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Sovereignty, Law and the Common Good : constitutional lessons from Brexit

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The Brexit process has given us insights into how perceptions of law and constitutional legitimacy within and across the United Kingdom are shifting. Referendum outcomes since 2014 have increased the need for a new constitutional settlement. Meeting that need requires a broad consensus on how we want to govern ourselves, which does not currently exist. We therefore face an unstable period of majoritarian identity politics, with serious consequences for the UK's economic wellbeing and national cohesion.

Outside crime dramas and detective novels, most people most of the time do not think about the law and how it works. Civil and commercial law is largely hidden from public view. But European jurisprudence has always attracted a lot of attention, usually negative.

As a young Treasury civil servant I was involved in the detail of the Government's challenge to the legality of the 1986 European Community (as it then was) budget. This was on the grounds that the European Parliament had adopted the budget after exceeding the maximum rate of increase in non-obligatory spending – a seriously arcane issue. I recall my surprise when an MP at a Parliamentary Committee hearing criticised the European Court of Justice as 'a political court'. This seemed at the time a fringe view, attacking a Court which was already viewed as a global leader in areas such as competition law.

The Court found in favour of the UK, both on a request for interim measures to suspend the budget's implementation and then in the substantive case. But over the years I realised the conviction that somehow this European Court was illegitimate, not a real Court, was deeply held in many parts of Westminster. The mere existence of its judgements was seen as an infringement of British Parliamentary democracy, delivering technical but politically sensitive rulings which emerged from a complex and opaque structure of decision-making based overseas.

If we fast forward three decades, you will no doubt recall the Daily Mail front page on 4 November 2016 presenting three High Court judges as Enemies of the People, in a format that reminded some of 1933 Nazi German press attacks on their opponents. The judges' offence was to have ruled that triggering the Article 50 EU withdrawal process required an Act of Parliament, a judgement later upheld by the UK Supreme Court.

The newspaper's editors had clearly decided that if judicial process made the outcome they supported harder to achieve, then those in charge of implementing that process were fair game for personal attack. And personal attacks on judges, including online, contribute to a more intimidating climate for those who might have to take such decisions in future, and whose responsibilities mean that they are unable to defend themselves.

In this case, after a day's delay the Secretary of State for Justice stated that 'the independence of the judiciary is the foundation upon which our rule of law is built'. But the government, to the surprise of many, did not criticise media attacks on individual judges. Lord Neuberger, then President of the UK Supreme Court, commented in an interview a few

months later ‘I think some of what was said was undermining the rule of law.’ The Political Editor of the Daily Mail at the time of their attack on the judges left the newspaper shortly afterwards, to become the Prime Minister’s Official Spokesman and Press Secretary.

I highlight this incident as a high-profile example of a worrying trend. Lord Bingham in his book ‘The Rule of Law’ written in 2010 states that ‘In Britain the rule of law is held to require the strictest political neutrality of the judges’. If some in our society no longer accept that there can be such a thing as political neutrality, only political outcomes which are supported or hindered by what happens in the Courts, then the implications for the rule of law are indeed serious.

It is striking that much of the challenge to respect for the rule of law should have crystallised around UK membership of the European Union. This is because the primacy of EU law in Britain since 1973 strikes a raw nerve in our political system. If we believe, with Professor Hart, that law is ultimately a social construction, built up from social rules, then EU jurisprudence seems to start from a more abstract and contentious place than does English common law .

The EU Treaties as revised in the Treaty of Lisbon refer explicitly to the rule of law as one of the six core values of the Union; and highlight the importance of representative democracy. These values are also British values as defined by Ofsted for schools: democracy and the rule of law being explicitly highlighted. So as one might expect, not least because the UK was a signatory to the Lisbon Treaty, there is an explicit set of shared values underpinning EU and UK law.

It is not clear that this declaration of values amounts to a shared social construction. Whatever its technical utility, a number of people just do not like the existence of European law within the UK. This hostility has not noticeably lessened over the decades since 1973.

Part of the problem seems to lie in the direct effect of EU law across all member states. This is necessary to ensure coherence and legal certainty but raises the profile of EU judicial decisions which impact on everyday life - from lawnmower noise to mobile phone roaming charges to data protection. These decisions implement agreed EU legislation which in the vast majority of cases has been supported by the UK government and benefits our economy or society. But that has never made them popular, nor in the eyes of many even legitimate.

There is also opposition to the way in which EU law has for the past 45 years been embedded in UK law through the 1972 European Communities Act. European law has a special status – the government cannot simply propose an amendment to an EU law on water quality or chemical safety, have Parliament vote on it and then amend domestic statutes accordingly.

