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The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond ...

Michael Gordon^{*}

Debate about 'sovereignty' has become impossible to avoid in the UK's current, post-referendum but pre-Brexit, constitutional environment. Perhaps this is nothing new, and UK constitutionalism has always been shaped, quite explicitly and to a significant extent, by a captivation with the concept of sovereignty. Yet at the very least, the 2016 UK referendum on European Union (EU) membership has served as the centrepiece around which public and elite exchanges about legal and political dimensions of sovereignty have visibly intensified. In this context, this paper aims to reflect briefly and critically on the UK's present sovereignty situation, considering the use (and abuse) of the concept in debate about national membership of the EU, its relevance (and irrelevance) to the process through which we move to exit from the Union, and also the potential implications of Brexit for our often confused national understanding(s) of this idea.

I. SOVEREIGNTY BEFORE, DURING AND AFTER THE EU REFERENDUM

A range of concerns about sovereignty have been exhibited by various actors in the UK before, during and after the 2016 referendum. The recurrence of this theme provides a clear indication that the (attempted) reconciliation of national ideas of sovereignty with membership of the EU has been a source of enduring angst in parts of the UK's political establishment (and indeed, perhaps the referendum result suggests, in a substantial section of the electorate). In the years before the referendum, under the previous Conservative–Liberal Democrat coalition government, we saw the enactment of the European Union Act 2011. The 2011 Act sought not only to establish a series of direct democratic 'locks' on the transfer of further power or competence from the UK to the EU, but also to reaffirm in statute that the sovereignty of the UK Parliament was retained during membership of the Union.¹ That what was advertised by the government as a 'sovereignty clause' curiously failed to include the word 'sovereignty' at all does not diminish the significance of this as an exercise in legislative

^{*} Liverpool Law School, University of Liverpool. All websites accessed 5 November 2016.

¹ See Paul Craig, 'The European Union Act 2011: Locks, Limits and Legality' (2011) 48 *Common Market Law Review* 1915; Michael Gordon and Michael Dougan, 'The United Kingdom's European Union Act 2011: "Who Won the Bloody War Anyway?"' (2012) 37 *European Law Review* 3.

experimentation—if anything, it further emphasises the ethereal quality, and perhaps therefore the related allure, of a constitutional concept resistant to being captured in law.

In the more immediate period prior to the referendum, sovereignty featured prominently in the (then) Prime Minister David Cameron's attempts to renegotiate the UK's position within the EU. Sovereignty concerns filled one of the four negotiating 'baskets',² and the final deal—rejected by the electorate and generally overlooked during the referendum campaign itself—included concessions for the UK. National parliaments, acting in sufficient numbers, would have been given 'red card' powers to veto EU legislative proposals, and—perhaps less substantially, yet symbolically more significant—the EU Treaties would be amended to provide the UK with a clear exemption from provisions charting 'ever closer union' between the Member States.³

During the referendum campaign there was yet further engagement with the idea of sovereignty. Afforded fleeting attention was Cameron's proposed (or at least, announced) 'sovereignty bill',⁴ which might presumably have offered some upgrade on a 2011 edition 'sovereignty clause'. Yet the details of this sovereignty bill never emerged—beyond the counterintuitive suggestion that it would have included provisions to enhance the position of the domestic judiciary through the creation of a 'constitutional court'⁵—and this now seemingly lies (along with much else) on the political scrapheap. The idea of sovereignty was not only deployed in these suggestions of the remain-campaigning government that we could take further domestic steps towards its better preservation while retaining EU membership. On the leave side, we saw something tantamount to sovereignty hysteria, reflected in that campaign's catch-all rhetoric of 'Take Back Control', and, most ludicrously, in declarations that exiting the EU would amount to an 'Independence Day' for the UK.⁶

Finally, after the referendum, and the vote to depart from the EU, ideas of sovereignty are crucially shaping debates about how we Brexit. We see questions concerning the authority of the 'advisory' referendum result and the possibility of the decision being reversed by the sovereign UK Parliament.⁷ We see questions concerning the role of the

2 See 'PM's Letter to President of the European Council Donald Tusk' (10 November 2015) <www.gov.uk/government/publications/eu-reform-pms-letter-to-president-of-the-european-council-donald-tusk>.

3 See 'Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union', EUCO 4/16 (2 November 2016) <www.consilium.europa.eu/en/european-council/president/pdf/new-settlement/>.

