

## GUEST EDITORIAL

### IS BREXIT RIPPING UP THE UNWRITTEN CONSTITUTION OF THE UNITED KINGDOM?

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Trick or Treat? The BBC couldn't resist the quip when news came through in the early hours of April 11 that the EU had granted the United Kingdom another extension up until the 31<sup>st</sup> October (i.e. Halloween...) thus avoiding the "hard thump" of a no deal Brexit. However, while there were certainly cheers from the Remain camp there were certainly also groans not only from the Leavers, but most of all from the many "agnostics" who cannot bear to hear the word Brexit anymore. Indeed for many in the British Isles Brexit is becoming a psychodrama. But something even worse is happening: Brexit is ripping up the unwritten constitution of the United Kingdom. Now in making this argument most scholars would begin with the very Brexit referendum itself. I am, however, not of this opinion. It is true that the former Conservative minister Francis Pym once asserted that the referendum was an "unknown beast in this country", but he made that statement before the United Kingdom held three nationwide referendums (1975, 2011 and of course 2016). The constitutional legitimacy of holding the Brexit referendum can be found in the Conservative Manifesto of 2015 where its leader promises a referendum on British membership of the EU before the end of 2017. Most observers (myself not included) thought that the Tories would not obtain an overall majority and would be forced to form another coalition with the Liberal-democrats and that the latter would have vetoed holding a referendum on EU membership.

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On the contrary Cameron's move to win back votes from the United Kingdom Independence Party with the slogan "you'll go to bed with Farage, but wake up with Miliband" was a success and he thus found himself with a majority albeit of just four seats. This Conservative majority meant that, according to constitutional convention, Cameron was obliged to fulfil his manifesto commitment to renegotiate British membership of the European Union and put the agreement to a referendum. And this is indeed what happened: on February 19, 2016 David Cameron comes back from Brussels all smiles and, reminiscent of Chamberlain after the Munich Conference in 1938, proclaims "we have obtained an agreement with the European Union" and therefore Brexit has been thwarted. He then puts the agreement to a referendum on 23<sup>rd</sup> June 2016 and, as we all know, loses. Holding the referendum as such was not outside the bounds of the constitution, but there are two issues, one substantive and one procedural, that are constitutionally contestable. First, one could argue that the Brexit referendum (or more precisely Britain's withdrawal from the EU) is a violation of the Good Friday Peace Agreement. In fact that peace accord was brokered under the presumption that both the United Kingdom and the Republic of Ireland would remain members of the EU which indeed acted as a facilitator of the negotiations. Second, since 1999 Britain is a devolved multi-nation state and therefore one could argue that there should have been a double threshold required in order for Brexit to occur: a popular majority UK-wide but also a majority in all four of the constituent nations of the United Kingdom. As one shall see both these issues have returned to haunt the Brexiteers because the much debated "backstop" is a position of last resort, to maintain an open border on the island of Ireland in the event that the UK leaves the EU without securing an all-encompassing deal in line with the Good Friday peace accords, while the very future of the United Kingdom is being put at risk due to the fact that Scotland which voted heavily in favour of Remain is being dragged out of the EU against its will.

In any case if one puts aside these two elements of possible "unconstitutionality" of the Brexit referendum there is no doubt that it is after June 23 2016 the first rips to Britain's unwritten constitution

are carried. As public lawyers we should not forget that from a strictly legal point of view the referendum 2016 was not legally binding. This was clearly explained to Members of Parliament in a briefing paper published on 3<sup>rd</sup> June 2015:

«This Bill requires a referendum to be held on the question of the UK's continued membership of the European Union (EU) before the end of 2017. It *does not contain any requirement* for the UK Government to implement the results of the referendum, nor set a time limit by which a vote to leave the EU should be implemented»

It could not have been otherwise because, as any first year law student knows all too well, one of the two pillars of Britain's uncodified constitution, together with the rule of law, is parliamentary sovereignty. The Brexiteers also knew this. Indeed their alluring slogan – 'Take Back Control' – in actual fact was the rendering into simple and plain English of an intricate constitutional debate spanning over at least five decades. The core element of this debate is that the United Kingdom's entry into the EEC/EU has demolished parliamentary sovereignty. Eminent Eurosceptics such as Tony Benn, Enoch Powell, Douglas Jay and Bill Cash all argued that the EC was taking power away from the cradle of modern democracy, the British Parliament, and therefore it was taking control away from the British people. These arguments have also been voiced by eminent jurists such as Lord Denning who, in *Bulmer v. Bollinger* [1974], famously referred to the incoming tide of EU law, observing that 'it flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute'.

