

## [Martin Loughlin](#) and Stephen Tierney The shibboleth of sovereignty

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## The Shibboleth of Sovereignty

Martin Loughlin\* and Stephen Tierney\*\*

*Abstract.* Sovereignty is the central tenet of modern British constitutional thought but its meaning remains misunderstood. Lawyers treat it as a precise legal concept – the doctrine of parliamentary sovereignty – but commonly fail to acknowledge that that doctrine is erected on a skewed sense of what sovereignty entails. In particular, they do not see that the doctrine rests on a particular political conviction, that the British state depends on a central authority equipped with an unlimited power. These two facets of sovereignty are now so deeply intertwined in legal consciousness that they cannot easily be unravelled and this becomes the main barrier to thinking constructively about Britain’s constitutional arrangements. This article substantiates these claims by explaining how the doctrine came into being, demonstrating how it is tied to a deeper political conviction, showing that its political underpinnings have been considerably weakened over the last century, and indicating how its re-working is the precondition of constitutional renewal.

*Keywords.* Sovereignty. Parliamentary sovereignty. Dicey. British constitution. Brexit.

### I Introduction

The legal doctrine of parliamentary sovereignty is such a fundamental tenet of constitutional belief that we commonly assume it to be of ancient provenance. In reality, it is a late-nineteenth century creation. Its author, the Victorian jurist Albert Venn Dicey, presented it as the central element of a work that sought to shift the basis of British constitutional thought. Noting that hitherto the constitution had been treated as a historical phenomenon, he argued that constitutional scholars, having been seduced by speculative ideas, had been drawn into a ‘maze in which the wanderer is perplexed by unreality ..., by antiquarianism, and by conventionalism’.<sup>1</sup> Criticizing those who regarded the constitution as an object of veneration, he maintained that the scholar’s duty must not be to eulogise but merely to analyse and expound.<sup>2</sup>

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<sup>1</sup> A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London: Macmillan 1885), 7. For subsequent

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<sup>1</sup> A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London: Macmillan 1885), 7. For subsequent references, we use *The Oxford Edition of Dicey*, J.W.F. Allison ed (Oxford: Oxford University Press, 2013), vol.1, 12.

<sup>2</sup> Dicey, *ibid.* 10.

Dicey argued that a scientific explanation could be advanced only by establishing a new and autonomous field, that of ‘the law of the constitution’. Noting that Blackstone in his influential *Commentaries on the Laws of England* of 1765 nowhere uses the term ‘constitutional law’,<sup>3</sup> Dicey claimed to have discovered a new branch of legal knowledge. Deploying a legal positivist method, he defined this new subject as one concerned to analyse ‘all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state’.<sup>4</sup>

Having re-orientated the object of study towards the rule order of the British state, Dicey confidently asserted that the basic rule of the constitution is expressed in ‘the doctrine of parliamentary sovereignty’. This is the rule that the Crown-in-Parliament ‘has, under the English constitution, the right to make or unmake any law whatsoever; and, further, that no person or body is recognised ... as having the right to override or set aside the legislation of Parliament’.<sup>5</sup> This foundational doctrine was presented as an objective and technical rule about the relative authority of sources of law.<sup>6</sup>

Dicey’s great achievement is to have been the first to apply a rigorous juristic method to the study of the British constitution. This provided subsequent generations of lawyers with a clear and relatively simple framework of analysis. But that is not all: his discovery of the ‘law of the constitution’ also caused subsequent generations of lawyers, despite continuing to pay lip service to the evolutionary character of the British constitution,<sup>7</sup> to regard the underlying basic law as of timeless authority.<sup>8</sup> Notwithstanding developments since the late-nineteenth century which have transformed the character of modern government, lawyers continued to uphold his account of the basic rule.

Continuing adherence to Dicey’s account, we argue, is now creating a ‘hopeless confusion both of language and of thought’ which flows from a failure to distinguish between the particularity of Dicey’s legal doctrine and the general concept of sovereignty. And the failure to recognise that his legal doctrine is inextricably tied to a particular political belief about authority is causing constitutional lawyers to become ‘perplexed by unreality’.<sup>9</sup>

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<sup>3</sup> Dicey, *ibid.* 11: A student ‘will discover that the very term “constitutional law”, which is not (unless my memory deceives me) ever employed by Blackstone, is of comparatively modern origin’.

<sup>4</sup> Dicey, *ibid.* 20.

<sup>5</sup> Dicey, *ibid.* 27.

<sup>6</sup> Dicey, *ibid.* 27-49, Lecture II: ‘The Sovereignty of Parliament’.

<sup>7</sup> As did Dicey himself. See *ibid.* 10: ‘The present generation must of necessity look upon the constitution in a spirit different from the sentiment of either 1791 or of 1818’. The dates refer to the publication of works he cited by Burke and Hallam.

<sup>8</sup> See, eg, Nevil Johnson, ‘Dicey and his Influence on Public Law’ [1985] *Public Law* 717 at 719: ‘Dicey’s elegant simplification ... carried the risk of tempting future generations to treat its terms as holy writ’. Cited by Allison in Dicey, above n 1, at xiv.

<sup>9</sup> The quoted phrase are those that Dicey applied to Blackstone’s account: Dicey, *ibid.* 12.

We aim to substantiate these claims by differentiating Dicey's legal doctrine from the general concept of sovereignty (sections III and IV) and then examining the contemporary consequences of this conflation (section V). But the political basis of the legal doctrine must first be explained (section II). Our key point is that no sooner had Dicey finished criticizing those who eulogise rather than analyse than he revealed that his fundamental legal doctrine rested its authority on a particular political belief, one which he treated as an article of faith. He hinted at this when noting that 'the omnipotence or undisputed supremacy throughout the whole country of the central government' is a feature that has 'at all times since the Norman Conquest characterised the political institutions of England'.<sup>10</sup> But it came more clearly into view when, within a year of publishing *The Law of the Constitution*, he published the first of his three books opposing home rule in Ireland. In this work Dicey invoked sovereignty not as a legal doctrine but explicitly as a political precept. Here he argued that home rule, which evidently does not undermine the legal doctrine of parliamentary sovereignty, is nevertheless 'a plan for *revolutionising* the constitution of the United Kingdom'.<sup>11</sup> This type of claim can only stem from a political belief of the necessity of maintaining untrammelled authority at the centre. 'Each successive generation from the reign of Edward I onwards', he later explained, 'has laboured to produce that *complete political unity* which is represented by the absolute sovereignty of the Parliament now sitting at Westminster'. This 'political unity' expresses what he called the 'instinctive *policy* of English constitutionalists'. Sovereignty is here not being expressed as a formal doctrine; it is a political conviction about the need for an unrestricted central power.

Notwithstanding his claim to be dispassionately presenting the law of the constitution, Dicey was making a politico-legal argument about sovereignty. His formal legal doctrine is inextricably tied to a substantive political conviction. And it is this politico-legal conception, we argue, that rapidly acquires the status of an article of faith among the British governing class.<sup>12</sup> In blending the political and legal aspects of sovereignty in such an inchoate manner, Dicey presented as 'the very key-stone of the law of the constitution'<sup>13</sup> a thoroughly ambiguous conception of sovereignty. Subsequent changes in the conditions of governing might cause us to question those political assumptions and in turn to qualify the meaning and status of the legal doctrine. But this has not happened; Dicey's unacknowledged and highly particular conception of sovereignty is now preventing the British from thinking creatively about constitutional matters.

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<sup>10</sup> Dicey, *ibid.* 95.

<sup>11</sup> A.V. Dicey, *England's Case Against Home Rule* (London: John Murray, 1886), 17 (emphasis supplied). See also n 54 below.

<sup>12</sup> On its reception, see Allison in Dicey, above n **Error! Bookmark not defined.**, xii-xvi.

<sup>13</sup> Dicey, above n 1, 41.

## II. The Evolution of the British Constitution

The British are virtually unique in having retained a traditional constitution. This inheritance derives from the failure of the revolutionary upheavals of the 1640s to institute a robust system of republican government. Consequently, after the restoration of the monarchy in 1660, a regime of aristocratic rule was established and that regime was then consolidated after 1689, extended fully to Scotland after 1707, and entrenched after 1714. These developments ensured that the conflicts between the Crown and Parliament which had dogged seventeenth century constitutional struggles could be accommodated in the eighteenth century by establishing a system of government founded on the formally unlimited legislative power of a composite entity, the Crown-in-Council-in-Parliament. This settlement was brought about by reforms that led to the authority of His Majesty's Ministry being dependent on parliamentary support. Earlier conflicts between the Crown and Parliament were alleviated by transforming Parliament from its traditional role of acting as a check on government into one in which, operating in conjunction with the Ministry, it became the key instrument of British government.

In 1765, Blackstone was able to explain that the basic principle underpinning this constitutional arrangement was that of parliamentary omni-competence.<sup>14</sup> This principle had the singular merit of presenting an intelligible, condensed and formal norm of absolute centralized authority which at the same time permitted considerable flexibility to accommodate changing power relations between the various partners in authority. The formal principle established a clear rule of relative law-making authority. This remains the basis of the modern arrangement.<sup>15</sup> But this formal principle otherwise left the basic constitutional questions unexamined. The British constitution continued to be understood as an evolving arrangement expressing the relative claims of the prerogatives of the Crown, the privileges of Parliament, and the liberties of the subject. Although eventually adopting 'parliamentary sovereignty' as the basic 'doctrine' of the 'law of the constitution', the British governing class had always recognized that the practical task of governing could not be resolved by appeal to abstract principle. Constitutional practice dictated that this formal right be tempered according to political conditions.

The character of modern British government was thus shaped by the conjunction of absolute formal right and continuously evolving practice. The principle that there must reside a

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<sup>14</sup> William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1776), vol.1, bk.1, ch.2.

<sup>15</sup> See, eg, *Duport Steels v Sirs* [1980] 1 WLR 142, at 157 (per Lord Diplock): 'It cannot be too strongly emphasized that the British constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interprets them.' The significance of the doctrine was reiterated by Lord Mustill in *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513, 567 D-F and again in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, per Lord Carnwath, paras 252-255.

central authority possessing the highest power of command was not to be confused with the claim that Britain should be *governed* by the central authority. That this distinction between sovereignty and government was well understood is reflected in the tradition of English local government, according to which the centre left most matters of internal government in the hands of local political elites.<sup>16</sup> Similarly, when the Treaty of Union between England and Scotland of 1707 established a common British legislative and executive authority, Scottish authorities were left with considerable autonomy with respect to domestic matters, especially those of religion, law, and education.<sup>17</sup> And after the Treaty of Union with Ireland of 1800 the formal right of the Westminster Parliament to legislate was extended throughout the United Kingdom of Great Britain and Ireland, but actual governmental practice revealed a more complex and asymmetric set of governing arrangements than the hegemony of parliamentary sovereignty might have suggested.<sup>18</sup>

The necessity of reconciling the simplicity of formal legislative supremacy and the complexity of governing practice was thrown into relief with respect to imperial government of the colonies. The practical limitations on the centre's powers to rule, attributable to the sheer physical distances involved and the means of communication available, had ensured that indigenous self-governing practices were able to evolve in the settled colonies.<sup>19</sup> Consequently, when the Seven Years' War ended in 1763 and the Westminster Parliament broke with these customary arrangements and asserted its formal right to legislate for the colonies, it resulted in constitutional conflict, a war of independence, and eventually to the loss of Britain's American colonies.

