Introduction

On 23 June 2016, a majority of the UK electorate who voted in the EU in-out referendum voted to leave the EU. This was a defining moment in the constitutional law and politics of the UK. Undoubtedly, exiting the EU has had legal, economic, and social effects within the UK, as well as in remaining EU States. But Brexit is as much about the British Constitution as it is about economics and relations with continental Europe. This book investigates the impact of Brexit on the British Constitution, but also locates Brexit in the broader context of historically significant British acts of union or disunion, drawing lessons from such past experience.

Constitutional Inadequacy

Brexit gave rise to a wide range of constitutional challenges and conundrums, which included: the role of 'advisory' referendums in Britain's Constitution; confusion over the UK's constitutional requirements for starting the EU withdrawal process; the respective roles of the UK Parliament and government in Britain's EU withdrawal; the position of the devolved nations in the Brexit process and the future of the territorial State; the extent and nature of domestic legislative changes necessary to complete Brexit, especially the increase of extensive executive powers; and the extent to which human rights will enjoy domestic protection post-Brexit.

All this has happened at a time of constitutional turbulence and disorder. Brexit has challenged a Constitution that was already 'unsettled'[1] (and it has since been further unsettled by COVID-19 regulations and the death of a long-reigning monarch).

The British Constitution has long been characterized as resting on the sovereignty of Parliament, and as unwritten, flexible, uncodified in nature, with political conventions and ministerial accountability often taking the place of hard law. However, this was a Constitution whose very uncodified and sometimes tacit nature was nonetheless supposed to give rise to a holistic

[1] N Walker, 'Our Constitutional Unsettlement' (2014) Public Law 529.

constitutional identity. There is no single document comprising the British Constitution, which instead is a blend of primary and secondary legislation, legally unenforceable conventions, arcane and opaque royal prerogatives, and insubstantial usages and understandings.

Much of the blame for the articulation of exceptionalism, flexibility and pride in the uncodified British Constitution must lie with Albert Venn Dicey, whose work, *The Law of the Constitution*, first published in 1885, set out what he perceived to be the main tenets of the Constitution. According to Dicey, the main pillars were parliamentary sovereignty, the rule of law and constitutional conventions – but in Dicey's opinion, 'The[e] secret source of strength is the absolute omnipotence, the sovereignty of Parliament.'[2] The other doyen of Victorian constitutionalism, Walter Bagehot, famously divided the Constitution into two parts – the 'dignified' and 'efficient'. Bagehot maintained that a disguised republic that had 'insinuated itself beneath the folds of monarchy', and that the function of the monarch was to 'disguise' the real working of government. Indeed, he claimed that the 'efficient secret of the English[3] Constitution' lay in the very close union and nearly complete fusion of executive and legislative powers. Both Dicey's and Bagehot's constitutional 'secrets' can prove highly damaging today. Unlimited parliamentary sovereignty acts as a straitjacket, making it impossible to protect key principles by constitutional entrenchment and closing off other constitutional models such as federalism. Bagehot's 'efficient secret' has come close to enabling executive sovereignty.

Dicey and Bagehot drew on earlier constitutional writing which stressed an organic English tradition of gradual evolution, continuity and preservation, traceable back to the 'Glorious' Revolution of 1688. The nineteenth-century historian and legislator, Thomas Babington Macaulay, wrote that, 'We owe this singular happiness, under the blessing of God, to a wise and noble constitution.'[4] To be sure, there was resistance to this celebration of the Constitution, from Tom Paine, for example. Nonetheless, Bagehot and Dicey continue to dominate English constitutional law to this day. And Dicey's work is seen by many as the nearest thing to a codified Constitution in Britain.

