



The British Constitution: Thoughts on the Cause of the Present Discontents

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Abstract: This paper, the text of the Robin Cooke Lecture given at the Victoria University of Wellington in December 2017, examines the constitutional implications of the UK's decision following the referendum of June 2016 to leave the European Union. Noting that by the latter half of the twentieth century many were arguing that the prospect for the British constitution was one of progressive paralysis, it argues that this prospect was avoided by the UK's embrace of continuing European integration. For this reason, the UK's withdrawal from the EU presents a series of constitutional challenges that are more complicated than the mantra 'taking back control' would suggest.

* Professor of Public Law, London School of Economics & Political Science. The Robin Cooke Lecture was given at the Faculty of Law, Victoria University of Wellington on 14 December 2017. I should like especially to thank Francis Cooke QC, Chief Justice Sian Elias, and the Faculty Dean, Professor Mark Hickford, for their kind hospitality on this occasion. I also thank Jo Murkens and Stephen Tierney for comments on the text. This paper is forthcoming in (2018) 16(1) *New Zealand Journal of Public & International Law*.

I

It's a great honour to be invited to this distinguished law school to give a public lecture dedicated to the memory of one of the twentieth century's great common lawyers. But it is also a responsibility, and in discharging it I hope I may be permitted the indulgence of coming to the other side of the world and speaking on a parochial matter – the state of the British constitution. I am fortified in the knowledge that Lord Cooke, though an advocate of New Zealand's jurisdictional independence, also valued the intimacy of the connections between the constitutional practices of our two nations. The imperial bond bequeaths a common legacy: a shared constitutional monarch, the lack of a codified constitution, and our common traditions of parliamentary government, representative democracy, and non-entrenched rights protection all indicate the closeness of our constitutional practices. Some New Zealanders even suggest that recent rationalisation of the British system has left your own cultural practices now standing 'gloriously but virtually alone among democracies'.¹ I'm not competent to make an assessment. All I propose to do is examine some of the constitutional problems we in Britain are today facing and to highlight the underlying sources of discontent.

I should start with the results of the UK General Election held in May 2015 when, contrary to all polling predictions, the Conservatives were able to form a majority government. This gave them freedom to implement their manifesto commitments, which included pledges to 'hold an in-out referendum on our membership of the European Union before the end of 2017' and to 'scrap the Human Rights Act and curtail the role of the European Court of Human Rights' by introducing a 'British Bill of Rights'.² They also asserted that, as 'the party of the Union', 'we will always do our utmost to keep our family of nations together' and to that end 'will work to ensure a stable constitution'.³

The commitment to repeal the Human Rights Act was placed on the back burner, but they proceeded with great speed to hold a referendum on EU membership. This took place on 23 June 2016 and, again contrary to the forecasts, it resulted, on an unusually high turnout of 72 per cent, in 51.9 per cent voting to leave. The Government had evidently been unprepared for this outcome, having undertaken no detailed work to address the consequences. David Cameron immediately resigned as Prime Minister and was replaced by Theresa May. May indicated that she had no intention of again going to the polls but within the year she surprised everyone by doing just that, justifying it on the Government's need to

¹ Matthew SR Palmer, 'Open the Doors and Where are the People? Constitutional Dialogue in the Shadow of the People' in Claire Charters and Dean R Knight (eds), *We, the People(s): Participation in Governance* (Wellington: Victoria University Press, 2011), 50-74, at 64 (n30): 'Both the United Kingdom and Israel, which may also claim to such status [an unwritten, evolving way of doing things], seem to have moved significantly towards written, judicially enforced core aspects of their constitution'.

² The Conservative Party Manifesto 2015, *Strong Leadership; A Clear Economic Plan; A Brighter, More Secure Future* pp.72, 58, 60.

³ *Ibid.* 69, 70.

acquire a strong mandate to negotiate Brexit. Held on 8 June 2017, this election – once again contrary to all polling forecasts – led to the Conservatives losing their majority. In order to maintain their administration, they have been obliged to enter into a ‘confidence and supply agreement’ with Northern Ireland’s Democratic Unionist Party.

The referendum result sent shockwaves across Europe and generated considerable uncertainty over Britain’s future financial, commercial and security relations. But the aim of my lecture is more limited. I want to consider what these developments reveal about the present state of Britain’s inherited constitutional arrangements.

II

In his celebrated essay on *The English Constitution*, Walter Bagehot noted that there is ‘a great difficulty in the way of a writer who attempts to sketch a living Constitution’. The difficulty is that ‘the object is in constant change’. Any writer ‘who tries to paint what is before him is puzzled and perplexed’ because ‘what he sees is changing daily’.⁴ Bagehot was neither the first to make this observation, nor the last.⁵ Even AV Dicey, the anointed high priest of British constitutional orthodoxy, recognised that ‘the constitution has never been reduced to a written or statutory form because each and every part of it is changeable at the will of Parliament’.⁶

There is truth in those observations but if strictly true they suggest that Britain has no constitution whatsoever, because whatever else the term ‘constitution’ signifies it surely expresses a relatively stable form through which political power is exercised. The British constitution exists because, despite changes in its working practices, its essential character is maintained. Indeed, it is for this reason that we continue to hold in high esteem the views of the Victorian jurist who was first to provide a systematic exposition of its basic precepts. As is well known, Dicey explained that the law of the constitution is based on two key principles – parliamentary sovereignty and the rule of law – and that, while these are not in any strict sense complementary, they are made so in practice by the role performed by those evolving habits, practices and political understandings he labelled ‘constitutional conventions’.

⁴ Walter Bagehot, *The English Constitution* RHS Crossman ed. (London: Fontana, 1963), 267.

