

## WHAT IS THE FUTURE FOR PUBLIC LAW?

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## 1. INTRODUCTION

What is the future of public law within the UK? How will the way in which public law develops within the UK affect and be affected by public law initiatives elsewhere at the national, regional and global levels? This enquiry will be a new work which will go beyond the EU/ECHR legacy on our public law and will look to developments challenging the future discipline and integrity of public law. There are claims that public law as a discipline is now outdated given the degree of, and growing, public/private interdependence and compenetration; growing internationalism and internationally based regulatory techniques in trade, finance, the environment; global dependence on information technology and data sharing; privatisation; contractualisation of public service; crime prevention and anti-terrorism activity. To these we may add the growing nativism of national politics which seeks to reverse transnational regulation and which runs counter to globalisation. My belief is that these claims are easily stated, over-stated and run the risk of being simplistic.<sup>2</sup> Claims that public law risks becoming something of an anachronism rest on a supposition that public law is a creature solely of the nation state and is confined by national barriers. It would be correct to insist, however, that the focus must bring into relief the multi-national dimension of public law. For over forty years our public law has been increasingly influenced by multinational and overseas legal doctrines. This is not going to cease despite protectionist and isolationist politics.

The key problems that public law addresses have not been removed. The state does not disappear; it re-forms. Novel emanations of power and influence emerge in association with governmental power. Moderating that power in the public interest remains a central objective of public law and a challenge to the neutrality of law. How will the post World

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<sup>2</sup> Some of these themes, but not necessarily their advocacy, are addressed in P.DOBNER AND M. LOUGHLIN eds *The Twilight of Constitutionalism*, C. MACAMLAIGH, C. MICHELON and N. WALKER eds *After Public Law* (2013). See also E.L.RUBIN *Beyond Camelot: Rethinking Politics and Law for the Modern State* Princeton UP (2005) and M. LOUGHLIN *Foundations of Public Law* (2010).

War II and twentieth century public law tradition have to adapt and develop in order to address the challenges and questions posed by the global context in which national public law has to operate? This context is developing at a time when there are, contrariwise, growing movements for indigenous constitutionalism, for return of national ‘sovereignty’, and for independence from external pressures which come in the form of globalism, liberal economics and internationalism.

The ‘Leave’ vote in Brexit is an indication of such sentiments as is Trump’s presidential triumph. The events of the post Brexit referendum in 2016 left many overseas commentators aghast that such a momentous decision could have been taken without qualified majorities, under the influence of gross exaggeration and falsehoods and racist prejudice. The US presidential outcome simply left many commentators aghast. But there was an uncomfortable truth that in the case of Brexit, the EU through the Commission, European Central Bank and the German Chancellor had behaved in a high handed and misguided manner towards faltering member state economies and had undermined national democratic will. The shortcomings of monetary union set the EU up as an easy object of criticism and disenchantment.<sup>3</sup> There are those who no doubt hoped that a populist sovereignty based on a referendum would not only diminish Parliamentary sovereignty – the *people* have spoken. It would also impede the progress towards an enhanced role for law and judicial process in the UK’s political constitution, a movement which is termed ‘juridification’. Such a process has been developing for more than four decades. It reached its zenith in the Divisional Court and Supreme Court’s rulings in the Brexit case in late 2016 and early 2017.<sup>4</sup>

This paper is a precursor to a study that will provide an analysis of the contemporary elements of public law and how they need to be modified and developed;

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<sup>3</sup> J. STIGLITZ *The Euro: And its Threat to the Future of Europe* (2016).

<sup>4</sup> *R (Miller) et al v Secretary of State for Exiting Europe* [2016] EWHC 2768 (Admin) and [2017] UKSC 5.

what do they provide; how relevant are they to modern governance; and how is political power, whether acting through public or private vehicles such as corporations, corporeal or virtual, rendered accountable, responsive and controllable? Are layers of power beyond control? The work will examine public law in a national and international perspective. It will fasten on core themes such as changing concepts of constitutionalism and the future embodiment of the rule of law, the separation of powers and constitutional pluralism. The work will explore the changing context of state and inter-state activity and institutions of governance and regulation, governance and decision-making techniques, transparency, promotion of the public interest and the modern meaning of democratic involvement by those who encounter power configurations and the public/private interface as citizens, aliens, 'subjects' or dis/unengaged. The work will spark widespread debate at home and abroad on these emerging challenges and themes in law and governance. The work will address themes that are not addressed in existing literature by UK lawyers who have tended to focus on home-grown or EU inspired developments or global public law. It is a very ambitious project but one which the author believes has to be undertaken.

## **2. WHAT IS PUBLIC LAW AND WHAT DOES PUBLIC LAW DO?**

We need to remind ourselves of some basic points. Public law is concerned with the exercise, non-exercise, control and accountability of, at its crudest, political power. That is the power to make decisions affecting the conditions of existence of the society or a large component of the society and decisions affecting interrelationships within society. It is public law that determines who are the members of the society. The political power in question may be exercised by politicians or by those appointed by them or those who work closely with them or even by those who act on their behalf, whether by design or default. The exercise of power relates both to elite actors within the political firmament and its outposts and their mutual relationships as well as their relationship with the members of the community over whom they exercise power.

Political power invariably resorts to legal forms for the expression of its content. One says 'invariably' but totalitarian regimes often seek a veil of secrecy and resistance to legal instruments. Such legal forms exist in what we now term constitutions, legislation and

regulations. Public law historically sets an institutional framework for legal decision-making through a royal council, an identified assembly or legislature or appointed ministers or individuals in office or by those acting on behalf of the public interest. The task of public law is to identify and give recognition to these forms and institutions and to the individuals operating within the forms and institutions. From recognition of powers public law moves to defining and interpreting the powers of the institutions and individuals setting out the extent, content and scope of their powers and privileges. The movement of power to actors in the private realm may or may not be accompanied by public law forms. There may or may not be formal delegation under legislation. Corporate law, charity law or conferral of exclusive privilege by way of monopoly may be the vehicles under which power is exercised. There is almost inescapably a body of sacred law setting out its own powers, immunities and privileges alongside/over the secular public law.

Different countries have different traditions in the manner in which public law has evolved. This subject has ample coverage in the literature.<sup>5</sup> Let it suffice for the present to say that in the western tradition there emerged a pre-eminence in ‘law’ as the official expression of power and that law was the subject of the judgments of courts in which powers could be identified, defined and challenged. In some countries power may be conferred under a formal constitution to strike down parliamentary legislation as ‘unconstitutional’. In others, England is the most prominent example, this is not the case. The origins of judicial review to interpret the limitations of statutory or executive powers can be seen in English case law from the seventeenth century. The post second world war period has been fundamental in the development of constitutionalism and constitutional

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<sup>5</sup> See T. PLUCKNETT *A Precise History of the Common Law* (1956); F.W. MAITLAND *The Constitutional History of England* (1955); J. BELL *French Constitutional Law* (1994). M. ROSENFELD and A.SAJÓ eds *The Oxford Handbook of Comparative Constitutional Law* (2013); for administrative law: J. SCHWARZE *European Administrative Law* (revised ed. 2006); N. BROWN and J. BELL *French Administrative Law* fifth edition (1998); R. C. VAN CAENEGEM *An Historical Introduction to Western Constitutional Law* (1995). Loughlin n 1 (2010); *The Max Planck Handbooks in European Public Law: Vol. 1. The Administrative State*. A. von Bogdandy, P. Huber and S. Cassese (eds) (2017).

jurisprudence in Europe. The EU's promotion of legality and legal competence through the judgments of the European Court of Justice added significantly to this tradition as well as borrowing from it.

