**PART I**

**CONSTITUTIONAL ISSUES**

**CHAPTER 1**

**BREXIT: THE RELATIONSHIP BETWEEN**

**THE UK PARLIAMENT AND THE UK GOVERNMENT**

*Michael Gordon\**

The UK Parliament and the UK Government

1. INTRODUCTION

The relationship between the UK Parliament and the UK Government is at the heart of the UK constitution. Between Parliament – the UK’s legislature[[1]](#footnote-1) – and the Government – understood here as the institution which sits at the head of the executive branch, and which has ultimate responsibility for the administration of the state[[2]](#footnote-2) – the most crucial decisions as to the shape of law and policy in the UK are made. The decision to withdraw from the European Union (EU) is clearly one of the most profound governmental choices the UK has ever faced, and will have implications for law and policy of the very highest order. It is a position that has been reached as a direct result of a series of decisions made and actions taken by the UK Parliament and Government, albeit in a more complex fashion than is usually the case, given the constitutional significance of exiting the EU. But it is not only a decision which has been, in effect, taken by the UK Parliament and Government, acting in conjunction with others, most obviously the electorate which voted to leave the EU in the June 2016 referendum. Instead, the decision to exit the EU is also a decision that has the potential to test the boundaries of, and perhaps even alter, the relationship between the UK Parliament and Government.

In this sense, the decision to exit the EU is one which will be delivered by the UK Parliament and Government – with immense consequences throughout the UK’s legal system, as is evident in the substantive chapters of this book – but also one which may come to impact on our understanding of the relationship between these institutions. Against this backdrop, this chapter has three aims: first, to explore how the process of Brexit is to be executed by the UK Parliament and Government, which itself depends on the way we conceive of the relationship between these institutions; second, to understand the complications for the domestic Brexit process that may result from the nature of that constitutional relationship; and third, to anticipate challenges that may be posed for both in the future.

The chapter will therefore initially outline the nature of the relationship between the UK Parliament and Government, and its constitutional significance. It will then move on to consider the domestic constitutional process by which the decision to exit the EU will be delivered, and the role(s) of Parliament and the Government within it. Next, the crucial complexities of the Brexit process – particularly as they affect the relationship between Parliament and the Government – will be examined. Finally, the chapter will reflect on some of the major challenges ahead, for both the UK Parliament and the UK Government, as they confront what is likely to be the major constitutional task of this era. At the outset of the process of withdrawal, while it is difficult to imagine the precise shape of the UK constitution after Brexit, or how the relationship between the UK Parliament and Government will be affected in the delivery of this decision, this chapter aims to demonstrate that the constitutional legacy of leaving the EU is certain to be profound.

2. THE NATURE OF THE RELATIONSHIP BETWEEN THE UK PARLIAMENT AND THE UK GOVERNMENT

The relationship between the UK Parliament and the UK Government is the most significant in the UK’s constitutional framework. There are other relationships of immense constitutional importance, of course, including the relationship between these political institutions and the courts, between the UK and the various devolved institutions operating in Scotland, Wales and Northern Ireland, and between all of these institutions of government and citizens. Yet none of these critical relationships has the centrality of that between Parliament and the Government, and while all shape and condition the relationship between Parliament and the Government in many important ways, they are all also ultimately subject to decisions taken between these two institutions.

The relationship between the UK Parliament and UK Government is an interactive one – these interactions may be positive or negative, reinforcing or challenging, complementary or conflicting, but the core functioning of these institutions is necessarily understood in terms of their engagement (or non-engagement) with one another. In this sense, the subject of the relationship between Parliament and the Government is huge – it is the fulcrum of constitutional decision-making, and permanently relevant to understanding the functioning of the UK system of government, but also potentially fluid, and concerns institutions which are themselves complex and multifaceted. This poses a number of challenges, when considering the impact of, and implications for, the relationship in the context of Brexit: how are we to break down the many and varied interactions, sub-relationships and processes, all occurring over a period of time? How can we understand what can be expected from the different branches? And how, if at all, can we begin to assess the performance of Parliament and the Government, individually and collectively?

Despite this complexity and these challenges, in a sense, there are at least some quite simple starting propositions which provide an essential structure to the constitutional relationship between the UK Parliament and Government. Parliament has a number of overlapping responsibilities: it is the sovereign legislative body, with constitutionally ultimate (and legally unlimited) power to make law in the UK; it is the forum from which a Government is established, and sustained, by virtue of possession of the continuing confidence of the House of Commons; it scrutinises official conduct, and holds the Government and its Ministers to account for their activity; and it represents the electorate, who elect constituency MPs to the House of Commons. The Government has related, intersecting functions to those of Parliament: it is generally responsible for drafting and promoting the Bills that the legislature will consider enacting as law; to retain office, it must retain the confidence of the legislature from which its authority is derived; it has a duty to account to Parliament for its administration of the state; and in making and implementing policy choices, it must seek to respect commitments made to the electorate. Ultimately, while the Government – crucially led by the Prime Minister – has the authority to take key decisions concerning policy, and implement those decisions within the law, it can only do so subject to the approval and oversight of Parliament.

A further distinction between the essential functions of Parliament and the Government is also of particular importance in the context of EU membership. The Government is the actor which represents the UK externally at the international – and in this case, European – level, whereas the responsibilities of Parliament are traditionally confined to the internal, domestic sphere. Membership of the EU complicates this classic division of responsibility to some extent, as Parliament is afforded some explicit functions as a matter of EU law, including a direct role in the scrutiny of European instruments, and the power to issue a ‘yellow card’, cautioning against the enactment of EU legislation, if acting in conjunction with sufficient other national legislatures in EU Member States.[[3]](#footnote-3) UK law has also provided a more direct role for Parliament in authorising Government decision-making in a range of areas at EU level.[[4]](#footnote-4) Yet despite these complexities, the Government remains the key external actor and primary decision-maker in relation to EU matters.

