

# **The United Kingdom Constitution on the move**

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**Lady Hale, Deputy President of the Supreme Court**

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Allegedly, the United Kingdom is one of only four countries in world not to have a written Constitution – the others are said to be Israel, New Zealand and Isle of Man. This does not mean that we do not have a Constitution. Everyone does. The UK played large part in framing the modern Constitutions of much of the common law world. So it must have had some idea of what a Constitution is and what it should do.

Thus, for example, the late Sultan Azlan Shah, Chief Justice and later King of Malaysia, described their Constitution as,

‘the supreme law of the land embodying three basic concepts: one of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation. ...The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the executive, legislative and judicial branches of government, compendiously expressed in modern terms that we are a government of laws not of men.’<sup>1</sup>

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<sup>1</sup> *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

So how does the UK Constitution measure up against these three basic concepts and how is it changing?

### *(1) Protecting fundamental rights*

The United Kingdom has always thought itself very good at that – or at least protecting freedom and the rule of law. It promoted the European Convention on Human Rights after the end of the second world war for the benefit of less enlightened European countries. This might be thought odd. Why would the UK commit itself to a binding international instrument allowing other countries to supervise our observation of human rights and fundamental freedoms when we were not prepared to have a Constitution with a Bill of Rights of our own to protect those rights in our domestic law? As Professor AWB Simpson has commented:

‘That Britain, or indeed any other European power, should sign up to even moderately effective mechanisms for the protection of human rights is intrinsically surprising.’<sup>2</sup>

The answer, he explained, was that the conduct of international relations, the negotiation of international treaties, was the province of the Foreign Office, which did not have any responsibility for running the country at home:

‘Plainly human rights, if actually protected, come with a price: restriction on the powers of those with authority. That was not a price which Foreign Office officials had to pay. They ran no prisons, police forces or courts, organised no

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<sup>2</sup> *Human Rights and the End of Empire*, Oxford University Press, 2001, p 11.

executions and no floggings, ordered no deportations or exiles, put down no insurrections.<sup>3</sup>

No, they saw human rights as an instrument, not of domestic, but of foreign policy. What Simpson refers to as ‘the export theory of human rights’:

‘... human rights were for foreigners, who did not enjoy them, not for the British, who enjoyed them anyway. They were for export. The export theory of human rights was and indeed still is shared by all the major powers . . .’<sup>4</sup>

Allied to this, of course, was the invincible belief of the ‘establishment’ (to which the Foreign Office officials by definition belonged) that Britain was the home of freedom. In Britain, everything which is not prohibited is permitted. This can be seen as positive feature – some joke that in Germany everything is forbidden which is not permitted. But it can be seen as negative – freedom consists only in what is left over after ‘this and that’ has been made illegal.

Eventually, of course, the defects in UK’s protection of fundamental rights of the individual against the State became apparent. Once the UK had accepted the right of individual petition to the European Court of Human Rights in Strasbourg, which happened in 1966, we began to lose cases there. The common law, whatever its merits, was not perfect. Nor could the UK courts protect individuals against encroachment on their fundamental rights by legislation. And they could not discuss any encroachment in the same terms as the European Convention and the jurisprudence of the Strasbourg Court would do. It was not possible to have a proper ‘dialogue’

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<sup>3</sup>           *Ibid.*, p 337.

<sup>4</sup>           *Ibid.*, p 346.

with that Court about what those rights meant. So in 1998 the Human Rights Act was passed to ‘bring rights home’.

The Act uses three techniques to do this: (i) the rights protected by the European Convention became rights in UK law; public authorities and officials have to act compatibly with them and individual victims have a right of action if they do not;<sup>5</sup> (ii) all legislation, whether passed before or after the HRA, whether primary or delegated, has ‘so far as possible’ to be interpreted compatibly with the Convention rights – this has proved a very powerful tool, developed from an equivalent obligation in European Union law;<sup>6</sup> and (iii) there is no power to strike down an incompatible provision of primary legislation, but the higher courts can declare it incompatible, leaving it to the government and Parliament to decide what to do about it:<sup>7</sup> they can choose between a fast track remedial order,<sup>8</sup> suitable for simple matters; or a new legislative scheme for more complex matters;<sup>9</sup> or to do nothing and leave it to the international machinery to decide what to do: the only example so far is prisoners’ voting rights.

