Brexit and the British Constitution

Martin Loughlin*

Three and a half years after holding a referendum on the question, the United Kingdom (UK) formally left the European Union (EU) on 31 January 2020. In that period there was not one of those 1,316 days when Brexit was not the subject of intense public discussion. Yet it would be difficult to find an issue on which the ratio between volume of noise and amount of insightful analysis has been higher. Much of the debate was generated by the sheer shock of the 2016 referendum result. Since 1649, when the English governing class executed Charles I only to discover that, after all, they still believed in the office of the king, there has rarely been so much post-hoc handwringing about what had been determined. And never before did so many take to the streets to express such support for a hitherto unloved technocratic project. Despite the cacophony of commentary, very little was devoted to a serious analysis of the constitutional implications of the decision. In different circumstances, the decision to leave the EU might have been a constitutional moment, an occasion for reconsidering constitutional fundamentals. But constitutional issues were resolutely avoided, with consequences still to be addressed.

In this paper, I outline the main constitutional issues that have emerged and consider their implications. But I begin with a sketch of the character of the British constitution and its modern development.

I. The Constitutional Heritage

The British constitution comprises a set of institutions, rules, and practices through which the authority of the British state is maintained. Its flexibility enabled the British to make the transition from aristocracy to democracy without violent revolution. The 17th century was racked by revolutionary upheaval as Crown and Parliament fought over the locus of ultimate

* Professor of Public Law, London School of Economics & Political Science.

authority. But during the 18th century these conflicts were sublimated through conceptual abstraction. Sovereign authority, it was then asserted, vests neither in the Crown nor in the Parliament, but in a composite entity called 'the Crown-in-Parliament'. Formally absolute, the authority of this concept of parliamentary sovereignty to make law was tempered in practice by the governing class's acceptance of some informal understandings of appropriate political conduct. In the high Victorian era these understandings were then given a formal status by A.V. Dicey, who labelled them 'constitutional conventions'.[1]

During the 20th century, these arrangements lost much of their feted flexibility as the so-called balances among the partners in authority were adjusted. The crown had already been reduced to a cipher, but with the coming of democracy the aristocratic chamber, the House of Lords, also lost authority. The extension of the franchise led to the formation of organised political parties and to the hegemony of professional politicians owing their primary allegiance not to the upholding of constitutional conventions but to party discipline. Add to this the fact that when governmental responsibilities were extended, the centre of political action shifted from parliament to government, and the flexible arrangement could be seen to have evolved into what Lord Hailsham in the 1970s called 'elective dictatorship'.[2] In reality, a government controlling a majority in the House of Commons had few constitutional limitations on its desired course of action.

Yet this loss of balances was not the only concern. There was also the claim that these inherited arrangements were singularly ill-adapted to the challenges of governing in the modern era. George Bernard Shaw highlighted the issue, lyrically explaining that the 'ocean of Socialism cannot be poured into the pint pot of a nineteenth century parliament'.[3] His point was made later, though more prosaically, by Leo Amery. Writing in mid-century, Amery maintained that the pressures of modern government exposed Britain's once flexible constitution as arthritic. The 'arteries of our constitutional system', he explained, are now suffering from 'acute high blood-pressure' at a time when 'the brain and body which they serve are being summoned to ever greater exertions'. The system, he predicted, could not withstand more intense strains without a complete breakdown that must end either in 'violent revolutionary change or in progressive paralysis'.[4]

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[1] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 8th edn., 1915), ch. 14.
[2] Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (London: Collins, 1977).
[3] Quoted in W.H. Greenleaf, *The British Political Tradition* (London: Methuen, 1983), vol.2, p.369.
[4] Leo Amery, *Thoughts on the Constitution* (London: Oxford University Press, 1947), ix.

II. Constitutional Reform

When the conditions for violent upheaval and fundamental renewal never materialised, it appeared that the prospect was progressive paralysis. Recognising this, during the latter half of the 20th century growing numbers of influential bodies called for fundamental reforms. Constitutional modernisation became a mantra, though often without the full implications of proposed reforms being made plain. In these deliberations one aspect of recent developments was commonly overlooked: that, despite the absence of conditions for fundamental reconstruction, 'progressive paralysis' had been avoided by the involvement of the UK in the venture of continuing European integration.

