

# Brexit and our unprotected constitution

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CONSTITUTION**

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*'The human rights insight is that none of us has a guaranteed space among the fortunate, that the border between affluence and misfortune is more porous than we assume. Human rights are for us all but likely to be called upon only when we need them. And rich and fortunate though we might seem, these are not guaranteed conditions: we will grow old, we may be visited unexpectedly by the police, an onset of mental ill-health may leave us vulnerable; our lives may change suddenly for the worst.'*

*Conor Gearty. On Fantasy Island, (2016)*

## I

The European Union Withdrawal Bill, currently before Parliament, seeks to do something quite unprecedented in the constitutional history of the modern world by withdrawing Britain from a protected constitution into an unprotected one.

The Bill provides for the incorporation of 44 years of EU law not already part of our domestic law into our domestic law so as to preserve legal continuity following Brexit in March 2019. It seeks to achieve this continuity by creating a new category of law – 'retained' EU law – which is to be incorporated into our domestic law. It will then be for the British government and Parliament to decide which retained EU laws they wish to keep, which they wish to modify, and which they wish to repeal altogether. The government

has already announced its intention of producing new legislation on agriculture and on immigration which would diverge from EU law.

There is of course nothing unprecedented in the process of incorporation itself. In the process of decolonisation, Britain, with the agreement of the ex-colonies, conferred continuity upon them by providing them with constitutions which incorporated British law into their own legal systems. The new states then decided which laws they wished to retain and which they wished to discard. The same process occurred when a part of the United Kingdom – the 26 counties of Ireland which chose to secede in 1921 to form the Irish Free State – incorporated British law into their legal system as a prelude to developing their own system of laws.

But there is a crucial difference between what the ex-colonies and the Irish Free State were doing upon independence, and what we are doing in withdrawing from the EU. They were moving from an uncodified and unprotected constitutional system – based on the sovereignty of Parliament – to codified and protected constitutional systems. We are doing the opposite – we are moving from a codified and protected constitutional system to an uncodified and unprotected one based on the sovereignty of Parliament. We are also moving from a system in which our rights have been enlarged to one where some of our rights will in effect have been abolished, as a result of a deliberate decision on the part of the government. As Andrew Langdon, QC, Chair of the Bar Council, declared in September 2017, 'Rights are not being brought home, they are being abolished'.

The EU is a protected constitutional system, its institutions enjoying only the powers given to them by the Treaties. This constitutional system is based upon a separation of powers between its institu-

tions – notably the Council of Ministers, the Commission and the Parliament – as well as territorially between the EU and the national member states. It is, moreover, a constitutional system based on the judicial review of primary legislation, since the European Court of Justice, as well as national courts, can disapply or annul legislation incompatible with any aspect of EU law, which, since December 2009, includes the European Charter of Fundamental Rights. The constitutional system of the EU, therefore, is, by contrast with the British constitutional system, protected against the abuse of legislative power.

It is rare if not unprecedented for a democracy to exit from a major international human rights regime; and no country has hitherto moved from a protected to an unprotected system. Such a process, therefore, raises profound constitutional questions.

Brexit will leave a gap in our constitution in terms of the protection of human rights. This gap could well be filled by the judges. If that happens, Brexit will increase the danger of a clash between the judges and Parliament. In addition, Brexit might prove to be a constitutional moment for Britain, since it may strengthen the case for Britain following nearly every other democracy in developing a codified constitution which provides for the judicial protection of human rights.

Our entry into the European Union transformed the British constitution. Brexit, far from returning us to the *status quo ante*, could transform it even more.

## II

Our membership of the European Communities, predecessors of the European Union, which we joined in 1973, involved a profound shift in power from Parliament and indeed the executive, to the courts. The European Court of Justice had developed, before British entry, two fundamental doctrines – the doctrine of direct effect and the doctrine of the supremacy of Community law or Union law as it now is. According to these doctrines, the legislatures of the member states, in acceding to the European Communities, had agreed to restrict their legislative competence in areas where the EU had acted. In consequence, Community law created rights for individuals which national courts and tribunals were under a duty to enforce. In the event of a conflict between Community law and the law of a member state, Community law was to take precedence; and in virtue of the judgment in *Simmenthal*,<sup>1</sup> it became the duty of every national court and tribunal to enforce Community law and to disapply any conflicting national law. The logical implication, therefore, was that a litigant could go to a domestic court in Britain to have a statutory provision enacted by Westminster set aside. British judges were now under a duty to evaluate legislation in terms of its compatibility with Community law. They were under a duty to apply Community legislation, and also to interpret Westminster legislation, where that was possible, so that it was in conformity with Community legislation. In the landmark case *R v Secretary of State, ex p Factortame Ltd.* [1991] 1 AC 603, the Law Lords for the first time disapplied part of a statute, the Merchant Shipping Act of

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1 Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, [1978] 3 CMLR 263.

1988, as being in conflict with Community law. In relation to EU law then, British courts became also in effect constitutional courts.

It followed that, so long as Britain remained within the EU, Westminster was in effect a legislature of limited competence. Europe, therefore, altered the balance of power in our system of government in favour of the judiciary, at the expense of Parliament and government; and the power of Parliament was limited by the supremacy of EU law. There was a shift of power from Parliament not only to the European Court of Justice but also to national courts. That of course was the case in all of the member states, but it was of particular importance for Britain which had no history of the judicial review of primary legislation. The effect of European Community membership was to entrench provisions of Community law into our legal system.