This episode illustrates the limitations of sovereigntist thinking.<sup>20</sup> The Westminster Parliament undoubtedly had the legal authority to pass the Declaratory Act of 1766 asserting its right to legislate for the colonies, but this could not alter the fact that many believed that

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<sup>16</sup> Émile Boutmy, *The English Constitution* (London: Macmillan, 1891), ch 4; Albert B. White, *Self-government at the King's Command: A Study in the Beginnings of English Democracy* (Minneapolis: University of Minnesota Press, 1933); Martin Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (Oxford: Clarendon Press, 1996), ch1.

<sup>17</sup> A.V. Dicey and R.S. Rait, *Thoughts on the Union between England & Scotland* (London: Macmillan, 1920), 328-332.

<sup>18</sup> Alvin Jackson, *The Two Unions: Ireland, Scotland and the Survival of the United Kingdom, 1707-2007* (Oxford: Oxford University Press, 2012), 69-71, 188-193.

<sup>19</sup> Andrew C. McLaughlin, 'The Background of American Federalism' (1918) 12 *American Political Science Review* 215-240, at 215: 'the essential qualities of American federal organization were largely the product of the old British empire as it existed before 1764.'

<sup>20</sup> See Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Belknap Press, 1967), 198-229; Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788* (New York: Norton, 1986); John V. Jerierski, 'Parliament or People: James Wilson and Blackstone on the Nature and Location of Sovereignty' (1971) 32 *J. of the History of Ideas* 95-106.

Parliament was acting contrary to the unwritten imperial constitution that had been evolving.<sup>21</sup> The issue, explained Edmund Burke, is ‘not whether you have a right to render your people miserable, but whether it is not in your interest to make them happy’; it ‘is not what a lawyer tells me I *may* do, but what humanity, reason, and justice tell me I ought to do’.<sup>22</sup> The American episode illustrates the point that constitutional understanding in the British tradition requires reconciliation of sovereign right and governmental practice. It suggests that a more comprehensive conception of sovereignty should entail not only recognition of the formal legal rule but also acknowledgement of the political legitimacy that underpins it.<sup>23</sup>

This need for some such reconciliation was explicitly acknowledged at home, where it was manifest in the growing importance of ‘public opinion’.<sup>24</sup> Rulers are generally able to realise their objectives, David Hume noted in 1742, only with the consent of the governed.<sup>25</sup> Constitutional government is realised not through the assertion of an absolute right but through the judicious management of public opinion. During the eighteenth century, the British governing class came to recognise that the emerging party system was a powerful tool of public opinion management. The division between the Whigs and the Tories which came about during that period was designed mainly for the purpose of effectively managing the arrangements of parliamentary government. The emerging party system had the potential to reduce the Crown to little more than a cipher; this was because it not only ensured the establishment of a disciplined Ministry but also, as HM Opposition, an alternative government in waiting. It was through the formation of this party system that the main practices of government, what Dicey was later to

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<sup>21</sup> The lessons of the consensual union between England and Scotland were not learned in relation to the America. Notably, before the 1776 revolution, Scotland was the ‘constitutional ideal’ for the American colonies: C.H. McIlwain, *The American Revolution: A Constitutional Interpretation* (New York: Macmillan, 1924), 80.

<sup>22</sup> Edmund Burke, ‘Speech on Conciliation with America, 22 March 1775’ in *The Writings and Speeches of Edmund Burke, vol. III: Party, Parliament, and the American War 1774-1780* W.M. Elofson and J.A. Woods ed. (Oxford: Clarendon Press, 1996), 106-169, at 135.

<sup>23</sup> It might be noted that this was implicitly accepted by Dicey. See, eg, his ‘Introduction to 8<sup>th</sup> Edition’, above n 1, at 426: ‘Parliament ... had long before 1884 practically admitted the truth of the doctrine in vain pressed on his contemporaries by Burke, when insisting on the folly of the attempt made by the Parliament of England to exert as much absolute power in Massachusetts as in Middlesex, that a real limit to the exercise of sovereignty is imposed not by the laws of man but by the nature of things, and that it was vain for a parliamentary or any other sovereign to try and exert equal power throughout the whole of an immense Empire’. For an account of how Dicey’s formalism was modified to accommodate the political realities in the United Kingdom’s Dominions as they moved to independence, see P.C. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 2005); Mark D. Walters, ‘The British Legal Tradition in Canadian Constitutional Law’ in N. Des Rosiers, P. Macklem & P. Oliver (eds) *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017), ch 3.

<sup>24</sup> A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London: Macmillan, 1905); A. Lawrence Lowell, *Public Opinion and Popular Government* (New York: Longmans, Green & Co., 1913); Walter Lippmann, *Public Opinion* (New York: Macmillan, 1934).

<sup>25</sup> David Hume, ‘Of the First Principles of Government’ [1742] in *Essays Moral, Political and Literary* (Indianapolis: Liberty Fund, 1987), I.iv.

label ‘constitutional conventions’, were worked out.<sup>26</sup> Such arrangements could only have been formed in a parliamentary system which remained under the control of the landed class; only in this atmosphere of what Bagehot called ‘club government’<sup>27</sup> could these conventional practices have been stabilized and institutionalized.

During the nineteenth-century, the great challenge faced by the ruling class was to manage the coming of democracy.<sup>28</sup> Could a gradual extension of the franchise be achieved while retaining faith in the ability of a parliamentary system moulded in an aristocratic era to represent the opinion of the nation? The main threat to that ambition was that the ‘common people’ would take up the claim made by the American colonists and push for more basic reforms founded on the conviction that sovereign authority ultimately rests not in the Parliament but in ‘the people’. By the end of the century, those fears had more or less dissipated. ‘Fifty years of reform have done their work’, declared Dicey in 1886, ‘and have removed the discontents, the divisions, the disaffection, and the conspiracies which marked the first quarter or first half of this century’.<sup>29</sup> Consequently, he continued, ‘there exists in Europe no country so completely at unity with itself as Great Britain’.<sup>30</sup> The governing class’s success in managing the transition to democracy was subsequently signalled by the fact that after the First World War the Labour Party, formed in 1900 to promote the representation in Parliament of the industrial working class, had emerged to replace the Liberals in the two-party parliamentary system.

The significance of this transition is of the first importance; it enabled Parliament to maintain its status as the voice of the political nation assembled.<sup>31</sup> Dicey’s doctrine of parliamentary sovereignty was purely formal and he appreciated ‘that whatever lawyers may say the sovereign power of Parliament is not unlimited, and that King, Lords and Commons united do not possess ... the utmost authority ascribable to any human institution’.<sup>32</sup> He accepted that,

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<sup>26</sup> Dicey, *Law of the Constitution*, above n 1, Pt III, ‘The Connection between the Law of the Constitution and the Conventions of the Constitution’. See further, Geoffrey Marshall, *Constitutional Conventions: the rules and forms of political accountability* (Oxford: Clarendon Press, 1984), 48-53.

<sup>27</sup> Walter Bagehot, *The English Constitution* [1867] R.H.S. Crossman ed. (London: Fontana, 1963), 156: ‘Nobody will understand Parliament government who fancies it an easy thing, a natural thing, a thing not needing explanation. You have not a perception of the first elements in this matter till you know that government by a *club* is a standing wonder.’

<sup>28</sup> See, eg, H.S. Maine, *Popular Government* (London: Murray, 1885), 97-98; Bagehot, *ibid.* 267-310 (‘Introduction to the Second Edition, 1872’).

<sup>29</sup> Dicey, *England’s Case*, above n 11, 151.

<sup>30</sup> *Ibid.*

<sup>31</sup> Ralph Miliband, *Parliamentary Socialism: A Study in the Politics of Labour* (London: Merlin Press, 2<sup>nd</sup> edn. 1972), 13: ‘Of political parties claiming socialism to be their aim, the Labour Party has always been one of the most dogmatic – not about socialism, but about the parliamentary system. Empirical and flexible about all else, its leaders have always made devotion to that system their fixed point of reference and the conditioning factor of their political behaviour... [T]he leaders of the Labour Party have always rejected any kind of political action (such as industrial action for political purposes) which fell, or which appeared to them to fall, outside the framework and conventions of the parliamentary system.’

<sup>32</sup> Dicey, *Law of the Constitution*, above n 1, 42.

in reality, there exist political limitations both external (deriving from the ‘possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws’) and internal (deriving from the composition of the sovereign power) on the exercise of that formal power.<sup>33</sup> But elsewhere Dicey failed to maintain such a strict analytical distinction. In particular, the distinction he establishes between the legal doctrine and the political dimension of sovereignty all but collapses once he confronted the greatest constitutional challenge of his day.

It is in his response to Ireland’s home rule claims that the elision between legal doctrine and political conviction is most prominently exhibited. In the course of advocating the Unionist case, Dicey explicitly blends these dimensions. ‘Under all the formality, the antiquarianism, the shams of the British constitution’, he asserts, ‘there lies an element of power which has been the true source of its life and growth’.<sup>34</sup> The ‘secret source’ of this strength ‘is the absolute omnipotence, the sovereignty, of Parliament’.<sup>35</sup> Situated within this source, he explains, we find ‘constitutional theory and constitutional practice ... for once at one’.<sup>36</sup> Dicey here claims that sovereignty is ‘at bottom, nothing else but unlimited power’ and the ‘pliability’ contained in the English formulation is ‘essential to the maintenance by England of the British Empire’.<sup>37</sup> Consequently, the threat presented by home rule is not that it undermines the legal doctrine; the threat is that it would ‘dislocate every English constitutional arrangement’. That is, it would ‘weaken the power of Great Britain’ and ‘would assuredly weaken the Government quite as much as the Legislature’.<sup>38</sup> That this is the assertion of the political conviction that unfettered power must for reasons of state be maintained by the central authority is reinforced by Dicey’s claim that ‘Home Rule in Ireland is more dangerous to England than Irish independence’.<sup>39</sup>

Our contention, then, is that, though unacknowledged, the doctrine of parliamentary sovereignty that is widely adopted in the twentieth century is not simply a formal legal rule expressing the primacy of legislation; it also acquires the status of a shibboleth, a widely held politico-cultural belief about the necessity of maintaining - untrammelled and inter-twined - political power and legal authority at the centre.<sup>40</sup> Although leading Victorian commentators such

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<sup>33</sup> Ibid. 42-7.

