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Foreword

Constitutional developments in the United Kingdom. The adaptability of the Westminster system

Philip Norton, Lord Norton of Louth
Professor of Government, University of Hull

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di Philip Norton, Lord Norton of Louth*

Sommario: Development of the Westminster system; A system under challenge; Reforms under the Blair government; Continuing constitutional uncertainty; An existentialist threat to the Westminster system; Post-Brexit; Conclusion

Development of the Westminster system

The British constitution is distinctive both for its form and its content. The United Kingdom is one of only three nations to have an uncodified constitution. During the period of republican rule (1649-60) that followed the English Civil War and the execution in 1649 of the king (Charles I), the country briefly had two codified, or 'written', constitutions (the Instrument of Government of 1653, followed by the Humble Petition and Advice 1657), but the experience of republican government proved unsuccessful and in 1660 the Restoration effectively put the constitution back to what it had been before 1649. The nation thus lacks a single authoritative document adumbrating the key provisions determining the form and relationship of the organs of the state and the relationship of those organs to the citizen.

Lacking a codified document, the provisions of the constitution derive from statute law, common law, conventions and works of authority[1]. Statute law is the pre-eminent source by virtue of the one core component of the constitution – the doctrine of parliamentary sovereignty. In the words of the great Victorian constitutional lawyer, A. V. Dicey, this stipulates that the outputs of the Crown-in-Parliament are binding and can be set aside by no body other than the Crown-in-Parliament[2]. It also flows from this that no Parliament can bind its successor. The doctrine, according to the jurist Lord Bingham, is immanent in the constitution. It has always existed and was not created by any body and as such there is no body that can change it[3].

There is no body that can strike down acts of the Crown-in-Parliament. Acts of Parliament are superior to common law. Common law, including prerogative powers, continues to have legal authority until such time as displaced by statute law. Common law remains an important source of law, providing an important role for the courts, and there remain important prerogative powers, not least the power to declare war. They exist at the discretion of the Crown-in-Parliament. Given that executive powers are exercised now by

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* Professor of Government, University of Hull

[1] P. Norton, *The Constitution in Flux*, Oxford, Martin Robertson, 1982, pp. 5-9.

[2] A. V. Dicey, *An Introduction to the Law of the Constitution*, London, Macmillan, 1959, pp. 39-40.

[3] T. Bingham, *The Rule of Law*, London, Allen Lane, 2010, p. 168.

ority in the House of Commons, prerogative powers are likely to remain a significant element of the constitution.

In terms of the relationship between the Crown and Parliament, this has been determined by three critical events in history and these have given rise to the emergence of a distinctive form of government – the Westminster system. The three critical events are the emergence of a Parliament in the 13th Century, the Bill of Rights 1689, and the development of mass-membership political parties in the 19th Century.

There was no one date on which a Parliament came into existence. The origins of Parliament are to be found in the 1360s, when the monarch, in whom all power resided, summoned to court knights drawn from the shires. The king already had a court to advise him, comprising the leading churchmen and earls and barons, in effect, the leading landowners in the country. He summoned knights to help him in raising taxes to wage war. The purpose of this enlarged court, what came to be styled a parliament, was to respond to the demands of the Crown, initially for money (supply) and later for law. This has remained the relationship. The monarch – now the monarch's ministers – place demands before Parliament to which the body responds. In the century after which a parliament came into being, the churchmen and the earls and barons began to sit separately from the knights and leading figures in the cities and towns (burgesses) who had also begun to be summoned, and this was the origins of two chambers – the House of Lords and the House of Commons.

The second fundamental development derived from the Glorious Revolution of 1688-89, when the king, James II, fled the country. To ensure constitutional continuity, he was deemed to have abdicated, and leading parliamentarians offered the throne to the Dutch Prince William of Orange and his English wife Mary (daughter of James II) on condition that they accepted the Declaration of Rights, which was then transposed into statute in 1689 as the Bill of Rights. The Bill of Rights prohibits the monarch from legislating (which had been possible through ordinances) without the assent of Parliament. The king could no longer ignore the body. On occasion, the king had not summoned a Parliament for some years, but now this was not possible. The two became inseparably linked. The king could no longer go round Parliament, but Parliament still looked to the king to be the fount of policy. The Bill of Rights remains the core document of the constitution.

The third critical development derives from the effects of industrialization in the 19th Century. The country saw the rise of artisans and a middle class. They lacked a political voice – the franchise was highly restricted, some parliamentary constituencies having only a handful of voters – and began to agitate for such a voice. Pressure for an extended franchise, as well as for more equal constituency sizes, led to various Reform Acts being enacted, the earliest being that of 1832, but the most significant being that of 1867. The 1867 Reform Act created an electorate of such a size that electors could now only be effectively reached through some form of organization, with the result that cadre political parties were transformed into mass-membership parties, recruiting supporters to campaign and

to raise funds. Political parties soon dominated electoral politics and then parliamentary politics, party cohesion being necessary for a winning party to govern.

The new politics gave rise to a distinctive political conflict, two main political parties fighting for the all-or-nothing spoils of electoral victory. The first-past-the-post electoral system facilitated one party gaining an absolute majority of seats and a party with a majority could deploy that majority to govern. The fact of popular election transformed the relationship between the two Houses and between Parliament and the Crown. The assent of all three – the Commons, the Lords, and the monarch – was necessary to enact a law, but the fact of election meant that both the monarch and the House of Lords came to defer to the wishes of the House of Commons. The deference was not necessarily conceded with a good grace, but by the early 20th Century, the dominance of the elected chamber was assured.

