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# ***Weakness not Crisis: Brexit and the UK Constitution***

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## **Abstract**

The UK's referendum vote to leave the EU in June 2016 generated deep divisions in British politics. It led to the resignation of incumbent Prime Minister David Cameron the following day, and an inability to deliver Brexit led to the resignation of his successor Theresa May in 2019. In addition, it has led to a number of legal challenges to the policies and processes of implementing these by both May's and Boris Johnson's governments. Those who support leaving the EU have characterised this period as one of 'crisis', in which politicians – unable to agree on a means of leaving – were pitted against the electorate or public will. Judicial challenges to the terms of exit and means of achieving Brexit were further incorporated into notions of crisis to the extent that failure to implement Brexit was portrayed as a crisis affecting the entire political system, or a constitutional crisis. In this article we unpack this discourse, and by distinguishing between different forms of crises challenge the existing understanding of Brexit as a constitutional crisis. Rather we suggest that these problems stemmed from constitutional weaknesses; specifically, that the constitution is based on a reductionist understanding of power.

Key words: Brexit, Constitutional Crisis, Constitutional Weakness, Political Power, UK Constitution

## ***Introduction: Is Brexit a Constitutional Crisis?***

In June 2016 the UK voted 51.9% to 48.1% to leave the European Union. Despite promises and timetables for an orderly departure, by mid-2019, the UK Parliament appeared to have reached an impasse, unable to agree on, and deliver, a Brexit blueprint. This led to rising tensions between the executive and the legislature, defined as a crisis by commentators and politicians. Such voices helped generate politicised attacks on the judiciary (Ewing, 2017:712) and calls to replace the 'broken' constitution (Eaton, 2017). The term 'crisis' was used to signify that widespread changes were needed; however, as we will demonstrate such arguments oversimplified the debates.

This article critically assesses such claims, and in doing so makes two contributions to the existing literature. The first is to situate the idea of Brexit as a 'constitutional crisis'. Whilst discussions on the broad idea of 'crisis' have been incorporated into some of the literature surrounding Brexit, much more is required to link the wider literature on crisis with the key characteristics and purposes of British constitutionalism<sup>1</sup>. By linking these together we compare divisions and differences surrounding Brexit with other periods of 'constitutional crisis'. In

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doing so, this article bridges discussions on constitutionalism and crisis by providing frameworks for analysing British constitutionalism *within* the context of crisis, offering a more effective paradigm for understanding the potential effects of Brexit on the British constitution. Drawing upon Brexit as a case study further offers a prism through which we might better understand the limitations of British constitutionalism more widely.

The second contribution of the article relates to the scholarship on the British constitution. By drawing upon Brexit as a case study, we seek to highlight and demonstrate the limitations of constitutions. We argue that the impasse in response to the Brexit referendum highlights a key weakness within the British constitution, as it prioritises limiting government action. Such priorities define power as stemming from action(s), rather than inactions. As the Brexit impasse demonstrates, the notion of parliamentary sovereignty contained within the UK constitution—often thought of as a counterweight to tyrannical government—offers little protection against agents and institutions wishing to maintain the status quo. Here, we suggest that the British constitution has a fundamental weakness, not borne out previously within the literature, in that it offers greater protections for those wishing to defend the status quo than for those seeking change.

This article focuses on the period between June 2016 and December 2019. It deliberately excludes the period following the 2019 general election, as its focus is on the UK's constitution, rather than Brexit policy *per se*. The majority the election afforded to the Conservatives under Boris Johnson shifted such debates away from constitutional crises in favour of policy debates. And there have been no reports or evidence to suggest that the 2019 election was in any way unconstitutional. At present Brexit has not led to constitutional changes or significantly increased demand for such changes (notably the Scottish National Party, SNP, had advocated Scottish independence prior to the 2016 EU referendum).

Language denouncing Brexit as a 'crisis' became increasingly common in the media and among politicians, predominantly among those arguing that their preferences were being ignored. These groups had different purposes for employing such language. The Daily Mail newspaper and other 'hard' Brexiteers used notions of crisis because, from their perspective, Brexit was not being fully implemented. Other right-wing newspapers also characterised what they saw as continued failings to negotiate an acceptable Brexit deal as evidence of a constitutional crisis. Meanwhile, the SNP argued that taking Scotland out of the EU "against its will", and without consulting the Scottish Parliament, represented a constitutional crisis, and Jeremy Corbyn used the term to denounce May's approaches to the Brexit negotiations (Cole, 2019).

Grieve (2018), a sitting MP (until December 2019) and former Attorney General, claimed that the Brexit impasse represented the "development of an unparalleled political and constitutional crisis" which "has precipitated the fall of one government and contributed to the failure of another... It is also breaking apart the previous broad consensus between the mainstream political parties as to how the economy should continue to be managed". Here Grieve offers political, rather than constitutional, arguments for the crisis. The constitution allows for governments to fall and change—a basic component of British democracy—and does not require consensus on economic management. Grieve, like others, further conflates 'undemocratic' and 'unconstitutional' in his depiction of Brexit as a crisis. It is important to note that these are separate critiques, as constitutions are not the monopoly of democratic states. Democracy, as it is conceived here, has roots in a plurality of institutions and governance structures including, but not limited to, constitutions. Like other MPs, Grieve sought to overcome the problem of Parliament's inability to pass Brexit legislation through constitutional means by proposing amendments to legislation (Thompson, 2020). Secondly, there exists the possibility that

something could be unlawful without it signifying a constitutional crisis, as in the case of Johnson's decision to prorogue Parliament (Gaussen, 2019). As the constitution allows for judicial review, such decisions could be conceptualised as the constitution working effectively. Alternatively, an event or process could be seen as a constitutional crisis whilst being democratic; for example, a democratic event could threaten the integrity of an authoritarian constitution.

