Law in a Time of Crisis

The Rt Hon Lord Sumption

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The United Kingdom has experienced two major political crises in the last five years. Brexit and COVID-19 are crises of very different kinds. But they have a significant feature in common whose implications will live with us for a long time. They are milestones in the demise of liberal democracy.

The model which will replace liberal democracy is already emerging. It will be more authoritarian and less dependent on Parliamentary deliberation. It will view our society as a great collective with a single collective notion of the public good, and treat dissent as antisocial, even treasonable. It will be less accepting of the idea that there are islands of human life in which, extremes apart, individuals are entitled to make their own decisions irrespective of the wishes of the state. The defining feature of totalitarian societies is a model of the relations between the state and the citizen in which individuals are first and foremost instruments of collective policy. This once distinguished them from democracies. The distinction will become less important, as formerly liberal societies move closer to the totalitarian model.

The first symptoms of this change were apparent well before anyone had heard of either Brexit or COVID-19. The Pew Research Centre has been tracking attitudes to democracy in different countries for some 30 years. Dissatisfaction with democracy has been rising in advanced democracies for most of that time, especially among the young, and particularly in the oldest democracies: the United States, the United Kingdom, and France. The UK has one of the highest levels of dissatisfaction in the world, at 69%. Only in Bulgaria and Greece is it higher. Dissatisfaction with democracy does not necessarily imply a preference for some other system. But more disturbing findings emerge from the regular surveys of political engagement conducted in the UK by the Hansard Society. In the 2019 survey 54% of respondents agreed that 'Britain needs a strong leader willing to break the rules', and only 23% disagreed. As many as 42% thought that the government 'shouldn't have to worry so much about votes in Parliament'.

These attitudes are closely correlated to economic performance. People who are dissatisfied with the economy, people who feel economically left behind or pessimistic about the future, are more likely to reject democracy. This is not altogether surprising. Historically, democracies have always been heavily dependent on economic good fortune. Western democracy was born in the nineteenth century, in an age of creative optimism, economic expansion, and European supremacy. Except for two short periods, the United States has enjoyed continuously rising levels of prosperity, both absolutely and relative to other countries, until quite recently. Britain's economic history has been more chequered, but the trajectory has generally been upward. In the life of any community, the shattering of optimism is a dangerous moment. Disillusionment with the promise of progress was a major factor in the 30-year crisis of Europe which began in 1914 and ended in 1945. That crisis was characterised by a resort to autocracy in much of Europe. Three-quarters of a century have passed since 1945, years marked by rapid economic growth and exponential improvements in standards of living. But today, the outlook is darker. Most Western democracies face problems of faltering growth and relative economic decline, of redundant skills and capricious patterns of inequality, most of them the legacy of past successes. These trends are likely to be aggravated in the UK by Brexit, and nearly everywhere by COVID-19. Climate change is a future challenge the implications of which are only beginning to dawn on people. Most of the measures proposed for dealing with it involve curtailing economic growth. Economic pessimism generates feelings of disempowerment which tend to discredit democratic institutions.

Against an unfavourable background like this, what will Brexit and COVID-19 contribute to these trends?

The Brexit crisis proved to be a watershed moment for British democracy. The first task of any political system is to accommodate differences of interest and opinion among citizens, so that they can live together in community without the systematic application of force. Democracies operate on the basis that although the majority has authorised policies which the minority rejects, these differences are transcended by their common acceptance of the legitimacy of the decision-making process. It is legally and constitutionally possible for a bare majority to take all the political spoils without engaging with the minority. But a democracy which persistently did that would not accommodate differences, but brutalise them. It would cease to be a political community, and could hardly function as a democracy.

For this reason, thoughtful democrats have always recognised that too much democracy is bad for democracy. They have been able to avoid the self-destructive tendency of democracy by spurning the direct decision of contentious issues by the electorate, and opting for representative politics instead. Representative politics are essentially

an institutionalised system of compromise. The rigidity of party discipline in the House of Commons means that compromise is rare across the House. But it happens indirectly because political parties have to accommodate a broad spectrum of opinion and interests if they want to be elected. People are naturally averse to compromise about issues on which they feel strongly. They prefer not to engage with the views of those with whom they profoundly disagree. Parliamentary systems force them to do so. Although political parties can exploit a single issue in a moment of national emotion to carry them to power without compromise, in the medium and long term they cannot afford to become ideological sects. If they did, they would move to the margins of politics where they would have limited influence and no prospect of power. This is what nearly happened to the Labour Party in 1983 and again in 2019.