⁵ See, eg, W. Ivor Jennings, *Cabinet Government* (Cambridge: Cambridge University Press, 1st edn. 1936), xii: ‘the British constitution is changing so rapidly that it is difficult to keep pace with it’; JP Mackintosh, *The British Cabinet* (London: Stevens, 1962), 534: ‘In fact, all of our institutions change as British society and world conditions alter.’; Graeme C. Moodie, *The Government of Great Britain* (London: Methuen, 1964), 16: ‘the British constitution is thus a continuously changing blend of the ancient and modern’; JAG Griffith, ‘The Political Constitution’ (1979) 42 MLR 1-21, at 19: ‘The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens’.

⁶ AV Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 8th edn 1915), 85-86.

During the eighteenth and nineteenth centuries, the flexibility of this framework, which was a product of the post-1688 settlement, received high praise from a wide range of European scholars, not least because it enabled Britain to make the transition to a modern democratic state without violent overthrow of the traditional aristocratic order. In the twentieth century, however, the very qualities that made those achievements possible – particularly the flexibility of evolving governmental arrangements developed under the protective framework of the absolute authority of the Crown-in-Council-in-Parliament – were becoming a source of growing discontent.

This discontent began to be expressed in earnest after the Second World War. In his Chichele Lectures of 1946, for example, Leo Amery drew on his long career in politics to reflect on the status of the British constitution. Published as *Thoughts on the Constitution*, Amery's conclusion was that 'the arteries of our constitutional system are already suffering from acute high blood-pressure at a time when the brain and body which they serve are being summoned to ever greater exertions'. They had proved their adaptability in the past but he doubted they could withstand 'the more intense strains of the near future without a complete breakdown ending in violent revolutionary change or in progressive paralysis'.⁷

This is the critical concern that has since been regularly reprised. For some, the cause of the problem is that the restraints inherent within the framework of the Crown-in-Council-in-Parliament have been stripped away,⁸ but for others the source of the problem is the framework itself.⁹ Whatever the precise diagnosis, since the 1970s it has become almost impossible to explain the British constitution without also proposing some aspect of its reform. Over the last fifty years, a consensus has been growing that the traditional arrangements have reached the end of their useful life and fundamental reconstruction is required.¹⁰

Although widely shared, those holding such views faced an intractable difficulty: experience shows that reconstruction can be effected only when a nation's system of government is shaken to its core, such as occurs when achieving independence from an imperial power or when the old regime has entirely collapsed as a result of military defeat or revolutionary overthrow. And although British expressions of the need for constitutional reform were becoming increasingly strident, such conditions – those identified by Amery as leading to 'complete

⁷ Leo Amery, *Thoughts on the Constitution* (London: Oxford University Press, 1947), ix.

⁸ Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (Glasgow: Collins, 1978), esp. Ch.20, 'Elective Dictatorship'.

⁹ David Marquand, *The Unprincipled Society: New Demands and Old Politics* (London: Fontana, 1988).

¹⁰ See Hailsham, above n.8; Nevil Johnson, *In Search of the Constitution: Reflections of State and Society in Britain* (Oxford: Pergamon Press, 1977); Anthony King, 'Overload: problems of governing in the 1970s' (1975) 23 *Political Studies* 283; James Douglas, 'The Overloaded Crown' (1976) 6 *Brit. J. of Political Science* 483; S.H. Beer, *Britain Against Itself: The political contradictions of collectivism* (New York: Norton, 1982); Mancur Olson, *The Rise and Decline of Nations. Economic Growth, Stagflation and Social Rigidities* (New Haven: Yale University Press, 1982); Leslie Scarman, *English Law: The New Dimension* (London: Stevens, 1974); Michael Zander, *A Bill of Rights?* (London: Sweet & Maxwell, 1975).

breakdown ending in violent revolutionary change’ – seemed to be missing. The prospect, it would appear, was one of ‘progressive paralysis’.

III

That prospect brings me to my main theme. I want first to suggest that, lacking the conditions for fundamental reconstruction, we have avoided ‘progressive paralysis’ by pursuing an incremental – and in certain aspects surreptitious – project of constitutional modernisation. This project, which has been gathering pace over the last four decades, has been driven, shaped, and bolstered by Britain’s participation in the venture of continuing European integration.

Our participation in the project of European integration has empowered the judiciary to review legislation (to ensure compatibility with European Union law), to adopt teleological modes of reasoning antithetical to traditional common law methods, to make a categorical distinction between constitutional statutes and ordinary legislation, and to devise a (continental-type) distinction between public and private law. It has enabled us to adopt what is in effect a Bill of Rights without the need for extensive public deliberation. And it has also led to the replacement of the Judicial Committee of the House of Lords (the court of which Lord Cooke was a distinguished member) with an independently-constituted Supreme Court. But that is not all: the existence of a common European governing framework has also helped the UK to set in place a dynamic scheme for devolving governmental powers to its several constituent nations and, perhaps most crucially, it provides the supporting structure for the unique cross-border arrangements that brought about a peace settlement in Northern Ireland.

In the 1990s, the economic historian Alan Milward advanced the thesis that the EU project constituted a European rescue of the nation-state: only by working within this international framework, he argued, could the western European countries after the Second World War re-build their states as the fundamental units of political life.¹¹ I want to make a similar but different argument with respect to the UK’s participation in the EU. The issue here was not that the war had undermined the political autonomy of the British state. Rather, it was eventually recognised that only by working within this European federal framework could the British state bring about an effective modernisation of its constitutional arrangements. And just as the strategy of deepening integration was pursued by European elites without involving their publics, so too was the British political elite able to effect major constitutional change without constituent deliberation. By promoting incremental constitutional change driven by the continuing processes of European integration, the British were able to hold on to the shibboleth of parliamentary sovereignty while re-configuring their governmental arrangements and reordering constitutional fundamentals to bring its features into closer alignment with other modern constitutional democracies.

¹¹ Alan S. Milward, *The European Rescue of the Nation-State* (London: Routledge, rev. edn. 1994).