Later Grieve (2019) warns against the "government's reckless brinkmanship and unconstitutional threats"—specifically Johnson's assertion that a no-deal Brexit could be pushed through, despite Parliament voting against it. However, he refrained from descriptions of constitutional crisis, noting that the constitution is "adaptable" and that "the sovereignty of parliament, the first principle of our constitution, is alive and well."

This language of crisis has been tempered, if not outright rejected, within the academic literature. Jessop (2017) argues that Brexit is not by itself a crisis, but a manifestation of a "continuing organic crisis of the British state and society". Likewise, Caporaso (2018) argues that (from the EU's perspective) Brexit, the Eurozone crisis and the refugee crisis are all intertwined, and Virdee and McGeever (2018) situate Brexit within a wider "financial and political crisis".

Others have linked the referendum result to notions of widespread constitutional change, though without employing the language of crisis. McConalogue (2019) argues that the referendum result could lead to a "resettling of Parliament's sovereignty based on a potentially new, enhanced constitutional settlement". However, in doing so he conflates perceptions of sovereignty with the exercise of sovereignty. McConalogue (2019:453) argues that such "constitutional 'unsettling' occurs when new events transgress the rules set out in previous precedented relationships". But again, this overlooks the actions of both May and Johnson as Prime Ministers who have worked within existing constitutional frameworks (for example, calling elections in June 2017 and December 2019, respectively) to try to achieve their Brexit policies. Following court decisions requiring that Parliament, rather than the executive alone, had to agree to Britain's withdrawal from the EU, the provisions of the constitution can be seen to have been upheld or strengthened following the Brexit referendum, rather than significantly altered.

We contend that the problems relating to the implementation of Brexit did not constitute a crisis. We argue that defining the political impasse generated by Brexit as a crisis reflects a misunderstanding of the nature and purpose of the UK constitution<sup>ii</sup>. But in analysing the relationship between Brexit policy and the constitution, we go further than those who employ notions of crises. We argue instead that the Brexit impasse stemmed from constitutional weaknesses. Such understandings are important not only in the field of crisis research but also in terms of Brexit policy. Rather than arguing that the constitution – or those charged with upholding it – should be radically altered or even replaced we argue that contemporary debates regarding the constitution need to incorporate a more holistic understanding of power.

This article first distinguishes between crises and constitutional weaknesses before exploring how constitutional provisions have affected the passage of Brexit legislation. That such impasses occurred should not be seen as a constitutional crisis—policies could be (and were) advanced and implemented without constitutional reform—but rather stem from constitutional weakness, in particular, the inability of the constitution to force legislation on any given topic. Distinguishing between crises and weaknesses is not only important in understanding contemporary debates surrounding Brexit (e.g. Menon & Wager, 2019) but also broader debates around constitutional reform.

### *Crisis and Weakness*

Dutton (1986:502) differentiates between periods of crisis and non-crisis noting that in the former “decision makers increase the levels of resources expended on an issue, enhance control over issue resolution and increase the level of issue-related explanation.” Crises, in other words, generate priorities for policymakers, and enable the prioritisation of resources in favour of policies designed and implemented to overcome the crisis. This is linked to Rapport’s (1962:212) understanding of crises as a “call to new action”.

Through their association with failure or sub-optimal events or outcomes, crises raise the stakes of the political game; they are “moments of decisive intervention” (Hay, 1996:254). Crises are not ordinary times in politics but require, by definition, investing a greater amount of resources and effort into solving their problems. They take priority upon the agenda and are built as temporary negative entities; they encourage quick solutions to return to a somewhat ‘normal’ state of affairs, often defined as being the state of affairs that existed prior to the crisis (or at least defined in relation to the pre-crisis situation). Economic indicators are often used to demonstrate progression through a crisis; only once economies have surpassed pre-crisis figures can they be seen as being out of crisis. Whilst it is less clear what pre-crisis metrics can be used to measure the progression of the Brexit crisis it is important to note that the ability to define both crises and the means by which those crises may (appear to) be resolved are highly politicised.

Jessop (2018:49) notes that crises contain both dangers and opportunities for those able to frame the debates. Jessop outlines five distinct features for analysing crises. Firstly, crises have “both objective and subjective aspects... objectively crises occur when a set of social relations cannot be reproduced in the old way. Subjectively, crises tend to disrupt accepted views of the world and create uncertainty on how to ‘go on’ within in.” Secondly, crises “do not have predetermined outcomes: how they are resolved, if at all, depends on the actions taken in response to them.” Thirdly, crises may be “deliberately exaggerated or even manufactured ... based on mis-perception or mis-recognition of real world events and processes. Sometimes crises may be manufactured or, at least exaggerated, for strategic or tactical purposes.” Fourthly, it is this subjective moment that facilitates “decisive action”; without it, disinterested observers “will have insufficient resonance ... to spur them into efforts to take decisive action”. Fifthly, crises are “complex, objectively overdetermined moments of subjective indeterminacy, where decisive action can make a major difference to the future.”

Within this framework we can see only limited similarities to the narratives relating to Brexit as a constitutional crisis. We can distinguish between the subjective elements that Jessop highlights in his third, fourth and fifth criteria and the objectivity contained within his first. This can be used to decipher between the narratives of a constitutional crisis (which have emerged in the media and popular discourse, as outlined above) and an understanding of crises as challenging existing structures.

This is important in understanding Jessop’s second assertion—that the outcomes (and in particular, resolutions, to crises) are contested. Here, the narratives of a constitutional crisis focused exclusively on a binary Brexit/No-Brexit debate; narratives such as “Judges against the people” did not concern themselves with the details of the Brexit agreement or other parliamentary legislation the government was seeking to pass. The crisis was framed not in terms of delivering Brexit but in terms of delivering a particular form of Brexit. This presented a simple solution, at odds with Jessop’s second feature of a crisis, epitomised in Johnson’s 2019 campaign slogan “Get Brexit Done”.

