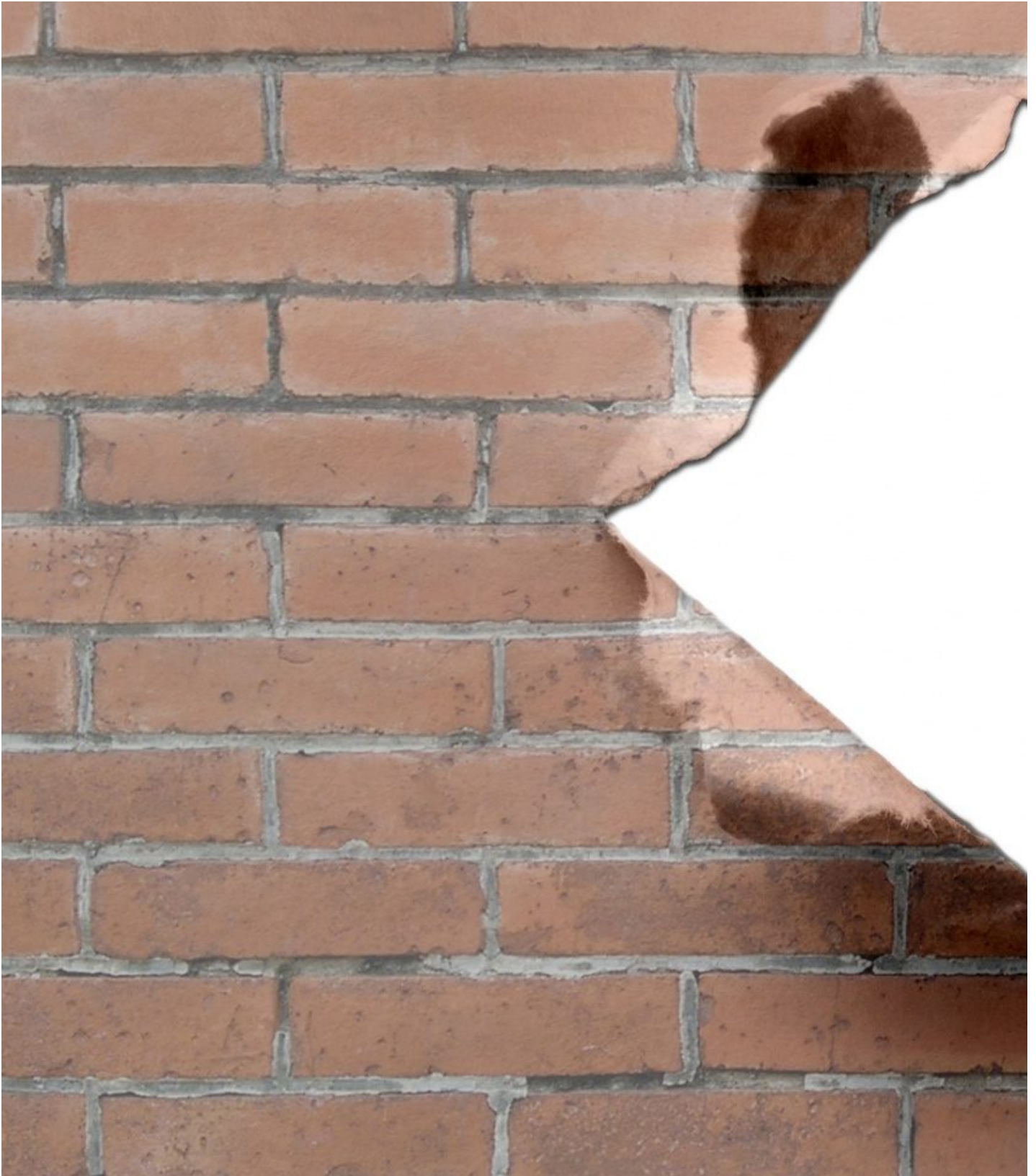


Conor Gearty on the Challenge to the Irish Protocol: 'the rule of law' is out

*The UK government has published a bill which threatens to depart from its long-standing advocacy of 'the rule of law' in international affairs. This will no doubt incur great damage to the UK's sense of self, writes **Conor Gearty (LSE)**. Before getting to the remarkable turn the UK government is inviting Parliament to make concerning what we can still call Brexit, it is worth recalling some background.*

The European Union (Withdrawal Agreement) Act 2020 declared itself a measure 'to implement, and make other provision in connection with, the agreement between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom's withdrawal from the EU'. It received Royal Assent on 23 January.