UK judges through the Factortame and Equal Opportunities Commission litigation (1990 and 1995 respectively) managed this tension skilfully through the device of an ‘implied supremacy clause.’ Their conclusions were that for Parliament to override European law required the statute in question to derogate expressly from section 2 of the European Communities Act, which otherwise was taken to apply implicitly to all subsequent legislation. This prevented EU-UK legal boundary disputes for the last twenty years, and was essentially a transparency provision. Breaching EU law could not be done as a side effect, given its serious consequences for the wider legal system.

The lack of any other meaningful constitutional law in the UK prevents a clear separation of different types of legal decision-making. Ultimately all law depends on Westminster, within Westminster on the House of Commons, within the Commons on the government majority, and within the government on the Prime Minister and No 10 advisers.

Elective dictatorship was famously the criticism of the executive made by the late Lord Hailsham in 1976, when he was an Opposition politician. The prospect of power shifting between the two main parties has served to weaken attempts to limit executive power at Westminster, since the Opposition do not want to find their actions more constrained when they come into government; and it is asking a lot of any governing party to pass laws constraining their own executive powers.

So we work within a political system where the effective power to make laws depends simply on maintaining a majority in the House of Commons. All UK laws can be amended, repealed or replaced in a matter of months, if not weeks.

The major opposition this majoritarian ideology has faced in recent decades comes from structures which exist outside of a binary party system: in particular the European Union with its own legal structures added to national courts, and since 1997 from devolution within the UK where a diverse range of powers have been given to the Northern Irish, Scots and Welsh legislative bodies.

There was some understanding in both cases that we were moving into new political and legal territory. It is significant that the arguments about whether Britain should join the European Economic Community saw the first party political discussions of referendums, in the early 1970s.

The 1972 European Communities Act was the most significant piece of constitutional legislation adopted since 1945. It passed its second reading in the House of Commons in February 1972 by only 8 votes. While the UK did join the EEC the following year, the political debate about membership continued. The 1975 referendum followed a renegotiation with Brussels by the then Prime Minister, Harold Wilson, and had its roots in Labour party internal political tensions over its approach to Europe.

The 67% popular vote to remain in the European Economic Community in June 1975 resolved the immediate political argument within the Labour government. The referendum was legally advisory only. But it set a precedent for managing decisions on which political parties found it difficult to agree internally. The referendum cuckoo was in the Westminster nest -without real consideration of its longer-term consequences for how the UK was governed.

This lack of constitutional clarity was highlighted during arguments about devolution in the late 1970s. In March 1979 the final decision on Scottish devolution was put to a referendum there. However the legislation was amended by backbenchers, against government opposition, to require that 40% of the eligible electorate had to vote in favour of devolution for it to be implemented – a super majority criterion for constitutional change.

In the event just under 33% of the Scottish electorate did so, in a 52/48 vote in favour. So devolution did not take place. For comparison, in the June 2016 Brexit referendum some 37% of the eligible UK electorate voted to leave the EU.

This experience revealed a lack of support for any super majority criterion in referendums, and it was not used again. In the next Scottish referendum in September 1997 there was a 74% majority for devolution on a 60% turnout, without any electorate threshold requirement – though in fact that result did pass the 40% threshold used in 1979. The Scottish independence referendum of 2014 had a very high 84% turnout and a result of 55% voting against independence in what was a simple majority vote.

Neither the devolution debates, nor the independence referendum, resolved the issues of how and when such a vote could be called, or whether there were cases where a bare majority in favour would not be sufficient. But these issues cannot be ignored forever.

If Scotland had voted for independence in the 2014 referendum there was no provision for a subsequent referendum should a majority have later wished to rejoin the UK; nor was there any agreement on how often an independence referendum could reasonably be held. Who is to decide such issues, and why should their decision be considered legitimate? Existing law does not get us very far if it can be rapidly and easily amended or repealed by simple majority.

A similar complexity crops up with Europe-related referendums. Leaving the EU can legally be decided unilaterally by the UK Parliament, without agreement of the devolved parliaments and assemblies in Scotland, Wales and Northern Ireland. But a return to EU membership is not under Westminster's control.

How should this asymmetric choice on EU membership : constitutionally easy to leave - though you might not think so from the current political agonies at Westminster; much harder to return - because of the need for a new Treaty of Accession to be negotiated then ratified by twenty seven other member states legislatures and the European Parliament - be reflected in the process by which such decisions are taken, at Westminster and in the devolved nations?

