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Constitutional Illegitimacy over Brexit

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Abstract
Members and supporters of the British government say that the only constitutionally legitimate course of action over Brexit after the referendum is to press ahead with withdrawal from the European Union, even if that would entail the complete severance of all ties (which we normally call 'hard Brexit'). A more sophisticated view of the constitution, however, shows that these more or less populist arguments are false. As the Supreme Court confirmed in the recent *Gina Miller* judgment, the constitution did not change with the June referendum. Parliament is still supreme and determines both ordinary legislation and constitutional change. In fact, if one examines closely the claim that the referendum entails hard Brexit, it becomes obvious that this claim is false as well. The referendum opened the door for one among four different possibilities. Which Brexit option—if any—the United Kingdom should take is a matter for Parliament now to decide, following the normal processes of democratic deliberation and representation.

Keywords: Brexit, constitution, referendum, Supreme Court, democracy, legitimacy

One hears Eurosceptics in Britain say that a second referendum on the EU would be 'undemocratic' and that it would somehow undermine the authority of the vote of June 2016. It is a strikingly odd thing to say. A referendum is supposedly a means of communicating the people's will. If you accept that it is a good way to decide an important issue, why not accept it as frequently as you are able to set up polling stations? If a referendum does indeed express the people's will, why prevent that will from being expressed again? After all, we do something similar to that with parliamentary elections: we have one every few years. We do it precisely in order *to* change our minds. Is this a mistake too? If the fear is that a referendum can be manipulated by those asking the question, then why accept that a referendum was legitimate in the first place?

Admittedly, those who say those things do not exactly mean them. The Eurosceptic campaigners are not interested in articulating novel principles for democracy: they want the UK to leave the EU. Consider their predicament. For forty years, they were being derided as an irrelevant and extremist minority, ignored by the mainstream. They are now basking in the glory of their narrow victory and they are not going to let the opportunity slip. They will say anything to achieve their prized end, which is to sever all ties between the United Kingdom and the European Union. The referendum is just a means to that end.

Yet, however self-serving, these arguments about democracy are finding a welcome audience: most British people now believe that a second referendum is not needed. A CNN/ComRes opinion poll found in December 2016 that only a third of voters would welcome a referendum on the terms of Brexit.[1] It seems that even some of those who voted to remain do not wish to have another vote.

One explanation for this is that the referendum is being seen as a response to past unfairness. It is presented as the overdue rebellion by the people against a remote, elitist and essentially illegitimate Establishment—and this is what is most alarming about these arguments. They signal an acceptance of the premise that all established institutions are at fault. These arguments have internalised and, therefore, normalised anti-democratic populism.

The populist challenge

This kind of populism has thrown the UK Constitution into a state of confusion. People

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seem not to know how to respond to it. Old certainties about the supremacy of Parliament, the independence of the civil service and the paramount role of the courts are being challenged.

These old truths are challenged both because they are elements of the supposedly illegitimate Establishment, and because of the alleged superior authority of the referendum. Alarmingly, the nebulous idea of the illegitimate Establishment seems now to include our democratic representatives in Parliament, as well as the civil service and the courts. This is very close to being a rejection of our present democratic institutions. Theresa May, who ironically is an unelected Prime Minister who won office through the internal processes of her party, said in a speech last October that those who challenged the legality of the Article 50 notification were 'subverting democracy'. It was an extraordinary thing to say for a sitting Prime Minister.

This statement—not an isolated one—was a public endorsement of the populist narrative. The 'will of the people' as expressed in the referendum was being portrayed as the only democratic institution. The courts were seen as democracy's opponent, not part of the essential architecture of checks and balances that make democracy possible—something that has been common ground in English law since 1688. The claimants in the *Gina Miller* case—and the other cases that were later joined with it—were, of course, not seeking to cancel the result of the referendum: they were only to seeking to exercise their right to seek judicial review under the law. They relied on legal arguments alone, not on any sort of political or other power. They did not impose anything on anyone.