<sup>34</sup> Dicey, *England’s Case*, above n 11, 168.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid. 168-9.

<sup>37</sup> Ibid. 169-70.

<sup>38</sup> Ibid. 173.

<sup>39</sup> Ibid. 6.

<sup>40</sup> It is accepted that this claim cannot be demonstrated beyond doubt without detailed examination of practice and this type of study cannot be undertaken here. Consider only this: the two most important constitutional questions that the UK has faced over the last 50 years concern relations between the several nations of the UK and the UK’s relationship with what is now the European Union. In each of these cases, both the political debate as well as the legal analysis invariably has come to focus on the claim that sovereignty, which is taken to mean parliamentary sovereignty, must always remain unencumbered. The formal legal doctrine is intertwined with the evident political merits of a unitary system in establishing the parameters of constitutional debate. See *Report of the Royal Commission on*

as Dicey and Bagehot recognized that the singular merit of the British constitution 'is that it is no constitution at all'<sup>41</sup> and that 'the object is in constant change',<sup>42</sup> by the twentieth century a myth had grown up around the idea that parliamentary sovereignty in its general politico-legal meaning is the constitution's defining characteristic. The formal legal positivist conception had absorbed the political conviction in a manner that masked the failure to develop a more comprehensive explanation of sovereignty that was able adequately to accommodate its legal and political dimensions.

### III The Peculiarities of Parliamentary Sovereignty

In *The Law of the Constitution* Dicey states that 'the sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions' and 'that its existence is a legal fact'.<sup>43</sup> But in his Introduction to the eighth edition in 1915 he moved beyond legal formalities and indicated that the power located in Westminster is an undeniable political fact. 'No constitutional arrangements or fictions', he argued, 'could get rid of the fact that England would, after as before the establishment of Home Rule all round, continue [to be], in virtue of her resources and her population, the predominant partner throughout the United Kingdom, and the partner on whom sovereignty had been conferred'.<sup>44</sup> This sovereign power, he emphasized, is conferred 'not by the language of any statute or other document, but by the nature of things'.<sup>45</sup> The Westminster Parliament is sovereign, he was indicating, not because of its status in a hierarchically ordered rule system; it is sovereign by virtue of its position in a power system. That is, the law of the constitution relies for its authority on power and material force; the validity and efficacy of legal order rests on an underlying constituent power.

Dicey here presents an explicitly political account of sovereignty. But however it is conceived, sovereignty is not in any strict sense a fact: it is a concept. Sovereignty expresses the quality of a particular mode of political association. The concept first came into common usage

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*the Constitution* 1969-1973, Cmnd 5460 (London: HMSO, 1973), vol.1, para 539: 'we have concluded that if government in the United Kingdom is to meet the present-day needs of the people it is necessary for the undivided sovereignty of Parliament to be maintained. We believe that only within the general ambit of one supreme elected authority is it likely that there will emerge the degree of unity, co-operation and flexibility which common sense suggests is desirable.' And: 'the UK Parliament is, and will remain, sovereign in all matters ... Westminster will be choosing to exercise that sovereignty in devolving legislative responsibilities to a Scottish Parliament without in any way diminishing its own powers. The Government recognised that no UK Parliament can bind its successors'. 'Scotland's Parliament' (Cm 3658, 1997), para. 4.2.

<sup>41</sup> Ibid.169.

<sup>42</sup> Bagehot, above n 27, 267.

<sup>43</sup> Dicey, above n 1, 27.

<sup>44</sup> Dicey, above n 1, 473-4.

<sup>45</sup> Ibid. 474.

in the early-modern period when the most pressing political issue was to identify the locus of government authority. It is for this reason that sovereignty is often associated with the belief that there must exist some ultimate power that protects the political order.<sup>46</sup> That idea was most clearly expressed in the claim that a ‘sovereign’ ruler meant a ruler who was not legally obligated to any other power, such as the Emperor or the Papacy. The ruler’s ‘sovereignty’ signified independence from any higher authority. Sovereign rulers exercised absolute formal legal authority over their subjects.

This feature of absolute formal legal authority is a necessary but not sufficient condition of sovereignty, which is as much about autonomy as about power. The idea of sovereignty emerges only once it is acknowledged that governing is a complex undertaking that is qualitatively different from personal rule. That is, the sovereign ruler occupies a representative office. And once it was recognized that the office of the king represents the ‘community of the realm’, the way was open for the office of the ruler (the Crown) to be institutionalized. This was accomplished through a process of functional differentiation, during which it was recognized that the ‘sovereign’ tasks of governing could be exercised not by the person of the king but only through the king in his public capacity. These sovereign powers could only be exercised through certain institutional forms.<sup>47</sup>

Institutionalization of the office of the king runs through the contours of English constitutional development. The tasks of governing thus came to be exercised variously through the king-in-council, the king-in-council-in-parliament, the king’s ministers, and the king’s courts. Sovereignty expressed the absolute legal authority of the ruling power, but this meant the ruling power in its corporate capacity. The king as such never possessed sovereignty: only after the establishment of relatively stable institutional arrangements through which the powers of the Crown were to be exercised could lawyers talk about the sovereign character of that office.

The modern doctrine, that acts of the Crown-in-Parliament are the highest expression of law, was achieved in stages. The English Reformation, cutting off the secular power of the Church in Rome, marked one important milestone, not least because the king in this exercise of statecraft felt obliged to make use of the Parliament.<sup>48</sup> But it was during the seventeenth-century conflicts that the critical ‘struggle for sovereignty’ occurred, the outcome of which then shaped

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<sup>46</sup> See, eg, Bagehot, above n 27, 214: ‘Hobbes told us long ago, and everybody now understands, that there must be a supreme authority, a conclusive power, in every State on every point somewhere’.

<sup>47</sup> See Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), ch.5. The development of the concept is examined in more detail in Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), esp. 64-75, 117-119, 184-186.

<sup>48</sup> See, eg, *Ferrers’ case* (1543); excerpted in G.R. Elton (ed.), *The Tudor Constitution: Documents and Commentary* (Cambridge: Cambridge University Press, 1960), 267-70, at 270 (per Henry VIII): ‘We at no time stand so highly in our estate royal as in the time of Parliament; wherein we as head and you as members are conjoined and knit together into one body politic’.

the modern legal doctrine as Parliament and Government were fused in the concept of the Crown-in-Parliament as a monolithic sovereign authority.<sup>49</sup> Only in the late-eighteenth century was the century's leading jurist able to express the principle that the Crown-in-Parliament has 'sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding the laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal'.<sup>50</sup> And only in the late-nineteenth century was that century's leading jurist to proclaim the 'doctrine' as the foundation of the 'law of the constitution'.<sup>51</sup>

Developments in the twentieth century throw into relief the peculiar character of the doctrine. Its distinctive feature was that, notwithstanding the eventual establishment of a regime of representative democracy, its monarchical form was retained. That is, adjustment to these changing political realities was accomplished not by foundational re-constitution but only by a re-arrangement in the status of the partners in the corporate entity of the Crown-in-Parliament. 'As to the mode in which King, Lords, and Commons were to divide the sovereign power between themselves', noted Dicey, 'there have been at different times disputes leading to civil war; but that Parliament – that is, the Crown, the Peers, and the Commons acting together – is absolutely supreme, has never been doubted'.<sup>52</sup> That remained the case throughout the twentieth century. The loss of its veto power in the eighteenth century had meant that the monarch's role became largely ceremonial and the decline of hereditary authority in the nineteenth century led gradually to a diminution in the role of the House of Lords and the retention in the twentieth century only of a power to revise and delay. But despite these changes, the doctrine of the ultimate authority of the Crown-in-Parliament was not simply retained but strengthened. The modern period marks the apotheosis of the doctrine. 'In England', noted Dicey in 1915, 'democratic government has already given votes, if not precisely supreme power, to citizens'.<sup>53</sup> It has not given supreme power to citizens because that supreme power remains encased in a monarchical form.<sup>54</sup>

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<sup>49</sup> Joyce L. Malcolm, *The Struggle for Sovereignty: Seventeenth Century English Political Tracts* (Indianapolis: Liberty Fund 1999), 2 vols.

<sup>50</sup> Blackstone, above n.14, 156.

<sup>51</sup> Cf. Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999), a work that seeks to demonstrate 'that the doctrine is considerably older than [the mid-nineteenth century]: it has been accepted by a large majority of English lawyers since the 1640s' (at 7). Goldsworthy's historical study provides a valuable corrective to the recent claims of 'common law constitutionalism' (below at XX: [text at nn104, 105]), but his claim in reality concerns the concrete notion of parliamentary supremacy rather than the modern abstract idea of sovereignty. It is, in the words of one reviewer of the work, 'a fine description that begs almost every conceivable theoretical question about sovereignty': Fred Nash, [2000] 48 *Political Studies* 1052.

<sup>52</sup> Dicey, *England's Case*, above n 11, 168.

<sup>53</sup> Dicey, Intro to 8<sup>th</sup> edn., above n 1, 453.

<sup>54</sup> See Martin Loughlin, 'The State, the Crown and the Law' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999), 33-76.

The singularity of this process of modernisation is highlighted through comparison. In European legal thought the continuing evolution of governing arrangements - through institutionalization, internal differentiation and corporatization of the office of the sovereign – required a distinction to be drawn between the sovereign powers of governing and the concept of sovereignty itself. Specifically, the sovereign powers of rule could be divided, and indeed must be so divided, but sovereignty, the absolute authority of the ruling power, could not. This distinction became of intense practical significance as a consequence of the overthrow of feudal orders during modern revolutionary upheavals. Once the idea gained a foothold that sovereign right was not bestowed from ‘above’ (by God) but was conferred from ‘below’ (by ‘the people’), the claim of ‘popular sovereignty’ could be asserted. This may have been an ambiguous, if not paradoxical, idea, not least because the people exist *qua* people - that is, as the bearers of sovereignty - only once governing arrangements have been established. But it was only through this shift in the basis of symbolic representation that modern constitutional reconstruction could be effected.

