure Parliamentary authorisation, until the UK Supreme Court stopped it; the cavalier attitude to the constitutional convention that the legislatures of the devolved nations and regions of the UK should normally have to give their assent before the Westminster Parliament could legislate in devolved matters; the failure of the then Lord Chancellor, one Liz Truss, to fulfil her constitutional obligation to defend the judiciary from the vicious attacks on the judges by the tabloid press in the wake of the first *Miller* decision; the massive use of so-called Henry VII powers in the legislation implementing Brexit, essentially

giving Ministers untrammelled powers to legislate by Executive fiat, without adequate Parliamentary scrutiny; the attempt by Boris Johnson to prorogue Parliament in order to avoid defeat in a critical Brexit-related vote until stopped by the Supreme Court. I could, of course, go on, but I hope the point is clear.

Anyone who thinks that in the period between 2016 and 2021 demonstrated a commitment by the United Kingdom to the Rule of Law was clearly living in a different universe to the one I inhabited. Were the Brexit-related laws open, and clear? Or were they ambiguous, vague, obscure, and imprecise law, often intended to mislead and confuse? The latter. Were the laws relatively stable? Clearly not. Was the making of the laws during this period guided by open, stable, clear, and general rules? No. One of the few institutions that was not polluted by the singled-minded aim of 'getting Brexit done', another of the three-word slogans that we were subjected to, was the judiciary. But was the independence of the judiciary itself guaranteed? Not by Liz Truss it wasn't.

But that, you may think, is all ancient history and we should let bygones be bygones. Look forward to the sunlit uplands, perhaps. But I suggest that that would be a mistake. The ideology of Brexit has not gone; rather, it has morphed. Each of the issues I've mentioned up till now challenged the Rule of Law by adopting policies that undermined *domestic* law or constitutional convention, but we are now faced with the equivalent approach translated to the international level, where the UK government seems intent on mounting a sustained challenge to the Rule of International Law. Or, to put it in more familiar terms, perhaps, a sustained challenge to the rule-based legal international order.

And that should be of concern beyond the UK, given that the rule-based international order is now so challenged by the behaviour of other states beyond Europe: Russia in Ukraine; China in Hong Kong and, potentially, in Taiwan; the United States under President Trump. I want to suggest that the battle over the Rule of Law in the United Kingdom is an important part of the global challenge to the Rule of Law, and therefore that what may seem merely issues of UK domestic politics matter well beyond the UK. And in each of these cases, the challenge is to the first principle of the Rule of Law identified by Raz; it is a challenge to the fundamental principle that people should be ruled by the law and obey it

Which brings us to Northern Ireland and the Protocol. By the Protocol, I mean, of course, the Ireland-Northern Ireland Protocol that is attached to, and is an integral part of, the EU-UK Withdrawal Agreement under which the UK and the EU agreed the terms under which the UK would leave the EU. The central aim of the Protocol, we might say, was to uphold the Rule of Law. I characterise the aim of the Protocol in this way because the purpose of the Protocol was to protect the Belfast-Good Friday Agreement, a peace treaty, that helped bring an end to the Northern Ireland Troubles, the near civil war that scarred Northern Ireland between the early 1970s and 1998. The 1998 Agreement was a peace agreement between most of the main political parties in Northern Ireland, but it was also in the form of an international treaty between Ireland and the United Kingdom. The Protocol was intended to protect that Agreement, in all its dimensions.

To solve the problems that Brexit itself created, the UK and the EU could have agreed some different solution to that adopted in the Protocol, and we know that an alternative was offered by the EU but rejected by the UK. And we know that the Protocol itself provides for a degree of flexibility in its application, and that these are on the table in the current negotiations between the EU and the UK. All that is entirely appropriate and consistent with the Rule of Law; indeed, these are the ways in which the Rule of Law is upheld.

