BREXIT AND THE UK'S CONSTITUTION

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I. REFERENDUMS AND PARLIAMENTARY SOVEREIGNTY

Referendums have been used in the UK in the 20th and 21st centuries for a number of purposes.

a. The UK's constitution is based on parliamentary, not popular sovereignty. Referendums can be seen as contrary to the idea of representative and responsible government, though this may be a virtue. Dicey's view of referendums was that, on the Swiss model, limited to giving the political sovereign (the electorate) a veto over legislation passed by Parliament, they could be a useful tool for limiting the adverse effects of party domination of the political and legal system. The Welsh and Scottish devolution referendums in 1979 were of this kind, limited to a vote on the desirability of implementing devolution legislation which had already been passed. They were not a restriction on what Parliament could legislate but a control over the circumstances in which Act of Parliament could take effect. This is similar, though not identical, to allowing Ministers to bring provisions of Acts into force (or not) by Order in Council. Compare the *R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 A.C. 513, HL.

b. Dicey thought that referendums were conservative in their tendency, likely to stop the capacity of parties to lose touch with ordinary electors and generate factional (progressive) legislation which had little popular support. Dicey approved of that. Beyond that, referendums would hand policy-making power to the ignorant. (The Welsh and Scottish pre-legislative devolution referendums in 1997 were of this kind.) See A. V. Dicey, *Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century* 2nd edn (London: Macmillan and Co., 1914), *passim*; A. V. Dicey, 'Introduction', in *Introduction to the Study of the Law of the Constitution* 8th edn (London: Macmillan and Co., 1915), xci-c, concluding, 'It is probable, if not certain, that any one, who realises the extent to which parliamentary government itself is losing credit from its too close connection with the increasing power of the party machine, will hold with myself that the referendum judiciously used may, at any rate in the case of England, by checking the omnipotence of partisanship, revive faith in that parliamentary government which has been the glory of English constitutional history.'

c. There are, however, forms of referendum other than the legislative veto model. When used as a policy-making instrument, as in the case of California's initiative and referendum, the UK's EU withdrawal referendum, or the Scottish independence referendum, its implications are very different, which is not to say that they are unjustified where popular support is required for a matter relating to the character and shape of the nation.

d. Special cases

i. Northern Ireland Act 1998, s. 1:

> 1.— Status of Northern Ireland.
>
> (1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.
>
> (2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

ii. Scotland Act 1998, s. 63A (inserted by Scotland Act 2016):

> 63A Permanence of the Scottish Parliament and Scottish Government
>
> (1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements.
>
> (2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government.
>
> (3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum.

iii. European Union Act 2011

iv. European Union Referendum Act 2015

II. The effects of referendum campaigns on the system of government in the UK

a. Nearly always requires suspension of normal governmental arrangements, especially Cabinet government and collective responsibility, because it hands to people outside Cabinet responsibility for making Government policy.

b. Puts a strain on the role of Parliament, because it becomes politically and socially very difficult for Parliament to enact legislation inconsistently with the outcome of

the legislation. Substitutes direct for representative democracy, in substance if not in form.

c. Can lead to divisions within political parties, which are the main instruments of our representative system of government, although in the case of the EU referendum it was a response to such divisions rather than the cause of them.

III. The decision to initiate the withdrawal procedure from the EU

a. Article 50 TEU requires the notification of intention to withdraw to be given in accordance with the Member State's constitutional requirements.

b. In the UK, some constitutional requirements are legal, while others are not, being founded on conventions, practices, or understandings, some of which are political while others are administrative.

c. The non-legal requirements are, in my view, distinctively different from laws, because (i) they are not made by an authoritative source or procedure (and in many cases are not 'made' at all), (ii) they are not often reducible to an agreed text, (ii) they are subject to continuous re-negotiation, and (iv) they are not 'valid' or 'invalid' (although I acknowledge certain similarities between the way in which some of them emerge and the way in which the common law may develop). They usually originate in a response to some conflict or problem, emerging as a way of plastering over a crack so that orderly political and administrative business may resume. If they work, they become almost second nature to political and administrative actors. This means that any of these requirements may change suddenly in response to new circumstances, often as a result of disagreement as to what the convention, practice, etc., really requires in those circumstances.

