



Bennett Institute
for Public Policy
Cambridge

POLICY BRIEF

Brexit and the [rule of] law

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UNIVERSITY OF
CAMBRIDGE

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Published November 2019

Publication from the Bennett Institute for Public Policy, Cambridge
www.bennettinstitute.cam.ac.uk

Brexit and the [rule of] law

Introduction

Brexit has posed a challenge to the law, both at domestic level and at EU level. I wish to argue that the law is being used to shape the politics, to constrain the politics and ultimately to respond to the politics. Maybe it was always thus. But Brexit has brought the relationship between law and politics into sharp focus and will put an increasing burden on the judges. There are, however, risks associated with this.

In the first part of this briefing paper I will discuss the events of the last couple of months through a constitutional lens. I want to argue that, in the absence of a functioning parliament, a political crisis came close to a constitutional crisis. I then want to examine how the role of the law, the rule of law and the rule by law, will become an increasingly prominent feature of our landscape and one that will put the judges in the frontline.

I want to conclude by warning of the risks associated with this. Those voting leave were in part voting against a project seen as created by the elites for the benefit of the elites. They were voting against the supremacy of EU law. There will be severe resistance if the elites – which include lawyers – are seen as trying to recreate that system in some form at domestic level. Just remember the words of [Kwasi Kwarteng](#) after the *Cherry* judgment in the Scottish court: 'I'm not saying this, but, many people... are saying that the judges are biased.' Law – and the courts – are increasingly the battleground in the broader remain/leave struggle currently being fought out across the country.

The Crisis

The Political Crisis

Constitutional historians may regard Autumn 2019 as the moment in which the UK moved from political crisis to constitutional crisis. Certainly there was a political crisis. The government had lost its majority and struggled to respond in the most sensible way – by calling an election. The Fixed Term Parliaments Act 2011, drafted to smooth the way for the establishment of a coalition government 2010-2015 and thus to avoid another potential crisis, became a straightjacket. The need for a two thirds majority of votes in parliament to call an election, in fact gave the opposition parties the whip hand.

In the end, good old fashioned self-interest prevailed. The SNP, worried about the impact of the Alec Salmond trial in January 2020, eventually seized the opportunity to agree to a one line (in fact ten line) bill, now Act, allowing an early election. The Lib Dems agreed, recognising that it is easier to run the revoke line before the UK has in fact left the EU. And Labour were forced to follow suit because they didn't want to be seen as the party pooper. The [Early General Election Act 2019](#) was rapidly passed by Parliament, by simple majority, announcing that 'An early parliamentary general election is to take place on 12 December 2019 in consequence of the passing of this Act.' (The FTPA 2011 continues to apply and so all future elections may be in December....)

The Constitutional Crisis

But I would argue there was a constitutional crisis too, a crisis generated by the behaviour of the government itself and the lead figures in it when faced with a lack of majority. What we have learned is that the British Constitution is essentially based on good behaviour; the expectation is that the rules of the game – Conventions, rules, the Cabinet handbook – will be complied with by the Prime Minister and his ministers (and their advisors). It is becoming increasingly clear that the rules of the gentleman's club are breaking down. At one level it is minor but embarrassing. Remember when there was a [coordinated walk out](#) by Conservative MPs when SNP MP Joanna Cherry stood up to speak in the house.

At another level it is serious. The prorogation of parliament for five weeks (34 calendar days) is perhaps the best example. In the scheme of things Brexit, it will in fact be a footnote. But in terms of respect for the Constitution it is serious. There was, in fact, an argument that could have been run to justify it. Namely that there was a need for parliamentary silence so that the PM could have got on with renegotiating the Withdrawal Agreement. So long as there was a chance that Parliament might intervene – as it did in fact do with the Benn Act (properly known as the EU (Withdrawal) (No.2) Act – the EU was unlikely to move. The EU rightly thought that the Brexit crisis was primarily a domestic matter and that it should not intervene if at all possible.