The Human Rights Act has undoubtedly made life more difficult for those government departments that do have to run things at home, particularly for the Home Office: notable examples are the prohibition on deporting people to places where they risk being tortured;<sup>10</sup> and the obstacles to deporting foreign national criminals who have lived here for long time.<sup>11</sup> Sections of the press have referred to it as the ‘hated’ Human Rights Act – and yet they have sometimes relied upon it themselves, particularly when defending freedom of expression.<sup>12</sup>

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<sup>5</sup> Human Rights Act 1998, ss 1, 6 and 7.

<sup>6</sup> *Ibid*, s 3.

<sup>7</sup> *Ibid*, s 4.

<sup>8</sup> *Ibid*, s 10.

<sup>9</sup> Eg the Gender Recognition Act 2004, in response to *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467.

<sup>10</sup> Eg *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110.

<sup>11</sup> Eg *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799.

<sup>12</sup> Eg *Weller & Ors v Associated Newspapers Limited* [2015] EWCA Civ 1176, [2016] 1 WLR 1541.

Successive Conservative party manifestos since 2010 have promised to repeal the Human Rights Act and (sometimes) to replace it with British Bill of Rights and Responsibilities. Some politicians have also floated the possibility of leaving the European Convention or at least the jurisdiction of the Strasbourg Court altogether (both of which would entail leaving the Council of Europe, a completely separate organisation from the European Union). However, the recent Queen's Speech said nothing about either. The Conservative Party Manifesto said:<sup>13</sup>

'We will not repeal the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes.'

Our membership of the Council of Europe and adherence to the European Convention is a completely separate matter from our membership of the European Union. Further:

'We will remain signatories to the ECHR for the duration of the next Parliament'.

This seems to be keeping open the option of withdrawal. And who can say what the duration of the next Parliament will be? Until 2011, the constitutional position was clear. No parliament could last for more than five years.<sup>14</sup> But the Prime Minister could at any time advise Her Majesty that Parliament should be dissolved. One of the constitutional innovations of the 2010 Parliament was the Fixed Term Parliaments Act 2011. This fixes the duration of Parliament at five years (and the date of the General Election), unless (a) members for two-thirds of the seats in the House of Commons vote for an earlier election or (b) a simple majority vote that they have no confidence in Her Majesty's Government (unless confidence is restored within 14 days).

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<sup>13</sup> *Forward, Together Our Plan for a Stronger Britain and a Prosperous Future* The Conservative and Unionist Party Manifesto 2017, p 38.

<sup>14</sup> Parliament Act 1911, s 7.

The object is to prevent the current Government calling an early election at a time to suit them.

But recent events have shown that, if the politics are right, (a) can easily be achieved.<sup>15</sup>

But for the time being, it is Human Rights Act business as usual and we still get a considerable number of cases raising human rights arguments – by my count, some 15 of the 45 judgments so far delivered this year have done so.

## *(2) Distributing sovereign powers between the States and the Federation*

Until 1998 we would probably have said that this was not a feature of the UK Constitution (perhaps forgetting the Government of Ireland Act 1920). We are not a Federation. That is true. There are four distinct parts of the UK – England, Scotland, Wales and Northern Ireland. But only three of them have their own governments and legislatures: Scotland has its own Parliament and Executive under the Scotland Act 1998; Northern Ireland has its own Assembly and Executive under the Northern Ireland Act 2000; Wales has its own Assembly and Government under the Government of Wales Act 2006 as recently amended by the Wales Act 2017. England does not. And even trying to restrict the power of the Scots, Welsh and Irish members of the UK Parliament over legislation affecting England only – EVEL – proved very controversial.

But we are a Federation in the sense that Scottish, Welsh and Northern Irish governments and Parliaments have full executive and legislative competence over the matters which have been devolved to them. This has had consequences for the Supreme Court.

First, the Court has to behave like a proper constitutional court, deciding whether the devolved institutions have kept within the powers which the UK Parliament has given to them. This can come up in two ways:

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<sup>15</sup> The Conservative Party Manifesto before the 2017 election promised to repeal the 2011 Act.