d. As a matter of law, relations with other states and international organisations are a matter for the executive under the Royal Prerogative, which is not subject to judicial control or parliamentary control unless an Act of Parliament has restricted the exercise of the prerogative (as, for example, has happened in relation to the ratification of certain treaties under Constitutional Reform and Governance Act 2010, section 20, and Part 1 of the European Union Act 2011).

e. Giving notification under Article 50 is not a treaty – it merely sets in motion a process of negotiation which may lead to a treaty in due course – so is not subject to any legal restriction, although:

    i. the Government would be collectively and individually responsible to Parliament for the exercise of the prerogative after the event; and

    ii. the Government will probably think it sensible to consult Parliament before giving notification under Article 50, but it would not be bound by the result of the consultation if, for example, a majority in the Commons were to favour remaining in the EU.

f. Courts have no role in relation to give notification under Article 50, because, with very limited exceptions, the exercise of the prerogative in relation to international affairs is, in principle, absolute, in the sense that, once a court is satisfied that an act or omission is within the scope of the prerogative and is not governed by statute, the court will not assess the propriety of the exercise of the power. See, in relation to EEC, EC and EU treaty-making, *Blackburn v. Attorney General* [1971] 1 W.L.R. 1037, CA, *McWhirter v. Attorney General* [1972] C.M.L.Rep. 882, and *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] Q.B. 552, CA. This is subject to a number of qualifications.

   i. Where a statute intrudes on the field occupied by the prerogative, the Crown cannot exercise the prerogative in a manner inconsistent with the statute: *Attorney General v. De Keyser's Royal Hotel* [1920] A.C. 508, HL; *R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 A.C. 513, HL.

   ii. Where the prerogative in relation to international affairs is exercised in a way which affects the Crown's responsibility towards people within its protection abroad, it is possible that domestic law requires the Crown at least to consider whether to make representations to other states in support of the people concerned, and whether to take a step which opens them up to penal or preventative sanctions at the hands of another state or an international organisation. That duty may perhaps be subject to judicial review: *R. (Abbassi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA CIv 1598, [2003] UKHRR 76; *R. (Al Rawi) v. Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279, [2008] Q.B. 289, CA; *R. (Youssef) v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, [2016] 2 W.L.R. 509, SC, at [19]-[27] *per* Lord Carnwath J.S.C., writing for the Court.

   iii. It is possible, too, that a prerogative act or omission which directly interferes with a person's rights may be amenable to judicial review (subject to the defence of 'act of state'), as long as it does not involve review of decisions affecting foreign policy; but giving a notification under Article 50 is a decision affecting foreign policy, and can have no direct effect on people's rights, as people's rights under EU law continue to operate until such time as EU law ceases to apply in the UK as a result of a treaty or the effluxion of time under Article 50 itself. Cp. Lord Carnwath in *Youssef*, above, at [25], [34].

g. It has been suggested that, in some way, section 2 of the European Communities Act 1972 requires an Act of Parliament to give authority for the Government to give notification under Article 50. This seems to be a misreading of the section, which is concerned with the processes by which EU legislation takes effect in the UK and the relationship between EU and UK legislation. It does not affect the prerogative power to enter into treaties which may change the effect of EU law, or to take steps

which do not directly affect the law in the UK: *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] Q.B. 552, CA.

h. It has been suggested that, in some way, the Constitutional Reform and Governance Act 2010, section 20 makes it necessary for Parliament to have an opportunity to decide whether, and, if so, when, an Article 50 notification should be given. This seems to confuse the process of starting the process of negotiating towards a treaty with that of deciding whether to ratify a treaty, and fails to take account of the definition of 'treaty' and 'ratification' in section 25 of the Act.