Participation in the project of European integration (both through the EU and the Council of Europe) has greatly empowered the judiciary. It enabled the judiciary to review legislation to ensure compatibility with EU law,[5] to adopt teleological modes of reasoning antithetical to traditional common law methods,[6] to make a categorial distinction between constitutional statutes and ordinary legislation,[7] and to bolster a (continental-type) distinction between public and private law.[8] Participation in this integration project has meant that the British have adopted what is in effect a Bill of Rights without the need for extensive public deliberation.[9] And it greatly strengthened arguments for the replacement of the Judicial Committee of the House of Lords with an independently-constituted Supreme Court.[10] 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,[11] and it provides the supporting structure for the unique cross-border arrangements that brought about a peace settlement in Northern Ireland.[12]

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[5] See, e.g., *R. v Secretary of State for Transport, ex parte Factortame* (no 2) [1991] 1 AC 603.
[6] See, e.g., Human Rights Act 1998, s.3.
[7] See, e.g., Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 27 *Oxford J. of Legal Studies* 461-481.
[8] Cf. J.D.B. Mitchell, 'The causes and effects of the absence of a system of public law in the United Kingdom' 1965 Public Law 95-118; Lord Woolf, 'Droit Public - English Style' 1985 Public Law 57-71
[9] Human Rights Act 1998.
[10] Constitutional Reform Act 2005, Part III. One of the reasons for this reform, which jettisoned the tradition of the highest court formally being a committee of the House of Lords, was that it was felt difficult to reconcile with the provision in article 6 of the European Convention of Human Rights, whereby civil rights and obligations must be determined by an 'independent and impartial tribunal'.
[11] See, e.g., Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (Oxford: OUP, 9th edn, 2019), chs 9-11, 13.
[12] *The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland*, Cm 3883 (1998).

The British state incrementally modernised its constitution by gradually harmonising its governing practices to fit more easily into the evolving framework of European federalism. And just as this strategy of deepening European integration has been pursued by European elites without involving their publics, so too was the British governing class able to effect these major constitutional changes with very little constituent deliberation. This has meant that the British could adhere to the shibboleth of parliamentary sovereignty while re-configuring governmental arrangements and reordering constitutional fundamentals, aligning them more closely with those of its partner Member States. This became the key method of rescuing the British constitution from the threat of institutional and conceptual sclerosis.

III. Political Consequences

But at what political cost? The British joined the common market without open acknowledgment of the likely constitutional implications. This issue was fudged for many years. It was only after the single market programme was completed in 1992 and the EU moved to a more explicitly federalising stage of the project that constitutional implications for the UK became more apparent. The recognition was marked by growing Euroscepticism, signified politically by the rise of the UK Independence Party,[13] and constitutionally by pledges from all major political parties not to transfer new powers to the EU without first holding a referendum.[14] These developments came to a head in 2015 when the Conservatives were returned as a majority government having pledged an in/out referendum on EU membership. Held on 23 June 2016, on a turn-out of 72.2% it resulted in a majority (52-48%) voting to leave. This led to a protracted period of political upheaval, the constitutional implications of which did not end when, in January 2020, the UK formally left the EU.

[13] In the UK elections to the European Parliament in May 2014 UKIP topped the poll*: European Parliament Elections 2014*, House of Commons Library Research Paper 14/32 (11 June 2014).

[14] Liberal Democrat Manifesto 2010, 67: 'Liberal Democrats … remain committed to an in/out referendum the next time a British government signs up for fundamental change in the relationship between the UK and the EU'. Green Party Manifesto 2015, 71: We support the proposal to have an in–out referendum so that the British people can have their say'. Labour Party Manifesto 2015, 77: 'Labour will legislate for a lock that guarantees that there can be no transfer of powers from Britain to the European Union without the consent of the British public through an in/out referendum'. Conservative Manifesto 2015, 72: 'The EU needs to change. And it is time for the British people – not politicians – to have their say. Only the Conservative Party will deliver real change and real choice on Europe, with an in-out referendum by the end of 2017'.

In order to grasp these implications, it is necessary to say something about what the EU is, or rather, has become. The EU is no longer simply an inter-governmental association that pools certain sovereign tasks of member state governments for the common good, as liberal integrationists suggest. But neither is it a project that seeks to establish a European superstate, as conservative Eurosceptics commonly contend. It is a specific type of institutional formation: a federation.[15] This federation evolved from the failures of European nation-states both to sustain regimes of representative democracy and, especially during the Second World War, to maintain the security of their borders.[16] And once established, the federation became the institutionalised expression of a growing gulf between national governing elites and ordinary citizens. Increasingly in the grip of TINA - 'there is no alternative to the market' - national political elites found mutual support for their programmes through participation in a regime of transnational neoliberalism. In the process, relations of accountability to their national constituents became severely strained. National methods of control and accountability for governmental action were being hollowed out.[17]