This shift of power to the judiciary was very much in accordance with constitutional trends in Britain in the latter part of the 20<sup>th</sup> century. Even before we entered the European Community in 1973, judges had been taking a more activist stance towards the executive, abandoning the attitude of judicial deference that had previously characterised their approach, and developing a system of administrative law. In addition, at the end of the 20<sup>th</sup> century, the enactment of devolution implied a more active role for the courts in ruling upon disputes between Westminster and the devolved legislatures, even though these legislatures remain legally subordinate to Westminster, and the courts do not have the power to disapply primary legislation which encroaches upon their responsibilities. But, above all, the Human Rights Act of 1998 implies a more active role for the courts which came under a duty to interpret all legislation, wherever that was possible, so that it conformed to the European

Convention of Human Rights. Admittedly, by contrast with the EU, the European Convention is not a superior legal order, and the courts have no power to strike down primary legislation which cannot be interpreted to conform to the Convention. All that they can do is to issue a 'declaration of incompatibility', a statement which has no legal effect. It is then up to ministers and Parliament to repair the situation. There is a special fast-track procedure for doing so, enabling a minister to make an order amending the offending legislation. But this is an executive judgment on human rights rather than a judicial remedy. In theory, Parliament could vote down such an order. So far, however, ministers and Parliament have always taken remedial action following a declaration of incompatibility, but nevertheless, the Human Rights Act does not provide for a legal remedy.<sup>2</sup> This means that the courts are in effect saying to a successful litigant, 'your rights have been infringed but we can take no remedial action' or perhaps 'your rights would have been infringed if you had any, but under a Diceyan constitution, your rights are dependent upon a sovereign parliament, and we have no further status in the matter'. In a case, *Burden and Burden v The United Kingdom*, Application no. 13378/05, heard by the European Court of Human Rights in December 2006, that Court declared that a declaration of incompatibility did *not* provide an effective remedy - such as is required by Article 13 of the European Convention which was not incorporated into the Human Rights Act. - since such remedy as the declaration of incompatibility secured 'is dependent on the discretion of the executive and [one] which the Court has

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2 There is a seeming exception to this statement that Parliament has so far always taken remedial action in that it has not yet dealt with the issue of prisoners voting rights, the subject of a declaration in *Smith v Scott* 2007 SC 345, effectively approved by the Supreme Court in the *Chester* case [2013] UKSC 63, para. 39. But the government has promised to introduce a bill to remedy the position.

previously found to be ineffective on that ground' (para. 40). But the Court also declared it to be 'possible that at some future date evidence of a long-standing and established practice of ministers giving effect to the courts' declarations of incompatibility might be sufficient to persuade the Court [of Human Rights] of the effectiveness of the procedure. At the present time, however, there is insufficient material on which to base such a finding'.

Even so, the Human Rights Act made the European Convention in effect part of the fundamental law of the land. It brought the modalities of legal argument into the politics of the British state.<sup>3</sup> In a lecture in 2005, the late Lord Steyn, a Law Lord, declared that 'In the development of our country towards becoming a true constitutional state the coming into force of the Human Rights Act 1998 --- was a landmark. --- By the Human Rights Act Parliament transformed our country into a rights-based democracy. By the 1998 Act Parliament made the judiciary the guardians of the ethical values of our bill of rights'. Lord Steyn defined 'a true constitutional state' as one which has 'a wholly separate and independent Supreme Court which is the ultimate guardian of the *fundamental law* of the community'.<sup>4</sup> (Emphasis added). The idea of fundamental law is of course something new in our constitutional experience, and its being cited by Lord Steyn is a good indication that the Human Rights Act could prove the first step on what may prove a long and tortuous journey towards a codified constitution.

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3 Compare Philip Bobbitt, *Constitutional Interpretation*, Blackwell, 1991.

4 Lord Steyn, '2000-2005: Laying the Foundations of Human Rights Law in the United Kingdom': Lecture to The British Institute of International and Comparative Law, 10 June 2005.

### III

The transformation of Britain into a rights-based democracy was strengthened by the European Union's Charter of Fundamental Rights. This Charter was adopted by the EU in 2000, but it did not become part of EU law until the Lisbon Treaty of 2007, which came into force in December 2009. The Charter draws on the European Convention of Human Rights, although it is, constitutionally, separate from the Convention and its 54 articles contain a number of rights which are not in the Convention. Amongst these rights are the Article 3 right to the integrity of the person which prohibits eugenic practices and reproductive cloning; the Article 8 right providing for the protection of personal data and a right of access to such data; the Article 13 right to academic freedom; the Article 14 right to vocational and continual training; the very specific Article 21 right to non-discrimination on grounds 'such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation' – this article, unlike the European Convention, provides explicit protection for members of the LGBT community; the Article 24 rights of the child, giving effect to a United Nations Convention on the rights of the child, and specifically including a right of access on the part of the child to both parents; and the Article 25 rights of the elderly. There are, in addition, an Article 34 right to social security, an Article 35 right to health care, and an Article 38 right to environmental protection. In some cases, a European Convention right is considerably widened in application, most notably the Article 47 right to a fair trial and an effective remedy, which in part replicates Article 6 of the European

Convention, but also provides for a right to a fair hearing which would almost certainly apply, for example, to tribunals such as the immigration tribunal, as well as to the courts.

The extensive rights enumerated in the Charter show that the protection of rights is a dynamic and not a static phenomenon. Rights are not to remain frozen in the form in which they were enacted in 1950 in the European Convention of Human Rights, which the European Court of Human Rights regards as a living instrument. At that time indeed, few would have thought of a right to environmental protection, nor to the right of freedom from discrimination on grounds of sexual orientation in an era when, after all, homosexuality was illegal in Britain and in many other democracies.

The Charter, which only applies when member states are implementing EU law, is a part of EU law and in consequence its provisions can be used to justify a declaration to the effect that a challenged provision of a member state is illegal in substance or was illegally arrived at. The institutions of the member states, including the courts of the member states, then have a duty to recognise the consequences of such a declaration of illegality. If they do not, various remedies are available. The European Court of Justice can perhaps now be compared to the United States Supreme Court in terms of the breadth of its powers; and the national courts of the member states are also required to disapply primary legislation and quash secondary legislation if they find such legislation to be incompatible with a Charter provision that is directly effective where the national legislation lies within the scope of EU law.