The populist assault continued after the High Court found that an Article 50 notification must be decided by Parliament, under standard rules about the use of the royal prerogative. Popular newspapers attacked the judges as 'enemies of the people'. Again, this was not an isolated incident. More newspapers later targeted the judges that heard the case on appeal at the Supreme Court last December. So, the general intellectual atmosphere of constitutional law was thus transformed.

Anthony Barnett wrote that these attacks were the 'raw meat of dictatorship' and proposed that British institutions could only be defended by a written constitution.[2] Vernon Bogdanor, an experienced observer of the UK Constitution, wrote that the will of the people, not the will of Parliament, is now 'sovereign'.[3] Most constitutional lawyers will disagree with this conclusion, but the very fact that such an argument is being made shows that the populist challenge is affecting the stability and coherence of our constitutional framework.

Thankfully, the Supreme Court did not agree with the challengers. In its justly celebrated and wide-ranging *Gina Miller* judgment of 24 January 2017 ([2017] UKSC 5) the majority of the Supreme Court affirmed the standard principles of the UK Constitution. It ruled (par. 82) that a major change to UK constitutional arrangements, such as withdrawal from the European Union, could not be achieved by a ministerial decision. Constitutional change can happen, the Court continued, 'in the only way that the UK constitution recognises, namely by parliamentary legislation'. The conclusion follows 'the ordinary application of basic concepts of constitutional law to the present case'. Constitutional change cannot happen through practice, evolution or change of opinion, as previous constitutional theorists have written. It can only happen through the proper channels of legislation. This is not said anywhere explicitly in the UK unwritten Constitution, but is now held to be true as a 'basic concept' of the constitution.

The UK Constitution has for years relied on a careful balance between Parliament, the political parties, the civil service and the courts. It is a more or less unique arrangement, which has been held together by an unwritten set of rules and principles that place emphasis on constitutional precedent and convention. All other European states have a written constitution, which works as the public foundation of their political life. No constitutional change is accepted there without a specific process of amendment, normally requiring increased majorities in Parliament. EU law was thus introduced there through explicit constitutional amendments.

It is different in the United Kingdom, where such a clear public document stating

political principle is missing. So, when novel arguments about constitutional change are being made, as they are by Bogdanor and others, they matter more than they would elsewhere. This is why *Miller* was so significant. The Supreme Court has now confirmed that the UK Constitution is not dissimilar to the European constitutions. It too requires an *explicit* political and democratic process for the constitution to change. This is because the constitution cannot be something so fickle as to be changing every time the public mood changes. A constitution can only be amended through a process of law. Otherwise, it is not a constitution at all.

The judgment can defend the constitution legally, but cannot do so politically. That the constitution is unwritten means we do not have a clear method of changing it for all time. The *Miller* judgment refers to the present, but does not secure the future. So far, the courts have allowed the constitution to evolve, with new Acts of Parliament taking their place in the general framework as 'constitutional statutes'. They allowed this to happen without fixing precisely the reason for distinguishing some statutes as constitutional and others as ordinary. This careful balancing act is now at risk. The referendum is being presented as a novel ground for change, and perhaps, as the most important constitutional instrument of all. This seems also to be the government's position. We do not know what can happen next, if this populist view is widely endorsed. If we do not protect the constitution in argument and deliberation, we may find before long that the system of checks and balances we have come to know is being replaced. It is important to understand exactly how the populist claims challenge our constitutional fundamentals. Once we understand what these novel claims say, we will then see that they are extremely unattractive.

How something can be illegitimate

The key idea here is that of constitutional 'illegitimacy'. What does it mean to say that a government's actions can be illegitimate? Discussions of legitimacy often fail to distinguish between two senses of legitimacy. The first is the *subjective* sense or what we might call 'social legitimacy'. It refers to the fact that people may believe an institution, decision or office to be legitimate. A popular government is thus socially legitimate if there is widespread support for it. It is obvious, however, that this subjective sense of legitimacy is derivative. It depends on having some prior conception of a substantive test of legitimacy that one can apply to the relevant institution in order to determine if it is legitimate. This is an *objective* sense of legitimacy. The key distinction here is that between legitimacy and full justice. It is generally accepted that the tests of legitimacy require something less than—or different from—perfect justice. An unjust decision may have political legitimacy—if it is taken by a democratic government, for example. I shall call this test simply 'political legitimacy'. It is not enough for this sense to say that a government is legitimate because it is popular. If we said that, we would be confusing social legitimacy with political legitimacy.