This was the political context shaping domestic events in the UK in 2015-16. There was a growing recognition that the EU was a response to issues that simply did not apply to the UK. In 2015 the UK Parliament, with 90 percent of MPs voting in favour, passed an Act transferring the decision on EU membership to the electorate to be exercised through a referendum.[18] But in that referendum around 75 percent of MPs voted to remain, including a majority of the Cameron Cabinet and a majority of Conservative MPs.[19] The Government was therefore in the invidious position of having to deliver an outcome it had not supported and to negotiate this through a Parliament, the great majority of whom had voted to remain. It was a unique situation in the modern history of British parliamentary practice, generating a crisis

[15] Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford: OUP, 2021).
[16] Chris J. Bickerton, *European Integration: From Nation-States to Member States* (Oxford: OUP, 2012); Alan S. Milward, *The European Rescue of the Nation State* (London: Routledge, 2nd edn 1992).
[17] Peter Mair, *Ruling the Void: The Hollowing Out of Western Democracy* (London: Verso, 2013); Stefan Auer, *European Disunion: Democracy, Sovereignty and the Politics of Emergency* (London: Hurst, 2022), ch.2.
[18] Introducing the Referendum Bill, the Government spokesperson stated: 'This is a simple, but vital, piece of legislation. It has one clear purpose: to deliver on our promise to give the British people the final say on our EU membership in an in/out referendum'. The Labour Opposition spokesperson stated: 'I do not think that anyone who goes into the polling station on the day … will not understand the consequence of voting either way'. For the Green Party, Caroline Lucas MP stated: 'I welcome the Bill and will support it. Greens have long called for a referendum on EU membership, not because we are anti-EU, but because we are pro-democracy'. Hansard, 28 May 2015, vol. 596, cols. 1047, 1059, 1142. The Referendum Bill passed its second reading with a 544-53 vote in favour.
[19] Robert Tombs, *This Sovereign Isle: Britain in and out of Europe* (London: Allen Lane, 2021), 102. Tombs records (at 108) that 185 Conservative MPs voted remain, with 144 voting leave.

of parliamentary government. The crisis had two dimensions. The first was of parliamentary representation, born of the fact that neither leave nor remain voters were adequately represented by their constituency MPs. Almost two-thirds of Labour constituencies, for example, had voted to leave, yet within a couple of years the Labour leadership was calling for a second referendum to reverse the decision.[20] Secondly, it led to a crisis of governmental authority, with the Government split, if not overtly on leave and remain then at least on acceptable terms for leaving.[21]

What followed was Shakespearean in its drama, though whether tragedy or comedy remains unclear. Two key aspects are relevant here: the implications for parliamentary government and the impact on what might be called the territorial constitution.

IV. Parliamentary Government

The Government had been completely unprepared for the exit outcome, having undertaken no detailed work to address its consequences. Immediately following the referendum, Cameron resigned as Prime Minister (PM) and was replaced by Theresa May. May at first indicated that she had no intention of going back to the polls, but within the year surprised everyone by doing just that, claiming the need to acquire a strong mandate to negotiate Brexit. Held on 8 June 2017, this election – again, contrary to forecasts – lost the Conservatives their majority, obliging them to enter a 'confidence and supply agreement' with Northern Ireland's Democratic Unionist Party (DUP). I will briefly sketch the constitutional aspects of what followed.

Parliamentary government depends on party discipline and revolves around the two-party arrangement of Government and Opposition. But because Brexit divided MPs across party lines, such discipline proved almost impossible to maintain. The conduct of parliamentary business could not operate according to normal conventions,[22] and neither

[20] Sir Keir Starmer, Labour Party Conference, 25 September 2018, calling for a second referendum with remain being an option.

[21] This division was highlighted by Theresa May's proposed withdrawal agreement drawn up in 2018, which included staying in the single market for trade in goods. This led to the resignation of David Davis as Brexit Secretary, then Boris Johnson as Foreign Secretary and Steve Baker as Europe minister. The EU subsequently rejected May's deal.

[22] See, e.g., Speaker rulings on Standing Order 24, which is used to seek an emergency debate but not generally used to debate a substantive motion. The Speaker twice ruled to permit a motion on seeking extensions rather than risk a no-deal exit from the EU: EU (Withdrawal) (No 5) Bill (Cooper-Letwin, April 2019) and EU (Withdrawal) (No 6) Bill (Benn, September 2019). These became the EU (Withdrawal) Act 2019 and EU (Withdrawal) (No 2) Act 2019 respectively.

could the convention of collective cabinet responsibility.[23] At times, traditional practices of parliamentary government broke down entirely.