In outlining the subjective elements of crises Jessop (2018) notes that individuals or groups may wish to ‘create’ crises “not directly related to immediate events or purposes” to achieve broader political goals, such as through the imposition of martial law to ensure political survival (see also Fairman, 1942). Agents may then wish to construct crises or redefine them to suit their agendas, such as to push through legislation aimed at preventing Brexit (or a particular type of Brexit) or to advance a particular form of Brexit (including a “no deal” or WTO Brexit). One reason for suggesting a crisis, therefore, may be to shape governmental policy.

Narratives alone cannot summon a crisis; as Brass (1986:246) emphasises “a crisis situation must be perceived by someone or some group to have reality.” Jessop’s objective criteria which establishes that “existing social relations cannot be reproduced”, draws upon such notions and is akin to the medical definition of crisis which is understood as “the turning point in [a] disease, the moment when the body either starts to shake off the disease or succumbs to it.” (Gamble 2009:38).

Narratives supporting a constitutional crisis have not extended to calling for widespread constitutional change – those advocating Brexit as a constitutional crisis have not sought to change the UK constitution in a manner that would fit into understandings of Brexit as marking a turning point. As we demonstrate below, much of the contested nature of Brexit policy has worked within, rather than against, the UK constitution. Groups opposed to both Brexit and the actions of the MPs, judges, and others, have not questioned their constitutional role, or sought to utilise powers that go beyond the constitutional norms (e.g. revolutions) in order to pursue their aims. This is in contrast to previous episodes defined as constitutional crises (see below) and Jessop’s (2018:52) argument that “crises do not generate their own resolution”.

Narratives of a constitutional crisis, then, are subjective, and can be debated and even rejected, as we seek to do here. We contend that narratives of Brexit as a constitutional crisis are problematic as they implicitly suggest the constitution is, or at least should be, able to decide between contrasting options. Proponents of Brexit as a constitutional crisis see the crisis as emanating from a failure to compel MPs to pass legislation. Such a ‘failure’ highlights a paradox. One of the key advantages that those campaigning for Brexit advocated was the ability to “take back control”; to give greater power to Parliament (not the government or the electorate – both of whom were portrayed as pro-Brexit) to decide the future of the UK.

It is also worth noting that events have multiple, and different, repercussions. Stating that the Brexit referendum or legislative process does not represent a constitutional crisis is not akin to saying that it does not represent, or have an impact on, a different type of crisis. Indeed, Jessop (2016:139) notes that the Brexit vote “exacerbated” a “representational crisis” and predicted that it could worsen a “legitimacy crisis” if “public opinion, spurred on by the pro-Brexit press, becomes dissatisfied with progress and suspects a deliberate policy of backsliding on the part of government.” We accept Jessop’s arguments and suggest that the narratives of a constitutional crisis outlined above correlate with such a prediction. This, however, does not diminish our own argument; namely that the Brexit process and negotiations have not led to a constitutional crisis.

Jessop (2018:50) warns against too readily accepting notions of crisis. He argues that “over-reliance by participants or observers on interpreting specific symptoms as evidence of a continuing crisis or yet another crisis can create a blind spot that side-lines alternative descriptions, diagnoses, prognoses and potential causes of action.” Rather than seeing Brexit as a constitutional crisis we argue that a greater analysis of the role of constitutions is needed. Constitutions are seen as providing a framework for the legitimate exercise of public power (Krisch, 2009). Constitutions establish how laws may be enacted and passed and ensure that

the processes of policy formation and implementation are legitimate, but there is no mechanism to compel governments to legislate on a particular issue or matter. As we will see, this is problematic even in the ostensibly more flexible, political constitution of the UK.

### ***Parliamentary Sovereignty and the UK Constitution***

A constitutional crisis, then, should be viewed as a call to new action, denoting a fundamental failure of purpose that requires or produces a rupture significant enough to alter the foundations of the constitution itself. In this sense, a constitutional crisis is something more than an event that demonstrates an inefficiency or lack of capacity in the constitution to solve a particular political issue. Rather, in a constitutional crisis, the means proposed to resolve the issue would necessitate a fundamental reorganisation of constitutional structures and purposes. To understand whether the issues surrounding the Brexit impasse in Parliament did entail such a crisis, it becomes necessary to understand the constitutional arrangements of the UK, particularly as they pertain to parliamentary sovereignty.

Constitutional arguments regarding Brexit have centred around the notion of parliamentary sovereignty. This ostensible clash between Parliament's legal sovereignty and the conceived 'political sovereignty' of the voting public, with Parliaments' reluctance to pass a Brexit deal in supposed contradiction with the people's will laid out by the referendum result, clearly posed a challenge for the UK's constitutional arrangements (Matthews, 2017). Debates have, therefore, focused on the constitutional relationship between Parliament and the executive, and the right of that executive to implement the 'will of the people', potentially in defiance of Parliaments will. The principle of parliamentary sovereignty—and its relationship to other parts of the UK's constitutional infrastructure—are therefore central to debates around whether Brexit constituted a constitutional crisis. This section outlines the idea of parliamentary sovereignty and the constitutional relationship between Parliament, popular sovereignty, and the UK executive. In doing so, it will outline the conditions for when discourses around crisis might become an appropriate vehicle for discussing extant political challenges within the UK system.

Of the defining features of the UK constitution, it is perhaps parliamentary sovereignty that stands as the legal *grundnorm*, bringing together the patchwork of rules that form our constitutional order. It is also the one that firmly distinguishes the UK constitution from other prominent 'written' (codified) constitutions, including the French and United States constitutions (King, 2009). In codified constitutions ultimate authority derives from the norms and form articulated in constitutional text, which are adjudicated upon by a separate judiciary that has the right to strike down legislation should it contravene the formal norms of that constitution. Such constitutions, thus, generate a 'hierarchy' of law, which constrain successive governments.