The significance of this development is that in the modern world sovereignty is a concept expressing the absolute character of the power and authority created through an exercise of constitutional imagination. Sovereignty vests neither in the ruler (such as the king), nor in the corporate office of government (such as the Crown-in-Parliament), nor in the people (as claims of popular sovereignty suggest). As an expression of the absolute authority of an imaginative engagement of self-government of a political nation, sovereignty is exhibited in the process of settling institutional arrangements through an exercise of collective political will.

The modern concept of sovereignty expresses a set of relations. These relations have intrinsically political and legal dimensions. Sovereignty is the regulatory idea that enables us first to conceive of an autonomous political domain and then to be able to express that in legal terms. The political dimension is power-generational and the legal is power-distributive. The crucial point is that the doctrine of parliamentary sovereignty is purely legal: it expresses the principle that there is no legal limitation on the jurisdictional competence of Parliament and that an Act of the Crown-in-Parliament is the highest expression of (positive) law. But this legal doctrine rests on the political – or power-generational – dimension. This latter dimension connotes power that is created as a result of the symbolic drawing together of a multitude into a ‘people’ or a ‘nation’. It is this power that must be harnessed through distinctive institutional forms, the most basic of which is the state, a complex juristic entity comprising three essential aspects: territory, people, and ruling authority.<sup>55</sup>

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<sup>55</sup> See further Loughlin, *Foundations*, above n 47, ch 7.

Sovereignty, then, is an essential characteristic of the nation-state. Every sovereign state possesses supreme, unlimited and indivisible authority. There can be no limitation on a state's authority to rule by means of law. But almost all regimes have now adopted modern constitutions that allocate the 'sovereign' tasks of governing among particular institutions, such as the legislature, executive and judiciary. And since the jurisdictional competence of each of these governmental institutions is limited by its constitution, no institution possesses an ultimate authority to rule. Far from amounting to a limitation on sovereignty, constitutional arrangements that divide governmental powers between legislative, executive and judicial authorities or which divide powers territorially in federal schemes involve an explication of the sovereign authority of 'the people' as the bearer of 'constituent power'.

Owing to the singular character of British governmental development, British lawyers often display symptoms of confusion about sovereignty. Having lived so long with the authority of the legal doctrine of parliamentary sovereignty, they wrongly assume it is definitive of the concept. They fail to appreciate that a conflation has taken place because Parliament is at once conceived to be a legislature and a constituent assembly,<sup>56</sup> and that 'if the principle of the supremacy of Parliament is translated into continental terminology, it amounts to what is otherwise called the "sovereignty of the state"'.<sup>57</sup> A specific legal doctrine concerning the status of the legislation enacted in the Westminster Parliament is confused with a political-constitutional principle whereby the relative authority of governmental institutions in the constitution of the state is filtered through the supremacy of the state itself as ultimate source of legitimacy and authority.<sup>58</sup> The former expresses a legal, power-distributive principle while the latter is a consequence of a political, power-generative principle. And when the conditions upon which the power-generative principle works alter, so too must the meaning and status of the legal doctrine.

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<sup>56</sup> Alexis de Tocqueville, *Democracy in America* [1835] H. Reeve trans., D. J. Boorstin intro. (New York: Vintage Books, 1990), vol.1, 100. The elision of the two dimensions caused theoretical problems for the United Kingdom's Dominions in the late nineteenth century, insofar as a narrative was needed to justify the role of the UK Parliament – as an external legislature - in amending Dominion constitutions. To overcome this legitimacy gap, constitutional theorists referred overtly to Westminster as 'a constitutional assembly' and 'the constitution-maker for the colonies': see W.H.P. Clement, *The Law of the Canadian Constitution* (Toronto: Carswell, 1892) (3rd ed., 1916), 29 and 32, cited by P.C. Oliver, 'Parliamentary Sovereignty, Federalism and the Commonwealth' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Oxford: Hart Publishing, 2018), 49-72.

<sup>57</sup> Giovanni Sartori, 'Constitutionalism: a preliminary discussion' (1962) 56 *American Political Science Review* 853-64, at 854.

<sup>58</sup> See further Loughlin, *Idea of Public Law*, above n 47, 88-91.

## IV Questioning Diceyan Sovereignty

The error British lawyers commonly make is to fail to draw a distinction between sovereignty and government. Sovereignty is a principle of unity: it expresses illimitability, perpetuity, and indivisibility of the ruling authority of a state. Any limit on sovereignty eradicates it, any division of sovereignty destroys it. But sovereignty must not be confused with particular institutional forms of government. There is, noted Bodin, a ‘great difference between the state and the government of the state’,<sup>59</sup> and unless it is maintained we will be thrown ‘headlong into an infinite labyrinth of errors’.<sup>60</sup> This is the source of error of those jurists who conflate the general concept with a particular rule and assume that the doctrine that determines the status of an Act of Parliament is definitive of the concept of sovereignty.

This conflation, mainly attributable to Britain’s unusual constitutional history, leads to errors of an elementary nature, such as the idea that the institutional division of governmental competences (in a formal written constitution) or the establishment of federalism is incompatible with, rather than an explication of, sovereignty. It is necessary to undertake a reconceptualization of the concept, and for this we must return to Dicey’s arguments, particularly his sustained opposition to home rule in Ireland.

Notwithstanding the fact that Irish home rule bills included provisions retaining the ‘supreme power and authority of the Parliament of the United Kingdom’ to legislate for Ireland, Dicey maintained that they contemplated the establishment of a federal arrangement in which ‘the supremacy of the Imperial Parliament will virtually and in truth ... be destroyed’.<sup>61</sup> His argument was that Parliament loses sovereignty because it relinquishes the right to govern, a power that in a strict sense is not vested in Parliament. He argues, further, that although Parliament retains the right to abolish the home rule scheme, this right has a different source.<sup>62</sup> Dicey’s reasoning on this point is revealing. The power to remove these home rule provisions, he maintains, is not strictly given by Act of Parliament: ‘It is given to Great Britain, not by

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<sup>59</sup> Jean Bodin, *The Six Bookes of a Commonweale* [1576] R. Knolles trans. 1606, K.D. McRae ed. (Cambridge, Mass: Harvard University Press, 1962), 199.

<sup>60</sup> Bodin, *ibid.* 249-50; see further Martin Loughlin. ‘Why Sovereignty?’ in R. Rawlings, P. Leyland & A. Young (eds), *Sovereignty and Law: Domestic, Regional & Global Perspectives* (Oxford: Oxford University Press, 2013), 34-49.

<sup>61</sup> A.V. Dicey, *Fool’s Paradise, being a Constitutionalist’s Criticism of the Home Rule Bill of 1912* (London: John Murray, 1913), 63, 66. The term ‘supremacy’ rather than ‘sovereignty’ might seem ambiguous, but it is clear that he uses the terms interchangeably. See, eg, *ibid.* at 69: ‘the sovereignty of the Imperial Parliament will suffer an immense diminution’. In 1882 he wrote that federalism ‘revolutionises the whole constitution of the United Kingdom; by undermining parliamentary *sovereignty*, it deprives English institutions of their elasticity, their strength, and their life’ (emphasis added). A.V. Dicey, ‘Home Rule from an English Point of View,’ *Contemporary Review* (July 1882), 66-86, 84.

<sup>62</sup> A.V. Dicey, *A Leap in the Dark, or Our New Constitution* (London: John Murray, 1893), 31-32. See further, A. Jackson, ‘The Failure of British and Irish Federalism, c.1800-1950’ in Schütze and Tierney, above n.56, 29-47.

enactment but by nature; it arises 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'.<sup>63</sup>

With this admission, the basis of Dicey's political jurisprudence is made explicit: the 'law of the constitution', he is saying, ultimately depends for the source of its authority on material power. This is later reinforced in a remarkably frank statement:

The various forms of the English Constitution have, on the whole, possessed the immense merit of giving at each period of our history political authority into the hands of the class, or classes, who made up the true strength of the nation. Right has in a rough way been combined with might. Wherever this is not the case, and genuine power is not endowed with political authority, there exists a sure cause of revolution; for sooner or later the natural forces of any society must assert their predominance. No institution will stand which does not correspond with the nature of things.<sup>64</sup>

Parliamentary sovereignty may be the fundamental doctrine of the 'law of the constitution', he is saying, but there exists a more basic conception of sovereignty that expresses 'the nature of things'. Dicey here acknowledges the distinction between constituted power and constituent power and asserts the primacy of the latter, a primacy which is not simply a matter of political fact but an inherent feature of the constitutional doctrine of sovereignty which, to be meaningful, must embrace its political and legal dimensions.

Once this is made explicit, his otherwise confused argument against home rule in Ireland is clarified. Since the scheme envisages the retention of Parliamentary sovereignty, home rule is not contrary to the legal doctrine.<sup>65</sup> Dicey's objections are that home rule for Ireland will breed further division within Ireland, will make the strong element in the community subordinate to the weak,<sup>66</sup> and will 'weaken the power of Great Britain'.<sup>67</sup> To Ireland, he says, 'will be given

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<sup>63</sup> Dicey, *A Leap*, *ibid.* 29. The appending note states: 'This is the only sense in which the sovereignty of the Imperial Parliament is inalienable'.

<sup>64</sup> Dicey, *ibid.* 127.

<sup>65</sup> As James Bryce, a parliamentarian and follower of Dicey, put it: 'We shall retain as a matter of pure right the power to legislate for Ireland, for all purposes whatsoever, for the simple reason that we cannot divest ourselves of it.' *Parliamentary Debates* (10 May 1886), quoted in Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth* (Oxford: Clarendon Press, 1957), 65-66. See also Christopher Harvie, 'Ideology and Home Rule: James Bryce, A. V. Dicey and Ireland, 1880-1887' (1976) 91 *English Historical Review* 298-314.

<sup>66</sup> Dicey, *Leap*, above n.62, 128: 'In Ireland Dublin is made supreme over Belfast, the South is made not the equal, but in effect the master of the North; ignorance is given dominion over education, poverty is allowed to dispose of wealth. If Ireland were an independent state, or even a self-governed British colony, things would right themselves. But the politicians who are to rule in Dublin will not depend on their own resources or be checked by a sense of their own feebleness. They will be constitutionally and legally entitled to the support of the British Army; they will constitute the worst form of government of which the world has had experience, a government which relying for its existence on the aid of an external power finds in its very feebleness support for tyranny.'

<sup>67</sup> Dicey, *England's Case*, above n 11, 173.

power without responsibility, to England, responsibility without power'.<sup>68</sup> His argument against home rule is not that of a positivist lawyer advising that it offends a basic rule of constitutional law. It is an explicitly political argument based on a conviction that home rule for Ireland will create conflict in Ireland and weaken Great Britain. It recognises that the status of the legal rule draws its authority from political conditions, that the form of the constituted power derives from the workings of the constituent power, and that the constitutional meaning of sovereignty cannot be derived solely from its legal formulation.