A final complication of relevance in this context relates to decision-making concerning matters of the highest constitutional and political significance. In some circumstances, despite the sovereignty and constitutional centrality of Parliament, and the political authority to lead the UK allocated to the Government, some decisions may be too important to be taken by these institutions acting together, without further input. Constitutional practice in the UK now recognises that a referendum may be required to obtain the direct popular support of the electorate for major change to the architecture of the state. This has been the case in particular in relation to the establishment of devolution in Scotland, Wales and Northern Ireland,[[5]](#footnote-5) the possibility of independence for Scotland[[6]](#footnote-6) or the reunification of Northern Ireland with the Republic of Ireland,[[7]](#footnote-7) and potential change to the voting system to the House of Commons.[[8]](#footnote-8) While there is no definitive prescription as to the character or extent of change which can only be legitimised by a referendum,[[9]](#footnote-9) it has long been clear that a decision to exit the EU would be a decision of such constitutional magnitude that popular approval would be politically essential. The decision to join the (then) EEC in 1972 was not subject to such a vote, but the question of the UK’s continuing membership was put to a referendum in 1975,[[10]](#footnote-10) effectively establishing a requirement widely accepted by the main political parties that withdrawal would only be possible subject to approval at a national referendum.

When these basic propositions are applied in combination to the decision to withdraw from the EU, an allocation of tasks between Parliament and the Government can be seen, in principle, to emerge. This is not a framework based on the idea of a separation of power – a model which is of questionable relevance to the UK’s constitutional arrangements even as a matter of principle[[11]](#footnote-11) – but instead one based on a ‘close union, the nearly complete fusion’ of powers between Parliament and the Government,[[12]](#footnote-12) supplemented by the direct involvement of the electorate from which both institutions derive their democratic authority. It was for Parliament and the Government to decide to refer the question of the UK’s ongoing membership of the EU to the electorate. In response to a decision to leave, the Government has a mandate to bring about our exit from the EU, in implementation of the referendum result, and at the international level, negotiate first the UK’s withdrawal, and then begin to explore a future relationship. Parliament will be required to hold the Government to account during this process, and scrutinise its activity at the international level (as in general), while also legislating to make the necessary changes to domestic law in preparation for withdrawal, providing certainty and continuity as the authority of EU rules within the national legal order is removed.

As will be considered below, implementing the decision to leave the EU in this way creates complexities for the UK Parliament and the Government, and poses a number of challenges for the relationship between them. Before we consider them, however, we will first explore in further detail – and in light of the basic framework established above – the constitutional process of Brexit so far.

3. BREXIT: THE UK CONSTITUTIONAL PROCESS

Withdrawal from the EU is very likely to be the major constitutional task of this era. The UK’s political institutions face the challenge of attempting to unravel (and perhaps even before that, to understand) over four decades of legal integration, while establishing new economic, social and diplomatic relations with the rest of the continent. We have been led to this point by a series of decisions made and actions taken by the UK Parliament and Government(s) over a number of years. While the roots of the decision to exit the EU certainly run deep,[[13]](#footnote-13) the core developments which have brought the UK to the point of withdrawal have occurred relatively quickly, and more activity will now be required in a very short space of time.

The formal starting point for Brexit was the manifesto commitment to hold an ‘In/Out’ referendum on EU membership of Prime Minister David Cameron Government’s in the run-up to the 2015 general election.[[14]](#footnote-14) That election delivered a surprise victory for Cameron, and a Conservative majority Government.[[15]](#footnote-15) The manifesto referendum commitment was subsequently delivered, with Parliament enacting the European Union (Referendum) Act 2015 to allow for the national vote to be held. After a prolonged exercise in which the Government sought to renegotiate UK membership of EU, Prime Minister Cameron backed the option of remaining in the EU.[[16]](#footnote-16) The UK Government therefore campaigned on that basis, albeit with Cabinet collective responsibility suspended to allow some senior Ministers to support (some very actively) the ‘leave’ campaign.[[17]](#footnote-17) On 23 June 2016, the referendum was held and the electorate voted to leave the EU, by 51.9 per cent to 48.1 per cent on a turnout of 72.2 per cent of eligible voters.[[18]](#footnote-18)

In the face of his defeat, David Cameron resigned as Prime Minister, and a new Conservative majority Government was formed under the leadership of Theresa May.[[19]](#footnote-19) Despite also supporting the campaign to remain in the EU, the new Prime Minister enthusiastically affirmed her commitment to delivering the referendum result, expressed in the empty circularity of the much repeated catchphrase ‘Brexit means Brexit’.[[20]](#footnote-20) A high-profile legal challenge was successful in establishing that an Act of Parliament was required, as a matter of domestic constitutional law, to authorise the formal notification by the Government to the European Council of an intention to withdraw from the EU.[[21]](#footnote-21) On that basis, Parliament enacted the European Union (Notification of Withdrawal) Act 2017, and the Prime Minister – in accordance with the power conferred by that statute – duly issued notice of the UK’s intention to withdraw as required under Article 50 of the Treaty on European Union on 29 March 2017.

Even a basic overview of the Brexit process to this point – in effect, covering the commencement of exiting the EU – demonstrates clearly the interactive nature of the constitutional relationship between the UK Parliament and Government. This will continue as we move into the core stages of delivery of the decision to withdraw from the EU. Yet now that notice of withdrawal has been given, this becomes more than simply a domestic constitutional process. Indeed, in many ways the process of withdrawal is critically framed by EU law, and in particular the terms of Article 50.[[22]](#footnote-22) As well as setting out the manner in which a withdrawal agreement will be approved at the EU level,[[23]](#footnote-23) Article 50 most significantly establishes a two-year time limit during which exit must be agreed, or it will occur automatically at the end of that period.[[24]](#footnote-24) To avoid an abrupt and unmanaged exit, two parallel strands of activity must be completed within the two-year time period imposed by the Article 50 process.

