

The Political Constitution Ten years from now – dodo or phoenix?

Paper by Prof Rory O'Connell

Abstract

The repercussions from the referendum on June 23rd 2016 have sent shockwaves through the political and constitutional system. The referendum has implications for devolution, the nature of politics in the UK, the long term future of some of the political parties, and indeed the political nature of the constitution itself. The political constitution lacks a single written text or the entrenched provisions that go with it and embraces in many ways flexibility, often thought to give it enormous resilience. The EU referendum has exposed potential fault-lines in the constitutional system.

Rory O'Connell is Professor of Human Rights and Constitutional Law at Ulster University. He joined the Transitional Justice Institute and School of Law in 2013 and was appointed Director in 2014. Rory's research and teaching interests are in the areas of Human Rights and Equality, Constitutional Law and Legal Theory. Rory is a Fellow of the Higher Education Academy, and teaches at both undergraduate and postgraduate level. Rory studied law at University College Dublin. During his degree, he spent a year as an ERASMUS student at the Université de Rouen. In 1992, he graduated with a Bachelor of Civil Law (European Legal Studies) degree (First Class) and received a UCD Open Postgraduate scholarship. He proceeded to write an LL.M. by thesis on The Irish Courts and Equality Before the Law, graduating in 1994, with First Class honours. He moved to the European University Institute, Florence to undertake a PhD on the theory of constitutional interpretation and graduated from the EUI in 1997, with Distinction. Rory's first lecturing post was in Comparative Law at Lancaster University Law School. From 2001 to 2013 he was a member of the Human Rights Centre, School of Law at Queen's University of Belfast. Rory is on the Executive of the Committee on the Administration of Justice (CAJ).



The Political Constitution Ten years from now – dodo or phoenix?

As mentioned earlier, the referendum on 23 June 2016 has stirred considerable controversy and exposed numerous and important fault-lines in the body politic – including divisions between the different kingdoms, principalities or provinces of the UK, but also within some of those (notably England), between generations, between the 48% and the 52%, between the political establishment and the electorate,¹ between much of the economic and intellectual elite and the general population. In so doing it has also put pressure on the political nature of the constitution and raised questions about constitutional design. Questions of constitutional design are important – arguably one of the reasons for the downfall of the first Northern Ireland experiment with devolution was that the tension between the reality of a deeply divided society and a constitutional system not designed to handle such pressures became unmanageable.

The political constitution

The 'political constitution' is a term used by JAG Griffith in a celebrated 1979 essay;² yet famously, despite using the phrase as the title for his article he did not offer a definition of the term.

The concept of the 'political constitution' overlaps with the more familiar term 'unwritten constitution' but it is a more useful concept in understanding the practice of the modern constitution. Both concepts rely on the notion that there is no single authoritative - typically entrenched - text which sets out the basic rules for the exercise of power and makes legitimate how power is exercised. However 'unwritten' is somewhat inaccurate since much of the constitution is written and indeed is increasingly found in written form, most notably in a plethora of statutes but also in other documents such as the Cabinet Manual; even the unwritten 'conventions' of the constitution now find written expression such as the Sewel convention referenced in s 2 of the Scotland Act 2016.

The term 'political constitution' is frequently contrasted with the concept of a 'legal constitution', which gives us a sense of what is intended by the former term. A 'legal constitution' relies on legal and judicial mechanisms to a significant extent; the typical example may be the US constitution, or the Irish or the German - all including single written texts with special amendments processes and strong judicial protection of the constitutional system. So a starting point for understanding the political constitution is understanding what it is not. Having said that, as Adam Tomkins well remarks, this is not a binary choice; rather it is a sliding scale with all constitutions including legal and political constitutionalism but in different mixtures.³ Undeniably the UK constitution has been adopting more and more the features associated with legal constitutionalism, thanks to developments in

¹ 'Various trends seem to have heightened citizen dissatisfaction with representative government': Stephen Tierney, 'Whose Political Constitution; Citizens and Referendums' (2013) 14 German LJ 2185, 2193.

² John AG Griffith, 'The political constitution' (1979) 42 (1) The Modern Law Review 1-21.

