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Section One

Essay
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AD HOC CONSTITUTIONAL REFORM IN THE UK

The UK Constitution has recently witnessed upheaval, most of it relating to the UK's exit from the European Union and its consequences. The Constitution seems to be being pulled in opposite directions across three specific axes: the extent to which courts can control acts of the Government and determine constitutional issues; whether the UK Constitution rests on parliamentary or popular sovereignty; and whether the balance of power in Westminster belongs to the Government or to Parliament. This Essay argues that recent events illustrate the problems of informal constitutional reform. Changes appear to be made on an ad hoc basis to resolve specific issues rather than being based on a specific long-term design for the constitution. The Fixed-term Parliaments Act 2011, for example, was enacted to facilitate a coalition Government, but was then applied to a minority Government which had to enact decisions on which there was little political consensus, leading to calls for its repeal when its provisions appeared to create a political impasse. The growing role of the UK courts has been called into question, with two recent independent reviews. This, in turn, has led to a lack of legal certainty, as well as a growing lack of legitimacy as these reforms take place in court decisions, or through quickly-enacted legislation, with little if any broader mandate from citizens. Whilst this may not be resolved by the enactment of a written constitution, it does question whether the UK Constitution is fit for purpose and whether more needs to be done to differentiate constitutional from legislative change.

*1410 ESSAY CONTENTS

INTRODUCTION 1411
I. A DECADE OF CONSTITUTIONAL UPHEAVAL 1412
II. CONSTITUTIONAL TENSION LEADING TO A POTENTIAL CONSTITUTIONAL MOMENT 1418
III. FORMAL AND INFORMAL MODELS OF CONSTITUTIONAL CHANGE 1421
IV. UNINTENDED CONSEQUENCES: THE FIXED-TERM PARLIAMENTS ACT 2011 1423
V. CONSTITUTIONAL UNCERTAINTY: UNLAWFUL PROROGATION? 1427
VI. ILLEGITIMATE CONSTITUTIONAL CHANGE 1430
CONCLUSION 1432

*1411 INTRODUCTION

In 2013, Professor Kay drew on his extensive research on formal and informal mechanisms of constitutional change to analyse a series of changes in the United Kingdom (UK) constitution. [1] His work focused on the extent to which the UK's understanding of parliamentary sovereignty had changed in the light of recent constitutional reforms. In particular, he looked at: the UK's membership of the European Union (EU), the Human Rights Act 1998, the devolution of power to Scotland, Wales, and Northern Ireland, the growth in judicial review through the use of common law principles to provide more thorough controls over the executive and, potentially, possible future checks on Acts of Parliament. [2] His concern was not to evaluate the direction of travel of these modifications, but the manner through which they had been achieved. Were these constitutional changes made in a legitimate manner?

In the few years since Kay's assessment there have been even more fundamental modification. Yet more lurk on the horizon as the UK leaves the European Union. Moreover, yet more constitutional reforms were promised in the manifesto of the Conservative

Party, which secured a large majority government in the December 12, 2019 general election.[3] This Essay will use Kay's framework of constitutional change to evaluate the extent to which the UK constitution has evolved over the last decade, drawing on and extending Kay's analysis. It will argue that there is no clear direction of travel. Rather, modifications potentially push the UK constitution in two competing directions. After providing a brief account of these changes, it will evaluate how they illustrate the dangers of ad hoc, ***1412** informal constitutional reform. Whatever direction of travel the UK constitution embarks upon, we would do well to learn the lessons of the dangers of informal constitutional reform Kay has so expertly illuminated.

I. A DECADE OF CONSTITUTIONAL UPHEAVAL

Kay commented on four major areas in which parliamentary sovereignty has been placed under strain, if not limited. This Essay will focus on three of these four, all of which have seen further changes over the last decade: the UK's membership in the EU, judicial review, and the Human Rights Act. Of these three, two now appear to place parliamentary sovereignty under greater strain. All three could be potentially reversed in the near future.

The most dramatic volte-face concerns the UK's membership in the EU. UK courts, until exit day, enjoyed a power to disapply legislation which directly contravenes directly effective provisions of EU law.[4] The clearest example is the Supreme Court's decision in *Benkharbouche*.[5] Benkharbouche, a Moroccan national, had been employed at the Sudanese embassy in London as a housekeeper and cook for the ambassador.[6] Following her dismissal, she brought a claim for unfair dismissal, a failure to pay the minimal wage, and a breach of the Working Time Regulations, which implemented the EU's Working Time Directive.[7] However, the State Immunity Act 1978 had been interpreted to provide the Embassy with immunity from employment claims brought by non-UK nationals.[8] As such, it appeared that Benkharbouche would be unable to bring a legal action.

However, the Supreme Court concluded that this effective blanket ban breached Article 47 of the EU's Charter of Fundamental Rights and Freedoms, which provides that "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal."[9] The EU Charter can apply in the UK provided that this is within the scope of EU law.[10] In this instance, the Working Time Regulations implemented EU law. As such, the effective blanket ban meant that Benkharbouche had no access to court and no ability to obtain an effective remedy for a potential breach of her EU rights under the ***1413** Working Time Directive. In order to ensure that Benkharbouche's Charter right was not breached, the Court disapplied the provision of the State Immunity Act 1978, enabling Benkharbouche to bring her claim for a breach of the Working Time Regulations.[11] In the words of Lord Sumption, "a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied."[12] The disapplication of legislation is, to put it mildly, difficult to reconcile with parliamentary sovereignty.