Political legitimacy, whatever its philosophical justification, is not a controversial idea: it goes hand in hand with constitutional law. The tests of legitimacy coincide with modern principles of the rule of law, democracy and human rights. Wherever these principles are reasonably well respected, there is a *legitimate,* although not perfectly just, state. I propose the following principles of political legitimacy. A political institution, decision or office is legitimate if it does at least five things: (a) It operates under a framework that recognises the higher role of an established constitution; (b) the constitution in place protects reasonably well its citizens, through the rule of law and the respect of civil, political and social rights; (c) law-making is subject to democratic procedures of representation and accountability; (d) all public institutions comply fully with the existing constitutional framework in a way that is always open to the monitoring and, occasionally, enforcement by the courts; and (e) the constitutional framework itself is general and is not being manipulated for short term political gain.

These are reasonable starting points for any discussion of political legitimacy. They are also the main principles of the unwritten common law Constitution of the United Kingdom, as confirmed by the Supreme

Court in *Miller*. It is not open to the government or to anyone else to deny their legal significance. They have come about through legislation and through the refinement of the common law over many centuries. The referendum on the European Union could not have changed them.

Nevertheless, the government's position on withdrawal from the EU challenges these constitutional fundamentals. Its position is that a complete decision to withdraw from the EU was taken on 23 June. In her speech at the Conservative Party Conference in Birmingham in October 2016, Theresa May said: 'We can start—as I said on Sunday—by doing something obvious. And that is to stop quibbling, respect what the people told us on the 23rd of June—and take Britain out of the European Union.' It all turns on the phrase 'what the people told us'. What is 'the people'? And what did it say? In order to see that the Prime Minister's premise is false and that the policy it has set in motion is constitutionally illegitimate, we need to ask first what the referendum was about.

What was decided in June?

The referendum question was simple: it was a question concerning membership. It was about leaving or remaining, so rejecting or endorsing membership. It concerned the familiar status quo. The question did not say what we might wish to replace the status quo with. And as we shall see, it could not do that because there are many ways in which the UK could be connected to the EU without being a member. The various possibilities for leaving have been helpfully summarised by the European Union Committee of the House of Lords in a report entitled 'Brexit: The Options for Trade'.[4] The report lists four separate options, which is a convenient simplification.

The first option is EEA membership, which entails membership of the single market and free movement of persons (also known as the 'Norway' deal). The single market is very significant for the British economy, because it is an integrated geographical area where formal rules of non-discrimination and mutual recognition entail a virtually friction-free environment for the movement of goods, services and workers. This applies also to financial services which, through the mechanism of passporting rights, can be provided throughout the EU from anywhere within the EU. This market access will be lost if the UK leaves the single market. The second option would be the agreement to remain in the customs union, but not in the single market. It is the agreement currently entered between the EU and Turkey, which is also a candidate country for membership (although the likelihood of joining is currently very low). The third option would be an *ad hoc* trade agreement with the EU outside the single market (the 'Canada deal'). We can only speculate as to what such a bespoke deal would include. The fourth option is the option of no deal with the EU and, therefore, trade on the basis of WTO rules outside the single market ('hard Brexit'). It is the only option not requiring any negotiations with the remaining EU member states. It is the default position that will come about if the two-year deadline of Article 50 passes without agreement.

These options are very different in content. The first keeps the UK within the single market. The others do not. The four options are also different in how they can come about. The first three depend on negotiations with others and they can only exist if an agreement is struck with the other twenty-seven member states. But the fourth option—hard Brexit—can be a *unilateral* decision because it does not depend on the consent of anyone else to come about. Given the referendum question, voting 'Leave' was not a vote for choosing any particular of the four available options.

