

## Do national crises encourage dictatorship? Recent experiences of Covid-19 and Brexit in the UK

Written by Gavin Drewry, Emeritus Professor of Public Administration, Royal Holloway, University of London, and Workshop Director for PAI's workshops on:

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Some of you may recognise this as a portrait of Henry VIII, King of England from 1509 to 1547. Henry is remembered for many things, not least for his six wives. The fate of those unhappy women – three of whom were peremptorily divorced and two of whom were executed on trumped up charges – contains the glimmering of a clue as to what this reference to a despotic 16<sup>th</sup> century English monarch might have to do with 21<sup>st</sup> century words like ‘dictatorship’, ‘Covid-19’ and ‘Brexit’.

England in King Henry’s day did have its share of crises – plague epidemics were common, and the country was often at war with one or more of its European neighbours. In those pre-democratic days, the political and constitutional landscape looked very different. Parliaments were summoned infrequently, solely to raise money for the King. Concepts like democracy, elections and accountability were unknown. The courts were the King’s courts, and the judges were, in every sense, His Majesty’s judges. But perhaps Henry’s most enduring constitutional legacy was his propensity for ruling the country and his personal life by royal decree.

Nowadays we citizens of democratic countries – including the UK – probably like to think that such dictatorial tendencies have long disappeared, along with mediaeval absolute monarchies. Yes, our Prime Ministers and Presidents do wield a lot of power, but they are constrained by formidable countervailing forces. Constitutions set limits on what governments can legally do. International law attempts to impose order on a globalised world and to promote universal human rights and the rule of law. Most of today’s models involve some degree of separation of powers: an electorally mandated executive that drives policy decisions; an elected legislature that legitimates those policies by scrutinising and enacting legislation and holds the executive to account for its actions; an independent judiciary that makes sure that the government sticks to the constitutional rules.

But experience of recent crises has raised some concerns. A week is a long time in politics, so the old saying goes. Governments have limited shelf-lives. Political leaders are always in a hurry to get results, no more so than when faced with the urgency of national and international crisis. In such circumstances, parliamentary scrutiny may be resented as an irksome obstacle to speedy action, and adverse rulings by non-elected judges may be denounced as anti-democratic. The temptation to side-step such inconveniences – particularly if, as is currently the case in the UK, the Government has a very large parliamentary majority – may become very strong for ambitious political leaders in search of approving headlines and quick results. And if a constitution is weak or ambiguous, or if the judges are in the pockets of the government, or if, as is almost uniquely the case in the UK, the constitution is uncoded, then the temptation may become almost irresistible.

One consequence of this is that crises lead to a greatly increased use by the executive of secondary legislation and delegated powers. Such devices are not objectionable in principle. Modern governments have such large agendas that much necessary legislative detail can neither be anticipated in advance nor accommodated within the limited compass of primary Acts of Parliament. So a lot of the small print has to be added later in the form of rules and regulations made under the authority of Ministers, using delegated powers conferred by primary Acts. But, inevitably, these secondary measures are so numerous and voluminous that they receive only very limited parliamentary scrutiny.

Both the Covid-19 crisis and the UK withdrawal from the EU have required substantial primary legislation. The Coronavirus Act 2020 is a broad-brush statute that confers vast discretionary powers,

not only on UK Ministers but also on local authorities, health authorities, and public transport agencies. The semi-autonomous devolved governments in Scotland, Wales and Northern Ireland have also adopted similar, but not always identical, powers. Such powers (e.g. ones to do with 'lockdowns' and restrictions of public gatherings) have a huge impact on people's lives yet are not subjected to the degree of scrutiny that their importance merits. This scrutiny deficit is exacerbated by the fact that opposition political parties are understandably nervous about being seen to be obstructively partisan at a time of such grave national emergency. And Parliament itself has had to adapt some of its procedures to the hard realities of the pandemic – in particular, a lot of recent parliamentary debate and scrutiny has had to be conducted online.

What about Brexit? After four-and-a-half years of fraught negotiations between the UK and the EU, the final deadline for signing a withdrawal treaty was 31 December 2020. Many observers suspected that – given the likely controversiality of such an agreement – the UK Government would delay things for as long as possible so as to present Parliament with a *fait accompli*, too late for meaningful scrutiny and debate. And so it came to pass. The UK-EU Trade and Cooperation agreement was announced 24 December 2020; the published version ran to about 2000 pages, including annexes. Parliament was recalled on 30 December and the European Union (Future Relationship) Bill - 87 pages long - passed all its stages in both Houses in just 14 hours.

Not only was the parliamentary scrutiny of this hugely important legislation woefully inadequate, but the Act also makes extensive provision for delegated legislation. One species of such legislation that has always been regarded with particular suspicion is an enabling provision that gives Ministers the power, not only to flesh-out some of the detail in an Act of Parliament but also to amend that Act itself. Such provisions are commonly known as Henry VIII clauses – in inglorious memory of the 16<sup>th</sup> century royal despot. There are egregious examples in Future Relationships Bill, of which I offer just an extract, as follows:

[Section] 31. Implementation power

(1) A relevant national authority may by regulations make such provision as the relevant national authority considers appropriate— (a) to implement the Trade and Cooperation Agreement [and other related treaties] ...

(2) Regulations under this section may make any provision that could be made by an Act of Parliament (including modifying this Act) ...

Are the recent actions of the UK Government and the Head of Government, the Prime Minister, at this time of crisis taking us back towards the pre-democratic absolutism of the 16<sup>th</sup> century? No, of course not – but there are some worrying straws in the wind. When the present crisis has passed, will 'temporary' emergency measures be repealed? We will have to wait and see.

Other countries, in different ways, may be observing similar tendencies. If readers would like to share their thoughts and experiences, we would love to hear from you.