An overarching duty to comply with the law?

The UK Internal Market Bill: 'Minor clarifications' and the Rule of Law. **Khawar Qureshi QC** tracks events in Parliament so far this month

The astonishing admission on 8 September 2020 by the Conservative Government through the Northern Ireland Secretary Brandon Lewis, that it was seeking to adopt legislation which would (if enacted) violate International Law, albeit engaging in the now (sadly) characteristic sophistry by adding 'only in a specific and limited way' to effect 'minor clarifications", should be seen for what it is - continuation of the destructive trend towards unilateralism and erosion of trust in the rules based system.

On 19 October 2019, Boris Johnson described the Withdrawal Agreement (the Treaty) which he signed on behalf of the UK as 'an excellent deal' which would 'take this country and the whole of Europe forward'.

On 23 January 2020 the EU Withdrawal Act (the Act), Section 7A thereof sought to give domestic effect to the Treaty, specifically by the means set out in Article 4 of the Treaty, so as to achieve direct effect for applicable provisions of the Treaty as a matter of domestic law. By the same provision, the UK also committed itself to 'ensure compliance', which included the disapplication of inconsistent or incompatible domestic law provisions.

Nevertheless, (and perhaps somewhat curiously), Section 38 of the Act was at pains to point out that, within our territorial jurisdiction, Parliament is sovereign. It is correct that a Treaty cannot take effect under our domestic law without Parliamentary legislation. It is also correct that Parliament is able to legislate in a manner inconsistent with Treaty obligations, albeit that the Courts may well determine that Parliament cannot legislate in violation of certain peremptory norms, known as *jus cogens* in International Law.

What is also correct is that any violation of the Treaty by the UK has the potential to give rise to binding arbitration with consequent sanctions (Articles 167 to 181 of the Treaty). This might happen if the UK proceeds to enact the UK Internal Market Bill (the Bill), with its 'minor clarifications', specifically Clauses 42-45 of the Bill, which expressly seek to override provisions of the Withdrawal Treaty and their legal effect under domestic law.

Clauses 42 and 43 of the Bill seek to empower Ministers to make regulations that would be inconsistent with the Treaty. By virtue of Clause 42, Ministers would be able to override the need for export declarations on goods moving from Northern Ireland to Great Britain. Furthermore, Clause 43 seeks to enable the UK to dis-apply EU state aid rules as between Northern Ireland and the EU. In addition, Clause 45 of the Bill seeks to oust any legal challenge to Regulations promulgated pursuant to Clauses 42 and 43, as they are intended to have effect 'nothwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent'.

There may be two explanations for the Governments' conduct:

(i) the Prime Minister was not aware of the precise terms of the Withdrawal Treaty and its effect when he signed and lauded the same;
(ii) the Treaty was signed and the possibility of threatening to renege was considered as a negotiating option.

The former Attorney General Geoffrey Cox rightly described the Governments' position as 'unconscionable'. Five former Prime Ministers and the former Lord Chief Justice Lord Thomas have also voiced their concerns. The Head of the Government Legal Department Sir Jonathan Jones has apparently resigned over this issue. Meanwhile, the Lord Chancellor Robert Buckland (who, if there was ever any doubt, is obliged by Section 17 of the Constitutional Reform Act 2005 to 'respect the rule of law') has taken a more subjective and nuanced view. He stated he might resign if the law was 'broken in a way that I find unacceptable'.

Untenable justification is being advanced by the Government. The stated position of the Attorney General and the Solicitor General is that Ministerial Code reference to an 'overarching duty to comply with the Law' excludes International Law. This is simply wrong.

In 2018, the English Court of Appeal (in the case of *GCHR v. the Prime Minister* [2018] EWCA Civ 1855) was assured by a statement made in October 2015 by Lord Faulks on behalf of the Government in Parliament that '..a member of the Executive, including a Minister such as myself, is obliged to follow international law, whether it is reflected in the Ministerial Code or not. All Ministers will be aware of their obligations under the rule of law'. The Court was also re-assured by the statement issued by the Cabinet Office in 2015 that 'comply with the law includes International Law'.

If the Bill becomes law in its present form, and the contemplated Regulations are promulgated, it remains to be seen whether a legal challenge ensues before the English Courts. The Government has already signalled its intention to examine (if not attempt to reduce) the scope for Judicial Review in the Public Law context, having appointed Lord Faulks to prepare a report on the subject. However, the majority decision of the Supreme Court in the very recent case of *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22 has sent a strong reminder (as unfortunately seems increasingly necessary), that the Courts are the only and ultimate arbiters of what does or does not comply with the rule of law. **NLJ**

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