4 See 'EU Deal: Cameron Vows to Put Commons Sovereignty "Beyond Doubt"' *The Guardian* (3 February 2016) <www.theguardian.com/politics/2016/feb/03/eu-deal-david-cameron-uk-parliament-sovereignty-beyond-doubt-boris-johnson>.

5 See Jeff King, 'On the Proposal for a UK Constitutional Court' (*UK Constitutional Law Blog*, 8 February 2016) <<https://ukconstitutionallaw.org/2016/02/08/jeff-king-on-the-proposal-for-a-uk-constitutional-court/>>; Mike Gordon, 'The UK's Sovereignty Uncertainty' (*UK Constitutional Law Blog*, 11 February 2016) <<https://ukconstitutionallaw.org/2016/02/11/mike-gordon-the-uks-sovereignty-uncertainty/>>.

6 See eg, 'EU Referendum: Boris Johnson Says Thursday Could Become Britain's "Independence Day"' *The Independent* (21 June 2016) <www.independent.co.uk/news/uk/politics/eu-referendum-boris-johnson-independence-day-live-debate-bbc-vote-leave-brexit-remain-a7094531.html>.

7 See eg, Geoffrey Robertson, 'How to Stop Brexit: Get Your MP to Vote It Down' *The Guardian* (27 June 2016) <www.theguardian.com/comments/free/2016/jun/27/stop-brexit-mp-vote-referendum-members-parliament-act-europe>.

devolved institutions in the negotiation of withdrawal, and whether individual constituent nations—especially the remain-voting Scotland or Northern Ireland—could ‘veto’ the UK-wide decision.⁸ And we see questions concerning the constitutional position and powers of the UK Parliament in the process of exiting the EU. In this particular context, the concept of sovereignty is perhaps most controversially figuring in arguments as to the domestic authority for giving notification of a national decision to leave the EU, which, in accordance with Article 50 of the Treaty on European Union, initiates a process of negotiation at the European level leading to UK exit.⁹

All of this gives cause for reflection, in the ongoing aftermath of the referendum, on the UK’s present sovereignty situation. There is much confusion about how exactly sovereignty is (or should have been) applicable in these various debates. In no small part this is due to the conflation of different understandings of sovereignty. Of particular importance has been a failure to appreciate the distinction between internal and external ideas of sovereignty: the domestic concept of parliamentary sovereignty as a fundamental principle of UK constitutional law, and the national sovereignty of the UK as a state engaged in supranational and international systems and relationships.¹⁰

Why have we seen these very different understandings of sovereignty collapse into a single murky soup? It is not clear whether we have witnessed wilful elision for duplicitous ends, with those hostile to the European project exploiting a constitutional familiarity with parliamentary sovereignty to make interferences with state sovereignty seem more grievous. Or whether this referendum experience merely betrays a lack of understanding of core—and, of course, in some respects fluid—constitutional concepts. Either way (or some other way besides), it is important to try to trace some of the implications of this confused thinking, both because ideas of sovereignty will be of continuing significance as we negotiate our way through Brexit, and also to start to appraise our potential situation in the aftermath of exiting the EU, and beyond. In the next section, therefore, the paper will consider the concept of parliamentary sovereignty and its relevance to Brexit, before moving on to explore the idea of national sovereignty and its relevance to Brexit. In doing so, and pushing past some of the bewilderment, we may find that any expectation that Brexit could herald a glorious restoration of sovereignty in the UK emerges as a false promise based on a flawed premise.

⁸ See eg, ‘Theresa May: No Scotland Opt-out or Veto from Brexit’ *The Telegraph* (2 October 2016) <www.telegraph.co.uk/news/2016/10/02/theresa-may-no-scotland-opt-out-or-veto-from-brexit/>.

⁹ See eg, ‘Theresa May Does Not Intend to Trigger Article 50 This Year, Court Told’ *The Guardian* (19 July 2016) <www.theguardian.com/politics/2016/jul/19/government-awaits-first-legal-opposition-to-brexit-in-high-court>.

¹⁰ This is not to suggest that other conceptions of sovereignty are not available, or that other clashes between competing understandings of sovereignty have not been generated by the referendum result: see eg, Vernon Bogdanor, ‘Europe and the Sovereignty of the People’ (2016) 87 *The Political Quarterly* 348.