However, this organic Constitution underwent a gradual reform process in recent decades. These constitutional developments affected sovereignty and lines of authority. The changes included EU membership; the 1998 Human Rights Act; devolution in Scotland, Wales and Northern Ireland; removal of most hereditary peers from the House of Lords; and the increasing use of referendums as instruments of constitutional change. All this rendered the Constitution (and Britain) less unitary and more heterogeneous, more willing

[2] AV Dicey, *England's Case against Home Rule* (3rd ed., 1887) 168.
[3] Notably, Bagehot entitled his work, first published in 1867, *The English Constitution*. Dicey also referred, throughout *The Law of the Constitution*, to the *English* Constitution. Both works, however, cover the whole UK.
[4] Lord Macaulay and Lady Trevelyan (eds.), *Speeches: The Complete Writings of Lord Macaulay* (New York, 2004) II, 219.

to recognize centres of power elsewhere, without however bringing any cohesion or consolidation of constitutional form. Indeed, it was questionable whether all of this constitutional activity amounted to a major disruption likely to transform the nature of Britain's Constitution, or was simply a further evolution of Britain's flexible Constitution. For this activity had an ad hoc, disorderly feel to it.

EU membership undoubtedly played a crucial role in this constitutional transformation. This went hand in hand with developments undermining law's connection with the State. Post-sovereign approaches argue that States now share their powers with supra-State, sub-State, and trans-State systems. Neil MacCormick famously contended that 'sovereignty and sovereign states, and the inexorable linkage of law with sovereignty and the state, have been but the passing phenomena of a few centuries, that their passing is by no means regrettable …'[5]

However, Brexit challenges this recent vision of post-sovereignty. Perhaps, the most common constitutional idea to feature in Brexit debates was a reassertion of national sovereignty, of 'taking back control'. Yet, this is an anachronistic notion of sovereignty, and too simplistic. It fails to capture the way in which pooling sovereignty in one area may actually empower a State. Indeed, Brexit could imperil the very national sovereignty its advocates believe it will bring about. This is because, as well as threatening Britain's economic security, it risks empowering the executive at the expense of Parliament, and shattering the stability of the UK by threatening the peace settlement in Northern Ireland and provoking a further independence referendum in Scotland.

The 2016 EU referendum placed Britain's constitutional system under great strain, as well as providing it with uncommon public attention (including high-profile lawsuits such as *Miller*). Indeed, Peter Hennessey stated, shortly after the EU Referendum: 'The referendum was like a lightening flash illuminating a political and social landscape long in the changing … we need to look at our internal constitutional arrangements – the relationships between the nations, regions and localities of the United Kingdom.'[6] Most strikingly, the Brexit process has shed light on the inadequacies of the Constitution. As Blick and Hennessey comment, 'A key characteristic of the British constitution is the degree to which the good governance of the UK has relied on the self-restraint of those who carry it out.' But they concluded that the self-restraint is now missing, and those in charge are 'Good Chaps no more'.[7]

[5] N MacCormick, 'Beyond the Sovereign State' (1993) 56 MLR 1.
[6] House of Lords, Hansard 05 July 2016, Volume 773, at column 1963.
[7] A Blick and P Hennessy 'Good Chaps No More? Safeguarding the Constitution in Stressful Times' (2019): https://consoc.org.uk/wp-content/uploads/2019/11/FINAL- Blick-Hennessy-Good-Chaps-No-More.pdf. Maybe they somewhere include 'chapesses'. See also, P Hennessey, 'Our Sense of Decency Survived the War. It Won't Survive This', *The Times*, 8 September 2019, www.thetimes.co.uk/article/our-sense-of-decency-survived-the-war-it-wont-survive-this-3m9skzd79

And yet, there is little evidence that Brexit will provide a 'constitutional moment' in which a common solution will be found to these constitutional conundrums. It is doubtful whether a federal UK or codified Constitution will emerge, however much new constitutional arrangements are needed to deal with Brexit. Advocates of Scottish independence, or a united Ireland, are unlikely to have enthusiasm for an arrangement that would entrench them in the UK, even if it provided entrenched legal procedures to protect devolved nations within the State. And those satisfied with Brexit are unlikely to desire a codified Constitution or federal option, given that a desire for strong parliamentary sovereignty motivated their euroscepticism in the first place. Such distinct political identities militate against a comprehensive approach that could enable the British Constitution to deal with issues of disputed authority and the legacy of Brexit. In these circumstances, the outcome of the Brexit referendum provides a severe constitutional challenge for Britain.