These conditions gave rise to a specific form of government. The Westminster system became a well-recognised and distinct form of parliamentary government, indeed so well recognized that its distinctive features are often taken as given and not defined[4]. There are several key defining features[5]. First, it is executive-driven. The Crown continues to make demands for legislation and supply. These are channeled through the Crown's ministers, formally appointed by the Crown, but determined by the outcome of a general election. By convention, the monarch invites the leader of the party winning a majority in the House of Commons to form a government. The political reality of the outcome of an election combines with the constitutional doctrine of parliamentary sovereignty to produce a powerful executive. The system proceeds on the core dictum that the king's government must be carried on.

The second core feature is that of rules-based adversarial conflict. According to Anthony King in his seminal article on modes of executive-legislative relations, the dominant mode in the United Kingdom is the Opposition mode[6]. The two parties, he argued, are characterized by seeking domination, not accommodation. This separates them from the more consensual systems generally to be found in other European democracies. In Westminster, the two principal parties face one another as opponents, most visibly represented in Prime Minister's Question Time in the House of Commons, where the Prime Minister and Leader of the Opposition engage in gladiatorial verbal combat. The conflict, though, takes place within a set of accepted rules. Both parties are constitutional parties and both adhere to parliamentary rules. The Government is His Majesty's Government and the Opposition is His Majesty's Opposition, led by a Leader of the Opposition who occupies a post that is publicly salaried. Rules constrict both and both comply with them in order to make the system work. The rules are enforced in the House of Commons by a neutral

[4] See M. Russell, R. Serban, *The Muddle of the "Westminster Model": A concept Stretched Beyond Repair*, in *Government and Opposition,* vol. 54, n. 4, 2021, pp. 744-764.

[5] These characteristics are taken from P. Norton, *Is the Westminster System of Government Alive and Well?*, in *Journal of International and Comparative Law*, vol. 9, n. 2, 2022, pp. 1-24.

[6] A. King, *Modes of Executive-Legislative Relations: Great Britain, France and West Germany*, in *Legislative Studies Quarterly*, vol. 1, n. 1, 1976, pp. 11-34.

presiding officer (the Speaker), assisted by professional clerks who are the servants of the House and not the government. There is what I have elsewhere termed an equilibrium of legitimacy[7]. Each party enjoys a recognized, and protected, role within the system.

Both parties compete in the arena of the House of Commons. It is through elections to the House that the government is chosen and it is through the House of Commons that the party in government is able to exercise its power. The number of chambers (one or two) is not a defining characteristic of a Westminster parliament, but rather the existence of a dominant chamber. That chamber comprises a very public arena in which the parties compete. Nelson Polsby identified a spectrum of legislatures, ranging from the transformative, possessing the independent capacity to mould and transform proposals into law, to the arena, offering a setting for the interplay of significant political forces[8]. On his analysis, the Westminster Parliament is very much in the latter category. The government may know that it will win the vote, but not that it will win the argument. The Opposition enjoys the oxygen of publicity. The government knows that it will be challenged on a consistent and structured basis by the Opposition. It has to promote and defend its position in the full glare of media attention. It knows that a bad performance by ministers will get noticed. The House of Commons thus provides a public stage for what is effectively a continuous election campaign.

Since its development in the 19th Century, the Westminster system has been credited with underpinning political stability, being able to ensure an essential balance between effectiveness and consent. «An organization that cannot effectively influence around it», wrote Richard Rose, «is not a government. A government that acts without the consent of the governed is not government as we like to think of it in the Western world today»[9]. The Westminster system is deemed to exhibit the attributes of accountability, effectiveness, coherence, transparency, responsiveness and flexibility[10]. The electoral system generally produces a party with an absolute majority of seats and the constitutional convention of collective ministerial responsibility ensures that there is one entity that stands before the House of Commons between elections and before electors at the next general election to be held to account for the conduct of government. There is one body responsible for public policy and the electorate may choose to sweep it from office at the next election.

Election day, in the words of Karl Popper, is «judgment day»[11]. It is a coherent system and one that electors understand. They know what they are voting for and can see what happens to their vote. It is an effective system because the party-in-government is able to deliver its designated programme of public policy, but at the same time knows that it will

[7] P. Norton, *Playing By the Rules: The Constraining Hand of Parliamentary Procedure*, in *The Journal of Legislative Studies*, vol. 7, n. 3, 2001, pp. 13-33.
[8] N. Polsby, *Legislatures*, in F. I. Greenstein, N. W. Polsby (eds.), *Handbook of Political Science*, Boston, Addison-Wesley, 1975, pp. 277-296.
[9] R. Rose, *Ungovernability: Is There Fire Behind the Smoke?*, in *Political Studies*, vol. 27, n. 3, 1979, p. 353.
[10] P. Norton, *Speaking for the people: a conservative narrative of democracy*, in *Policy Studies*, vol. 33, n. 2, 2012, pp. 128-129.
[11] Sir K. Popper, *The Open Society and its Enemies Revisited*, *The Economist*, 23 April 1988.

ion. It thus cannot afford to be too far removed from public sentiment between elections. The system, by virtue of operating within an uncodified constitution, is also able to adapt to a changing political environment. There is no constitutional straitjacket. Michael Foley identified what he termed «constitutional abeyances», that is, a tacit condoning of constitutional ambiguity as a means of resolving conflict[12]. Although such abeyances also exist in systems with codified constitutions, they are especially salient in the context of the Westminster system of government. It is the combination of these attributes that renders the system of government distinctive and one that has generally been held up for praise, rather than condemnation.