II. PARLIAMENTARY SOVEREIGNTY AND BREXIT

The UK's membership of the EU—and the commitments such membership entails—features very prominently in the modern constitutional narrative that parliamentary sovereignty is a much challenged doctrine.¹¹ Yet while undoubtedly presenting difficult questions, the fundamental conundrum on which this challenge was founded is ultimately one which has been solved: the domestic doctrine of parliamentary sovereignty *can be reconciled* with the idea that EU law is to have domestic supremacy.¹² There remains considerable debate as to exactly how this reconciliation has been achieved, and its broader constitutional consequences. Yet what is truly crucial is recognising that EU membership (among other things) has prompted us to recalibrate our understanding of the meaning and implications of parliamentary sovereignty, rather than abandon as unsalvageable the idea of a constitution founded on legally unlimited law-making power.¹³

Yet this academic resolution—such as it is—has never seemed to translate into public discourse. In the public realm, or at least parts of it, there is still a sense that parliamentary sovereignty is left precarious by EU membership in particular.¹⁴ No doubt attempts by successive governments to encourage the UK Parliament to legislate to (re)confirm its legislative sovereignty might have contributed to or endorsed the apparent sense that this power was in peril. The most recent proposal of this kind, discussed above, teetered on collapsing into total incoherence, founded as it was on the notion of empowering a constitutional court in the name of preserving parliamentary sovereignty. Such failings in understanding suggest that we should be grateful the government never developed a plan which would have changed the constitution while purporting to preserve it, but also the extent to which 'innovative' proposals have been thought necessary to somehow save sovereignty.

If precise thinking about parliamentary sovereignty was not, therefore, a feature of the referendum or its run up, we might wonder whether this can be rectified as we move through the process of exiting the EU. Yet we are also beginning to see problematic engagement with the doctrine in a number of the responses to the Brexit vote.

First, the idea that it might be possible for the 'advisory' referendum result to be reversed stems from a failure to understand the idea of parliamentary sovereignty in

¹¹ See, eg, HWR Wade, 'What Has Happened to the Sovereignty of Parliament?' (1991) 107 *Law Quarterly Review* 1.

¹² See Lord Bridge in *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603 (HL) 658–59. More recently, see Lord Mance in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591 [80].

¹³ For the argument that a 'manner and form' understanding of parliamentary sovereignty should now be understood to represent the constitutional orthodoxy in the UK, see Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015).

¹⁴ See, eg, anxiety about the proposed 'red card' procedure in the House of Commons European Scrutiny Committee, *UK Government's Renegotiation of EU Membership: Parliamentary Sovereignty and Scrutiny* (2015–16, HC 458, 15 December 2015) para 132.

its constitutional context. Parliament certainly retains the legal power to legislate in a way which is contrary to the decision reached by a majority of the electorate in the 2016 referendum. But that Parliament is legally unconstrained in this regard is only part of the picture—this power exists and is exercised in a constitutional environment in which that legislative authority is limited by a range of crucial political, democratic, moral and practical considerations. Indeed, the entire justification for the doctrine of parliamentary sovereignty, and the legally unlimited legislative power which it allocates to the UK Parliament, is premised on the fact that this power *is* constitutionally limited, just not by law. And as the political responses to the Brexit vote surely demonstrate—with a new Prime Minister aligned with the remain side insisting that EU exit must nevertheless be delivered¹⁵—these non-legal constitutional limits are often far more profound in their force and effects. The referendum may be legally advisory, but it is no rejection of parliamentary sovereignty to recognise that its result is constitutionally binding.

Secondly, with Scotland and Northern Ireland voting to remain, and England and Wales voting to leave, we have seen some suggestions that the constituent nations of the UK may be entitled to a veto over Brexit. Yet, again, while the existence of this division in mandates raises acutely difficult democratic questions, the entire devolution scheme preserves in general the UK Parliament's sovereign power to legislate on any subject,¹⁶ and relations with the EU in particular are matters reserved to the UK,¹⁷ or in the case of Wales, not transferred.¹⁸ From this starting point, rather than seek to assert the existence of a veto power, other avenues of constitutional engagement exist for the devolved governments and institutions; in particular, in exploiting their positions to obtain influence in the negotiation of Brexit (with the UK government, at least at the outset, recognising in principle the need for 'national consensus' on the shape of Brexit).¹⁹ There is also the nuclear alternative of referendums on independence from the post-EU UK, for which standing authority exists in Northern Ireland,²⁰ and, on the 2013 precedent, temporary authority could surely be procured in Scotland.²¹ The devolution scheme, approached in this way, at a minimum creates the potential for greater influence and further options for the remain-voting nations (and perhaps even the leave-voting Wales) in relation to Brexit than exist for remain-voting parts of England.