i. Nevertheless, as Sir Stephen Laws has argued – S. Laws, 'Article 50 and the Political Constitution' U.K. Const. L. Blog (18th July 2016) (available at: https://ukconstitutionallaw.org/) – the absence of a legal requirement for Parliament to be involved before an Article 50 notification is given does not mean that Parliament should not be involved. The question is whether parliamentarians can persuade the Government, or Government believes, that it would be sensible to involve Parliament. One reason for doing so, as Laws points out, is that it would be unwise for the Government to trigger the Article 50 process without being confident that it could get parliamentary approval for the legislation which would be needed in order to avoid chaos at the end of the process. But, as Laws also points out, Parliament is going to be working on speculation rather than information about what it will be asked to approve, unless the EU is prepared to enter into pre-Article 50 negotiations yielding sufficiently clear understandings to let Parliament know what it is agreeing to.

IV. The end of negotiations, withdrawal, and the UK's constitution

a. When the Article 50 notification is given, a process of negotiation ensues. This will end if agreement has not been reached after two years, or longer if all Member States agree to an extension. While there is no need for Parliament to legislate during this period in relation to the place of EU law in the UK, it would be sensible for legislation to be put in place to pave the ground for withdrawal, particularly by specifying what parts of the law which currently have effect in the UK will continue to do so after withdrawal. This will not be straightforward, because (as Sir Stephen Laws, above, points out) the details of the withdrawal agreement may not be clear, so the legislation would need to cater for a number of different possibilities. An additional complication is the different means by which different elements of EU law have taken effect in the UK, including direct applicability and direct effect (which require no UK legislative action), indirect effect (requiring judicial action), and express enactment by Act of Parliament or by statutory instrument made under section 2 of the European Communities Act 1972.

b. *If there is no agreement and no unanimous agreement to an extension of negotiations*, the UK will simply cease to be part of the EU two years after the date of the Article 50 notification. In this event, there will be no treaty to ratify, and no need to repeal section 2 of the European Communities Act 1972, since Community rights, etc., will no longer have effect in the UK by virtue of EU law.

c. *If there is an agreement*, it will probably require to be ratified by the parties. In that event, the agreement will probably fall within the definition of a 'treaty' in section 25 of the Constitutional Reform and Governance Act 2010, and so will have to be laid before each House of Parliament before ratification, in accordance with section 20. The Act does not, however, prevent the Government from ratifying the treaty without parliamentary approval of it, although one can expect the Government to make time for a debate on the terms of the agreement. If the agreement is approved (or not disapproved) following the debate, the Government will inevitably ratify it.

d. It will not be necessary to repeal section 2 of the European Communities Act 1972 before or after ratification of any treaty, because EU law will automatically cease to operate in the UK when the treaty enters into force by virtue of the terms of section 2(1) itself.

e. The decision to ratify (or not) will not be subject to judicial review: *Blackburn v. Attorney General* [1971] 1 W.L.R. 1037, CA, *McWhirter v. Attorney General* [1972] C.M.L.Rep. 882, and *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] Q.B. 552, CA. It might be said, against this proposition, that ratification will directly deprive people in the UK of Community rights, and that it should be possible to use judicial review to ensure that people are not being improperly deprived of their rights. This seems to me to be mistaken, for two reasons. First, it is within the field of decisions affecting foreign policy, which courts will not control. Secondly, it would not be a case where the decision would be 'directed at the rights of specific individuals' (see *per* Lord Carnwath in *Youssef* at [26]) so as to make judges more inclined to see it as a matter affecting individuals than as a matter in the international sphere.

V. <u>After withdrawal</u>

a. One restriction on the legislative capacity of the Queen in Parliament will have disappeared, leaving open questions about other limitations.

b. Cabinet government may be able to return to normal.

c. The future use of referendums is likely to be subject to debate.

d. We are likely to find that we have new constitutional conventions, practices and understandings about the role of Parliament in foreign affairs.

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