OUP Public Law Update (Spring 2019) – Brexit and the Constitution

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Introduction – The Constitutional Context

A great deal has happened since Parliament returned from its summer recess in early September 2018.[1] Brexit-related constitutional novelty, confusion and, occasionally, something approaching a crisis have all become common features of the UK's constitutional landscape over the past few months. As such, this Update does not propose to address comprehensively the Brexit-related events of the last eight months. Instead, I will deal more briefly with a range of issues, and direct you to other literature where possible.

One key question to hold in your minds as you read is: is there anything constitutionally abnormal about what has been happening? Or is it simply that so much is happening that what would otherwise be perfectly normal constitutional processes are occurring at such a high frequency that they are being made to seem unusual?[2]

I have set out a short table of contents below. There is some interlinking of the sections to avoid repetition, but it should be possible to read many of the sections as standalone discussions also.

[1] Full list of recess dates for the 2017-19 session are available here https://www.parliament.uk/about/faqs/house-of-commons-faqs/business-faq-page/recess-dates/

[2] In this regard, reflect on Michael Gordon's blog 'Constitutional overload in the UK' (*The UK in a Changing Europe* blog, 10 December 2018), available at https://ukandeu.ac.uk/constitutional-overload-in-the-uk/

5. Looking ahead

1. Collective responsibility

1(a) Introduction

Collective Cabinet responsibility is a hallmark of constitutional government in the United Kingdom. It is worth laying out the basics of this idea before explaining the relevance of the principle to this Update. Collective responsibility is expressly discussed in Chapter 4 of the Cabinet Manual, where it is stated that:

> 'The Cabinet system of government is based on the principle of collective responsibility. All government ministers are bound by the collective decisions of Cabinet, save where it is explicitly set aside, and carry joint responsibility for all the Government's policies and decisions.'[3]

The Ministerial Code also provides guidance on the practices which underpin the idea of collective responsibility. In particular, that personal views discussed at Cabinet should remain private, and only the jointly agreed view of Cabinet (i.e., of the Government) should be discussed publicly. Section 2 of the Ministerial Code in general is instructive, but 2.1 encapsulates the essence of this idea:

> 'The principle of collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained.'[4]

Where a minister feels unable to follow the jointly agreed view of Cabinet, the expectation is that they should resign. This is dealt with in the Cabinet Manual at 3.20. This indicates that their private view differs from the public position offered by Government, but they are still expected to maintain the confidence of things discussed in Cabinet prior to their resignation.[5]

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[3] Cabinet Manual, 4.2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf

[4] Ministerial Code, 2.1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672633/2018-01-08_MINISTERIAL_CODE_JANUARY_2018__FINAL___3_.pdf

[5] For a more detailed discussion of this aspect of collective responsibility see *AG* v *Jonathan Cape Ltd* [1976] QB 752

None of the above is legally enforceable, collective responsibility is a constitutional convention. Yet, if we look at Ivor Jennings' 3-stage test for identifying conventions,[6] we can see that there are good reasons for having the convention.

1. *Are there any precedents which indicate a constitutional actor ought to behave a particular way?* Yes, there are lots of examples of ministers resigning where their views differed from that of the government (not least, two Secretaries of State for Exiting the European Union).
2. *Do the actors believe they ought to behave in that way?* Given the explicit statements about collective responsibility found in the Cabinet Manual and Ministerial Code, it is evident that all members of the government are normally expected to follow the principle of the convention. The only exception to this would be if the principle were expressly suspended, and it has not been (as it was in relation to, *inter alia*, the Brexit Referendum campaign).
3. *Is there a good constitutional reason that justifies following the rule?* Yes, the premise of collective responsibility is to ensure government is able to carry out its work effectively without publicly exposing internal divisions. Highlighting internal divisions is likely to embolden political opponents both internally (e.g. government backbenchers, the Official Opposition), and externally (e.g. foreign powers and organisations), because they will perceive the government as not being united behind a clear policy. Exploitation of internal division by political opponents is a normal feature of constitutional operations, but plainly *perpetual* division is not conducive to stable government. Significant internal division would normally be a precursor to a change in leadership, or a General Election and possible change in government. If making such changes frequently is viewed as constitutionally undesirable, then collective responsibility is necessary to reduce the risk of the conditions that enable such change arising.

1(b) Collective Responsibility and Brexit

Is Brexit *sui generis*? If so, does this explain why so many of our constitutional expectations have – or could be argued to have – been misunderstood, misapplied, or simply ignored? Although Brexit *per se* is unprecedented, I do not think that the underlying constitutional framework is necessarily unfit to manage the task in constitutional-legal terms. Where the difficulties have been encountered, this has related primarily to the political aspects of the United Kingdom's constitution. The upsetting of ordinary practice stems from the political irreconcilability of some of the key actors involved, not from the lack of availability in

[6] Laid out in Joint Committee on Conventions, 'Conventions of the UK Parliament' (Report of Session 2005-06, Volume II, Minutes of Evidence and Appendices) at EV119-120

principle of constitutionally "normal" solutions to the underlying substantive issue; the challenges facing collective responsibility are a good example of this.