Theresa May's proposals, based on the UK remaining in the customs union and being subject to EU regulations for an indeterminate period, did not command widespread support. Variations were put to the Commons on three occasions but all three were voted down. [24] There followed the European Parliament elections in May 2019, in which the Conservatives were placed fifth, with the newly formed Brexit Party topping the polls.[25] This was the worst nationwide election result in their history. It led to May, the following day, announcing her resignation.

May was then replaced by Boris Johnson whose tumultuous premiership stretched the conventions of constitutional practice almost to breaking point. Determined to 'get Brexit done' even if that meant leaving the EU without a deal, he withdrew the whip from 21 MPs who had voted in favour of a Bill to remove the possibility of a no deal exit. Since this led to the loss of the Government's majority, this would normally have led to the collapse of the Government and holding of a general election. But under the Fixed-terms Parliament Act 2011 this required a two-thirds majority vote and Opposition parties wanted to ensure the negotiation of an extension to the withdrawal date.

Meanwhile, on 25 July, the day following Johnson's appointment as PM, Parliament adjourned for its 2019 summer recess to reconvene on 3 September. In the interim, at a Privy Council meeting on 28 August, the Queen, on the advice of her PM, ordered that Parliament be prorogued from 9 September until 14 October. When Parliament reconvened on 3 September, the PM insisted on leaving the EU by the end of October, the then designated date. It was this that caused the revolt by 21 Conservative MPs, leading to the Government losing a series of major votes.

What followed was unprecedented. Parliament, with the Speaker's support,[26] took

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[23] See R.B. Taylor, 'Brexit and collective cabinet responsibility: why the Convention is still working' (LSE Brexit Blog, 20 May 2019) <https://blogs.lse.ac.uk/brexit/2019/05/20/brexit-and-collective-responsibility-why-the-convention-is-still-working/> accessed 28 November 2022.

[24] The first Agreement (January 2019) was defeated in the Commons by 432 votes to 202, the biggest ever parliamentary defeat of any government. The second modified Agreement was defeated in March by 391 to 242. The Speaker then allowed MPs to take over the Commons Order Paper to hold 'indicative votes' on alternative proposals: all eight proposals put forward failed to obtain majority support. The Government then put forward its third Agreement and this also was rejected, by 344 votes to 286.

[25] *European Parliament Elections 2019: Results and Analysis*, House of Commons Library Briefing Paper No 8600 (26 June 2019).

[26] Above n.22..

control of the House of Commons Order Paper. The Opposition introduced a Bill mandating the PM to request a further extension of the withdrawal date until 31 January 2020 if a renegotiated withdrawal agreement had not been adopted by 19 October. This Bill passed all its Commons stages that same day and received the Royal Assent on Monday 9 September, just before prorogation.[27] In effect, Parliament had taken over the functions of the Government.

Into this constitutional chaos stepped the judiciary, notably in the two *Miller* cases. The first *Miller* case generated a great deal of political heat but was – at least in constitutional terms – relatively uncontroversial. Could the Article 50 TEU notification to the EU, signalling its decision to withdraw, be exercised by the Government through its treaty-making prerogative powers or did it require parliamentary sanction? Although Parliament had not complained about the Government's intended use of its prerogative powers, this did not prevent the launch of a citizens' challenge through judicial review. In a high-profile case the Supreme Court held that, since rights were affected by the notification, authorisation by Act of Parliament was required.[28] If the litigants had been anticipating that Parliament would then vote down the proposed Article 50 notification, their hopes were soon frustrated. An Act authorising the PM to issue the notification was speedily enacted.[29]

The second *Miller* case concerned the legality of the prorogation, an issue that proved much more controversial. There is no statute or convention regulating the length of any prorogation; it normally lasts 7-10 days though on occasions it had been longer.[30] By September 2019 the Parliamentary session, which normally lasts a year, had been running since 21 June 2017, longer than any in the previous forty years. The Government therefore justified prorogation on the grounds that there was not much new legislative business to conduct, that the new Ministry needed time to devise a new legislative programme, and that the 34 calendar days proposed included the party conference period when Parliament is typically adjourned for three weeks anyway. It therefore claimed that only 7-10 sitting days would be lost and that Parliament would be in session before the critical EU Council meeting of 17-18 October, leaving time for debate and the introduction of any new legislation before 31 October.[31] Some

[27] EU (Withdrawal) (No 2) Act 2019.
[28] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[29] Introduced on 26 January, two days after the Supreme Court ruling, the Bill was fast tracked, and received the Royal Assent on 16 March 2017: European Union (Notification of Withdrawal) Act 2017.
[30] *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB), para. 54.
[31] *Miller*, ibid. para. 13.

parliamentarians, including the Speaker, called the prorogation a 'constitutional outrage'.[32] Yet no parliamentary action was taken to overturn this in the week before it was prorogued.