First, at the international level, negotiation with the remaining EU Member States, of a withdrawal agreement (and potentially a framework for a future relationship, or even, if the approach of the UK Government is accepted, a future free trade agreement). And second, at the domestic level, legislation to prepare the UK legal system for the withdrawal of the supremacy and effectiveness of EU law within the national order. This will principally involve the enactment of what the Government has described as a ‘Great Repeal Bill’[[25]](#footnote-25) – to deal more generally with the implications of the removal of EU law from the UK legal system, including the replacement of the European Communities Act 1972, the key legislation providing for the domestic effectiveness of EU law – along with other pieces of subject-specific legislation in areas which will see significant policy change as a consequence of Brexit, such as immigration law and customs regulation.[[26]](#footnote-26) The delivery of these two strands of activity simultaneously, within a two-year timescale, will be an immense challenge to the capacity of both the UK Parliament and Government, and, in many ways, a test of the relationship between them.

The constitutional process to deliver the UK’s exit from the EU has therefore already been complex and contentious, and further challenges inevitably lie ahead. The next section identifies some of the specific reasons for the complexity of the Brexit process for Parliament and the Government, and how we might seek to offset some of these difficulties. The section which follows then considers the major future challenges that the UK’s central political institutions will have to confront.

4. COMPLEXITIES FOR PARLIAMENT AND THE GOVERNMENT

Implementing the UK’s exit from the EU represents a near unprecedented constitutional challenge. There are a number of factors which combine to make the Brexit process extremely complex for both the UK Parliament and the Government: the scale and significance of EU law; the interlocking nature of supranational and domestic law which is a necessary consequence of EU membership; and the competition between the authority of the Brexit referendum and that of the representative political institutions themselves.

First, the scale and significance of EU law and administration, which has expanded during the UK’s membership to cover a range of substantive areas from consumer and employment rights, to agriculture and fisheries policy, to environmental regulation and data protection. The precise number of EU laws which are applicable within the UK, or have influenced the development of domestic law, is a matter for debate, such is the scope of their impact.[[27]](#footnote-27) Yet it is widely agreed that EU rules are broadly dispersed throughout the UK’s legal system, and it will be a major job simply to map, let alone to unravel, their domestic application.

In removing the authority of EU rules, a variety of different difficult decisions will be required about how to fill the vacuums created. Some substantive rules or standards may more easily be domesticated, and simply converted into applicable UK legal norms. Others, however, depend on the existence of reciprocal arrangements with other EU Member States – such as rules concerning the free movement of people, or customs regulation – and so cannot simply be transposed into domestic law. Instead, such legal norms will need to be replaced; yet this may not be straightforward, since the law in these areas may be affected by whatever future trade relationship is agreed between the UK and EU, with customs rules or product safety standards being clear examples. Moreover, where substantive rules which can more readily be incorporated into UK law depend on implementation or administration by an EU agency, such as the European Medicines Agency, replacements for these arrangements will need to be designed. It is therefore clear that the very fundamental task of replacing EU law will be far from easy, for a diverse range of decisions will have to be taken to determine the way forward in a diverse range of areas of law.

Second, the UK’s membership of the EU is necessarily premised on an interaction between supranational and domestic law: EU law exists at the supranational level, yet has effects in the national legal system, and the principle of supremacy requires that inconsistent national law must be disapplied to ensure conformity across the Member States.[[28]](#footnote-28) This interlinking of supranational and domestic law will itself be a source of complexity for Parliament and the Government, because it means coordination is necessary as the connection between EU law and UK law is unlocked. That there will be two strands of activity – negotiating at the international level, legislating at the domestic level – has already been noted. Yet the nature of EU membership means that they cannot be approached in isolation; instead, the supranational and the domestic activity will be intrinsically linked. For example, the withdrawal agreement negotiated by the Government at the European level will be subject to approval by Parliament in the domestic sphere. Similarly, the legislation to be enacted by Parliament to replace EU law within the UK will need to be compatible (or at least not incompatible) with any future relationship agreed between the Government and the remaining 27 EU Member States.

Indeed, the potential for the connectivity between supranational and national law to cause complexity in the domestic constitutional process has already been made clear. This can be seen in the case of *R (Miller) v* *Secretary of State for Exiting the European Union*,[[29]](#footnote-29) in which the UK Supreme Court held by a majority of eight justices to three that an Act of Parliament was required to provide the Prime Minister with explicit authority to give notice of intention to withdraw from the EU, for the purposes of Article 50 TEU. The (in many ways unsubstantiated) basis for the majority decision was that EU law was constituted ‘as an entirely new, independent and overriding source of domestic law’,[[30]](#footnote-30) and the potential for this source to be removed once notice had been given, potentially automatically, at the end of the Article 50 two-year time limit, was of such constitutional significance that it required express legislative authorisation: ‘We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation’.[[31]](#footnote-31)Yet this decision seemed to confound the well-established allocation of responsibilities between the Government and Parliament, in accordance with which the Government has the authority under its royal prerogative executive powers to take decisions at the international level concerning the making or unmaking of treaties, while Parliament is responsible for altering (or not altering, as it decides) any domestic law which is contingent on the operation of supranational agreements. That the European Communities Act 1972 did not seek to remove from the Government the power to withdraw from the EU treaties, nor would the terms or legal validity of that statute be in any way altered by issuing notice under the royal prerogative, provide reasons to doubt the conclusion reached by the majority.[[32]](#footnote-32) Yet regardless of the correctness of the decision, the *Miller* case provides ample evidence of the kind of complexity that Parliament and the Government face in delivering Brexit, given the intersecting nature of UK and EU law which is a necessary consequence of EU membership.

Third, the manner in which the decision to leave the EU was reached also provides a further source of complexity for Parliament and the Government. Here, we see a competition between regular and irregular authority claims, in the form of the (related) representative democratic mandates of Parliament and the Government, and the direct democratic force of the referendum vote to leave the EU. The potential clash between these regular and irregular democratic claims is made more acute by the Government’s advocacy of the defeated option of remaining in the EU, which also attracted overwhelming support among parliamentarians.[[33]](#footnote-33) Moreover, the formal legal status of a referendum result is ‘advisory’, since it is the UK Parliament which is sovereign within the constitution.[[34]](#footnote-34) This creates difficulty for Parliament and the Government in that they are asked to deliver a policy of profound significance, but to which they were not committed, and which they may not be legally obliged to implement.