15 See 'Theresa May Says "Brexit Means Brexit" and There Will Be No Attempt to Remain Inside EU' *The Independent* (11 July 2016) <www.independent.co.uk/news/uk/politics/theresa-may-brexit-means-brexit-conservative-leadership-no-attempt-remain-inside-eu-leave-europe-a7130596.html>.

16 Scotland Act 1998, s 29(2)(d); Northern Ireland Act 1998, s 6(2)(d); Government of Wales Act 2006, s 108 (6)(c).

17 Scotland Act 1998, Sch 5, para 7(1); Northern Ireland Act 1998, Sch 2, para 3.

18 Government of Wales Act 2006, Sch 7.

19 Statement by the Secretary of State for Exiting the EU, David Davis MP, *Hansard*, HC Deb 5 September 2016, vol 614, cols 38–41.

20 Northern Ireland Act 1998, s 1.

21 Scotland Act 1998 (Modification of Schedule 5) Order 2013, SI 2013/242.

Thirdly—and perhaps most controversially—the notion of parliamentary sovereignty is likely to be deployed in the (at time of writing imminent) legal challenge concerning the domestic authority for making, and notifying to the European Council, a national decision to depart from the EU, in accordance with the terms of Article 50 of the Treaty on European Union. The idea that this challenge is to preserve parliamentary sovereignty has already been aired for rhetorical purposes in the prior publicity campaign conducted by the applicants, and, as such, can be expected to feature as a component of the wide-ranging legal arguments being developed.²² Yet this dispute is not really about parliamentary sovereignty at all. Or, at least, it is no more about parliamentary sovereignty than any other case which involves the interpretation of statute, and therefore the analysis of Parliament's legislative intent. Parliament has, inevitably in light of its constitutional position, been heavily involved in the path that has led to Brexit: most significantly, by enacting the European Union Referendum Act 2015, which authorised a referendum on EU membership. Parliamentary sovereignty is not a constitutional principle which requires the UK Parliament to take all decisions; instead it gives Parliament the ultimate (and unlimited) responsibility for establishing the framework within which decisions are taken, which it has done in the 2015 Act. That Parliament has passed power to the electorate to decide whether to remain within or leave the EU does not diminish its sovereignty;²³ indeed, to facilitate a national referendum is a potent exercise of its sovereign legislative power.

Instead, the Article 50 challenge is fundamentally about the royal prerogative, and the government's power to conduct foreign affairs and international relations. Inevitably there is constitutional interaction between the prerogative power exercised by the government at the international (and therefore also the European) level, and the domestic legislative power of Parliament: for agreements reached at the international level to have domestic force, they must be given effect in statute. In this case, the implementing legislation related to membership of the EU—the European Communities Act 1972—can only be repealed by Parliament. But this fact alone does not constrain the government acting at the international level from altering (or in this case, removing) the obligations associated with EU membership.²⁴ There is nothing in the terms of the 1972 Act which prevents a decision to withdraw, and indeed, the Article 50 withdrawal process itself has been endorsed by Parliament, through enacting the European Union (Amendment) Act 2008, giving domestic legal effect to the changes to EU law introduced by the Treaty of Lisbon, of which the creation of Article 50 was one. Parliament could unquestionably have used its sovereign power to restrict the use of the prerogative in relation to an Article 50 decision, but it has not done so: not in the 2015 Act, which is silent on

²² See eg, 'Article 50 Process on Brexit Faces Legal Challenge to Ensure Parliamentary Involvement' (*Mishcon de Reya website*, 3 July 2016) <www.mishcon.com/news/firm_news/article_50_process_on_brexit_faces_legal_challenge_to_ensure_parliamentary_involvement_07_2016>.

²³ Contrary to the argument in *Bogdanor* (n 10).