The legality of the prorogation was swiftly challenged in both the English and Scottish courts. Initially, a powerfully constituted (English) Divisional Court held that the issue was not justiciable, but the (Scottish) Inner House of Court of Session determined otherwise. These two discrepant rulings were appealed to the Supreme Court. In a single judgment, the eleven-member Court unanimously held that a decision to prorogue Parliament would be unlawful 'if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive'.[33] Finding this to be the case, the Court declared that the PM had acted outside his powers in advising prorogation, that this vitiated the Order-in-Council, and that the actual prorogation, 'which was as if the Commissioners had walked into Parliament with a blank piece of paper', was similarly 'unlawful, null and of no effect'.[34]

There are many contentious aspects of this ruling.[35] But its main constitutional significance lies in the way the Court interpreted its ruling that 'the boundaries of a prerogative power relating to the operation of Parliament are … determined by the fundamental principles of our constitutional law'.[36] It held that the two most relevant constitutional principles are those of parliamentary sovereignty and parliamentary accountability and, invoking both to determine the limit of the power of prorogation, concluded that the PM's advice in this case was unlawful. In effect, the Court had converted a set of political practices concerning parliamentary accountability into normative principles and then acted as the authoritative interpreter of their meaning. In doing this, the Supreme Court was asserting that the British constitution comprises a structure of legal principles which it is their responsibility to protect.

This chaotic phase abruptly ended in December 2019. Although the PM claimed he would never seek an extension beyond 31 October, a letter mandated by the EU (Withdrawal) (No 2) Act was indeed sent, albeit unsigned, alongside a note stating that the Government did

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[32] *The Guardian*, 28 August 2019.
[33] *R(Miller) v Prime Minister/Cherry v Advocate General* [2019] UKSC 41, para. 50.
[34] Ibid. para. 69.
[35] See Martin Loughlin, 'The Case of Prorogation: The UK Constitutional Council's ruling on appeal from the judgment of the Supreme Court' *Policy Exchange*, October 2019:
https://policyexchange.org.uk/publication/the-case-of-prorogation/
[36] *R(Miller) v Prime Minister/Cherry v Advocate General* [2019] UKSC 41 [38]

not feel a further extension would serve any purpose. Nonetheless, the EU granted a flexible extension until 31 January 2020. At this point, as Robert Tombs argues, 'Britain was made to look ridiculous and ungovernable, but this was evidently considered a price worth paying to humiliate Johnson and damage his popularity'.[37] If so, it backfired: anticipating possible electoral gains, the Liberal Democrats and the SNP then indicated they were prepared to support a general election. The Bill providing for this was duly enacted on 31 October. The Early Parliamentary Elections Act 2019, authorising a general election on 12 December, thus circumvented the need for a two-thirds majority under the Fixed-term Parliaments Act 2011. In the election campaign, Labour offered a second referendum and the Liberal Democrats pledged to overturn the referendum and remain in the EU, but the Conservatives were returned with a large overall majority of 80.

The Johnson administration negotiated relatively minor amendments to the May withdrawal agreement and the UK formally left the EU at the end of January 2020. The fact that it happened at all might be taken to signify that Britain's constitution continued to work relatively well. But the process has bequeathed a legacy of growing mistrust of many governing institutions. Furthermore, the rift which these developments exposed among Conservatives has scarcely been overcome. For quite other reasons, Johnson was forced to resign in July 2022 but stayed on till 6 September when Liz Truss was elected leader. She in her turn was forced to resign 50 days later amid the financial and political crisis resulting from an absurd un-costed 'mini-budget' that sought to reduce the tax burden of the most privileged. Consequently, the UK has had five PMs since the 2016 referendum, all Conservative and none of whom has been removed by a general election. 'Taking back control' has proved to be a rather hazardous undertaking.

One reason for this chaos is division within the Conservative party over the way forward. This had weakened their negotiating position with the EU as well as their standing within Britain, and has undermined their ability to negotiate any effective deal. Their ability to do so was hardly assisted by a general sense that the senior civil service was adamantly opposed to leaving the EU.[38]

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[37] Tombs, above n.19, p 121.

[38] James Forsyth, 'Boris' mission impossible', *The Spectator*, 4 July 2020: 'the view in Whitehall is that of the 40 or so permanent secretaries, only one voted for Leave'.

A second reason is that Brexit requires the unravelling of a massive body of EU law and regulations and their conversion into UK law. With so much political energy focused on the when, how, and whether of Brexit, little has been left for consideration of the constitutional implications of the processes by which withdrawal is to be achieved. The withdrawal legislation has given Ministers unprecedented powers to amend or repeal existing parliamentary legislation with very little parliamentary oversight, marking a significant further shift in power from parliament to government.[39] Any sense that leaving the EU would lead to the rejuvenation of popular control and accountability of law-making has scarcely been realised.