Britain did not, however, incorporate the Charter into domestic law, and, together with Poland, secured what ministers believed was an opt-out, or, to be more precise, a protocol – Protocol 30 -

providing, firstly, that the Charter did not extend the ability either of our domestic courts or of the European Court of Justice to find any of our legal provisions inconsistent with the Charter; secondly that the Charter would not create any new actionable rights in Britain or Poland; and thirdly that the Charter would only apply to Britain and Poland if the rights for which it provided were already recognised in domestic law. The then Prime Minister, Tony Blair, told the Commons in 2007, 'It is absolutely clear that we have an opt-out from the charter ---'. The then Foreign Secretary, David Miliband, told the Commons in 2008 that 'The treaty records existing rights rather than creating new ones. A new legally binding protocol guarantees that nothing in the charter extends the ability of any court to strike down UK law'.<sup>5</sup> Much later, in 2014, the then Home Secretary, Theresa May, told the Commons, that the Charter was 'declaratory only and we do not consider that it applies to the United Kingdom'.<sup>6</sup>

However, Protocol 30 did not have the effect envisaged of allowing Britain to enjoy a general opt-out from the Charter. In the *NS* case in December 2011, the European Court of Justice ruled that the Protocol 'does not call in question the applicability of the Charter in the United Kingdom or Poland-----Thus --- the Charter must be applied and interpreted by the courts of Poland and of the United Kingdom '. The Protocol 'was not intended to exempt the Republic of Poland or the United Kingdom from the duty to comply with the provisions of the Charter, nor to prevent a court of one of those Member States from ensuring compliance with those provisions'.<sup>7</sup>

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5 House of Commons Debates, vol 462, col 21, 25 June 2007; vol. 470, col. 1250, 21 January 2008.

6 House of Commons Debates, vol. 588, col. 342, 19 November 2014.

7 Joined Cases C-411/10 and C 493/10, summary of the judgment, para. 4.

From the point of view of the EU, it would indeed have appeared odd if an opt-out were possible from what was seen as a fundamental constitutional document.

The Charter has been used by British judges to do what they are prevented from doing in the Human Rights Act, namely disapplying parts of Westminster statutes because they are in conflict with the Charter. In *Benkharbouche v Secretary of State for Foreign Affairs*,<sup>8</sup> Ms. Benkharbouche claimed against the Sudanese embassy, unfair dismissal, failure to pay her the national minimum wage and holiday pay, as well as breaches of the Working Time Regulations. The Sudanese embassy claimed immunity under the provisions of the 1978 State Immunity Act. But Lord Sumption ruled that sections of the Act were incompatible with Article 6 of the European Convention providing for a fair trial. The remedy for this would be a declaration of incompatibility which, as we have seen, is not a strictly legal remedy, since it has no legal effect. But Article 47 of the Charter of Fundamental Rights provides that anyone whose rights have been violated has 'the right to an effective remedy'. If the Convention had been violated, Lord Sumption held, so also had the Charter; and he concluded, therefore, that 'a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied' (para. 78).

In a second case, *Vidal-Hall v Google Inc*,<sup>9</sup> the Court of Appeal ruled that part of the Data Protection Act 1998 should be set aside as breaching Articles 7 and 8 of the Charter of Fundamental Rights requiring respect for private and family life and data protection. In a third case, in 2014, two backbench MPs, Tom Watson, now deputy

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8 [2017] UKSC 62

9 [2015] 3 WLR 409.

leader of the Labour Party, and David Davis, now Secretary of State for Exiting the European Union, brought proceedings to secure the disapplication of the Data Retention and Investigatory Powers Act 2014 as contrary to the Charter, arguing that it would have a deleterious effect on the ability of an MP to communicate confidentially to his constituents. Watson and Davis invoked the Charter, rather than the Human Rights Act, precisely because the Charter provided for greater protection than the European Convention. It seems ironic that a leading Brexiteer, David Davis, brought proceedings to question the validity of an Act of Parliament on the grounds that it offended against European Union principles! The High Court found for Watson and Davis. The Court of Appeal referred the issue to the European Court of Justice, which held that the Act as a whole was contrary to Articles 7, 8 and 11 of the Charter, providing for freedom of expression and information, and that EU law precluded legislation such as the Data Protection Act, which lapsed at the end of 2016. The effect of the Charter, therefore, was to allow the High Court to render invalid those parts of a Westminster statute that were inconsistent with EU law.<sup>10</sup> Presumably not even the strongest Brexiteer would seek to argue that any of these judgments ought to be reversed. It is not obvious, therefore, why the Charter should be thought of as hazardous; nor is it clear what dangers are being averted by its repeal.

It is clear that, far from Britain achieving an opt-out, the Charter has provided stronger protection of human rights than is offered by the European Convention of Human Rights. In evidence in October 2017 to the Commons Exiting the EU Committee, Dr. Charlotte

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<sup>10</sup> *Secretary of State for the Home Department v Davis & Watson* [2015] EWCA Civ 1185; and *Tele2 Sverige v Post-och, Secretary of State v Watson* (2016) C-203/15 and C-698/15.

O'Brien of the University of York Law School, detected 248 cases in the courts of England and Wales that had cited the Charter, 17 in Northern Ireland and 14 in Scotland.<sup>11</sup>

There is, therefore, until Brexit, a hierarchy of rights protection in Britain. The Charter provides for disapplication of conflicting domestic legislation, whilst the Human Rights Act provides only for a declaration of incompatibility, even though some would argue that the rights protected in the European Convention are at least as fundamental as those in the Charter. The former limits parliamentary sovereignty, the latter does not. The protection given by the Charter does, therefore, expose the very limited protection in terms of enforceability in relation to primary legislation given by the Human Rights Act.

The Charter is not, however, to be incorporated into UK law as retained EU law after Brexit. It will therefore no longer apply domestically in interpreting and applying retained EU law. Nevertheless, Article 5(5) of the Withdrawal Bill purports to provide for the preservation after Brexit of 'fundamental rights or principles which exist irrespective of the Charter', although the bill does not specify what these 'fundamental rights' actually are. It would of course be pointless to incorporate the whole of the Charter into domestic law. The Charter is, after all, addressed to 'the institutions, bodies, offices and agencies of the Union --- and to Member States --- only when they are implementing Union law' (Article 51.1), and the preamble refers to the aspiration of 'ever closer union', an aspiration to which David Cameron, in his renegotiation, successfully argued, Britain was not committed. Further, some of the Charter rights, such as the

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11 HC 373, Oral Evidence, 11 October 2017, Q19.

right to vote in European Parliament elections, become irrelevant after Brexit.

