

In a Democracy the Rule of Law means Parliament is supreme over the Executive

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Murray Hunt considers why the Rule of Law is relevant to the current constitutional confrontation between the UK Government and Parliament

Whenever the political temperature rises dramatically, invocation of the Rule of Law is seldom far behind. It is frequently enlisted by both sides in a political dispute, as a high-minded weapon to deploy on political opponents. All too often it is used in a rhetorical way, to lend extra weight to a political argument that the other side are doing something which flies in the face of a deeply held constitutional value.

Precisely because of this risk of debasing the genuinely valuable currency of the Rule of Law, the Bingham Centre has, since its foundation in 2010, followed the judicious modesty of its founding inspiration, Tom Bingham, and never rushed to join the fray when the Rule of Law is one of the brickbats flying in a political controversy.

However, when a recent Lord Chancellor and Secretary of State for Justice, with a well deserved reputation for understanding both the meaning and the importance of the Rule of Law ([here](#)), writes to his successor and the Attorney General, from the same political party, asking for confirmation that the Government believes in the Rule of Law, as David Gauke did this week ([here](#)), it is clear that the Rubicon is coming into view.

The Rule of Law is, of course, neutral on the issue of Brexit per se: it has nothing to say about whether the UK should or should not be a member of the European Union. But the way in which the UK disentangles itself from a legal order of which it has been a member for the best part of 50 years does raise a large number of significant Rule of Law issues.

Implementing the UK's vote to leave the EU is, in essence, an accelerated process of rapid constitutional transformation. Like any process of constitutional and legal change, that process unavoidably engages well established Rule of Law principles indigenous to the UK, such as legal certainty and continuity, predictability and foreseeability, and the accountability of the Executive to Parliament in our system of parliamentary democracy.

A number of the new Government's recent actions do not inspire confidence that the centrality of the Rule of Law in this process of constitutional reform is appreciated by all those advising the new Prime Minister. This comment leaves aside the Rule of Law implications of the Government's decision to embrace a no deal Brexit without parliamentary approval, its threat to expel dissenting MPs from the Conservative Party and the use of armed police to escort a summarily dismissed civil servant from the Prime Minister's offices, to focus on two issues which have been thrown into sharp relief.

The first is the prorogation of Parliament for a five week period from 9th-12th September to 14th October. The second is the Government's apparent questioning of its duty to comply with law duly passed by Parliament. This has been called into question in two ways. First, by appearing to raise the possibility that the Government might frustrate Parliament's expressed will by not sending the Bill for Royal Assent. Second, by sowing doubt about whether the Government will comply with a law passed by

Parliament.

The arguments over the strict legality of prorogation are now well rehearsed and the courts will decide the legal questions of whether the Government's advice given to the Queen about the exercise of her personal prerogative to prorogue Parliament is in principle reviewable for abuse of power and whether, on the facts, this particular decision constituted such an abuse. Whatever the outcome of the legal challenge, however, the suspension of Parliament cannot be treated as a wholly "political question", on which the Government of the day enjoys complete and unfettered discretion to dispense with the elected legislature when convenient. Nor can the Government pick and choose the laws with which it complies. In this country we are already one Civil War too late for those arguments to be made.

As a number of leading constitutional experts point out in today's [Times](#), the UK constitution is a complex set of norms, of varying degrees of normativity and enforceability. Those norms include a commitment to Government according to the Rule of Law, which in turn entails a number of more specific norms regulating the relationship between the Government and Parliament. The Executive requires statutory authority to act in a way which interferes with fundamental interests, including rights and liberties. Executive power must never be unlimited or exercised arbitrarily. The legislature is supreme over the Executive. The Executive must implement duly enacted statute law. There must be an effective remedy for any abuse of Executive power, including refusals to implement laws passed by Parliament.

So the Rule of Law is not the exclusive preserve of judges and lawyers. It speaks also to the Executive and Parliament and the relationship between them. All of these well established Rule of Law principles are in play when the Government uses its power to advise the Queen to prorogue Parliament for an unusually long period of time which effectively deprives it of the opportunity, not only of discussing and debating, but even possibly legislating on the biggest constitutional question to be decided in the UK for generations. Those principles also require the Government to respect the democratic legitimacy of laws passed by both Houses of Parliament and to comply with clear statutory duties which have been enacted by Parliament.

As history tells us, and recent experience around the world confirms, democratic populists, of left or right, do not care much for democratic institutions, or the expertise built up by those who work in them and study them. They prefer the claim that the elected Executive has a monopoly of democratic legitimacy because only it can channel directly the monolithically-conceived "will of the people".

We know how slippery is the slope that can lead to authoritarianism, even in a democracy. We also know how badly this can end. It would be nice to think that in the UK our democratic institutions and the constitutional arrangements underpinning them are sufficiently robust to withstand the stresses and strains to which they are increasingly subjected by democratic populism, and sufficiently flexible to evolve and adapt to accommodate legitimate concerns. But it is now clear that we cannot take either of those things for granted.

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