The constitution was not a significant subject of debate for most of the 20th Century. Indeed, if anything it was deemed exportable, begetting a number of political systems deemed to fall within the rubric of 'Westminster' systems. They have formed a distinct family and remain extant, coming together in organizational form in the Commonwealth Parliamentary Association (CPA). A number of them have chambers that emulate the House of Commons in design and colour and with presiding officers (Speakers) who still don robes and sometimes wigs. When Commonwealth parliamentarians get together, they essentially talk the same parliamentary language.

For much of the century, the UK was viewed as having a stable, indeed settled constitution. Parliament was deemed to have emerged from the Second World War with its reputation enhanced. Despite the chamber of the House of Commons having been destroyed by enemy bombing in 1941, it continued to meet to discuss the prosecution of the war and constituents' problems. It was seen as a vindication of the system of government[13].

Politics was deemed to take place within the framework of the constitution. The constitution was not itself a subject of political debate. In a parliamentary debate in 1981, a government minister recalled that in 1964 he had written a book about politics. «When I read it not so long ago», he recalled, «it struck me that it contained virtually no discussion on constitutional problems...It was written at a time when, by and large, we did not regard our constitution as something about which we should be having second thoughts»[14]. He went on to say that «we have seen a deep devotion to parliamentary democracy but a willingness on the part of some of us to say that all is not perfect. There is nothing more important than that we stick up for the system that we have inherited down the age, and that still has so much to offer all the people of the country»[15].

For much of the period up to the 1970s, the constitution was a subject for law texts rather than politics texts. That was to change and on a notable scale. The constitution went from being settled to notably unsettled[16].

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[12] M. Foley, *The Silence of Constitutions*, London, Routledge, 1989.
[13] P. Norton, *Winning the War but Losing the Peace: The British House of Commons during the Second World War*, in *The Journal of Legislative Studies*, vol. 4, n. 3, 1998, pp. 33-51.
[14] Cited in P. Norton, *The Constitution in*, cit., p. v.
[15] *Ibid.*, p. 287.
[16] A. King, *The British Constitution*, Oxford, Oxford University Press, 2007.

A system under challenge

In the last quarter of the 20th Century, voices demanding constitutional change began to be heard. They were the product of economic and political turmoil and a sense that the system of government was not delivering the benefits attributed to it. Far from it being a balanced system, it was seen to lean too heavily in favour of a dominant executive.

The UK economy was not performing well, not least relative to its competitors – motivating in part the UK application to join the then European Economic Community (EEC), becoming eventually a member on 1 January 1973 – and the early 1970s witnessed stagflation (inflation and rising unemployment) and industrial unrest. There were 'the troubles' in Northern Ireland, resulting in British troops having to be deployed to try to maintain order. Nationalist movements also became more prominent in Scotland and Wales. There was political uncertainty, reflected in two general elections being held in one year (1974), neither producing a government with a substantial working majority. On the one hand, there was a growing literature questioning whether Britain was governable and, on the other, a perception that government was too powerful, a government returned on a minority of votes and enjoying a bare majority in the House of Commons being able to pass substantial legislation. In 1976, leading Conservative politician, Lord Hailsham, delivering the Dimbleby Lecture, coined the phrase «elective dictatorship», arguing that power had become too centralized, and the phrase stuck[17].

The reaction to such tensions was to question whether the constitution was delivering what was expected of it in terms of stability and ensuring that government was effectively called to account through Parliament. The period saw calls for specific constitutional reforms. Some politicians and commentators began to make the case for a new system of electing MPs, designed to ensure that no party was able to wield power unilaterally on the votes of a minority of electors. The alternation of political parties in office was also argued to generate discontinuity in public policy[18]. Others argued for government to be constrained through the enactment of a Bill of Rights, ensuring that certain pre-political rights were protected and, if possible, put beyond amendment by a simple majority in the two Houses of Parliament[19].

Such calls for change were essentially inchoate, but towards the end of the century there began to emerge different and coherent approaches to constitutional change, each positing a constitutional framework deemed most appropriate for the United Kingdom. By the end of the century, it was possible to identify seven different approaches, ranging from the high Tory to the Marxist[20]. However, debate came to be dominated by two: the liberal

[17] Lord Hailsham, *The Elective Dictatorship*, London, BBC, 1976.
[18] See especially S. E. Finer (ed), *Adversary Politics and Electoral Reform*, London, Anthony Wigram, 1975.
[19] See, e.g. A. Lester, *Democracy and Individual Rights*, London, The Fabian Society, 1968; Q. Hogg, *New Charter*, London, Conservative Political Centre, 1969; M. Zander, *A Bill of Rights?*, London, Barry Rose, 1975.
[20] Summarised in P. Norton, *The changing constitution*, in B. Jones, P. Norton, I. Hertner (eds.), *Politics UK*, 10th edn., London, Routledge, 2022, pp. 356-357.

and the traditionalist. The latter embraced the Westminster system of government, extolling the attributes adumbrated above, while the liberal emphasized the centrality of what Giovanni Sartori in *Democratic Theory* summarized as «the theory and practice of individual liberty, juridical defence and the constitutional state». Individual liberties were seen as being under threat, not least from an all-powerful or potentially all-powerful government, subject to inadequate formal constitutional barriers, and with the route to protecting individual liberty being through fragmenting political power. As such, it became a radical movement for constitutional change, articulating the case for a new electoral system – one based on proportional representation – as well as an elected second chamber, a Bill of Rights, and a devolution of powers to different parts of the United Kingdom; indeed, in its pure form, it favoured federalism.