In reality the only constraints on UK use of referendums have proved to be those of political tactics and party advantage in the Westminster Parliament. So we have a political tool – the referendum – being used to deliver profound and long-term constitutional consequences through a Parliamentary process which is identical to that used for uncontentious and technical legislation.

The Courts must interpret current law rigorously and impartially, and prevent executive decision-making expanding beyond its legal limits. But is it reasonable to expect them to go further and to erect legal obstacles to sudden or erratic constitutional shifts in the UK's structures of government if Parliament itself chooses not to do so? As Professor Hart noted some fifty years ago 'it is conceivable that the constitutional question at issue may divide society too fundamentally to permit of its disposition by a judicial decision'.

The argument that loading too much weight onto the judicial system risks undermining the wider social acceptance of our laws is a serious one. But it is equally important to provide UK citizens with some certainty about the continuity of our basic constitutional structures, and agreement on how we are to decide on them. This must surely include some judicial safeguards around the procedures used to change those laws that carry significant constitutional implications.

It is relevant to this debate that the twenty-year-old devolution settlement is proving to be less legally secure than many imagined. The Westminster government has made clear that the

so-called Sewel Convention, the Legislative Consent Motion, does not prevent UK wide laws being passed whenever the Westminster Parliament so decides. And the 1998 Scotland Act notes that the section setting out devolved areas 'does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.'

Thus the Westminster government can decide unilaterally that legal powers in sectors such as agriculture and fisheries hitherto exercised through European Union structures with devolved official and Ministerial involvement in Council meetings, will in future be controlled at least temporarily in London rather than Edinburgh, Cardiff or Belfast. The result will be to reinforce centralised executive control by the Westminster government, an outcome which is seen by many to cut across the political commitments made to respect devolution of power. The Supreme Court confirmed this distinction between politics and law, when it commented on the Sewel Convention that 'the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law'.

Ultimately therefore within the UK all devolved powers depend on the continued consent of the Westminster Parliament to the relevant legislation; and that can be amended or removed by a simple majority decision. This makes for administrative convenience across Whitehall. But I am not aware of any other democratic state within which the accepted distribution of legislative power at sub-national level has so little legal protection from unilateral change.

The position of Northern Ireland is legally different, given the existence of a bilateral international agreement signed by the United Kingdom and Republic of Ireland governments in April 1998. The British-Irish Agreement became effective in December 1999, and is part of the Good Friday or Belfast Agreement which underpins the devolved system of government in Northern Ireland. This was implemented through the Northern Ireland Act of November 1998, and approved by referendums in both Northern Ireland and the Republic.

Constitutional change was required, and agreed, in the Republic through the nineteenth amendment to the Irish constitution which allowed explicit recognition of the separate jurisdiction of Northern Ireland. This was approved in a May 1998 referendum by a 94% majority and implemented in December 1999.

The UK Government is committed to allowing Northern Ireland residents access to the European Court of Human Rights, and together with the Irish Government agreed to enshrine the European Convention on Human Rights in law. This took place in the UK through the 1998 Human Rights Act. If in future this Act should be repealed, the 1998 Treaty commitments require continuity for the legal safeguards in respect of Northern Ireland human rights.

What though is the status of these commitments, which elsewhere would be understood as clearly constitutional in form? In the UK they cannot be regarded as genuinely secure without a continued commitment to them by Westminster legislators, which in turn requires a broad political consensus around the way we do things in this country – how we govern ourselves. And that no longer seems to exist.

The combination of devolution being restricted through executive discretion, except in Northern Ireland where it has the additional protection of Treaty status, and departure from the European Union without any real consensus on the legal status of our future economic and political relationship with the EU, has left huge uncertainty around the UK's political system.

Constitutional decisions can now be taken by Ministers on the basis of short-term political advantage, so long as they command a Parliamentary majority. Increasingly populist political and media attacks on judges and officials responsible for safeguarding the longer-term structures of Treaties, domestic law and civil administration that ensure the democratic continuity of the United Kingdom state seek to take legitimacy away from any hindrances to the government of the day doing whatever it wants.

Thus voices can now be heard in Parliament arguing that if the Good Friday Agreement causes complications for Brexit it should simply be repealed, and the related Treaty with the Republic denounced. Internally, they argue that devolution should not be allowed to stand in the way of any Westminster decisions on how powers returning from EU shared sovereignty are distributed, even if this restricts temporarily or permanently the accepted workings of devolution over the last two decades.

Within Westminster democratic legitimacy is taken to reside solely with the majority in the House of Commons. The House of Lords has been described as 'unelected', and by implication illegitimate, by the Government when it seeks to question or modify executive decisions, whether or not they have been explicitly endorsed by the House of Commons.