Although the 'Jennings Test' provides a good justification for the operation of the convention, it is premised on the political capacity of the government – and, in particular, the Prime Minister – to enforce it. The exercise of discipline over the Cabinet has been problematic for the Prime Minister since the General Election of 2017. The 2017 election returned a minority Conservative government reliant on the votes of other parties, and its own ability to maintain its internal cohesion. Furthermore, as the Government's negotiations with the European Union progressed, elements within the Conservative party (both 'leave' and 'remain' voting caucuses), as well as positions adopted by other groups in the House of Commons, have actively tried to pull the government in very different directions. The contest beyond government is mimicked within Cabinet itself, which reflects the differences between the leave and remain wings of the Conservative party.

As these two sides vie for dominance, information from within government has been leaked to the press. This has meant that the Prime Minister has withheld information from Cabinet for fear that it will be leaked, with the fear that this would expose (further) divisions in government. At the same time, ministers have complained that they are not able to properly discuss – and therefore reach an appropriately reasoned joint conclusion – matters because of this withholding of information.

The position of the Prime Minister, challenged from both sides politically within her party, and subject to a fairly comprehensive (discussed below) refutation of her efforts from Parliament, is politically problematic (also discussed below). As such, she has struggled to enforce the discipline of collective responsibility on the Cabinet. At the same time, members of Cabinet and the wider groups to which they belong, have struggled to countenance the propositions put forward by their opponents. They each view the other's position as fundamentally flawed, which has made progress towards any compromise problematic. Add to this the more overt manoeuvring for the Conservative party leadership (and the role of Prime Minister) stimulated by Theresa May's concession that she will resign in due course, and the possibility of a General Election or fresh referendum, and it is plain that the conditions for collective responsibility are not present. The Prime Minister is politically weak, Cabinet is divided, there is the prospect of a change in leadership and government.

The prevailing political situation has caused the constitutional principle of collective cabinet responsibility to go into hibernation, the current political climate being too unsettled for it to function properly. This is not necessarily a crisis, hibernation is a normal part of many life cycles. Indeed, many of the conditions present at the moment are regular features of the United Kingdom's political landscape. Nonetheless, it may feel that we are experiencing a type of crisis because of the consequences of any answers to the core question – Brexit – underlying the appearance of these features at this particular time.

You may want to think about whether this is likely to lead to any longer-term consequences for the functioning of Cabinet government in the United Kingdom. You could read one or more of the following to inform your thoughts on this.

* M. Bennister, and R. Heffernan, 'The Limits to Prime Ministerial Autonomy: Cameron and the Constraints of Coalition' (2015) 68(1) *Parliamentary Affairs* 25-41
* C. Foster, 'Cabinet Government in the Twentieth Century' (2004) 67(5) *Modern Law Review* 753-771
* P. Hennessy, 'What are prime ministers for?' (2014) 2 *Journal of the British Academy* 213-230

2. The Party-Political System in the United Kingdom

The extended introduction to collective responsibility and how it is currently operating is instructive because it explains the relative – perhaps inevitable, given the circumstances – weakness of the Government. This provides a useful backdrop against which to understand many of the other constitutional disagreements that have taken place.

One area of development and disagreement has been in relation to the party-political system that dominates the House of Commons, to a lesser extent governs the operations of the House of Lords, and generally dictates the electoral contests at constituency level. When I talk about changes to the party-political system I do not mean that the political landscape is fragmenting such that we can expect to see more multi-party government, and a more mixed House of Commons chamber (that is a separate debate). Instead, I mean that the Brexit process has precipitated some notable events in relation to political parties, the full consequences of which have yet to become clear.

It is worth briefly considering three things in relation to party government. First, the confidence vote held by the Conservative party on Theresa May's leadership; secondly, the place of minority government and parliamentary confidence votes in a constitutionally challenging context; and thirdly shifts in the relationship between some MPs and their parties, that have in some circumstances led to their resigning the party whip.

2(a) Conservative Party Confidence Vote

The internal machinations of political parties are not of themselves ordinarily of direct constitutional concern. The obvious exception to this position, however, is when those machinations directly effect the personnel of government. Thus, a vote of no confidence in the leader of the Conservative party, when that party is in government, can have the effect of changing the Prime Minister by virtue of triggering a leadership competition within the party. The winner of that competition would then become Leader of the Party and, by convention,

Prime Minister where the party is in government and maintains the confidence of the House of Commons.

On 12 December 2018 Theresa May, Leader of the Conservative Party and Prime Minister survived a vote of no confidence held by the 1922 Committee (the Committee of Backbench – non-government – Members of Parliament) with a majority of 83 (200:117). Under the rules of the Conservative party this means that she cannot be subjected to another formal vote of no confidence for one year. However, much more recently (08 April 2019) leading members of the European Research Group, a faction within the Conservative party (discussed below), have called for an informal vote of no confidence in Theresa May.