³ Adam Tomkins, 'What's Left of the Political Constitution?' (2013) 14 (12) German Law Journal 2275-2292, 2276.

'Brexit and Rights: Discussion seminar on the human rights and equality implications of the EU referendum', MAC Belfast, 27th September 2016

judicial review, the devolution statutes, the Human Rights Act and of course the European Communities Act.⁴

At its heart the political constitution includes norms and principles which need to be enforced but these are the subject of political rather than legal enforcement. Judges have a role to play but they should not have the final say in a political constitution. According to Griffith, merely calling some decisions legal rather than political does not make them so and does not make them more amenable to judicial than political resolution – it just means that political decisions get made by judges.⁵

This implies an important focus on political rather than legal accountability. With it comes a commitment to 'responsible and accountable government'⁶, to the notion of parliamentary democracy – parliament is the central forum in which all currents of the polity are represented, and which can legitimately decide final issues of policy; it functions as 'a source of legal authority as well as a forum for representation and responsibility'.⁷

In the political constitution, the implication of this is that there is no sharp difference between the political and the constitutional.⁸ There are no ultimate principles such as found in an entrenched constitution, much less any unamendable 'eternity' clauses; or rather where we do have 'eternity' clauses such as in the Acts of Union, s 1(2) of the Ireland Act 1949 (now repealed), or even s 1 of the Scotland Act 2016, they do not mean anything legally; they can always be repealed by Parliament.

Taken to its extreme, this feature of the political constitution means that anything – or nothing – can be constitutional. JAG Griffiths caught it well in his 1979 lecture:

The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also.⁹

This highlights the supposed suppleness and adaptability of the constitution; but it also highlights that there is no definitive mechanism for changing the constitution – that is to say that while an act of parliament will undoubtedly achieve this, there are many different versions of this and alternative mechanisms for changing the constitution. An act of parliament may be highlighted in a manifesto or not, may be presaged by elaborate consultations and draft bills or not; and it says nothing about the opportunities opened up through exercise of the royal prerogative, or adoption of different modalities of referenda.

⁴ Both Ewing and Tomkins though are skeptical of grander recent claims of the demise of the political constitution. Ewing describes this shift as a 'conspicuous failure': KD Ewing, 'The Resilience of the Political Constitution' (2013) 14 German LJ 2111, 2113. Tomkins affirms that 'the political element of the constitution is alive and well, indeed, it is thriving as it rarely has before': Adam Tomkins, 'What's Left of the Political Constitution?' (2013) 14 (12) German Law Journal 2275-2292, 2278.

⁵ John AG Griffith, 'The political constitution' (1979) 42 (1) The Modern Law Review 1-21, 16.

⁶ KD Ewing, 'The Resilience of the Political Constitution' (2013) 14 German LJ 2111, 2116

⁷ KD Ewing, 'The Resilience of the Political Constitution' (2013) 14 German LJ 2111, 2118.

⁸ '... political constitutionalists tend to conflate constitutional and ordinary politics ...' Marco Goldoni and Christopher McCorkindale, 'Why we (still) need a revolution' (2013) 14 German LJ 2197, 2211.

⁹ John AG Griffith, 'The political constitution' (1979) 42 (1) The Modern Law Review 1-21, 19.

1997-2016 A constitutional revolution

The referendum of 23 June 2016 may be seen as the apogee of a process that has shaped the constitution since 1997. Indeed, the plethora of changes introduced since 1997 have amounted to a veritable if somewhat slow constitutional revolution. Prior to 1997 the state was highly centralised, there was no such impediment as a bill of rights to executive or parliamentary power, referenda were rare events - there had only been one UK wide referendum, that on the then EEC in the 1970s.

Devolution, the Belfast / Good Friday Agreement, the Human Rights Act, House of Lords reform, the increased use of referenda, the arrival of a coalition government, debates over the royal prerogative, reform of the judiciary and Lord Chancellor's position; the Scottish independence referendum, the Fixed Term Parliaments Act, English votes for English law, proposals for a 'British' Bill of Rights; all these have transformed the constitution. Yet so have new conventions such as the one arguably about the use of the military abroad, and even standing orders.