The referendum thus only rejected a fifth option—that of remaining a member under the current arrangements. That the referendum question had to focus on the status quo is understandable: since nobody knew then—and we still do not know now—what precise deal the negotiations will produce, no other choice was available for us to consider. It was natural to start from the question of whether the status quo was acceptable and leave the future options indeterminate.

Nevertheless, the Prime Minister is now saying that only *two* of the four options are open to the UK following the referendum. In her Birmingham speech, she said 'But let's state one thing loud and clear: we are not leaving the European Union only to give up

control of immigration all over again. And we are not leaving only to return to the jurisdiction of the European Court of Justice. That's not going to happen.' The Prime Minister's statements entail that the first option is out of consideration, because the EEA option is incompatible with retaining immigration control for EU citizens or with escaping the jurisdiction of the European Court of Justice. But it also means that in all likelihood, the second option is excluded too, because membership of the customs union would normally require some supervisory role for the European Court of Justice. Membership of the EEU would be the only way in which the UK could remain in the single market without being a member of the EU. So the government seems to be saying that Brexit means either the third or the fourth option, which means some variation of 'hard Brexit'.

Is that legitimate? It is very hard to see that it is, given how the decision was made. The referendum was not a vote about leaving the single market; nor was it a decision to limit the rights of European citizens. Neither of these questions was on the ballot. Staying in the single market or the customs union as well as accepting free movement of European citizens are fully compatible policy choices with Brexit. Some people who voted for Brexit may have thought that the Norway deal was a good option for them in the years ahead, or they might have thought that this was something for another day. If they had known that Brexit meant only hard Brexit with all the associated economic hardship it will bring, they might have opted to vote to remain. We do not know this, because hard Brexit was not on the ballot.

Moreover, the Prime Minister's decision to escape free movement of persons is actually contrary to the choice made by her predecessor as Prime Minister, who supported 'Remain' and won the general election of 2015. Hence, Mrs May's decision to leave the single market cannot derive any legitimacy from the 2016 referendum or from the 2015 general election.

Therefore, the government's argument that the referendum was a decision for hard Brexit is groundless. There was no referendum decision that there should be a hard Brexit. There was also no general election where the parties supporting hard Brexit have received a majority (quite the contrary —UKIP was the only party that sought anything like Brexit in the last general election). Moreover, there is no parliamentary decision for hard Brexit—since no such vote has been offered by the government. In short, the only ground for hard Brexit is the decision of the Executive. There is no other constitutional basis for it. And as we saw above, one of the principles of constitutional legitimacy in the UK is that law-making should be subject to democratic procedures of representation and accountability. This principle—established as far as back as the 1688 Bill of Rights—is clearly violated when important political or even constitutional decisions are made by the Executive alone. This is, I am afraid, what the British government has resolved to do: to proceed to hard Brexit on the basis of no constitutional legitimacy whatsoever.

Is time important?

I now turn to a possible argument that could be raised by supporters of the government. This is the argument of speed: because hard Brexit is the quickest possible Brexit, in that it does not require negotiation, it is the one that must take place in preference to all others. This statement too, however, has no basis on the referendum result. The referendum itself said nothing about the length of negotiations or the role of transitional arrangements. Indeed, as we saw above, three of the four Brexit options require extensive talks with our partners, otherwise they do not exist. The referendum did not decide that the government must act quickly, or in any event, before the next general election. The referendum also did not decide that we must stop talking to our European partners it was a vote for Brexit, not for isolation. So, the only reasonable interpretation of the referendum vote is that the UK government has a mandate to start negotiations about replacing its EU membership with a new type of arrangement. Nothing else follows. There is no presumption in favour of speedy, or unilateral, or hard Brexit.

Having time to negotiate is essential for another reason too, which the electorate surely must be interested in. The transition from the present status to the new one must happen smoothly. A smooth transition

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requires that the two agreements which the UK will need to strike with the EU should happen at the same time. What are these two agreements? First, Brexit requires a 'withdrawal agreement' sorting out what happens to financial commitments, pensions, institutions and the like. Second, it requires a 'trade agreement' about the future trade relations between the UK and the EU. This agreement will determine if London banks can do business in the EU, whether British cars and car parts will be subject to customs formalities and tariffs, and whether persons will need visas to travel and work in Europe. Such issues will not be resolved by the withdrawal agreement. If the two agreements happen at separate times, then we are forced to the WTO model by default immediately after withdrawal. This means that hard Brexit will have to precede any other type of relationship with the EU. But that would be a very unwelcome development for the UK economy.