The paramount objectives of public law comprised identifying 'official' institutions and establishing authority to make official pronouncements as law. A division is seen between 'public' bodies and 'private' bodies. In a simple sense: who is the king? What can the king do? When can the king do it? How can the king do it? Must the king act with another individual or institution? What, if any, restraints operate on the king or those acting on his behalf?

When the 'official' is identified the task is then to identify the content of the official words or actions or inactions. Unlimited power is ultimately uncontrollable power and uncontrollable power is the very antithesis of law.

Set out in these terms the tasks of public law seem relatively straightforward. However, there were accompanying difficulties complicating identification in the senses outlined above. If we focus on England as an example, when the King morphed into the 'Crown' and this latter term was used for executive government in England the challenges facing public law became legally ever more abstruse. What was the 'Crown' and what did the 'Crown' embrace? Who answered for the 'Crown'?

A further factor was the insistence on official secrecy in Britain and a lack of transparency in governance.<sup>6</sup> Another was judicial self constraint – a particular problem in England and the United Kingdom where there was no written constitution and until recently there was no *developed system* of public law. Principles of judicial review in England go back through the centuries it is true and the courts could make striking declarations in favour of individual liberty and property to mark out the distinction, and the security that

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<sup>6</sup> On the Law Commission proposals for strengthening official secrecy laws see *Protection of Official Data* No 230 (2017) [http://www.lawcom.gov.uk/wp-content/uploads/2017/02/cp230\\_protection\\_of\\_official\\_data.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2017/02/cp230_protection_of_official_data.pdf)

resided in the distinction, between ‘meum’ and tuum’. Between what is mine and what is another’s. Stephen Sedley and Paul Craig have both mapped the development.<sup>7</sup> But judicial review of administrative action was neither systematised nor systemic. It was ‘sporadic and peripheral’ to use the words of Stanley de Smith.<sup>8</sup> Judicial review has become far more frequent and systematic. There was, additionally, no written constitution allowing review of legislation within the terms and spirit of the constitution.

Yet another feature was the pre-dominance of the political constitution and a desire to keep legal intervention to a minimum. The establishment and organisation of government were matters of royal prerogative. The reality of the political constitution was reflected across the political spectrum in other nations. In a legal culture such as the British that recognised no domestic concept of fundamental human rights,<sup>9</sup> that lacked a system of public law and which relied so heavily upon the royal prerogative in matters of governance, the ‘political question’ that was inappropriate for courts to probe and subject to judicial principle and examination was more broadly constructed than in many other comparable jurisdictions.

My career as a legal academic since 1976 has witnessed a dramatic change in this tradition outlined above. Much of my work has catalogued these changes and there is no need for rehearsal. Judicial review has become a far more flexible tool to control the

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<sup>7</sup> S. SEDLEY *Lions Under the Throne. Essays on the History of English Public Law* (2015); P. CRAIG *UK, EU and Global Administrative Law* (2015).

<sup>8</sup> S.A. DE SMITH *Judicial Review of Administrative Action* 3<sup>rd</sup> ed 1973, p.3. For statistics see: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/643445/civil-justice-statistics-quarterly-jan-mar-2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/643445/civil-justice-statistics-quarterly-jan-mar-2017.pdf) and for a commentary:

<https://ukhumanrightsblog.com/2015/03/23/the-true-statistics-behind-judicial-reviews-success-rates/> (accessed 6 November 2017)

<sup>9</sup> See to the contrary M.TUGENDHAT *Liberty intact: human rights in English Law* (2017) OUP.

exercise of governmental power and abuse of authority. But judicial review has become deeply resented by government. Those with power invariably bridle at correction.

The dramatic developments we have witnessed have also included freedom of information legislation in 2000 accompanied more recently by a non statutory promotion of open data and transparency through Big Data and Open Data initiatives. The future, the Prime Minister promised in 2012, will be ‘open’.<sup>10</sup> It seems likely to depend on non statutory facilitation to promote public/private commercial exploitation of data. Many striking developments in transparency have also occurred as a result of the influence of EU law and its predecessors EEC and EC law.

Domestic protection of human rights was introduced by the Human Rights Act 1998 which made many provisions of the ECHR effective in UK law subject to a domestic gloss. The advance in human rights protection has seen the extension of judicial inquiry into executive action even in areas falling within the rubric of national security.<sup>11</sup> It has advanced and covered actions in overseas countries.<sup>12</sup> The influence of EU law and the greater emphasis on human rights has fomented changes to domestic law that have raised questions of constitutional identity largely unknown within domestic courts until the last twenty years.<sup>13</sup> The courts have been vigilant to distinguish questions of individual right

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<sup>10</sup> *Open Data: Unleashing the Potential* Cm 8353 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78946/CM8353\\_acc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78946/CM8353_acc.pdf) (accessed 6 November 2017).

<sup>11</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56 and *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.

<sup>12</sup> *Smith v Ministry of Defence* [2013] UKSC 41; *Mohammad et al v Ministry of Defence et al* [2017] UKSC 1; *Serdar Mohammed et al v Ministry of Defence* [2017] UKSC 2; *Belhaj et al v J. Straw et al* [2017] UKSC 3.

<sup>13</sup> *HS2* [2014] UKSC [2014] UKSC 3; *Pham* [2015] UKSC 19.



which are appropriate for judicial protection and wider questions of policy where the courts lack expertise such as acting ‘in the interests of national security’.<sup>14</sup>

### **3. SOME QUESTIONS TO ADDRESS**

What we now need to examine are not the advances made but the problems that remain through these advances. These problems constitute a remaining agenda for reform and challenge in our public law.

#### ***3.1. Brexit***

First of all, the outcome of the EU referendum will have an overriding determination on the challenges that face our public law. The Brexit result is known. We do not know what Parliament – both Houses – will eventually do in the event of the leave vote. One hoped MPs acting as responsible representatives will not consent to a bill repealing the European Communities Act 1972 and coming into effect before the UK government has formally withdrawn from the EU treaties. Such action would be in breach of the treaties and international law. The government rightly rejected calls for such a measure. Parliament, as a result of the *Miller* judgment was presented with, and has assented to, legislation authorising notice under Art 50 TEU.

We simply do not know how the courts will react to a Brexit in the longer term. We know that the courts have ruled that Parliament must have a vote via legislation before Art 50 TEU may be invoked. Parliamentary sovereignty and the unique status of EU law as a source of UK law, necessitated such measure.<sup>15</sup> The courts will have no alternative but to accept the fact of Brexit if that comes about after treaty negotiation and legislation. But how will courts operate in a significantly altered landscape? The government has presented

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<sup>14</sup> *Secretary of State for the Home Department v Rehman* [2001] UKHL 47.