But, in fact, this was not the argument that was run. Indeed no justification was actually given to the Scottish court as to why prorogation was necessary. There was no sworn evidence. And the Supreme Court got to see the redacted version of the Prime Minister's handwritten note.¹

The Prime Minister's cavalier approach to using the Monarch for his own political purposes is also remarkable and a further sign of the degradation of the gentleman's club approach to the Constitution as we know it. First, she was essentially forced into proroguing parliament in September for those five crucial weeks. As the Supreme Court noted in *Miller II*, she had no choice but to do it:

First, the power to order the prorogation of Parliament is a prerogative power: that is to say, a power recognised by the common law and exercised by the Crown, in this instance by the sovereign in person, acting on advice, in accordance with modern constitutional practice. It is not suggested in these appeals that Her Majesty was other than obliged by constitutional convention to accept that advice. In the circumstances, we express no view on that matter. That situation does, however, place on the Prime Minister a constitutional responsibility, as the only person with power to do so, to have regard to all relevant interests, including the interests of Parliament.

¹ 18. The second document is the Prime Minister's handwritten comments on the Memorandum, dated 16th August. They read: "(1) The whole September session is a rigmarole introduced [words redacted] t [sic] show the public that MPs were earning their crust. (2) So I don't see anything especially shocking about this prorogation. (3) As Nikki notes [sic], it is OVER THE CONFERENCE SEASON so that the sitting days lost are actually very few."

Then there was the Queen's speech (and a second prorogation) which was de facto a party election broadcast. It required five days of discussion in the House. But what was so crucial in September (proroguing parliament in order to have a Queen's speech setting a new agenda for a new Prime Minister) became a side show in October since it was abundantly clear that the government's main objective was to have an election, despite repeated and continuous denials by the Prime Minister.

However, the most egregious example of the disregard of the Constitution – and of parliament - is in fact the one with the most lasting legacy: the tabling of the EU (Withdrawal Agreement) Bill (WAB) on the night of Monday 21 October, with a view to it having completed its passage through the Commons by Thursday 24th October. The WAB is a highly complex, sophisticated piece of legislation. It is largely an amendment statute, amending not just the EU (Withdrawal) Act 2018 but also a number of other complex pieces of legislation. It contains numerous Henry VIII powers (see the length of the [memo](#) on delegated powers), not just in respect of the hastily drafted section on Northern Ireland but also on the highly sensitive matter of citizens' rights.

The secretiveness of the May and Johnson government over this legislation stands in stark contrast to the approach adopted by the government over the 2018 Act whose drafts had been considered and consulted on relatively widely. Yes, it is certainly true that the substance of the WAB cannot be amended since it constitutes the domestic implementation of an international obligation. Yet the form of that implementation certainly deserves scrutiny. Why is the sifting mechanism developed in the context of the 2018 Act not being used as well for the WAB? Why is there no close scrutiny of the implication of a border down the Irish sea?² What about the all-important Joint Committee overseeing relations between the EU and the UK (one section, no detail of who sits on it, its powers, its accountability)? Why no proposer impact assessment (the £167m figure given relates to the running of the Independent Monitoring Authority (IMA))?

More fundamentally it begs the question why the Commons had only three days to look at the Bill. This suggests a scornful disregard for Parliament. As (Lord) David Anderson has pointed [out](#), 'Parliamentary scrutiny, by select committees and by the tabling and debating of amendments, is not some unnecessary luxury: it is what makes the difference between authoritarian rule and rule by consent'. Yet political expediency has trumped the due process of legislation.

The timetable also suggested a scornful disregard for the legislatures of Scotland and Wales. There are surely devolved issues at play here. Why were they not asked for their consent? It may be that they won't give it. But at least they will have been asked. The damage that has been inflicted on these sensitive relationships is profound and long-lasting. And this is not to mention what has been done to, and for, Northern Ireland.

² The implications of the Northern Ireland Protocol, now no longer the insurance provision but the front stop or status quo, are only slowly beginning to reveal their secrets. The details of internal border checks, customs declarations, and the like are becoming apparent, not least to the Secretary of State who apparently negotiated their content. Is the rush to get the WAB through in fact the manifestation of acting in haste so that the repenting is done in the leisure of the years to come as the complex and burdensome system of checks are put into place against a backcloth of growing fear, loathing and worse in the North. The politics of this look terrible.

