We need a Restoration of the Constitution Bill

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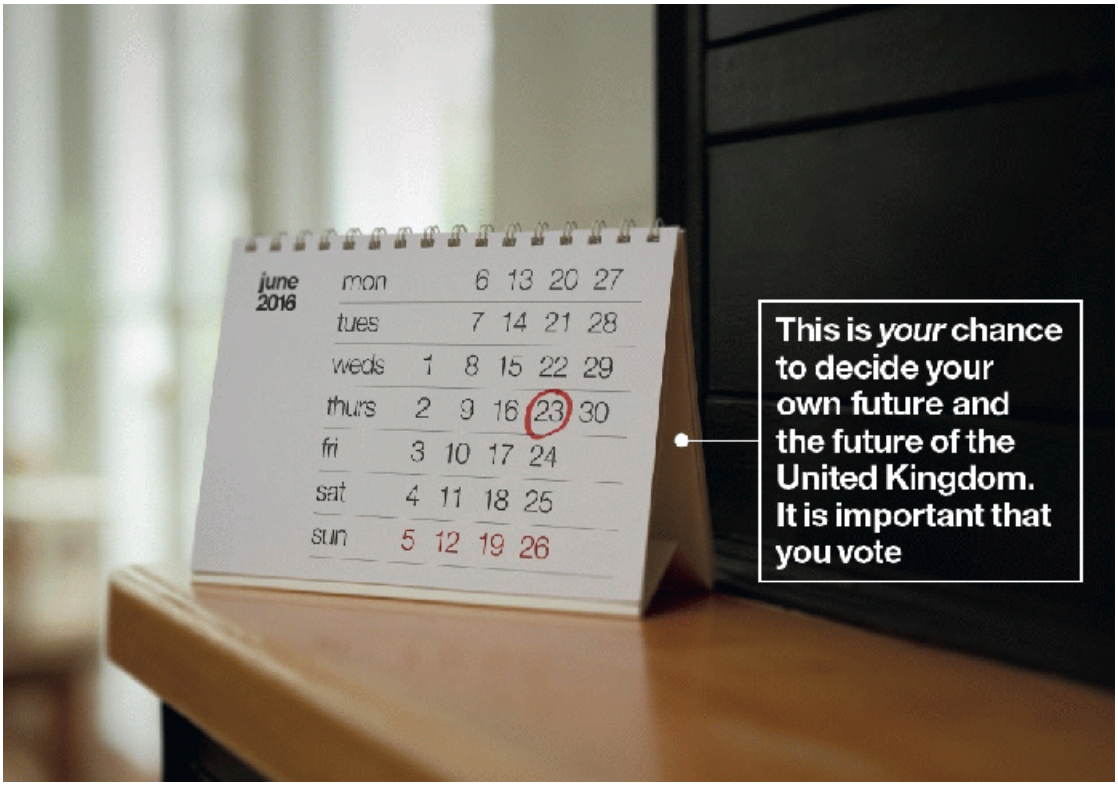
Introduction – the need for action

The United Kingdom's unwritten constitution has been subjected to severe strain during the Brexit process. In some respects, it has been found wanting and, in addition, has suffered areas of palpable damage to previously well-functioning aspects, such that there is doubt over whether it will function as effectively in the future as it did in the past.

The root cause of these problems is a conflict between direct democracy – the people's vote in the referendum to leave the EU – and traditional representative democracy, because the outcome of the referendum has simply not been accepted by majority of Members of the current (2017–2019) Parliament.

If we had a written constitution, it would make provision for referenda and define their legal consequences. However, under our unwritten constitution the outcome of the 2016 referendum is given no legal weight at all, despite the fact that 33.5 million people cast their vote in it on the express basis (as set out in the government's leaflet to every household) that:

> "The referendum on Thursday, 23rd June is your chance to decide if we should remain in or leave the European Union...
>
> This is your decision. The Government will implement what you decide.
>
> If you're aged 18 or over by 23rd June and are entitled to vote, this is your chance to decide."