<sup>15</sup> Note 4 above.

its plans to repeal the European Communities Act 1972, to remove the jurisdiction of, and references to, the European Court of Justice and to transmute EU implemented laws into domestic law where possible.<sup>16</sup> It will involve unprecedented executive law making as laws are modified or removed. Senior judges have urged the government to provide clear guidance on how UK judges should treat CJEU judgments delivered after the UK departs from the EU where words in an EU measure are mirrored in UK legislation.<sup>17</sup>

We do not know whether Brexit will foment pressure for a new constitutional settlement that might include a written constitution. Nor do we know whether Brexit will lead to the break-up of the Union or whether a written constitution might be the only way of keeping the devolved Union together. Centrifugal forces may prove irresistible on a Brexit, although the appetite for independence in Scotland seems to have waned as I write. The Constitution Reform Group has published a working document on an Act of Union as a new constitutional settlement securing the long term strength of the union of the United Kingdom.<sup>18</sup> Even if break-up of the Union is prevented, there are likely to be the most difficult of questions concerning devolved competencies in human rights protection. What will occur in UK-Irish Republic relations? The result of the change in Parliamentary

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<sup>16</sup> *Legislating for the United Kingdom's withdrawal from the European Union* Cm 9446 (2017)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604516/Great\\_repeal\\_bill\\_white\\_paper\\_accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf) The bill as introduced is at: [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill\\_2017-20190005\\_en\\_2.htm#pb2-l1g6](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_2.htm#pb2-l1g6) (accessed 6 November 2017).

The Withdrawal Bill faces an extraordinarily difficult passage before enactment with over 300 amendments tabled.

<sup>17</sup> Clause 6 states that UK courts and tribunals *may have regard* to CJEU decisions and principles in judgments after exit day 'if it considers it appropriate to do so'. Since then a 'transitional arrangement' has entered the reckoning. See Lord Neuberger 'The role of the judges in a post-referendum world' <http://www.publiclawproject.org.uk/resources/265/the-role-of-the-judges-in-a-post-referendum-world> (visited 3 November 2017).

<sup>18</sup> <http://www.constitutionreformgroup.co.uk/publications/> (accessed 6 November 2017).

standing orders allowing English only stages in Parliamentary legislative procedures for legislation affecting English concerns only may prove legally and politically impossible to manage and unforeseeably divisive. The departure of Scotland, and the less likely departure of Northern Ireland, both of whom voted to remain, will leave a Parliament for England and Wales only. This in itself raises questions about the legislative and institutional supremacy of Parliament.

The decision to hold a referendum on the UK's future in the international community is a striking illustration of Parliament's diminution. It seems that the 'people' have become a component of Parliament not through representation but through direct involvement.<sup>19</sup> The accusation by the *Daily Mail* after the Brexit judgment that the judges who upheld Parliament's constitutional position were 'Enemies of the People' was supporting Parliament's diminution. We have to see how Parliament will react to measures brought before Parliament by the executive to achieve Brexit. The *Miller* decisions of the Divisional Court and Supreme Court have been referred to. As stated long ago, constitutionally this (ie what to do about the referendum result) is Parliament's judgement – no-one else's.<sup>20</sup> The Referendum Act 2015, although agreed to overwhelmingly by Parliament, placed no legal duty on Parliament to accept the outcome as binding. It is advisory and any Prime Ministerial representations on its mandatory outcome are not legally binding on Parliament. The Supreme Court affirmed this. To compare a referendum statute which has legal effects simply consider the terms of the EU Act 2011. Under its terms the government cannot agree to EU treaties etc unless the referendum condition is satisfied. This requires approval in a UK referendum. A government would be acting unlawfully if it acted without referendum approval. But even here it does not dictate that

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<sup>19</sup> V. BOGDANOR (2012) *Oxford Jo. Of Legal Studies* 32(1), 179 'Imprisoned by a Doctrine: the Modern Defence of Parliamentary Sovereignty.'

<sup>20</sup> It is worthwhile recalling the views of the deeply unfashionable, sexist etc Irishman Edmund Burke on the duties of a Westminster MP as an elected representative: <http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.htm> (accessed 6 November 2017). 1

Parliament also has to approve what the referendum decides. It is the executive that is bound in law.

### 3.2. *Sovereignty*

Without an overriding EU edifice questions of sovereignty will no longer focus on the jurisprudence of the ECJ and its rulings. But as I have written elsewhere, we are unlikely to return to a position of Parliamentary Sovereignty as understood over forty years ago.<sup>21</sup> Nonetheless, the Queen’s speech in May 2016 proclaimed that Her Majesty’s ministers will uphold Parliamentary Sovereignty and the primacy of the House of Commons – a blunt message to the Lords.<sup>22</sup> *Miller* reminded the government of that sovereignty. It was determined by the court not asserted by Parliament. It richly illustrates that ‘twin sovereignty’ of the Crown in its courts and the Crown in its Parliament.<sup>23</sup> Indeed, Parliament shows little sign of assertion. The courts emerged as the senior partner. How will *Miller* be used in future international developments?<sup>24</sup> What precedent does this ‘unique’ case set?

Nonetheless, I have no doubt that the courts perceive limits on what Parliament may legitimately enact in legislation and that they have the ability to shape appropriate relief when required. This is not to suggest that the UK courts are surrogate legislators. There is a difference between striking down legislation as unlawful and refusing to enforce legislation which abuses human rights or the rule of law. The position was neatly summed up by Lord Hodge in a case involving Scottish prisoners challenging a prohibition on such

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<sup>21</sup> P.BIRKINSHAW and M. VARNEY in P.BIRKINSHAW and A. BIONDI eds *Britain Alone! The Consequences and Implications of UK Withdrawal from the European Union* (2016) ch. 1.

<sup>22</sup> <https://www.gov.uk/government/speeches/queens-speech-2016> (accessed 6 November 2017).

<sup>23</sup> Lord Bridge in *X v Morgan-Grampian* [1990] 2 All ER 1 at 13.

<sup>24</sup> P.BIRKINSHAW (2017) *European Public Law* ‘Editorial’ Vol 23(2).

prisoners voting in the 2014 referendum on Scottish independence. Their challenge was unsuccessful as the exclusion involved no breach of law. In *Moohan v Lord Advocate* Lord Hodge said, with the support of four other justices, that in relation to a claim based on the common law:

"I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by the principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful." ([2014] UKSC 67 para 35)

In accepting this position, the Court of Appeal has similarly refused to rule legislation excluding certain ex pats from voting in the Brexit referendum in June 2016 unlawful under the common law. The possibility stated by Lord Hodge did not exist in *Moohan* because there was no abuse in the statute at the heart of the case. By implication, had there been an abuse a different approach would have been possible.<sup>25</sup>

The point at issue was repeated by Lord Neuberger writing for a unanimous court in *R (Public Law project) v Lord Chancellor* in a case dealing with restrictions in regulations on legal aid entitlement.<sup>26</sup>

In our system of parliamentary supremacy (*subject to arguable extreme exceptions, which I hope and expect will never have to be tested in practice*), it is not open to a court to challenge or refuse to apply a statute, save to the extent that Parliament authorises or requires a court to do so. [Para 20]

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<sup>25</sup> *Shindler v Lord Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469 paras 47 – 50 Lord Dyson.

<sup>26</sup> [2016] UKSC 39.

The possibility of judicial non enforcement of a primary statutory was acknowledged. This is an idea that travels back as far as *Dr Bonham's case* and Chief Justice Coke in 1610. Coke famously stated that 'in many cases' the common law will *control* acts of Parliament rendering them void. The doctrine has not been treated as orthodox in the last two and a half centuries and there has been endless debate as to what the dicta actually meant. The contemporary version does not speak of holding statutes 'void' 'in many cases' but on their non enforcement via a declaration of illegality in the event of extreme abuse of fundamental right. Parliament is not unqualifiedly sovereign. But, what will happen if a court declares provisions in a statute 'unlawful' or 'illegal' and the government chooses not to accept the declaration?