Constitutional Amnesia

And yet, this is not the first time that Britain has encountered challenges to its very constitutional identity. Past 'acts of union and disunion',[8] such as the loss of British colonies in North America and British Empire; the admission of Scotland and Ireland into the union and then departure, or possible departure (Scotland); and the UK's EU membership since 1973, all provide precedents which help us understand how a British constitutional identity has been shaped or dismantled by law, and how law has determined issues of union, sovereignty and devolution of power. There are lessons to be learned from surprisingly similar past situations, although past examples of constitutional transformations are all too rarely invoked. Such constitutional amnesia may be a useful shield for obfuscating an unsettling imperial past involving violence, dark acts and an ugly history of colonialism. Nonetheless, there are surely ways to retrieve and re-examine the constitutional legacies of empire without falling into an unrealistic and unwholesome nostalgia.

About 75–100 years ago, many of the most noted British constitutional theorists examined the structures of the British Empire and Commonwealth (i.e. A Berriedale-Keith, Ivor Jennings, KC Wheare). More recently, those interested in transnational constitutionalism and legal pluralism have looked at the structures of the EU. But comparisons are rarely made (except perhaps by historians such as Linda Colley). And in not doing so, British legal scholars have missed something interesting. Arguments over the nature of constitutional arrangements – such as whether the British East India Company had sovereignty over parts of India, or whether the British Parliament could legislate for the entirety of the empire, raise interesting comparisons with contemporary discussions over where sovereignty lies in the EU.

[8] L Colley, *Acts of Union and Disunion* (Profile Books, 2014).

Furthermore, debates in the late nineteenth/early twentieth centuries over Irish Home Rule prefigured contemporary debates about Scottish independence. England, Scotland, Wales, and Ireland have a long history together. Questions over the union and how to manage UK unity are hardly new. However, past considerations, such as the early twentieth century exploration of 'Home Rule All Round', are infrequently revisited. The British seem ignorant of their constitutional history.

Britain's past abounds with acts of a constitutional nature across the globe, including constitution-making and managing constitutional transitions. All sorts of relationships between Britain and its overseas territories existed, and many of those territories, such as Australia and Canada, applied federalism while still within the British Empire. In contrast, there was little enthusiasm for federalism within the UK. Indeed, there existed a curiously bifurcated approach to Britain's Constitution. This indicates that the constitutional law applying within Britain was understood as differing from that which applied in Britain's then colonies and overseas territories, although this was never made explicit, and indeed, such a bifurcated approach conflicted with many of Britain's actions in the past. And, although many scholars in those overseas territories have analysed those constitutional relationships in great detail, there has been far less consideration from British theorists as to the impact of Britain's empire on the British Constitution as it applied in the UK.

Instead, commentaries on the British Constitution have often employed an 'exceptionalist' narrative, one that views Britain's uncodified Constitution, and its historical evolution, as unique and unparalleled, but nonetheless a blessing and infinitely preferable to 'foreign' Constitutions. Such a characterization is, however, unfortunate, because it hinders the ability to capture contemporary developments with constitutional language. As Bell noted, the nature of our devolutionary arrangements differs from the UK's 'dominant narrative of constitutional reform as a process that has involved continuity rather than rupture.'[9]

And once we look a little more closely, we see that a dominant narrative of peaceful continuity and exceptionalism is an *English* account that fits less happily with arrangements in other parts of the UK. Northern Ireland has certainly not enjoyed a long, peaceful history of gradually evolving constitutional affairs. Scotland possesses its distinct legal system, a different understanding of unionism, and frequently evokes a distinct constitutional tradition – as expressed in the 1989 Claim of Right and Constitutional Convention, and more recent independence initiatives. In these circumstances, the traditional narrative of unlimited parliamentary sovereignty appears less as a shared constitutional doctrine, and more as a device to manage and suppress other peoples – such as Scots, Irish, Welsh, and in the past, colonists.

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[9] C Bell, 'Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison' (2014) PL 458.

Therefore, this book has two main leitmotifs: *constitutional inadequacy* and *constitutional amnesia*. They come together in the phenomenon of Brexit. The remaining ten chapters of this book are divided into two parts. The first part examines five specific case studies, or 'acts of union and disunion'. The second concentrates on five themes of particular relevance to Brexit, alert to the relevance of the historical case studies to these themes. This 'Introduction' provides a summary of some of the main ideas and conclusions explored in these chapters.