Participation in the common project of European integration became the method of rescuing the British constitution from institutional and conceptual sclerosis.¹²

IV

If this thesis is correct, then the question to be asked is: what does Brexit tell us about the present condition of the British constitution? If constitutional modernisation has been quietly driven by continuous European integration, what does withdrawal signal?

The Brexit referendum opened up a fissure that exposed certain deep-seated layers of the present discontents. It divided the nation geographically, politically and culturally. Basically, England and Wales voted to leave, with Scotland, Northern Ireland and London wishing to remain. But it also exposed a gulf which, because it cuts across party political lines, has unsettled the governing arrangements on which many of our conventional practices are based. This gulf is class-based and cultural: it is between communitarians and cosmopolitans, between somewheres and anywheres, between sovereignty-defenders and rights-advocates, and – as it turned out – between democrats and liberals.¹³ The referendum result, which was the most class-correlated in recent political history,¹⁴ exposed the degree to which Labour, created to give the working class parliamentary representation, is now a party of the middle-class.¹⁵

This fissure has become the determining factor of contemporary politics. It divides those who feel that the pace of change is eroding the foundations of British culture and identity from those who see mass immigration, European integration and an extending human rights culture as gains not threats.¹⁶ The fault line is between constitutional traditionalists and constitutional modernisers.

This is a serious matter not just because the line cuts across party affiliation; most significantly for our purpose, it exposes certain constitutional ambiguities that

¹² Cf. European Union Committee, *Brexit: Devolution* (4th Report of Session 2017–19, HL Paper 9), para 26: ‘A common feature of all the devolved settlements is that the devolved legislatures are prohibited by statute from legislating contrary to EU law. Thus the EU has been, in effect, the glue holding together the United Kingdom’s single market.’

¹³ Martin Loughlin, ‘The End of Avoidance’, *London Review of Books*, Vol.38, no.15, 2 July 2016, 12–13; David Goodhart, *The Road to Somewhere: The New Tribes Shaping British Politics* (London: Penguin, 2017).

¹⁴ Goodhart, *ibid.* 19–20, showing that 57% of those in Social Classes A and B voted to remain, 49% in C1, dropping to 36% in Classes C2, D, E.

¹⁵ The Labour party is now overwhelmingly middle class in MPs and activists and narrowly so also in voters. In 2010, its middle-class vote (Classes ABC1) of 4.4m for the first time outstripped its working class vote (Classes C2DE) of 4.2m; that ratio remained roughly the same in 2015. In 1970, by contrast, the working class to middle class vote was 10m to 2m (though working class numbers have since declined considerably). In the 2017 election, Labour increased its share of working class vote from 34% to 42%, but the Conservatives’ working class vote share rose from 32% to 44%. See Goodhart, *ibid.* 75.

¹⁶ The issue of immigration has been particularly contentious. Twenty-five years ago, net immigration into Britain was zero. The pattern has since changed, especially after 2003 when the UK Government opened the labour market to new accession EU states of eastern Europe. Presently, 1.1m UK citizens work or reside in EU countries, compared with 3.3m EU citizens in UK, and since mid 2000s gross annual inflows into the UK have never been below 500,000. See Goodhart, *ibid.* 101, 123.

modern British practice has deliberately sought to avoid addressing. Brexit is assumed to signal ‘taking back control’, restoring parliamentary government, and reinforcing the sovereign authority of the Crown-in-Parliament. But if my thesis is correct, the situation is much more complicated. Too much change has taken place over the last forty years for the objectives of constitutional traditionalists readily to be met. And at the same time, Brexit places in question the status of those recent modernising reforms.

The doctrine of parliamentary sovereignty will surely be reasserted, but it can be little more than an empty shell. This is because in reality its constitutional standing rests on the contentious political claim that sovereign authority must be located in some central institution equipped with unlimited power. Dicey had masked this point in his *Law of the Constitution*, but he was explicit about it when considering the vexed question of Irish Home Rule. There he contended that Westminster’s right to repeal a scheme for home rule derived not from *law* but from *power*. The right flows ‘from the inherent capacity of a strong, a flourishing, a populous, and a wealthy country to control or coerce a neighbouring island which is poor, divided, and weak’.¹⁷ It is the peculiar strength of the British constitution, he elaborated, to have placed political authority at each period of our history ‘into the hands of the class, or classes, who made up the true strength of the nation’.¹⁸ Right must be combined with might and ‘no institution will stand which does not correspond with the nature of things’.¹⁹

Dicey is surely correct but if that is so, it suggests that contemporary constitutional lawyers have been holding on to the doctrine long after it can be said to conform to ‘the nature of things’. Centralised power has been diminished as a result of social, economic and political developments that significantly modify the conditions of institutional authority. The authority of the Commons has been eroded by a series of developments, including a decline in electoral turnout, the erosion of party membership, the decline of trust in parliamentary representatives revealed in a series of scandals, and the abdication of its law-making role to the executive through the delegation of open-ended secondary law-making powers. At the same time, the cultural-political notion of the ‘British people’ has become disaggregated, a trend manifest in demands for the devolution of power to the non-English regions. And there has also been a dissipation of authority away from central political institutions, evident in the growing impact of post-parliamentary politics, and the extension of transnational networks of government that operate at some remove from parliamentary oversight. No longer able to present itself as ‘the political nation assembled’, the power of the Commons has been diminished and it is in the nature of things that the doctrine of sovereignty must also be qualified.²⁰

¹⁷ AV Dicey, *A Leap in the Dark, or Our New Constitution* (London: John Murray, 1893), 29. The appended footnote states: ‘This is the only sense in which the sovereignty of the Imperial Parliament is inalienable’.

¹⁸ Dicey, *ibid.* 127.

¹⁹ Dicey, *ibid.*

²⁰ These claims are considered in more detail in Martin Loughlin and Stephen Tierney, ‘The Shibboleth of Sovereignty’ (forthcoming).