The instincts of British judges, nonetheless, are inherently conservative – that is to achieve consistent development through the application of underlying principle and not abrupt and unjustified change.<sup>27</sup> That is change that is not solidly grounded in legal doctrine. Their role is not one of legislators or the striking down of legislation except in an *in extremis* situation where a statutory provision or provisions would not be enforced. If we were to see a new constitutional settlement involving a written constitution this fact, that is the fact of judicial conservatism, would have to be reckoned with. It would be a significant barrier to a written constitution in the United Kingdom as exists in the USA, Germany and even France and Canada. Within a tradition of conservatism, British judges nonetheless have made striking developments in legal doctrine. This introduction provides several examples of how, over time, judicial review and judicial protection have advanced.

### ***3.3. Further English Devolution***

Further devolution of power to English urban authorities could lead to significant centres of power outside the Metropolis and together with the Greater London Authority

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<sup>27</sup> See *Lord Sumption and the Limits of the Law* NICHOLAS BARBER, RICHARD EKINS, PAUL YOWELL eds (2016) for essays on judges, adjudication and legislation.

these centres could pose a real challenge if not to the legislative omni-competence of Parliament then to the supremacy of Parliament as a constitutional institution. Power is increasingly seeping away from Parliament. It may be difficult, impossible, for Parliament to regain its former institutional dominance.

### **3.4 . What is Public?**

A further question, and one that initiated our inquiry, involves the identity of the public realm. This is a subject that has accompanied public law development particularly, but not exclusively, since the end of the second world war with the growing agenda of nationalisation but it took on added significance in the era of Margaret Thatcher. Her policies of privatisation, off-loading and contracting out of functions formerly in the public sector heralded a global movement towards provision of public service and even the conduct governance by the private sector. Naturally, this massive transfer of power and influence raised questions in the minds of lawyers and political scientists. If private bodies were acting as state surrogates, or even in collaboration or in consort with the state, to what extent was it appropriate to subject them to the discipline of law that was designed to hold public power accountable? To what extent have private corporations or private interests become *de facto* state bodies? What are the private parts of the state and, once identified, what accountability devices should they be subject to? Judicial review, for instance, developed analytical devices to assess whether private bodies were to be subject to judicial review.<sup>28</sup> Judicial review also had to assess when, if ever, powers residing in contract involving a public authority were to be subject to review.<sup>29</sup> In English law, contract was a part of private law and under orthodox Diceyan doctrine not appropriate for judicial review.

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<sup>28</sup> Going back in England to *R v Panel on Takeovers and Mergers ex p Datafin* [1987] QB 815 (CA).

<sup>29</sup> *R v Legal Aid Board ex p Donn* [1996] 3 All ER 1; cf *Hampshire CC v Supportways Community Services Ltd* [2006] EWCA Civ 1035.

Inroads have been made into this tradition especially under the EU public procurement directives and regulation of tendering.

### ***3.5. Freedom of Information (FOI)***

Two areas raise particular problems. One of these concerns the extent of freedom of information legislation. The UK legislation (FOIA), legislation with a very wide scope, provides for almost universal coverage of public authorities. There are notable, but few, exclusions. Power is given to the secretary of state to designate private bodies and contractors as a ‘public authority’ subjecting them to the Act’s requirements. This power has been used very sparingly and then only to cover bodies with a high level of ‘officialdom’ such as the Association of Chief Police Officers and the financial services ombudsman. The government has shown a marked reluctance to extend freedom of information to apply directly to private contractors or private regulators. This approach was not criticised by a Commons Committee reviewing FOIA.<sup>30</sup> As private bodies assume more of the powers of government and remain unelected, demand for greater transparency in the private/public interface will grow. What are the criteria to be used to assess when such an extension is justifiable? The criteria must focus on the public interest and how the public interest is best served. This question lies at the heart of the present inquiry.

There were fears that a review of the FOIA by an ‘independent’ commission appointed by the government would neutralise the Act and would make it less effective as a vehicle of openness. The report early in 2016 did no such thing but, to some surprise to those fretful of an evisceration, recommended worthwhile and sensible reforms.<sup>31</sup> While

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<sup>30</sup> Justice Committee First Report (2011-12) HC 96 I *Post Legislative Scrutiny of the FOIA*. Bodies covered by environmental access laws have more flexible status identifying provisions: *Fish Legal* [2013] Case C-279/12 <http://www.bailii.org/eu/cases/EUECJ/2013/C27912.html>

<sup>31</sup> *Independent Commission of Freedom of Information Report* March 2016 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/504139/Independent\\_Freedom\\_of\\_Information\\_Commission\\_Report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf) (accessed 6 November 2017).



FOIA seems firmly established in our constitutional landscape, what IT developments under ‘Big data’ and Open data’ will by-pass FOIA requirements? Could this happen in a manner that undermines FOIA? Most crucially, FOIA has become a part of ‘transparency’ now seen as a universal attribute of good governance. How does transparency, which at its base seeks to explain the basis of the operation of power and to expose the process of governance to scrutiny and simplification, deal with the post fact and post truth society which are seen as responsible for the Brexit vote and Trump’s victory?

FOIA is a domestic statute aimed at domestic public authorities. The USFOIA acts similarly. A further question that one has to pursue is whether an international FOIA needs to be agreed in order to bring transparency to bodies whose reach is global? Who would agree to it, under what authority, what would it cover and what would it contain? Regional versions of this exist, the most famous being the law in the EU which includes environmental information and the ECHR Convention on access.<sup>32</sup> Brexit might suggest a step back from such wider developments.

### ***3.6. Human Rights***

A not dissimilar consideration concerning the public/private boundary applies to human rights protection. Although the Human Rights Act applies to public bodies and private bodies exercising public functions, and to that extent it goes further than the FOIA, the courts have made heavy weather of these definitions displaying a reluctance to extend state responsibility to private actors who have taken over responsibilities from public

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See note 6 above on suggested official secrecy laws in the UK.

<sup>32</sup> See the CHR (GC) *Magyar Helsinki Bizottsag v. Hungary* [2016] ECR 975. <http://www.bailii.org/eu/cases/ECHR/2016/975.html> and compare with *Kennedy v Charity Commission* [2014] UKSC 20 and *Evans v Att Gen* [2015] UKSC 21. See Mowbray [2017] *European Public Law* Vol 23(4) forthcoming.

authorities as a commercial endeavour.<sup>33</sup> The question of horizontality, like transparency, is a major issue for the future although it is not new. ‘Horizontality’ here refers to the duty on private bodies to comply with human rights duties. A recent decision of the UK Supreme Court<sup>34</sup> confirms that in a contractual relationship between two private parties there is no space to infer state responsibilities and ECHR duties on mortgagees seeking possession orders. The case was different to those where possession orders from public sector landlords were concerned or cases where courts invoked ECHR rights to prevent tortious harm to individuals by private parties such as newspapers.<sup>35</sup> Courts have also interpreted relevant statutes in a manner which does impact on a private law relationship where statutory rights for a party to the agreement have been subject to the interpretation of ECHR rights. Courts have interpreted the statutes in a manner that prevents a breach of the ECHR right.<sup>36</sup>

The question of human rights protection is an area in which legal change is promised in the UK change which is bitterly contested. It seems unlikely that horizontality (application to ‘private’ bodies) will be attended to if change does take place so that the HRA is replaced by a UK Bill of Rights. Indeed, the highly criticised outline proposals [which the 2016 Queen’s Speech stated would be ‘brought forward’ but without accompanying detail (just as the 2015 Queen’s Speech reported)] of the government seem intent on restricting human rights protection. The Conservative Party manifesto of 2017 stated that a new bill of rights for the UK (‘the human rights legal framework’) would be returned to once the Brexit process was finalised – it will take a brave soul to predict when that might be.