This hard-edged majoritarianism is fundamentally a doctrine which gives significantly increased power to the UK executive arm based in 10 Downing St, so long as any Prime Minister can retain the support of a majority of MPs. The consequences of this approach to future UK governance are worth highlighting.

First it is clearly not accepted in Scotland. If devolution risks being hollowed out in the wake of Brexit, even temporarily, then the chances of a second referendum vote for independence rise. This is exacerbated by the settled majority consensus in Scotland to remain in the EU, and in particular in the single market and customs union, a point the Scottish First Minister has emphasised.

Second it poses serious risks to the hard-won constitutional settlement in Northern Ireland. If Brexit's Parliamentary arithmetic leads to a dilution or even rejection of parts of the 1998 Good Friday Agreement settlement through the imposition of new regulatory controls on the island of Ireland we face a profound crisis in Anglo-Irish relations. This outcome would be a serious breach of the UK Government's Treaty commitments under international law and seen as a breach of trust. The political impact within Northern Ireland of Westminster unilaterally changing the terms of the peace settlement there would be long lasting. No-one aware of the human tragedies resulting from thirty years of conflict can be complacent about what is at stake.

Let us hope then that the Westminster government continues to respect its firm commitments to maintain the economic status quo and avoid new borders on the island of Ireland. However the resulting economic advantages of full single market membership for firms based in Belfast risk disadvantaging close competitors based in Glasgow or Liverpool, unless all of the UK remains permanently in the single market and customs union, which is not currently the government's negotiating objective. In such a case pressures for a further referendum on Scottish independence within the EU look set to increase.

A country as profoundly divided as the UK is today about its future relationship with the European Union needs to work hard to find a basic consensus on the way forward. Political voices arguing for a quick agreement with the EU which can then be amended after we leave

are thinking in purely Westminster terms, where everything is always subject to change - including the law.

Our European partners do not work in this way. Their agreement is required to deliver the stable long-term economic, political and security relationship that the UK national interest requires. That in turn requires building mutual trust, avoiding cheap rhetoric, and accepting that political pressures do not only exist on this side of the Channel.

We therefore have a choice ahead. Continuing down the majoritarian road in Westminster ignores the legitimate, separate interests of the devolved nations in a close and stable relationship with our European neighbours. It thereby increases the risk of a breakup of the United Kingdom. When the unrealistic expectations it encourages of quick and easy trade and other deals with the EU are not met, a populist backlash both in Parliament and the wider UK media is likely. This in turn makes a sustainable post-Brexit agreement more difficult to reach.

The alternative of a revised settlement across the UK with some entrenched constitutional provisions offers a more sustainable, transparent and fair structure for political decision-making, including for a future economic relationship with Europe. But it also seems unlikely to occur. Current policy includes dismantling the structure of quasi-constitutional law derived from the EU which has provided business certainty in key areas such as control of state aids and competition policy, and also contributed to a stable UK framework within which devolved powers could operate.

So what is to be done?

We could simply accept a less legally constrained politics, and agree with John Locke's view that : 'Prerogative can be nothing but the people's permitting their rulers to do several things of their own free choice, where the law was silent, and sometimes too against the direct letter of the law for the public good, and their acquiescing.' This approach has been used during wartime, with broad public support.

But in peacetime, in an open and diverse society, do we really wish to acquiesce in effectively untrammelled executive power? And it is all too evident that ideas of the public good, most obviously in relation to Brexit but also on a range of other social choice issues, are now deeply divided. The lack of a plausible consensus on how the public good is to be defined in today's society should make us reluctant to go too carelessly down the route of greater executive discretion. That remains true even when those in power aim to use that discretion in good faith, for the common good as they see it.

Historians among us may recall that the Civil War was fought in opposition to untrammelled Royal Prerogative, including in the signing of Treaties. The Palace of Whitehall may have burned down in the 1690s but its ethos of executive absolutism remains stubbornly present at the centre of government.

If we believe this problem can be resolved through more effective scrutiny and control of executive prerogative, we can look at the composition and election of the two Houses of Parliament. It is unfortunate that the reputation and therefore legitimacy of the House of Lords has declined over the fifteen years since it was last reformed, while the numbers attending have increased to around 800 members, including the 92 remaining hereditary peers. Despite the good work done by many of its members to scrutinise and question

government legislation it is hard to see how the Lords as currently constituted can become an effective and legitimate second chamber able to entrench constitutional legislation.