However, just as the constitution moved in one direction, other events move it firmly in the other. On Thursday, June 23, 2016, a referendum was held to determine the UK's continued membership in the EU.[13] 51.9% of those who participated in the referendum voted to leave, with 48.1% voting to remain.[14] The voters in England and Wales voted to leave the EU, with those in Scotland and Northern Ireland voting to remain.[15] The UK left the EU on January 31, 2020. The transition, or implementation period, regulated by the European Union (Withdrawal Agreement) Act 2020, ended at 11pm on 31 December 2020. The UK now has a new Cooperation and Trade Agreement with the EU, implemented by the hastily enacted European Union (Future Relationship) Act 2020.[16] The European Communities Act 1972, which provided the means through which UK law incorporated EU law into domestic law, was repealed on exit day.[17] Its provisions were then temporarily revived to provide for the direct effect and supremacy of those aspects of EU law the UK was required to continue to abide by until the end of the implementation period, under the terms of the UK's Withdrawal Agreement with the EU.[18] At the end of the implementation period, those provisions of EU law in force at the end of the implementation period are now part of domestic law, referred to as "retained EU law."[19] The supremacy of retained EU law continues, but only as it concerns legislation enacted prior to the end of the ***1414** implementation period.[20] Moreover, the EU's Charter of Fundamental Rights is no longer part of domestic law.[21] In effect, this reverses the impact of EU law on parliamentary sovereignty. If retained EU law disapplies or overrides domestic legislation after the end of the implementation period, this is because it is an example of later legislation overriding earlier legislation.[22] The only exception applies to aspects of the Withdrawal Agreement that continue to have both direct effect and supremacy - notably the provisions regarding the protection of the rights of EU citizens residing in the UK and the Northern

Ireland Protocol.[23] In addition, the European Union (Withdrawal Agreement) Act 2020 recognises that "the Parliament of the United Kingdom is sovereign"[24] notwithstanding "directly applicable or directly effective EU law," which will continue during and after the end of the implementation period.[25]

Decisions of the UK courts towards the end of the last decade have further strengthened common law controls over the executive. One of the main ways in which we have seen the courts developing even stronger common law controls over the executive has been through the application of the principle of legality. Recent caselaw not only illustrates the extent to which the courts are willing to read down legislation in order to protect fundamental common law rights, but also exemplifies the expansion of this principle, so that it now underpins other aspects of judicial review. In addition, there are further dicta suggesting limits on parliamentary sovereignty. The clearest illustration of the development of common law principles of judicial review can be found in two recent Supreme Court cases. The first concerns ouster clauses: clauses designed to make decisions of administrative bodies or inferior courts or tribunals immune from actions for judicial review by the high court and above. The second was a judicial review of the prerogative power of prorogation.

In *Privacy International*, the Supreme Court was called upon to determine the scope of an ouster clause designed to remove jurisdiction of the high court over decisions of the Investigative Powers Tribunal (IPT).[26] The clause states that "determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."[27] ***1415** In a decision which strongly divided the court, the Supreme Court concluded by four judgments to three that the ouster clause was unable to oust the jurisdiction of the high court over decisions of the IPT.[28]

Lord Carnwath, with whom Lady Hale and Lord Kerr agreed, specifically referred to the law relating to the interpretation of ouster clauses as an exemplification of the principle of legality, focusing in particular on the need to uphold the rule of law to ensure access to justice.[29] He read down the ouster clause.[30] Section 67(8) specifically removed judicial review of the high court over determinations of the IPT as to whether the IPT had the jurisdiction to act.[31] However, Lord Carnwath argued that this was only capable of removing judicial review of the high court over purported determinations of the IPT to act.[32] In other words, if the IPT made a legal error when determining the scope of its jurisdiction, it would only make a purported and not a real determination as to whether it had the jurisdiction to act.[33] The high court would be able to review decisions of the IPT and quash determinations of the IPT as to whether it had the jurisdiction to act when these determinations made a legal error, such that they were only purported and not real determinations.[34]

Lord Sumption (with whom Lord Reed agreed) and Lord Wilson disagreed with this interpretation.[35] Lord Sumption placed more emphasis on the wording of the clause as a whole, read in the context of the creation of the IPT.[36] Its role was to oversee the legality of actions of security organisations.[37] Lord Sumption concluded that the ouster clause would remove jurisdiction of the high court over the IPT for substantive errors made by the IPT when determining the scope of its jurisdiction.[38] In other words, the IPT was given the power to substantively determine the scope of its own jurisdiction. However, judicial review was not removed as regards procedural legal errors that the IPT might make when determining the scope of its jurisdiction.[39] Lord Wilson concluded that the ouster clause ***1416** had succeeded on its application to the facts of the case.[40] The high court was not able to review a potential legal error made by the IPT when determining the scope of its jurisdiction.[41]

In addition, dicta in *Privacy International* build on the existing dicta that there are situations in which the courts may not apply legislation[42] -- albeit that these were not applied in the case. As Kay remarked in his assessment, an obiter dictum of Lord Steyn in *Jackson* suggests that, in exceptional circumstances, courts may refuse to apply primary legislation.[43] In *Privacy International*, Lord Carnwath suggested a further limit, again linked to the protection of the rule of law and the preservation of access to the courts, asserting:

> I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be

> upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law. [44]

Lord Wilson also appeared to suggest that it would not be possible for legislation to remove the power of the court to determine whether an inferior court or tribunal had made a jurisdictional error--interpreting a "jurisdictional error" in the narrow sense as an error as to the precise scope of jurisdiction of the tribunal or inferior court, as opposed to the wider sense where all legal errors are included within the definition of a jurisdictional error. [45]

There is also growing evidence of the Supreme Court taking on a larger role in the protection of the constitution, ensuring that the executive acts are in line with fundamental constitutional principles of the common law. The most striking example is found in the recent decision of *R* ***1417** *(Miller) v. Prime Minister/Cherry v. Advocate General (Scotland)*. [46] The Supreme Court unanimously concluded that the Prime Minister's advice to the Monarch to prorogue Parliament was ultra vires. [47] Consequently, as far as the law was concerned, Parliament had never been prorogued. [48] The scope of the prerogative power to prorogue was determined by the common law. In particular, the prerogative power of prorogation was restricted by two fundamental constitutional principles--parliamentary sovereignty and parliamentary accountability. These two principles placed a specific limit on the prerogative power of prorogation. Prorogation is unlawful if it "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." [49] When this occurs, the court will intervene "if the effect is sufficiently serious to justify such an exceptional course." [50]

On the facts, Parliament was prorogued for an exceptionally long time--five weeks--when prorogation to allow for a new Queen's Speech normally only took a few days. [51] Moreover, the prorogation was for a period of five weeks of what was, at the time, eight remaining weeks prior to the UK's exit from the European Union. [52] Parliament was required to play a role during this constitutionally important time. [53] As the Prime Minister had not provided any reason for this extensive prorogation, the prorogation was unlawful.