It may be surprising to some that at no point in the process above, or as a consequence of any change in the leadership of any governing party, is a General Election required to be held to validate the newly appointed leader's premiership. This is justified on the basis that the government is drawn from the personnel of Parliament, and the authority of one (or more than one acting in concert) party to command the confidence of the House of Commons. If the governing party retains a majority in the Commons, then it may attempt to use the provisions of the Fixed-Term Parliaments Act 2011 to call an early General Election, if it thinks it will win, but it is not legally obliged to do so.[7] That being said, two recent Prime Ministers who came to power as a result of party leadership changes, Gordon Brown and Theresa May, felt compelled to call early General Elections, generally with unfavourable (to them) results.

In relation to the constitutional position where a sitting Prime Minister loses a majority, but no other party gains a majority, such that negotiations must take place between parties with a view to forming a government that can command the confidence of the Commons, see the following resources on the caretaker convention:

* House of Commons Political and Constitutional Reform Committee, 'Government formation post-election' (HC 1023, 10th Report of Session 2014-15)
* P. Schleiter and V. Belu, 'The Challenge of Periods of Caretaker Government in the UK (2015) 68(2)6 *Parliamentary Affairs* 229-247

2(b) Minority Government, Parliamentary Confidence Votes and the FTPA 2011

The discussion of General Elections and caretaker governments takes us somewhat away from the more specific question of party leadership challenges and contests. However, it is worth thinking about in relation to what such leadership challenges may provoke. The proposition that a General Election may follow after a change in leadership may make the

[7] It is conceivable that a party may undergo a change of leadership in the run-up to the end of a Parliament, and thus be compelled to hold a General Election through the ordinary operation of the parliamentary term limits imposed by the Fixed-Term Parliaments Act 2011

prospect of replacing a party leader unattractive where a government is engaged in a controversial, or otherwise difficult political process, since they will not feel they can guarantee a favourable electoral outcome.

In the current context we are left with a constitutionally awkward situation in which:

1. The Prime Minister is unable to carry her business through the House of Commons because a large minority within her parliamentary party will not support that business, and other members of the House are not willing to support it.
2. The Prime Minister appears unwilling to resign on both principled and political grounds, at least for the time being.
3. None of the leadership contenders jockeying for position seem particularly keen to take over the role at present, and caucuses within (and outside of) the party have struggled to convince enough parliamentarians to adopt a different course of action to the one proposed by the Government.
4. A confidence and supply arrangement, which the Conservative Party has with the Northern Irish Democratic Unionist Party because the former did not win a majority in the 2017 General Election,[8] has seen the DUP indicate it would support the government in confidence votes while blocking key government business (the Brexit Withdrawal Agreement).
5. The incapacity of the opposition parties to convince sufficient numbers of the government backbenches to vote in favour of a no-confidence motion as a key stage in one of the routes to bring about an early general election.[9]

The ordinary constitutional expectation is that a government which cannot command a majority in the House of Commons in relation to central planks of its mandate (an explicit example of which is discussed below in relation to votes on the governments negotiated agreement with the European Union) should resign and call a General Election. Yet, largely because of political (1-4, above) and legal constraints (5, above), not to mention the international diplomatic implications and practical politico-legal considerations in relation to the Brexit timetable specifically (e.g. the need to amend the relevant domestic legal provisions to take account of, *inter alia*, extensions to the Article 50 negotiation process), this convention has not been at the forefront of considerations. In this way, the internal machinations of a political party can be seen to have more general constitutional consequences.

For a discussion of confidence motions and the Fixed-Term Parliaments Act 2011, see:

* R. Brazier, 'A small piece of constitutional history' (2012) 128(Jul) LQR 315-319

[8] See earlier update
[9] See Fixed-Term Parliaments Act 2011, s.2(3)-(5)

* House of Commons Public Administration and Constitutional Affairs Committee, 'The Role of Parliament in the UK Constitution Interim Report: The Status and Effect of Confidence Motions and the Fixed-Term Parliaments Act 2011' (HC 1813, 14th Report of Session 2017-19), available at https://bit.ly/2UGzwIq

2(c) Changing allegiances of MPs in relation to political parties

The question of Brexit has provided the premise for a number of other shifts in internal party structure. These will be dealt with briefly, principally in relation to 'The Independent Group', but readers may also wish to think about the European Research Group.[10]

The Independent Group, currently in the process of registering as a political party under the name of Change UK: The Independent Group, is comprised of Members of Parliament who have variously resigned the party whip from the Conservative and Labour parties. Although primarily a political move ostensibly brought about because of disagreements over the parties' policies in relation to Brexit, the resignations do raise a question about whether a constituency votes for a candidate personally, who is aligned to a party, or for a party which puts forward a candidate. The difference is constitutional, and crucial since, if it is the former, an MP can change party allegiance with relative (legal) impunity, whereas, if it is the latter, electors in a constituency might rightly be aggrieved if their MP switched to a different political party. The situation is complicated by the fact that most prospective MPs align themselves with party manifestos and rely on party-political machinery to support their campaign.

