

Chapter 4

Constitutional Law

Aileen McHarg *University of Strathclyde*

The impact of EU membership on the UK constitution has been profound. In the *Miller* (Article 50) case, the Supreme Court described the effect of the [European Communities Act 1972](#) (ECA) – the means by which EU membership was given effect within the UK – as being unprecedented in constitutional terms. Not only did it provide for a new source of law, and a new constitutional process for making law in the UK, it also fundamentally changed the UK's system of government and the way in which we think about the location and exercise of public power.

The key constitutional change was the shift from what was understood in 1972 (at least outside Northern Ireland) as a *unitary* constitutional order, with a single legislative body and single source of sovereign authority (the UK parliament) to a *multi-level* system in which governmental power is divided and shared between different geographical tiers. Not only did EU law act as a constraint upon the legislative competence of the UK parliament – and later also upon the devolved legislatures in Scotland, Wales and Northern Ireland – but the EU was itself a limited legal order, bound by its own constitutional framework as laid down in the treaties.

EU membership has therefore been a significant driver of the movement away from the UK's traditionally political constitution, in which democratic accountability was regarded as the major guarantee against abuse of governmental power, towards a more legally-constrained constitution, with a greater role for the courts as a check on public bodies. Its impact has been both direct and indirect. In direct terms, EU law itself has proved to be a fertile source of grounds of challenge to government action. Individuals and organisations who think that their rights under EU law have been breached by public bodies have been able to bring actions before the UK courts, often securing better remedies than would have been available under purely domestic law. Indirectly, the broader shifts in constitutional thinking engendered by EU membership – about the dividing and sharing of governmental power, and about the role of law in constraining the state – may have paved the way for later developments, such as devolution and the [Human Rights Act 1998](#) (HRA), which have also enhanced the constitutional role of the courts.

The most obvious constitutional impact of EU membership has been on the doctrine of parliamentary sovereignty. In the famous case of *R v Secretary of State for Transport ex p Factortame (No 2)* [1991] 1 AC 603, the House of Lords, for the first time since the Glorious Revolution, 'disapplied' an Act of the UK parliament so as to give priority to a directly effective principle of EU law. Constitutional scholars continue to argue about the basis for the *Factortame* decision, and the extent to which it modified the doctrine of parliamentary sovereignty. But there is no doubt that the ECA achieved what the orthodox (Diceyan) version of sovereignty said was impossible: the parliament of 1972 succeeded in binding its successor parliaments to give primacy to EU law (at least while the ECA remains on the statute book).

Moreover, the modification of the sovereignty rule has not been limited to compliance with EU law. Sir John Laws' rationalisation of the *Factortame* decision in *Thoburn v Sunderland CC* [2003] QB 151 introduced the idea that the domestic legal order

recognises a hierarchy of statutes. Whereas Dicey had famously claimed that the Acts of Union of 1706-1707 were of no greater legal authority than the Dentists Act 1878, it is now accepted that 'constitutional statutes' such as the ECA, but also the HRA, the devolution statutes, the Representation of the People Acts and so on, enjoy a special legal status which immunises them from implied repeal.⁸

However, the constitutional effects of EU membership are by no means limited to parliamentary sovereignty. Lord Denning's famous metaphor of EU law being 'like an incoming tide. It flows into the estuaries and up the rivers'⁹ applies as much in relation to constitutional law as in other areas. General principles of EU law, such as proportionality, certainty, transparency and respect for fundamental rights, have influenced the way in which UK domestic courts approach the task of controlling public power, and have altered specific legal doctrines, such as eroding the privileges of the Crown in litigation¹⁰ or imposing state liability for unlawful acts.¹¹

As well as shifting the balance of power between the courts and parliament, EU membership has also affected the separation of powers between the executive and the legislature. In general, its effect has been to empower government ministers, who have an important law-making role in the EU via the Council of Ministers and [extensive powers](#) to implement European obligations via secondary legislation, at the expense of parliament. In addition, EU membership has been a conduit for the influence of constitutional ideas from our European neighbours – for instance, the requirement to use a system of proportional representation for [European Parliament elections](#) or the use of constitutional referendums as a means of checking further European integration.¹²

The overarching legal framework provided by EU law has also fulfilled certain constitutional functions which are less easily performed within the domestic legal order. In relation to devolution, for instance, EU law has acted as a centralising influence, counteracting the potentially disintegrative forces unleashed by the creation of sub-state legislatures. More specifically, in Northern Ireland, the UK and the Irish Republic's common membership of the EU was one of the factors that facilitated the Good Friday Agreement, which ended 30 years of conflict by enabling the sharing of sovereignty across the Irish border without threatening Northern Ireland's place within the UK. EU membership has also entrenched certain commitments, for instance to environmental protection, or gender equality, or the maintenance of open markets, which cannot be guaranteed in domestic law because of the doctrine of parliamentary sovereignty.