Our objective is not to pass judgement on the soundness of Dicey's argument; it is only to demonstrate that the law of the constitution he expounded drew its authority from contingent political conditions. And it is change in those political conditions, it would appear, that caused him to assert that 'no fundamental change in the constitution' should be made 'which has not received the undoubted assent of the nation'.<sup>69</sup> In relation to Gladstone's 1893 Irish Home Rule Bill, he maintained that although this principle imposes a special obligation on the House of Lords, such a basic proposed change might also require 'a direct appeal to the electors in the nature of a Referendum'.<sup>70</sup> For a jurist who founded his scholarly reputation on the claim that 'the true constitutional law is his only real concern' and that '[h]is proper function is to show what are the legal rules (i.e. the rules recognised by the Courts) which are to be found in the several part of the constitution',<sup>71</sup> this is a remarkable assertion. He blithely concedes as much, stating that:

This course, it may be said, is unconstitutional. This word has no terrors for me; it means no more than unusual, and the institution of a Referendum would simply mean the formal acknowledgement of the doctrine which lies at the basis of English democracy – that a law depends at bottom for its enactment on the assent of the nation as represented by the electors.<sup>72</sup>

Far from adhering to the professor's duty 'to state what are the laws which form part of the constitution, to arrange them in their order, to explain their meaning, and to exhibit where possible their logical connection',<sup>73</sup> Dicey was claiming that his analysis must 'bring into prominence the sovereignty of the nation'.<sup>74</sup> Recognizing the primacy of constituent power, he felt impelled to look beyond the rules of the constitution and 'override the practices to protect the principles of the constitution'.<sup>75</sup> Whatever else this might signify, it marks a reversion to his

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<sup>68</sup> Dicey, *Leap*, above n 62, 130.

<sup>69</sup> Dicey, *Leap*, *ibid.* 198.

<sup>70</sup> Dicey, *Leap*, *ibid.* 198.

<sup>71</sup> Dicey, *Law of the Constitution*, above n 1, 23.

<sup>72</sup> Dicey, *Leap*, above n 62, 199.

<sup>73</sup> Dicey, *Law of the Constitution*, above n 1, 24.

<sup>74</sup> Dicey, *Leap*, above n 62, 199.

<sup>75</sup> Dicey, *Leap*, *ibid.* 199-200.

acceptance of the idea that the British constitution is a continually evolving phenomenon, and that the meaning of the *constitution* is broader than the content of *constitutional law*.

Dicey's renewed focus on constituent power acquired an enhanced significance in 1914 in the context of his opposition to the third home rule bill. Having identified 'the rule of law' as the second basic principle of constitutional law,<sup>76</sup> it is not surprising that he asserts a 'paramount duty to obey the law of the land'.<sup>77</sup> What is surprising, though, is his preparedness to qualify that duty: 'such obedience', he argues, 'can be due only when the law is the clear and undoubted expression of the will of the nation'.<sup>78</sup> His immediate concern was that, having been rejected by the Lords, the Government might use the Parliament Act 1911 to pass the Home Rule Bill into law. Were this to occur without the scheme having first being put to the electorate, Dicey claimed, the Act 'will be in the form of a law, but will lack all constitutional authority, and the duty of Unionists will be to treat it as a measure which lacks the sanction of the nation'.<sup>79</sup>

Inventing the concept of 'the mandate', a rule unknown to British constitutional law, he argued that any attempt 'to pass a Home Rule Act without any appeal to the electorate violates the whole spirit of our existing constitutional government'.<sup>80</sup> Contrary to his warning to lawyers against reliance on 'political understandings' of governmental practices whose 'speculative solution belongs to the province of political theorists',<sup>81</sup> he readily engages in precisely this type of exercise. But he does not stop there. When he asserts that 'there may exist acts of oppression on the part of a democracy ... which justify resistance to law, or, in other words, rebellion',<sup>82</sup> he comes close to advocating violent resistance. When the 'unity of the nation is at stake', he maintains, '[w]e must resist Home Rule as the Northern States of America resisted Secession'.<sup>83</sup> The threat of oppression being envisaged, he concludes, might require invoking an 'old Whig doctrine' which 'might justify what was technically conspiracy or rebellion'.<sup>84</sup> And his only caveat is that 'no loyal citizens should, until all possibility of legal resistance is exhausted, have recourse to the use of arms'.<sup>85</sup>

During the twentieth century, Dicey's doctrine of parliamentary sovereignty acquired the status of orthodoxy. But once the conditions of its formulation are examined it becomes clear that, far from being an objective legal concept, it is a politico-legal construct whose

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<sup>76</sup> Dicey, *Law of the Constitution*, above n 1, 25, 95-119.

<sup>77</sup> Dicey, *Fool's Paradise*, above n 61, 143.

<sup>78</sup> *Ibid.* 143.

<sup>79</sup> *Ibid.* 147.

<sup>80</sup> *Ibid.* 153.

<sup>81</sup> Dicey, *Law of the Constitution*, above n 1, 19.

<sup>82</sup> Dicey, *Fool's Paradise*, above n 61, 143.

<sup>83</sup> *Ibid.* 144.

<sup>84</sup> *Ibid.* 155-6.

<sup>85</sup> *Ibid.* 157. See further Iain McLean, *What's Wrong with the British Constitution?* (Oxford: Oxford University Press, 2010), chs 5-7.

constitutional standing depends on being closely tied to a political belief that sovereign authority must be located in a central institution holding unlimited power. This point has commonly been obscured by the widespread acceptance of Dicey's analytical method, notwithstanding the fact that his political convictions actually worked to erode the authority of that method.<sup>86</sup> Having adopted this politico-legal conception of parliamentary sovereignty as an article of faith, constitutional lawyers acquired a skewed appreciation of the concept, invariably treating the formal doctrine as definitive of sovereignty's meaning. It is only by recognizing that the legal doctrine is the peculiar product of specific historical circumstances and particular political convictions, that the space opens up for examining how continuing evolutionary developments might qualify that doctrine.

## V Reconceptualising Sovereignty

How, it might be asked, are developments in government leading to a reconceptualization of the meaning of sovereignty within British constitutional understanding? Our central argument is that changes over the last fifty years have now rendered incoherent the idea that the Diceyan doctrine provides a cogent account of the exercise of sovereign legal powers within the British state. At the beginning of the twentieth century, Dicey himself had already acknowledged that tensions between the political and legal aspects required some qualification of the legal doctrine. Yet this did not prevent the doctrine's survival, not least because, after the partial resolution of the Irish question in the 1920s, the political basis of the claim to absolute parliamentary sovereignty was not put under strain again for decades. The political authority of the House of Commons, wearing its ill-fitting hat as embodiment of the people's constituent power, went largely unchallenged and only since the 1970s has the ability of the Commons to express the authentic and authoritative will of the British people progressively waned.

This loss of authority is reflected in several structural factors. First, the authority of the Commons has been undermined by a decline in electoral turnout in parliamentary elections,<sup>87</sup> by the erosion of party membership in the past half century,<sup>88</sup> by the decline of trust in

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<sup>86</sup> Note, for example, how little prominence is given to his writing on home rule in the *Oxford Edition of Dicey*, above n 1, a two volume work that, according to the dustjacket blurb, 'provides sources with which to reassess the extraordinary and lasting influence of Dicey's canonical text'.

<sup>87</sup> Turnout in general elections was generally above 75 per cent from 1950-1992 but dropped to 59.4 per cent in 2001. It has remained below 70 per cent since then, although the trend has been improving, peaking at 68.7 per cent in 2017. 'Turnout at Elections', House of Commons Library Paper, CBP 8060, 26 July 2017.

<sup>88</sup> In 1953 the Conservative Party had 2.8 million members and the Labour Party over 1 million. The Conservatives dropped to approximately 150,000 members by the end of 2013 and Labour suffered a similar dip until a sharp increase to over 500,000 ahead of the 2015 leadership election. *Membership of UK Political Parties*, House of Commons Library Briefing Paper No. SN05125, 1 September 2017.

parliamentary representatives revealed in a series of scandals,<sup>89</sup> and by the abdication of its law-making role to the executive through the delegation of open-ended secondary law-making powers.<sup>90</sup> Secondly, there has been a growing disaggregation of the cultural-political notion of the ‘British people’,<sup>91</sup> reflected in demands for the devolution of more and more governing powers to the non-English regions of the state. Thirdly, there has been a growing use of referendums<sup>92</sup> to determine the ‘will of the people’ or ‘peoples’<sup>93</sup> of the UK. And, finally, there has been a dissipation of authority away from central political institutions, manifest in the growing impact of post-parliamentary politics,<sup>94</sup> and the emergence of transnational networks of government on the global stage operating at some distance from traditional parliamentary oversight.<sup>95</sup> The cumulative effect has been to reveal that Parliament – essentially the Commons – is no longer able to present itself as the authoritative voice of the political nation. Once the claim that the Commons embodies ‘the true strength of the nation’ starts to be contested, then the power-generative aspect of sovereignty is modified and it is in ‘the nature of things’ that the legal doctrine must also be qualified.<sup>96</sup>

That these developments have been shielded from legal view owes much to the prevailing influence within British thought of a legal positivist philosophy. Dicey’s legalism had driven a wedge between the historian’s method of ‘ascertaining the steps by which a constitution has grown to be what it is’ and the lawyer’s aim to discern ‘the law as it now stands’, that is, between ‘political understandings’ and ‘rules of law’.<sup>97</sup> When Dicey claimed that ‘understandings are not laws, and that no system of conventionalism will explain the whole nature of constitutional law’,<sup>98</sup> he severed the generative and the distributive, the conditions of ‘political

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<sup>89</sup> Those declaring trust in politicians and government declined from nearly 40 per cent to below 20 per cent between 1974 and 2003: C. Bromley, J. Curtice and B. Seyd, ‘Is Britain Facing a Crisis of Democracy?’ (London: Constitution Unit, July 2004). A more recent survey reports that in 2012 32 per cent said they ‘almost never’ trust governments, up from 11 per cent in 1986: A. Park, C. Bryson, E. Clery, J. Curtice and M. Phillips (eds.), *British Social Attitudes: The 30th Report* (London: National Centre for Social Research, 2013).