Government leaflet, page 3.

Despite the public's expectation that the outcome of the referendum would be decisive and binding, under the UK's unwritten constitution all the legal power remained in Parliament under the doctrine of Parliamentary supremacy. This led to the outcome of the referendum being described as merely "advisory" in law, and to the Supreme Court in the first *Miller* case holding that it did not even authorise a government which wanted to implement the referendum result to use an existing prerogative power to withdraw from the Treaty on European Union (TEU).

It should be noted that neither the European Communities Act 1972 nor any other statute contains any provision restricting the exercise of the Crown's normal prerogative power to withdraw from treaties in the case of the EU treaties Indeed, Parliament over the years has created a large number of statutory restrictions in relation to the exercise of other prerogative powers under those treaties, and singularly failed to fetter the prerogative to give notice of withdrawal under Article 50 TEU. Despite this, the majority of the Supreme Court felt impelled to discern the existence of an implicit Parliamentary intent in the 1972 Act that such

notice should not be given without the authority of a further Act of Parliament.

That decision may have slightly delayed but did not impede the process of leaving the EU, since Parliament then enacted the European Union (Notification of Withdrawal) Act 2017. Nonetheless that decision flagged up a further constitutional problem, which is the way in which the deeply embedded hostility or horror of many of the country's senior judges to Brexit and the Brexit process appears to have affected their interpretation and application of the law.

The third major constitutional problem has arisen from the unwillingness of a pro-Remain majority in Parliament to implement the referendum result, coupled with their ability and willingness to invade the normal powers of the government of the day to regulate the business before the House of Commons and to conduct foreign policy, and also to "dig in" against an election under the Fixed Term Parliaments Act 2011.

The Standing Orders and established practices of the Houses of Parliament are an integral part of the checks and balances of our constitution. The Cooper-Letwin Act and the Benn Act have shown these checks and balances as vulnerable to being overturned by a transient majority – for example by the reduction of the normal process of scrutiny of Bills through the compression of the first, second and third readings of a Bill within a single day of proceedings.

Should we have a written constitution?

These problems – or some of them at least – might not have happened or might be less serious if the UK had had a written constitution. For example, a written constitution such as that of the United States provides for fixed term Congressional elections, but also copes with the inevitable situations when the President does not have a majority in the House or Senate or both by giving the President an independent democratic and legal mandate, and defined powers (such as over foreign affairs) which the Constitution entitles the President to exercise.

But the problem is that creating a written constitution for the UK would be a huge enterprise. Even if it were limited to setting down our existing constitutional rules in codified form, it is virtually certain that it would fail to do so accurately, or in a way which would cope with unexpected future events. The mayhem wrought by the limited constitutional reform of fixed term Parliaments demonstrates that this larger exercise would be riddled with the law of unintended consequences.

So, in our pragmatic way, we should confine ourselves to fixing what needs to be fixed. For this purpose, we should put forward a Restoration of the Constitution Bill.

Restoring Parliamentary processes

The first and most obvious restoration is that the Fixed Term Parliaments Act 2011 should repealed and not replaced. The previous non-statutory rules and constitutional conventions governing confidence of the House of Commons in a government and dissolution of Parliament were well worked out and understood and should be restored.

Secondly, the ability of the government of the day to prevent the two Houses of Parliament from imposing on it an Act contrary to its will should be restored. It should be borne in mind that the two Houses of Parliament are not Parliament. Parliament also consists of a third element, the Monarch, whose assent is needed for a Bill to become law. The Monarch of course does not act on her own behalf but represents and acts on the advice of the executive branch of the State, i.e. the government.

The power of the Monarch to veto a Bill has been exercised once and once only in the United Kingdom, during the reign of Queen Anne. In 1708, she refused royal assent to the Scottish Militia Bill which had been passed by both Houses of the then new Parliament of the United Kingdom of Great Britain. (The United Kingdom of Great Britain had been created by the Acts of Union between England and Scotland of 1707 and the new unified Parliament of Great Britain met for the first time in October 1707). Previously, royal assent had been refused to Bills in the

Parliament of England on a number of occasions by William III and previous monarchs.