In principle, MPs are representatives sent from a constituency to exercise their judgment (in a classic Burkean sense[11]), and are not delegates sent to convey the views of their constituents. This means that an MPs view can differ from some, even a majority of their constituents. Having said this, because MPs are politically accountable at the ballot box, they will generally seek to align their views with a majority of their constituents so as to secure re-election. It is something of a chicken and egg situation, in that who is shaping the views of whom is reflexive, and complicated by the actions/omissions of the national party and other actors/events.

In a constituency which voted for them when they were aligned to a particular political party, there is a reasonable expectation that – if the national party continues to stand on a popular

[10] For discussion of this see S. Whale, 'The ERG: A party within a party?' (*The House: Parliament's Magazine* 27 September 2018), https://www.politicshome.com/news/uk/foreign-affairs/brexit/house/house-magazine/98571/erg-party-within-party however note that this discussion predates the motion of no confidence in Theresa May of December 2018.

[11] See this unpacked in greater detail here, Edmund Burke, Speech to the Electors of Bristol (1774), in *The Works of the Right Honourable Edmund Burke, Volume 1* (London: Bohn, 1854), pp.446-449, available at https://bit.ly/2UqkxD8

platform – this will have a positive effect on the electoral chances of individual MPs. However, if an MP judges that the national party platform is problematic, or they think it will harm their interpretation of what is in their constituency's or the national interest, they are within their rights to rebel on specific votes and suffer the disciplinary consequences within their party, or to resign from the party, but keep their seat in Parliament. MPs constituting The Independent Group, and a number of other MPs have taken the second option. The constitutional mechanism for holding MPs to account for these choices is political, it occurs at the ballot box. An MP can choose to resign,[12] and thus trigger a by-election, and they may do this in response to political pressure. However, absent specific legal conditions being met,[13] there is no other mechanism for a constituency to compel its representative to stand for re-election outside of the ordinary electoral cycle.

In the particular crucible of Brexit, the decision of some MPs to resign from their political parties has attracted criticism because, *inter alia*, their constituencies voted 'leave' and they are perceived as proposing to 'remain' in the European Union, and/or they stood on party manifestos that proposed to give effect to the outcome of the 2016 referendum on the United Kingdom's membership of the European Union. Among other things, the lack of a consensus within Parliament, and within individual political parties, has made it difficult for the leadership of some political parties to maintain internal discipline. The emergence of The Independent Group should be seen as part of a spectrum of strains being placed on the party-political system that has historically contributed significantly to the structure, processes, and relationship between Parliament and Government, since there are also numerous MPs who have remained within the parties who consistently defy the party whips on Brexit-related issues. This may have consequences as regards whether those MPs are re-selected as candidates for the next General Election, but as noted above, until that time MPs defying the party whip, or resigning it, are constitutionally free to do so.

You can find out more information about the role of the party whips using the following resources:

* J Walpole and R Kelly, 'The Whip's Office' (House of Commons Library Standard Note, SN/PC/02829, 2008) available at https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN02829
* Parliament's website, at https://www.parliament.uk/about/mps-and-lords/principal/whips/

[12] Resignation from the House of Commons is not technically possible, instead an person can become disqualified from sitting as an MP by deliberately bringing themselves within the terms of the House of Commons Disqualification Act 1975, the quickest way of doing this is to take on one of two Crown sinecures used to facilitate departure from the House (Crown Steward of the Manor of Northstead and Bailiff of the Chiltern Hundreds)

[13] See Recall of MPs Act 2015

3. Parliamentary Procedural Matters

The next set of events can, in very broad terms, be seen as parliamentary procedural matters that either represent a break from traditional practice, or which in themselves constitute a notable event. While the processes themselves were constitutionally significant, in a procedural-legal and -political sense they are more straightforward than the conventional / practical issues discussed above as concerns Cabinet and party discipline. As such, I plan to deal with them more succinctly, and point readers to more detailed unpacking of specific examples of these issues elsewhere.

3(a) Irish Backstop, the AG's legal advice, and Contempt of Parliament

The government had declined to release the Attorney General's legal advice on the status of, *inter alia*, the so-called 'Irish Backstop' in the withdrawal agreement negotiated with the European Union. The government had previously indicated to Parliament that the advice would be released following a motion to that effect winning a majority in Parliament.[14] A motion of contempt was brought by Parliament to censure this decision.[15] The motion passed successfully (311:293), and subsequently the government released the advice.

If implemented, the backstop would create a situation in relation to the Republic of Ireland and Northern Ireland to avoid the establishment of what has been referred to as a 'hard' border between that nation of the United Kingdom and the Republic of Ireland (i.e. the implementation of border checkpoints). This is, it is said, designed to honour provisions in the Good Friday Agreement which ended almost all hostilities on the island of Ireland by, among other things, removing border-crossing check points. The arrangement would necessarily differentiate the Withdrawal Agreement provisions as they affect Northern Ireland from the rest of the United Kingdom.