<sup>90</sup> House of Lords Select Committee on the Constitution, *Delegated Legislation and Parliament: A Response to the Strathclyde Review*, HL Paper 116, 23 March 2016; id., *The ‘Great Repeal Bill’ and Delegated Powers*, HL Paper 123, 7 March 2017; Lord Judge, ‘Ceding Power to the Executive: The Resurrection of Henry VIII’, Lecture, King’s College, London, 12 April 2016.

<sup>91</sup> ‘Devolution: Identities and Constitutional Preferences across the UK’ in Park et al (eds.), *British Social Attitudes: The 30th Report*, above n.89, 139-173.

<sup>92</sup> Stephen Tierney, ‘Direct Democracy in the United Kingdom: Reflections from the Scottish Independence Referendum’ [2015] *Public Law* 633-651.

<sup>93</sup> While there have only been three UK-wide referendums, there have been three on devolution/independence in Scotland, four on devolution in Wales and two on constitutional status/devolution in Northern Ireland.

<sup>94</sup> Colin Crouch, *Post-Democracy* (Cambridge: Polity, 2004); Peter Mair, *Ruling the Void? The Hollowing Out of Western Democracy* (London: Verso, 2013).

<sup>95</sup> Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010); Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013); Neil Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2015).

<sup>96</sup> The quoted phrases are from Dicey, above n.64.

<sup>97</sup> Dicey, *Law of the Constitution*, above n 1, 15-16, 20.

<sup>98</sup> Dicey, *ibid.* 22.

right' from positive law, the constitution of the state from a formal legal conception of 'the law of the constitution', and the relational aspects of sovereignty from the formal legal doctrine. And although Dicey himself had dimly acknowledged the linkage, the widespread adoption of his legal method – of stating the laws, arranging them in order and demonstrating their logical connection – erected a major barrier to understanding.

This is not to suggest that constitutional lawyers have not examined the deficiencies of the legal doctrine or presented alternative formulations that qualify the Diceyan notion. The point is that, not connecting the legal and the political in an appropriate way, they have been unable to offer cogent reasons for conceptual adjustment.<sup>99</sup> Consider, for example, the efforts of scholars such as W.I. Jennings and R.F.V. Heuston to promote a 'manner and form' thesis, that is, an argument that Parliament is able under certain conditions, to bind itself as to the form of subsequent legislation.<sup>100</sup> Being advocated earlier in the century, and therefore prior to the institutional developments of the last fifty years, their arguments remained speculative and contentious and their cogent arguments ultimately foundered over the failure to provide an appropriate justification for the thesis.

Recognizing that the formal legal doctrine could not be equated to sovereignty,<sup>101</sup> Jennings came closest to identifying the critical issue. But because he adopted a sociological positivist method that rejected any form of metaphysical inquiry, he was unable to rest his argument on the operations of political right. Consequently, although accepting that the legal doctrine derived from a political fact, he also felt obliged to recognize that 'the power of a legislature derives from the law by which it is established'.<sup>102</sup> In most countries that law is expressed in the basic constitutional law and therefore in the institutionalized conditions of political right. Lacking access to this type of argument, Jennings felt obliged to accept that in the United Kingdom, 'which has no written Constitution', that source must derive 'from the accepted law, which is the common law'.<sup>103</sup> And this equation of political right with common law avoids serious examination of the critical question of the constitution of political authority.

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<sup>99</sup> Political actors promoting constitutional reform have also stumbled upon this truth, without offering much reflection upon how the political dimension of sovereignty is to be conceived. Lord Irvine, for example, a key architect of the constitutional changes brought about by the Labour Government after 1997, felt obliged to fall back upon the idea of the Commons as the authentic voice of the political nation: 'the doctrine of parliamentary supremacy, seen from a modern perspective, is properly to be viewed as an expression of the political sovereignty of the people'. Lord Irvine of Lairg, 'Sovereignty in Comparative Perspective: Constitutionalism in Britain and America' (2001) 76 *New York University Law Review* 1-22, 14.

<sup>100</sup> W.I. Jennings, *The Law and the Constitution* [1933] (London: University of London Press, 5<sup>th</sup> edn 1959), ch 4; R.F.V. Heuston, *Essays in Constitutional Law* (London: Stevens, 2<sup>nd</sup> edn., 1964), ch 1.

<sup>101</sup> Jennings, *ibid.* 149: 'legal sovereignty is not sovereignty at all. It is not supreme power. It is a legal concept, a form of expression which lawyers use to express the relations between Parliament and the courts.'

<sup>102</sup> Jennings, *ibid.* 156.

<sup>103</sup> Jennings, *ibid.*

Heuston, by contrast, promoted the manner and form thesis both as a logical requirement and a moral imperative. Rightly recognising that sovereignty is a concept, he maintained that ‘the rules which identify the sovereign and prescribe its composition and functions are logically prior to it’.<sup>104</sup> But again, rather than examining how *les principes du droit politique* might do their work, Heuston simply asserted that the authority of these logically prior rules was founded on a moral principle, the protection against the abuse of absolute sovereign authority.<sup>105</sup>

Today, certain judges and scholars are beginning, for good reasons, to acknowledge the cogency of the manner and form thesis. But following Jennings in assuming that these prior rules are aspects of the common law,<sup>106</sup> and following Heuston in giving a moral interpretation of their basis,<sup>107</sup> they seek to justify the doctrine not as an expression of contemporary conditions of relational sovereignty but as a product of the intrinsic moral reasoning of the common law.

Our argument is that institutional developments over the last half-century have eroded the foundations of Dicey’s doctrine and give force to the manner and form thesis advocated by Jennings and Heuston. But this evolution, we suggest, cannot adequately be explained by the implausible argument that the constitution rests on the bedrock of common law, that the judiciary is the authoritative interpreter of constitutional meaning, and that constitutional arrangements are now to be conceived not as an expression of power but as a complex of moral principles. The better view is that this attrition is an expression of changing political conditions within the British state, that these changes are most coherently explained through an examination of changing assumptions

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<sup>104</sup> Heuston, above n.100, 6.

<sup>105</sup> Heuston, *ibid*, 30-1: ‘[T]he new doctrine of parliamentary sovereignty is more than a striking affirmation of the supremacy of the law in times of stress... The great advantage of the new doctrine is that it enables these tremendous issues to be decided according to the ordinary law in the ordinary courts. By redefining the doctrine of sovereignty from within its own four corners the common law has shown its instinctive wisdom’.

<sup>106</sup> See *R (Jackson) v Attorney-General* [2005] UKHL 56, esp. per Lord Steyn: ‘Parliament acting as ordinarily constituted may functionally redistribute legislative power in different ways. For example, Parliament could for specific purposes provide for a two-thirds majority in the House of Commons and the House of Lords. This would involve a redefinition of Parliament for a specific purpose. Such redefinition could not be disregarded.’ (at [81]). This should be read in the context of Lord Steyn’s broader point: ‘The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.’ (at [102]). See further para.[163] per Baroness Hale. These obiter remarks are still somewhat heretical. For the opposite view of manner and form restrictions see *Thoburn v Sunderland City Council* [2002] 3 WLR 247, per Laws LJ para 59: ‘Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the ECA. It cannot stipulate as to the manner and form of any subsequent legislation.’ This follows the orthodox view as expressed in *Ellen Street Estates v Minister of Health* [1934] 1 KB 590. For a forceful restatement of this position see M Elliott, ‘A “Permanent” Scottish Parliament and the Sovereignty of the UK Parliament: Four Perspectives’, *UK Const. L. Blog*, 28 Nov 2014: available at <https://ukconstitutionallaw.org/>

<sup>107</sup> See, eg, T.R.S. Allan, *The Sovereignty of Law* (Oxford: Oxford University Press, 2013), 135-6, arguing that the manner and form thesis is a product of a legal positivist theory of law and avoids the need for judgment, judgment that depends on ‘the moral values that underpin our constitutional arrangements’ (at 136). Per contra, Michael Gordon, *Parliamentary Sovereignty in the UK Constitution* (Oxford: Hart, 2015), esp. ch.7.

about the source and location of political authority, and that these changing assumptions are most clearly expressed through a relational understanding of sovereignty. That is, as power-generational conditions change they inevitably alter the power-distributive dimension of authority. Continuing institutional differentiation of governmental responsibilities now indicates that Parliament can no longer claim to be the sole repository of sovereign authority and this development is one in which Parliament itself has acquiesced. Manner and form limitations on Parliament's authority are the product of political developments, developments in which central governmental institutions – not least Parliament itself – have played a decisive role.<sup>108</sup>

The argument that Parliament has knowingly disclaimed much of the political dimension of sovereignty by effectively constraining its own legal authority is sustained by a series of older (Dominion/Commonwealth independence) and more recent developments extending from the United Kingdom's accession to, and membership of, the European Union (the likelihood that new constraints will derive from the process of withdrawal from the EU is also discussed below), the development of a 'territorial constitution', the enactment of the Human Rights Act 1998 in a form that imposes structural conditions to ensure that domestic legislation complies with European Convention principles, and the manner in which legislation like the Constitutional Reform Act 2005 bolsters the independence of a judicial branch and legitimates its role in upholding 'the existing constitutional principle of the rule of law'.<sup>109</sup> Most of these developments have been widely discussed and it is not necessary to consider the implications of all of them in detail here. Our purpose is only to highlight certain crucial aspects of the institutional changes they have effected in ways that hollow out the claims of the Diceyan doctrine.

UK membership of the European Union, for example, has undermined Dicey's main tenets that the Crown-in-Parliament has 'the right to make or unmake any law whatsoever' and 'that no person or body is recognised ... as having the right to override or set aside the legislation of Parliament'.<sup>110</sup> Even at the date of accession on 1 January 1973 it was clear that the founding European treaties were a source not only of valid but also of superior law for Member States,

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<sup>108</sup> Gordon, *ibid.*, defends the manner and form account in a series of sound arguments but then gives it a normative reading – an account of the significance of democracy in the British system. Our argument is that there is no need to adopt a normative theory: the modifications are the consequence of the evolving set of political power relations. The Scotland Act 2016 s.1 is a case in point. It inserts a new s.63A into the Scotland Act 1998, which declares that that 'the Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements' and are 'not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum.' The power relations which now characterise devolution make the unilateral abolition of Scottish devolved institutions by Act of Parliament without such a referendum so inconceivable as to render the formal legal power to do so nugatory. A conception of sovereignty which asserts the valence of an unusable power is, in constitutional terms, as Dicey himself eventually recognized, meaningless.

<sup>109</sup> Constitutional Reform Act 2005, s.1.