Turning to the House of the Commons, the attempt in 2011 to amend the voting system in a more proportional direction was defeated by over two to one on a 41% turnout; there is no current prospect of this issue being reopened. Election to the House of Commons first requires success within local party caucuses, which determine the effective choice available to the electorate. MPs are increasingly career politicians, with limited outside experience, and often with strong media links. This trend too seems set to continue, producing an elected chamber of politicians susceptible to media pressure to focus on short-term issues.

So it may be there is nothing to be done, at least until there is a clearer sense in the country of why structural change is needed both in how we take decisions : entrenching some rules more deeply ; and where we take decisions : nearer to citizens locally and regionally, and with a legally entrenched devolution of fiscal and legislative power to the United Kingdom's different nations.

In the short term we are likely to see more populist government, with each new Prime Minister seeking to overturn established decisions and offer a different way forward. Brexit means that this political disruption will occur against a background of slower economic growth and therefore less resource available to fund public services. Leaders who claim they can avoid the need for hard choices between higher tax or less adequate public services may thereby achieve short term popularity and exploit our majoritarian system to grasp centralised executive power.

This power does not extend to determining unilaterally our future relationship with the European Union. Over the years ahead Westminster politicians look set to be frustrated by the limited legal options available for negotiation with Brussels, and the costs and constraints attached to each. Enjoying all the economic benefits of the single market and customs union without accepting the same legal framework as other member states, including free movement of workers, and without substantial payments into the EU budget, is never going to be negotiable. Nor is the UK ever going to be an equal negotiating partner with the rest of the European Union given that it represents less than 20% of current EU output.

The blame for the significant and continuing harm to UK competitiveness if we remain outside the single market will lie in London rather than Brussels. But it is unlikely to be presented that way. And every new EU regulation or trade negotiation will trigger arguments about how far the UK is prepared to conform to changed rules and on what legal basis, increasing business uncertainty.

This type of low trust, short-term, rolling Brexit negotiation by the Westminster government will lead to any Scottish First Minister seeking to build a separate, less unfavourable relationship with the European Union. For the current Scottish government this is likely to be part of a wider strategy to keep Scotland's regulatory model as close to EU structures as can be achieved within Scottish law, and to build a separate political relationship with the European institutions. This would put Scotland in a stronger position to manage a smooth transition back into the European Union as a member state in its own right, should there be a further referendum on Scottish independence.

Attempts to undermine the letter or the spirit of the 1998 Good Friday Agreement will reopen wider constitutional issues in Northern Ireland, in a way which cannot be helpful to either Unionist or Nationalist communities there. As already noted, it would be contrary to our

Treaty commitments to reimpose border regulations in Ireland where none exist today. To do so would directly impact on people's everyday lives, constraining cross-border healthcare, adding costs and delays to integrated agrifood businesses, and restricting shared services from road haulage to insurance.

The solution with greatest cross-community support in Northern Ireland is for the rest of the United Kingdom to remain within both a Customs Union and the single market, so avoiding the need for any new restrictions either north-south or east -west. The 2016 referendum did not change how economies prosper. Maintaining the current legal status quo around the border is important to jobs and investment as well as the wider peace process.

Conclusion

Where against this fragmented political, economic and legal background does the common good lie, and how do we work towards it? We might usefully start by recognising that our system is no longer fit for purpose, for the reasons I have outlined. More of the same – centralised executive authority with diminished legal and Parliamentary oversight – will not produce a better result. But radical change is not yet on the political agenda.

We urgently need to agree some basic rules of the road. These should at least include a commitment to avoid referendums without genuinely comparable alternative outcomes. In the longer term there must be serious consideration of whether more than a simple UK-wide majority is required for a decision with wide constitutional significance; a clear time limit on how often referendums can be repeated; a new legal framework for devolution to nations and regions of the UK which includes meaningful powers to tax and borrow, with a time period of at least a decade within which they will not be amended; and a renewed cross party commitment to actively support and protect the independence of the judiciary.

We may then have to wait for popular frustration with politics to influence the shape and focus of our political parties; and perhaps for the leadership of a new generation of politicians more prepared when faced with tough choices to tell it like it is.

The problem is how to ensure this happens without first testing the alternative model of aggressive populism, extreme centralised political control, and a desire to win whatever the longer-term price in terms of law or minority rights, to its destructive conclusion. The consequences for shared values and mutual respect across Britain, Northern Ireland and also the Republic of Ireland of more populist Westminster politics would be serious and long-lasting. It would lead to a diminished country – less open, less prosperous, less respected and more divided.

Unstable populism is now a real threat. So we must set out clearly why our common good involves protecting the rule of law, improving democratic decision making across the UK, building prosperity and security in a shared framework with our European partners.

And this argument must first be won across the United Kingdom rather than inside the Palace of Westminster.

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