Thirdly, recent modernising reforms underpinned by the project of European integration has meant that far too much change has taken place over the last forty years for any sense of the status quo ante to be restored. Brexit cannot of itself restore the sovereign authority of the Crown-in-Parliament, because the EU was merely one of the symptoms of change in the configuration of domestic political authority.[40]

Brexit may have been a necessary condition of restoring sovereignty, but it is not, of itself, sufficient. The Government has taken tentative steps to restore its power vis-à-vis the judiciary by proposing amendments to the Human Rights Act that seek to displace the authority of the European Court of Human Rights.[41] But restoration of democratic accountability requires much more. The problem of what Peter Mair called 'ruling the void' cannot be addressed without giving serious consideration to the necessity of democratic renewal.

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[39] European Union (Withdrawal) Act 2018; Retained EU Law (Revocation and Reform) Bill had its Second Reading in the House of Commons on Tuesday 25 October 2022 (all REUL will be repealed unless Ministers decide to exercise a power to preserve it by end of 2023).

[40] Martin Loughlin and Stephen Tierney, 'The Shibboleth of Sovereignty' (2018) 81 *Modern Law Review* 989-1016.

[41] Having pledged in 2019 to repeal the Human Rights Act and replace it with a British Bill of Rights, the Conservative Government in 2021 established an Independent Review of the Human Rights Act, whose terms of reference did not include repeal of the Act. The Review proposed amending the 1998 Act to give greater priority to UK statutes and common law rulings. But its publication in December 2021 was accompanied by a Government consultation paper proposing to replace the Act in its entirety with a new British Bill of Rights. The new Bill of Rights was intended to remain faithful to the basic principles of the ECHR but to reverse what the Government called 'the mission creep' that had led to the HRA being used 'for more and more purposes, and often with little regard for the rights of wider society'. In May 2022, the Queen's Speech stated that the Government 'will ensure the constitution is defended' and 'will restore the balance of power between the legislature and the courts by introducing a Bill of Rights'. A Bill was introduced in September 20222 was then withdrawn. The architect had been Dominic Raab, who was replaced as Justice Secretary by Liz Truss; since he was reappointed under Rishi Sunak's administration, its status presently remains uncertain.

V. The Territorial Dimension

As well as unsettling practices of parliamentary government, the referendum divided the nation geographically and culturally. Basically, England and Wales voted to leave, while Scotland, Northern Ireland and London elected to remain. The cultural division was essentially class-based, leading to the adoption of distinctions between communitarians and cosmopolitans, between somewheres and anywheres, between sovereignty-defenders and rights-advocates, and, as it turned out, between democrats and liberals. In general terms, the referendum divided those who felt that the pace of change was eroding the foundations of British culture and identity from those who saw mass immigration, European integration and an extending rights culture as gains not threats. The fault line, then, was between constitutional traditionalists and constitutional modernizers.

The cultural aspect of these divisions raises important questions, on which only a few observations will be made. It is notable that the British vote was not out of line with citizens' opinions across much of the EU at that time.[42] Secondly, it is not obvious that voters in Scotland and Northern Ireland were less Eurosceptic than elsewhere in the UK. Rather, it seems more likely that they were influenced by different concerns. In Northern Ireland the result was complicated by the issue of reunification of Ireland, and in Scotland by a nationalist ambition for independence only feasible within the EU.[43] Thirdly, though polemics on both sides of the case went into overdrive, remainers - always presenting themselves as the voice of reason - made no positive case for the EU and then simply treated those who voted leave as xenophobes, reactionaries, or just plain ignorant. Finally, the fact that so many self-styled 'left intellectuals' joined in that chorus reveals the extent to which they have ceased not only to be

[42] Tombs, above n.19, pp. 65-66: 'At the time of the referendum, the percentage of people expressing a broadly "unfavourable view" of the EU was very similar in the Netherlands (46%), Britain (48%), Germany (48%) and Spain (49%). Far more took a negative view in France (61%) and, especially, Greece (71%).'