This is not a book about Brexit as such, but a book about how the British Constitution has been affected by Brexit, and about how Britain's constitutional past is of relevance to Britain's latest act of disunion, Brexit. There are of course already many works which deal with legal aspects of Brexit, and this book certainly aims to capture the legal, political and constitutional changes of Brexit. However, this book also seeks to derive historical comparisons from Britain's constitutional past and earlier challenges regarding Statehood, sovereignty and territorial boundaries. Academic and disciplinary boundaries within law have been sufficiently solid that there has been little crossover between those working on EU law and those studying the law of the Commonwealth, Empire, Scottish devolution or Irish independence. Yet the challenge of Brexit is that it raises so many questions pertinent to all of these situations. One notable conclusion is that the British were never clear (perhaps deliberately, perhaps not so) as to what they meant by sovereignty. But they have been too willing to enforce this inchoate idea of sovereignty by force and/or unprincipled activity – a response often both damaging to those on the receiving end, and to Britain itself.

PART I: FIVE CASE STUDIES OF ACTS OF UNION AND DISUNION

I examine five case studies which reveal Britain's constitutional contingencies and complexities. Each of these studies examines Britain's role in relation to a wider community (Colonial and Revolutionary North America, Empire, Commonwealth, EU, ECHR) or a smaller one (Scotland, Ireland) in the context of a historically significant act of union or disunion. The point of this exercise is to map and analyse change at critical moments in British constitutional history. A legal-historical excursus enriches our understanding of concepts, compelling us to reconsider the meaning not only of union, sovereignty and differentiation within a broader polity, but also how law can facilitate these.

I often use the term 'Britain' loosely as a collective term for the four disparate nations of Scotland, England, Wales, and (Northern) Ireland, while recognizing that the 'UK', while being the official State in international law, is a more recent designation.

1. Scotland: The union of Scotland and England was the founding act of the UK in 1707, and consensually agreed between two sovereign parties. Scotland was never a colony of England and post-union retained considerable autonomy, including its distinct and separate legal and education systems and Church. As a result of the 1707 union, the UK Parliament (which was not simply the

English Parliament enlarged) came into being. The doctrine of unlimited parliamentary sovereignty is not accepted by everyone in Scotland, where there exists an alternative Scottish tradition of popular sovereignty, and the belief that Scotland's place in the UK union rests on its consent.

Since devolution in 1998, Scotland has developed some progressive constitutional forms, as well as more pro-European inclinations that challenge the unitary constitutional approaches of London. Brexit, however, has placed the UK union under strain, and there have been demands for a second Scottish Independence referendum. Surprisingly, despite the threat of Scottish independence, there has been little debate about what the 'Union' or 'Britain' is or should be.

2. Ireland: The legal and constitutional relationship between Ireland and England (and latterly Britain) was unclear for many centuries. Although Ireland enjoyed a good deal of legislative sovereignty under Grattan's Parliament from 1782, the Acts of Union in 1801 set up direct rule from Westminster. During the nineteenth century, there was a campaign and draft legislation for Irish Home Rule (which Dicey, an ardent unionist, vehemently opposed). This campaign is worth reconsidering in the Brexit/Scottish independence context, given the varied legal and constitutional arrangements that were explored and vigorously debated. However, Home Rule never came about, rendered pointless by subsequent events. Since the Belfast/Good Friday Agreement and devolution in 1998, Northern Ireland has a had a variegated but pragmatic settlement of consociation and compromise quite different from the traditional British constitutional settlement. The EU has played its role in the peace process, providing structures for its continuation. Brexit now presents considerable challenges for Northern Ireland and the Republic.

(The situation for Scotland, Northern Ireland, and Wales, especially post-devolution, and with regard to Brexit, is also considered further below in this Introduction).

3. The US – The Loss of Britain's First Empire: From 1764 to 1776, the British Empire confronted a political crisis for which there was no constitutional precedent. The issue was parliamentary sovereignty – the authority of the British Parliament over America. The Declaratory Act of 1766 asserted the right of the UK Parliament to legislate for the colonies 'in all cases whatsoever'. Yet, the British case for parliamentary sovereignty was not particularly clear, and eminent English politicians and lawyers, such William Pitt the Elder and Lord Camden, argued that Parliament had no ability to tax the American colonies. By 1774, most American spokesmen argued that Parliament exercised no authority over internal affairs in America. In 1776, the American colonies declared their independence and a war of independence ensued, that Britain lost.