We have seen this complexity play out already in debates about the binding nature of referendum result, and whether Parliament could have refused to accept it, an opportunity presented by the outcome of the *Miller* litigation.[[35]](#footnote-35) It is also manifested in uncertainty about how exactly the Government should interpret the vote to leave the EU, especially given the multiplicity of reasons informing individual voter choices – whether control over immigration, sovereignty over law-making, or access to the single market should be prioritised is not determinable merely by reference to the referendum mandate. Of course, the simple juxtaposition of direct and representative democratic authority overlooks the fact that the representative institutions were the source of the resort to direct democratic decision-making: the Government through its election on a manifesto commitment to hold a referendum, and Parliament in enacting legislation to facilitate this. Yet if the true difficulty is therefore the competition between the irregular authority of the referendum and the regular authority of the UK’s central political institutions, we may also see that the effect will be further attempts to use irregular authority to trigger constitutional change in the aftermath of Brexit. This may most obviously occur in Scotland and Northern Ireland – countries in which the national vote was in favour of remaining in the EU – if the consequence of Brexit is to provoke a (now-requested) second Scottish independence referendum,[[36]](#footnote-36) or a border poll on the reunification of Ireland.[[37]](#footnote-37)

How can we confront this complexity? While there is no sense in which it can be eliminated from the delivery of the decision to leave the EU, there are two things which may at least help us to respond appropriately.

First, we must seek to understand Brexit as a process, rather than as a series of unconnected momentary events (or crises). It is a constitutional process that, at least in principle, may be understood to occur in three phases: with the triggering of Article 50 Brexit has been commenced, it must now be executed by the UK’s political institutions, and will ultimately (whether with or without a withdrawal agreement) reach a formal conclusion.[[38]](#footnote-38) This is important because it demonstrates that the process of exiting the EU must be understood holistically, rather than considered in fragments.[[39]](#footnote-39) It emphasises, crucially, that there will be different roles for different institutions at different times, and that some points will be more significant than others. Such an approach can help us to identify, in relative terms, what activity should be prioritised, and when, given the scale of the task, and the limited time available. For example, from this perspective we can appreciate that Parliament should be able to exert influence at some points more readily than others: dealing with the Great Repeal Bill, for instance, will present a far greater opportunity for the legislature to shape the Government’s approach to the domestic change necessitated by Brexit than was realistic when enacting the Article 50 Bill designed simply to begin the formal process of negotiation.

Second, we must set expectations appropriately, in light of a clear understanding of the parameters of the relationship between the UK Parliament and the Government. There are significant and well-founded concerns about exit from the EU becoming an executive led and dominated process, given it will be the Government which is responsible for negotiating the terms on which we exit the EU, and (most likely subsequently) the parameters of a future relationship. Nonetheless, while frequently aired, suggestions that the UK constitution establishes an ‘elective dictatorship’ are in many ways based on a misunderstanding of the role of Parliament, and its ability to exert policy influence, often through activities which shape government action in ways which are difficult to measure, such as the power of the legislature’s anticipated reactions and informal pressure.[[40]](#footnote-40) Yet the thesis that Parliament is in contemporary decline has not only prospered because of misunderstanding of Parliament’s role and capability, especially in comparison with the resources of even a shrinking executive, and a civil service subject to cost saving in an extended period of public sector funding cuts.[[41]](#footnote-41) Instead, the decline thesis also prospers when the expectations of Parliament are inappropriately set – rhetoric of Brexit as a restoration of parliamentary sovereignty, exhibited throughout the referendum campaign and since,[[42]](#footnote-42) is not helpful in this regard, in that it is both a constitutionally flawed claim,[[43]](#footnote-43) while also conjuring a mythical vision of parliamentary rule which did not exist prior to 1972, and cannot be revived now.[[44]](#footnote-44) Parliament can be an effective actor in the UK constitution, and despite the complexity of withdrawal from the EU, there is the potential for it to influence very significantly the shape of the UK after Brexit. Yet for this to be possible, we must be clear about Parliament’s role(s) in the process, recognise that it will inevitably have to interact with the Government, and set challenging but realistic expectations of what it might achieve.

We may therefore attempt to manage the complexities of the Brexit process, but it remains inevitable that withdrawal from the EU will pose major challenges for Parliament and the Government, and the functioning of the relationship between them. The final section of this chapter considers some of the key challenges which lie ahead.

5. MAJOR CHALLENGES AHEAD FOR PARLIAMENT AND THE GOVERNMENT

It is clear that the domestic constitutional process of exiting the EU will centrally involve the UK Parliament and Government, and will do so in complex ways. The pace of change is such that it is far from easy to anticipate the precise challenges which lie ahead. Nonetheless, we can identify some crucial future concerns. Perhaps the overwhelming constitutional danger for present purposes is that the relationship between Parliament and the Government could fail to function in an effective and legitimate way. Given the centrality of this relationship to delivering Brexit, the stakes are high: such a failure could have implications for the nature, quality and coherence of the UK’s future domestic position and relationship with the EU, and potentially even undermine the authority of the domestic political institutions themselves. It would be an especially problematic time for the latter to occur, exactly at the moment the UK Parliament and Government are reacquiring very significant power and competence over the shape of the UK’s legal system by virtue of exit from the EU.

There are two areas in which risks of particular significance are present. First is an accountability challenge; second is a legislative challenge.