[43] John Curtice, 'How deeply does Britain's Euroscepticism run? (London: National Centre for Social Research, 2016), 7: in 2015 '60 per cent of Scots could be classified as Eurosceptic, just 5 points lower than Britain as a whole'. It might be noted that following entry into the EU by a Conservative government in 1973, the newly-elected Labour government in 1975 held a referendum to determine whether the UK should remain and 68.7% voted in favour. The strongest contingency in favour was that of Conservative voters in the south of England, while the least favourable were Labour voters and, geographically, Scotland and Northern Ireland. That is, it was a mirror image of the 2016 result.

democrats but also have abandoned their historic role of defending the interests of the working class.[44]

My focus, however, is on the territorial aspects of Brexit. Scotland's vote presented major challenges. The Scottish National Party (SNP) first formed a majority government in Scotland in 2011, promising to legislate to give the people of Scotland a referendum on independence. Conceded by the UK Government,[45] this was held in 2014 and yielded a majority vote against independence (55.3% to 44.7%). The referendum was supposed to be a once in a generation concession, but following the Brexit referendum, in which Scotland voted 62 percent to 38 percent in favour of remaining, the SNP has been calling for a second referendum, arguing that Scotland has been removed from the EU without their consent. Their claim was rejected by the UK Government. But after winning a fourth consecutive term in government in May 2021 (winning 64 of the 129 seats), the SNP proposed to introduce a bill for an advisory referendum. Uncertain whether this was within the competence of the Scottish Parliament, the Lord Advocate, the Scottish Government's senior law officer, referred the question to the Supreme Court. Unanimously holding that the bill related to a 'reserved matter', in November 2022 the Court held that it did not fall within the Scottish Parliament's competence.[46]

The SNP's response was to declare that the next election to the Scottish Parliament, scheduled for 7 May 2026, would be treated as a 'de facto' referendum. It is important to note that after Brexit any independence vote will have much more serious consequences for Scotland. During the 2014 referendum the Scottish Government proposed to retain the British monarch, to keep the pound, to have the Bank of England act as regulator of its economy and, of course, both Scotland and the rest of the UK would remain within the EU single market and the federal framework. After Brexit, however, Scotland cannot retain sterling as its currency, nor have the Bank of England as regulator of monetary policy. If Scotland

[44] The traditional leftist critique of the EU seemed almost to have disappeared. In the 1970s, E.P. Thompson, reflecting the general position, wrote: 'Particular arrangements convenient to Western European capitalism blur into a haze of remembered vacations, beaches, bougainvillea, business jaunts and vintage wines': cited in Hugo Young, *This Blessed Plot: Britain and Europe from Churchill to Blair* (London: Macmillan, 1998), 290. Cf. Richard Tuck, *The Left Case for Brexit* (Cambridge: Polity, 2020), vii: 'As the campaign began over the Brexit referendum … I found myself increasingly troubled that there seemed to be few people in the debate putting the old left-wing case against Britain's membership of the European Union'.

[45] The Scotland Act 1998 limits the legislative competence of the Scottish Parliament and sets out 'reserved matters' in relation to which the Parliament cannot make laws: s.29(2)). These specifically include aspects of the constitution that relate to the Union of the Kingdoms of Scotland and England: Schedule 5(1).

[46] *Reference by the Lord Advocate of devolution issues under para.34 of Schedule 6 of the Scotland Act 1998* [2022] UKSC 31

intended to join the EU, the EU would require the introduction of customs barriers between England and Scotland. Further, Scotland would be required to adopt the Euro and one of the criteria for doing so is that its budget deficit be no more than 3% of GDP. Scotland's budget deficit in 2021-22 was 12.3% of GDP, down from 22.7% of GDP in 2020-21 (though if the increased value of North Sea oil and gas reserves is discounted, the 2021-22 figure is 15.7%).[47] The Scottish Government would therefore be required to institute a strict austerity package to meet this criterion.

The implications of Brexit for the status of Northern Ireland are similarly profound. Northern Ireland is an altogether special case: created in the 1920s following the partition of Ireland, it has remained an intensely divided society. It occupies an unusual status in that all UK citizens from Northern Ireland are entitled to Irish passports and the UK Government has pledged to unite Northern Ireland with the Republic of Ireland once a majority vote in favour in a referendum.[48] Although a majority in Northern Ireland voted to remain in the EU (56-44%), that vote is apportioned differentially across the two communities, with 90 percent of nationalists voting to remain in contrast with 35 percent of unionists. Support for re-unification of Ireland has increased since the Brexit referendum, though there appears presently not to be a majority in favour.[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 was formalised in the Belfast (Good Friday) Agreement, which was central to the peace process that ended armed conflict.[50] The Agreement is an international treaty pledging close cooperation between the British and Irish Governments and underwritten by virtue of their being members of the EU. But the Belfast Agreement is not just an international treaty between two sovereign states.

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[47] Institute of Fiscal Studies: https://ifs.org.uk/articles/scotlands-underlying-public-finances-are-improving-oil-and-gas-revenues-rise-long-term.

[48] Northern Ireland Act 1998, s.1.