The case provides further support for the growing role of the common law in ensuring constitutional government and maintaining the rule of law through placing common law controls on the power of the executive, be they derived from legislation or from the prerogative. However, this too hangs in the balance. The Conservative Party manifesto promises to establish a Constitution, Democracy and Rights Commission, [54] a promise also found in the first Queen's Speech of the new majority Conservative Government. [55] This Commission will be tasked with examining "the relationship between the Government, Parliament and the courts; the ***1418** functioning of the Royal Prerogative ... and access to justice for ordinary people." [56] Moreover, the manifesto promises to "ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays." [57] The manifesto includes a promise to "update the Human Rights Act" to "ensure that there is a proper balance between the rights of individuals, our vital national security and effective government." [58] The Conservative Government appointed a panel to carry out the Independent Review of Administrative Law, which reported on 18 March 2021, [59] and a differently composed panel to instigate an Independent Review of the Human Rights Act, which is due to report in the summer of 2021. [60]

II. CONSTITUTIONAL TENSION LEADING TO A POTENTIAL CONSTITUTIONAL MOMENT

In addition to these changes, it is becoming clear that the UK Constitution is being pulled in two different directions along three potential axes. The first axis is clearly illustrated by the case law discussed in the previous section. [61] It concerns the growing role of the court in the control over actions of the executive and, potentially, the legislature. Have the courts gone too far in developing these principles, effectively challenging the role of parliamentary sovereignty as the key principle of the UK Constitution? In particular, have the courts developed a new key role in protecting the UK Constitution, ensuring that the Government acts within the scope of the Constitution as defined by fundamental principles of the common law in addition

to ensuring the executive acts within the proper legal scope of its powers? If so, can we understand the proposed potential constitutional modifications as a means of moving the UK Constitution in the opposite direction on this axis?

The second and potentially more fundamental axis concerns the very nature of the UK Constitution and the identification of its key component. Is the UK Constitution based on the sovereignty of the people or on the sovereignty of Parliament? This tension has been illustrated most dramatically following the outcome of the Brexit referendum. [62] While the ***1419** referendum gave rise to a majority vote in favour of the UK's exit from the European Union, the same could not be said of the majority of MPs in the Westminster Parliament or of the then-existing Government. [63] This tension came to a head in particular in 2019, which saw three major Governmental defeats when the House of Commons exercised their power under Section 13 of the European Union (Withdrawal) Act of 2018 to reject the then Prime Minister Theresa May's Withdrawal Agreement with the EU. [64]

2019 also saw the enactment of two Private Members' Bills which became legislation through innovative uses of the Standing Order Rules. The first successfully amended a business motion, which had been proposed by the Government, in order to suspend Standing Order 14, the Standing Order that prioritises Government business in the House of Commons. [65] The second used Standing Order 24, which empowers MPs to propose urgent motions, also to suspend Standing Order 14 and propose an alternative business motion. [66] It had been previously assumed that Standing Order 24 could only be used for neutral motions, not for those that had a substantive content. Both empowered the Commons to enact all three stages of legislation in one day. Both were used to enact legislation which required the Government to seek an extension to the Article 50 negotiation period in order to prevent the UK from leaving the EU with no deal. [67] A series of defeats, over both measures designed to facilitate the UK's exit from the EU and to hold an early parliamentary general election, [68] eventually led the then Prime Minister, Boris Johnson, to propose and push through legislation to partially repeal the Fixed-term Parliaments Act 2011, enabling the holding of an early parliamentary ***1420** general election on 12 December 2019. [69] The large swing towards the Conservative Party can be interpreted as an indication from the electorate that Parliament was failing to act in line with the wishes of the majority of those who voted in favour of Brexit in the 2016 referendum. Regardless of one's views on Brexit, the events of 2019 provide further evidence of a rift between the sovereignty of the people and the sovereignty of Parliament. How far can the UK continue to be based upon the sovereignty of Parliament when there is an emerging practice--some would even argue a constitutional convention--of the use of referendums to decide major constitutional issues such as Scottish independence, [70] the European Union, [71] and electoral systems? [72]

The above tension also demonstrates a third axis--the nature of the UK's parliamentary democracy. David Howarth describes this as a tension between Westminster and Whitehall visions of democracy. [73] The distinction turns upon different understandings of the relative role of the legislature and the executive. Under the Whitehall vision, the role of the legislature is to support the Government, which normally enjoys a majority in the Commons. [74] As such, the role of the opposition is to propose an alternative form of Government ready for the next general election, as opposed to providing a detailed scrutiny of legislation or the actions of the Government. [75] Under the Westminster vision of democracy, the role of the legislature is different. The opposition is not there merely to propose a potential alternative Government, but also to provide detailed scrutiny over legislation, including aiming to push for different policy outcomes, as well as to provide detailed scrutiny over the actions of the executive. [76]

In addition to the events described above, in the 2017-2019 parliamentary session, opposition and backbench MPs acted together, obtaining a series of policy modifications of the European Union ***1421** (Withdrawal) Act 2018. [77] The *Miller/Cherry* decision can be interpreted as the court's endorsement of a Westminster as opposed to a Whitehall vision of democracy. [78] The principle of parliamentary accountability draws on the understanding that the Government only holds power to the extent that it enjoys the confidence of the House of Commons. [79] The Government is accountable to the House of Commons which, in turn, is accountable to the people. [80]

All of these tensions are arising not just because of Brexit, but also because of the informal nature of the UK Constitution. The lack of a codified constitution does not entail that the UK has no written sources of constitutional rules. Nor does it necessarily entail a greater difficulty in determining the content of constitutional provisions. More fundamentally, it demonstrates how the UK constitution is continually evolving. Key constitutional principles, such as: the nature of constituent power; the definition of the state; the separation of powers; and the specific delineation of the relative powers of distinct governmental institutions,

are either under-developed or fluid. They do not provide a clear anchor to the UK constitution, a specific formal means of constitutional modification, or guidelines as to the direction of travel of constitutional developments. Consequently, events like Brexit can place the UK constitution under considerable strain, with the resolution of these tensions dependent upon the political persuasion of the Government, which holds power at the moment in time when these tensions become apparent.