²⁴ See the conclusion of the Divisional Court on this point in *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Lord Rees-Mogg* [1994] QB 552, 567.

next steps, nor in the European Union Act 2011, which constrains the government in relation to almost every other kind of significant decision imaginable at EU level.²⁵

This is not unlawful use of the prerogative to, in effect, nullify an Act of the sovereign Parliament. Triggering Article 50, and commencing the (potentially extendable) two-year negotiation period, starts a process during which EU law still applies in the UK by virtue of the 1972 Act itself. Rather than focusing on triggering Article 50 as an isolated moment, as this legal challenge demands, we should view the constitutional process holistically. During this process of withdrawal, Parliament has responsibility for repealing the 1972 Act, responding to the government's actions at the European level, just as Parliament did when initially enacting the 1972 Act. And, of course, the government's actions at the international level are themselves a consequence of Parliament's action at the domestic level, because they are a response to the decision of the electorate at the referendum authorised by parliamentary legislation. Parliament started the process of withdrawal at the domestic level with the 2015 Act, and will conclude it at the domestic level by replacing the 1972 Act.²⁶ It is absolutely right—indeed, vital—that Parliament should debate and scrutinise the government's plans for the withdrawal negotiations, but such activity at international level does not need further legal authorisation by the UK legislature, and this is no violation of the doctrine of parliamentary sovereignty, when properly understood in constitutional context.

There is a degree of irony in some appeals for the judicial 'enforcement' of parliamentary sovereignty, now that this has become a convenient concept, when much energy has been directed towards diminishing this doctrine in the courts in recent years.²⁷ We must therefore avoid constructing a legal narrative which exploits parliamentary sovereignty as a rhetorical flourish, while implicitly inviting Parliament to use its legislative power to reverse a clear, direct democratic decision, even where we may disagree strongly with the outcome. This is especially important because manufacturing a clash between direct and representative democracy may well mean empowering the entirely *unrepresentative* upper chamber of Parliament. If claims about parliamentary sovereignty are used to encourage the judiciary to mandate that new legislation is required to approve UK exit from the EU, and a bill is subsequently blocked by the House of Lords, then we may end up not only in a constitutional crisis, but in a legitimacy black hole.

If the immediate aftermath of Brexit can be navigated successfully, will the termination of the UK's membership of the EU see domestic debate about the salience of parliamentary sovereignty subside? From one perspective, argument about sovereignty and its implications is such an embedded feature of the contemporary constitution, it seems difficult to imagine that withdrawal of one specific stimulus—no matter how

²⁵ See n 1.

²⁶ See the announcement of a 'Great Repeal Bill' by the PM: 'Repealing EU Act Will "Make UK Independent" Says Theresa May' (*BBC website*, 2 October 2016) <www.bbc.co.uk/news/uk-politics-37533217>.

²⁷ See, eg, *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [102], [104], [159]; *Moohan v The Lord Advocate* [2014] UKSC 67, [2015] AC 901 [35].

fundamental—will radically shift the terms of debate. While much is at this stage unclear, the possibility that Brexit might prompt broader change to the architecture of the territorial constitution means the topic of the UK Parliament's legislative power, as it relates to the devolved institutions in Scotland and Northern Ireland in particular, will surely remain of great significance.

Yet, from another perspective, wrestling with the commitments flowing from EU membership has been a key driver of judicial efforts to construct a common law constitution.²⁸ Will exiting the EU have a chilling effect on attempts to discover the constitutional statutes, instruments and principles which might have the potential to ground a framework of higher order domestic law? Such a common law framework, if ever established, could have significant potential implications for the idea of parliamentary sovereignty, in so far as it would provide the gloss to conceal an otherwise blatant judicial power-grab. Yet perhaps instead such efforts—if they are to be pursued—will now need to be refocused, becoming part of broader moves to articulate a legal framework within which the power of Parliament must be exercised, and is therefore potentially constrained. We might see such an approach at work, for example, in Lord Neuberger's leading judgment in *Evans*,²⁹ in which 'the principle of legality' was expanded to the point where it was no longer a tool of statutory interpretation in circumstances of ambiguity, but sufficient to render the clear language of a statute utterly insignificant. Or in *Nicklinson*,³⁰ where many of the judges were not uncomfortable with the idea of using a declaration of incompatibility under section 4 of the Human Rights Act 1998—or even the mere threat of its use—to 'encourage' Parliament to reconsider certain highly contentious and contested policy decisions. The modern self-confidence developed by the judiciary, initially as a consequence of the expanded powers accruing to them by virtue of the UK's position in the EU, seems unlikely to be inhibited solely by the termination of that membership. Instead, debate about parliamentary sovereignty can be expected to continue, both during Brexit, and beyond.