There are, nevertheless, many rights in the Charter which would certainly remain relevant to Britain. In some cases, such as that of the rights of the child, they give access to United Nations conventions which Britain has ratified but not incorporated into her system of law. Even so, were provisions of the Charter to become part of our domestic law, some of them would have to be rewritten, and some would have to be adapted to suit specifically British conditions.

The government has promised that all EU-derived rights in domestic law – or some variant of them – will be preserved after Brexit and that it will present to Parliament a list of the rights in the Charter to show that they are all in fact being secured in domestic law. But a list of rights presented by a minister is hardly a substitute for a codification of rights protected by the judicial review of primary legislation such as is secured by the Charter. Even more important, the legal remedy provided by the Charter will be lost. The courts, therefore, will no longer be able to rule that a particular statute or part of a statute is unlawful or quash an action on the basis that legislation is not compatible with Charter rights, or with domestic provisions intended to replicate such rights. This means that there will no longer be a legal remedy for a breach of Charter rights. It will no longer be possible for the courts to enforce the provisions of the Charter. In addition, the rights guaranteed by the Charter will in future be at the mercy of a sovereign parliament which can, at any stage, amend or delete them. The rights may be incorporated into our law, but their status will be radically different. They will no longer be protected rights, nor will there be a remedy if they are breached. Unless the rights in the Charter become part of an

amended Human Rights Act, there will not even be the remedy of a declaration of incompatibility.

The Withdrawal Bill does admittedly provide that retained EU law shall be supreme over domestic legislation enacted prior to exit day, though not after exit day, so that, until exit day, such domestic legislation can presumably be disapplied by the courts if in conflict with retained EU law. But after that retained EU law can be amended, repealed or modified at any time by a sovereign parliament, and nothing in the bill provides that primary legislation would be required to achieve this purpose.

What value, it might be asked, does a right have if it is dependent upon the whim of a sovereign parliament and if there is no legal remedy for a breach? There can be little doubt that an important protection given by the Charter will be lost upon Brexit.

It would seem that, after Brexit, we will revert to our constitutional situation before 1973, when we joined the EU, whereby the sovereignty of Parliament was the dominant, if not our only, constitutional principle. We will be engaged in a process, not of entrenchment, as was the case in 1973, but a process of disentanglement, quite unique in the democratic world. Just as our entry into the European Community strengthened the courts at the expense of Parliament and the executive, so Brexit could reverse the process by strengthening Parliament and the executive at the expense of the courts. In practice, under our political system, the confidence principle means that the view of the government normally coincides with the majority in the elected house, and so Brexit is likely to increase the power of government rather than Parliament. Restoring the sovereignty of Parliament was of course one of the major political aims of those who supported Brexit. But 'taking back control' will

mean not only that Parliament will be taking back control from the EU and from the European Court of Justice. Parliament and, still more, the government will also be 'taking back control' from our own national courts as well as from EU courts.

Some of the Brexiteers who sought to 'take back control' did so precisely because they wished to remove what they regard as burdensome regulations from our law, such as the working time directive or the temporary agency work directive. In their view, the supremacy of EU law prevented the British public from being able to decide for themselves upon employment law and to vote out those who had made laws which the public did not like. Theresa May has, admittedly, committed the government to retaining EU employment rights. Nevertheless in the EU, so Brexiteers argued, because of the system of qualified majority voting in the Council of Ministers, laws could be imposed upon us to which the government and Parliament of the day were opposed. After Brexit, by contrast, all our laws will be scrutinised by Parliament, which can, at least in theory, modify or reject them.

It follows, nevertheless, that, because the Charter of Fundamental Rights is not being retained, Brexit will mean a reduction in our rights and in the means of their enforcement. Excluding the Charter means that individual citizens will no longer have the protection which it provides. Our rights, therefore, are now entirely dependent upon Parliament, whose sovereignty is being restored. That trend goes very much against that in most democracies where rights protection is gradually being enlarged rather than abolished. In Britain, by contrast, rights are being deliberately withdrawn by a political decision on the part of the government. Brexit therefore will leave a huge gap in our system of rights protection unless our judges

become more creative. This could have momentous constitutional consequences.

## IV

The first such consequence could be pressure for further rights protection in Britain so that we retain the same level of protection as we enjoyed while in the EU. Such protection could be secured by a British Bill of Rights.

Those who favour a British Bill of Rights have various motives. Some Conservatives favoured replacing the Human Rights Act with a British Bill of Rights, in order to reduce, not to increase, the protection secured by the Human Rights Act which, some believed, made it too difficult to apprehend and deport those guilty of serious offences and in particular terrorist offences. They wanted a British Bill of Rights which would be a Human Rights Act 'minus'. But some other Conservatives favour a British Bill of Rights for other reasons, as do a number of non-Conservatives. In 2012, seven out of nine members, including four Conservatives, of an official committee on a British Bill of Rights, chaired by Sir Leigh Lewis, came out in favour of a British Bill of Rights primarily because they believed that the 'Europe' label prevented the Human Rights Act from acquiring the degree of popular support which constitutional rights enjoy in most other democracies.<sup>12</sup>

Brexit could lead to pressure for a British Bill of Rights which would be the Human Rights Act 'plus'. Of course, such a legislative exercise could not take place as a mere by-product of the Withdrawal

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12 Commission on a Bill of Rights: *The Choices Before Us*, 2012.

Bill. It would be a highly complex and time-consuming exercise to rewrite relevant parts of the Charter of Fundamental Rights so as to render it applicable to post-Brexit Britain. It would require considerable public debate and consultation and this would have to include consultation with the devolved bodies in Scotland, Wales and Northern Ireland. There is, nevertheless, as the Charter shows, a strong case for increasing the number of rights which the courts are able to protect, over and above those protected by the European Convention. Indeed the Convention was regarded by its signatories in 1950 not as a ceiling, as the maximum level of protection which member states of the Council of Europe should grant, but as a floor, as the very minimum which any state claiming to be governed by the rule of law should support.