While the UK does not have such a written constitution or such an obvious hierarchy, parliamentary sovereignty nonetheless plays a not dissimilar role within the UK constitution. As Gordon (2015:22-23) argues, parliamentary sovereignty acts as the 'central organising principle' of the UK constitution. The fact that the will of Parliament and ordinary parliamentary law stand as the 'Supreme Expression of Law' places the principle of parliamentary sovereignty at the apex of the UK constitution. While independent loci of authority do exist in the UK constitution, such as prerogative, precedent or common law, the practice of such principles is constrained by the legal authority of Parliament which can limit and modify all other forms of constitutional authority. Understanding the role of this organising

principle and how it relates to the power of the executive is therefore critical in understanding whether the clashes between popular and parliamentary sovereignty that became so salient in the Brexit debate rose to the level of a 'constitutional crisis'.

Many, if not most, of the earlier principles of the UK constitution establish the ways in which the powers of the 'Crown' should be exercised and limited. The Magna Carta, or Great Charter (1215), was formed as a peace treaty between English barons and the King and focused on the rights of free men (primarily barons, but also serfs). The Charter provided theoretical protections against arbitrary imprisonment, imposed limitations on the monarch's taxation powers, and demanded the provision of ostensibly impartial justice. It also demanded the creation of a 'Council of Barons', who would decide on matters related to taxation (Vincent, 2012). The Charter is significant in the constitutional canon of the UK as it represented the first formal recognition that the Crown's powers were not unlimited and were subject to restrictions based on (at that time a very limited) set of fundamental rights of Free Englishmen, as well as the idea that the monarch's power should be limited and overseen by a 'conclave' of significant individuals within the Kingdom. The Magna Carta was thus the first step on the road to the creation of a monarchy embedded within a wider constitutional 'state of laws' (Loughlin, 2013). Limiting the arbitrary exercise of power by the executive or monarch outside of extant *lex* was, and remains, critical to the operation of the UK constitution and the Great Charter was the first real attempt to do this. It therefore laid the foundations for the more radical parliamentary limitations on the Crown's powers that emerged after the English Civil War. As Loughlin (2013:44) stated, "By establishing the fact that the acts of the King had an official character exercisable through particular forms, the Charter constituted a landmark in English governing arrangements."

The centuries following the Magna Carta saw the gradual emergence of Parliament, which was created and summoned by monarchs to maintain geographically widespread support from their barons and to raise funds for military campaigns and other expenses. Parliaments began as sporadic events where monarchs would summon a Council of Barons to discuss and agree on tax levies and to garner support for other important measures and policies. This procedure was expanded by Henry III (1216-1272) to include the representation of two knights from each shire. This process thus brought into being the idea of a geographically representative parliament and laid the foundations for the House of Commons (Loughlin, 2013:42-46). During this period, the authority and role of Parliament grew as Edward I (1272-1307) grew reliant on the institution to fund his wars and his extensive use of the military and, accordingly, on the knights and barons who constituted the early parliaments.

Over the next 200 years Parliament established itself and its power to create laws as an integral part of the early constitutional architecture of the country while remaining broadly subservient to the monarch. Early parliamentarians preferred to demand a share in the power of the Crown rather than denying or challenging its validity, particularly as it remained within the power of the monarch to call or dismiss Parliament. Thus, the view of the 'Crown in Parliament', of the monarch and Parliament creating an integrated sovereign power became increasingly predominant as a way of viewing the exercise of sovereign power in England (Loughlin, 2013).

The fact was, the monarch *needed* Parliament to govern, particularly to fight wars, and as a result, the power of Parliament continued to grow. Henry VIII (1509-1547) particularly utilised Parliament to support his own power against his opponents, not least his ecclesiastical ones. Henry VIII (quoted by Holinshed, 1808) summarised this increasing integration of the two



bodies as follows: “We as in no time stand so highly in our estate royal as in the time of Parliament, where we as the head and you as members are conjoined and knit into the body politic”. By this point, it was broadly accepted that an Act of Parliament constituted the highest form of legal authority and when used in conjunction with kingly consent, was without legal limitation. Indeed, it was the authority of an Act of Parliament, the Act of Supremacy of 1534, that changed the very religion of the state, installing the monarch as the new Head of the Church (Act of Supremacy, 1534). Such power demonstrated that an Act of Parliament was now clearly the ‘highest expression of law’, laying the foundation for the doctrines of parliamentary sovereignty/supremacy that remains the pre-eminent constitutional principle of British politics (Loughlin, 2013:48). However, its absolute sovereignty—including over the monarch—had yet to be established.

By the seventeenth century Parliament had already attained a prominent position in the English constitutional architecture as the ‘body’ of the body politic, with the monarch forming the head. The monarch’s executive power remained pre-eminent in many respects, but to act with full sovereignty, he also needed the legislative power of Parliament. This settlement lasted until the reign of Charles I (1625-49). With the King claiming the ancient right of Divine Mandate and refusing to govern according to the traditional understanding between the King and Parliament, a restive Parliament began to act independently, passing the Petition of Right (1628), which laid out specific protections for individuals and impeaching Ministers of the Crown whom they felt were acting beyond their rightful power (UK Parliament, 2022a)

The King responded by dismissing Parliament in 1629 but was forced to recall it in 1640 due to the desperate state of the nation’s finances (UK Parliament, 2022b). It was at this point that Parliament laid before the King nineteen propositions, which would fundamentally re-order the relationship between the King and Parliament. The nineteen propositions called for a fundamental change in the relationship between the King and Parliament, with Parliament taking on a far more prominent role in overseeing and restraining executive power (Constitution.org, n.d). During this period, Parliament appealed to notions of political sovereignty; because true power lay with the people, and they considered themselves the people’s representatives, they argued that the source of true sovereignty lay not with the King, as God’s viceregent, but with Parliament themselves. Parliament (while initially formed by Royal Decree) had “taken on the power of self-creation”, and no longer saw itself as answerable to the King’s power or as an addendum to his authority (Loughlin, 2013:58.). This new claim to parliamentary authority as an independent power possessing self-sustaining sovereignty and authority sparked the Civil War and laid the foundations for the new constitutional settlement.