MPs had various concerns about the nature of the legal advice, in particular whether it would be possible for the United Kingdom to unilaterally withdraw from the backstop arrangements. The success or failure of the Withdrawal Agreement in the House of Commons hinged, in no small part, on whether this was possible. There could, therefore, be political costs and benefits to various factions within Parliament of the information being released.

The censure of the motion itself was designed to carry political weight only, especially since Parliament's power to mete out punishments is, in modern times, limited. Thus, even though the motion required the publication of the legal advice, it remained open to the government – if it deemed it politically possible – to defy the motion (though the Speaker said that it

[14] See motion and debate in Hansard, HC Deb 13 November 2018 vol. 649 at http://bit.ly/2Q86aBj
[15] See motion and debate in Hansard, HC Deb 04 December 2018 vol 650 at http://bit.ly/2Qf7AcX

would 'be unimaginable that [the advice] would not be [published]'[16]). The legal advice was published the following day. In constitutional terms this is an example of the political constitution working to maintain the institutional checks and balances – albeit in a relatively extreme situation – between Parliament and the Government.

A discussion of contempt and other powers of the House of Commons can be found here:

* House of Commons Information Office, Disciplinary and Penal Powers of the House, (Factsheet G6 General Series, 2010), available at https://www.parliament.uk/documents/commons-information-office/g06.pdf

3(b) Meaningful Votes 1, 2, and 3 and the Speaker's Procedural Intervention

Under s.13 of the European Union (Withdrawal) Act 2018, Parliament is able to obstruct the passage of any Withdrawal Agreement secured through negotiation with the European Union because the Government is compelled to provide an opportunity for a vote on said agreement (see, e.g., s.13(2)). This can be distinguished from the ordinary procedure for ratifying international treaties under s.20 of the Constitutional Reform and Governance Act 2010 which operates as a negative process – that is, if Parliament has not positively stated that it does not wish for a treaty to be ratified, it can be ratified. Thus, the votes were made 'meaningful' in that they could prevent ratification of a proposed treaty (i.e. the Withdrawal Agreement) if Parliament was unhappy with the terms, and thus avoid giving domestic legal effect to its provisions.

Following the release of the Attorney General's legal advice (discussed above), the date for the first meaningful vote (MV1, 11 December 2018) was postponed when it became clear the Government could not win. Over the Christmas period efforts were made to rally support. When the Government brought the Agreement before Parliament on 15 January 2019, it suffered the largest defeat of any Government in parliamentary history (432:202).

Subsequent meaningful votes were held over the following weeks. The Government sought further concessions and tweaks to the language from the European Union, but still lost by significant margins (MV2 12 March 2019 391:242; MV3 29 March 2019 344:286).

Between MV2 and MV3, the Speaker of the House of Commons indicated that the procedural manual for Parliament (*Erskine May*) stated that:

[16] See Hansard, HC Deb 04 December 2018 Vol 650 at http://bit.ly/2SB05dd

> 'A motion or an amendment which is the same, in substance, as a question which has been decided during a session may not be brought forward again during that same session.'[17]

The Government was able to bring back a version of the Agreement which was sufficiently different so as to satisfy the procedural requirements of *Erskine May* though, as I have said, it still lost (MV3). At the time of writing, there is talk of an MV4.

Under ordinary constitutional circumstances, the repeatedly demonstrated inability of a government to command the confidence of the House in relation to a, if not *the*, central plank of its domestic legislative agenda, would cause a government to fall (probably even with the provisions of the FTPA 2011 in operation). The whole premise of the separation of functions between Parliament and Executive rests on this expectation. The Sovereign selects a Prime Minister, and appoints a government, on the basis of the expectation that such a government could get its business in the House done. Much of what I have already discussed above probably explains why in this particular circumstance this has not happened, but it is nonetheless constitutionally irregular, and symptomatic of the stresses which the Constitution is labouring under.

4. Indicative Votes, Backbench Legislation and Royal Assent / The Position of the Sovereign

In the United Kingdom, the government is drawn from the membership of Parliament. In ordinary constitutional times government proposes legislation for Parliament to consider. Similarly, and in aid of this position, government determines how the vast majority of time in Parliament will be allocated through the use of business motions. Generally speaking, in our constitutional context at least, such a situation is uncontroversial since the government has won a General Election on the promise of giving legislative effect to the proposals in its manifesto (barring any changes in circumstance requiring an alternative approach – this will need to be justified politically). As such, the government of the day will normally be able to count on a majority of MPs ready and willing to support that manifesto. Even if the government is something other than a majority government (minority, confidence and supply minority, coalition), the expectation that a government will be able to command the confidence of the House means that the above arrangements are also the norm.

4(a) Indicative votes

In recent weeks we have seen a variation in this arrangement arising from the parliamentary impasse over whether to approve the Prime Minister's Withdrawal Agreement, or whether

[17] Hansard, HC Deb 18 March 2019, vol 656 at http://bit.ly/2FoI66d, quoting *Erskine May Parliamentary Practice* (LexisNexis, 2011 24th edition), p.397

some other arrangement should be pursued. For the reasons already discussed extensively above, the normal routes around this (a change in party leadership, a General Election, and in this specific case, a referendum) remain politically complex and controversial in a way that would be unlikely to be the case under other circumstances. Thus, the variation is specific, in that it is limited to the question of Brexit, but it is procedurally-constitutionally unusual.