III. NATIONAL SOVEREIGNTY AND BREXIT

If the idea that exiting the EU was somehow necessary to preserve *parliamentary* sovereignty emerges as based on a flawed understanding of this fundamental constitutional doctrine, claims about the dilution of *national* sovereignty may nevertheless have greater relevance to Brexit. For the pooling of the latter kind of sovereignty to enable cooperation among states at the supranational level was always at the heart of the

²⁸ See, eg, *Thoburn v Sunderland City Council* [2002] EWHC 195, [2003] QB 151; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324; *Pham* (n 12).

²⁹ *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787. For critical discussion, see Michael Gordon, 'The UK's Fundamental Constitutional Principle: Why the UK Parliament Is Still Sovereign and Why It Still Matters' (2015) 26 *King's Law Journal* 229, 237–42.

³⁰ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.

European project,³¹ and in light of this centrality, debate about the appropriate balance between national and EU power and competence will no doubt persist long after the exit of the UK. Yet while national and parliamentary sovereignty must be understood as distinct phenomena, it is worth considering whether the tendency to collapse the two has a distinctly British flavour. Has domestic preoccupation with parliamentary sovereignty created an environment in the UK in which general claims of reduced national sovereignty are felt more acutely, and can therefore prosper? The centrality of parliamentary sovereignty as a constitutional organising principle and symbolic focal point in the UK, in the absence of a formal constitutional text or instrument, makes it readily available as a key touchstone of domestic political debate, even if one which is subject to challenge from a range of different perspectives.³² Do our constitutional arrangements invite the kind of confusion about sovereignty that has characterised the path to Brexit?

These are difficult questions for those who defend the doctrine of parliamentary sovereignty as a normatively attractive constitutional doctrine, and, unsurprisingly, there are no easy answers. Euroscepticism, in the UK and elsewhere, is obviously a multifaceted phenomenon driven by many and complex forces, and not simply a function of vague claims about sovereignty. Moreover, it is tempting to suggest that increased familiarity with ideas of sovereignty should be a source of better understanding, rather than bewilderment. Yet while there is clearly much to be desired in this respect, support for the kind of democratic constitutionalism with which parliamentary sovereignty is most closely associated cannot be contingent on its ability to deliver only political outcomes of which we approve.³³ Instead, a choice of constitutional system will depend on a combination of reasons, both principled and practical in nature, and while there is much scope to reform the UK's contemporary political constitution, the only response to Brexit must be to engage openly with, and not seek to suppress, the politics which have led to this point.

In so doing, we can recognise that there are legitimate concerns about the democratic character of EU governance,³⁴ and the activity and positioning of the Court of Justice of the European Union,³⁵ among other things. But such specific challenges for Member States acting both within and against the EU institutions are ultimately also underpinned by difficult questions about how national sovereignty can most effectively be utilised. It is far from radical to suggest that power and influence are gained by the acceptance of contingent constraints on sovereignty—indeed, this insight has long

31 See Case 6/64 *Costa v ENEL* [1964] ECR 585, [1964] CMLR 425.

32 See Gordon (n 13), chapter 1.

33 See KD Ewing, 'The Resilience of the Political Constitution' (2013) 14 *German Law Journal* 2111, 2117–18; Gordon (n 13), 293–322.

34 On problems even in EU implementation of democratic mechanisms designed to offset its 'democratic deficit', see, eg, James Organ, 'Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-making on the Legal Admissibility of European Citizens Initiative Proposals' (2014) 10 *European Constitutional Law Review* 422.