A few things to note about these changes. First, the extreme heterogeneity of the mechanisms by which they have been achieved. An Act of Parliament is the typical instrument yet it is not the only one. For some changes a referendum has also been incorporated for instance. In some cases, the legislative changes have been accompanied by detailed consultation and in others minimal consultation (perhaps most strikingly over the proposed abolition of the Lord Chancellor's position).

Second, many of these changes have been left deliberately unfinished; pragmatic compromises which leave open the possibility of a 'second stage' be it a bill of rights to complement the Human Rights Act or the second stage of House of Lords reform.

Third, the changes betray very little sense of an overall plan or coherence, seen in the differences among the different devolution regimes each of which has its own bespoke complicated arrangements. The lack of coherence is also seen in what is not done. The devolution arrangements for instance were initially accompanied with plans for regional assemblies in England, but these were abandoned, leaving the 'English' or West Lothian' question unanswered until the EVEL standing orders of 2015.

Fourth, these factors lead to a regular process of constitutional change; again seen most notably in the devolution systems. While the changes to our own local constitutional arrangements might be based on the need to respond to the complexities of a divided post-conflict society, the systems in Wales and Scotland have also seen regular changes; in Scotland's case culminating in an independence referendum and then the adoption of the Scotland Act 2016.

Fifth, the process is frequently ad hoc indeed opportunistic and even political in nature.¹⁰ The proposed abolition of the Lord Chancellor's position and reform of the the judiciary in the Constitutional Reform Bill (now Act 2015) were announced with minimal if any consultation. It is a matter of some irony that some of the most dramatic constitutional

¹⁰ Marco Goldoni and Christopher McCorkindale, 'Why we (still) need a revolution' (2013) 14 German LJ 2197, 2218, referring to the devolution settlements.

'Brexit and Rights: Discussion seminar on the human rights and equality implications of the EU referendum', MAC Belfast, 27th September 2016

changes have been introduced by a Conservative dominated government, albeit of course not always reflecting the desire of the Conservative party itself. These include the Fixed Term Parliaments Act, the referendum on the voting system, the Scottish independence referendum, the adoption of the EVEL standing orders and the EU referendum itself. The Fixed Term Parliaments Act 2011 involved a major change to the Prime Minister's prerogative power to dissolve Parliament, one of the core elements of the Westminster system of parliamentary government; the Act disposed of it in order to provide a degree of certainty to the duration of the Conservative Liberal Democrat coalition. Even more striking was the adoption of the English Votes for English Laws standing orders in 2015; notwithstanding their importance to the constitutional settlement, these were adopted by a vote of the Commons and not an Act of Parliament; even more strikingly they were carried based on support from the Conservative party without any serious effort at cross-party support. This renders this a singularly unstable - and by the way somewhat complex - element of the modern constitution.

The referendum of 23 June 2016

Many of these features of the political constitution are seen and seen arguably at their worst in the referendum of 23 June 2016. In considering this it is worth bearing in mind the importance of the referendum. The Prime Minister of the day described it as the most important decision facing the UK in a generation. According to a parliamentary committee, Brexit will 'result in the most significant changes in the UK's constitution in a generation'.¹¹ The scale of what was at stake appears in the view of a Parliamentary committee, describing the implementation of Brexit as 'arguably the most complex, demanding and important administrative and diplomatic task that the Government has undertaken since the Second World War'.¹²

The referendum itself was announced by the Prime Minister in order to address dissension in the ranks of his own party and political threats from an insurgent political party.

Unlike some of the other referenda mentioned, this was announced as an advisory referendum. It is possible to adopt referenda with clear legal implications¹³ (albeit Parliament has the possibility to change its mind thanks to the doctrine of parliamentary sovereignty). Yet paradoxically despite being advisory, it seems politically unthinkable – likely political suicide for any party so inclined – not to implement Brexit, whatever Brexit may mean. If the political constitution rests on the primacy of parliament and the notion of parliamentary sovereignty, the Conservative premiership of David Cameron has dealt it a stunning blow.