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<sup>33</sup> *YL v Birmingham City Council* [2007] UKHL 27.

<sup>34</sup> *McDonald* [2016] UKSC 28.

<sup>35</sup> *Commencing in Douglas v Hello!* [2001] QB 967 (CA).

<sup>36</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

Resentment has been expressed over a perceived ‘loss’ of control over our law and courts because of the ECHR and the Strasbourg court standing in judgment of the UK. The extraterritorial effect of the ECHR and its application through the HRA have brought serious disquiet to those who believe that the rule of law is a purely national, the popular expression of commentators is autochthonous, concern. The latter dimension illustrates vividly the way in which protection of human rights has been seen in some quarters as invading the zone of immunity reserved to the executive and those acting on behalf of the executive. Announcements in October 2016 by the UK Defence Secretary indicate that the HRA will not apply to UK armed services operating outside the jurisdiction. Judgments of the Strasbourg court had extended the scope of liability and future derogations would be sought.<sup>37</sup> The manifesto referred to above stated that the UK ‘will remain signatories of the ECHR’ for the duration of the next Parliament. Mrs May was thinking of a five-year term when she made that prediction.

### ***3.7. Equality and Discrimination***

Equality and discrimination present particular difficulties. Nationality allows widespread discrimination between individuals based on the accident of birth. The mass migration following conflict in the middle-east and parts of Africa illustrates as poignantly as possible that nationality and citizenship define one’s right of entry and residence, one’s right of movement. The problem is one of size of the migrating population and their lack of resources. For the wealthy few concessions can be readily made. While efforts to address discrimination have been legislated in the UK since the 1960s in relation to race, gender and a growing number of ‘characteristics’ probably the most pervasive and enduring discriminating features emanate from class and wealth. The two are not the same. Class is no guarantee of wealth just as wealth is no guarantee of class. But privileged birth invariably sets one on a course for life with built-in advantages in relation to education,

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<sup>37</sup> <https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations> (accessed 6 November 2017). See n 12.

employment, opportunity and prospects. ‘Casualisation’ of labour has a pronounced effect on the socio-economically disadvantaged. Attempts in legislation to address socio-economic disadvantages have either lain fallow or have been ineffective in helping to realise greater equality. The incoming Prime Minister in July 2016 promised to set this problem at the heart of her administration following the Brexit vote. Her first major policy proposal involved a national revival of grammar schools in England,<sup>38</sup> a policy which had been responsible for divisive reactions, both in the past and present. Grammar schools are accused of being elitist and inegalitarian in their impact on secondary (11-18 year old) education. The best resources are diverted to a minority. A possibility for all becomes a reality for a few. The voracious appetite of Brexit to absorb the lion’s share of government and Parliamentary time, and the absence of a Parliamentary majority, meant that this policy fell by the wayside after Mrs May’s ill-judged call for the 2017 election.

It would be over-simplistic to suggest that the Brexit referendum result was ‘out’ because of a disaffected working class vote. That vote, however, had its considerable place and clearly registered the resentment of working class communities’ sense of exclusion, alienation and disadvantage. This process of disengagement has been in existence since the 1970s but has been heightened by globalisation and professional elitism.

The 2017 Higher Education and Research Act provides an interesting example in this discussion. The Act purports to be a measure aimed at enhancing equality of opportunity for all in degree level education. Its proposals aim to dismantle the safeguards that constitutionally ensured independence in university management through the Privy Council and to set a framework which places political control of decision making, in the sense of making crucial decisions on policy, through the Office for Students, a non departmental public body which will replace two existing bodies (below). The Act

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<sup>38</sup> [https://consult.education.gov.uk/school-frameworks/schools-that-work-for-everyone/supporting\\_documents/SCHOOLS%20THAT%20WORK%20FOR%20EVERYONE%20%20FINAL.pdf](https://consult.education.gov.uk/school-frameworks/schools-that-work-for-everyone/supporting_documents/SCHOOLS%20THAT%20WORK%20FOR%20EVERYONE%20%20FINAL.pdf) (accessed 6 November 2017).

unleashes unprecedented market forces as the controlling factor in establishing or dis-establishing universities. The chief executive of the Office is appointed by the Secretary of State. Existing powers of direction by the secretary of state are replicated for the Office. It will be an ‘arms length’ quango. The story of quangos is a long story and to that extent nothing institutionally is strikingly innovative in the Act. We have long witnessed the use of ciphers in British governance. Quangos inevitably entail control by a minister who uses a non-ministerial public body to conceal the full extent of the exercise of his/her own power.

The premise of the Act is that the Office will be financed from fees etc from universities although the Secretary of State will make grants to the Office and may make loans. Its role is to encourage competition in higher education driving up quality and outcomes through a Teaching Excellence Framework. It will assume the regulatory powers of the existing Funding Council and the statutory powers of the Director of Fair Access to Higher Education. It will have entry and search powers under warrant. Its supplementary co-incidental powers include doing ‘anything ... which appears to it to be necessary or expedient for the purpose of, or in connection with, the performance of its functions.’ [Sched 1 para 15]. Such sweeping powers are often given to ministers or local authorities. The Office is the state in microcosm.

The independent Office will be charged with maintaining current protections for academic freedom and institutional independence. Elite institutions will remain largely untouched and appeared set to have authorisation to increase their student fees – although all institutions will be able to apply for such an increase. The potential voting power of the ‘young vote’ has forced the government to accept that since the Bill was introduced the climate for raising fees has altered significantly. Costs of living increases in fees will be dependent on the Office and government. The government can also alter retrospectively the borrowing conditions of student loans by changing (increasing) repayment thresholds and

interest rates.<sup>39</sup> Banks cannot do this. Poorer students are likely to enrol with newly created entrepreneurial institutions without the former guarantees of quality based on academic peer review and traditions of dedication to education. No doubt an army of consultants will be willing and paid recruits to advise on quality. A new unified research institution – UK Research and Innovation – will comprise different subject panels and will aim to reduce bureaucracy – the very thing the reforms for creating greater competition and transparency in higher education are likely to create.

Wealth, class and privilege set the parameters for our lives and how they are fulfilled. Addressing this question is one that must be tackled in legislation in a manner which is consistent with the seriousness of the task just as race, gender, disability and orientation have been.<sup>40</sup> Superficially, overt discrimination in protected areas is not as manifest as was once the case. Events after the Brexit vote should not allow complacency when large increases in racially motivated incidents and crimes were reported. But many of the protected areas have high proportions of members from the lower socio-economic groups. The subject brings home in a vivid manner how law reform through case law – the ‘test case’ strategy - is inherently limited. This is a task for Parliament and the statute book.

### ***3.8. National Security***

National security has often been referred to as the *suprema lex*. As we have witnessed greater migratory movement, security has become a global pre-occupation encompassing national, regional and international dimensions. *Salus populi* is the first *raison d’etre* of government. *Salus mundi* has understandingly been judicially

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<sup>39</sup> <https://hansard.parliament.uk/commons/2016-07-18/debates/C97C7935-F73E-4693-ACEA-9B49A67F4B2B/StudentLoansAgreement> (accessed 6 November 2017).

<sup>40</sup> <http://www.law.leeds.ac.uk/assets/files/events/Inequality-and-the-law-lecture-plenary.pdf> (accessed 6 November 2017).

acknowledged by domestic judges as a primary concern.<sup>41</sup> The problem is: does invocation of ‘national security’ allow too wide a cloak to be drawn over governmental action? The exaggerated and unjustifiable use of intelligence without independent verification to justify the invasion of Iraq in 2003 has been roundly criticised by official reports, most recently the Chilcot report.<sup>42</sup> There is widespread and continuing suspicion of government use of secret intelligence.