Those who think that the main threat to parliamentary sovereignty comes from the principle of the supremacy of EU law and that after exit the doctrine's status will be restored are surely mistaken. The uncertainties that will follow are likely only to fuel further discontent. This discontent is already becoming apparent in the deterioration of institutional relations as the Brexit process unfolds. I will illustrate my claim by focusing on just three of these: the impact of the process on Government-Parliament relations, on the UK's territorial constitution, and on the relationship between Parliament and the people.

V

Consider first the impact of withdrawal on relations between Parliament and Government. After the referendum result, the immediate question was: what follows? The statute authorising the referendum had simply stated that 'a referendum is to be held on whether the UK should remain a member of the EU'.²¹ Did the referendum result bind Parliament or was it merely advisory? Many - especially those unhappy with the outcome - argued that, given our constitutional tradition of parliamentary sovereignty, the referendum decision could be advisory only. Formally, that must be right. But it ignores political realities. The Conservatives had pledged to give 'the British people – not politicians – their say' by offering a 'real choice on Europe, with an in-out referendum'.²² And Parliament had endorsed this by authorising the referendum. In reality, Parliament was bound to give effect to the result.

But how to do so? Article 50(1) of the Treaty on European Union provides the answer: 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'. What do our 'own constitutional requirements' require? The UK Government conducts foreign relations under the Crown's prerogative powers. We acceded to the EU by such an exercise, though it was necessary subsequently to enact the European Communities Act (ECA) 1972 to give effect in domestic law to the EU's legal order. Could the notification of intention to withdraw similarly be given by an exercise of governmental prerogative? According to the formal interpretation, that must be correct: giving notice under Article 50(2) does not in itself alter any law; it simply initiates a process of negotiation.

But that argument overlooks two points. The first is that Article 50 is not just a general invitation to negotiate; it initiates a process that leads directly to withdrawal within a specific time period. The second concerns the character of the ECA. This is not just a statute; it is a 'constitutional statute' and it authorises a 'dynamic process' by which directly applicable and directly effective EU law become autonomous

²¹ European Union Referendum Act 2015, s.1(1).

²² *Conservative Party Manifesto 2015*, above n.2, p.72.

sources of UK law. In reality the Article 50 notification initiates a process that leads inexorably to a change in UK law and the removal of rights. It therefore surely requires authorisation by Act of Parliament before the notification is issued.

One might have expected that such a basic question relating to parliamentary supremacy over Crown prerogative would have been asserted by Parliament itself. Not so. The issue instead had to be raised in a crowd-funded application for judicial review which eventually went to the Supreme Court. In *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, the Supreme Court held that since rights were affected by the Article 50 notification, parliamentary authorisation was required. ‘It would be inconsistent with long-standing and fundamental principle’, stated Lord Neuberger, ‘for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone’.²³

The *Miller* litigation was a rather bizarre episode in the history of British constitutional law. The Divisional Court decision that reached the same result caused uproar in certain sections of the media, with *The Daily Mail* notoriously branding the three judges ‘enemies of the people’.²⁴ For a period of six months or so – between July 2016 when permission to have the case heard was granted and the Supreme Court ruling on 24 January 2017 – the action greatly excited the attention of the public. It was heard before an unprecedented eleven-member Court, the proceedings were televised and reported daily, and several commentators referred to it as ‘the most important constitutional litigation of the century’.²⁵ Really?

The litigants and sections of the public were evidently investing the case with greater importance than it deserved. If they were anticipating that Parliament would vote down the proposed Article 50 notification, their hopes were soon to be frustrated. On 26 January, two days after the Supreme Court ruling, the European Union (Notification of Withdrawal) Bill was introduced, was fast tracked, and received the Royal Assent on 16 March 2017. It was fast-tracked to meet the Prime Minister’s political deadline of issuing the notification before the end of March. And it was a simple one clause Bill which stated that: ‘The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom’s intention to withdraw from the EU’.

If the case had such great constitutional significance, how come the matter was capable of being resolved by such a simple provision? Far from being the most

²³ [2017] UKSC 5, para.81.

²⁴ *The Daily Mail*, 4 November 2016. The report stated: ‘MPs last night tore into three “out of touch” judges for ruling that embittered Remainers in Parliament should be allowed to frustrate the verdict of the British public. The Lord Chief Justice and two senior colleagues were accused of putting Britain on course for a full-blown “constitutional crisis” by saying Brexit could not be triggered without a Westminster vote.’

²⁵ From the many see only: Ian Cram, ‘The UK Supreme Court and Brexit: ‘the United Kingdom’s Supreme Court has handed down its ruling in the most significant constitutional law case in the UK for over a generation’. <http://constitutional-change.com/the-uk-supreme-court-and-brexite/>; Christopher McCrudden and Daniel Halberstam, ‘*Miller* and Northern Ireland: A Critical Constitutional Response’, Michigan Public Law & Legal Theory Research Paper No.575 (October 2017), p.25: ‘the most important constitutional issue for many generations’; Simon James, ‘“The Case of the Century”: The Supreme Court and Brexit’ (2017) 10 *Britain and the World* 217-37.

important constitutional decision of the century, arguably it was not even the most important constitutional decision handed down by the Supreme Court that day.²⁶ Although the litigation generated a great deal of theatre, excitement and expense, with twelve QCs and altogether twenty-two barristers being listed for the Supreme Court hearing, its lasting significance is not altogether clear. And it leaves us with a lingering question: why did the Government not simply introduce the EU Withdrawal Bill in early July 2016 rather than waiting until January 2017?

VI

The process of determining authorisation for notification may not have revealed Parliament in an especially good light, but the more lasting consequences for Government-Parliament relations were to be raised by the European Union (Withdrawal) Bill. Introduced in July, the Bill completed its Commons stages in January 2018. The Bill, which the House of Lords Delegated Powers Committee called ‘one of the most important Bills in the constitutional history of the United Kingdom’,²⁷ is intended to give legal effect to withdrawal. It does so by repealing the European Communities Act 1972 and then converting into UK law the large body of EU-derived law that would otherwise immediately disappear.