III. FORMAL AND INFORMAL MODELS OF CONSTITUTIONAL CHANGE

Kay's work provides the benchmark for distinguishing between, and evaluating, different forms of constitutional change. It remains the case that it is hard to distinguish between formal and informal modifications of the UK constitution. This is despite developments in UK constitutional law establishing a category of 'constitutional' statutes. Provisions of constitutional legislation have to be overturned by clear, specific, or even express words. Their provisions will not be overturned by implication alone. [81] Moreover, there is an emerging difference in the procedures used ***1422** for the enactment of constitutional legislation. The committee stage as applied to constitutional legislation normally takes place before a Committee of the whole House, as opposed to a Public Bill Committee. [82] However, as will be discussed below, the enactment of the Early Parliamentary General Elections Act 2019 suggests that the then Government, if not the House as a whole, is less accepting of the need for differential treatment of constitutional and ordinary legislation. Constitutional legislation can be enacted in haste when required - note in particular the European Union (Future Relationship) Act 2020, which was enacted in one day, to implement a long and complex Treaty, agreed six days earlier, which Parliament was not required to approve in order for the Treaty to be ratified. [83]

Whilst there are suggestions of differential treatment of constitutional as opposed to legislative change, the UK constitution is still predominantly changed in an informal manner. As such, constitutional modifications display the disadvantages of the use of these informal means of change. Kay argues that there are three main disadvantages of informal constitutional modifications. First, informal modifications are ad hoc. They do not form part of a deliberate design. Consequently, constitutional modifications enacted informally often lack an element of deep reflection and choice. Second, there can be a lack of certainty to informal constitutional amendment. This lack of certainty undermines the very purpose of constitutionalism. It is difficult, if not impossible, to ensure that power is constrained by constitutional principles if we are unable to identify the very principles designed to uphold constitutional government. Third, there is a lack of legitimacy in the manner in which informal constitutional change is achieved. [84] Formal constitutional change engages citizens as well as institutions, recognising the role of the people as part of constituent power. Informal constitutional change frequently fails to provide a role for the people. Moreover, it may fail to fully engage all of the institutions of government. [85]

***1423** This section will argue that the last decade of constitutional change illustrates all three of these weaknesses. The problems of constitutional change that lack a clear design and the dangers of unintended consequences of constitutional change are illustrated starkly by the Fixed-term Parliaments Act 2011 and recent political events. The problems of the lack of certainty are illustrated through the *Miller/Cherry* decision. Both illustrate a potential lack of legitimacy, as do more recent examples of legislative changes and interpretations of Standing Orders, all of which played a role in the particularly dramatic year of 2019.

IV. UNINTENDED CONSEQUENCES: THE FIXED-TERM PARLIAMENTS ACT 2011

Prior to the Fixed-term Parliaments Act 2011, legislation only proscribed a maximum length of Parliament, with the Parliaments Act 1911 fixing this at five years. [86] Parliament could be dissolved by the Monarch, exercising her prerogative power. [87] In practice, this placed a discretion in the hands of the Government to advise the Monarch to dissolve Parliament at a time which would be perceived to provide an electoral advantage to his or her political party. [88] The 2011 Act replaced this prerogative power with a series of statutory provisions. It fixes parliamentary terms to five years, setting the dates of general elections. [89] It also provided for two means through which an early parliamentary general election could take place. First, it would be possible for an early general election to be held following a vote of no confidence in the Government. If a vote of no confidence succeeds, there follows a period of fourteen days in which an alternative government could be formed, or confidence could be regained in the current government. If a government were to obtain a vote of confidence from the Commons in that fourteen-day period, then it would become the new government and continue to the end of that parliamentary term. [90] If not, then Parliament is dissolved and a general election takes place. Second, an early parliamentary general election takes place if ***1424** two-thirds of the 650 members of the House of Commons votes in favour of an early parliamentary general election. [91]

This "change of the highest constitutional significance" was enacted by ordinary legislation.[92] Its enactment also aimed to resolve a particular constitutional problem: fixing parliamentary terms as part of the coalition agreement between the Liberal Democrats and the Conservatives who formed a Government from 2010 to 2015, as well as responding to other long-term calls for reform.[93] The Act lengthened parliamentary terms in practice, in addition to proscribing a longer term than is used for the devolved legislatures, whose terms are fixed at four years. Moreover, it removed any remaining personal role of the Monarch in the dissolution of Parliament; replaced a prerogative with a statutory power; placed votes of no confidence on a statutory footing these having been previously determined by constitutional convention; had consequences for the parliamentary terms of the devolved legislatures who were unable to hold an election on the same year as an election to the Westminster Parliament; and provided for an innovative use of a supermajority within the Commons.[94] It also altered the balance of power between the legislature and the executive. Prior to the Act, it was possible for the Prime Minister to use the vote of no confidence to prevent backbench MPs from voting against the government's wishes. Although rebellious backbench MPs may be willing to defeat governmental policies, they may be less willing to vote against the government were that to trigger a general election.[95] The Act was also seen as further evidence of a modification of the nature of the UK's parliamentary democracy, moving from a majoritarian to a consensus model, given the way in which the Act curtailed the powers of the prime minister, reduced the dominance of the executive over the legislature, and potentially created circumstances under which it may be more likely that elections would produce minority Governments or hung Parliaments.[96]