<sup>110</sup> Dicey, *Law of the Constitution*, above n 1, 27.

which even express provisions within their domestic constitutions could not withstand.<sup>111</sup> The European Communities Act 1972 made the ‘new legal order’ of the EU part of domestic law and, stating that all rights and obligations ‘from time to time arising by or under the Treaties ... are without further enactment to be given legal effect’,<sup>112</sup> accepted that the effect of this legal order would, if the Treaties so ordained, be direct and unmediated by Parliament. The 1972 Act also conceded to the European Court of Justice the entitlement in effect to override, and in so doing require domestic courts to set aside, the legislation of Parliament.<sup>113</sup> That the 1972 Act qualified the Diceyan doctrine<sup>114</sup> was in fact recognised by parliamentarians at the time of its passage,<sup>115</sup> a political self-consciousness that would in due course be given legal recognition by the judiciary.<sup>116</sup>

Such was the pervasive influence of EU primacy upon Parliament, a primacy willingly absorbed within the British system of government, that any assertion of the residual constituent power of the British people was, in this context at least, merely of rhetorical effect. It might be argued that this process is now set to be reversed and that the UK’s withdrawal from the EU will reinstate unequivocally the supremacy of Parliament in relation to EU law. The European Union (Withdrawal) Act 2018 (‘the Withdrawal Act’) repeals the European Communities Act and if it effects a clean break with EU law then a strengthening of Parliament’s competence in relation to the EU follows. But such an outcome bolsters rather than undermines our essential contention that the legal dimension of supremacy is contingent upon politics: Parliament’s power varies depending upon the nature of the UK’s political relationship with the EU legal order.

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<sup>111</sup> *Costa v ENEL* [1964] ECR 585.

<sup>112</sup> European Communities Act 1972, s.2(1).

<sup>113</sup> Prior to accession, the ECJ had already enunciated two fundamental principles, those of the supremacy of European law and that of direct effect (which s.2(1) and (4) of the 1972 Act affirmed). In *Costa v ENEL*, above n.111, the ECJ had declared that membership ‘carries with it a permanent limitation of [a state’s] sovereign rights’ in that a provision of Community law must prevail against any conflicting provision of domestic law and, further, that the rights and obligations created by Community law not only bind states as a matter of international law but are able also to be directly enforced by individuals in domestic courts. The ECJ would be the ultimate arbiter of the effect and enforcement of the supremacy of Community law (as recognised in the 1972 Act, s.3(1)).

<sup>114</sup> Sir William Wade, ‘Sovereignty - Revolution or Evolution?’ (1996) 112 LQR 568, at 571. Barber writes: ‘it is clear that parliamentary sovereignty ‘ceased to be a feature of the British constitution after *Factortame*; nonetheless, its emotional pull is such that many constitutional scholars write as if it continues to exist.’ N.W. Barber, ‘The afterlife of parliamentary sovereignty’, (2011) 9 *International Journal of Constitutional Law* 144–154, 152. See also Barber, *The Constitutional State* (Oxford: Oxford University Press, 2010), 112–116.

<sup>115</sup> Danny Nicol, *EC Membership and the Judicialization of British Politics* (Oxford: Oxford University Press, 2001), 89–102.

<sup>116</sup> When the House of Lords later declined to enforce the Merchant Shipping Act 1988 after the ECJ had ruled that its provisions were contrary to obligations in the Treaty of Rome 1957, authoritative effect was given to this principle of primacy. As Lord Bridge stated in that case: ‘Whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary’. *Factortame (No 2)* [1991] 1 AC 603, 658. As the United Kingdom prepares to withdraw from the European Union, the capacity of the courts to disapply primary legislation has recently, and rather ironically, been restated: *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, causing Alison Young to describe disapplication as now ‘run of the mill’: A. Young, ‘Benkharbouche and the Future of Disapplication’, *UK Const. L. Blog*, 24 Oct. 2017: available at <https://ukconstitutionallaw.org/>.

Furthermore, there are good reasons to question whether the process will in fact be as simple as suggested. The Withdrawal Act provides that law deriving from the EU - 'retained EU law' (ss. 2-4) - will be given domestic effect after Brexit and will in fact benefit from the principle of 'supremacy' over pre-exit UK law (s. 5). That this body of law will authorize the disapplication of legislation enacted prior to exit day sits oddly with the traditional doctrine of implied repeal. Furthermore, a transitional period will apply until December 2021 in which the primacy of EU law seems certain to be maintained within UK law, and while the terms of any new relationship agreement are still to be negotiated with the EU, it is possible that the regulatory frameworks attached to a new relationship agreement will require UK acceptance of, and judicial submission to, the authority of EU jurisdiction in areas subject to such agreement, leading to a more restricted and contingent reassertion of 'sovereignty' than many imagine.

If EU membership has demonstrated how the role of the Commons as the repository of sovereign authority can be diminished by the UK's acceptance of an external source of authority, so too has the re-birth of sub-state nationalism. The status of the northern six counties of Ireland, which had been left unresolved in the 1920s, and demands for devolution in Scotland and Wales, have together become a major governmental preoccupation over the past half century. Membership of the EU initially enabled these developments to be contained and their constitutional significance diluted. The fact, for example, that both the Republic of Ireland and the United Kingdom as Member States had relinquished significant aspects of their sovereign powers to the EU helped resolve the Northern Ireland conflict, with EU law providing a crucial backdrop to the provisions of the Belfast (Good Friday) Agreement<sup>117</sup> and the Northern Ireland Act 1998 through which it was endorsed.<sup>118</sup> It was also uncontroversial that the competence of the new devolved institutions in Northern Ireland, Scotland and Wales should be circumscribed by the supremacy of EU law.<sup>119</sup> Consequently, the EU has, in the words of a recent parliamentary committee report, become 'in effect, part of the glue holding the United Kingdom together since 1997'.<sup>120</sup> This is because the supremacy of EU law has 'in many areas ensured consistency of legal and regulatory standards across the UK, including in devolved policy areas', with the result that 'the UK internal market has been upheld by the rules of the EU internal market'.<sup>121</sup>

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<sup>117</sup> Belfast Agreement, Preamble: 'The British and Irish Governments: ... Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union ...' *The Belfast Agreement*, Northern Ireland Office, 10 April 1998.

<sup>118</sup> Northern Ireland Act 1998 s.7.

<sup>119</sup> Scotland Act 1998, s.29(2)(d), Northern Ireland Act 1998, s.6 and Government of Wales Act 1998 s.106 (substantially amended by the Government of Wales Act 2006 s.108A).

<sup>120</sup> European Union Committee, *Brexit: Devolution* (4th Report of Session 2017–19, HL Paper 9), para 26.

<sup>121</sup> *Ibid.*

Nevertheless, it was evident that even EU membership could not forever suppress the constituent dimension of sovereignty in the British constitution. The clearest signal of this was provided by the Scottish independence referendum of 2014. The election of an SNP Government in Edinburgh in 2011 with an overall majority and a mandate for such a referendum generated nothing short of a crisis of state. That the UK Government did not respond by asserting state sovereignty is indicative of changing political conditions and in particular the diminished authority of the Westminster Parliament. Implicitly recognizing that might creates right, in the Edinburgh Agreement of 2012 the Government conceded power to the Scottish Parliament to hold such a referendum and undertook to respect the result. The referendum might not have been won by the secessionist cause,<sup>122</sup> but the issue remains far from being resolved.<sup>123</sup>

Meanwhile, English nationalism was also beginning to stir, in part fuelled by resentment over ostensibly special concessions over devolution but mainly because of an apparent desire for a more assertive relationship with the EU.<sup>124</sup> One manifestation of the latter was the European Union Act 2011 by virtue of which Parliament sought to reassert its own legal supremacy by confirming that the direct applicability or direct effect of EU law was contingent upon the recognition of this status by the 1972 Act.<sup>125</sup> It remained unclear whether this Act would have any impact on the legal relationship between UK and EU law or whether its effect would be purely symbolic.<sup>126</sup> In particular, the Act introduced a ‘referendum-lock’ in relation to future EU treaty undertakings.<sup>127</sup> Whether the judiciary would have accepted a ratification process wherein Parliament sought to bypass these provisions was never tested. The more important point is that, 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, the Act sought to shift the issue of supremacy from Parliament to ‘the people’. The 2011 Act, the product of a Government lacking significant representation in Scotland,<sup>128</sup> signifies the strengthening of English national identity in part stimulated by dissatisfaction with constitutional developments.

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<sup>122</sup> To the proposition ‘Should Scotland be an independent country?’ 44.7 per cent voted Yes and 55.3 per cent No.

<sup>123</sup> On 13 March 2017 the First Minister of Scotland announced the intention to hold a second referendum on independence. These plans are currently on hold following the general election of 2017 but remain SNP party policy.

<sup>124</sup> Charlie Jeffery et al., ‘Taking England Seriously: The New English Politics’, *The Future of England Survey* (2014) [http://www.centreonconstitutionalchange.ac.uk/sites/default/files/news/Taking%20England%20Seriously\\_The%20New%20English%20Politics.pdf](http://www.centreonconstitutionalchange.ac.uk/sites/default/files/news/Taking%20England%20Seriously_The%20New%20English%20Politics.pdf). Stephen Tierney, ‘Brexit and the English Question’ in Federico Fabbrini (ed.), *The Law and Politics of Brexit* (Oxford: Oxford University Press, 2017), 95-114.

<sup>125</sup> European Union Act 2011, s.18.

<sup>126</sup> See Martin Loughlin and Cal Viney, ‘The Coalition and the Constitution’ in Anthony Seldon and Mike Finn (eds) *The Coalition Effect, 2010-15* (Cambridge: Cambridge University Press, 2015), 59-86 at 75-77.

<sup>127</sup> European Union Act 2011, ss. 2-3.

<sup>128</sup> The Conservative Party won only one seat and 16.7 per cent of the vote in the 2010 general election.

But most importantly, in seeking to bind the competence of future parliaments through the ‘referendum-lock’ and by transferring the final say from Parliament to the people, the Act was a self-conscious abdication of Parliament’s own supposedly ultimate legal sovereignty to popular political sovereignty.

The 2011 Act is now redundant in face of the UK’s withdrawal from the EU and has consequently been repealed by the European Union (Withdrawal) Act 2018.<sup>129</sup> But this does not denote the rejuvenation of legal sovereignty: the Withdrawal Act is itself the consequence of the June 2016 referendum and is therefore yet another instance of Parliament’s transference of the fundamental decision on EU membership to the people. The 2018 Act also reflects the changing internal territorial realities of the UK. A provision which initially sought to place all of the powers returning from Brussels in the first instance with Whitehall - whether these fell within reserved or devolved areas - later to be dispersed to the devolved territories at the UK Government’s exclusive discretion, was seen to be so inconsistent with the spirit of devolution, most recently restated in the Scotland Act 2016 and Wales Act 2017, as to force a complete reversal of that approach.<sup>130</sup> In the same vein, the anticipated Withdrawal Agreement and Implementation Bill,<sup>131</sup> intended to give effect to the exit agreement between the UK and EU, is likely to create a constitutional status *sui generis* for Northern Ireland so as to reflect the terms of the ‘joint report’ issued by the UK and EU on 8 December 2017.<sup>132</sup> These developments show how fundamental political changes in the territorial constitution are conditioning the way in which the UK leaves the EU.