It follows that having time to negotiate properly is essential if Brexit is to lead to a smooth transition, whatever the end result may be. Even a hard Brexit would need time for negotiations about trade so as to avoid the cliff's edge of a sudden transition to the WTO rules without any preparation. It is, therefore, an illegitimate use of the referendum result—even if it was taken to be a sufficient mandate for hard Brexit—to claim that the British people decided to have the fastest possible Brexit or one without negotiations. On the contrary: all types of Brexit will reasonably require time to negotiate a smooth transition to the new state of affairs.

Restoring our constitution

The reality is that the referendum result has been used as a means to other ends. The populist argument is being used to unsettle our constitution and to diminish the role of Parliament, the civil service and the courts. In effect, the populist argument seeks to remove from our system the process of democratic deliberation that has been central to our democratic institutions. Using the referendum in this way risks, therefore, making our political system less democratic, not more.

The populist claim grants absolute power to one person, the Prime Minister, who then acts in the name of the people, but without the normal institutions of accountability. But parliamentary deliberation is indispensable under our constitution—and this is for a very sound reason. As we have seen, choices are not black and white, yes or no. Various policy goals often coexist and compete with one another. They require tradeoffs and the exercise of judgement. Such decisions have to be made by Parliament, where all the various interests of the nation are represented, at least in principle. Direct democracy, where we decide only one policy at a time, by way of a referendum, could not possibly replace this complex discussion of the various competing options, which can take place in a parliamentary chamber. Direct democracy, which limits decision to a one-off choice between two pre-selected alternatives, *prevents* full deliberation on the available options. Cutting off deliberation is the same thing as cutting off representation.

The correct position is simple: the referendum decision was a rejection of the status quo, but all it meant was that we now need to deliberate about what to do next. First, we need to engage in negotiations with a view to establishing the alternatives (so we need, in principle, to proceed with making the notification of Article 50). Second, once we know what they are, we need to choose one of the available options. It is clear that there are many more decisions to make, depending on the way the negotiations turn out. How can we make those complex decisions? The only legitimate body to make them is Parliament. If Parliament feels constrained, perhaps a new referendum on the final deal could also be called. But such a referendum must take place when a concrete and real option is on the table.

It is clear, therefore, that the government's position so far has been constitutionally illegitimate. By taking the will for 'some Brexit' and interpreting it as a will for an 'exclusively hard Brexit', the government has distorted the referendum vote. Moreover, by seeking to proceed with hard Brexit without an electoral mandate for doing so or without an Act of Parliament setting out what it would mean for people's rights, the government has also been violating constitutional fundamentals.

It is important for our constitutional system that these novel claims under the

supposed 'will of the people', be clearly rejected. The referendum is of course binding, but the referendum left open very many questions about what kind of relationship the UK should have with the EU. The constitutional process for making these decisions requires that Parliament should be involved at every stage.

Notes

1 CNN/ComRes opinion poll, http://edition.cnn.com/2016/12/19/europe/cnn-brexit-poll/index.html?iid=EL (accessed 29 March 2017).

2 A. Barnett, 'Why Britain Needs a Written Constitution', *The Guardian*, 30 November 2016, https://www.theguardian.com/commentisfree/2016/nov/30/why-britain-needs-written-constitution (accessed 29 March 2017).

3 V. Bogdanor, 'After the Referendum the People and not Parliament are Sovereign', *Financial Times*, 9 December 2016, https://www.ft.com/content/9b00bca0-bd61-11e6-8b45-b8b81dd5d080 (accessed 29 March 2017).

4 House of Lords, European Union Committee, 'Brexit: The Options for Trade', 5th Report of 2016–17, 13 December 2016; https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/72/72.pdf (accessed 29 March 2017).