However, as the events of 2019 illustrate starkly, its enactment gave rise to unintended consequences. In 2019, Theresa May's government ***1425** faced three defeats on major policy issues.[97] These arose through the operation of section thirteen of the European Union (Withdrawal) Act 2018, which required the Commons to vote in favour of the Withdrawal Agreement and the Political Declaration on the Future Relationship between the UK and the EU in order to ratify the Withdrawal Agreement.[98] The Commons voted against the agreement three times: on 15 January by 432 to 202 votes; on 12 March by 319 to 242 votes; and on 29 March by 344 to 286 votes.[99] The first vote was the largest ever defeat of a Government in the modern era of universal suffrage to Westminster. Such defeats would normally have led either to a Government being pressured into resigning, the importance of the policy issues on which the Government was defeated almost being regarded as indirect votes of confidence, or may well have given rise to a vote of no confidence. The first governmental defeat did give rise to a vote of no confidence under the provisions of the Fixed-term Parliaments Act. It took place the next day and was defeated by 306 votes to 325.[100] Whilst backbench MPs may have been prepared to vote against governmental policy on the Withdrawal Agreement, they were not prepared to vote against the Government as a whole.

Tensions grew as the government faced further defeats. The failure to secure a vote in favour of the Withdrawal Agreement led to the resignation of Theresa May as leader of the Conservative Party, to be replaced as leader, and thereby as Prime Minister, by Boris Johnson.[101] Johnson's government also faced repeated defeats. Prior to the September prorogation of Parliament, Boris Johnson twice sought to obtain a vote for an early parliamentary general election.[102] Despite obtaining a majority on both occasions, he did not obtain enough votes to obtain the requisite two-thirds of all Members of Parliament.[103] Boris Johnson tried, and failed, again to obtain a vote in favour of an early parliamentary general election on 28 ***1426** October.[104] The Government then introduced a bill to propose an early general election immediately after losing the vote.[105] This bill was enacted in the House of Commons on the 29 October, and passed through the House of Lords on 30 October with the House of Lords agreeing to modifying their Standing Orders to enable the legislation to be enacted so quickly.[106]

The Early Parliamentary General Elections Act 2019 (2019 Act) received royal assent on 31 October.[107] Its provisions partially repealed the Fixed-term Parliaments Act 2011 (2011 Act), providing for an early parliamentary general election to be held on 12 December.[108] Section 1(1) of the 2019 Act stated that "[a]n early parliamentary general election is to take place on 12 December 2019 in consequence of the passing of this Act," with section 1(2) explaining that 12 December was "to be treated as a polling day appointed under section 2(7) of the Fixed-term Parliaments Act 2011."[109] The 2019 Act did not specifically state that the early parliamentary general election would take place notwithstanding the requirements of the 2011 Act, which only allowed for an early parliamentary general election following a two-thirds vote of the whole House in favour of an early parliamentary general election or a successful vote of no confidence.[110] This could be explained by the fact that both the 2011 and the 2019 Act were examples of constitutional legislation, making it possible for later constitutional legislation to partially impliedly repeal earlier legislation, or by reading the 2019 Act as a specific exception to the 2011 Act. What is clear, however,

is that the government did not feel the need to provide for such a clause or even to discuss whether such a clause was needed given the general acceptance that the 2011 Act is an example of a constitutional statute.

The events of 2019 clearly illustrate the unintended consequence of the 2011 Act. As Schleiter and Belu recognise, the Act is suited to and acts better in a consensual as opposed to a majoritarian democracy. [111] Whilst this may have been the case during the coalition government, and should arguably have been the case in 2019 with a conservative minority government, the Conservative government was unwilling to act in a consensual manner. The backdrop of Brexit, the policy commitment of the ***1427** government to implement the outcome of the referendum and ensure the UK's exit from the EU, and the unique mechanism found in Section 13 of the European Union (Withdrawal) Act 2018 (2018 Act) empowering the Commons to have more of a say in the ratification of Treaties, including provisions designed to provide a means for the Commons to guide the Government, [112] provided an unusual setting which placed the provisions of the 2011 Act under strain. Whilst the 2018 Act may have marked a move to more consensual politics, it was clear that the behaviour of the Government had not changed, resting on a majoritarian view of democracy. The 2011 Act became viewed as a stop-gap solution to a specific problem, creating what Boris Johnson referred to as a zombie Parliament, unable to perform what he perceived to be its job: supporting the Government to achieve Brexit. [113] Moreover, its provisions were, eventually, easily removed; it is no wonder that the strong conservative majority government elected in December 2019 placed the repeal of the 2011 Act on its manifesto, as later announced in the Queen's speech. [114]

V. CONSTITUTIONAL UNCERTAINTY: UNLAWFUL PROROGATION?

The events of 2019 also illustrate the uncertainty that arises as constitutions change informally, undermining the extent to which constitutions can perform their job of maintaining the rule of law and ensuring governments act according to constitutional standards. The clearest illustration of this was *R (Miller) v. Prime Minister/Cherry v. Advocate General for Scotland*, which concerned the legality of the advice given by Boris Johnson to the Queen to prorogue Parliament. [115] Gina Miller brought her case to the High Court in England whilst Joanna Cherry, a Scottish National Party ("SNP") member of the Westminster Parliament, brought her case before the Scottish courts. [116] Both argued that the advice given to the Prime Minister was unlawful, tainted by an improper purpose. [117] Both Gina Miller and Joanna Cherry failed at first instance. Both the English and the Scottish courts originally concluded that the prerogative power of prorogation was too political and therefore was not justiciable. [118] However, Cherry succeeded on her appeal to the Inner ***1428** House of the Court of Session, leading to both cases being heard together in the Supreme Court. [119] With Parliament prorogued, and given the importance of the issue, both cases progressed quickly to the Supreme Court.