Because this power of veto has lain unused for 300 years, for the present government to have advised the Queen to refuse royal assent to the Benn Bill would have risked embroiling the Queen in acute political controversy. But the effective power of the executive to veto a Bill needs to be restored. This can be done by a clause in the Restoration Bill which declares that the Queen retains the right and duty to refuse royal assent to a Bill, if so advised by Her ministers.

Although the power of the executive, represented by the Monarch, to refuse royal assent has not been used since Queen Anne's day, that power has been used since then in Commonwealth and colonial legislatures and was carried across into the United States Constitution where it is still regularly exercised – although under the US Constitution the President's veto can be over-ridden by a two-thirds majority vote in Congress.

No such proviso is needed in the United Kingdom because under our constitution, the House of Commons has the power to bring down the government by withdrawing confidence. A restored and effective veto power on Bills prevents the House of Commons having its cake and eating it by failing to withdraw confidence but at the same time forcing a government to do the opposite of its fundamental policies.

Embedding the core legislative procedures of the Houses of Parliament within a statutory framework should be considered. The House of Commons has operated its procedures for centuries based on the central role of the Speaker. Despite many periods when the House dealt with acute political controversies, successive Speakers have exercised their powerful discretion in a non-partisan way. It would be regrettable if this flexible and valuable part of our constitution has to be destroyed because of the partisan behaviour of the retiring Speaker but clearly the role and powers of the Speaker need to be reviewed.

The Courts

The other area of our constitution which requires attention are the courts, and particularly the Supreme Court. The Supreme Court judgment in the second *Millller/Cherry* case on prorogation of Parliament is a matter of grave concern, despite the fact that it did not in the end lead to any practical consequences beyond a few extra days of pointless shouting in Parliament and some minor disruption to the ability of MPs to attend the Conservative Party Conference.

The legal reasoning of this judgment has been severely criticised by Prof John Finnis FBA QC, Professor Emeritus of Law & Legal Philosophy in the University of Oxford, in "*The unconstitutionality of the Supreme Court's prorogation judgment*", published by Policy Exchange on 28 Sept 2019.
https://policyexchange.org.uk/publication/the-unconstitutionality-of-the-supreme-courts-prorogation-judgment

That paper demonstrates, convincingly to myself and I hope to any fair minded reader, that the Supreme Court has gone well beyond its proper constitutional and judicial role of interpreting and applying existing laws, and instead has engaged in creating new legal rules which did not previously exist - notably a new supposed legal rule about the prorogation of Parliament which is set out in paragraph 50 of the judgment:

> " ... a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive."

Paragraph 52 of the judgment says (wholly unconvincingly) that the rule the Court has created "*is not concerned with the mode of exercise of the prerogative power within its lawful limits. On the contrary, it is a standard which determines the limits of the power, marking the boundary between the prerogative on the one hand and the operation of the constitutional*

principles of the sovereignty of Parliament and responsible government on the other hand. An issue which can be resolved by the application of that standard is by definition one which concerns the extent of the power to prorogue, and is therefore justiciable."

The Court's contention that a rule which assesses whether or not a prorogation has the effect of frustrating Parliament's constitutional functions "without reasonable justification" is about the *limits* of the power of prorogation rather than about its *manner of exercise* is manifestly absurd. Further, assessing what is or is not a "reasonable justification" is a matter of acute political controversy and the Court has invented a test which could not have been better designed to plunge the courts into having to make politically contentious value judgements in order to apply it.

There is an obvious and entirely defensible reason why the Prime Minister should have advised a five-week period of prorogation in the lead-up to the then Brexit date of 31 October 2019. That is to strengthen his hand in delicate and vitally important negotiations with the European Union by making it plain to the EU that during that period of time the House of Commons would not be able to rescue the EU from the consequences of "no deal" if the EU failed to back down from its intransigent position over the Withdrawal Agreement and the backstop Protocol.