- (i) in course of ordinary litigation, as all the Scottish cases have so far done: for example, when insurance companies challenged an Act of the Scottish Parliament providing for damages claims in respect of pleural plaques;<sup>16</sup> or
- (ii) by a law officer – Attorney General, Counsel General or Lord Advocate - referring a Bill passed by a devolved legislature before it receives Royal Assent to the Court to rule on whether it is within the scope of devolved powers. This type of ‘abstract review’ is new to our Constitution. There have been three Welsh references since the Welsh Assembly got full legislative powers: for example, insurance companies challenging a Bill of the Welsh Assembly providing for employers and insurers to reimburse NHS for expenditure on treating asbestos related diseases caused by employers’ breach of duty.<sup>17</sup>

Second, however, the UK Parliament as sovereign can still legislate for whatever it likes. But there is the so-called ‘Sewel convention’, now embodied in both the Scottish and Welsh devolution statutes: the Welsh Act, for example, says that:

‘it is recognized that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly.’<sup>18</sup>

So the Scottish and Welsh governments argued in *R (Miller) v Secretary of State for Exiting the European Union*<sup>19</sup> (the big Brexit case) that the UK Parliament could not legislate to take us out of the European Union without the consent of the devolved Parliaments. We held that this was a

<sup>16</sup> *Axa General Insurance Limited and others v The Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868.

<sup>17</sup> *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General for England and Wales* [2012] UKSC 53, [2013] 1 AC 792; *Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43, [2014] 4 All ER 789; *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales* [2015] UKSC 3, [2015] 1 AC 1016.

<sup>18</sup> Government of Wales Act 2006, s 107(6), added by Wales Act 2017, s 2.

<sup>19</sup> [2017] UKSC 5, [2017] 2 WLR 15.

political, not a legal commitment.<sup>20</sup> This was helped by the word ‘normally’. What is and is not ‘normal’ in this context is scarcely a justiciable issue.

But the devolved governments were able to argue the point because Brexit will undoubtedly change their legislative and executive competence. At present, they have to keep within the subject matter of their devolved powers, such as agriculture. But they also have two over-arching limitations: they have to act compatibly with (a) the European Convention rights and (b) European Union law.<sup>21</sup> Exiting the EU will remove the latter limitation, thus expanding the scope of their powers. This raises some interesting questions about the extent of the devolution settlement. Many devolved areas have been substantially governed by EU law, so the scope for individual manoeuvre by the devolved institutions was limited. Once we have left the EU, that scope may become much greater.

Is that what central government wants? The trend, of course, is towards greater rather than lesser devolution, including ceding some powers over taxation. The politics of altering the current distribution of subject matter are happily not for us.

### *(3) Distribution of sovereign power*

This is the biggest of the three concepts and the most fundamental. In the UK, we always thought that we knew what it meant. We have two governing constitutional principles:

First is the sovereignty of Parliament, summed up in maxim that ‘Parliament can make or unmake any law’; and

Second is the rule of law, summed up in the maxim that no-one is above the law and the courts are there to ensure everyone observes it.

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<sup>20</sup> *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583.

<sup>21</sup> Eg Scotland Act 1998, s 29(2)(d).

But things have never been as simple as that.

(i) *The sovereignty of Parliament*

We are here talking, not about the external sovereignty of the United Kingdom as a nation state vis-à-vis other sovereign nation states, but about the internal sovereignty of the UK Parliament vis-à-vis the other organs of government.<sup>22</sup> This has never been quite as absolute as some accounts would suggest. Fergal Davis has argued that it was compromised long before 1972 when Parliament passed the European Communities Act.<sup>23</sup> In theory, it might have been lawful for the UK Parliament to repeal the Statute of Westminster 1931 and reassert the power to legislate for the Dominions without their consent, but it would surely have been unconstitutional to do so. As Lord Reid put in *Madzimbamuto v Lardner-Burke*,<sup>24</sup> a case about legislating for post UDI Southern Rhodesia,

‘... it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.’

A second potential limitation lies in the rules of statutory construction. Three of these are particularly important. The first is the principle of legality, under which the courts presume that Parliament did not intend to encroach upon fundamental rights unless it has done so in clear language – so that the Parliamentarians know what they are doing and are prepared to take the

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<sup>22</sup> The two do tend to get confused in debates about sovereignty: see Michael Gordon, ‘The UK’s Sovereignty Situation: Brexit, Bewilderment and Beyond’ (2016) 27(3) *King’s Law Journal* 333.

<sup>23</sup> Fergal Davis, ‘Brexit, the Statute of Westminster and Zombie Parliamentary Sovereignty’ (2016) 27(3) *King’s Law Journal* 344.