### ***Britain’s Modern Constitutional Settlement***

Despite Charles I’s defeat by the parliamentary forces, it was not until the end of the seventeenth century that Britain’s modern constitutional settlement was formed. Despite Parliament’s victory in the Civil War, Oliver Cromwell took on the position of Lord Protector and managed the country as a dictator, regularly dismissing and side-lining Parliament (Firth, 1893). It was not until the Glorious Revolution (1688-9) that Parliament’s modern place in the constitutional settlement emerged. William of Orange (William III, 1689-1702) accepted the throne on the basis that his power would be limited by Parliament’s legislative supremacy, resulting in the formation of Britain’s constitutional monarchy (Bogdanor, 1995). It was an Act of Parliament, not succession, which enabled William to become King, meaning, parliamentary supremacy now undeniably stood above royal power as the *grundnorm* of the British

constitution. This power was formalised in the Bill of Rights (1689), which enshrined the right to regular parliaments and entrenched its supremacy as the ultimate authority and independent from the monarchy. The Bill, which stated “Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament,” therefore established the legal principle of parliamentary sovereignty (transcending earlier notions of political sovereignty), and its current position as the central organising principle of the UK constitution (Gordon, 2015). No act of the Crown or any other body could therefore contravene or override the will of Parliament. As Dicey (1885, cited in King, 2009) stated, this arrangement ensured Parliament, “the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”

Relatedly, as an ordinary Act of Parliament represented the supreme manifestation of law, Parliament could not, and cannot, bind its successor. These two great principles—that Acts of Parliament cannot be voided by any other institution of government as ‘unconstitutional’ and that parliament cannot bind its successor—became the foundations of the doctrine of parliamentary sovereignty and remain predominant in contemporary British constitutionalism (King, 2009).

### ***The Legitimacy of Parliament and Parliamentary Sovereignty***

The principles of parliamentary sovereignty were thus explicated in the settlement following the Glorious Revolution. However, the basis for the legitimacy of parliamentary rule remained relatively unclear. Parliament often claimed to speak for ‘the people’, but until 1832 less than 5 percent of people could vote to choose their representatives. Parliament remained the preserve of the landed gentry and only a very small part of the population (white, male, and rich) were able to vote for their representatives (Loughlin, 2013:55).

Influenced by the great revolutionary movements in France (1789-1799) and the United States (1775-783), nineteenth and twentieth centuries were dominated by ultimately successful attempts to extend the voter franchise and entrench parliamentary sovereignty through notions of popular legitimacy. Popular sovereignty, which had been previously rejected by conservative statesman like Burke, now gained irresistible momentum as providing the legitimate basis for government and authority. Parliament therefore gradually became seen as a representation of the sovereign will of the people, following a series of reforms beginning with the Reform Act of 1832 and culminating in the Representation of the People’s Act 1928. Parliament was now not only the sovereign legal authority but also the repository and representative of the will of the British people. The major effect of this transition was a transference of power from a ‘truly’ bicameral system in which the House of Commons and Lords governed jointly to a system where the Commons became pre-eminent as representatives of the sovereign authority of the British public (Loughlin, 2013:55-57). The Parliament Acts of 1911 and 1949 enforced the supremacy of the Commons by reducing the ability of the House of Lords to veto bills and enshrining the primacy of the elected house on the explicit basis that this house, as representative of the British people’s will, should be the ultimate law-making authority in the country (Gravells, 2006).

### ***Parliamentary Sovereignty and the Executive***

Parliamentary sovereignty is therefore the vital fulcrum on which the rest of the constitutional system stands (Loughlin, 2013). This sovereign authority does not, however, mean that it is Parliament that actively ‘governs’. As an ‘evolutionary’ constitution, the UK constitution has been flexible in the relationship between core constitutional principles, and the relationship between Parliament and Government reflects this flexibility (King, 2009). The central ‘organising principle’ of Parliament’s legal sovereignty has existed in tandem with the need for effective governmental authority since the Glorious Revolution and its elevation to the underpinning principle of the UK constitution, working alongside the complex system of rules and customs that form the remainder of the British constitution.

It was acknowledged from the time of the Glorious Revolution that the day-to-day process of governing would be undertaken not by Parliament but by ‘Ministers of the Crown’, who were appointed with the consent of Parliament. This early iteration set up the division of power within the UK constitution in which the Crown (represented by the Government) undertook the day-to-day running of the state, with its legitimacy undergirded by parliamentary consent and in acquiescence to the doctrine of parliamentary sovereignty. From this delegation of authority and the retreat of the monarch as a meaningful political power the office of Prime Minister, cabinet government, and formal political parties emerged. The authority of the Government rested on its ability to command a majority in the sovereign Parliament. The natural tendency of power to concentrate around a small number of individuals and the adversarial nature of British politics ensured that governments have largely been able to control the parliamentary majority and ensure the passage of their desired legislation through Parliament.

As Bagehot (1867) stated, this is an intended part of the constitutional architecture of the UK and is, at least theoretically, intended to provide authoritative and strong government, with the sovereign Parliament ensuring the accountability of the government to the people. Further, proceeding from the Act of Settlement of 1701 the judiciary exists as the third branch of government with the purpose of interpreting parliamentary statutes to ensure that the authority of the government does not overstep the parliamentary and constitutional principles that underpin the UK’s unwritten constitution. Cumulatively, as King (2009, ch.3) argues, these principles form the roots of the British constitutional system. Parliament is sovereign, but this sovereignty is usually a ‘limiting’ factor on government rather than an active power, organising and limiting the exercise of that power. The sovereign Parliament is elected once every few years by the people and then gives consent by the majority to the formation of a government. The judiciary also plays a crucial role “in the sense that they developed common law, interpreted statute law and ensured that the actions of governments were in strict accordance with that law” (King, 2009:45). Finally, governments are held in check by the ‘nuclear option’ of a vote of no confidence from Parliament, which leaves a clear chain of legitimation between the people and their representatives in the sovereign Parliament.