[49] Oran Doyle, 'The Irish unification debate after the Northern Ireland Assembly Elections' (24 May 2022): 'The political alignment on constitutional issues in Northern Ireland is more unsettled than at any point since 1922. Political support is now split 40:40:20 rather than 2:1 in favour of retaining the Union. There is no current majority in Northern Ireland for Irish unification. But the 20% of 'others' have – very roughly speaking – lined up alongside nationalists on the two other constitutional issues of recent years, voting against the UK's departure from the EU and supporting the Protocol as the least worst attainable solution to managing the implications for Northern Ireland of the UK's departure from the EU.': https://dcubrexitinstitute.eu/2022/05/irish-unification-debate-after-northern-ireland-assembly-elections/

[50] *The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland*, Cm 3883 (1998).

It has also reframed the entire structure of Northern Ireland government and set in place a range of modern constitutional techniques, such as establishing a consociational form of government, designed to overcome division and to bolster trust. 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'.[51] Despite these unique aspects, the UK Government took the view that no special constitutional considerations would apply to Northern Ireland with respect to Brexit.[52]

Since Northern Ireland is the only part of the UK that has a land border with an EU state, the issue of trade barriers has here remained a contentious matter. The erection of customs barriers on the border was felt to threaten the peace process and the accords established in the Belfast Agreement. Initially a 'backstop' was proposed by the May government, an arrangement in which Northern Ireland would remain in the single market and the whole of the UK would form a common customs territory with the EU until a final agreement could be negotiated. This was rejected by the UK Parliament and, under Johnson's government, the backstop was replaced by a new Protocol to the Withdrawal Agreement. Under this Protocol, EU customs union arrangements still apply in Northern Ireland, with the customs border established in the Irish Sea. The working arrangements of the Protocol have generated disputes between the UK and EU and are a source of discontent among unionist groups in Northern Ireland, such that the DUP has refused since May 2022 to permit the restoration of devolved government in Northern Ireland pending resolution of the issue.

In general, these territorial aspects of Brexit have raised major constitutional questions which threaten to become existential issues for the UK. Historically, the doctrine of parliamentary sovereignty has been underpinned by a common British political identity founded, first, on Protestantism as the established religion of England, Wales, Scotland and Northern Ireland and, secondly, on imperialism, which became a distinctively British – rather than English – project. By the mid-twentieth century, the growing secularisation of public life

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[51] *Belfast Agreement*, ibid. 13 (para.17).

[52] See *McCord* case, in which it was argued unsuccessfully that Article 50 could not be triggered without first eliciting the consent of a majority of the people of Northern Ireland on the ground that it would be contrary to the Northern Ireland constitutional settlement expressed in section 1 of the Northern Ireland Act 1998 and the Good Friday Agreement. In effect, the contention was that any change to the constitutional status of Northern Ireland that made it more difficult to give effect to referendum guarantee in section 1 would be unconstitutional: *R(Miller) v. Secretary of State for Exiting the European Union/Reference by the Court of Appeal (Northern Ireland) in the matter of an application for judicial review by Raymond McCord* [2017] UKSC 5.

and the loss of Empire had diminished the force of these unifying factors. In the period between 1945 and 1980, they have been replaced by the promotion of a national (i.e. British) industrial economy, but government policies of de-industrialisation and privatisation have since loosened those bonds.[53] The present settlement for the devolution of governmental power across the several nations of the UK no longer seems stable, while the drivers that have maintained a sense of a common British identity seem to be losing their force.

VI. Conclusion

The constitutional ramifications of the 2016 decision to leave the EU have only gradually been revealed. Certainly, those who were sceptical of the trajectory of the UK's adherence to the project of continuous European integration have yet to rise to the challenge of the mantra 'taking back control'. Brexit may have been a necessary condition of democratic renewal, but it has not been a sufficient one. The post-referendum experience has exposed serious weaknesses in existing parliamentary procedures for rendering government subject to control and accountability. The scant consideration given to consequences beyond England of the UK leaving the EU has exposed the drawbacks of an Anglo-centric, over-centralized system of government. It has made the reunification of Ireland a more likely prospect. Since Northern Ireland was never fully integrated into the structures of the British state, technically this is not so difficult, though political and cultural challenges remain daunting. Brexit might have saved the union with Scotland, but only because it erected much greater economic and political hurdles to the goal of independence, leaving unresolved the political and cultural challenges in rebuilding a pan-British sense of nationhood. In the light of these many outstanding issues, it is safe to say that the British constitution is now more unsettled than it has ever been in living memory.

[53] David Edgerton, *The Rise and Fall of the British Nation: A Twentieth-Century History* (London: Allen Lane, 2018).