The accountability challenge concerns the way in which Parliament will hold the Government to account during the prolonged period of withdrawal negotiations with the EU. There are a number of areas of concern. The Government will be in a privileged position as the lead actor representing the UK at the international level, and may prioritise the confidentiality of the negotiations over the transparency necessary to facilitate meaningful parliamentary oversight. The Government has committed to ensure that the UK Parliament is at least as well informed as the European Parliament, although it is as yet unclear what this will amount to in practice.[[45]](#footnote-45) Further, the scale of the negotiations means that the role of parliamentary select committee scrutiny in specialist substantive fields will be vital, and there has been a vast amount of activity already across a range of areas.[[46]](#footnote-46) Yet there is also a danger of inadequate coordination of that scrutiny – competition between committees, political parties, and the Commons and Lords is inevitable and valuable if it raises the quality of oversight. But there is a need to avoid key messages getting lost in a morass of detail if they are to influence the Government (whether directly, or indirectly, by shaping public opinion).

Finally, there has been debate about what it means for Parliament to have a ‘meaningful’ vote on the final terms of the withdrawal agreement, now that the necessity of votes in both Houses of Parliament has been accepted by the Government (which represents an important upgrade on the already applicable treaty ratification rules contained in existing legislation).[[47]](#footnote-47) The need for final votes on the terms of the agreement has a significant role to play in underpinning the Government’s sustained engagement with Parliament: if the deal has to be sold to parliamentarians, the Government will need to interact constructively as Parliament scrutinises its ongoing diplomatic activity, while also anticipating the likely reaction(s) of the legislature to the shape of the withdrawal agreement, and attempting to mould its terms to address concerns where possible. Yet the limitations of a meaningful vote are also clear, insofar as the choice that faces Parliament will be highly constrained by external factors. For if Parliament rejects the deal on offer, it is not obvious that this will provide the Government with any scope for last minute renegotiation with the remaining EU Member States – instead, it may force the UK into the position of automatic exit without an agreement, in accordance with the operation of Article 50.

Parliament will therefore face a number of difficulties in holding the Government to account effectively. There is an obvious disparity between the capacity of the Government and a single legislature, although there may be ways to offset this – for example, coordination between the Parliaments and Assemblies of the UK (while not the core focus of this chapter),[[48]](#footnote-48) could provide opportunities for an enhanced voice in areas of consensus with parliamentarians in Scotland, Wales and/or Northern Ireland. Similarly, the dispersal of power among parliamentarians, various select committees and between the two Houses, may give the impression of a lack of distinct leadership for Parliament – especially when compared to the European Parliament, with a very visible lead negotiator in Guy Verhofstadt. Yet we should not be too quick to underestimate Parliament – it is wrong, for example, to see the failure to amend the Article 50 Bill as a parliamentary failure, given the limited purpose of that legislation, and the difficulties in enforcing, in real terms, the kind of aspirational provisions guaranteeing the rights of EU nationals and ‘meaningful’ final votes that were most prominently debated. Indeed, rather than being constrained by legal provisions, we have seen Government concessions on final parliamentary votes and the production of a White Paper induced through the normal practices of the political constitution,[[49]](#footnote-49) where pressure, the press and time combine to force changes in official policy or approach. Given the enormous public interest in the UK’s exit from the EU, this kind of scrutiny, channelled by and through Parliament, is only likely to intensify.

The legislative challenge, in contrast, will be focused on the Great Repeal Bill, which will remove the authority and supremacy of EU law within the UK (by repealing the European Communities Act 1972), while preparing the legal system for exit by simultaneously transposing EU rules into the UK legal system, where practical and appropriate to ensure certainty and continuity. As has been discussed above, this will be an immensely complex task, requiring much technical work, and difficult decisions across a range of substantive areas. The capacity of Parliament will obviously be tested, and given the scale of work involved in a short timeframe, it is inevitable that much of the detailed work will need to be done by the Government, using subordinate law-making powers afforded to them by the legislature. There are obvious concerns attached to this, including those as to the possibility of overuse of secondary law-making powers by the Government,[[50]](#footnote-50) that the Great Repeal Bill might include so-called ‘Henry VIII’ powers which allow the amendment of Parliament’s primary Acts by secondary legislation made by the executive,[[51]](#footnote-51) and that the entire process will include limited opportunities for parliamentary scrutiny, with the legislature bypassed and diminished at a crucial constitutional moment.

It is no doubt correct that there are real dangers here concerning the possibility of proper constitutional scrutiny of law-making and the level of democratic accountability for changes made under the Great Repeal Bill. Yet given the size of the challenge of preparing the UK legal system for exit from the EU, the use of secondary legislative power is not optional, but unavoidable. And this is no violation of the fundamental idea of the sovereignty of Parliament, which does not prohibit the allocation to the executive of delegated legislative powers – indeed to grant such powers is an exercise of legislative sovereignty in recognition of the scale and complexity of modern state activity. Parliament will retain responsibility for authorising (legally) and controlling (politically) all Government activity associated with preparing the domestic legal system for EU withdrawal. Yet in exercising its power and enacting a Great Repeal Bill, Parliament also has a constitutional responsibility to ensure these powers are appropriately constructed for effective completion of the stated purpose of ensuring legal certainty and continuity, and are limited to prevent the Government from obtaining powers to make significant policy changes as the authority of EU law is removed. In addition to clear and focused definition of the scope of the powers, conditions attaching to their use, such as requirements of impact assessment or explanatory statements, and time limits after which the powers expire, will also be critical to ensure that this task is executed in a constitutionally legitimate manner.[[52]](#footnote-52) The design of the legislation will also, of course, need to be supplemented by a sustained desire from members of the House of Commons and Lords to scrutinise the detailed terms of delegated legislation made under the Great Repeal Bill – whether in specialist committees concerned in particular with statutory instruments,[[53]](#footnote-53) or more generally – and give clear voice to any concerns arising.