<sup>24</sup> [1969] 1 AC 645, 723.

political consequences of doing it.<sup>25</sup> This is a long-standing principle, but the second is more recent. This is that certain Acts of Parliament are so constitutionally important that where later legislation appears inconsistent it is presumed not impliedly to have repealed the constitutional statute. This was articulated in the so-called ‘metric martyrs’ case, where Laws LJ held that the European Communities Act itself was such a statute. The primacy it gave to EU legislation (requiring the use of metric measures) prevailed over a later statute (allowing for the use of imperial measures).<sup>26</sup> We can probably also identify a third principle, that Parliament is presumed not to legislate incompatibly with the rule of law, either by removing certain governmental acts from scrutiny in the courts,<sup>27</sup> or by authorizing government to override judicial decisions.<sup>28</sup> But these are simply rules of construction which could be displaced by clear legislative language.<sup>29</sup>

Thirdly, of course, Parliament can voluntarily surrender some of its sovereignty, as it undoubtedly did in the European Communities Act 1972. That Act created a new source of UK law - the legislation of the EU institutions and its interpretation by the Court of Justice of the European Union. Insofar as such law was either directly applicable or had direct effect in EU law, the Act gave it direct effect in UK law, so that it became law without the need for implementing legislation here. But it goes further than that, because UK law has to be interpreted consistently with EU law. This is a stronger duty of conforming interpretation than that in the Human Rights Act, because it requires the courts to ignore a legislative provision, even in an Act of the UK Parliament, if it cannot be interpreted compatibly with EU law.<sup>30</sup> And, of course, if we do not know how a piece of EU law is to be interpreted, we have to refer the

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<sup>25</sup> *R v Secretary of State for the Home Department ex p Simms* [1999] UKHL 33, [2000] 2 AC 115.

<sup>26</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151.

<sup>27</sup> *Anisminic Ltd v Foreign Compensation Commission and Anor* [1969] 2 AC 147.

<sup>28</sup> *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787.

<sup>29</sup> The suggestions in *Jackson and Ors v Attorney General* [2005] UKHL 56, [2006] 2 AC 262 that the courts might decline to apply clear legislative language which was incompatible with the rule of law is much more controversial and was regarded as heretical by the late Lord Bingham.

<sup>30</sup> *R v Secretary of State for Transport, ex p Factortame (No 1)* [1990] UKHL 7, [1990] 2 AC 85.

question to the Court of Justice of the European Union. We still decide the outcome of the particular case before us, but we have to do so in accordance with their interpretation of the law.

There was a time when our constitutional experts debated whether Parliament could take back the sovereignty it had yielded to the EU or whether it was gone forever. That time is long past. Everyone accepts that Parliament can repeal the European Communities Act and that is what it intends to do, in the ‘Great Repeal Bill’ which is due to be introduced next week. The more interesting and difficult question is how it is to be done. We in the courts want the clearest possible guidance from Parliament as to how we should treat EU law after Brexit, but the issues raised are many and complicated.

According to the White Paper on the Great Repeal Bill,<sup>31</sup> the plan is to retain the existing body of EU-derived law in force as it was at the date of Brexit. This includes the jurisprudence of the CJEU. This will apply to situations which arose before that date. That’s fine for cases where the law is *acte clair* – ie we know what it is. But if it is not *acte clair*, we shall have lost the power to refer the question to the CJEU, so we shall have to do our best to work it out for ourselves. It would help to know how much weight we should give to CJEU jurisprudence, not only as it existed at the date of Brexit, but also thereafter.

The Government has also announced that it does not intend to preserve the Charter of Fundamental Rights of the European Union (which is modelled on but different from the European Convention on Human Rights). This may not present many problems, as the Charter only applies when a member state is implementing EU law.<sup>32</sup> But there are occasions when the Charter does inform the content of EU law rights. We have a current example in a case<sup>33</sup> about the rights of so-called ‘Zambrano carers’ – third country nationals who are primary carers of EU

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<sup>31</sup> Department for Exiting the European Union (2017), *Legislating for the United Kingdom’s withdrawal from the European Union*, Cm 9446.

<sup>32</sup> Charter of Fundamental Rights of the European Union (2000/c 364/01), article 51(1).

<sup>33</sup> *R (HC) v Secretary of State for Work and Pensions and others*, on appeal from [2015] EWCA Civ 49.

national children and who must be allowed to live and work in the EU if otherwise the children would be obliged to leave the EU and thus deprived of their rights as citizens of the Union.<sup>34</sup>

The arguments before us have focused on non-discrimination and the rights of children, protected by articles 21 and 24 of the Charter. It would help to know what to do with CJEU jurisprudence which relies upon the Charter for some of its reasoning.