This debate, though, was somewhat divorced from the realities of political life. While scholars and some politicians thought about and discussed the constitution as a constitution, most political leaders were operating independently of such discourse. They were fighting for domination within the existing Westminster system. Few party leaders thought seriously about constitutional issues as such. Two who did were Labour leader John Smith, who died suddenly in 1994, and Conservative Prime Minister John Major, who resigned following his party's electoral defeat in the 1997 general election. Smith devised an agenda of constitutional reforms, largely though not wholly allied to the liberal approach[21], while Major was a defender of the Westminster system[22]. Smith's successor as Labour leader, Tony Blair, was swept into office in 1997 with a large majority. Blair inherited much of Smith's agenda and there were some major constitutional reforms enacted during his premiership. However, there was no intellectually coherent approach to constitutional change.

Reforms under the Blair government

The changes enacted under Blair's premiership were substantial[23]. The Human Rights Act 1998 incorporated the main provisions of the European Convention on Human Rights into UK law. Various powers were devolved to elected bodies in Scotland, Wales and Northern Ireland. There was a substantial reform of the House of Lords, most hereditary peers being removed under the terms of the House of Lords Act 1999. There was later the introduction of a UK Supreme Court, replacing the appellate committee of the House of Lords as the nation's highest court.

There was also the use of referendums in Scotland, Wales and Northern Ireland. Previously unknown to the UK constitution, referendums had been variously discussed

[21] M. Stuart, *John Smith: A Life*, London, Politico's, 2005, pp. 293-295.
[22] P. Norton, *The Constitution*, in K. Hickson, B. Williams (eds.), *John Major: An Unsuccessful Prime Minister?*, London, Biteback, 2017, pp. 73-89.
[23] P. Norton, *The Constitution*, in A. Seldon (ed.), *Blair's Britain 1997-2007*, Cambridge, Cambridge University Press, 2007, pp. 107-114.

since the late 19th Century, but there was not the political will to embrace them[24]. Labour leader Clement Attlee had in 1945 deemed them to be instruments of Nazism and Fascism[25] and their use was not prominent in debate prior to the 1970s. As Vernon Bogdanor noted, «During the immediate post-war years… the referendum disappeared as an issue in British politics»[26]. However, their use developed in the 1970s in an attempt to resolve political conflicts. There was a referendum in Northern Ireland in 1973 on the issue of the province remaining within the UK and then, in 1975, the first UK-wide referendum on the UK's continued membership of the EEC[27]. It was legislated for by a Labour Government in order to resolve conflict within the Labour Party on the issue of European integration. The Blair Government not only legislated for referendums in the different parts of the UK on the issue of devolution, but also promised referendums on other issues (electoral reform, joining a European single currency) should the Government seek to introduce them. The effect was, in essence, to ensure that referendums became a part of the constitutional framework of the United Kingdom. They could be utilized as and when Parliament legislated for one.

There was also one other unplanned constitutional change, deriving essentially from Blair's lack of understanding of constitutional principles. Prior to his premiership, the decision to commit British troops to action abroad was taken by government under the prerogative power of the Crown. Once troops were in action, the Government reported its actions to the House of Commons and ministers answered for the decision. In 2003, Blair was persuaded by two senior ministers that he should seek the approval of the House of Commons before committing British forces to support the USA in invading Iraq. He did so and in effect set a precedent. It is now seen as a convention that, insofar as the matter can be debated publicly, the approval of the House of Commons should be sought before British forces are sent into action abroad[28]. However, it is a matter for the Prime Minister to determine whether such action can be brought publicly before the House.

However, the period of the Blair government was notable also for what wasn't done and the limitations of the reforms that were implemented. There was no reform of the electoral system. Although the government established an independent commission on the electoral system to recommend an alternative to the existing system, nothing happened following the publication of the commission's report. The commitment to a referendum on the electoral system was not fulfilled. The devolution of powers to elected bodies in Scotland, Wales and Northern Ireland, still left ultimate power in Westminster, with UK

[24] P. Norton, *Referendums and Parliaments*, in J. Smith (ed.), *The Palgrave Handbook of European Referendums*, Cham, Palgrave Macmillan, 2021, pp. 98-101.
[25] V. Bogdanor, *Power and the People*, London, Victor Gollancz, 1997, p. 120.
[26] V. Bogdanor, *Western Europe*, in D. Butler, A. Ranney (eds.), *Referendums Around the World*, Washington DC, American Enterprise Institute, 1994, p. 36.
[27] D. Butler, U. Kitzinger, *The 1975 Referendum*, London, Macmillan, 1976; A. King, *Britain Says Yes*, Washington DC, American Enterprise Institute, 1977.
[28] J. Strong *Why Parliament Now Decides on War: Tracing the Growth of the Parliamentary Prerogative through Syria, Libya and Iraq*, in *The British Journal of Politics and International Relations*, vol. 17, n. 4, 2014, pp. 19-34; P. Norton, *Governing Britain: Parliament, Ministers and our Ambiguous Constitution*, Manchester, Manchester University Press, 2000, pp. 39-40.

government accused of adopting a 'grace and favour' approach to the devolved bodies. There was also no uniformity in the devolution of powers. Legislative powers were devolved to Scotland, but not to Wales.