Much of the work of the security and intelligence agencies is conducted under the strictest conditions of secrecy. We have had to rely upon unofficial leaks to uncover the world-wide scope of surveillance over all of us. Litigation involving terrorist suspects takes place in closed courts or tribunals with special provisions where a suspect is not allowed to see the evidence, or all of the evidence, against the suspect. The more we come to discover hitherto secret practices the more concern is expressed about the power, and absence of appropriate forms of accountability, over the services and their influence in law-making and policy formulation. Sir Stephen Sedley has even asked whether the security and intelligence services constitute an autonomous power of the state without effective constraint and control.<sup>43</sup> If this is correct are there any recommendations that can sensibly be made to improve oversight and accountability?

The legislative framework of surveillance carried out by UK authorities has been recast by the Investigatory Powers Act 2016, Theresa May’s last major initiative as Home Secretary. Ironically, the Act’s temporary legislative precursor was the subject of a legal challenge before domestic and EU courts by David Davis MP, appointed by Prime Minister May as Brexit minister, although he departed from the litigation by the time the Advocate

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<sup>41</sup> *Secretary of State v Rehman* [2001] UKHL 47.

<sup>42</sup> *The Iraq Inquiry* July 2016 <http://www.iraqinquiry.org.uk/the-report/> (accessed 6 November 2017).

<sup>43</sup> S. Sedley note 7 above chapter 9.

General of the EUECJ gave his opinion.<sup>44</sup> This opinion basically advised that national parliaments could enact duties of general data retention for communication providers and access powers to the retained data to authorities providing this obligation was limited to what was strictly necessary in the fight against serious crime investigation and prevention and was accompanied by necessary and strict legal safeguards of legal certainty, accessibility, foreseeability, and proportionality. The obligation would include all the safeguards outlined by the EUCJ in the *Digital Rights* case including prior independent review before access to the data by the authorities. The judgment of the ECJ was even more constraining on the national legislation both in relation to retention and access to data. The fight against terrorism cannot render ‘*the general and indiscriminate retention of all traffic and location data .... necessary.*’<sup>45</sup> In short the obligation of retention must be proportionate, within a democratic society, to the objective of fighting serious crime, which means that the serious risks engendered by the obligation, in a democratic society, must not be disproportionate to the advantages which it offers in the fight against serious crime.

Will the IP Act strike the right balance between security, surveillance and individual autonomy? Needless to say, the jurisprudence of the CJEU will not be binding in its judgments delivered post Brexit although the EU Withdrawal Bill allows UK courts and tribunals to have regard to post exit CJEU decisions and principles. Could we expect such a robust protection from our own courts?<sup>46</sup> The EU Withdrawal Bill follows the White Paper

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<sup>44</sup> Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen and Secretary of State for the Home Department v Tom Watson* <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-07/cp160079en.pdf> (accessed 6 November 2017) from which Davis recused himself see *Secretary of State v D. Davis* [2015] EWCA Civ 1185.

<sup>45</sup> Case C-293/12 and C-594/12, [2016] EUECJ:C:2014:238 para 103 and paras [95], [108] and [112].

<http://www.bailii.org/eu/cases/EUECJ/2016/C20315.html> (accessed 6 November 2017).

<sup>46</sup> See note 17 above. The UK Investigatory Powers Tribunal has referred to the ECJ questions concerning the coverage of EU law and UK bulk surveillance communication data powers: *Privacy International v Secretary of*



and ensures that the EU Charter of Fundamental Rights, which was a core aspect in the ECJ case above, will not be absorbed post Brexit into UK law.

### ***3.9. Internationalisation of Public Law***

The globalisation of law and the relationship between law and foreign policy have been transformed since the Second World War with immeasurable implications for the relationship between law and politics. The aftermath of the Second World War strengthened the hand of international law. But international law is binding on states often without any means of enforcement. Its application to non-state bodies is limited. It is only 'enforceable' by means of judgments of the international court which in reality means through politically loaded procedures of the United Nations and Security Council. International law is the spiders' web through which the big insects pass without hindrance after Honoré de Balzac. Where an international judicial body does have significant power, such as the appellate body of the WTO dispute settlement system, its rulings have been compromised by acts of the US government which has also blocked the re-appointment of a judge to the tribunal because it accused him of creating, and not applying, the law.<sup>47</sup> Conversely, when the Independent Tribunal in the South China Sea arbitration issued a unanimous ruling against China, the decision was rejected by China but supported emphatically by the USA. The USA had not, however, ratified the relevant treaty, the UN Convention on the Law of the Sea.<sup>48</sup> In fact, the imposition of EU sanctions against Russia after the annexation of the Crimea and deliberate destabilisation of the Ukraine is a real

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*State for Foreign Affairs* 30 October 2017 <http://www.ipt-uk.com/judgments.asp?id=35> (visited 3 November 2017).

<sup>47</sup> FT 1 June 2016 'Washington threatens to undermine the WTO.'

<sup>48</sup> <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf> (accessed 6 November 2017).

example of the ‘bite’ of EU foreign relations policy and one that was propelled by the UK as a member of the EU.

Some states allow for international law to be a part of domestic law, and therefore domestically enforceable, under specified circumstances. This is not the case in the UK where international law has to be ‘incorporated’ within domestic law before becoming enforceable. There are well recorded attempts to make international tribunals more effective in relation to war crimes – the International Criminal Court is a striking example in such crimes although signatories are withdrawing their agreement - and in trade and commercial disputes, financial regulation, environmental protection and communications regulation as well as opening up claims to individuals as litigants. International networks in a wide range of subject areas exist. But the subject of the theme introduced in this paragraph takes a different dimension.

What is interesting and important for the present discussion is the manner in which domestic courts have become increasingly involved in litigation concerning foreign policy. These matters would hitherto have been largely non-justiciable before domestic courts. They were a part of that zone of executive immunity about which we spoke earlier. As a consequence of the extension of protection of individual rights, whether under the Human Rights Act or common law development of judicial review or liability, there has been a shrinking of the spheres of executive immunity in previously inviolable areas. Inroads have been made into the immunities of act of state, both UK and foreign, state and diplomatic immunity and actions of the military and leading politicians in overseas conflict zones have been questioned in the domestic courts. These are remarkable developments in justiciability and ones which require further exploration.<sup>49</sup>

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<sup>49</sup> See P.BIRKINSHAW in *Le Droit public britannique: état des lieux et perspectives* sous A. Antoine Société de législation Comparée, Collection Colloques Vol 27, p. 47.

Security, as already stated, is an international concern. A large body of scholarly work is being carried out on the global dimension of public law. International public law differs from public international law insofar as its domain involves public law systems in domestic jurisdictions, in regional systems such as the European Union and in international agreements such as the WTO. The object of inquiry is the development of principles of justice in relation to the exercise of power and regulatory frameworks, initially state, or state sanctioned, or state approved power and how principles of law and justice and their applicability beyond a nation state, and beyond state bodies, may develop. The object of concern is with non state actors, although such bodies may have state recognition. The concern is focused on their use of power and influence and how bodies and individuals may use principles developed from public law to protect their individual or collective interests. How have the principles of public law advanced justice beyond the state? Paul Craig has recently conducted an extensive review of the literature in the area of global administrative law. It constitutes an excellent introduction to this subject.<sup>50</sup> The political rhetoric since Brexit and the 2016 Presidential election is defiantly anti globalisation and internationalism. How will that development affect this subject?