So Brexit had been a fight for parliamentary sovereignty (Westminster taking back control), but as soon as the referendum had been won there was what the German psychologist Wilhelm Wundt would have defined as a "heterogony of ends". Suddenly parliamentary sovereignty was no longer the main objective, but Brexit in itself. This was epitomized by the fact that the May Government claimed that, on the basis of the Crown's treaty-making prerogative, it had the power to trigger withdrawal under Article 50 without a vote in Parliament. The paradox is remarkable. After

decades of Eurosceptics and Europhobes claiming that Britain's membership of the EEC/EU was a violation of Parliamentary Sovereignty the implementation of Brexit was being carried out by side-stepping Parliament.

It is common knowledge that this was contested by numerous legal scholars and politicians. The British-Guyanese entrepreneur Gina Miller took her adversity a step further and challenged this assumption by way of judicial review in front of the High Court and indeed the latter handed down a decision in her favour. The "heterogony of ends" is further confirmed by the hysterical reaction of the Europhobic English tabloids. The Daily Mail defined the three judges "Enemies of the People!" posting their "mugshots" on its front page, the Sun spoke of a "bombshell judgment", the Daily Express evoked Churchill's famous speech, "we shall fight them on the beaches", and even the usually composed, albeit Eurosceptic, Daily Telegraph opened with "Judges vs the People". Never in the history of the United Kingdom had there been such a vehement attack against the judiciary, so much so that then then Justice Minister Lizz Truss was heavily criticised for her silence, and when the Minister finally intervened in defence of the British justice system, many observers in any case noted that it had been "*too little too late*".

At that point the May Government had to go through parliament in order to invoke Art 50, and again one can observe another rip in the constitution being made. Indeed May and her ministers insisted on the fact that parliament *must* vote the withdrawal bill without any amendments because otherwise MPs would go against the *will of the people*. It is highly likely that historians writing on Brexit in the years to come will consider this to be the moment when the centuries' old doctrine of parliamentary supremacy was definitely pushed aside. Indeed, with a few notable exceptions a fearful majority of the House of Commons voted in favour of the bill without any amendments.

Paradoxically it was the unelected House of Lords that provided some resistance to the trampling over of parliamentary sovereignty, but to no avail: the May Government refused any form of compromise and on March 29, 2017 she sent her letter to Donald

Tusk, President of the EU informing him of Britain's intention to leave the EU.

At this point we come to another violation of the constitution which has been generally ignored by commentators. Despite numerous promises that she would not ask for an early election on April 18 Mrs May announced the following outside Number 10 Downing Street: "I have just chaired a meeting of the Cabinet where we agreed that the Government should call a general election on the 8 June". Her opening statement is at the very least an anomaly if not a fully-fledged violation of the law because, following the approval of the Fixed Term Parliament Act in 2011 (FTPA 2011), the Government cannot "call an election", but as she explains later in her speech the government can only "move a motion in the House of Commons calling for an election". This motion requires a two thirds majority which to the surprise of many she subsequently obtained thanks to the decision of the Labour Party to support the motion. Looking at the then opinion polls one appeared to be in the presence of a very rare case of turkeys asking for the anticipation of Christmas... We all know that this move turned out to be a terrible boomerang: instead of obtaining the landslide majority forecast by most political pundits Mrs May accomplished the formidable feat of losing her albeit razor thin majority. One might argue that here we can find the origins of the Irish predicament of Brexit that has so far prevented the PM from getting her deal passed through Parliament.