However, the Justices of the Supreme Court professed not to see any such reason or justification and demanded that any reasons supporting the prorogation should be set out in the government's evidence. Apart from the practical difficulty faced by the government in being expected to prepare evidence to meet a legal test which did not exist until the Supreme Court came to give its judgment, a requirement that the government must explain the reasons for a prerogative act in court if challenged – and therefore effectively to the whole world – is itself unjustified and gravely damaging.

The action being challenged was a political act affecting the nation as a whole and not, for example, a planning application affecting an individual who may therefore be entitled to reasons.

Finally, the Court's reasoning about the consequences of its finding of unlawfulness in the advice to the Queen is quite remarkable. It did not merely set aside the advice, leaving the PM to tender new and different advice to the Queen, but ruled that the Queen's acts taken on the basis of that advice were void, with the consequence that the prorogation had not taken place at all.

The extension from the advice being unlawful to the subsequent act of the Monarch being unlawful was itself a remarkable leap. But it also involved trampling over a further and deeply embedded constitutional rule, namely that set out in Article 9 of the Bill of Rights 1689 which provides that the proceedings of Parliament are not be questioned "*in any court or place out of Parliament*".

Parliament consists of three elements; the Commons, the Lords and the Queen. When Bills are assented to, all three elements of Parliament come together in the Lords (with the Queen normally being represented by Commissioners rather than appearing in person). The proceedings in which Royal Assent is given to Bill are undoubtedly part of the proceedings of Parliament and therefore unchallengeable in court, and indeed the Supreme Court in *R (Barclay) v Lord Chancellor* [2014] UKSC 54 at [47]-[48] expressly held so.

Prorogation of Parliament takes place in virtually identical circumstances (and indeed is often at the tail end of a proceeding where the Commissioners announce royal assent for any outstanding Bills). However, in a passage of the judgment where the Court's reasoning descends from being contentious into risibility, the Court said at paragraph 58:

> "58. The prorogation itself takes place in the House of Lords and in the presence of Members of both Houses. But it cannot sensibly be described as a "proceeding in Parliament" It is not a decision of either House of Parliament.

> Quite the contrary: it is something which is imposed upon them from outside. It is not something upon which the Members of Parliament can speak or vote. The Commissioners are not acting in their capacity as members of the House of Lords but in their capacity as Royal Commissioners carrying out the Queen's bidding. They have no freedom of speech. ..."

Obviously, the same could equally be said of the proceedings in which royal assent is granted to Bills.

It should be remembered that the Supreme Court is comparatively new and that its creation was the result of an ill-considered "reform" by the Blair government which was apparently the by-product of Blair's desire to get rid of Lord Irvine of Lairg as Lord Chancellor and to abolish his office at the same time.

It was predicted by many – including, interestingly, Lord Neuberger – that the abolition of the Law Lords and their replacement by the new Supreme Court would lead to greater judicial assertiveness by that Court. Names are important, and the very fact that it is named "Supreme Court" and given its own special building on Parliament Square has probably served to embolden its judges and inflate their view of its importance and functions.

The prorogation decision is not the first, but is certainly the most extreme to date, example of the Supreme Court exceeding the proper bounds of its constitutional powers and effectively acting as a politically impelled legislative body rather than a court. It is unacceptable for this Judgment to be allowed to stand, both because it curtails the proper exercise of prerogative powers and interferes with the relationship between government and Parliament, and because if uncorrected it will encourage this Court in yet further excesses in the future.

A two-pronged approach is needed. First, to correct the constitutional consequences of this judgment, and secondly to seek to curb the activist tendencies of the Supreme Court.

Correcting the consequences of the judgment:

First, the Restoration Bill should explicitly declare the judgment to be erroneous and void. In particular, it should declare that the rule on the exercise of the power to prorogue as set out in paragraph 50 of the judgment does not exist in law, and that the English High Court decision which was reversed by the Supreme Court judgment was correct in law.