Whereas the accountability challenge will require persistent attention and activity from Parliament and the Government, and its tangible impact may often be unclear, the legislative challenge will be focused around more structured moments of activity, and the parliamentary impact may be more direct and discernible. Yet this does not mean that one is more important than the other – rather it demonstrates the variation in, and pervasiveness of, the challenge that the UK’s central political institutions will face in delivering Brexit. There are genuine constitutional dangers to ward against as the process develops, and it would be wrong to fuel expectations of Parliament and the Government to a point beyond which they can be reached. This is already a risk, given the extensive, and simplistic, rhetoric about ‘taking back control’ and the ‘restoration’ of parliamentary sovereignty, which are unwelcome hangovers from the referendum campaign. That there will also be external constraints on what the UK can achieve in exiting the EU is clear, most obviously flowing from the positions taken by the EU27. There will also be a range of other internal dynamics in operation, with the potential to constrain both the Government and the UK Parliament – it will be essential, for example, for the views of the devolved governments and legislatures to be considered and acted upon within the process.

Nevertheless, the relationship between the UK Parliament and Government will be at the centre of the domestic constitutional process, and inevitably tested by Brexit. If the process of withdrawing from the EU is to be conducted in a way which is both effective and constitutionally legitimate, Parliament and the Government must ensure that their engagements are constructive and extensive, and that the account of their interactive relationship, set out at the start of this chapter, is not reduced to a formal constitutional nicety.

6. CONCLUSION: TENSIONS IN THE CONSTITUTIONAL PROCESS OF BREXIT

Exiting the EU has been, and will continue to be, complex and challenging – it is impossible to underestimate the extent to which this task will test both the UK Parliament and Government, and the relationship between them, which will be central to the constitutional process of Brexit. Indeed, tensions are already emerging in (at least) three broad areas as Parliament and the Government deliver the UK’s withdrawal from the EU, suggesting there is no room for complacency about the potentially dramatic constitutional implications of Brexit.

First, we see institutional tensions, generated by debate as to the proper roles of Parliament and the Government (and indeed, as a result of the *Miller*[[54]](#footnote-54)case, the courts) in relation to the execution of Brexit. While there has been some genuine uncertainty in this area, there has also been a lot of simplistic and unhelpful rhetoric which has the potential to unsettle the process, distort the relationship between Parliament and the Government, and thereby foster false expectations about what exactly the UK can achieve from withdrawal from the EU. On all sides, there must now be awareness of the need for Parliament and the Government to interact, and do so effectively, in a sustained, open and critically constructive manner if the process and the aftermath of exiting the EU is to be navigated in a way which minimises division and maximises consensus.

Second, we have seen the emergence of tensions relating to legitimacy, most fundamentally in the potentially competing direct and representative democratic mandates of the referendum result and the MPs elected to the House of Commons respectively. While as a matter of constitutional practice, these mandates have been reconciled by the acceptance in Parliament of the authority of the referendum result, notwithstanding the overwhelming support for remaining in the EU among members of the legislature, again oversimplification has led to misunderstanding about the functioning of the UK constitution and its core political institutions. Perhaps more significant than the ostensible clash between direct and representative democracy will be the enduring difficulties that are likely to flow from the attempts to accommodate regular and irregular authority claims in the UK’s uncodified constitution. The regular authority of the standing democratic institutions – including, but not only, Parliament and the Government – has very obviously been unsettled by the irregular authority flowing from the referendum decision, and the legacy of this could be long lasting. While some ‘constitutional unsettlement’ may be inevitable given the fluid fabric of our present framework,[[55]](#footnote-55) there are broader questions here about how (if at all) the dissonance in views between the Brexit-voting majority and the Remain-supporting political establishment can be channelled into more effective regular constitutional engagements, rather than left to accumulate and deliver irregular, erratic systemic shocks. The planning of parliamentary and governmental reform may now be required, although the implications of the decision to exit the EU may be so far-reaching that further irregular shocks – perhaps most easily anticipated in the form of an independence referendum in Scotland and a border poll in Northern Ireland – may, in any event, be unavoidable. And while the general election to be held in June 2017 will provide the UK Government then elected with a new mandate, it will not resolve the underlying, ongoing tensions between competing claims to constitutional legitimacy.

Third, we may also see the development (or perhaps, for some, intensification) of constitutionalist tensions. While Brexit will obviously change the substantive rules of the UK constitution in a very significant way, it may also have implications for the nature and dynamics of UK constitutionalism. Exiting the EU has the potential to change not just the powers of the UK Government, and the responsibility, authority and effectiveness of the UK Parliament (and the jurisdiction of the UK courts),[[56]](#footnote-56) but also the way in which the constitution operates to empower and condition activities taken by, and interactions between, these core institutions. In particular, we may see continuing tension between visions of the constitution which emphasise its legal components and processes, and those which emphasise the political underpinnings and relationships.[[57]](#footnote-57) How Brexit will affect this dynamic is unclear, yet that it has the potential to do so seems certain: existing debates about the authority of the referendum result and the triggering of Article 50 already reflect the differences in perspective from a legal and a political constitutionalist standpoint. Whether the influence of ‘euro-legalism’[[58]](#footnote-58) will now diminish, or the political constitution has facilitated a crisis which ultimately swallows it,[[59]](#footnote-59) or some alternative, will be for the future. Yet we can be sure that this will not involve a reversion to the UK’s pre-1972 condition. Instead, the constitutionalist tensions which Brexit has unleashed will surely lead to the development of some new model – for better or worse – because the impact on the UK constitution of EU membership, and its withdrawal, will be impossible to write out of what comes next.

1. \* Liverpool Law School, University of Liverpool. For helpful questions, comments and feedback, I am grateful to the participants at the workshop organised by the EU Law @ Liverpool research unit in London on 17 April 2017.