Echoing Dicey’s response to the Home Rule crisis, the 2011 Act, the 2018 Act and the likely terms of the Withdrawal Agreement and Implementation Bill each recognise that constitutional authority rests ultimately on popular legitimacy. Parliament’s acknowledgement that, on certain critical constitutional matters, its legal competence is dependent on popular endorsement recognizes as clearly as did Dicey’s utterances on Ireland a century earlier the inability of the doctrine of parliamentary sovereignty to contain the political, power-generational, dimension of sovereignty; this reality is emphasised by the Brexit referendum in 2016, the resulting decision to overturn the UK’s legal relationship with the EU on the basis of a popular vote and by the impact of devolution upon this process.

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<sup>129</sup> s. 23(8) and schedule 9.

<sup>130</sup> Compare European Union (Withdrawal) Bill, cl.11 with European Union (Withdrawal) Act 2018 s.xx

<sup>131</sup> “New Bill to implement Withdrawal Agreement”, UK Government Press Release, 13 November 2017.

<sup>132</sup> ‘Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress During Phase 1 of Negotiations under Article 50 TEU on the United Kingdom’s Orderly Withdrawal from the European Union’, TF50 (2017) 19 – Commission to EU 27, 8 December 2017.

Another example is ‘the Vow’ issued by all the main UK political parties following the Scottish independence referendum in 2014, promising that Scottish devolution would be ‘permanent’, a commitment subsequently given formal effect in the Scotland Act 2016, as discussed above. As with the ‘referendum-lock’ provision in the European Union Act 2011, this commitment was reinforced by a similar protection in the new Scotland Act and most recently in the Wales Act 2017.<sup>133</sup> Such provisions extinguish the formal rule that Parliament has the competence to make any law. This is more than a mere manner and form restriction. It is an undertaking by Parliament to be bound by the popular will of different parts of the United Kingdom. In doing so Parliament has recognised devolution as a political fact that cannot be ended unilaterally by parliamentary fiat.

The result of the 2016 referendum highlights the importance of the relational concept of sovereignty, and, in particular, of the vital significance of its power-generational aspect. The most important constitutional decision of the past fifty years was made not by the purportedly sovereign Parliament but by the people directly. In the 2011 Act Parliament had asserted its supremacy over EU law in a practically meaningless manner. The reality of EU legal supremacy was a fact of membership regardless of however much Parliament might gripe about it.<sup>134</sup> That supremacy will now be ended and while technically it will be ended by Act of Parliament,<sup>135</sup> the real decision was political not legal, made not by Parliament but by the people. That decision bolsters the claim that EU membership was first and foremost a restriction upon the power-generational dimension of sovereignty. In 1972 J.D.B. Mitchell and others maintained that the essential constitutional change had taken place on accession when the Government signed the Treaty and the 1972 Act merely provided a legal form to a more fundamental constitutional decision.<sup>136</sup> It was therefore not surprising that the decision to leave the EU required a highly symbolic political endorsement through the express mobilization of constituent power. The UK’s withdrawal will be effected by way of the exit agreement;<sup>137</sup> the European Union (Withdrawal) Act by which the ECA 1972 is repealed<sup>138</sup> and the proposed Withdrawal Agreement and Implementation Bill which implements the deal will merely facilitate and ratify respectively the exit agreement itself. This is not to undervalue the significance of law but merely to highlight the flexibility of legal ‘supremacy’ in the face of political realities. A further twist is to

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<sup>133</sup> Scotland Act 2016, s.1. An equivalent provision is contained in the Wales Act 2017, s.1.

<sup>134</sup> See *Benkharbouche* above n.116.

<sup>135</sup> European Union (Withdrawal) Act 2018, ss. 1, 5.

<sup>136</sup> J. D. B. Mitchell, S. A. Kuipers, B. Gall, ‘Constitutional Aspects of the Treaty and Legislation Relating to British Membership’ (1972) 9(2) *Common Market Law Review*, 134–166; J.D.B. Mitchell, ‘British Law and British Membership’, (1971) 2 *Europarecht* 97, 100-103.

<sup>137</sup> European Union (Withdrawal) Act 2018, s.9.

<sup>138</sup> European Union (Withdrawal) Act 2018, s.1.

be found in the proposed Withdrawal Agreement and Implementation Bill which, as discussed, is intended to give effect to the withdrawal deal signed by the UK and EU in December 2017; in this, the UK will undertake that citizens' rights 'will have effect in primary legislation and will prevail over inconsistent or incompatible legislation, unless Parliament expressly repeals this Act in future'.<sup>139</sup> This explicit renunciation of the doctrine of implied repeal in relation to this proposed Bill goes further even than the European Communities Act 1972 in expressly curtailing a traditional feature of the doctrine of parliamentary sovereignty, undertaking that Parliament will restrict its own future legislative action.<sup>140</sup>

The reawakening of the power-generational dimension of sovereignty in both the Scottish independence referendum and the Brexit referendum demonstrates the manifest limitations of the Diceyan account of the doctrine of parliamentary sovereignty. But it also exposes certain deep fissures within the edifice of the British state, leading to the political dimension of sovereignty now playing out in troubling ways. Following the 2014 Scottish referendum, it came as no surprise that the Brexit referendum result was immediately analysed along 'national' lines, with majorities for leave in England and Wales being disaggregated from those for remain in Scotland and Northern Ireland. Before the 2016 referendum the Scottish Government had called for a form of consociational referendum, whereby a majority vote in each of the four territories of the UK would be needed to provide consent to withdrawal from the EU.<sup>141</sup> From the perspective of the formal doctrine of sovereignty such assertions can be dismissed as mere political claims; a simple majority across the UK was all that the European Union Referendum Act 2015 Act required. But this ignores the political fact that Parliament is no longer able 'to maintain its status as the voice of the political nation assembled'. The language of nation within the UK is now the language of *nations*, a fact borne out by the manner in which the Brexit process has been conditioned by the territorial constitution.

## VI Conclusion

By the beginning of the twentieth century, Dicey had come to realise - largely because of his own political beliefs - that the legal doctrine of parliamentary sovereignty he had earlier formulated with such great success presented a rather skewed and partial account of the concept. But in the end neither he nor any other influential constitutional law scholar of the early twentieth century

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<sup>139</sup> Joint Report, above n 132, para 36.

<sup>140</sup> Mike Gordon, 'Parliamentary Sovereignty and the Implementation of the EU Withdrawal Agreement (Parts I and II)', U.K. Const. L. Blog (17 Jan. 2018) (available at <https://ukconstitutionallaw.org/>)

<sup>141</sup> 'SNP's Sturgeon says UK withdrawal from EU "must have" four nation backing', BBC News, 29 October 2014, <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-29805045>

was able to project a richer conception of sovereignty with which to offer a more nuanced account of British constitutional development. We continue to live with that legacy, which is most clearly manifest in our inability to devise an adequate conceptual framework through which to address the major constitutional questions of our time.

Withdrawal from the European Union, the effective entrenchment of the territorial constitution and the growing influence of a rights discourse all resonate at the constitutional level. And in seeking to explain and account for continuing constitutional development it is now apparent that a conception of sovereignty which is equated to the unlimited legislative authority of the Crown-in-Parliament and which rests on an inchoate appeal to the need for Westminster to hold on to untrammelled power is inadequate and must be jettisoned. Recent legislation such as the European Union Act 2011, the Scotland Act 2016 and the European Union (Withdrawal) Act 2018 (especially its provisions relating to devolution) have shown that whenever the conditions of the power-generative aspect of sovereignty change, the nature and status of the received legal doctrine is modified. The self-managed erosion of Parliament's purported omni-competence in the Scotland Act 2016 and Wales Act 2017 highlights the degree to which the absolutist legal doctrine has been qualified by political developments. Reworking the meaning and significance of sovereignty is today the vital first step towards achieving conceptual renewal of the British constitution.

Having demonstrated this by bringing Dicey's political convictions into alignment with his legal doctrine, some legal positivist jurists might argue that his controversial political claims can be rejected without the authority of the doctrine being undermined. This is implausible. Dicey may have deployed the political underpinnings of sovereignty in a strategic way because of his personal views on Irish home rule, but the essential nature of the legal-political nexus remains. Whatever his motivations, we draw from Dicey the cogent conclusion that the doctrine of parliamentary sovereignty is a legal fact because it is a political fact. Indeed, can the legal fact be retained without the existence of the political fact? In one sense, this is precisely our argument about the source of current constitutional difficulties. But Dicey's most distinguished twentieth century disciple, Sir William Wade, readily accepted that the doctrine exists as 'the ultimate *political* fact',<sup>142</sup> a point that legal philosophers who rely on an ultimate 'rule of recognition' based on acceptance by officials cannot avoid conceding.<sup>143</sup> And yet this type of separability claim does not go to the fundamentals of our analysis.

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<sup>142</sup> H.W.R. Wade, 'The Basis of Legal Sovereignty' (1955) *Cambridge LJ* 172-197, at 188 (emphasis in original).

<sup>143</sup> See H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2<sup>nd</sup> edn 1994), 120-122 (in which a tortuous explanation of colonial independence is offered that seeks to evade the necessity of addressing evolving political power relations).

Our essential argument is that the shibboleth is not just to be found in the intrinsic connection between the legal and political aspects of Dicey's views; it is the belief pervading modern British constitutional law that parliamentary sovereignty expresses certain qualities that a sovereign is deemed to possess. This tradition of thought, of which Dicey is simply the most distinguished legal exponent, conceives the main tasks to be those of locating the sovereign (e.g., the Crown-in-Parliament) and then determining the sovereign's essential attributes (e.g., unlimited legislative authority). This is a primitive view, the product of a history in which the concept of sovereignty had its originating source in the figure of the sovereign. But in the modern world of differentiated institutions of government, sovereignty is not the attribute of a single institution; it expresses the sum of relations formed through the manner in which political authority is constituted. In this understanding, institutional relations between legislative, executive and judicial authority evolve according to changing political conditions. If lawyers aspire to respond constructively to contemporary constitutional questions, then the shibboleth of that legal doctrine must be discarded and the modern concept of sovereignty embraced.