MPs were asked to give an indication – through a series of indicative votes – of which of a range of proposals they would support in relation to Brexit. The purpose of these votes was to determine whether opinion in the House could be said to be coalescing around any particular options. There were two rounds of indicative votes (27 March 2019; 02 April 2019). The first consisted of 8 options, for which there was no majority for any of the options. The second consisted of 4 options, for which again there was no outright majority for any of the options.

In a political sense, therefore, the votes were not conclusive. However, to carry out the votes in the first place, backbenchers were required to amend the business motion of the House, which they did on 25 March 2019.

* A detailed summary of the process for taking control of business in this instance, and links to the text and video of the debate, is available here: https://www.parliament.uk/business/news/2019/march/brexit-next-steps-debate-returns-to-the-commons/

It is plain that this represents an upending of the established relationship between Parliament and the Government; government generally controls the business of the House except on specific days which are given over to the Opposition and Backbench Business Committee. However, given the specific circumstances of Brexit, is it likely to have longer term consequences for the relationship between Parliament and Government? My expectation is that, although a similar situation could occur in relation to similarly controversial constitutional issues (e.g. repeal of the Human Rights Act 1998, reform/abolition of the House of Lords, future questions relating to membership of the European Union), a number of other factors must likely also be present.

4(b) Backbench Legislation – the 'Cooper-Letwin' Bill

It will be clear from the preceding section that, generally speaking, legislation originates with the government. There are obvious exceptions to this – Private Members Bills.[18] However, even these Bills are normally reliant on the government of the day adopting them so as to create enough time for the Bill to complete its passage.

[18] See further information from Parliament, here https://www.parliament.uk/about/how/laws/bills/private-members/

The so-called Cooper-Letwin Bill (the European Union (Withdrawal) (No. 5) Bill 2017-19), now the European Union (Withdrawal) Act 2019 (c.16), was a Private Members Bill that sought to compel the Prime Minister to lay a motion before the House of Commons concerning whether an extension should be sought in the Article 50 process, and if so, for how long. The motion could be accepted, amended or rejected, and a number of other scenarios were also contemplated.

The Bill was constitutionally interesting because, as I mentioned above, a Private Members Bill would normally struggle to complete its passage through the parliamentary process for want of time. However, not only did the 2019 Act achieve this, it did so in rapid time (1st Reading in the Commons 02 April 2019, Royal Assent 08 April 2019). This swift progress was achieved via the successful moving of a business of the house motion by Sir Oliver Letwin (Yvette Cooper sponsored the Bill in the Commons – hence the 'Cooper-Letwin' Bill) in the Commons. This motion secured sufficient time for the Bill, and any amendments from the Lords, to be debated. The margins of success were very narrow, as discussed in the parliamentary documents listed below.

As with other issues discussed in this Update, the likelihood of this type of situation arising again is likely to be confined to circumstances relating to controversial constitutional matters that are not amenable, for one reason or another, to the ordinary solutions available under the constitutional arrangements of the United Kingdom. Nonetheless, the events constitute something of a watershed, since they potentially establish a clear path for MPs able to garner sufficient support to disrupt the government's control of parliamentary business.

Thinking about the bigger picture, the implications of this process – if it were over-used – would be to re-shape the relationship between Parliament and Government. Even things as fundamental as government being required to have the confidence of the House of Commons would be affected since this confidence is measured primarily on the ability of the government to get key legislation through Parliament. If the Commons felt able to actively disrupt this programme of legislation, would this remain a sensible yardstick to measure confidence? Is the House's ability to set its own rules and procedures sufficient justification for varying long-established understandings in exceptional circumstances? Is a narrow majority in the Commons sufficient to justify such a variation? The process did not need to answer these questions, and in any event the answers would likely be contested.

The legal implications of the Act itself may be of less legal-constitutional significance altogether, having been somewhat superseded by events – the Prime Minister wrote to the European Council asking for an extension before the Bill passed. Professor Mark Elliott (legal advisor to the House of Lords Constitution Committee) wrote in a tweet on 09 April 2019:

> 'The full impact of the Cooper-Letwin legislation has now become clear. It is going to enable the House of Commons to require the

> Prime Minister to do something that she has already done. In other words, it is going to make no difference whatsoever.'[19]

It is really a political question whether the existence of the Bill compelled the Prime Minister to seek an extension, or whether she would have done so in any event. Without knowing the minds of all of the protagonists, it is difficult to tell what drove their behaviour. The two detailed blog posts listed below, along with a range of other materials, provide an extended account of the Cooper-Letwin Bill and the events surrounding it.