### ***The Contemporary Constitution and Parliamentary Sovereignty***

There has been substantial change to the constitutional settlement of the UK since the end of the Second World War and particularly over the last 30 years. The UK Parliament has been willing to delegate more authority ‘outward’ from itself, both in the form of its initial decision to pass the European Communities Act of 1972 as well as through devolution, in which Acts

of Parliament were utilised to delegate competence to newly created governments in Scotland and Wales. Human rights commitments, which used to be matters of common law or dispersed among various pieces of legislation, have been formalised in the Human Rights Act. The Constitutional Reform Act of 2005, which created the Supreme Court, separated the primary judicial power from the Lords, further clarified the separation of power and enhanced the role of the judiciary in constitutional matters. Parliament has legislated for referenda on important constitutional questions, enhancing the direct role of the 'people' in constitutional matters. As a fundamentally political constitution driven by parliamentary statute, convention, and custom, the UK constitution changes relatively easily and it is undoubtedly the case that social and political transformations have substantively changed the way the UK constitution actually operates (Bogdanor, 2009).

However, at least to date, the fundamentals of parliamentary sovereignty and its relationship with the executive and judiciary remain intact under our current constitutional arrangement. Despite transformations in the UK constitution, these have been validated and created with Acts of Parliament. Constitutional change has remained within the paradigm of the fundamental principles of the UK constitution, including parliamentary sovereignty and the relationship between Parliament, the executive and the judiciary. While the power of the judiciary has expanded, it has not sought to challenge the doctrine of parliamentary sovereignty. At least until now, the devolved administrations have not sought to govern outside of their established devolved competences or to challenge the fundamental supremacy of Parliament in areas where authority has not been delegated. It is certainly possible that further constitutional crises *could* occur relating to these changes should, for example, the Scottish Parliament formally break away from Westminster without Parliamentary consent, but this rupture remains untested and theoretical. Therefore, the essential principles of the British constitution—that Parliament is sovereign (and dominated by the elected commons), the government governs within the strictures that Parliament provides, and the judiciary adjudicates—remain fundamentally intact. Parliament's legal sovereignty, therefore, continues to 'organise' the UK constitution and continues to limit and shape its development despite an advancement of both judicial and regional power in the broader functioning of the UK constitutional system.

Unlike the aforementioned changes, the events of Brexit between 2016 and 2019 have been presented as a constitutional crisis, and these discussions have centred around ostensible challenges posed to parliamentary sovereignty and the executive-Parliament relationship by the referendum result. Undoubtedly, these events posed challenges to the *efficacy* of the constitution in dealing with the unprecedented political events the referendum caused and the reluctance of Parliament to vote for something they did not agree with. A crisis, however, is much more than that: it is a 'call to new action' and represents the potential for a fundamental turning point for those embroiled within the crisis. Therefore, for Brexit to become a constitutional crisis, it would have to undermine the constitutional principle of parliamentary sovereignty and its relationship with the other parts of the UK constitutional system or other fundamental constitutional areas. A constitutional crisis would have resulted in Brexit representing a fundamental turning point in the evolution of the UK constitution, one driven not only by media narrative but also by political action. Drawing upon two historic constitutional crises in the UK (the 1911 constitutional crisis and 1914 Home Rule crisis), we demonstrate that while Brexit demonstrated constitutional weakness and a challenge to constitutional efficacy, it did not represent a constitutional crisis as both opponents and

proponents of Brexit were willing to (and indeed did) work within existing constitutional means to pursue their goals.

### ***The 1909–10 Constitutional Crisis***

Following its 1906 victory, the Liberal government sought to assert its dominance over the Conservative-dominated House of Lords and “in 1907 the House of Commons passed a resolution emphasising that it was the will of the commons that had to prevail” when disagreements occurred between the two houses (Shell, 2007:14).

In 1909 the Liberal government sought to introduce new taxes on landholdings and wealth to fund welfare programmes such as pensions (Murray, 1973:556). The House of Lords rejected the plans causing a power struggle between the two chambers, with the Commons seeking to assert its dominance and the Lords rejecting any changes to its equal status. This generated a deadlock, and in 1910 two elections were fought under “a ‘peers versus the people’ theme”. Advocates of the government suggested that the will of the people—expressed in the 124-seat 1906 landslide victory and the two elections of 1910 which, although they denied the Liberals a majority, returned more Liberal MPs than those of any other party—was being frustrated by the unelected, and thus unaccountable, House of Lords. Such narratives support Jessop’s (2018) subjective criteria for understanding these events to be a crisis.

The deadlock was broken only when the King raised the potential for “mass creation of Liberal peers to overcome Conservative resistance” (Shell, 2007:14). This intervention forced the House of Lords to temper its objections and accept the 1911 Parliament Act which outlined the supremacy of the House of Commons. The crisis of 1909–10 was essentially a power struggle between the houses of Parliament. The King’s intervention suggested that the traditional method of appointing peers could be circumvented, as the rationale for creating new peers would be explicitly to ensure the legislative passage of the budget, an overtly political act. This directly challenged existing constitutional arrangements establishing the distribution of power, such as the relationship between the two chambers or the power of the monarch to make political appointments in the House of Lords, thus supporting Jessop’s (2018) objective criteria: that existing social relations could not continue in the existing manner.