¹¹ Constitution Committee, *4th report: The Invoking of Article 50* (House of Lords, London 2016-2017) HL 44 para 1. Another Committee explains that at stake are the country's prosperity, international standing and influence, internal security, the rights of two million EU residents and one million UK nationals in the EU: Select Committee on the European Union, *1st Report - Scrutinising Brexit: the role of Parliament* (House of Lords, London 2016-2017) HL 33, para 3

¹² Select Committee on the European Union, *1st Report - Scrutinising Brexit: the role of Parliament* (House of Lords, London 2016-2017) HL 33, para 30.

¹³ Constitution Committee, *4th report: The Invoking of Article 50* (House of Lords, London 2016-2017) HL 44, para 17.

Similarly, it would have been possible to include different types of conditions in the EU Referendum Act. For instance, it was possible to include a requirement for more than a simple majority, or for threshold levels of participation or for threshold levels of support across the UK.¹⁴ The referenda about devolution in Scotland and Wales in 1979 included such thresholds requiring support of 40% of the electorate and not just a simple majority or those voting. Given the clear (and entirely unsurprising) splintering of the vote between the countries and territories of the UK, the failure to address any threshold for these different entities is also problematic.

And of course the implementation of the Brexit decision is still unclear, the subject of several court cases and also a report of Parliament.¹⁵ The simple language of Article 50 - 'Any Member State may decide to withdraw from the Union in accordance with *its own constitutional requirements.*' (italics added) seems darkly humorous. No one knows really what those constitutional requirements are. The Government contends this is a matter for the royal prerogative, but this is being challenged in the courts.¹⁶ A parliamentary committee has made the reasonable point that parliament must be involved before Article 50 is triggered, but even it indicates there are variations in how this might be done – either through an act of parliament or through a resolution of one or both houses. Whether the devolved assemblies have a role to play is also unclear.¹⁷

The future?

The EU referendum therefore highlights some of the tensions in the political constitution, in particular the ad hoc process by which momentous constitutional change can be decided. Where will we be in ten years' time? It is still unclear whether Brexit will be achieved, how it will be delivered and what Brexit will entail. Yet the constitutional implications are also unclear. We are moving into a possible constitutional 'moment' when the unthinkable becomes thinkable. The process of EU negotiation prior to the referendum did not give adequate attention to the devolved entities and especially the issue of the land border.¹⁸

In ten years, we may be noting the passing of the political constitution, certainly the unwritten constitution. Already the UK is one of only three states which lacks a single written authoritative text as a constitution. The pressures which have been put on it by the EU referendum may be too severe. How should in particular the Scottish government and people feel about continuing in a Union in which the most vital of national issues can be decided in such a way as to override their votes. The political constitution rests on certain implicit assumptions of both trust and competence; assumptions fundamentally shaken by

¹⁴ Oonagh Gay, *Thresholds in Referendums* (Parliament, 2011).

¹⁵ Constitution Committee, *4th report: The Invoking of Article 50* (House of Lords, London 2016-2017) HL 44.

¹⁶ People's Challenge Interested Parties 'Skeleton arguments in Brexit case' [2016]

<http://1exagu1grkmq3k572418odoooy-m-wpengine.netdna-ssl.com/wp-content/uploads/2016/09/Article-50-skeleton-final-redacted-names.pdf>

¹⁷ Constitution Committee, *4th report: The Invoking of Article 50* (House of Lords, London 2016-2017) HL 44, para 35.

¹⁸ Select Committee on the European Union, *9th Report - The EU referendum and EU reform* (House of Lords, London 2015-2016) HL 122, paras 72-74.

'Brexit and Rights: Discussion seminar on the human rights and equality implications of the EU referendum', MAC Belfast, 27th September 2016

the referendum. The promises made to the Scottish people of remaining in the (European) Union and being stronger together have been shown to be devoid of value.

Yet it is also possible that the political constitution will survive even rise phoenix like from the constitutional conflagration threatened by Brexit. The UK is a highly complex state, neither federal nor unitary, with four key components yet one of which dominates in several ways. Perhaps the political constitution and only the political constitution can offer the suppleness and adaptability of managing the complex divisions exposed by the referendum and navigating the challenges ahead. Initiatives like the Bingham Centre's Charter of the Union may provide some mechanisms to hold the union together amidst the centrifugal forces of the future.