At the Bill’s core is the concept of ‘retained EU law’, a concept which not only covers existing primary and secondary legislation relating to EU matters but also directly effective EU law which will be domesticated by the Act. The status of ‘retained EU law’ remains uncertain (is it primary legislation, secondary legislation or some third category?), a matter of practical relevance with respect to the extent to which ‘retained EU law’ is capable of being challenged by judicial review. But the most important aspect for our purpose is the extent of the powers it gives to Ministers to amend or repeal this body of retained EU law. The Bill gives broader (so-called) Henry VIII powers – that is, powers given to Ministers to amend or repeal primary legislation²⁸ – than has ever before been drafted. It led the House of Lords Delegated Legislation Committee to conclude that ‘the propriety of giving Ministers such unprecedented powers to override Acts of Parliament subject, in the great majority of cases, to no scrutiny whatsoever on the floor of either House’ is unacceptable and amounts to an ‘inappropriate delegation of power’.²⁹

²⁶ Cf. *Belhaj v Straw* [2017] UKSC 3; *Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1 (per Lord Sumption, para.175: ‘These appeals raise questions of some constitutional importance concerning the ambit of the act of state rule. They arise from allegations that British officials were complicit in acts of foreign states constituting civil wrongs and in some cases crimes and breaches of international law.’)

²⁷ House of Lords Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill* (3rd Report 2017-19, HL 22), para.1.

²⁸ This is named after an Act of Henry VIII passed in 1539 and which (apparently) gave the force of law to the King’s proclamations. See Lord Judge, ‘Ceding Power to the Executive: The Resurrection of Henry VIII’, Lecture, King’s College, London, 12 April 2016.

²⁹ House of Lords Delegated Powers Committee, above n.27, para.6.

In one sense, it is difficult to see how the highly ambitious objectives of the Bill – giving domestic legal status to all EU derived law created over the last 60 years and then providing for its modification to render it compatible and effective – might otherwise be realised. The drafting technique adopted draws on the traditional practice of using legislation to authorise Government to act to cover all eventualities and then leaving a great deal to trust and conventional methods of accountability. The constitutional problems arise because those conditions have now changed, and the Bill's drafting neither reflects changing constitutional sensibilities nor changing terms of trust. The drafting led the House of Lords Constitution Committee to produce a scathing reported which concluded that:

The European Union (Withdrawal) Bill raises a series of profound, wide-ranging and interlocking constitutional concerns... The executive powers conferred by the Bill are unprecedented and extraordinary and raise fundamental constitutional questions about the separation of powers between Parliament and Government.... The multiple uncertainties and ambiguities contained within the Bill ... raise fundamental concerns from a rule of law perspective. The capacity of the Bill to undermine legal certainty is considerable [and] ... it is a source of considerable regret that the Bill is drafted in a way that renders scrutiny very difficult, and that multiple and fundamental constitutional questions are left unanswered.³⁰

We should not romanticise Parliament's role. As Amery notes: 'It is not, and never has been, a legislature, in the sense of a body specially and primarily empowered to make laws'. The function of legislating, he explained, may be shared between the 'King, Lords and Commons in Parliament assembled' but it 'has always been predominantly exercised by Government'.³¹ Nevertheless, Parliament has always had as its proper and vital function 'to watch and control the government'³² and it is this that is now in danger of being displaced. As the House of Lords Constitution Committee concluded:

The number, range and overlapping nature of the broad delegated powers would create what is, in effect, an unprecedented and extraordinary portmanteau of effectively unlimited powers upon which the Government could draw. They would fundamentally challenge the constitutional balance of powers between Parliament and Government and would represent a significant—and unacceptable—transfer of legal competence.³³

³⁰ House of Lords Select Committee on the Constitution, *European Union (Withdrawal) Bill: Interim Report* (3rd Report, Session 2017-19, HL 19), p.2 (Summary).

³¹ Amery, above n.7, p.12.

³² JS Mill, *Representative Government*: cited in Amery, *ibid*.

³³ House of Lords Constitution Committee, above n.30, para.44.

Anyone who believes that leaving the EU will automatically lead to the restoration of control and accountability of law-making should consider carefully the likely impact of the Ministerial powers in the Withdrawal Bill.

The experience so far of the impact of the Brexit process on Parliament-Government relations thus reveals a more complicated picture than the mantra of 'restoring control' would suggest. Following the referendum, Parliament did not actively seek to assert its authority to authorise the Article 50 notification; that was delegated to judicial decision. After the court had ruled that parliamentary authorisation was required, this was quickly given. And there is little evidence with respect to the withdrawal process to indicate that parliamentary oversight has been reasserted. Only eight days were allocated to complete the Bill's Committee stage in the Commons,³⁴ and although amendments amounting to 180 pages were tabled for debate, only one vote went against the Government.³⁵ So much political energy seems to be focused on the when, how and whether of Brexit, that little is left for consideration of the constitutional implications of the processes by which withdrawal is to be achieved.

VII

The second institutional aspect to consider concerns the impact of Brexit on the territorial constitution. Since 1998, an elaborate scheme of devolution of legislative and executive powers to Scotland, Wales and Northern Ireland has been instituted. A 'reserved powers' model has been adopted, according to which all powers not expressly reserved to Westminster are devolved. As a result, in a range of fields including agriculture, fisheries, the environment and parts of justice, powers are presently shared between the EU and the devolved governments without any UK departmental involvement. Common UK policies exist in these fields only in so far as there are common EU policies. How will such arrangements be maintained after Brexit?