What is not appropriate and is a breach of the Rule of Law is the deliberate breach of international agreements either as a negotiating tactic, or for domestic political advantage. And that, I am afraid, is precisely the position that the British Government currently takes. Indeed, to quote the late, unlamented Prime Minister in another context, that is a disgrace. Not one, but three international agreements are now being held hostage by the British Government. The Northern Ireland Protocol Bill deliberately breaches the Protocol, a position that is supported by the Government resorting to an outlandish, and frankly embarrassing resort to the doctrine of necessity. Last year, yet another attempt to breach the Protocol, in the Internal Markets Bill, was only narrowly averted by concerted EU and US pressure. The Retained EU Law Bill will repeal a swathe of previous EU law without replacing it, a significant proportion of which is necessary for the UK to comply with the Protocol. The recently enacted Elections Act breaches the Protocol in its provisions on the voting rights of EU citizens residing in Northern Ireland. But it is not just that these measures undermine the Protocol. In doing so, they also undermine the Belfast-Good Friday Agreement.

And just when you might be thinking, well, at least the European Convention on Human Rights is safe, think again. Parliament's own human rights committee has said that the Bill dealing with legacy issues in Northern Ireland is highly likely to breach the Convention. And the return of Dominic Raab as Justice Secretary means that his pet project, a British Bill of Rights, is likely to be resurrected. Despite its name, it seeks to repeal the current legislation that incorporates the ECHR into domestic law, replacing it with a considerably weaker alternative. This Bill has the unusual distinction of managing to breach all three of the international agreements I've mentioned. Quite a feat.

Returning to the Protocol, there is now a significant uncertainty as to whether the UK intends to obey international law in the shape of the Protocol, or whether the Protocol was only ever a temporary political expedient. The, as yet unresolved, debate in the UK is whether to embrace what has been called a 'realist' understanding of international law, one where whether to comply is based solely in immediate self-interest, where compliance is accepted it is based on the narrowest interpretation possible, and where limited exceptions are provided, they are not applied in good faith. That is one route, and that is the path the UK is currently taking. This approach values continuing popular responsiveness above all else, providing internal reassurance to the state's political supporters that their view of the popular will continues to be protected – the justification offered is frequently that only this approach enables democratic politics to take place.

The alternative is that the UK should follow what has been termed a more liberal-institutionalist understanding of international agreements, in which compliance takes place irrespective of perceived immediate self-interest, and the aim is to make the system as a whole effective, not least because of the need to support a rule-based international order. That is the approach that the UK itself urges Mr Putin to take in Ukraine, and China to take in Hong Kong, but does not apply it in the context of Northern Ireland. Put more theoretically, this approach values behaving consistently over time, adhering to previous commitments, and accepting *pacta sunt servanda*. This is the position that provides reassurance to *external* parties that their expectations will continue to be fulfilled, and the objectives of agreements furthered in a spirit of co-operation.

The UK is, then, currently facing a conflict and a choice, between two important principles. It is clear, I hope that I consider that it is only the former approach that is consistent with the Rule of Law. But the outcome of this debate in the UK is by no means certain.

In this internal UK debate, the EU has an important role to play in ensuring that the UK chooses the right course of action, the path that is consistent with the Rule of Law. The irony, of course is that it is (I believe) in the UK's own self-interest in the longer term to take this path. How, then, should the EU behave? In my view, it will achieve the result that is consistent with the long-term preservation of the Rule of Law only by exercising some 'tough love'. It should reject any attempt to renegotiate the Protocol, in the interests of preserving the Belfast-Good Friday Agreement. It should hold the UK's feet to the fire, insisting that existing legally binding agreements are fully complied with, before any new agreements with the UK are even contemplated. It should require the withdrawal of all the legislation that is currently before Parliament that is contrary to the Protocol. And if these requirements are not met, then it should impose swift, proportionate, and effective sanctions. This tough love approach is not only important for the EU's future relations with the UK, and for the shoring up the faltering peace in Northern Ireland. It is also vital for the future of the Rule of Law globally.