In only its second sitting before a maximum number of eleven Justices, the Supreme Court unanimously concluded that the advice was unlawful, and, in turn, that prorogation was unlawful. [120] In reaching this conclusion, the Supreme Court reasoned differently from the lower courts: it did not focus on the purpose of the advice given to prorogue Parliament, but on its effect. [121] Consequently, by focusing on the scope of the prerogative power, the court did not need to consider the controversial issue of whether the prerogative power was too political to be justiciable before the court. [122] Courts have long had the power to determine the scope of prerogative powers, which is set by the common law. [123] The Supreme Court relied on two background constitutional principles which provided a limit on the scope of the prerogative power of prorogation: parliamentary sovereignty and parliamentary accountability. [124] The use of both was controversial. [125]

Parliamentary sovereignty is traditionally understood in terms of the scope of Parliament's law-making powers. [126] Parliament can enact legislation on any subject matter it wishes, without this being questioned in a court, save that it cannot bind its successors and thereby entrench constitutional principles. [127] The Supreme Court concluded that parliamentary sovereignty would be harmed if there were no limits that could be placed on the power of the executive to prorogue Parliament. [128] This could result in Parliament being permanently prorogued, never able to sit and perform its functions. Regardless of whether one sees this as a valid or invalid interpretation of parliamentary sovereignty, it was not clear that parliamentary sovereignty included these aspects until recognised in this case.

In addition, it is hard to find clear support in the case law for a principle of parliamentary accountability. Although underpinning legal standards and, in the words of the Supreme Court, having "been invoked time and again throughout the development of our constitutional and ***1429** administrative law, as a justification for judicial restraint as part of a constitutional separation of powers," it had not previously been used in a court to justify a limit on a prerogative power. [129] Again, it was not clear that parliamentary accountability would be interpreted in this manner to limit the prerogative power of prorogation. In addition, some regard the use of parliamentary accountability in this manner as evidence of the court enforcing a constitutional convention, despite clear case law to the contrary. [130]

These were not the only controversial elements of the decision pointing to the lack of clarity surrounding key constitutional principles and their application, and the lack of certainty as to the scope of constitutional change. The Supreme Court reasoned from first principles, drawing on background constitutional principles to develop a specific limit on the prerogative power of prorogation. [131] In determining that the power to prorogue Parliament was void, the Supreme Court provided a definitive application of Article 9 of the Bill of Rights 1688, which prevents courts from questioning proceedings in Parliament. [132] Although the prorogation of Parliament takes place in the House, the Court concluded that it was not a proceeding in Parliament as the decision was made by the executive alone and was not a decision of either House. [133] Although Parliament may also assert its ability to determine the scope of proceedings in Parliament, the Supreme Court concluded that it was for the court and the court alone to determine what is meant by a proceeding in Parliament, or a matter that was in the exclusive cognizance of Parliament. [134]

It is not the place of this Essay to assess whether the decision of the Supreme Court was correct. It is to illustrate the uncertainty and controversy surrounding the decision. The decision both reinforced and changed the constitution. The fact that this can erode the effectiveness of constitutional principles to regulate executive actions is demonstrated by the Government's reaction to the decision. Following the decision, Parliament was recalled the following day. [135] The Prime Minister gave a statement to the House in response to the decision, asserting that he thought the court "was wrong to pronounce on what is essentially a ***1430** political question, at a time of great national controversy," perceiving the case as a method to betray the will of the people and prevent Brexit. [136] His remarks were coupled with statements that he would not comply with the legal requirements of the European Union (Withdrawal) (No. 2) Act 2019 and would refuse to send a letter to the European Council requesting an extension of the Article 50 negotiation process. [137] Although the Prime Minister did, eventually, comply with the law, he did so by sending an unsigned copy of the text of the letter as set out in the Appendix of the 2019 Act, accompanied by an explanation of why the letter had been sent and a signed letter explaining that the letter expressed the wishes of the Commons, but that the policy of the Government was still to leave the EU on 31 October, even if this meant leaving with no deal. [138]

VI. ILLEGITIMATE CONSTITUTIONAL CHANGE

This brings us to Kay's final criticism: Modifying the constitution in this manner leads to a lack of legitimacy--it fails to include the people. All of the modifications discussed above failed to provide sufficient inclusion of the people. The decision to hold a referendum on Brexit followed a manifesto promise of one political party and was enacted through legislation which did not include wide pre-legislative scrutiny or consultation of the people. [139] The same is true of the enactment of the Fixed-term Parliaments Act 2011. Although the *Miller/Cherry* decision was televised and widely commented on by the international and national media, there was no public consultation regarding the content of background constitutional principles. The hearing also witnessed public protests outside the court, focusing on supporting "leave" or "remain" in addition to protesting that democracy had been silenced--either as the executive wished to prorogue Parliament, or because Parliament wished to silence the will of the people by failing to support Brexit. [140] The only way the people felt they could take part in such decisions was to protest outside the institution charged with interpreting the constitution.

***1431** Moreover, constitutional change has been occurring without full engagement of all of the institutions of the Constitution, let alone the people. The most striking example is the way in which Standing Orders of the Commons had been interpreted. Standing Orders regulate the manner in which the House of Commons regulates its own internal affairs. [141] Standing Orders can be modified by a mere resolution of the House of Commons. [142] Their interpretation and application come from the Speaker, who is elected by the House of Commons. [143] As discussed above, in 2019, the Speaker interpreted Standing Orders in a manner that facilitated the enactment of Private Members' Bills. [144] In particular, the Speaker interpreted Standing Order 24, enabling

an emergency debate, to allow for the determination of substantive issues, when previously it had been believed that this could only be used for neutral motions. [145] Standing Order 24 was then used to introduce a motion to suspend the application of Standing Order 14, which prioritized Government business. [146] In effect, this allowed the legislature to take control from the Government.