Now all of this might be dismissed as the rough and tumble of political debate. But it matters because it is about truth and ultimately trust. While truth might be the first casualty in war, we are not at war. We are certainly not at war with the EU, but it does, at times, feel like we are at war with ourselves. There is already a sense of nostalgia for the May days in parliament. She, at least, would not lie to parliament. Boris Johnson has proved economical with the truth. This undermines trust. And of course he let it be known that he didn't have much time for the law either – that he was going to ensure the UK left the EU on the 31 October 2019, do or die, even if that meant disregarding the [Benn Act](#). The effect of this has been corrosive on the institutions of the law. And even on the rule of law itself.

But I wish to argue now that these remarkable events have thrust the law – and the courts – into the somewhat unwanted limelight. And so far, the law has prevailed. For the moment.

The role - and rule - of the Law

Law as shaping politics

The lack of trust in the Prime Minister was the main explanation for the Benn Act. In that crucial window in early September 2019 when parliament sat for a week before the first prorogation occurred, Parliament decided to use the time to do something innovative – and unique in recent times. With the aid of the (unconventional) speaker, it took the powers for itself, using SO 24 (and amending SO 14), and enacted a piece of highly prescriptive legislation mandating the unwilling executive to do something it did not want to do – ask for an extension to Article 50 if certain conditions had not been satisfied by 19 October 2019. The concern was, of course, that the government, apparently intent on securing a no-deal Brexit, was doing everything in its power, including closing parliament for 5 weeks, to run down the clock and leave with no deal on 31 October. The majority in parliament did not want that and so supported the Benn Act.

The Act in its own terms was tightly drafted. But it overlooked one key issue: the interplay between the Benn Act and the WAB. If there was a deal concluded at the European Council on 17/18 October and Parliament voted on a motion in favour of that deal, the terms of the Benn Act would have been satisfied and the Act would have been turned off. Then, if the WAB was brought before Parliament, it could have been blocked, or talked out, or suffered a death by a thousand cuts through Brexiter or Remainer amendments, resulting in the UK leaving without having completed the process through Parliament, and the UK leaving, in fact, with no deal. Hence the need for further legal intervention – the Letwin amendment to the Benn Act motion. So on the much hyped 'super' Saturday, when Parliament sat for the first time since the Falklands, Parliament in fact supported the Letwin amendment, thereby withholding their approval for the Prime Minister's Brexit deal, unless and until Parliament had passed all necessary legislation to implement it (namely the WAB). MPs were back doing their weekend shopping by 3pm and Boris Johnson was forced to write the letter to the EU requesting an extension. He did so gracelessly – with a good amount of media spin about three letters not one, thereby obscuring the fact that he had done the very thing he had repeatedly said that he would not do. The letter of the (Benn) law was in fact respected. The EU granted a three month extension.

The whole saga illustrates a further issue highlighted by [David Howarth](#): the different views of the role of parliament. The Whitehall view is that Parliament acts as the obedient puppy of the executive; this view prevailed throughout the latter half of the twentieth century. By contrast, the Westminster view is that Parliament is there to hold the executive to account. The last few months have shown Parliament, steered by the speaker John Bercow, trying to do just that. As [Ian Dunt](#), the acerbic (Remain) political commentator put it:

The history books will be generous to [John Bercow]. He understood the two central facets of the British constitution: flexibility and moral centre. It's not formally codified in a single document, which allows it to bend and mould itself to circumstance. But it is rooted down in a central premise, which is that parliament is sovereign. This is what guides the flexibility.

Brexit led to an unparalleled attack on parliament. The executive, under both Theresa May and Boris Johnson, saw an opportunity to sidestep parliament and the courts and ground its legitimacy on the referendum mandate instead. It needed a strong, independent Speaker, who understood that he should respect convention but not be trapped by it, to counter that assault. We should thank our lucky stars that we had one. If we did not, the damage to the British constitutional structure would have been much more severe than it was.

There may be nostalgia for the dynamism, debate and vigour of this period in years to come, in the absence of John Bercow as speaker and as the Whitehall view reasserts itself if one of the main parties gets a majority in the election on 12 December.