- Graeme Cowie, 'European Union (Withdrawal) (No. 5) Bill 2017-19', (2019) House of Commons Library Briefing Paper Number 08541, available at http://researchbriefings.files.parliament.uk/documents/CBP-8541/CBP-8541.pdf
    - And see a summary https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8541#fullreport
- House of Lords, 'European Union (Withdrawal) (No. 5) Bill: Commons Stages', Library Briefing, available at https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2019-0042
- Mark Elliott, 'The Cooper-Letwin Bill: Parliamentary control over the extension of Article 50' (*Public Law for Everyone*, 04 April 2019), available at https://publiclawforeveryone.com/2019/04/04/the-cooper-bill-parliamentary-control-over-the-extension-of-article-50/
- Mark Elliott, 'Does the Prime Minister's request for an Article 50 extension scupper the Cooper-Letwin Bill?' (*Public Law for Everyone*, 05 April 2019), available at https://publiclawforeveryone.com/2019/04/05/does-the-prime-ministers-request-for-an-article-50-extension-scupper-the-cooper-letwin-bill/
- Other documents relating to the Bill https://services.parliament.uk/Bills/2017-19/europeanunionwithdrawalno5/documents.html

4(c) Royal Assent, Prorogation and the Position of the Sovereign

As a consequence of the issues outlined in the last section, two intertwined questions relating to the proper constitutional role of the Sovereign have emerged. First, can the government advise the Sovereign to decline to provide Royal Assent to a Bill that had completed the requisite stages in the Houses of Parliament? That is, can the government use the Royal Assent requirement to veto legislation? Secondly, and relatedly, can the

[19] See Mark Elliott, @ProfMarkElliott, https://twitter.com/ProfMarkElliott/status/1115631338693042177

government advise the Sovereign to prorogue (end a parliamentary session – e.g. the 2017-19 session) Parliament before the usual time? The purpose of which, in this instance, would be to wipe out any legislation progressing through Parliament that was not subject to a motion that allowed it to be carried over to the next session.

These two propositions are controversial since they can be read as placing the Sovereign in a political situation, which by a combination of long-established law and convention arising from the settlement established by the Glorious Revolution, is to be avoided at all costs.

The question as to the constitutionality of both propositions arose in relation to the loss of control of parliamentary business by the Government that led to the so-called Cooper-Letwin Bill, discussed above. It shows a real tension between the views of Government and Parliament about their respective roles, and which institution believes it holds the "best" democratic mandate. Each "side" of this debate places a good deal of weight on the implications for representative democracy of not following their view.

I will say a little about the idea of ministerial advice vis-à-vis the Sovereign, but to understand the intricacies of this debate in greater detail, the reader is advised to consult the blog posts putting the position from both – broadly speaking – sides, listed below. In terms of advice, the Sovereign takes a good deal of advice from her ministers, about various primarily executive actions. However, as Jeff King indicates, this does not appear to extend to legislation. He goes into a good deal more detail, but as the simplest indication that ministerial advice does not extend to Parliament, he indicates the preamble to every Act of Parliament (**emphasis** added) reads[20]:

> 'Be it enacted by the Queen's most Excellent Majesty, by and **with the advice and consent of the Lords Spiritual and Temporal, and Commons**, in this present Parliament assembled, and by the authority of the same, as follows…'

The advice originates here from Parliament, not government. Perhaps the situation is complicated by the presence of the government in Parliament, the overlap in personnel, and the government's expectation that it will normally be able to dominate (at least) the Commons by deployment of, *inter alia*, a majority, its power of initiative, its control of business. It can be suggested, however, that this confuses two different issues; the role of the executive and the powers of a Parliament normally cooperative with the executive. It is the Queen-in-Parliament that is sovereign (the combination of the Lords, Commons, and Sovereign), and Parliament which controls parliamentary procedure. Mark Elliott puts it thus (*emphasis* original):

[20] Jeff King, 'Can Royal Assent to a Bill be Withheld if so-advised by ministers? (*UK Constitutional Law Assocaition Blog*, 05 April 2019) available at https://ukconstitutionallaw.org/2019/04/05/jeff-king-can-royal-assent-to-a-bill-be-withheld-if-so-advised-by-ministers/; the post also unpacks a much more detailed explanation.

> 'Just because Parliament is generally (at least to an extent) beholden to the Executive does not make it improper for Parliament to assert itself when, as now, circumstances and parliamentary arithmetic permit. The procedural rules that have been departed from so as to enable the indicative votes process to run are *Parliament's* procedural rules. And, being the master of its own procedure, Parliament is entirely free to suspend, amend or rescind those rules. That it is unusual for it to do so does not make it unconstitutional.'[21]

The above-passage forms part of a response to John Finnis, whom, it must be said, takes quite a different view.[22] The problem is that, given the febrile political debate around all things Brexit, placing the Queen in a constitutionally contested (there is evident disagreement among key actors, even if one of those groups is wrong as a matter of constitutional law) position is entirely against accepted constitutional practice. The Sovereign is at all times – in theory – to exist in a state of political ambiguity above the system. Her political views are supposed to remain a mystery in order that she can maintain a public image of neutrality. All political decisions are supposed to be reached away from the Sovereign, and then clear advice communicated to her. The very premise of this disagreement implies that it would be acceptable to leave some discretion to the Sovereign in political matters.