One obvious path would be to take the relevant rights from the Charter and add them to those protected under the Human Rights Act to create a British Bill of Rights. An alternative would be to follow the parliamentary Joint Committee on Human Rights which, in its report entitled *A Bill of Rights for the UK*, published in 2007-8, before the Charter of Fundamental Rights came into force, proposed five types of rights for inclusion. These were:

- (1) Civil and political rights and freedoms, such as the right to life, freedom from torture, the right to family life and freedom of expression and association. The Joint Committee also proposed a new right to equality.
- (2) Fair process rights, such as the right to a fair trial and the right of access to a court. The Committee also proposed a right to fair and just administrative action.

- (3) Economic and social rights, including the right to a healthy and sustainable environment. The Joint Committee accepted that such rights could not easily be made justiciable, but declared that they would nevertheless impose a duty, on the part of government and other public bodies, of ‘progressive realisation’, the principle adopted in the post-apartheid South African constitution. This principle would require the government to take reasonable measures within available resources to achieve these rights and report annually to Parliament on progress, although individuals would not be able to enforce these rights against the government or any other public body.
- (4) Democratic rights, such as the right to free and fair elections, the right to participate in public life and the right to citizenship.
- (5) The rights of particular groups, such as children, minorities, people with disabilities and victims of crime.<sup>13</sup>

One argument for adding such rights to those already recognised in the Convention, has been stressed by Dominic Grieve MP, a former Attorney-General. It is that it would make it easier for the British people to feel that they, as it were, ‘owned’ the bill of rights. At present, many regard the Human Rights Act as an elite project, designed only to protect highly unpopular minorities, such as suspected terrorists and asylum seekers. The Act, therefore, is not grounded in strong popular support. Rights that might be generally used by all,

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13 HL165, HC 150, 2007-8

such as a right to health care, would give human rights legislation greater popular salience, and might thus, paradoxically, make it easier to protect the rights of unpopular minorities. In addition, the very title 'A British Bill of Rights' might help in securing public support for rights in that it will appear as something indigenous, rather than as a foreign import – even though, of course, much of the impetus of the European Convention came from British lawyers and from Winston Churchill, who believed in a Europe unified by the rule of law.

In addition to adding to the rights listed in the Convention, the Human Rights Act could be strengthened in another way, by providing stronger protection for rights than is provided in the Act. There are two ways in which this can be done, by legislative entrenchment and by judicial entrenchment.

In 2006, David Cameron, as Leader of the Opposition, called for a home-grown British Bill of Rights. He suggested that it might be entrenched by being made exempt from the provisions of the Parliament Acts, which allow the Commons in the last resort to override the Lords. At present the only legislative provision that is exempt from the Parliament Acts is that requiring a general election to be held at least once every five years. The reason for this, of course, is to ensure that an unscrupulous government with a majority in the Commons cannot postpone the date of a general election beyond five years to keep itself in power. Similarly, the effect of exempting a British Bill of Rights from the Parliament Acts would be to ensure that a government could not alter its provisions without securing the agreement of the Lords. An alternative might be to provide that the Act could be amended only by a special majority in the House of Commons, for example, two-thirds of those voting.

Such provisions are common in relation to Bills of Rights. The American Bill of Rights can only be amended by a special majority of Congress and a special majority of the states; the same is true of the protection of rights in the South African constitution. The Canadian Charter of Rights and Freedoms can be amended only by two-thirds majorities in both houses. Israel, which, like Britain, lacks a codified constitution, has a set of Basic Laws protecting rights which can be amended only by an **absolute** majority in the single-chamber parliament, the Knesset. New Zealand, which also lacks a codified constitution, and has a sovereign parliament, entrenches part of the 1993 Electoral Act by providing that it can be amended only by 75% of the MPs in the single-chamber parliament or by referendum.

The second way of strengthening the protection offered by the Human Rights Act is by giving judges power to do more than simply issue a declaration of incompatibility when, in their view, legislation infringes the European Convention. In most countries with a bill of rights, such as the United States, South Africa and Germany, judges can invalidate primary legislation which conflicts with the Act. In Canada, the government can over-ride the judges by introducing primary legislation, accepting explicitly that it is not accordance with the Charter of Fundamental Freedoms of 1982, but declaring that 'notwithstanding' this, it ought to be enacted. All primary legislation of this 'notwithstanding' type needs to be renewed every five years; but the political stigma attached to introducing primary legislation with such a clause is so great that the Federal government has never yet employed it – although it has been employed at sub-federal level by provincial governments. The Canadian government and Parliament can thus, like the British government and Parliament, decide to ignore the decision of a judge

in a human rights case. It is, however, more difficult to take this course in Canada than it is in Britain, since if Parliament in Britain disagrees with a declaration of incompatibility, it needs to do nothing other than maintain the status quo; whereas, the Canadian Parliament has to act positively to override the Charter. Admittedly, Parliament in Britain has in the past always responded to a declaration of incompatibility by amending or repealing the offending statute or part of a statute. But the danger remains, especially, as we have seen, that so many of the provisions in the Human Rights Act are used to protect highly unpopular minorities, such as suspected terrorists, prisoners and asylum seekers. How much easier it would be to protect human rights if that protection were only to be invoked by nice people such as ourselves

## V

Judicial entrenchment in Britain would entail explicit recognition that the Human Rights Act was fundamental constitutional legislation. To allow judges to disapply primary legislation would of course undermine the doctrine of parliamentary sovereignty. In the words of the Solicitor General, Robert Buckland, in a recent parliamentary debate on the Charter, 'Allowing courts to overturn Acts of Parliament, outside of the context of EU law, on the basis of incompatibility with these principles [of the Charter] would be alien to our legal system and would offend against parliamentary sovereignty'.<sup>14</sup> But the doctrine of the sovereignty of Parliament is subject to many incoherencies and inconsistencies.<sup>15</sup>

The sovereignty of Parliament may be defined as the legal rule that Parliament can enact any law and that no other body or person can set aside any parliamentary enactment. It is not clear whether that sovereignty allows Parliament to enact a law to limit its powers in a way which would bind a future Parliament. If it cannot enact such a law which would make a future Parliament non-sovereign, that might be thought of as an exception, the one possible exception, to the doctrine of sovereignty; or alternatively it might be seen as an exemplification of the doctrine. It seems, however, odd to suggest that one of the qualities of omnipotence, an omnipotence that is often said to yield flexibility, is something that one cannot do, i.e.