Some of the reforms implemented were in line with the liberal approach, but they fell far short of constituting a coherent path to a constitution seen as most appropriate for the UK. Each reform was justified on its individual merits and not as part of achieving an overarching constitutional settlement, as advocated by various reform movements.

Attempts to justify the reforms as deriving from an intellectually coherent approach to constitutional change proved unconvincing. In a debate in the House of Lords on the constitution in December 2002, initiated by this writer, the Lord Chancellor, Lord Irvine of Lairg, sought to justify the government's approach, contending that the government proceeded «by way of pragmatism based on principle» and he identified three principles.

The first is that we should remain a parliamentary democracy, with the Westminster Parliament supreme and within that the other place [the House of Commons] the dominant partner. Secondly… we should increase public engagement in democracy, developing a maturer democracy with different centres of power where individuals enjoy greater rights and where government is carried out closer to the people...Our third principle is that the correct road to reform was to devise a solution for each problem on its own terms[29].

The problem with this formulation was that the first two principles were not necessarily compatible with one another and the third was a get-out clause[30]. I have paraphrased it «at once, to retain power at the centre, not to retain power at the centre, and to decide as one goes along»[31].

The period of Labour Government after 1997 was thus notable for extent of constitutional changes implemented, but also for the lack of any clear vision as to what form of constitution was appropriate for the United Kingdom. The changes implemented were substantial, but discrete. There was no sense of direction. What was clear was that the changes did not undermine, certainly not destroy, the core tenet of the constitution. Constitutional power remained embodied in the Crown-in-Parliament.

The key to understanding the limited nature of the changes is the combination of Prime Minister Tony Blair's approach to constitutional issues and the fact that the Labour Party, just as much as the Conservative Party, is a constitutionally conservative party.

Tony Blair had entered politics with no clear grounding in the process of government or the principles of the constitution[32]. He had no experience of government before becoming Prime Minister and he relied on self-belief and his religious faith to get the outcomes he wanted[33]. He exhibited little understanding of the courts, Parliament, or the premier's

[29] House of Lords Debates *(Hansard)*, 18 December 2002, col. 691.
[30] P. Norton, *The Constitution*, in A. Seldon, *Blair's Britain*, cit., p. 120.
[31] P. Norton, *Tony Blair and the Constitution*, in *British Politics*, vol. 2, n. 2, 2007, p. 272.
[32] P. Norton, *Tony Blair and the Office of Prime Minister*, in M. Beech, S. Lee (eds.), *Ten Years of New Labour*, Basingstoke, Palgrave Macmillan, 2008, pp. 89-102.
[33] P. Stephens *Tony Blair: The Price of Leadership*, London, Politico's, 2004, p. 26.

relationship with the monarch[34]. He was accused of exhibiting a presidential style of government, in effect, acting as if directly elected by the people, even though he wasn't. Indeed, J. H. Grainger likened him to Weber's ideal type of independent political leader, a monocrat. «Policy stems from or is endorsed by the free decision of the inner-determined, value driven, subjective leader»[35]. He entered government having little understanding of the constitution and essentially left office not fully understanding it. The constitution was thus essentially malleable under his premiership and underwent change at times because of an impulsive decision. This encompassed especially the creation of a Supreme Court and the intended abolition of the position of Lord Chancellor. It also extended to reform of the House of Lords, expressing a view opposed to electing the second chamber, thus undermining attempts to get the House of Commons to vote in 2003 for a largely elected House of Lords.

The other explanation is more enduring. The Labour Party has long recognised that the route to achieving a radical social and economic policy is through control of a majority in the House of Commons. It has therefore been wary of anything that would restrict its capacity to achieve change through this route. It has been sceptical of electoral change that may deny it the opportunity to form a single-party government. It has paid lip service at times to an elected second chamber, but not pursued measures that would establish such a body. An elected second chamber would threaten the primacy of the House of Commons, through which government exercises its control. The Human Rights Act did not confer on courts the power to strike down Acts of Parliament. Senior courts were empowered to issue declarations of incompatibility, identifying when measures or actions were in breach of Articles of the ECHR. It was up to government to bring forward measures to bring the law into line with the court's judgment. Parliament retained the power not to enact such law. The formation of the Supreme Court entailed a transfer of personnel from the House of Lords to the new court, not the creation of new powers. The government committed itself to devolution, but primarily for political reasons, in essence to counter the rise of the Scottish National Party in Scotland. In short, there were substantial constitutional changes, but no dissolution of the doctrine of parliamentary sovereignty and the fundamentals of the Westminster system. The executive-centric nature of the system favours Labour when it is in power. When it is in opposition, it works to persuade the electorate to put it back in power.

Continuing constitutional uncertainty

Blair's successor as Prime Minister, Gordon Brown, although he thought seriously about constitutional issues, had little time to address them and was distracted by political and economic crises. The general election of 2010 was expected to result in the return of a Conservative Government, adhering to the traditional approach to constitutional change, and a period when the constitution was not subject to major change. Although the

[34] P. Norton, *Tony Blair and the Office*, cit., pp. 96-98.
[35] J. H. Grainger, *Tony Blair and the Ideal Type*, London, Imprint Academic, 2005, p. 38.

Conservatives had opposed Labour's constitutional reform programme, it was anticipated that a Conservative Government would adopt a conservative stance by maintaining the constitutional framework as it stood at the time it assumed office. In the event, this was not what happened. The 2010 election failed to result in a clear Conservative victory. The Conservatives gained a plurality, but not an absolute majority, of seats and in order to mobilise a majority formed a coalition with the Liberal Democrat Party. This was first time that the UK had acquired a coalition government as a result of the arithmetic of the outcome of a general election[36].