The question of prorogation is slightly different to that of ministerial advice to withhold Royal Assent in relation to Bills passed by both Houses of Parliament because it *is* a personal prerogative of the Sovereign exercised on the advice of her ministers.[23] Generally speaking one would expect the advice to be given in accordance with, *inter alia*, legal provisions governing the timing of elections and/or with regard to the parliamentary cycle established at the start of a parliamentary session. This is because prorogation has the effect of ending a parliamentary session.

If it has immediate effect (i.e. without notice), this means that a parliamentary session ends abruptly, with no opportunity to cajole Bills through part-completed procedures, including Royal Assent. In such circumstances, the Bill ceases to be. If it is resurrected in the next session, it reverts to the starting point. The Order in Council (the legal form taken by the exercise of the prorogation prerogative). Early prorogation can also have delayed effect,

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[21] Mark Elliott, 'Brexit, the Executive and Parliament: A response to John Finnis' (*Public Law for Everyone*, 02 April 2019) available at https://publiclawforeveryone.com/2019/04/02/brexit-the-executive-and-parliament-a-response-to-john-finnis/

[22] John Finnis, 'Royal Assent – A Reply to Mark Elliott', (*UK Constitutional Law Association Blog*, 08 April 2019) available at https://ukconstitutionallaw.org/2019/04/08/john-finnis-royal-assent-a-reply-to-mark-elliott/

[23] See Cabinet Manual, 2.24, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf

such as when a General Election is scheduled outside of the ordinary cycle,[24] leaving time to allow Bills to be completed. This might include the use of motions which can permit existing Bills to be carried over to the next session in their current form.

Plainly, the problem of misusing – what constitutes misuse being a matter of constitutional conventional perspective – the prorogation prerogative is that it could be used to circumvent Parliament's control of its own procedures. Thus, a sovereign law-making Parliament, in full control of its internal processes for making laws could, in a way beyond its control to countermand, be rendered inactive by the executive. Even in extremis, it is difficult to see how this could not precipitate a political, constitutional crisis. Of course, in ordinary constitutional times the government effectively dominates Parliament, and so this type of situation would not arise.

There has been a great deal of detailed debate on this question, including:

* Robert Craig, 'Executive versus Legislature in the UK – A response to Mark Elliott and Tom Pool' (*UK Constitutional Law Association Blog*, 05 April 2019) https://ukconstitutionallaw.org/2019/04/05/robert-craig-executive-versus-legislature-in-the-uk-a-response-to-mark-elliott-and-tom-poole/
    - This blog also contains links to a number of other pieces, letters from leading commentators to broadsheet newspapers and similar that are of relevance to this debate.
* Mark Elliott, 'Brexit, the Executive and Parliament: A Response to John Finnis' (*Public Law for Everyone*, 02 April 2019) https://publiclawforeveryone.com/2019/04/02/brexit-the-executive-and-parliament-a-response-to-john-finnis/
* John Finnis, 'Royal Assent – A Reply to Mark Elliott' (*UK Constitutional Law Association Blog*, 08 April 2019) https://ukconstitutionallaw.org/2019/04/08/john-finnis-royal-assent-a-reply-to-mark-elliott/
* David Howarth, 'Westminster versus Whitehall: Two Incompatible views of the Constitution' (*UK Constitutional Law Association Blog*, 10 April 2019) https://ukconstitutionallaw.org/2019/04/10/david-howarth-westminster-versus-whitehall-two-incompatible-views-of-the-constitution/
* Jeff King, 'Can Royal Assent to a Bill Be Withheld if so-advised by Ministers?' (*UK Constitutional Law Association Blog*, 05 April 2019) https://ukconstitutionallaw.org/2019/04/05/jeff-king-can-royal-assent-to-a-bill-be-withheld-if-so-advised-by-ministers/

[24] See Cabinet Manual 2.24 and 2.26 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf

* Stefan Theil, 'Unconstitutional Prorogation' (*UK Constitutional Law Association Blog*, 03 April 2019) https://ukconstitutionallaw.org/2019/04/03/stefan-theil-unconstitutional-prorogation/

5. Looking ahead

There are a number of issues which, for reasons of space, I have not been able to address here including the decisions in:

* *The UK Withdrawal From The European Union (Legal Continuity) (Scotland) Bill – A Reference By The Attorney General And The Advocate General For Scotland* [2018] UKSC 64
* *Wightman* v *Secretary of State for Exiting the European Union* (C-621/18)

In addition to these two decisions – on devolution and Brexit, and revocation of Article 50 TEU respectively – questions over the legal (domestic and international) means by which the Article 50 countdown timer is extended, and the negotiations between the Government and Official Opposition have also been left to one side. The announcement of an extension of Article 50 to October 2019 means that these issues will remain relevant, and could be dealt with in a later update.