The Brexit referendum of 2016 was adopted as a way of circumventing the Parliamentary process. The theory is that once the answer has been supplied by the majority, it is the answer of the entire community. This notion is both false and profoundly damaging. It is false because the minority still exists and has no reason to alter its opinion simply because it is a minority. It is damaging because it creates a sense of entitlement in the majority, which dispenses them from the need to engage with those who disagree. Referenda have often been used as the tools of tyrants. Napoleons I and III, Hitler, and Putin have all used them as a license to institute authoritarian governments. In Britain, the effect of the Brexit referendum was more subtle. It did not bring a tyrant to power. What it did was to undermine representative politics and prevent it from accommodating differences among our people on one of the most contentious issues of modern times. Since an ability to do that is essential to the long-term survival of a democratic constitution, this has impoverished our politics and destroyed the tolerant conventions by which we had previously been governed.

The natural consequence has been the election of a government with a strong authoritarian streak, characterised by a resentment of opposition and dissent. At what earlier stage in our history would the Attorney General have told the House of Commons, as Geoffrey Cox did in all seriousness in September 2019, that it was 'unfit to sit' because it would not allow the government to leave the European Union until it had made satisfactory alternative arrangements? This was not an isolated event, but part of a consistent pattern. Other symptoms of the rejection of our pluralist traditions include: the brutal political purge of the once-dominant Europhile element in the Parliamentary Conservative Party; the threat of revenge against the Supreme Court for its temerity in insisting, in the two Gina Miller cases, on the constitutional authority of Parliament; the overt hostility to the BBC for its alleged failure to share the government's outlook, coupled with a threat to destroy its financial model; the insistence on filling positions in the government's gift from the Cabinet to the Trustees of the British Museum with loyalists and placemen regardless of their qualifications for the job, or lack of them; and the contempt for civil servants who dare to give expert but unwelcome advice. These have all been attacks on national institutions which stand for a plurality of opinion. They represent something new and unwelcome in our political culture.

The constitutional baggage carried over from the Brexit debacle proved to be the starting point for the government's response to the next crisis.

At the root of the problems generated by the pandemic was the public's attitude to the state and to risk. People have remarkable confidence in the capacity of the state to contain risk and ward off misfortune. An earlier generation regarded natural catastrophes as only marginally amenable to state action. The Spanish flu pandemic of 1918–21 is the event most closely comparable to the COVID-19 pandemic of 2020. It is estimated to have killed 200,000 people in the United Kingdom at a time when its population was about two thirds what it is now. The UK government took no special steps to curtail its transmission, apart from isolating the infected and the sick, which had been the classic response to epidemics from time immemorial. No one criticised it for this. COVID-19 is a somewhat more infectious pathogen than Spanish flu, but it is significantly less mortal. It is also easier to deal with because it mainly affects those with underlying vulnerabilities due to age or certain underlying clinical conditions. A high proportion of these people are economically inactive. By comparison, Spanish flu had a particularly devastating impact on healthy people aged under 50. Yet in 2020 Britain, in common with most Western countries, ordered a general lockdown of the whole population, healthy or sick, something which had never been done before in response to any disease anywhere. These measures enjoyed substantial public support.

In the intervening century, something has radically changed in our collective outlook. Two things in particular have changed. One is that we now expect more of the state, and are less inclined to accept that there are limits to what it can do. The other is that we are no longer willing to accept risks that have always been inherent in life itself. Human beings have lived with epidemic disease from the beginning of time. If one can imagine a hypothetical world in which every community had a sterile space into which it could withdraw at the onset of disease, humanity would have become extinct. It would have no natural immunity and would simply be wiped out the next time that a new pathogen struck too quickly or silently for flight.

COVID-19 is a relatively serious epidemic but historically it is well within the range of health risks which are inseparable from ordinary existence. In Britain, bubonic plague, smallpox, cholera and tuberculosis were all worse in their time. Internationally, the list of comparable or worse epidemics is substantially longer, even if they did not happen to strike Europe and North America. The average age at which people die with COVID-19 is 82.4, which is not significantly different from the average age at which they die without COVID-19. The change is in ourselves, not in the nature or scale of the risks that we face.