But what could explain this disagreement over sovereignty between Britain and America? Both parties were British subjects, generally reading the same provisions of law. This chapter looks to several factors for explanation. These include the fact of Britain's uncodified Constitution, which ensured that it would be unclear which laws were in any case 'constitutional'. There was also

the issue of how the British Constitution applied in the colonies. Did it apply in the same way as in mainland Britain, or was there a separate set of constitutional principles for the British Empire? The dominant view in Britain was that the colonies were a subordinate extension of the British State. In this way, the British Empire was understood as a single State – composed of single people, one Constitution, and one king – and British authority was conflated with parliamentary authority, national sovereignty with parliamentary sovereignty. This view, however, was contested in the colonies, which asserted that only the existence of a shared monarch connected American colonies legally to Britain and to each other. This suggested that colonial assemblies were comparable to Parliament. The 1603 union of the Crowns of Scotland and England was used to support this argument – that a monarch could reign over two countries, each with autonomy and separate parliaments. Indeed, the American constitutional theorist, McIlwain, went so far as to argued that, 'The true constitution of Britain was not unitary, but federal.'[10] There was, however, no acceptance of this in Britain, where the doctrine of undivided and unlimited sovereignty was increasingly employed by those in power.

4. British Empire/Commonwealth[11]*:* Britain at one time ruled over virtually a quarter of the globe's territory and population. Many late nineteenth-century textbooks asserted that Parliament's supreme law-making power applied throughout the empire.

However, the reality of empire undermined that. As Disraeli stated of the empire, 'No Caesar or Charlemagne ever presided over a domain so peculiar.' There was no legal definition of the British Empire and it possessed no explicit constitutional meaning. The constitutional law of the British Empire really was no clearer than it had been for the American colonies in the eighteenth century. For the empire was diverse and incoherent. Terminology was not very clear. The terms 'colony', 'dominion', 'possession' 'plantation', and other expressions were used in different ways at different times. Indeed, an anti-formalist attitude tended to prevail – often eschewing formal law in favour of informal assurances, customs and conventions. There was no attempt to establish a uniform legal code. The empire included 'an extraordinary range of constitutional, diplomatic, political, commercial and cultural relationships'[12] with at least eleven diverse species of government: Crown colonies of rule (including the huge 'sub-empire' of India); settlement colonies (mostly self-governing by the late nineteenth century); protectorates; condominia (like the Sudan); mandates (after 1920); naval and military fortresses (like Gibraltar and Malta);

[10] C McIlwain, 'The Historical Background of Federal Government', in R Pound, *Federalism as a Democratic Process* (1942).

[11] 'Commonwealth' here is used to denote later configurations of the British Empire as applying to self-governing Dominions from the nineteenth century, and not to 'The Commonwealth of Nations' as it now exists.

[12] J Darwin, *The Empire Project: The Rise and Fall of the British World-System, 1830–1970* (Cambridge University Press, 2009) at 1.

'occupations' (like Egypt and Cyprus); treaty-ports and 'concessions' (such as Shanghai, which was the most famous); 'informal' colonies of commercial pre-eminence (like Argentina); 'spheres of interference' like Iran, Afghanistan, and the Persian Gulf; and private trading companies – that is, the East India Company, whose claim to sovereignty over swathes of India was not defeated until well into the nineteenth century. Indeed, as one reviewer noted, 'There is scarcely a constitutional experiment known to modern practice (except, perhaps, the Russian Soviet) which is not to be found in one or other of the Constitutions of the Empire.'[13]

Indeed, it was impossible for Westminster to bind nearly a quarter of the globe with its legislation. The colonies and overseas territories were not represented in Westminster. The situation was not akin to the EU Parliament, in which British citizens had directly elected MEPs, in a Parliament with a co-decision or veto on legislation. The colonies' own legislatures, their own people on the ground, really determined what was going on, except in a few cases. And the sovereignty of the Parliament in London was only one of many types of sovereignty that existed. Much of the British Empire lent itself to a more pluralistic type of sovereignty – one that was divided, shared and indeterminate. Benton and Ford identified a 'middle power' at work in British colonies, which included the judges, magistrates, and commissioners who applied a form of legal governance of the colonies, often very much of their own, creating a vernacular Constitution.[14] What this definitely was not, was the reach of some imperial parliamentary sovereignty. And this meant that the empire lacked unity, and pluralistic tendencies flourished.