The 1909 constitutional crisis related to the House of Commons’ desire to implement legislative changes, whilst the Brexit impasse relates to a chamber whose inaction functioned to maintain the status quo. In 1909 external pressure was placed upon MPs from the Lords; Brexit, in contrast, cannot be seen as an existential crisis but, rather, stemmed from MPs’ own actions. Even those seeking to frame Brexit as a crisis adopt the premise that it is MPs (either on their own or in conjunction with others) who are obstructing the desired outcomes (e.g. through narrations of ‘parliament against the people’). Challenges to Johnson’s actions have been undertaken through the provisions set out within the constitution: for example, through the courts. MPs have focused upon notions of parliamentary sovereignty (either explicitly or implicitly) to oppose or delay a no-deal Brexit, through passing legislation such as the Benn Act. These actions have defended the position of the constitution rather than seeking to reshape it. Equally, those outside Parliament have challenged decisions over prorogation and attempts to reduce the time available to Parliament to consider Brexit legislation through the courts.

### ***The Irish Home Rule Crisis 1914***

A further example of a constitutional crisis can be seen in the events of 1910–14. This was not the first iteration of the Irish Home Rule question, yet what distinguished this from previous discussions was “the threat of violence with which the matter was attended and the debate about whether or not the British state could or would use force to impose a settlement” (Larkin,

2014:201). This crisis then can be seen as a “distinct moment in a process [i.e. the question of Irish independence] which has a much longer time frame” (Gamble, 2009:38).

The support offered to the Liberals in passing their budget after 1910 came in exchange for an Irish Home Rule Bill, which was presented to Parliament in 1914. This led to opposition from unionists in Ulster, who sought to be excluded from such legislation. Amidst reports of increased arms available to a quickly growing Ulster Volunteer Force the government sent “precautionary” troops into the region in March (Jalland, 1980:222-229) to ensure conformity with the Parliament Act. Such moves were also opposed by the Conservatives, under the leadership of Bonnar Law, who had used parliamentary means to delay the passage of the Irish Home Rule Bill until 1914.

Powell (1996:160-61) argues that although opposing a bill was not unconstitutional “opponents of home rule in Ulster went beyond the bounds of constitutionality [through] their plan to establish a provisional government without parliamentary approval and their determination to defend that government by military action against the forces of the crown”. The Home Rule Bill threatened civil war. Opposition was not limited to radicals, but also supported by senior politicians. Bonnar Law (quoted by Powell 1996:177) leader of the Conservative Party, accepted that the constitution and law could be circumvented to avoid Irish Home Rule. In January 1914 Law wrote to the Kings Private Secretary in January 1914; “there are now only two courses open to the government: they must either submit their bill to the judgement of the people, or prepare to face the consequences of civil war.”

That those in Ulster were prepared to circumvent the law and constitution with force to achieve their stated goal of remaining a part of the United Kingdom distinguishes this as a crisis. In the case of the people’s budget the monarch—who was expected to be above party politics—was willing to change the composition of the House of Lords in order to ensure a particular legislative outcome. In both instances, the existing provisions within the UK’s constitution appeared under threat. In both cases there existed tensions between external forces and the role of Parliament. Parliamentary sovereignty was undermined by the actions of the monarch (in threatening to create a number of new peers to force a particular resolution) and the Ulster Volunteer Force (which was willing to use force to prevent the government’s Home Rule Bill).

The resolutions to these crises are not discussed here. That neither of the crises led to a paradigm shift or wide-spread change is immaterial to our understanding of these events as crises—as Jessop (2018) argues, not all crises need to be resolved. The term ‘crisis’ is appropriate in each context as they saw a fundamental challenge to the status quo. Rather, these are used as case studies to compare the events surrounding the constitutional crisis pertaining to Brexit that are discussed below.

### ***The Resolution of the Brexit Crisis?***

Boris Johnson and others who advocated Brexit claimed that Parliament’s inability to pass the government’s legislation amounted to an impasse. In order to overcome this, they decided on an election as an alternative means of putting the question back to the electorate rather than a further, “second” referendum that some political opponents were advocating. Despite initially being unwilling to grant an election, fearing the timing could be used by the government to push through a no-deal Brexit without proper scrutiny, opposition parties (whom Johnson needed to support a motion calling for an election under the Fixed Term Parliament Act) only supported such motions following the passing of the Benn Act and the agreement to extend Britain’s date of departure to the end of January 2020.

The 2019 election focused on the impasse and perceived failings of MPs to fulfil the promises made in 2016. The prominence afforded to Brexit was highlighted in the Conservative campaign slogan “Get Brexit Done.” During the campaign, Johnson promised that all prospective Conservative MPs had signed up for his deal, thus minimising the potential for any rebellions, such as the one in September 2019 which saw 21 Conservative MPs lose the party whip. It also facilitated parliamentary approval for Johnson’s Withdrawal Agreement Bill in December 2019.

This resolution was achieved by both a democratic means (i.e. through an election and the subsequent passage of legislation in Parliament) and within the framework of the existing UK constitution; there was no coup or revolution that threatened the incumbent government. Rather it was a decision taken by that government, in conjunction with opposition leaders, to refer questions of leadership back to the public. It was furthermore a process that has been undertaken at regular intervals in recent British history and does not prevent any future election or constitutional practice from being exercised.

### ***Weakness not Crisis: The Constitution and Brexit***

The history and development of the UK constitution depicts debates over the legitimate power of those entrusted with decision-making. A common theme linking the early barons under King John (1199-1216) to those arguing in favour of devolution or even regional independence is legitimacy—to what extent can those who yield power exert it over others? Answers to this question assume that those who are able to yield power simultaneously wish (and maximise their ability) to use such power.