Given the reserved powers model, if nothing further were done those EU competences would transfer to the devolved governments. There would be, of course, the need for co-ordination and therefore for some UK-wide frameworks to be established. But the question is: what form should these frameworks take and, crucially, who will assume responsibility for making them? The Welsh government has argued that these competences should fall to devolved governments and that,

³⁴ For the experience in the late Victorian period, see Amery, above n.7, p.38, n.1. He relates that in consideration of the Government of Ireland Bill 1893 14 parliamentary days were allocated for its introduction and debates on Second Reading, 28 days in Committee, and 3 days for Report and Third Reading.

³⁵ This was Amendment 7 tabled by Dominic Grieve, which allows the Government to use statutory instruments to implement the withdrawal agreement only once Parliament has voted to approve the final terms of the withdrawal agreement.

where needed, common frameworks should be negotiated among the four UK nations through the establishment of a UK Council of Ministers modelled on the EU Council of Ministers.³⁶ Alternatively, it might be argued that the UK Government could take on the responsibility of establishing broad policy frameworks within these fields, but otherwise leave those powers devolved.

The proposal in the Withdrawal Bill, by contrast, is highly centralising and runs directly contrary to such models. The Bill proposes that all ‘retained EU law’ reverts to Westminster.³⁷ UK Ministers have suggested that, at some later stage, some of those powers could be devolved and, in order to achieve this, the Withdrawal Bill amends the devolution statutes. This approach is justified on the need at the outset to secure a common UK approach, with competences being gradually devolved where it is agreed that a common approach established by EU law does not need to be maintained.

Once again, this method reflects the old-style sovereigntist notion that all power must flow through Westminster. It generates controversy for a number of reasons. It amounts to the first significant rolling back of the devolutionary scheme. It also leaves the devolved legislatures entirely dependent on the UK Government for the release, both in timing and conditions, of these new competences. And given the ambiguity of the concept of ‘retained EU law’, it means that on exit day it will be almost impossible to determine clear boundaries of devolved competences. The Commons Constitutional Affairs Committee labelled the Government’s approach to clause 11 ‘constitutionally insensitive’.³⁸ The First Ministers of Scotland and Wales were more blunt: they called the Bill ‘a naked power-grab’ and ‘an attack on the founding principles of devolution’.³⁹ They also stated that, as it stands, they would not recommend legislative consent for the Bill.

Under the Sewel Convention, so-called after the Minister who accepted this informally when piloting through the Bill that became the Scotland Act 1998, ‘the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament’.⁴⁰ Some have argued that the convention applies more generally with respect to any alterations to the powers of the Scottish Parliament, but there is no settled agreement on this. Nevertheless, the UK government has conceded that it is ‘the practice of the Government to seek the consent of the devolved legislatures for provisions which would alter the competence of those legislatures or of the devolved administrations

³⁶ Welsh Government, *Brexit and Devolution: Securing Wales’ Future* (Cardiff: Welsh Government, 2017)

³⁷ Cl. 11 provides that devolved institutions cannot modify retained EU law unless the modification would have been within their legislative competence immediately before exit day.

³⁸ House of Commons Public Administration and Constitutional Affairs Committee, *Devolution and Exiting the EU and Class 11 of the European Union (Withdrawal) Bill: Issues for Consideration* (First Report, Session 2017-19, HC 484), para.41.

³⁹ *Joint Statement from the First Ministers of Wales and Scotland in reaction to the EU (Withdrawal) Bill*, 13 July 2017: <http://gov.wales/newsroom/firstminister/2017/170713-joint-statement-from-first-ministers-of-wales-and-scotland/?lang=en>

⁴⁰ After the Scottish independence referendum in 2014, it was agreed that the convention would be incorporated in a statute. The quoted formulation is that which is included in the Scotland Act 2016, s2.

in Scotland and Northern Ireland⁴¹ and on this basis the Government will seek legislative consent for the EU Withdrawal Bill.⁴²

The Sewel convention has particular force because since 2016 it has been placed on a statutory footing. What then happens if Scotland and Wales refuse legislative consent for the EU Withdrawal Act? This consent does not appear to be a formal legal requirement. In the *Miller* case, the devolved governments were represented in the Supreme Court case after a case from Northern Ireland was joined to the English litigation. But the argument made there – that Article 50 should not be triggered without the consent of the devolved institutions – was rejected. In *Miller*, the Supreme Court held that judges are ‘neither the parents nor the guardians of political conventions; they are merely observers’.⁴³ The Court therefore concluded that ‘the policing of its scope and manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law’.⁴⁴

If the Government were to proceed to implement the Withdrawal Act without the consent of the devolved legislatures, we might find ourselves in the situation of their actions being lawful but unconstitutional. Quite what that means is unclear; everything in this sphere depends on context and circumstance. The only sure thing is that it would provide powerful ammunition to the Scottish National Party when they push for another referendum on Scottish independence.⁴⁵ After the Brexit referendum, the SNP initially threatened to petition for another independence referendum but this has now been deferred pending the conclusion of the Brexit deal.⁴⁶

IX

The implications of Brexit for the status of Northern Ireland are even more profound. Northern Ireland is an altogether special case: created in the 1920s as a consequence of Irish partition, it has remained an intensely divided society. It

⁴¹ *Delegated Powers Memorandum for the EU (Withdrawal) Bill*: cited in Stephen Tierney, ‘The European Union (Withdrawal) Bill: Legal Implications for Devolution’: <https://constitution-unit.com/2017/09/07/the-european-union-withdrawal-bill-legal-implications-for-devolution/>

⁴² BBC News, ‘Brexit: Devolved institutions’ consent sought on Repeal Bill’, 26 June 2017: <http://www.bbc.co.uk/news/uk-wales-politics-40412934>

⁴³ *Miller*, para.146.

⁴⁴ *Miller*, para.151.