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14 House of Commons Debates, 21 Nov. 2017, vol. 631, col. 971,

15 See for a more detailed discussion, Vernon Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty', *Oxford Journal of Legal Studies*, vol. 21, March 2012, pp. 179-195.

bind oneself. So, if Parliament cannot bind itself, there has always, so it seems, been one exception to the doctrine that Parliament can enact any law. If it **can** bind itself, then it can make itself non-sovereign in the future. The conundrum is of course similar to that which asks whether God can bind herself.

Parliament, however, has succeeded in binding itself. The referendum on the alternative vote system of election held in 2011 bound Parliament in the sense that, in the case of a 'yes' vote, then, under section 8 of the Parliamentary Voting and Constituencies Act 2011, that system would have been introduced without any further parliamentary vote. In the event of a 'Yes' vote, the minister would have been required to make an order bringing in the alternative vote system. Since 1972, it has been accepted by successive governments and embodied in legislation that Northern Ireland shall not cease to be a part of the United Kingdom without the consent of the majority of its electors voting in a referendum, as in s1 of the Northern Ireland Act 1998. It may well be, therefore, that a purported Act of Parliament providing for the cession of Northern Ireland without a referendum would be declared invalid by the courts. In 2011, Parliament passed the European Union Act which required a referendum in the event of a treaty transferring further powers to the EU. It has been said by one authority that 'To seek to bind future parliaments by prohibiting the enactment of legislation without a referendum first being held is not consistent with the doctrine of parliamentary sovereignty.'<sup>16</sup> The courts might nevertheless have disapplied legislation purporting to transfer powers without a referendum.

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16 David Goldsworthy, HC 633-ii, 2010-11, Ev. 31, para. 9.

By joining the European Community, Parliament clearly succeeded in binding itself. It may be argued that Parliament in the European Communities Act explicitly provided for UK primary legislation to be over-ruled, so that it only bound itself with its own consent, a consent which is currently being revoked. But neither responsible ministers nor prominent jurists nor academics believed that they were binding themselves during the parliamentary proceedings on the European Communities Bill. Indeed, both Lord Hailsham, the Lord Chancellor, and Sir Geoffrey Howe, the Solicitor-General, went further, declaring that it was logically impossible for Parliament to limit its own powers. Lord Hailsham declared that it was 'abundantly obvious' 'not merely that this bill does nothing to qualify the sovereignty of Parliament but that it could not do so', and that parliamentary sovereignty prevailed over 'any treaty you choose to name, including this one'. Sir Geoffrey Howe declared that 'the ultimate supremacy of Parliament will not be affected, and it will not be affected because it cannot be affected'.<sup>17</sup> He quoted Lord Diplock, a Law Lord, who had told the Association of Teachers of Public Law in December 1971, that 'If the Queen in Parliament were to make laws which were in conflict with this country's obligations under the Treaty of Rome, those laws and not the conflicting provisions of the Treaty would be given effect as to the domestic law of the United Kingdom'.<sup>18</sup> And Lord Diplock told the House of Lords that, although legislation contrary to the provisions of the Treaty of Rome would clearly be a breach of that Treaty, nevertheless, 'the courts would be bound to give effect to a subsequent Act of Parliament under the law as it is administered in

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17 House of Lords Debates, 7 August 1972, vol. 334, cols 813, 911; House of Commons Debates, 5 July 1972, vol 840 col 556.

18 House of Commons Debates, 5 July 1972, vol. 840, col. 629.

the courts today, and as it will continue to be administered, because the Bill does not alter that'.<sup>19</sup>

'Most of us', Margaret Thatcher concluded in 1995, 'including myself, paid insufficient regard to the issue of sovereignty in consideration of the case for joining the EEC at the beginning of the 1970s --- There was a failure to grasp the true nature of the European Court and the relationship that would emerge between British law and Community law'.<sup>20</sup> The White Paper, *The United Kingdom and the European Communities*, Cmnd. 4715, 1971, which preceded the parliamentary debates, said misleadingly in para. 29, '**Like any other treaty**, the Treaty of Rome commits its signatories to support agreed aims' but the commitment 'represents the **voluntary** undertaking of a sovereign state to observe policies which it has helped to form'. (Emphasis added). Hardly anyone noticed the new role which the courts would assume nor the fact that the protection of parliamentary sovereignty would, in effect, rest with the judges and not with Parliament. Hardly anyone predicted the *Factortame* judgment. Similarly, no one, so far as I can ascertain, predicted *Benkharbouche*. In both cases, judges took it upon themselves to disapply primary legislation. Perhaps, then, it was not the European Communities Act of 1972 which undermined the sovereignty of Parliament, since most parliamentarians and jurists believed that it was being retained, indeed that it could not logically be surrendered. Rather, it was decisions of judges which undermined the doctrine of parliamentary sovereignty.

It might perhaps be argued that Brexit restores the parliamentary sovereignty which was lost in *Factortame*. But, if the judges can

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19 House of Lords Debates, 8 August 1972, vol. 334, col. 1029.

20 Margaret Thatcher, *The Path to Power*, Harper-Collins, 1995, p. 497.

modify the doctrine of sovereignty in one direction, they could also modify it in another - for example by disapplying primary legislation which is contrary to human rights. For, after *Factortame*, as Professor H.R.W.Wade insisted, sovereignty had become 'a freely adjustable commodity whenever Parliament chooses to accept some limitation' – though perhaps it might have been more accurate to say - whenever the *judges* choose to accept some limitation.<sup>21</sup>

A second consequence of Brexit, therefore, could be pressure for a greater role for the judges in protecting human rights. The judges may themselves decide to fill the gap in the constitution which Brexit will leave. In the White Paper, *Rights Brought Home*, accompanying the introduction of the Human Rights Bill into Parliament, the government declared of the proposal that judges be given the power to set aside Acts of Parliament that it 'would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest they desire this power, nor that the public wish them to have it'.<sup>22</sup> Yet, some senior judges are coming to believe that they may need the power to disapply primary legislation if protection of human rights is to be effective. A natural consequence, so it may seem, of the Human Rights Act, is an erosion of the principle of the sovereignty of Parliament. Some judges believe that this principle is but a judicial construct, a creation of the common law. If the judges could create it, they can now supersede it. H.W.R.Wade in a seminal article in the *Cambridge Law Review* in 1955, declared that, 'The seat of sovereign power is not to be

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21 H.R.W.Wade, 'Sovereignty – Revolution or Evolution?', *Law Quarterly Review*, 1996. P. 573.