Doing so limits power to Lukes’ (2005:22) first face of power that of decision making. The constitution has evolved, and has historically been adapted, to prevent tyrannical governments from exercising too much power over citizens or populations. Far less attention has been devoted to the idea of non-decision making, defined as the

means by which demands for change in the existing allocation of benefits and privileges in the community can be suffocated before they are even voiced; or kept covert; or even killed before they gain access to the relevant decision-making arena; or, failing all these things, maimed or destroyed in the decision-implementing stage of the process (Bachrach and Baratz 1970:44)

Non-decision making can, then, be seen as upholding the status quo, even if there are competing pressures advocating change. Politicians—or those able to exert power over the policy-making process—may favour maintaining the status quo rather than being responsible for implementing what they, or voters, perceive to be a worse option. Lukes (2005) argues that there exists a further, radical view of power (that of preference-shaping) which also incorporates the role of non-visible conflicts, something that, again, the constitution fails to account for.

Whilst we may not expect constitutions to account for non-visible forms of power, a more holistic understanding of observable power is required. Weaver (1986:372-374) argues that politicians are vote-maximisers, and that people who have suffered a loss are more likely than those who have gained a corresponding amount to notice it (and therefore it is more likely to have a political effect). This leads politicians to be “at least as interested in avoiding blame for—perceived or real—losses that they either imposed or acquiesced in as they are for ‘claiming credit’ for benefits they have granted.”

Here, politicians, including those who wish to see the UK leave the EU, still opposed particular means of achieving this if they feared voters would blame them for any negative effects this

may entail. Hansson (2019) demonstrates how politicians, including those in the cabinet and supportive of the government's plan, were careful to avoid blame for the risks associated with Brexit, principally through employing the "language of self-preservation".

Politicians may then possess incentives to simply reject any legislation that enables the UK to leave the EU, especially if they can justify their objections through the discourse that this such legislation is the wrong means (rather than intrinsically bad). Doing so enables them to object to the specifics of the legislation (avoiding blame for it) rather than the overarching intention. This rationale may offer reasons for the failure of the indicative votes in March 2019 to find an acceptable solution or agreement (parliament.uk, 2019).

Whilst such scenarios raise moral or philosophical questions they also raise practical ones. If politicians have an incentive to prevent changes to the status quo or lack the enthusiasm to support legislation that changes the status quo there is little constitutionally that can be done to bypass the normal channels of policy making.

As the constitution cannot compel governments to act it cannot objectively *fail* if the governments (or representatives) decide not to act. Declaring (in)actions undemocratic (as hard Brexiteers have done) is very different from claiming actions to be unconstitutional. Rejecting defining current events in terms of crisis, we argue that constitutional provision is limited in its scope. This suggests that the constitution, in its current guise, remains capable of maintaining the rules of the game and ensuring that any legislation emanating from a Brexit referendum or discourses is in keeping with existing provisions. It also reflects that the powers of the constitution are limited in scope; the constitution cannot, compel actors to behave or act in certain ways. Whilst it may be able to prevent certain actions this is very different from forcing actors to act in certain ways.

To take an extreme case, imagine a government that actively decided not to pursue any policies or bring legislation to Parliament and deliberately blocked other attempts to pass legislation (e.g. backbench bills). As long as the government was able to command the confidence of the House of Commons (or, importantly, not demonstrate that it had lost the confidence of the House), there are no provisions within the constitution to enforce the passage of legislation before the next general election. Given that the date of a future general election can also be changed at the discretion of Parliament a government could further seek to extend such a paralysis.

### ***Further Considerations***

If the issue of Brexit is, then, viewed as a crisis, it needs to be framed outside of the constitution. For it is impossible to force a legislative body within a system of parliamentary supremacy to act, at least at a constitutional level. We have argued that the relationship between the Brexit impasse and the constitution is better defined as constitutional weakness, rather than crisis, as it has exposed an area in which the constitution offers little guidance. The underlying assumption of the UK constitution is that those who are able to exercise power wish to do so, emphasising and encompassing a basic understanding of power.

Yet this does not suggest that other crises are not simultaneously occurring—for example, a policy crisis or a crisis within specific political parties. It merely indicates that the problems, and thus solutions, to any crisis are not rooted within the UK constitution. Nor does this article predict or assert that a constitutional crisis will not occur due to further developments. We leave open the possibility that the weaknesses of the constitution as outlined here are exaggerating any (or multiple) crises, but again this is not sufficient in itself to constitute a constitutional crisis.



The evolution of the UK constitution has been set within a context of protecting citizens from tyrannical governance structures, with little or no provisions for extending the protected freedoms beyond freedoms from interference. As we have demonstrated the premise of the UK's constitution is that the status quo is not a tyrannical state, and the freedoms are protected by preventing an imposition of such tyranny. However, should this situation change so that a tyrannical situation were to become the status quo (i.e. imposed upon the UK's population from an external source) and this situation were supported by Parliament, there exist no constitutional provisions that would require Parliament to legislate or to actively overcome such conditions. Further considerations regarding the relationship between constitutional weakness and limits of parliamentary sovereignty are then required. In particular more could be done to assess which additional constitutional provisions are needed to protect citizens from the inaction of Parliament.

Although we have focused on the UK constitution, the issues addressed in this article also speak to a wider limitation within constitutions and constitutionalism more generally. Constitutions attempt to protect individuals, citizens, the people from potentially repressive or tyrannical governments. Other constitutions also possess similar limitations as those identified here; for example, the United States constitution has few powers at its disposal to overcome government shutdowns in the face of disagreement between the executive and legislature.

It may be, then, that constitutions, despite their considerable role in both limiting the exercise of political power and enabling the exercise of constituent power are ultimately limited in their capacity to control the practice of politics in a holistic sense. Further study on this topic would therefore be instructive in understanding both the potentialities and limitations of constitutions and constitutionalism on the practice of politics.

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<sup>i</sup> Here we use the term British constitutionalism to refer to the academic discourse which discusses it in these terms. This is distinguishable from the UK constitution itself.

<sup>ii</sup> Here we deliberately use the term UK constitution, rather than British constitution to clarify that it covers not only Great Britain but also Northern Ireland.