In the English High Court decision which was reversed by the Supreme Court, Lord Burnett, Lord Chief Justice, and two other senior judges decided that whether to prorogue Parliament, and for how long to prorogue it until the next Parliamentary session, are so inherently political in nature that there are no judicial or legal standards by which the courts are able to assess the legitimacy of the action taken.

They pointed out that the timing of prorogations has been used in the past by governments for reasons of political or legislative advantage. The post-War Attlee government artificially created a very short Parliamentary session of only a few days in order to over-ride resistance in the House of Lords against the reduction of its veto powers. So, even if the length of the prorogation was designed to advance the government's political agenda regarding Brexit, rather than just allowing preparations for the Queen's Speech which will open the new session, that is not territory the courts can enter into.

Second, the Bill should restrict the obligation on the government to give reasons for the exercise of prerogative or other powers which are of general scope and which do not directly and individually affect particular people, and should prevent the courts from drawing adverse inferences from the government's failure or refusal to give reasons in a court challenge against such acts.

Third, it should declare that prorogation proceedings are part of the proceedings of Parliament for the purposes of Article 9 of the 1689 Bill of Rights.

Fourth, it should declare than any unlawfulness in any advice tendered to the Monarch or to any other person does not render unlawful any consequent proceedings in Parliament.

Fifth, it should declare that the prerogative power of the Crown to withdraw from any international treaty or agreement is to be regarded as unencumbered in the absence of an express statutory provision to the contrary, and that the implementation of the treaty's provisions in domestic laws does not amount to such a statutory restriction.

The functioning of the Supreme Court

Regarding the broader question of the Court itself, there have been calls for pre-appointment hearings in the Commons and/or Lords in which persons being appointed as Supreme Court Justices (and possibly to other senior judicial roles as well) would be questioned on their views and attitudes.

While one can see the argument for this, such a procedure would at best be ineffective and could make things worse. It could positively encourage the idea that judges should bring their political views into the court room, and, having had those views endorsed at a confirmation hearing, should vigorously incorporate them in their judgments.

A more fundamental approach is needed.

It should be recognised that the Blair reforms were a mistake, first in converting the comparatively low-key Law Lords into an all-singing all-dancing Supreme Court. The UK's unwritten constitution in which Parliament is supreme does not require a "Supreme" court. For functional reasons, there needs to be a court at the apex of the appeal tree from England and Wales, Scotland, and Northern Ireland, which ensures consistency of the law across the United Kingdom.

It is one of the glories of a truly free society – and has been entrenched in our own society since the Act of Settlement of 1701 – that the courts are independent of the government and will apply the law without fear or

favour, including in cases where it leads them to find for the citizen against the government But it does not follow that any and every decision by courts against the government of the day is to be welcomed, where the decision is based not on the application of settled rules of law but as the result of legal rules and approaches devised by judges because they seem good to them. That is not the rule of law, but discretionary rule by judges who do not have the self-restraint to respect the proper boundaries of their own powers.

It is too late to go back and reinstate the low-key and low-cost Law Lords, but we can replace the functions of the Supreme Court with a low key and functionally named Final Appeal Court. That could with advantage be housed in rather less palatial premises than the current supreme court building on Parliament Square. One question is whether such an apex appeal court needs to have a permanent membership. An alternative model is for appeals to be heard by rotating panels of judges drawn from the Courts of Appeal of England and of Northern Ireland and the Court of Session in Scotland.

But more importantly, the Blair reforms downgraded the role of Lord Chancellor as appointor of judges, defender of the judiciary and of judicial independence, and as link between the judiciary and the world of politics, which had worked well for many years. It ‘quangoised’ the judicial appointment process, with demonstrable increase in expense and time and trouble spent by all in the processes, but with no demonstrable concrete benefit or curing of a defect.

So, the further step in the process is to restore the central role of the Lord Chancellor as a judicial as well as a political figure and in judicial appointments.