### ***3.10. Access to Justice and the Rule of Law***

Access to Justice is far from a novel theme! This was the subject of my inaugural lecture in 1991. The UK is not alone in witnessing the impact of austerity measures on access to justice. The outcome is the same everywhere: the impoverished are removed from the possibility of going to law where their interests or rights are involved. The impact in England is particularly hard in legally aided work, family law, employment and social security law and in judicial review. There have also been costs imposed on defendants in criminal litigation which call into question the basic fairness of the criminal process. What this represents is an assault on the rule of law itself. The UK Supreme Court criticised regulations as *ultra vires* which removed from legal aid entitlement those people who could

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<sup>50</sup> See note 7 above.

not satisfy a residence test as set out in the regulations. The court found that the power exceeded those given by Parliament in legislation but declined to rule on the discriminatory nature or otherwise of the regulations.<sup>51</sup>

The rule of law is a value laden concept and there are many conceptions of the rule of law. We know the concept ranges in content from the most formal of offerings based on abstract equality, legal regularity and the blind eye of justice to the fullest evocations of substantive interpretations where substantive equality ultimately entails widespread redistribution of wealth. Conversely, many of those who support a substantive content for the rule of law argue it is not the rule of law that can make the poor richer or the rich more humble.<sup>52</sup> Reducing injustice nonetheless will invariably have distributional implications.

Within the UK, reflecting practices elsewhere, we have witnessed a movement from procedural to substantive content in UK/EU law and UK law more generally. It would now be conspicuous not to include protection of human rights within the rule of law. This was unthinkable in conventional analyses thirty years ago. The importance of the ECHR and Court of Human Rights is an essential feature in this development. Lord Bingham in his rightly acclaimed book on *The Rule of law* (2010) lists the protection of human rights as a component of the rule of law as well as access to law. The movement to a greater substantive content for the rule of law is widely accepted. But we need to establish the limits of the rule of law and its interpretation today – both for domestic law, and the interrelationship between domestic law and extra territorial systems of law. The position of EU law and what it offers us in the UK will be affected by the Brexit vote. Quite how we shall have to wait and see.

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<sup>51</sup> *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39. See also the powerful statements in *R (UNISON) v Lord Chancellor* [2017] UKSC 51 paras 65-89.

<sup>52</sup> S. SEDLEY note 7 p 280.

If a majority cannot afford to go to law what does this say about equality before the law? Many years ago, and sporadically since, I worked on non judicial forms of redress which form a part of the alternative dispute resolution movement. These forms of redress are a necessity. But they cannot be a complete substitute for judicial redress. When judicial redress is denied to the majority the rule of law not only runs the risk of becoming meaningless; it will become meaningless.

It is therefore a matter of regret that for the first time since the 1950s there is in England and Wales no statutory standing body to keep the whole field of administrative justice under scrutiny. The Administrative Justice and Tribunals Council was abolished in 2013 in the cull on public bodies under the coalition government and a non-statutory advisory body, the Administrative Justice Forum, meets twice a year.<sup>53</sup> This is not an adequate substitute for a standing body to advise on administrative justice on a comprehensive basis.

### ***3.11. Brexit and the Future***

As I wrote at the beginning of this introduction, this analysis takes place at a time when the UK has made the most important decision in over forty years, undeniably unprecedented, in relation to the UK's relationship to the international community. I say 'unprecedented' because the referendum in 1975 was with reference to a trading community of what was about to become nine members and not a 'union' of twenty-eight. Quite what the ultimate bearing of the June 2016 decision will be on the final outcome in our relationship with the EU has to be determined. The repercussions of the Brexit referendum vote are incalculable. Complex negotiations appear quagmired. One question that will be uppermost is the following: how will our courts develop the nascent

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<sup>53</sup> <https://www.gov.uk/government/groups/administrative-justice-advisory-group> (accessed 6 November 2017).

On the concerns of the Administrative Justice and Tribunals Council's demise (from the AJTCs perspective) see *Securing Fairness and Redress: Administrative Justice at Risk?* (2011).

constitutionalism that the Supreme Court has fostered in the last few years and which has its origins in earlier case law of the appellate committee of the House of Lords? The questions raised hitherto in this paper will remain and become more pressing. *Miller* is a striking example.

The decision from the plebiscite was to leave. We have no idea what this will ultimately mean for the detailed outcome and content of negotiations. What will be the relationship between the UK and EU that emerges? What will be the place of the UK in the new world order? Will there be pressure to remove the UK from a permanent seat at the UN Security Council? What will be the outcome for sovereignty? ‘Sovereignty’ was one of the most widely touted concepts in the Brexit campaign. I do not recall any sensible unpacking of this term beyond ‘controlling borders’ and immigration and ‘getting back control’, meaning making our own laws and making them ‘democratic’ and giving Parliament sovereignty over our judges. Parliament never ceded its overall legislative sovereignty although I have spoken of a limitation above in the form of judicial non-acceptance of egregiously abusive acts against the rule of law. The UK ministers and UK elected MEPs participated in law making at the EU level. National Parliaments were given greater influence in EU law-making. In international negotiations the Crown is ‘sovereign’ but has always, or certainly for over 400 hundred years, lacked the power to change domestic law. The Brexit judgment *advanced* that point emphatically, although I have spelt out some reservations.<sup>54</sup> If the UK lacked competence to make trade treaties where the EU had acted that was because we had pooled sovereignty with our partners in these matters. I would ask for a catalogue of disadvantages that such agreements effected. None exist I would submit.

This phrase ‘sovereignty’ of course is not self-defining. But no-where was it explained in a manner that brought out and unpacked its real significance. No-where were

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<sup>54</sup> Editorial (2017) *European Public Law* Vol 23 Iss 1 March 2017 and note 21.

the implications of the replacement of representative sovereignty by popular sovereignty spelt out.

How much of the existing EU provisions implemented in UK laws will remain? The EU Withdrawal Bill sets out the agenda for absorbing EU law into UK law invariably by executive law-making.<sup>55</sup> It seems clear the premium on EU and public lawyers is going to be huge as the unravelling, in whatever form, of future relationships is underway. The General Council of the Bar of England and Wales, the professional regulatory body for barristers, has written that in areas such as data protection UK law is likely to remain modelled on EU law because of the necessity of having ‘safe harbours’ for data holding and cross border data transfers.<sup>56</sup> The UK government has accepted this.<sup>57</sup> Financial regulation is likely to be based on EU law and any trade deals with the EU may well result in EU legal frameworks in environmental law, environmental information law, public procurement and competition law including state aids. Specific outcomes will be the result of ‘deals’ and bargaining power. One can only guess as to the timing involved. The EU Canadian trade deal seen by some Brexit supporters as a model for the UK’s future with the EU has taken

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<sup>55</sup> See Hansard paper on EU (Withdrawal Bill) *Delegated Legislation, Parliamentary Scrutiny and the EU (Withdrawal) Bill* (Sept. 2017), [https://assets.contentful.com/xkbace0jm9pp/4mZb6S8t3yukaqAqKYkskC/955ff1e64ba499649e2bc72f9a942059/Taking\\_Back\\_Control\\_FINAL.pdf](https://assets.contentful.com/xkbace0jm9pp/4mZb6S8t3yukaqAqKYkskC/955ff1e64ba499649e2bc72f9a942059/Taking_Back_Control_FINAL.pdf) site (visited on 25 Sept. 2017).