The Conservatives and Liberal Democrats negotiated a Coalition Agreement[37]. The two parties could find common cause on some economic and social issues. However, where there was not a meeting of minds was on constitutional issues. The Conservatives embraced the traditional approach and the Liberal Democrats the liberal approach, in essence approaches at different ends of the constitutional spectrum. It was a case of making concessions or compromises and on constitutional issues, they tended to favour the Liberal Democrats. As Ruth Fox observed, «Overall, the Conservatives got the better of the deal in the economic arena, and the Liberal Democrats the political and constitutional reform agenda»[38]. Two major policies favoured by the Liberal Democrats – electoral reform and an elected second chamber – were agreed, as was a proposal for fixed (or semi-fixed-term) Parliaments. The Government introduced and achieved passage of a Bill to provide for a referendum on introducing the Alternative Vote (AV) for electing MPs. This was a concession, as Conservative MPs, supporting the traditional approach, were essentially in favour of making no change to the electoral system, and Liberal Democrat MPs who, favouring the liberal approach, wanted a system based on proportional representation. The Government in 2011 introduced and achieved passage of a Fixed-term Parliaments Act, providing that a Parliament was to last five years unless a vote of no confidence in the Government was carried by the House of Commons or the House voted (if a division was forced) by a two-thirds majority of all MPs for an early general election[39]. The following year, the Government introduced a House of Lords Reform Bill, providing for 80 per cent of members of the second chamber to be elected.

Reaching agreement on these measures was the high point of Liberal Democrat influence. Its two main policies – achieving a step to electoral reform and an elected second chamber – failed to materialize. In a UK-wide referendum in 2011, electors voted against introducing AV for parliamentary elections. In 2012, the House of Lords Reform Bill ran into such opposition from Conservative MPs that it was withdrawn[40]. The Fixed-term Parliaments Act remained on the statute book, but proved controversial, especially when

[36] See P. Norton, *The Politics of Coalition*, in N. Allen, J. Bartle (eds.), *Britain at the Polls 2010*, London, Sage, 2011, p. 242.
[37] HM Government, *The Coalition: Our Programme for Government,* London, The Cabinet Office, 2010.
[38] R. Fox, *Five days in May: A new political order emerges*, in A. Geddes, J. Tonge (eds.), *Britain Votes 2010*, Oxford, Oxford University Press, 2010, p. 34.
[39] See P. Norton, *The Fixed-term Parliaments Act and Votes of Confidence*, in *Parliamentary Affairs*, vol. 69, n. 1, 2016, pp. 3-18.
[40] P. Norton, *Reform of the House of Lords*, Manchester, Manchester University Press, 2017, pp. 28-29.

Prime Minister Boris Johnson sought and failed three times to achieve an early election in 2019 under its provisions[41]. It survived for just over a decade, before being replaced by the Dissolution and Calling of Parliament Act 2022 that put the position back to what it had been prior to 2011.

The period also saw other referendums held – one in Wales in 2011 on extending the powers of the National Assembly for Wales and a far more high-profile and hotly fought referendum in Scotland in 2014 on whether Scotland should become an independent nation. Scots voted by 54 to 46 per cent against independence. All three main party leaders (David Cameron, Liberal Democrat leader Nick Clegg and Labour leader Ed Miliband) visited Scotland ahead of the referendum to promise more powers to Scotland if it voted against independence. Following the vote, more powers were devolved under the terms of the Scotland Act 2016. The Parliament was also notable for Prime Minister David Cameron, in trying to assuage critics of the EU within his own party, committing his party to hold a referendum on whether the UK should leave or remain in the European Union[42]. It was blocked by the Liberal Democrats from being government policy. The commitment was included in the 2015 Conservative Party election manifesto and when the Conservatives gained an absolute majority of seats in the election, the new Conservative Government achieved passage of legislation providing for an in/out referendum in 2016. On 23 June 2016, electors voted by 52 to 48 per cent to leave the European Union. This was to be the trigger for a momentous period in British constitutional and political history.

An existentialist threat to the Westminster system

In the immediate wake of the 2016 referendum, David Cameron – who had argued in favour of the UK remaining in the EU – resigned and was replaced by Home Secretary Theresa May. She set about achieving legislation to begin the process of withdrawal. However, in negotiating the terms of withdrawal, she felt constrained by the Government having a small parliamentary majority and decided in 2017 to seek an early general election, which she achieved under the terms of the Fixed-term Parliaments Act. The Conservatives began the election campaign with a substantial lead in the opinion polls, but after a disastrous campaign lost the lead and lost seats in the election, ending up as the largest party in the House of Commons, but without an absolute majority. A deal was negotiated with a Northern Ireland party, the Democratic Unionist Party, to have a majority in any votes on confidence and supply. What ensued was a Parliament in which the Government essentially lost control and the norms of the Westminster system subjected to incredible pressures. The Parliament, which lasted from 2017 to 2019, operated in such a way as to constitute an existentialist threat to the norms of the Westminster system[43].

[41] P. Norton, *Governing Britain*, cit., p. 121.
[42] P. Norton, *The coalition and the Conservatives*, in A. Seldon, N. Finn (eds.), *The Coalition Effect 2010-2015*, Cambridge, Cambridge University Press, 2015, pp. 483-485.
[43] P. Norton, *Is the House of Commons Too Powerful? The 2019 Bingham Lecture in Constitutional Studies, University of Oxford*, in *Parliamentary Affairs*, vol. 72, n. 4, 2019, pp. 996-1013.