EU membership has thus had both deep and pervasive effects on the UK constitution, and leaving the EU will therefore amount to another fundamental constitutional change. Moreover, whereas the decision to join the EU was primarily motivated by economic considerations, the impetus for Brexit has been primarily constitutional – the desire to 'take back control', by restoring sovereignty to domestic institutions and breaking free of a set of supranational institutions that, as Theresa

⁸ See also *H v Lord Advocate* [2012] UKSC 24; 2012 SC (UKSC) 308; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3

⁹ *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401 at 418

¹⁰ *R v Secretary of State for Transport ex p Factortame (No 2)* [1991] 1 AC 603; *Miller & Bryce v Keeper of the Registers of Scotland* 1997 SLT 1000

¹¹ *Francovich v Italy* [1991] ECR I-5357, [1993] 2 CMLR 66

¹² See Referendum Act 1975; [European Union Act 2011](#), Pt 1; [European Union Referendum Act 2015](#)

May put it in her [Lancaster House speech](#) in January 2017, 'sit very uneasily in relation to our political history and way of life.' The [European Union \(Withdrawal\) Bill](#) will therefore repeal the ECA and related provisions in the devolution statutes, thereby ending the UK's domestic obligations to implement and comply with EU law, and will 'repatriate' decision-making competences currently exercised at EU level to the UK and (perhaps) devolved parliaments.

However, it would be a mistake to think that we can turn the constitutional clock back to 31 December 1972. The idea of constrained and divided constitutional power, which was such a novelty when the UK joined the EU, has since become the constitutional norm. For instance, the existence of devolved legislatures significantly complicates the process of withdrawing from the EU. Difficult issues as to the implications of Brexit for the [future division of competences](#) between the UK and devolved levels – and in relation to both Scotland and Northern Ireland (both of which voted to remain in the EU) – have reopened questions about the survival of the UK state. It also seems unlikely that the constitutional role of the courts will shrink back to what it was prior to joining the EU. One lasting legacy of EU membership is likely to be a permanently emboldened UK judiciary still willing to use at least some of the legal tools bequeathed to it by EU law to constrain the exercise of public power.

EU membership will also leave a lasting imprint on the UK constitutional order in the form of a new category of 'retained EU law', to be created by the domestication of currently directly effective or directly applicable EU laws via the EU (Withdrawal) Bill. These will continue to have a superior status to other domestic laws, as well as continue to bind the devolved legislatures, and could persist for years, if not decades, until they are finally replaced by domestic legislation. The precise implications of this new legal category are [complex and unclear](#), and are likely to create problems for lawyers, judges and government actors for a long time to come.

In other respects, however, the constitutional change brought about by Brexit may be greater. New or enlarged institutions may need to be created to carry out the governmental tasks currently performed at EU level, such as emissions trading or trade negotiations, and new capacities developed for scrutinising legislation and policy in these areas. Removing the obligation to comply with EU law may also create opportunities for greater policy and institutional experimentation than might otherwise have been possible – for instance a return to a significant role for public ownership or a reversal of the trend towards the creation of independent regulatory agencies.

On the other hand, international legal constraints (particularly international trade laws and any future UK-EU trade deal) are likely to take on a greater significance as a constraint on government action, and may require a constitutional response. Of immediate concern are the extensive proposed 'Henry VIII powers' conferred on ministers by the EU Withdrawal Bill to implement the EU withdrawal agreement and secure compliance with international obligations, which will allow them to make extensive changes to domestic law, subject to only limited parliamentary scrutiny.

In short, Brexit notwithstanding, lawyers will continue to have to grapple with the impact of EU membership on the UK's constitution, as well as with the reality, in an increasingly globalised world, of the need to share governmental power within and beyond the boundaries of the state.

Further Reading

Armstrong, K (2017) [*Brexit Time: Leaving the EU: Why, How and When?*](#) (Cambridge University Press) – Especially Chapters 9, 10, 13 and 14

Birkinshaw, PJ and Varney, M 'Britain Alone Constitutionally: Brexit and *Resitutio in Integrum*', in Birkinshaw, PJ and Biondi, A (eds) (2016) [*Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU*](#) (Wolters Kluwer)

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Craig, P 'Britain in the European Union', in Jowell J, Oliver, D and O'Connell, C (eds) (2015) [*The Changing Constitution*](#) (8th Edition, Oxford University Press)

Elliot, M (2017) '[Resources / the EU \(Withdrawal\) Bill](#)', *Public Law for Everyone* Blog

Gormley-Heenan, C and Aughey, A (2017) '[Brexit and Northern Ireland: Three Effects on "the Border in the Mind"](#)', *British Journal of Politics and International Relations*, 19(3), 497-511

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E Wicks, E (2006) *The Evolution of a Constitution: Eight Key Moments in Constitutional History* (Hart Publishing) – Chapter 7