22 *Rights Brought Home: The Human Rights Bill Presented to Parliament*, By The Secretary of State for the Home Department, HMSO, October 1997, para. 2:13.

discovered by looking at the Acts of any Parliament but by looking at the courts and discovering to whom they give their obedience'.<sup>23</sup> In 2011, the European Union Act, s18, declared that 'Directly applicable or directly effective law --- falls to be recognised and available in the United Kingdom only by virtue of that Act [the European Communities Act of 1972] or where it is required to be recognised and available in law by virtue of any other Act'. But the refusal of those who enacted the European Communities Act in 1972 to accept that it would bind Parliament shows that it was the judges in *Factortame*, and not Parliament itself which decided that Parliament was no longer sovereign.

In *Jackson and others v Her Majesty's Attorney-General* in 2005, the Law Lords for the first time considered whether Acts of Parliament - the 1949 Parliament Act and the 2004 Hunting Act - were valid. Although the Court determined that these Acts were in fact valid, three Law Lords declared, for the first time, obiter, that Parliament's ability to pass primary legislation might be limited in substance. Lord Steyn declared that the principle of the sovereignty of Parliament, while still being the '*general principle of our constitution*', was:

'a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism'.

Lord Steyn then went on to say, in words which were to be much quoted:

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23 H.W.R. Wade, 'The Basis of Legal Sovereignty', *Cambridge Law Review*, 1955, p. 196.

'In exceptional circumstances involving an attempt to abolish judicial review of the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish'.<sup>24</sup>

He later elaborated, saying that 'For my part the dicta in *Jackson* are likely to prevail if the government tried to tamper with the fundamental principles of our constitutional democracy, such as five year Parliaments, the role of the ordinary courts, the rule of law, and other such fundamentals. In such exceptional cases the rule of law may trump parliamentary supremacy'.<sup>25</sup>

In another obiter dictum in *Jackson*, Lady Hale, now the President of the Supreme Court, declared: 'The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers'.<sup>26</sup>

In a third obiter dictum in the same case, Lord Hope declared:

'Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled --- It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament --- is

24 [2005] UKHL 56. Para. 102.

25 The Attlee Foundation Lecture: 11 April 2006: Democracy, The Rule of Law and the Role of Judges, p. 20.

26 Para. 159.

being qualified'.

He then said: 'The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based'.<sup>27</sup> In the sixth edition of *The Changing Constitution*, the editors, Jeffrey Jowell and Dawn Oliver declared, 'It may now be that the rule of law has supplanted parliamentary sovereignty as our prime constitutional principle', and in the 8<sup>th</sup> edition, the editors, Jowell, Oliver, and O'Connell declared that while 'It may take some time, provocative legislation and considerable judicial courage for the courts to assert the primacy of the rule of law over parliamentary sovereignty, but it is no longer self-evident that a legislature in a modern democracy should be able with impunity to violate the structures of the rule of law'.<sup>28</sup>

It is, of course, a fundamental implication of the doctrine of the sovereignty of Parliament that Acts of Parliament are not subject to judicial review. But, in the last resort, that depends upon the acceptance of this situation by the judges. The implication of these obiter remarks by the three Law Lords is that the sovereignty of Parliament is a doctrine created by the judges which can also be

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27 Paras. 107 and 120. Lord Hope spoke, significantly, of the **English** 'principle of the absolute legislative sovereignty of Parliament'. Lord Hope was a Scottish Law Lord, and the Scots have always been somewhat more sceptical than the English of the doctrine of the absolute sovereignty of Parliament which they find difficult to reconcile with the Acts of Union of 1706/7. In these Acts, uniting the Scottish and English parliaments, the Scottish negotiators sought and believed that they had succeeded in preserving the Scottish legal system and the system of Presbyterian church government in Scotland from alteration by the English.

28 6<sup>th</sup> edition, 2007, p. xi, 8<sup>th</sup> edition, 2015, p. 34. Both published by Oxford University Press.

superseded by the judges, and that some senior judges would wish to see the sovereignty of Parliament supplanted by an alternative rule of recognition, the rule of law.

The Human Rights Act proposed a compromise between the doctrines of Parliamentary sovereignty and that of the rule of law. It sought to muffle the conflict between the two doctrines by proposing a dialogue between the judiciary, Parliament and government, all of which are required to observe human rights. It sought to avoid the question of what happens if there is a conflict between parliamentary sovereignty and the rule of law. When I put that very question to a senior judge – ‘What happens if there is such a conflict?’ – he replied with a smile, ‘That is a question that ought not to be asked!’

Even so, there must always be a danger of conflict between these two constitutional principles, the sovereignty of Parliament and the rule of law. It is possible that the compromise embodied in the Human Rights Act will break down. There may be a difference of view between politicians and judges as to what the rule of recognition is or ought to be.

The government and most MPs believe that issues involving human rights should continue to be resolved by Parliament. In this they are supported by much of the popular press. The judges, however, are required by the Human Rights Act to review the actions of all public authorities for their compatibility with human rights, to quash secondary legislation where it cannot be found compatible, and to issue a declaration of incompatibility where primary legislation cannot be found compatible. The judges no doubt also believe that such a declaration should always be respected by Parliament. But, despite the Human Rights Act, ministers and MPs tend to the view, that, on human rights issues, there is some danger of judges

usurping power and thwarting the will of Parliament; they are, some ministers and MPs believe, misusing the power of judicial review so that it becomes a power of judicial supremacy over the nation's elected representatives. Tensions between law and government have been aggravated by the separation of the Supreme Court from Parliament, a reform that may have intensified judicial activism. Part of the purpose of Brexit, indeed, was to put an end to judicial supremacy. The judges for their part argue that ministers should not attack them for doing their job of reviewing legislation for its compatibility with the Human Rights Act. There is a danger, then, that the British constitution will come to mean different things to different people. It may come to mean something different to the judges from what it means to government, Parliament and people. The argument from parliamentary sovereignty points in one direction, the argument from the rule of law in another. It is too early to tell how the constitutional conflict will be resolved and what the shape of the final constitutional settlement is likely to be.