⁴⁵ The SNP acquired majority control of the Scottish Parliament in May 2011 and, having promised to give the people of Scotland a referendum on Scottish independence, after the agreement of the Westminster Government in 2012, this was held in June 2014. On a turnout of around 85%, the referendum yielded a majority vote against independence (55.3% to 44.7%).

⁴⁶ Note: in a speech given on 26 February 2018, David Lidington, the Minister for the Cabinet Office, conceded many of these constitutional points and pledged that the Government would bring forward an amendment to cl.11 of the Bill to ensure that, subject to UK frameworks being established, many of these EU powers would be transferred directly to the devolved governments: <http://www.ukpol.co.uk/david-lidington-2018-speech-on-brexite/>.

occupies an unusual status in that all UK citizens from Northern Ireland are entitled to Irish passports, it is the only part of the UK that has a land border with an EU state, and the UK Government has pledged to transfer Northern Ireland to the Republic of Ireland if and when a majority of its population voted to be reunited.⁴⁷ Although a majority in Northern Ireland voted to remain in the EU,⁴⁸ that vote is apportioned differentially across the two communities.⁴⁹

Brexit raises specific constitutional issues in this context primarily because of the role that the UK and the Republic's common membership of the EU has performed in taking the heat out of contentious questions of sovereignty and national identity. This is seen most explicitly in the Belfast (Good Friday) Agreement, which was central to the peace process that ended armed conflict. This Agreement is an international treaty pledging close cooperation between the British and Irish Governments 'as partners in the EU'. One Strand of the Agreement provides for the establishment of a North-South Ministerial Council to 'consider the EU dimension of relevant matters, including the implementation of EU policies and programmes'. Despite these unique aspects, the UK Government takes the view that no special considerations would apply to Northern Ireland with respect to Brexit. This once again reflects the traditional sovereigntist approach.

But the Belfast Agreement is not just an international treaty between two sovereign states; it has also reframed the entire structure of Northern Ireland government and, running against the grain of traditional British practice, established a range of modern constitutional techniques explicitly designed to overcome division and to bolster trust.⁵⁰ These techniques include establishing a consociational form of government for the province and holding a referendum to approve the Good Friday Agreement itself.⁵¹

These unusual circumstances provided the backcloth to the *McCord* case. In *Miller* the central argument was whether the Article 50 notification could be issued by prerogative or whether it required authorisation by an Act of Parliament. The argument in *McCord* went further: Article 50, it was argued, could not be triggered without first eliciting the consent of a majority of the people of Northern Ireland. Seeking to issue the notification without that consent, it was claimed, would be contrary to the Northern Ireland constitutional settlement expressed in section 1 of the Northern Ireland Act 1998 and the Good Friday Agreement. That is, any change to the constitutional status of Northern Ireland that made it more difficult to give

⁴⁷ Northern Ireland Act 1998, s.1

⁴⁸ In Northern Ireland, the result was: 55.8% voted to remain, with 44.2% voting to leave.

⁴⁹ 89% of nationalists voted to remain, as compared with only 35% of unionists. Some 88% of those identifying as Irish state that they voted to remain, as compared with 38% of those identifying as British. Some 85% of Catholics, against only 41% Protestants, voted to remain. Evidence of Professor Jonathan Tonge to the House of Lords EU Committee: cited in McCrudden and Halberstam, above n.25, p.9.

⁵⁰ Christopher McCrudden, 'Northern Ireland and the British Constitution since the Belfast Agreement' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford: Oxford University Press, 6th edn, 2007), 227-270.

⁵¹ A referendum was also held in the Republic of Ireland to authorise certain reforms to their constitution.

effect to the referendum guarantee in section 1 would be unconstitutional. And leaving the EU would do just that.

Upholding the traditional Diceyan approach, the Northern Ireland High Court rejected that argument and the case was then joined with *Miller* for determination by the UK Supreme Court. Though we might be sceptical about some of the claims made about the constitutional significance of what the court in *Miller* called ‘the main issue’ in that case – the ‘English’ question of prerogative versus parliament – it is difficult to refute McCrudden and Halberstam’s argument that the Supreme Court dealt with the Northern Ireland constitutional question in a truncated fashion and as a mere ‘side-show’. This, they claimed, was ‘not the way in which arguably the most important constitutional case affecting Northern Ireland since its foundation should be decided’.⁵² What resulted, they concluded ‘was a distinctly *English* constitutional debate’,⁵³ in which the Court singularly failed to address the question of the constitutional significance of the 1998 settlement. The UK Government presented its arguments as though the UK remained a unitary state and, although citing Dicey’s description of the British constitution as ‘the most flexible polity in existence’,⁵⁴ the Supreme Court’s ruling actually demonstrates just how inflexible their conception of the constitution remains.

The Supreme Court ruling, though feted in some quarters as bolstering the status of the doctrine of parliamentary sovereignty as the fundamental legal principle of the constitution, merely reinforces Dicey’s centralised power principle but takes no cognisance of the impact of constitutional developments over the last forty years. For all the judicial rhetoric about ‘constitutional statutes’,⁵⁵ ‘divided sovereignty’,⁵⁶ and federalisation,⁵⁷ the Supreme Court ruling in *Miller/McCord* was thoroughly traditional.

X

We should note, finally, the impact of Brexit on the evolving relationship between Parliament and the people, that is, between parliamentary and popular sovereignty.

⁵² McCrudden and Halberstam, above n.25, p.30.

⁵³ *Ibid.* (emphasis in original).

⁵⁴ *Miller*, para 40. See Dicey, above n.6, p.87.

⁵⁵ David Feldman, “The Nature and Significance of ‘Constitutional’ Legislation” (2013) 129 L.Q.R. 343-358; David Feldman, ‘Statutory Interpretation and Constitutional Legislation’ (2014) 130 L.Q.R. 473-497; Farrah Ahmed and Adam Perry, ‘Constitutional Statutes’ (2017) 37 *Oxford Journal of Legal Studies* 461–481.