The White Paper does not say whether the EU law to be preserved will include Directives, but it may well not, as these are not directly applicable and merely tell Member States what they must legislate to achieve. At present this is done in the UK by Regulations made under the powers contained in the European Communities Act 1972. But as we have to interpret those Regulations in conformity with EU law and ignore any that are incompatible, our practice has been to go straight to the Directive and ask what it, rather than the Regulations, means. A notable example are the Regulations implementing the Part Time Workers Directive, which wrongly excluded fee paid judicial officers from the ban on unjustified discrimination against part time workers.<sup>35</sup>

Once again, it would help to know what are we to do after Brexit if existing UK Regulations imperfectly implement an existing EU Directive.

After Brexit, the UK will of course be free to legislate incompatibly with EU law. But otherwise, the intention is that the existing body of EU-derived law remains in force unless and until changed by later UK legislation. The White Paper also said that the same would apply to CJEU jurisprudence, but the Supreme Court would be free to depart from it, on the same basis that we allow ourselves to depart from previous decisions of the appellate committee of the House of Lords or the UKSC itself, so ‘a similar sparing approach’.<sup>36</sup>

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<sup>34</sup> *Ruiz Zambrano v Office National de l'Emploi* (Case C-34/09) [2012] QB 265, European Court of Justice, Grand Chamber.

<sup>35</sup> *Ministry of Justice v O'Brien* [2013] UKSC 6, [2013] 1 WLR 522, following the decision of the Court of Justice of the European Union in *O'Brien v Ministry of Justice* (Case C-393/10) [2012] 2 CMLR 25.

<sup>36</sup> Department for Exiting the European Union (2017), *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446, para 2.17.

There will also be a host of technical changes needed to existing legislation so as to make sense – eg when we are no longer parties to an institution to which it refers. This will all have to be done in a hurry before Brexit, so the plan is to have order-making powers, which will include a ‘Henry VIII’ clause permitting amendment of primary legislation by order-in-council. Some fear that this may provoke a flurry of judicial review applications – and so we may need special powers to make sure that cases can come up to us as quickly as possible.

A particular concern of litigators, including family litigators, is that many EU Regulations do not just make rules which we can continue or not as we see fit. Some of them are multi-lateral agreements in the justice sphere – an example is the Brussels II revised Regulation, dealing with jurisdiction, recognition and enforcement of judgments in the family justice sphere. It will not be enough for the UK to continue with the agreements in force. The other states parties will have to agree to keep us in the club. It would not be acceptable to recognise and enforce other Member States’ orders about children if they will not do the same for us.

I mention these examples, not to suggest that the problems are insurmountable – of course they are not – but simply to point out how much constitutional and legal technicality there is to be thought through, in addition to the political negotiations, not only about the immediate consequences of our leaving but also about our future relationship with the EU.

Brexit has also revealed a further constraint on the sovereignty of Parliament, a constraint which may prove more radical and fundamental than any of the above. We were all brought up with the idea of representative democracy. We voted for our Member of Parliament, who went to Parliament to represent the interests of all her constituents, whether or not they had voted for her. This meant that, although she might take a party whip and be responsive to its discipline, in the end she had to make up her own mind about how to vote on the big issues of the day.

But then it was decided that staying in or leaving the EU should be submitted to a referendum. Legislation had already provided that further increases in the competence of the EU institutions should be submitted to a referendum<sup>37</sup> – it has even been suggested that a constitutional convention has developed that cession of power upwards should be confirmed by a referendum of the whole UK, whereas cession of power downwards to a part of the UK may require a referendum in that part of the UK.<sup>38</sup>

This was only the third UK wide referendum that we have had. The first was to confirm or deny our membership of the common market, as it was then called, in 1975. The second was to approve or not approve a change from ‘first past the post’ elections to the alternative vote system in 2012. The Act providing for this made it clear that a ‘yes’ vote would change the law – in effect the public were voting on amendments to the Representation of the People Act.

The Acts providing for the first and the third referenda did not provide that the result would change the law. They simply expressed the will of the people who voted. The ‘people’ were defined by reference to the franchise for general elections (with some additions, such as Members of the House of Lords, like me, who cannot vote in Parliamentary elections). This meant that 16 and 17-year-olds, who could vote in the Scottish referendum, were excluded; as were British citizens who had lived abroad (even if elsewhere in the EU) for 15 years or more;<sup>39</sup> and EU citizens living here, who could also vote in the Scottish referendum. Some have speculated that including them might have made a difference to the result, but all this shows is that the ‘people’, like the ‘electorate’ is a contestable concept.<sup>40</sup>

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<sup>37</sup> European Union Act 2011.