Theresa May faced problems not only in the negotiations with the EU, but also with her own backbenchers. Electors had voted in 2016 to leave the EU, but how and in what form this was to be achieved was not clear. There were different views of what constituted actual withdrawal. When asked to define what leaving – 'Brexit' – meant, May replied «Brexit means Brexit», which encapsulated the dilemma she faced. She eventually managed to negotiate a deal, but it was seen by critics as constituting a 'soft' rather than a hard Brexit (some arch-Brexiteers were not averse to leaving the EU without a deal) and she was unable to mobilise a parliamentary majority to support it. The issue of Northern Ireland and how to deal with goods flowing across the land border between Northern Ireland and the Irish Republic proved particularly problematic. (Under the agreement, the 'Northern Ireland backstop' entailed the UK staying largely within the single market until a solution could be found.) When put before the House of Commons, it went down to the biggest defeat in recorded history, by 432 votes to 202. When it was brought back two further times, it was again rejected.

In seeking to deliver a deal, May faced a House of Commons that was divided as much within as between parties. There was a fundamental clash between what electors had voted for in 2016 and what a transient majority in the House of Commons was prepared to deliver. Electors had voted to leave the EU, but there was not a majority of MPs in the 2017 Parliament agreed on what this meant. Some MPs wanted a 'hard' Brexit and some favoured no Brexit at all. What initially brought most of them together was opposition to the initial withdrawal agreement. However, there was no majority in favour of alternative options. Amendments to motions that the government was required to put were generally rejected. The House approved a motion for a range of indicative votes, expressing the view of Members on a range of options. Eight votes were taken simultaneously using ballot papers and all eight were defeated. It was easier to identify what the House of Commons was against than what it was for.

More importantly in terms of the Westminster system of government, the government lost control of the parliamentary timetable and of its unfettered right to negotiate a treaty. An amendment was agreed providing that, before a withdrawal agreement could be ratified, it had to be agreed by a motion of the Commons and an Act passed which contained provisions «for the implementation of the withdrawal agreement». It also made provision for what the government must do in the event of the motion not being carried. The House later approved a motion stipulating that if a deal was rejected and the government came up with an alternative the motion providing for that could be subject to amendment.

The government further lost control when, after the withdrawal agreement had been rejected, MPs – assisted by the Speaker of the House, John Bercow – voted to take control of the order paper, taking away the government's power to determine the business on a particular day, and provide that all stages of a bill could be taken in one day. The motion was carried by 312 votes to 311. A private member's bill, the European Union (Withdrawal)(No. 5) Bill, was then considered and passed by both Houses. The bill provided for the

Commons to decide the date of the extension sought under Article 50(3) of the Treaty on European Union. The government had effectively lost control.

However, it was not only the government's control of the parliamentary timetable and of international negotiations that was challenged, but also its control of its own ministers. The doctrine of collective ministerial responsibility came unstuck. Some ministers who disagreed with the government's stance followed the practice of resigning. There was a record number of resignations under May's premiership: between April 2018 and September 2019, a total of 38 ministers (including 11 Cabinet ministers) resigned. However, what was remarkable was having ministers abstaining or voting against their own government. In March 2019, 13 ministers (including four Cabinet ministers) abstained on a motion ruling out a no deal option in all circumstances. In a later vote, eight Cabinet ministers voted against a motion supporting an extension under article 50. Those voting against included the Brexit Secretary who had wound up the debate stating the government's position.

The executive control of government at the heart of the Westminster system was challenged in a way that was unprecedented in modern political history. The attempt to tie the government's hands in negotiations was the significant feature. As Vernon Bogdanor recorded, «The role of parliament is not to govern but to scrutinise those who do. This is especially the case with the treaty making power. Indeed, parliament has not rejected a treaty since 1864. And parliament is in no position to renegotiate a treaty. It has never in modern times sought to do so»[44]. Theresa May was in office, but not in power. A combination of events put her in a situation where she faced a constitutional crisis. In part, this was a product of the outcome of a clash between direct and representative democracy. Electors had voted in 2016 for the UK to leave the EU and the following year had voted for a House of Commons that was unsure as to how to give effect to the result, if indeed it should give effect to it. Given that electors cannot hold themselves to account for the outcome of a referendum and, given that there was a transient majority in the House of Commons tying the government's hands in seeking to withdraw from the EU and therefore no one body – the government held together by the doctrine of collective ministerial responsibility – standing before electors at an election to be held to account for the outcomes of public policy, the core accountability at the heart of the Westminster system was lost[45].

Given the challenges she faced and had not been able to resolve, Prime Minister May resigned. Her premiership was characterized by a failure of statecraft. She entered office with her hands tied by a referendum outcome and was not then able to develop a dominant narrative and control events[46]. She was succeeded by former Foreign Secretary Boris Johnson. He advised the monarch to prorogue Parliament for some weeks, advice that the Supreme Court ruled was null and void. The House of Commons again voted to take

[44] V. Bogdanor, *Guardian*, 29 August 2019.
[45] See P. Norton, *Governing Britain*, cit., Chs. 4 and 5.
[46] P. Norton, *Theresa May and the Constitution: A Failure of Statecraft*, in A. S. Roe-Crines, D. Jeffery (eds.), *Statecraft: Policies and Politics under Prime Minister Theresa May*, Cham, Palgrave Macmillan, 2023, pp. 347-362.

control of the timetable to enable passage of a private member's bill requiring the Prime Minister to seek an extension of negotiations beyond the deadline for withdrawal of 30 October unless the House had agreed a withdrawal agreement or voted for the UK to leave without a deal. The bill was approved by both Houses and the Prime Minister subsequently complied with its provisions, albeit with an ill grace.