## VI

Brexit exposes the fact that we have, almost uniquely in the democratic world, an unprotected constitution. Only two other democracies – New Zealand and Israel – lack codified constitutions. Israel, however, is working towards one and in 1992 the Basic Law: Human Dignity and Liberty provided that a law which contravened the rights enumerated in it would be unconstitutional, and could be declared invalid by the courts. The President of Israel's Supreme Court, Aharon Barak, argued that, in consequence, Israel's 'legis-

lature itself is now bound by fundamental human rights. No longer can it be claimed that Israel has no (formal and rigid) 'written constitution' regarding human rights. The new legislation has taken Israel out of its isolation and placed it in the larger community of nations in which human rights are anchored in a 'written and rigid' constitution, or in other words, in a document of normative supremacy or normative superiority'.<sup>29</sup> In the *Bank Hamizrachi* judgment in 1995, Israel's Supreme Court ruled that a new law infringed the Basic Law: Human Dignity and Liberty, and was therefore invalid. As a result, so one authority has argued, 'Israel became a constitutional democracy.'<sup>30</sup>

In his book, *Democracy in America*, the great French chronicler of democracy, Alexis de Tocqueville, declared that, 'In England, [he meant of course Britain], the Parliament has an acknowledged right to modify the constitution; as, therefore, the constitution may undergo perpetual change, it does not in reality exist; the Parliament is at once a legislative and constituent assembly'.<sup>31</sup> After *Factortame*, Parliament was no longer a sovereign legislative assembly, and no longer a constituent assembly, since it was bound by the European Treaties, which were in effect a constitution. But Brexit means that Tocqueville's statement once again becomes true, and our rights will once again be at the mercy of Parliament.

No other democracy except New Zealand now has a sovereign parliament, New Zealand, however, is hardly comparable to Britain, being a small country of just over four and a quarter million

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29 Aharon Barak, 'The Constitutional Revolution; Protected Human Rights', quoted in p. 30. Suzie Navot, *The Constitution of Israel*, Hart 2014, p. 30.

30 Navot, op. cit. p. 32.

31 *Democracy in America*, Part 1, chapter 6.

people – just over half the population of Greater London - and a relatively homogeneous one. It is very much an exception amongst the world's democracies. Our rights, therefore, which in most other democracies are protected by judges are in Britain, a large, diversified, multicultural and multidenominational democracy, protected primarily by Parliament. We have to ask ourselves whether our MPs are so uniquely sensitive to the protection of human rights as compared with legislators in other democracies that they should be entrusted with this important task. I have seen no evidence that this unique sensitivity exists. Indeed the experience of Northern Ireland from the 1920s to the late 1960s, and the experience of gay people until recently would seem to show that this heightened sensitivity is not in fact present. It is a fallacy – and a dangerous fallacy – to believe that because in a democracy the majority, having won power in a free election, has the right to rule, it also has the right to govern in any way that it likes, even if that means over-riding the rights of minorities.

In my book, *The New British Constitution*, published in 2009, I argued that we had, without really being aware of it, begun the process of creating a codified constitution, but in a typically British unplanned and ad hoc way. We were, I suggested, following such reforms as devolution and the Human Rights Act, moving towards a codified constitution, but without any real consensus on its shape or form.

Brexit seems partially to reverse this process, returning us to an unprotected constitution. But it raises the question of how long we can remain satisfied with such a constitution, in a position of what Aharon Barak referred to as one of 'isolation', or whether we too should enter 'the larger community of nations in which human

rights are anchored in a 'written and rigid' constitution.' We are, at present, I believe, in a transitional period. Eventually, no doubt, a new constitutional settlement will be achieved in what may prove a long and painful process in which there may be squalls, and indeed storms on the way. Brexit, by revealing the nakedness of our unprotected constitution, may, paradoxically provide a powerful impetus to the process of completing our constitutional development by enacting a codified constitution.

Countries normally adopt codified constitutions not as a result of a process of public debate or ratiocination, but after a break in constitutional continuity, either when a colony achieves independence - as with the United States in 1776, Norway in 1814 or India in 1947 - or to mark a change of regime following defeat in war, as with Germany in 1949 and Italy in 1947. These breaks in continuity give rise to a constitutional moment and a new beginning. One of the reasons why Britain lacks a codified constitution is that we have never had such a constitutional moment. We seem never to have begun as a nation, but to have evolved. We have not since Roman times been a colony, and we have not altered our fundamental regime since the Glorious Revolution in the 17<sup>th</sup> century. But Brexit will be a new beginning, and it will, in a sense mark a change of regime, albeit a peaceful one, the ending of that short-lived regime, lasting from 1973 to 2019 during which Britain was a member of the European Communities and then of the European Union, and was in consequence bound by its laws. It is just possible that Brexit will prove to be that break in continuity that will herald our own constitutional moment.







# Brexit and our unprotected constitution

By Professor Vernon Bogdanor

In this pamphlet, Prof. Bogdanor assesses the potential impact of Brexit upon the ‘unwritten’ United Kingdom constitution. He notes that it is rare if not unprecedented for a democracy to exit from a major international human rights regime; and that no country has hitherto moved from a protected to an unprotected system. Such a process, he concludes, raises profound constitutional questions. Brexit will leave a gap in our constitution in terms of the protection of human rights. This gap could well be filled by the judges. If that happens, Brexit will increase the danger of a clash between the judges and Parliament. In addition, Brexit might prove to be a constitutional moment for Britain, since it may strengthen the case for Britain following nearly every other democracy in developing a codified constitution which provides for the judicial protection of human rights. Our entry into the European Union transformed the British constitution. Brexit, far from returning us to the status quo ante, could transform it even more.

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