<sup>56</sup> [http://live.barcouncil.netxtra.net/media/472103/exec\\_summary\\_bar\\_council\\_eu\\_referendum\\_final.pdf](http://live.barcouncil.netxtra.net/media/472103/exec_summary_bar_council_eu_referendum_final.pdf) (all visited 3 November 2017).

[http://live.barcouncil.netxtra.net/media/472106/paper\\_i\\_bar\\_council\\_eu\\_referendum\\_final.pdf](http://live.barcouncil.netxtra.net/media/472106/paper_i_bar_council_eu_referendum_final.pdf)

[http://live.barcouncil.netxtra.net/media/472109/paper\\_ii\\_bar\\_council\\_eu\\_referendum\\_final.pdf](http://live.barcouncil.netxtra.net/media/472109/paper_ii_bar_council_eu_referendum_final.pdf)

[http://live.barcouncil.netxtra.net/media/472112/paper\\_iii\\_bar\\_council\\_eu\\_referendum\\_final.pdf](http://live.barcouncil.netxtra.net/media/472112/paper_iii_bar_council_eu_referendum_final.pdf)

<sup>57</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/639853/The\\_exchange\\_and\\_protection\\_of\\_personal\\_data.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639853/The_exchange_and_protection_of_personal_data.pdf) (accessed 25 Sept. 2017).

over seven years to negotiate and faced resistance from several EU member Parliaments and then a regional Parliament. The US president stated in the spring of 2016 that a UK/US trade deal would have to take its place in a long queue and the UK will be given no special treatment. This position was confirmed after the referendum result. Trump has consigned it to the waste bin – for the present. Whether the widely predicted cessation and collapse of the US/EU Transnational Trade and Investment Partnership will make any difference awaits to be seen. The incoming President is hostile to trade deals although the UK hopes that he will be sympathetic to the UK.

#### 4. CONCLUDING THOUGHTS

In introducing this paper I spoke of ‘the modern meaning of democratic involvement by those who encounter power configurations’. The 2016 referendum was the outcome of a divided political party whose leader was cornered into offering a plebiscite to buy off opponents in his own party who had an ideological obsessive aversion to ‘Europe’ or who were fearful for their Parliamentary seats because of a populist opponent in the shape of UKIP. Many voters explained that they simply had no grasp of the issues involved. It was widely reported many voted for Brexit because they did not think it would happen. Xenophobia, widely fanned fear of foreigners in particular by the popular press,<sup>58</sup> simplistic populism and a wish for an erstwhile image of ‘olde England’ had their place without doubt among more rational reasons for voting leave. But even the latter seemed very often more precariously placed on vacuous optimism and not hard, contestable fact. The dominance of social media as a means of saturating public opinion and colouring the

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<sup>58</sup> The Press Gazette analysed that in the last month of the campaign on Brexit more than 90 million newspapers were published with front pages favouring leave; only 30 million front pages were published with front pages favouring remain: *Financial Times* 25/26 June 2016 p. 6.



‘truth’ has been responsible for the prevalence of populist politics, it has been alleged.<sup>59</sup> The future was decided on a Prime Ministerial gamble that back-fired and a guess that was poorly informed. It has to be questioned whether this was a firm basis on which to fashion our future relationship with the rest of the world? Regrettably, the ‘Remain’ case was poorly – abysmally - conducted. There was a surplus of fact from ‘experts’ which the leave campaign successfully derided in the forum of popular opinion– what do experts know of the *real* word? – often derided successfully as fear-mongering. There was little consistent argument about the ethical principles of working together co-operatively for our common good in a joined enterprise with our partners. Two of the major protagonists for remain – the Prime Minister and the Chancellor – had long belittled the EU. What clear message would electors receive from this? It is as if the UK was the recipient of that old aphorism: ‘May you live in interesting times’. Its origin, reputedly Chinese, is disputed. It was a curse. ‘Those whom the Gods wish to destroy’ said Enoch Powell in decrying immigration in the 1960s ‘they first make mad.’

What future, one may ask, for nation-wide referenda where the outcome is unclear, the position complex and the stakes fundamental? The old constitutional conundrum: ‘Who decides who decides?’ has acquired fresh potency at a time of widespread populist politics and populist political leaders. The European Union was seen as a part of globalisation. Many Brexiteers had not benefited from this and felt threatened by it. The virtues of rational liberal politics devised by elites, the ‘gainers’ from European Union, simply had no pull for them. If the ‘elites’ are correct in assessing that the benefits of rational liberal politics benefit all more significantly than any alternative, how, if at all, are they going to persuade the ‘losers’ (the economic underprivileged) who won the Brexit vote of the

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<sup>59</sup> C. SUNSTEIN *#republic: Divided Democracy in the Age of Social Media* (2017). Princeton UP. K. Viner ‘How Technology disrupted the truth’ *The Guardian* 13 July 2016. T.NICHOLS *The Death of Expertise: The Campaign Against Established Knowledge and Why it Matters* OUP 2017.

benefits of rational liberal politics?<sup>60</sup> How is the message of rationality to be heard and protected in the era of populist politics and simplistic assertion? This is much wider than the future of public law. A transatlantic dimension to this has been added. The ninth circuit court of appeals has reminded the presidency of constitutional limits on its powers even in national security.<sup>61</sup>

But the political debate and its outcome set the context for public law. Political choice and direction based on sound evidence and fact have been at the heart of public law development for the last fifty years. This is the contribution of rationality and proportionality review. These contributions are to be more important than ever in preventing a tyranny of the majority aided by global technology – technology whose

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<sup>60</sup> M. IGNATIEF *Fire and Ashes: Success and Failure in Politics* (2013) and see Ignatief's review of Nick Clegg's *Politics: Between the Extremes* (2016) *Financial Times* 10-11 September 2016; E. LUCE *The Retreat of Western Liberalism* (2017).

<sup>61</sup> See *State of Washington et al v Donald J. Trump President et al* No 17 – 35105 CA Ninth Circ 9/02/2017 and the courts' suspension of Trump's Executive Order banning immigrants from seven Muslim countries entering the US. '[A]lthough courts owe considerable deference to the President's policy determinations with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action' (p.18). <http://cdn.ca9.uscourts.gov/datastore/opinions/2017/02/09/17-35105.pdf> (10/02/2017) (accessed 6 November 2017). For judicial orders against modified executive orders, see <http://www.vox.com/2017/3/15/14940946/read-full-text-hawaii-court-order-trump-refugee-travel-ban> (accessed 6 November 2017). The US Supreme Court upheld Trump's appeal to the extent that the preliminary injunctions were stayed (ceased to have effect) in relation to foreign nationals with no bona fide relationship with a 'person or entity' in the US. The hearing of the substantive issues will take place in the autumn of 2017: *Donald J. Trump et al v International Refugee Assistance Project* Nos 16-1436 (26/06/2017) [https://www.supremecourt.gov/opinions/16pdf/16-1436\\_16hc.pdf](https://www.supremecourt.gov/opinions/16pdf/16-1436_16hc.pdf) (accessed 6 November 2017).

For executive inspired assaults on the US Administrative Procedure Act 1946 see S. Rose-Ackerman 'A Regulatory Revolution is Underway' <http://www.thehill.com/blogs/pundits-blog/the-administration/322127-a-regulatory-revolution-is-underway> (accessed 6 November 2017).

executives have been zealous to protect the virtues of liberty without a commensurate sense of responsibility for the power they wield.