This modification of Standing Orders had a profound impact on the balance of power between the legislature and the Government, in turn having an impact on the UK Constitution. It is not known how far this precedent will be used in future, or even if this would be possible under a strong majority as opposed to a minority Government. This direction of travel may be reversed just as quickly, again with little say from the people. Although the Conservative party manifesto makes it clear that the Fixed-term Parliaments Act 2011 will be repealed, it is not clear what, if anything, will replace it. Moreover, the membership of the Constitution, Democracy and Rights Commission has not been made clear, nor has its mandate, process of decision-making, or direction of travel. Unlike promises in other manifestos, there is no reference to engagement with the people in order to enact what may be sweeping constitutional reforms. Whilst the events of 2019 may have been unusual, the process of constitutional change with little inter-institutional involvement, and no true engagement with the people is likely to continue.

*1432 CONCLUSION

This Essay has demonstrated the prescience and wisdom of Kay's analysis of the UK constitution. The past decade has proved to be one of considerable upheaval, particularly in 2019. But, this Essay does not necessarily argue in favour of the UK adopting a written constitution. Rather, it illustrates one of the many tensions at the centre of constitutionalism which also forms a part of Kay's body of work on constitutionalism--the need to enable flexibility for constitutions to adapt over time whilst also ensuring that there is sufficient protection for strong constitutional principles against accidental, or even deliberate, erosion. The recent experience of the UK constitution amply demonstrates the urgency of effectively resolving this tension.

Footnotes

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1 Richard S. Kay, *Changing the United Kingdom Constitution: The Blind Sovereign*, *in*SOVEREIGNTY AND THE LAW 98-99 (Rawlings et al. eds., 2013).

2 *Id*. at 98-102.

3 William Booth et al., *U.K. Election: Boris Johnson Wins Majority, While Jeremy Corbin Says He Won't Lead Another General Election Campaign*, WASH. POST (Dec. 12, 2019, 10:31 AM), https://www.washingtonpost.com/world/europe/uk-general-election-2019/2019/12/12/cc5ecb98-17ae-11ea-80d6-d0ca7007273f_story.html; CONSERVATIVE & UNIONIST PARTY, THE CONSERVATIVE AND UNIONIST PARTY MANIFESTO 2019, at 48 (2019), https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf.

4 Regina v. Sec'y of State for Transp. *ex parte* Factortame, Ltd. [1990] AC 2466 (HL) 2473 (appeal taken from Eng.).

5 Benkharbouche v. Sec'y of State for Foreign & Commonwealth Affairs [2017] UKSC 62 (appeal taken from Eng.).

6 *Id*. at 2-3.

7 *Id.*; *The Working Time Regulations*, HEALTH & SAFETY EXEC., https://www.hse.gov.uk/contact/faqs/workingtimedirective.htm (last visited Mar. 20, 2020).

8 *Benkharbouche*, [2017] UKSC 62 at 43.

9 *Id*. at 46.

10 *Id*.

11 *Id*.

12 *Id*.

13 *Nigel Farage Says Leave Win Marks UK 'Independence Day'*, BBC NEWS (June 24, 2016), https://www.bbc.com/news/uk-politics-eu-referendum-36613238.

14 *EU Referendum Results*, BBC NEWS, https://www.bbc.com/news/politics/eu_referendum/results (last visited Feb. 27, 2020).

15 *Id*.

16 Tom Edgington, *Brexit: What Is the Transition Period?*, BBC NEWS (Jan. 31, 2020), https://www.bbc.com/news/uk-politics-50838994. European Union (Withdrawal Agreement) Act 2020, c. 1, § 33 (U.K.), prevents Ministers from agreeing to an extension to the implementation period. However, there would be nothing to prevent the Government from quickly enacting legislation to empower a Minister to agree to such an extension were this deemed to be necessary.

17 European Union (Withdrawal) Act 2018, c. 16, § 1 (UK).

18 European Union (Withdrawal Agreement) Act 2020, c. 1, § 1-2, (UK).

19 European Union (Withdrawal) Act 2018, c. 16, § 6 (UK).

20 *Id*. § 5.

21 *Id*.

22 HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION, EUROPEAN UNION (WITHDRAWAL) BILL 9TH REPORT OF SESSIONN 2017-19, HL 69, at 18-19 (UK).

23 European Union (Withdrawal) Act 2018, c. 16, § 1 (UK), section 7A.

24 European Union (Withdrawal Agreement) Act 2020, c. 1, § 38.1 (UK).

25 *Id*. § 38.2.

26 R (Privacy Int'l Ltd) v. Investigatory Powers Tribunal [2019] UKSC 22 [2]-[3] (appeal taken from Eng.).

27 Regulation of Investigatory Powers Act 2000, c. 23, § 67(8) (Eng.).

28 *R (Privacy Int'l Ltd)*, UKSC 22 at [2], [145], [147].

29 *Id*. at [100]-[101].

30 *Id*. at [1].

31 *Id*.

32 *Id*. at [40], [105]-[107].

33 *Id*. at [107].

34 *Id*. at [107]. Lord Kerr and Lady Hale concurred with Lord Carnwath's judgment. *Id*. at [1]. Lord Lloyd-Jones also interpreted the ouster clause in this manner, although he did not concur with other aspects of Lord Carnwath's judgment and specifically refused to comment on the obiter dicta of Lord Carnwath. *Id*. at [147], [168].

35 *Id*. at [212].

36 *Id*. at [204].

37 *Id*. at [169].

38 *Id*. at [205].

39 *Id*.

40 *Id*. at [217].

41 *Id*.

42 *See id*. at [144] (suggesting that there are certain circumstances in which courts are not obligated to apply primary legislation).

43 Jackson v. Attorney General [2005] UKHL 56, [80], [85] (appeal taken from Eng.); AXA Gen. Ins. Ltd. v. Lord Advocate [2011] UKSC 46, [50] (appeal taken from Scot.); Moohan v. Lord Advocate [2014] UKSC 67, [34] (appeal taken from Scot.).

44 *R (Privacy Int'l Ltd)*, UKSC 22 at [144].

45 *Id*. at [150].