   The UK Parliament is split into 2 chambers – the elected House of Commons, and the unelected House of Lords, whose members may have obtained a right to sit in a number of ways, including nomination to a life peerage, election from within a group of peers holding hereditary titles, assuming office as a Bishop of the Church of England, or upon retirement as a senior judge. [↑](#footnote-ref-1)
2. ‘The Government’ is sometimes an ambiguous term – it may refer to all institutions in a political system taken together (eg, ‘the system of government’), the entire executive branch (comprising, among others, the civil service, police, army and Ministers, across local, regional and national levels), or the Ministers who are appointed by the Prime Minister (by convention, chosen from among Members of Parliament elected to the House of Commons, or peers entitled to sit in the House of Lords) to serve in Her Majesty’s Government. It is with the Government in this latter sense that this chapter is concerned. [↑](#footnote-ref-2)
3. For discussion of some relevant issues, see eg A Woodhouse, ‘With Great Power, Comes no Responsibility? The “Political Exception” to Duties of Sincere Cooperation for National Parliaments’ (2017) 54 *Common Market Law Review* 443–473. [↑](#footnote-ref-3)
4. See eg European Union (Amendment) Act 2008, and esp the European Union Act 2011. [↑](#footnote-ref-4)
5. See eg referendums held in Scotland in 1979 and 1997; Wales in 1979, 1997 and 2011; and Northern Ireland in 1998. [↑](#footnote-ref-5)
6. Scottish Independence Referendum Act 2013, section 1. [↑](#footnote-ref-6)
7. See eg the referendum held in Northern Ireland in 1973; also Northern Ireland Act 1998, section 1. [↑](#footnote-ref-7)
8. Parliamentary Constituencies and Voting System Act 2011, section 1. [↑](#footnote-ref-8)
9. See eg House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom* (HL 2009–10, 99). [↑](#footnote-ref-9)
10. Referendum Act 1975. [↑](#footnote-ref-10)
11. See eg G Marshall, *Constitutional Theory*, Oxford University Press, Oxford 1971, Ch 5. [↑](#footnote-ref-11)
12. W Bagehot, *The English Constitution*, Oxford University Press, Oxford 2001, original 1867, p 11. [↑](#footnote-ref-12)
13. See eg A Forster, *Euroscepticism in Contemporary British Politics: Opposition to Europe in the British Conservative and Labour Parties since 1945,* Routledge, Abingdon 2002. [↑](#footnote-ref-13)
14. See *The Conservative Party Manifesto* (2015) pp 72–73 <https://www.conservatives.com/manifesto>. [↑](#footnote-ref-14)
15. See eg ‘The 2015 General Election: A Voting System in Crisis’, *Electoral Reform Society* (2015) p 8 <http://www.electoral-reform.org.uk/sites/default/files/2015%20General%20Election%20Report%20web.pdf>. [↑](#footnote-ref-15)
16. See ‘Letter by President Donald Tusk to the Members of the European Council on his proposal for a new settlement for the United Kingdom within the European Union’, 2 February 2016 <http://www.consilium.europa.eu/en/press/press-releases/2016/02/02-letter-tusk-proposal-new-settlement-uk/>. For comment, see M Dougan, ‘The draft deal on UK membership of the EU’, *The Liverpool View*, 3 February 2016 <https://news.liverpool.ac.uk/2016/02/03/the-liverpool-view-the-draft-deal-on-uk-membership-of-the-eu/>. [↑](#footnote-ref-16)
17. See ‘EU vote: where the cabinet and other MPs stand’, *BBC News*, 22 June 2016 <http://www.bbc.co.uk/news/uk-politics-eu-referendum-35616946>. [↑](#footnote-ref-17)
18. See The Electoral Commission, ‘EU referendum results’, <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/upcoming-elections-and-referendums/eu-referendum/electorate-and-count-information>. [↑](#footnote-ref-18)
19. See ‘PM-in-waiting Theresa May promises “a better Britain”’, *BBC News*, 11 July 2016 <http://www.bbc.co.uk/news/uk-politics-36768148>. [↑](#footnote-ref-19)
20. See ‘Theresa May’s Conservative conference speech: Key quotes’, *BBC News*, 2 October 2016 <http://www.bbc.co.uk/news/uk-politics-37535527>. [↑](#footnote-ref-20)
21. *R (Miller) v* *Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583. [↑](#footnote-ref-21)
22. While there has been some debate about whether alternative ways of exiting the EU could be attempted, the Government has recognised that following the Article 50 process is the lawful way to withdraw: see Department of Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (Cm 9446, March 2017) para 1.9. [↑](#footnote-ref-22)
23. Article 50(2) and (4) TEU. [↑](#footnote-ref-23)
24. Article 50(3) TEU. The 2-year time limit can be extended in principle, but this is difficult – requiring unanimous consent of all remaining 27 EU Member States – and seems unlikely to be an option in practice: see HM Government, *The United Kingdom’s exit from and new partnership with the European Union* (Cm 9417, February 2017) para 12.2. [↑](#footnote-ref-24)
25. See generally *Legislating for the United Kingdom’s withdrawal from the European Union*, above n 22. See also House of Commons Library, ‘Legislating for Brexit: the Great Repeal Bill’ (Briefing Paper 7793, 23 February 2017) <http://researchbriefings.files.parliament.uk/documents/CBP-7793/CBP-7793.pdf>. [↑](#footnote-ref-25)
26. *The United Kingdom’s exit from and new partnership with the European Union*, above n 24, para 1.8. [↑](#footnote-ref-26)
27. See eg House of Commons Library, ‘Legislating for Brexit: directly applicable EU law’ (Briefing Paper 7863, 12 January 2017) <http://researchbriefings.files.parliament.uk/documents/CBP-7863/CBP-7863.pdf>; House of Commons Library, ‘Legislating for Brexit: Statutory Instruments implementing EU law’ (Briefing Paper 7867, 16 January 2017) <http://researchbriefings.files.parliament.uk/documents/CBP-7867/CBP-7867.pdf>; *Legislating for the United Kingdom’s withdrawal from the European Union*, above n 22, para 2.6. [↑](#footnote-ref-27)