35 See, among others, the concerns about the approach of the Court of Justice of the European Union articulated by UK courts in *HS2* (n 28), and *Pham* (n 12).

been a fundamental of sovereignty theory.³⁶ And this is to say nothing of what is now the necessity of cooperation between states in an increasingly integrated global world, and the overlapping national, supranational and international legal norms that are generated by the interaction of these different political systems.³⁷

Against this backdrop, it is far from apparent that big questions about national sovereignty and the (democratic) accountability of power in supra- or international structures are any better confronted, let alone resolved,³⁸ by attempted constitutional isolationism in nation states. This does not mean these questions and challenges are not real and pressing; rather that they will be present for nation states, whether members of the EU or otherwise. Yet even those questions which are specific to the EU and its advanced constitutional architecture may, paradoxically, be more challenging on the outside of a European project which, in Cameron's renegotiation exercise, showed a clear willingness to respond to UK concerns on sovereignty and otherwise. Whether Brexit is hard, soft or occupies some firm middle ground, future UK engagement with the EU is inevitable, and challenging its power and its institutions in a meaningful way from an external position will surely now be impossible.

Where, then, might we end up? The UK may have happened upon the worst of both worlds: in danger of further domestic misunderstanding of a parliamentary sovereignty which was not undermined by EU membership, while having diminished national sovereignty in pursuit of a romantic return to a mythical constitutional past. This does not mean there is no way back (although not to the EU—that path is surely closed, both in order to respect the domestic democratic decision made at the referendum, but also because the remaining 27 Member States are quickly moving on without us). For this is not an argument against parliamentary sovereignty as a democratic constitutional fundamental. Indeed, there is now a need for Parliament to justify its constitutional position more than ever, taking an active role in ensuring that the government is subject to sufficient means and levels of political accountability during the Brexit negotiations, and that an adequate legislative solution is constructed through which EU legal norms can be replaced, as required, and to the extent necessary. Nevertheless—banal though it may be for academics to call for clearer thinking about core concepts—we also need to try to understand the true nature of the problems that underlie national concerns about sovereignty, rather than distort those concerns by constructing false problems relating to domestic legislative authority which required no solution.

Brexit has real potential to further exaggerate constitutional problems operating at both a domestic and a supranational level: the alienation of citizens, the remoteness of power and the fragility of accountability. There is important legal and political

³⁶ See generally Martin Loughlin, *The Idea of Public Law* (OUP 2003) 72–98.

³⁷ In the context of environmental law, see, eg, Liz Fisher, 'Sovereignty, Red Tape ... and the Environment' *The EU Referendum and the UK Environment: An Expert Review* (16 June 2016) <<http://environmenteuref.blogspot.co.uk/2016/06/sovereignty-red-tapeand-environment.html>>.

³⁸ In the context of the WTO, see, eg, Gregory Messenger, 'Brexit and the World Trade Organization' (OUPblog, 2 May 2016) <<http://blog.oup.com/2016/05/brexit-wto-world-trade-organization/>>.

thinking to be done to try to prevent the worst possibilities, and reflection on how to make the most of sovereignty—both parliamentary and national—will be a vital part of this work. Whether in the process of exiting the EU and establishing a new future relationship with Europe, or in the substantive policy choices which may be opened up in a whole range of areas, from labour rights to the environment, or from agriculture to competition, Brexit will be an immense challenge for the UK's distinctively political constitution.³⁹ Great attention, engagement and a proper understanding of what is at stake, will all be necessary if what we see in practice is to exhibit some of the virtues of this approach to government.

IV. CONCLUSION

The UK's current sovereignty situation may therefore be a rather unsatisfactory one. Even the new Prime Minister Theresa May now promises that Brexit will restore the UK's position as a 'sovereign country'.⁴⁰ Yet was the EU ever really the UK's major problem with respect to our sovereignty? Griffith's classic lecture 'The Political Constitution' ends by recounting an Auden poem, in which preparations are made for a major expedition. Yet these preparations turn out to be in vain: 'In theory they were sound on Expectation, Had there been situations to be in; Unluckily they were their situation'.⁴¹ If all of this bewilderment ever clears, and once we eventually move beyond Brexit, we may ultimately come to a similar, unsettling realisation about sovereignty in, and of, the UK: perhaps we were our situation all along.

³⁹ See Michael Gordon, 'Brexit: A Challenge for the UK Constitution, of the UK Constitution?' (2016) 12(3) *European Constitutional Law Review*, 1–36.

⁴⁰ See 'Theresa May's Conservative Conference Speech: Key Quotes' (*BBC website*, 2 October 2016) <www.bbc.co.uk/news/uk-politics-37535527>.

⁴¹ WH Auden, *Collected Shorter Poems 1927–1957* (Faber and Faber 1966) cited in JAG Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1, 20.