46 R (Miller) v. Prime Minister/Cherry v. Advocate Gen. for Scotland [2019] UKSC 41, [61]-[62] (appeal taken from Eng.).

47 *Id*. at [61].

48 *Id*. at [62], [70].

49 R (Miller) v. Prime Minister/Cherry v. Advocate Gen. for Scotland [2019] UKSC 41, [50] (appeal taken from Eng.).

50 *Id*.

51 *Id*. at [17], [56].

52 *Id*. at [56].

53 European Union (Withdrawal) Act 2018, c. 16, § 13 (UK).

54 THE CONSERVATIVE AND UNIONIST PARTY MANIFESTO 2019, *supra* note 3, at 48.

55 Queen Elizabeth II, Her Majesty's Most Gracious Speech to Both Houses of Parliament (Dec. 19, 2019) (transcript available at https://www.gov.uk/government/speeches/queens-speech-december-2019).

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57 *Id*.

58 *Id*.

59 Ministry of Justice, *Open Consultation: Judicial Review Reform*, GOV.UK, https://www.gov.uk/government/consultations/judicial-review-reform (last visited Mar. 22, 2021).

60 *Independent Human Rights Act Review*, GOV.UK, https://www.gov.uk/guidance/independent-human-rights-act-review (last visited Jan. 24, 2021).

61 *See supra* Part I (discussing efforts to maintain rule of law and access to the courts).

62 *See* Holly Ellyatt, *UK Formally Leaves the European Union and Begins Brexit Transition Period*, CNBC (Jan. 31, 2020, 6:02 PM), https://www.cnbc.com/2020/01/31/brexit-day-uk-formally-leaves-the-european-union.html (discussing the political, economic, and societal divisions Brexit has caused).

63 *Brexit: All You Need to Know About the UK Leaving the EU*, BBC NEWS (Feb. 17, 2020), https://www.bbc.com/news/uk-politics-32810887.

64 European Union (Withdrawal) Act 2018, c. 16, § 13 (UK). *See Theresa May's Brexit Deal Is Rejected by U.K. Parliament*, N.Y. TIMES (Mar. 29, 2019), https://www.nytimes.com/2019/03/29/world/europe/theresa-may-brexit.html (discussing Parliament's rejection of Theresa May's withdrawal plan).

65 *See* Standing Orders of the House of Commons 2018, c. 14 (UK) (delineating government business practices).

66 *Id*. at c. 24.

67 The first gave rise to the European Union (Withdrawal) Act 2019 and the second the European Union (Withdrawal) (No. 2) Act 2019. European Union (Withdrawal) Act 2019, c. 16 (UK), http://www.legislation.gov.uk/ukpga/2019/16/enacted/data.pdf; European Union (Withdrawal) (No. 2) Act 2019, c. 26 (UK). *See*ARTICLE 50 EXTENSION, INSTITUTE FOR GOVERNMENT (Feb. 19, 2020), https://www.instituteforgovernment.org.uk/printpdf/7569 (discussing the process of Article 50 extensions).

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69 *See* Early Parliamentary General Elections Bill, 800 Parl Deb HL (5th ser.) (2019) (UK), https://hansard.parliament.uk/Lords/2019-10-30/debates/37AAC81F-A393-44B3-998522A76FA1D3D1/EarlyParliamentaryGeneralElectionBill (discussing Boris Johnson's efforts towards repealing the Fixed-term Parliaments Act in order to withdraw the UK from the EU).

70 Scottish Independence Referendum Act 2013, (ASP 14) § 1 (Scot.).

71 *See* The Referendum Act 1975, No. 801 (UK), http://www.legislation.gov.uk/uksi/1975/801/pdfs/uksi_19750801_en.pdf (discussing procedures for holding future referendums).

72 Parliamentary Voting and Constituencies Act 2011, c. 1 (UK), http://www.legislation.gov.uk/ukpga/2011/1/part/1/enacted (discussing voting procedures in parliamentary elections).

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74 *Id*.

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77 *EU Withdrawal Bill: Amendments and Debates*, INST. FOR GOV'T, https://www.instituteforgovernment.org.uk/explainers/eu-withdrawal-bill-amendments-and-debates.

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83 European Union (Future Relationship) Act 2020, c. 16, § 36 (UK), which specifically excludes the normal ratification process found in the Constitutional Reform and Governance Act 2010, c. 25, § 22-25 (UK).

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85 *See* Richard S. Kay, *Changing the United Kingdom Constitution: The Blind Sovereign*, *in*SOVEREIGNTY AND THE LAW: DOMESTIC, EUROPEAN, AND INTERNATIONAL PERSPECTIVES 98 (Richard Rawlings et al. eds., 2013) (discussing parliamentary sovereignty in the UK); *see also* Richard S. Kay, *Formal and Informal Amendment of the US Constitution*, 66 AM. J. COMP. L. 243, 261-63 (2018) (discussing alternative informal ways of changing the U.S. Constitution); Richard S. Kay, *Two Ways to Rewrite the Constitution*, 2015 WIS. L. REV. ONLINE 25, 29-30 (discussing the process of changing the Constitution through judicial decision making); Richard S. Kay, *Constitutional Change and Wade's Ultimate Political Fact*, 35 U. QUEENSLAND L.J. 31, 33-34 (2016) (discussing Wade's theory on parliamentary sovereignty).

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87 Fixed-term Parliaments Act 2011, c. 5 (Eng.).

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98 European Union (Withdrawal) Act 2018, c. 16, § 13A (UK).

99 *See* 652 Parl Deb HC (6th ser.) (2019) col. 1122-25 (UK); 656 Parl Deb HC (6th ser.) (2019) col. 291-95 (UK); 657 Parl Deb HC (6th ser.) (2019) col. 771-75 (UK).

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111 Schleiter & Belu, *supra* note 96, at 1-4, 14-15.

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120 *Id*. at [26], [61].

121 *Id*. at [55]-[56], [58].

122 *Id*. at [30]-[37].

123 *Id*. at [30].

124 *Id*. at [41]-[48].

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