28. For recognition of this in the UK, see *R* *v* *Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603. [↑](#footnote-ref-28)
29. [2017] UKSC 5; [2017] 2 WLR 583. [↑](#footnote-ref-29)
30. Ibid, [80]. [↑](#footnote-ref-30)
31. Ibid, [82]. [↑](#footnote-ref-31)
32. See esp the dissenting judgment of Lord Reed, ibid [179]–[204]. [↑](#footnote-ref-32)
33. See above n 17. [↑](#footnote-ref-33)
34. See eg *Miller* [2017] UKSC 5; [2017] 2 WLR 583, [116]–[125]. [↑](#footnote-ref-34)
35. See eg G Robertson, ‘How to stop Brexit: get your MP to vote it down’, *The Guardian*, 27 June 2016 <https://www.theguardian.com/commentisfree/2016/jun/27/stop-brexit-mp-vote-referendum-members-parliament-act-europe>. [↑](#footnote-ref-35)
36. First Minister of Scotland, ‘Section 30 letter’, 31 March 2017 <https://news.gov.scot/news/section-30-letter>. [↑](#footnote-ref-36)
37. For rejection of calls for a border poll, see Secretary of State for Northern Ireland, James Brokenshire MP, *Hansard*, HC Deb Vol 613, col 809 (20 July 2016). [↑](#footnote-ref-37)
38. See eg M Gordon, ‘Brexit: a Challenge *for* the UK Constitution, *of* the UK Constitution?’ (2016) 12(3) *European Constitutional Law Review* 409–444, 416–435. [↑](#footnote-ref-38)
39. For a dissenting judgment in the *Miller* case, recognising the importance of approaching Brexit as a process, see Lord Carnwath: [2017] UKSC 5; [2017] 2 WLR 583, esp [248]–[249], [264] and [274]. [↑](#footnote-ref-39)
40. See eg M Russell and P Cowley, ‘The Policy Power of the Westminster Parliament: The “Parliamentary State” and the Empirical Evidence’ (2016) 29 *Governance* 121–137. [↑](#footnote-ref-40)
41. On the parliamentary decline thesis, see M Flinders and A Kelso, ‘Mind the Gap: Political Analysis, Public Expectations and the Parliamentary Decline Thesis’ (2011) 13 *British Journal of Politics and International Relations* 249–268. [↑](#footnote-ref-41)
42. *The United Kingdom’s exit from and new partnership with the European Union*, above n 24, para 2.1. [↑](#footnote-ref-42)
43. In contrast, the better view is that Parliament remained sovereign throughout membership of the EU – and, indeed, the legislative facilitation of EU membership from 1972 onwards, and authorisation of a referendum leading to the decision to withdraw, provide very different examples of the flexibility of a constitution based on the legislative sovereignty of the UK Parliament: see eg M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy*, Hart, Oxford 2015, Ch 4. For a contrary view, see NW Barber, ‘The Afterlife of Parliamentary Sovereignty’ (2011) *International Journal of Constitutional Law* 144, 152–153. [↑](#footnote-ref-43)
44. See eg M Gordon, ‘The UK’s Sovereignty Situation: Brexit, Bewilderment and Beyond…’ (2016) 27 *King’s Law Journal* 333–343. [↑](#footnote-ref-44)
45. *The United Kingdom’s exit from and new partnership with the European Union*, above n 24, para 1.11. [↑](#footnote-ref-45)
46. There has been too much select committee activity to cite in full; the Government estimated that there had so far been 36 inquiries commenced as of February 2017: see *The United Kingdom’s exit from and new partnership with the European Union*, above n 24, para 1.10. Considerable work has been done in particular by the House of Commons Select Committee on Exiting the EU (which, at 21 members, is larger than a standard committee in light of the scale of work ahead of it) and the six sub-committees of the House of Lords EU Select Committee. Such has been the level of engagement with Brexit in all areas that, as of the end of March 2017, the House of Commons Transport Committee was conspicuous in *not* having commenced an inquiry relating to withdrawal from the EU. [↑](#footnote-ref-46)
47. Constitutional Reform and Governance Act 2010, sections 20–25. [↑](#footnote-ref-47)
48. See the contribution by J Hunt (Ch 2) in this collected volume. [↑](#footnote-ref-48)
49. See eg JAG Griffith, ‘The Political Constitution’ (1979) 42 *Modern Law Review* 1. [↑](#footnote-ref-49)
50. See generally, Lord Judge, ‘Ceding Power to the Executive; the Resurrection of Henry VIII’, *Lecture at King’s College London*, 12 April 2016 <http://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf>. [↑](#footnote-ref-50)
51. See generally NW Barber and AL Young, ‘The Rise of Prospective Henry VIII Clauses and their Implications for Sovereignty’ [2003] *Public Law* 112. [↑](#footnote-ref-51)
52. For a case study of parliamentary engagement with a related challenge, see eg P Davis, ‘The Significance of Parliamentary Procedures in Control of the Executive: A Case Study – the Passage of Part 1 of the Legislative and Regulatory Reform Act 2006’ [2007] *Public Law* 677. [↑](#footnote-ref-52)
53. Such as the Joint Committee on Statutory Instruments and the Secondary Legislation Committee of the House of Lords. [↑](#footnote-ref-53)
54. [2017] UKSC 5; [2017] 2 WLR 583. [↑](#footnote-ref-54)
55. N Walker, ‘Our Constitutional Unsettlement’ [2014] *Public Law* 529–548. [↑](#footnote-ref-55)
56. See the contribution by T Horsley (Ch 4) in this edited volume. [↑](#footnote-ref-56)
57. See eg A Tomkins, ‘In Defence of the Political Constitution’ (2002) 22 *Oxford Journal of Legal Studies* 157; T Hickman, ‘In Defence of the Legal Constitution’ (2005) 55 *University of Toronto Law Journal* 981; G Gee and G Webber, ‘What Is a Political Constitution?’ (2010) 30 *Oxford Journal of Legal Studies* 273; M Goldoni and C McCorkindale, ‘A Note from the Editors: The State of the Political Constitution’ (2013) 14 *German Law Journal* 2103. [↑](#footnote-ref-57)
58. See generally RD Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union*,Harvard University Press, Cambridge MA 2011. [↑](#footnote-ref-58)
59. See eg Gordon, above n 38, pp 435–444. [↑](#footnote-ref-59)