In the first of my 2019 Reith lectures, I drew attention to the implications of our aversion to risk for our relationship with the state. I referred to what I have called, then and since, the Hobbesian bargain. The seventeenth-century political philosopher Thomas Hobbes argued that human beings surrendered their liberty completely, unconditionally, and irrevocably to an absolute ruler in return for security. Hobbes was an apologist for absolute government. In his model of society, the state could do absolutely anything for the purpose of reducing the risks that threaten our wellbeing, other than deliberately kill us. Hobbes's state was an unpleasant thing, but he had grasped a profound truth. Most despotisms come into being not because a despot has seized power, but because people willingly surrender their freedoms for security. To resist this tendency requires of us a collective restraint and self-discipline, an appreciation of the complexity and interconnectedness of human affairs, and a willingness to resist the empire of fear. Our culture has always rejected Hobbes's model of society. Intellectually, it still does. But in recent years it has increasingly tended to act on it. The response to COVID-19 has taken that tendency a long way further. I could not have imagined in 2019 that my concerns would be so dramatically vindicated so quickly.

Until March 2020, it was unthinkable that liberal democracies should confine healthy people in their homes indefinitely, with limited exceptions at the discretion of ministers. It was unthinkable that a whole population should be subject to criminal penalties for associating with other human beings and answerable to the police for the ordinary activities of daily life. In a now-notorious interview in February 2021, Professor Neil Ferguson explained what changed. It was the lockdown in China. 'It's a communist one-party state, we said. We couldn't get away with it in Europe, we thought… And then Italy did it. And we realised we could.' It is worth pausing to reflect on what this means. It means that because a lockdown of the entire population appeared to work in a country which was notoriously indifferent to individual rights and traditionally treats human beings as mere instruments of state policy, they could 'get away with' doing the same thing here. As I write this, the British government has published an 'Integrated Review of Security, Defence, Development and Foreign Policy' which identifies China as presenting a 'systemic challenge to our values'. Liberty and personal autonomy are surely among our most fundamental of those values. They are also essential conditions for human happiness and creativity. Yet we have been willing to jettison them in favour of the Chinese model. Entirely absent from Professor Ferguson's analysis was any conception of the principled reasons why it had hitherto been unthinkable for Western countries to do such a thing. It was unthinkable because it was based on a conception of the state's authority over its citizens which was morally repellent even if it worked.

This is not, as many people appear to think, a phase which will pass when COVID-19 disappears (if it ever does). Governments rarely relinquish powers that they have once acquired. Wartime controls were kept in being for years after the end of the war. Some wartime powers continued to be exercised right up to the 1990s. But the problem is more fundamental than that. The government has immense powers, not just in the field of public health, but generally. These powers have existed for many years. Their existence has been tolerable in a liberal democracy only because of a culture of restraint which made it unthinkable that they should be used in the intrusive and abrasive manner in which the government has used its public health powers. Before 2020, it was only culture and convention which prevented us from adopting a totalitarian model. If something is unthinkable until someone in authority thinks of it, the psychological barriers which were once our only protection against despotism have vanished.

In the circumstances, we can hardly be surprised that this fundamental change has been accompanied by a deliberate and persistent attempt on the part of the government to limit Parliamentary scrutiny or any real political accountability. It has issued 'guidance' going well beyond its legal powers, and issued 'orders' at press conferences which had no legal basis. It has rammed complex legislation through Parliament without serious debate. It has absolved itself from any real Parliamentary control over public expenditure. It has evaded statutory requirements for advance Parliamentary approval on grounds of urgency which are difficult to justify. It has deliberately waited before making supposedly urgent statutory orders until Parliament was not in session. It has taken steps to prevent activities which its own regulations expressly permit, such as visits to doctors and dentists. In many respects, Parliament itself has not been willing to live up to its high constitutional calling.

However, at least as serious as the implications for our relations with the state are the implications for our relations with each other. The pandemic has generated distrust, resentment and mutual hostility. Authoritarian governments fracture the societies in which they operate. The use of political power as an instrument of mass coercion fuelled by public fear, is corrosive. It is corrosive even, perhaps especially, when it enjoys majority support. It tends to be accompanied, as it has been in Britain, by manipulative government propaganda and vociferous intolerance of the minority who disagree. These are the authentic symptoms of totalitarianism.

There is no inevitability about the future course of any historical trend. Social controls can become unpopular. There is an analogy in the fate of food rationing after 1939. It was necessary during the Second World War and enjoyed general public support. Belief in the efficacy of social control was an important part of the appeal of the Labour Party in the general election of 1945 which brought it to power with a huge Parliamentary majority. But people wearied of it over the following years. The insistence of the post-war Labour government on retaining it indefinitely cost it its majority in the general election of 1950 and put the Conservatives in power in 1951. Nevertheless, I am not optimistic about the future of my country. The changes in our political culture seem to me to reflect a profound change in the public mood, which has been many years in the making and may be many years in the unmaking. We are entering a Hobbesian world, the enormity of which has not yet dawned on our people.