Johnson did achieve agreement with the EU on a revised withdrawal agreement, one that most Conservative MPs were prepared to support. When the bill to give effect to it was put before the House of Commons, it achieved a second reading by 329 votes to 308. However, a timetable motion to ensure that the bill completed its remaining stages before 31 October, which would have enabled the UK to leave the EU by that date, was defeated. Johnson sought to resolve the impasse by holding a general election. He was constrained by the provisions of the Fixed-term Parliaments Act. Three attempts to trigger an early election failed when he could not mobilise the required two-thirds majority. He then introduced a free-standing bill, providing that there would be a general election on 12 December 2019, notwithstanding the provisions of the Fixed-Term Parliaments Act. Given that by that stage it was too late for the UK to leave the EU without a deal, the House agreed the Bill. In the general election, Johnson led a campaign on the slogan 'Get Brexit Done' and achieved a large parliamentary majority. The effect was to restore normal politics and the workings of the Westminster system of government.

The UK left the European Union at the end of January 2020. The challenge to government and Parliament was then to adapt to departure from the EU. There was over 40 years of legislation deriving from EU membership on the statute book. Parliament legislated so that, on exit day, the law remained in place and constituted a distinct form of UK law known as retained EU law. It was then for Parliament to decide what to do with it – repeal, amend or retain. The government subsequently achieved enactment of a bill to remove most of it by the end of 2023, but not all. Retained EU law remains an important element of UK law.

Post-Brexit

With the return of a Conservative Government and the UK's withdrawal from the European Union, the political system reverted to a state of normalcy in terms of the Westminster system, albeit one dislocated by the Covid-19 pandemic – both Houses having to decant and then meet in hybrid form – and by political controversies, not least how Johnson ran government[47]. His cavalier style, and various scandals affecting ministers and ex-ministers, created tensions, eventually leading to his resignation in 2022, following mass resignations of ministers led by Health Secretary Sajid Javid and Chancellor of the Exchequer Rishi Sunak. His successor, Liz Truss, became the nation's shortest serving Prime Minister in history, serving in office for 49 days before resigning, following a disast-

[47] See A. Seldon, R. Newell, *Johnson at 10*, London, Atlantic Books, 2023; S. Payne, *The Fall of Boris Johnson*, London, Macmillan, 2022; T. Bower, *Boris Johnson: The Gambler*, London, W. H. Allen, 2020.

rous autumn budget and disarray in government[48]. She was succeeded by the nation's first British-Asian Prime Minister, Rishi Sunak.

The political controversies raised a number of constitutional issues. Boris Johnson was briefly in hospital with Covid during the pandemic, raising the question of who runs the government in the event of the Prime Minister being incapacitated or dying. There was no clear constitutional guidance to cover such an eventuality[49]. The turnover of Prime Ministers also raised issues of leadership selection. The rules of the Conservative Party for electing a leader that had been introduced in 1998 effectively constituted an invitation to struggle between the party membership in the country, who chose the leader from two names put to them by the parliamentary party, but the parliamentary party held the exclusive power to remove the leader by a vote of no confidence. It was possible for the membership to select as leader a candidate who enjoyed the support of a minority of the party's MPs. Conservative MP Sir Graham Brady served as chairman of the 1922 Committee – the body drawing together backbench Conservative MPs – from 2010 to 2024. During his tenure, more Prime Ministers left office following a visit by him, essentially confirming that their time as premier was up, than left office as a result of a vote of the electorate[50].

Conclusion

The British Constitution has endured, its constitutional foundations confirmed by the Glorious Revolution of 1688-9 and its political foundations by the extension of the franchise in the 19th Century. The Westminster system evolved from these developments – it did not emerge fully formed on any particular date – and has demonstrated a remarkable resilience. Events of recent years, especially during the traumatic period of the 2017-19 Parliament, have created extensive and almost existentialist strains, but it has endured, in large part because what may be seen as its weakness is also its strength. Its flexibility may come close to facilitating a collapse of existing conventions and understandings, but that very flexibility has also prevented it from being overly tied by a constitutional straitjacket. It has endured not because of the constitution as a dedicated entity – a formal document – but because of a culture of constitutionalism, a recognition of the legitimacy of the system and its operating principles, that has built up over centuries[51]. People comply not because it is the law, but because it constitutes right behaviour. There is an acceptance, albeit a contingent acceptance, of authority, in return for the executive – initially the monarch, now the monarch's ministers – accepting restraints that are as much moral as formal. Insofar as it is possible to advance a theory of the British constitution, it is one of inherent adaptability. There is also a practical issue. However desirable some may see a codified

[48] H. Cole, J. Heale, *Out of the Blue*, London, HarperCollins, 2022.
[49] See P. Norton, *A Temporary Occupant of No. 10? Prime Ministerial Succession in the Event of the Death of the Incumbent*, in *Public Law*, January 2016, pp. 18-34.
[50] P. Norton, *The 1922 Committee: Power Behind the Scenes*, Manchester, Manchester University Press, 2023, Ch. 13.
[51] P. Norton, *Governing Britain*, cit., pp. 2-3.

constitution, there is no means to achieve it under the extant constitution. Politicians seek to make the system work because they have to. It may not be the ideal, but it is the real.