Again the British Constitution was torn even further. After a truly disastrous election campaign Mrs May lost her overall majority, but the Tories were still the largest party in the House of Commons. With a certain imperturbableness May did not think for a minute that Brexit might require a dose of sane consociationalism rather than the usual confrontational politics so typical of Westminster. She thus sought the external support of the Democratic Unionist Party of Northern Ireland to form a minority government. Now, of course this was not the first time a British Government had had the support of the Unionists but the last time this had happened was in the 1970s well before the much-cited Good Friday peace agreement. Indeed, the latter implies that the Irish and British governments must be

bipartisan in ensuring the formation of a government in Northern Ireland. I think we can safely say that the fact that Northern Ireland still does not have a government after two years is the “proof in the pudding” that the present May Administration is not seen as a credible facilitator of the formation of a new executive in Northern Ireland. Sadly the centrality of this issue was demonstrated by the recent killing of journalist Lyra McKee by members of the self-proclaimed “New IRA” and is testimony of how precarious peace really is in that region.

Let us now come to the events of the last few months where, once again, the British Constitution has been put under enormous strain. A frequent question certainly begs: how has May’s second cabinet survived for so long? It is a question that is frankly difficult to answer. Since forming her minority government on June 11, 2017 May has currently had 41 resignations with 31 of these relating to Brexit. I will leave it to the political scientists to verify whether this is a record breaker, but there is no doubt that this finds no equivalent in British parliamentary history. Some scholars have argued that the FTPA 2011 cited above is actually the reason for May’s survival. In the past any Prime Minister who saw the resignation of key members of her/his cabinet would have considered this *de facto* a motion of no confidence, but when a motion of no confidence was formally presented by Jeremy Corbyn in accordance with FTPA 2011 it did not pass despite the fact that 24 hours earlier Mrs May had conceded the worse defeat of any incumbent government. Furthermore, just a few weeks earlier Theresa May had also defeated a leadership contest within her own party. This is counterfactual, but probably the peculiar circumstances of Brexit rather than the Fixed Term Parliament Act explain why Mrs May has held on for so long. The truth is that nobody wants the thankless task of resolving the Brexit enigma. But even in attempting to get her deal passed (and I say *her* deal and not the *UK government’s* deal because this agreement was clearly negotiated by Theresa May without the full involvement of her cabinet) the Prime Minister has overstepped the boundaries. Indeed, when on March 18 the Speaker of the House John Bercow made reference to Erskine May and a precedent of 1604 to thwart a

another vote she decided to make a Machiavellian move and separate the actual deal from the political statement causing uproar from the opposition. This very un-British lack of fair play proved to be pointless because the deal was voted down once again albeit by a smaller margin. In the meantime the European Union (Withdrawal) (No. 5) Act has received Royal Assent and has become law. This law (better known as the Cooper-Letwin Act) prevents Britain from leaving the European Union and constitutes the legal basis for the extension of Art. 50 to October 31.

So what now? Well it would be easy to fall back on a much used (abused?) quotation and say that “predictions are hazardous, especially about the future”, but frankly the incredible events of the last two and a half years make this citation more than credible. Despite being defeated three times Theresa May’s deal could be approved, Britain could still leave without a deal although this would be in violation of its own statute law (the Cooper-Letwin Act), Parliament might finally muster up the courage to reaffirm its supremacy and revoke Art. 50, there could be another general election where a Brexit or Remain majority win or there could be another referendum. The discussions between the Conservative and Labour Parties (better late than never) might lead to the approval of May’s deal plus Britain remaining in the custom’s union (and even in the single market) something that has been dubbed Common Market 2.0 or Britain might obtain a Canada-style free trade agreement. In the meantime, there is another election which the UK might take part in (unless it leaves the EU by June 1) and those are the elections to the European Parliament. Five years ago those elections saw Nigel Farage’s UKIP become the first party in Britain with 26.6% and led to David Cameron’s decision in 2015 to promise a referendum. The latest poll by YouGov puts Nigel Farage’s newly founded Brexit Party in first place with 23%, but the Remain parties would have more than 50% of the share of votes. Trick or Treat? Who knows...