Indeed, it was likely that *power* was the only unifying factor underlying the empire, aided no doubt by British naval supremacy, and the fact that, in the nineteenth century, global communications were predominantly in British hands. However, that power could not be derived from a unified, coherent account of legal and political sovereignty. And power by itself lacks legitimacy – it must be validated by something else – which is where sovereignty becomes relevant, in providing that grounding. Yet, the claims of sovereignty made by the empire were often mutually self-contradictory.

5. The EU and ECHR: Dislike of 'eurolegalism' arguably defined a certain type of euroscepticism. In contrast, Britain, with its uncodified Constitution, has sometimes appeared to disdain law. British nonchalance, or indifference to legal rules, is sometimes displayed by those considering Britain's future post-Brexit – that is, expressing the view that trade deals and new arrangements can be made without cumbersome and legally binding treaties. However, this nonchalant stance rests on dangerously inaccurate assumptions and is not backed up by facts. Both the UK's membership of the EU and Brexit were accomplished by law. Furthermore, treaties are essential elements of the international

[13] E Jenks (1938) 20(4) Journal of Comparative Legislation and International Law 304.
[14] L Benton and L Ford, *Rage for Order* (Harvard University Press, 2016).

legal order and if ignored, Britain risks its reputation and future ability to benefit from international agreements.

Some decades ago, Lord Bingham noted that the Common Law was not an isolated island, and that English law had always shown a receptiveness to 'the experience and learning of others', citing as historic examples Pollock, Maitland, and the famous 1772 *Somersett's case* (which held that slavery could not be legally permitted in Britain) in which not only the work of Justinian, Grotius, Puffendorf, and Stair was cited, but also practice in innumerable countries. Lord Bingham expressed the hope that 'the 1990s will be remembered as the time when England – and I emphasise England – ceased to be a legal island, bounded to the north by the Tweed, and joined, or more accurately rejoined, the mainstream of European legal tradition …'[15]

Brexit might appear to have set back that optimism. However, British relations with continental Europe are deep and historical. British lawyers played a very strong role in the creation and founding of the European Convention on Human Rights (ECHR), so the rights of the ECHR (now incorporated in the Human Rights Act) are not alien, foreign devices. Furthermore, Britain was not forced into EEC membership, but joined voluntarily, persisting after its first two applications were rejected by General de Gaulle, because it perceived that it would be socially and economically enriched by such membership – a perception that turned out to be accurate. EU membership also provided an external support system for UK devolution, facilitating common approaches within the UK and conciliation between the UK and Ireland. The EU and ECHR provided external guarantees and entrenchment of human rights, many of which are now at risk post-Brexit.

Seeley suggested that the British built up an empire and then decolonized in a 'fit of absence of mind'.[16] The same may be true of Brexit, where Britain has risked leaving the EU in a state of insouciance as to the consequences.

PART II: FIVE THEMES

These five themes have been selected as of particular salience in Brexit debates. They are also analysed in light of the arguments and conclusions of the five case studies.

6. Sovereignty: Sovereignty is obviously key in the Brexit context, and in many ways lies at the core of this book's argument – a main part of which is that Britain has never been able to justify its assertion of unlimited parliamentary sovereignty. This book endorses the view that the doctrine of parliamentary sovereignty no longer carries the weight that Dicey accorded it, nor should

[15] T Bingham, '"There Is a World Elsewhere": The Changing Perspectives of English Law', in *The Business of Judging* (Oxford University Press, 2000) 87.

[16] J Seeley 'We Seem, as It Were, to Have Conquered and Peopled Half the World in a Fit of Absence of Mind', in *The Expansion of England* (Cambridge University Press, 1883).