The Agreement to which it refers was finalised on 19 October 2019. It contains a Protocol on 'Ireland/Northern Ireland'. Under the terms of this Protocol (Article 10(1)), a range of EU laws (set out in Annex 5 to the Protocol) 'shall apply to the United Kingdom, including concerning measures supporting the production of and trade in agricultural products in Northern Ireland, in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol.' There are exceptions to this requirement (Article 10(2)) which are to be determined by the 'procedures set out in Annex 6' of the Protocol. These procedures entail the setting of the detailed rules by an EU and UK 'Joint Committee' (established under Article 164 of the main treaty) which then has the power to vary them. But if 'the Joint Committee fails to determine the initial level of support and percentage in accordance with [this Annex], or fails to adjust the level of support and percentage in accordance with [it], by the end of the transition period or within 1 year of the entry into force of a future Multiannual Financial Framework, as the case may be, application of Article 10(2) shall be suspended until the Joint Committee has determined or adjusted the level of support and percentage': in other words, all favourable treatment will be out the window. The institutions of the European Union, and in particular the European Court of Justice, are specifically given a role with regard to the interpretation of, among other provisions, Article 10: Article 12(4).



All of this clearly constituted a huge range of concessions by the UK to the ongoing application of EU law within the state. Anything with a whiff of Northern Ireland to it becomes exposed to EU restrictions even if the investment under scrutiny is not based in Northern Ireland or not primarily aimed at that part of the United Kingdom. But the agreement of the 19th October is a Treaty and the Protocol is part of it: no one doubts that. Nor is there any dispute that the treaty forms part of international law by which the UK has agreed to be bound. Distasteful in retrospect perhaps, not understood at the time by those who signed it, but so what? Countries often sign treaties they dislike and want to get out of later. But they are generally stuck with them. The example of Germany under Chancellor Hitler did not end well, despite the short term domestic popularity of his rejection of the Treaty of Versailles. And unlike that German leader, the United Kingdom constantly protests its support for international law, calling for its better enforcement and excoriating those countries (like China in relation to Hong Kong) that it says breaches its terms. Even when the UK has waged controversial wars (such as Iraq) it has gone to endless trouble to establish an international law explanation, however flimsy others might regard it.

The UK government has now published a bill which promises (or threatens) to depart from this decades-long approach to international law. If enacted, the United Kingdom Internal Markets Bill as currently drafted purports to authorise domestic public authorities to seize the powers of the Joint Committee unto itself: clause 40. This might be to implement the Protocol (clause 40(2)(a)(i)) but it does not have to be: clause 40(2)(a)(ii). Clause 42 envisages ministers having the exclusive power to manage the movement of goods between Northern Ireland and Great Britain. A power of unilateral interpretation of Article 10 of the Protocol is likewise asserted: clause 43. And then, just in case all this was thought to be some mistake or administrative aberration, clause 45(1) asserts that both clauses 42 and 43 and their related regulations shall have effect 'notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent.' This is specifically said to include the Ireland/Northern Ireland Protocol: clause 45(4)(a).

What is going on? It is obvious why a senior government lawyer resigned: it was his job to ensure that bills respected the law, and this one manifestly does not. Maybe the government intends to withdraw the clauses but if it does humiliation cannot be avoided: these are such bald claims that they cannot be finessed by a qualifying word here or there. Maybe it hopes that the measure will fail in Parliament and so it will have demonstrated its determination without openly flouting what the country has long claimed to be a central principle. Again it is hard to see this happening without an embarrassing insistence on its own defeat: such is the strength of both its control over the lower house and its capacity to override the Lords. Will the courts strike the clauses down? Again very unlikely as the Bill is unequivocal and recent case-law (not least the *Miller* decision on the prerogative) has emphasised parliamentary sovereignty rather than wider ethical claims of human rights and the rule of law (as one or two earlier cases did). Maybe the powers being discretionary there is no intention ever to deploy them, but if this is the plan then why bother going to all this trouble for nothing? Perhaps it is a cunning plan to lure the EU into ending all talks and so guarantee a 'no-deal' Brexit for which it hopes the EU will get the blame, but the provocation is so egregious this outcome seems unlikely, and anyway, why turn guaranteed national decline into immediate suicide?

Of course, there may well be international and European legal proceedings. In the short term though this deliberate use of Ireland to raise the stakes with regard to the EU puts a hard border in Ireland back on the agenda, and closer now than it has ever been: the EU simply has to have territorial boundaries to maintain the integrity of its single market and this will have to be in Ireland if it is not in the sea between Northern Ireland and Great Britain. Anyone with any knowledge of Britain's conduct in Ireland should not be in the least surprised by this. A former Secretary of State's claim that Britain has no 'selfish, strategic or economic interest' in Northern Ireland may have been true in 1990 when it was uttered but it is manifestly not the case today.

The greatest damage, though, will be to the United Kingdom's sense of self. It runs no empire anymore; indeed it can barely hold itself together. Its government hates human rights and tries to abandon them when it can. Regional co-operation is out. True the government says it is committed to British values, but that can't be true any longer as these are said to include 'the rule of law'. The freedom Brexit seeks to achieve has no content.

This article gives the views of the author, not the position of LSE Brexit, or the London School of Economics.