With hindsight, the Benn Act may have provided a major catalyst in the Brexit process. For a Prime Minister apparently determined to leave the EU on 31 October 2019, leaving with no deal was now impossible at domestic level because of the Benn Act (Article 50 did, of course, require the EU-27 to agree to any extension request). So the only alternative for Boris Johnson was to see if he could negotiate a deal with the EU: law shaping politics. The meeting between Johnson and Varadkar in the romantic wedding venue near Manchester proved decisive. The DUP was dumped, the plan was to revert to Michel Barnier's suggestion in 2017 of a border down the Irish Sea, and the beginnings of a deal were done. The European Council signed it off on 18 October. There was then the small question of the constraints of actually getting it through Parliament – hence the attempt to slam the WAB through the Commons in three days. Boris Johnson might, [in fact](#), have succeeded had he not opted for an election instead. There was a majority in Parliament for second reading – and every single Tory MP voted for the deal (a united party is a successful party).

If the Conservatives get a majority, the WAB will be brought back before Christmas. But remember it took at least two months to set up Select Committees after the 2017 elections so there is every chance that there will be a further attempt to slam the WAB through Parliament without proper scrutiny if the deadline of 31 January is to be met. And the European Parliament has yet to vote on the Withdrawal Agreement. Article 50 still has a role to play.

Law as constraining politics

The 250 odd words of Article 50 TEU have placed considerable, if not total, constraint on the shape of events in the last three years. The separation of the divorce from the future negotiations, as (over)emphasised by the European Council [Guidelines](#) of April 2017, has proved to be the Achilles heel for the UK of the negotiations since 2017. It is rumoured that early in the process the UK took to the Commission its own legal opinion on how far a future trade deal could be negotiated during the divorce phase. The Commission refused to even consider it. 'Our way or the highway'.

Once the UK has left the EU, the position will be worse (for the UK). The EU is a system based on the conferral of powers. The future negotiations will need to be conducted under the framework of Article 218 TFEU and any future agreement(s) is likely to be adopted under Article 217 TFEU. There is a serious question of competence (to what extent can internal and external security issues be covered under these legal bases); will the agreement be mixed (and if so, don't forget the role of national and regional parliaments). The ignorance by key figures in the UK government of these crucial legal issues was exposed when one time Secretary of State for Brexit, [David Davis](#), said that the UK could do trade deals with France and Germany. Under EU law this is impossible. The EU acts as one and must do since negotiating most trade matters is an area of exclusive competence of the EU. And the Court of Justice has jurisdiction to hear challenges to questions concerning competence, under Article 218(11), as the Walloons have used to their [advantage](#).

At domestic level too, law, especially the courts, have acted as a constraint on politics. [Miller I](#) was the first example. There the Supreme Court required that in order to trigger Article 50, notice could not lawfully be given by Government ministers without prior authorisation by an Act of Parliament.

The courts have also indicated that they are prepared to intervene in the case of abuse of power. The Scottish courts led the way in [Cherry](#) (and subsequently in [Vince](#) on enforcing the Benn Act) and then the [Supreme Court](#) followed suit in [Miller II and Cherry](#). There has been a veritable cottage industry on commenting on the decision. I am not planning on adding to this apart from to point out that, for the purposes of my argument, the decision to find the question as to whether the Prime Minister's decision to recommend to the Queen that she should prorogue parliament was justiciable was already a turning point in the control of the executive. And for all the criticism that the Supreme Court's decision has received, it is worth bearing in mind that the upshot of the decision was to put matters back into the hands of Parliament whose role has now been expanded expressly to include accountability. As the Supreme Court put it in *Miller II* (paras. 46-47)

Ministers are accountable to Parliament through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power.

The principle of Parliamentary accountability has been invoked time and again throughout the development of our constitutional and administrative law, as a justification for judicial restraint as part of a constitutional separation of powers.

Once the genie of justiciability is out of the bottle it is hard to put it back in, although when (if?), normal Whitehall style government is resumed, it maybe the courts will feel less compelled to intervene.