⁵⁶ *Jackson v Attorney-General* [2005] UKHL 56, para. 102, per Lord Steyn: ‘We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second *Factortame* decision made that clear: [1991] 1 AC 603. The settlement contained in the Scotland Act 1998 also point to a divided sovereignty.’

⁵⁷ Speaking extra-judicially, Lady Hale in 2012 stated: ‘The United Kingdom has indeed become a federal state with a Constitution regulating the relationships between the federal centre and the component parts.’ Lady Hale, ‘The Supreme Court in the UK Constitution’ (Legal Wales 2012 conference, 12 October 2012) <www.supremecourt.uk/docs/speech-121012.pdf>

This issue revolves around the importance of the principle of representation. Parliamentary democracy in the Westminster model establishes government of the people and for the people but not by the people. Political parties are sometimes thought of as a menace to parliamentary government, not least because they formulate policies while by-passing Parliament and they direct government from outside formal processes. But the fact remains that modern parliamentary government works only through party systems that organise Government and Opposition. This makes for the efficient formation of policy, for the efficient dispatch of parliamentary business, and it is able to have an educative effect on public opinion. Problems arise, however, once that educative work is not being effectively carried out, that is, when parties fail adequately to represent voter interests. Given the way in which Brexit divides public opinion across party lines, this arguably is the situation today.

One symptom of changing relations between Parliament and the people, then, is the increased resort by governments to the use of referendums.⁵⁸ Consider as an illustration the use of the device countenanced by the European Union Act 2011. The aim of the 2011 Act was to enable Parliament to reassert legal supremacy over the EU by confirming that the direct applicability or direct effect of EU law was contingent upon the recognition of this status by the ECA 1972.⁵⁹ This seemed to be purely symbolic legislation.⁶⁰ However, by requiring any further transfers of competences to the EU not only to be approved by Parliament but also to be affirmed in a referendum of the British people,⁶¹ the Act also transferred the final say from Parliament to the people.⁶² The 2011 Act was a self-conscious abdication of Parliament's supposedly ultimate legal sovereignty in favour of popular political sovereignty.

The type of provision enacted in the 2011 Act marks the erosion of authority of the formal doctrine that Parliament has the competence to make any law. It is not a singular illustration.⁶³ Rather, it is part of a general process in which Parliament has acquiesced in dislodging itself from playing a pivotal role in governing processes. Parliament may have ceded some of its authority to the Government and some to EU institutions, but it has also ceded authority to the people. In this respect, the EU in-out referendum did not mark a major shift, but merely reinforced a general trend.

XI

⁵⁸ House of Commons Library Briefing Paper no.7692, *Referendums* (31 August 2016).

⁵⁹ European Union Act 2011, s.18.

⁶⁰ See Martin Loughlin and Cal Viney, 'The Coalition and the Constitution' in Anthony Selden and Mike Finn (eds) *The Coalition Effect* (Cambridge: Cambridge University Press, 2015), 59-86 at 75-77.

⁶¹ European Union Act 2011, ss.2-3.

⁶² See, eg, Vernon Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' (2012) 32 *Oxford J. of Legal Studies* 179-195, at 190: 'It is ... difficult to escape the conclusion that the European Union Act [2011] imposes a substantive limitation upon the powers of Parliament ...'.

⁶³ Scotland Act 2016, s.1; Wales Act 2017, s.1.

The title of this lecture is inspired by Burke's classic essay of 1770. In his day, the decisive struggle was between the prerogatives of the Crown and the privileges of Parliament, with Burke arguing that attempts to make Parliament an instrument of Crown policy were undermining the constitutional settlement and fuelling the type of popular discontent and disorder that democrats like John Wilkes were exploiting. Burke's essay extols the virtues of representative government, but he warns that it also imposes responsibilities. Nations, he explains, are not primarily ruled by laws, still less by force; they are governed by 'a knowledge of their [subjects'] temper'.⁶⁴ And if, by failing to keep attuned to public opinion, the Government is unable to carry the people with them then the Government must bear the blame.⁶⁵ Governments must act prudently, Burke maintains, for without this 'your Commonwealth is no better than a scheme upon paper; and not a living, active, effective constitution'.⁶⁶ In reflecting on the present discontents, we find ourselves not so far removed from the condition Burke identified in 1770.

Contrary to its 2015 manifesto pledges, the Conservative government today finds itself incapable of maintaining a stable constitution and, far from doing its utmost to keep the Union intact, is centralising power in ways that threaten to drive the Union apart. Its actions following the Brexit referendum – whether in adhering to a traditional stance on the scope of the prerogative, riding roughshod over parliamentary procedures, or refusing any accommodation to the post-1998 devolution settlement – suggest it is working on constitutional assumptions that can no longer be easily maintained. The present discontents, it would appear, are born of the sense that we are caught between a constitutional tradition that is dying and an evolving modern constitutional settlement that remains powerless to be born. The Brexit referendum may have come about for party political considerations rather than because this was a pressing constitutional issue, but the result has undoubtedly transformed the situation into that of a constitutional moment. The tragedy is that the entire political class seems now to be focused on a single issue – hard, soft or no Brexit – that it has failed to recognise this. We might be better served if they simply accepted the reality that on 29 March 2019 the UK will leave the EU and leave to the Government, subject to Parliament's oversight, the task of negotiating terms. They might then have the capacity for addressing the pressing future question: what constitutional arrangements are best suited to the needs of the post-EU British state?

⁶⁴ Edmund Burke, 'Thoughts on the Cause of the Present Discontents' in *Select Works of Edmund Burke*, vol.1 (Indianapolis: Liberty Fund, 1999), 69-156, at 70-1.

⁶⁵ Ibid. 74: 'When popular discontents have been very prevalent ... there has been generally something found amiss in the constitution or in the conduct of Government'.

⁶⁶ Ibid. 99.