<sup>38</sup> Vernon Bogdanor, ‘Brexit, the Constitution and the Alternatives’ (2016) 27(3) *King’s Law Journal* 314.

<sup>39</sup> An attempt to challenge this on the basis that it was an interference with freedom of movement within the EU failed in *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469, [2017] QB 226.

<sup>40</sup> Bleddyn Davies, “BREXIT and Sovereignty. The EU Referendum: Who were the British People?” (2016) 27(3) *King’s Law Journal* 323.

But the more interesting feature of this constitutional innovation is the impact which it has had upon the traditional concept of Parliamentary sovereignty. The referendum was not binding in law, although the Government had announced that it would respect the result. A substantial majority of Members of Parliament were in favour of remaining in the EU. Nevertheless, when they came to vote on the Bill to authorise the Government to start the Brexit process, they voted by a substantial majority to do so. Whatever their own views, and whatever the arguments for and against, once Parliament had voted to hold the referendum and the people had spoken they felt constrained to do what the people wanted. This was no doubt politically the right choice. It may also have been constitutionally the right choice, following Lord Reid's view in *Madzimbamuto*.

(ii) *The rule of law*

But the reason why they had to make that choice does show us that the rule of law is still alive and well in the United Kingdom. This was the decision of the Supreme Court in the 'big Brexit case', *R (Miller) v Secretary of State for Exiting the European Union*.<sup>41</sup>

Article 50(1) of the Treaty of the European Union provides that 'any Member State may decide to withdraw from the Union in accordance with its own constitutional arrangements'. A Member State which decides to withdraw shall notify the European Council of its intention. The Council is then expected to negotiate and agree upon the arrangements for withdrawal with the Member State. Under article 50(2), these must be agreed by the Council, acting by a qualified majority, and by the European Parliament. However, article 50(3) provides that the Treaties shall cease to apply to the State in question from the date of the entry into force of that agreement or, failing that, two years after the notification, unless the Council unanimously agrees to extend the period. The issue was whether, under our constitutional arrangements, giving that notification fell within

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<sup>41</sup> [2017] UKSC 5, [2017] 2 WLR 15.

the prerogative powers of the Crown in the conduct of foreign relations or whether it fell foul of the rule that the prerogative cannot be used to change the law of the land. Only Parliament can do that.

By the time the case got to the Supreme Court, all the Justices were agreed on that principle, but they disagreed on its application to the case. On the one hand, the European Communities Act 1972 created a new source of law and grants rights to individuals and businesses which will automatically be lost if and when the Treaties cease to apply. That is a consequence which can only be authorized by Act of Parliament. On the other hand, there was a highly plausible argument that the European Communities Act itself did just that. It only legislated for the applicability and priority of EU Law while the Treaties continued to apply. It must therefore have contemplated that they might not do so. Just as the executive has the power to make treaties, it has the power to unmake them.

The question therefore resolved, not into a big issue about the respective powers of government and Parliament, but into a much more technical issue of construction of the 1972 Act. In the event, the Supreme Court held by a majority of 8 to 3 that the authority of an Act of Parliament was required before the government could trigger the article 50 process. This could be seen as a victory for the sovereignty of Parliament and the rule of law. It may have been the biggest constitutional case since the Glorious Revolution of 1688. But, of course, it made not a blind bit of difference to the outcome, for the reasons already discussed.

### *Conclusions?*

No doubt there are many morals to these tales. But two stand out to me.

First, we have two constitutions – the legal constitution and the political constitution. The first is represented, for example, by the rule that Parliament can make or unmake any law, the contents of the devolution statutes, the rules of statutory construction, and the principles governing

judicial review of executive action. These are concrete rules that the courts must and do apply when deciding real cases. The second is represented by such things as the way Parliamentarians behave, for example in response to the referendum. I am not sure that this distinction is entirely the same as the familiar distinction between constitutional laws and constitutional conventions, but it comes close.

The second moral is that we are unlikely to adopt a written constitution any time soon. This is not only because of the formidable obstacles to agreeing upon and formulating such a document and then enacting it; it is also because, as recent events have shown, the Constitution is in a state of flux, such that, even if it could be agreed upon, few would want to set it in stone.

This means, of course, that the Supreme Court is not going to get the power to behave like other Supreme Courts in the common law world, including the Supreme Court of Canada, and strike down Acts of the UK Parliament as unconstitutional and that, as far as I am concerned, is a very good thing!