Law responding to the politics

And *Miller/Cherry* is only the start of law – or rather in the absence of a written constitution, the courts - responding to the politics. The next decade will be a challenging period for the judges. They will be asked to interpret the EU(W)A 2018, to work out what s.6 means about the account being taken of the case law of the Court of Justice. They will need to interpret and give effect to the 600 or so SIs that have been rushed through parliament using the s.8 Henry VIII powers. There will be mistakes and infelicities because they have been produced under pressure and without widespread consultation. And they were drafted in anticipation of a no deal Brexit on 29 March 2019 but with an eye to the WAB and a variable departure date. This is a complex factual matrix to operate under in areas of complex law.

There will be other challenges too – devolution for one. As is well [known](#), the Supreme Court has jurisdiction to hear and determine ‘devolution issues’ (questions relating to the powers and functions of the legislatures and governments established in Scotland and Northern Ireland by the Scotland Act 1998 and the Northern Ireland Act 1998 respectively), and questions as to the competence and functions of the legislature and executive established by the Government of Wales Act 2006, whether or not the issue arises in proceedings in England and Wales, Scotland or Northern Ireland. The Supreme Court can also be asked to scrutinise Bills of the Scottish Parliament (under section 33 of the Scotland Act), Bills of the Northern Ireland Assembly (under section 11 of the Northern Ireland Act) and proposed Assembly Bills under section 112 the Government of Wales Act 2006.

But there will also be a number of internal market style challenges. What if the Scottish legislature were to adopt legislation in the future that were to interfere with the ability of goods from rUK going into Scotland. At the moment such challenges are dealt with under EU law, as the [Scotch Whiskey](#) case showed. But how will they be dealt with in the future. In the absence of a written constitution (and I do not see that coming anytime soon), will common law creativity have to step into the breach? Will the common law doctrine on restraint of trade be developed to address such situations or will some new form of constitutional standard be developed?

The challenges may come sooner than you think. UK lawyers have got used to using EU law as a means of challenging domestic statutes and secondary legislation. With EU law turned off, is there any scope for challenge? Labour lawyers look fondly at [UNISON](#). The creativity of the common law was used to strike down the Order introducing fees in the employment tribunal for the first time. Lord Reed, giving the leading judgment, said that ‘The constitutional right of access to the courts is inherent in the rule of law.’ Lord Reed traced the right from the Magna Carta of 1215. He said on purely common law principles, ‘even an interference with access to

the courts which is not insurmountable will be unlawful unless it can be justified as reasonably necessary to meet a legitimate objective'

The *UNISON* decision does not stand alone. The 'exceptional circumstances' cases indicate that – in exceptional circumstances – the courts may still intervene even in the case of Acts of parliament. There is a rhetoric of deference – as Lord Hope said in [AXA](#), a sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty.. [it has] the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate. Yet, the courts have carved out a potential space for greater intervention. As Lord Hope said obiter in *AXA*, an elected and dominant majority in the Scottish parliament could use its power 'to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual'. In such circumstances 'The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.'

Conclusions

The future is one for the law – to shape, constrain and respond to the politics. We shall be ruled by law. It places a considerable responsibility on the judges for upholding the rule of law and shaping that law. But, as I said at the beginning, all of this comes with risks. While it is difficult to be sure, one of the reasons why people voted leave was to get out of rigid, hierarchical rules based structures imposed from above outside by those they perceived as unaccountable. While the lawyer in me craves for the creativity of the common law to (re)assert itself, the nascent political scientist in me recognises that there may well be a backlash by Leave voters against those seen as (re)creating systems and rules perceived to benefit the (Remain) elite. As my UK in a Changing Europe colleague, Anand Menon, put it to me, 'There is a serious debate about the boundary between non-majoritarian law and majoritarian politics. Why should people like us get to control what politicians elected by people like them get to do? It's a real debate, and it's live in the Spectator, Sun, and so on. How liberal should liberal democracy be, and do we want a situation where the courts take the place of politics? As Lord Hope in *AXA* shows, the judges are highly sensitive to these issues. Yet the presence of noisy lawyers quite clearly on one side of the debate, trumpeting their successes on social media and the television risks creating a serious backlash. Law becomes associated with one side of the argument; it's not neutral, at least as far as Leavers are concerned. The schisms continue.

About the author

Author biography

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