Chapter Fourteen: The strange romance of the sovereignty of parliament

An earlier chapter discussed the *Senedd* proposals for constitutional reform and noted that while some of them seem to have been widely accepted – such as reform of the House of Lords – others have not. In particular, there is resistance on all sides of the political spectrum to any form of governance that does not preserve the sovereignty of the Westminster Parliament as the only foundation for any future constitutional arrangements. It is this insistence upon parliamentary sovereignty that is so hard to dislodge – and yet it must be dislodged if a constitution of the UK or even of the Isles is to have any credence. The Welsh proposals, we remember, declared that…

> Parliamentary sovereignty as traditionally understood no longer provides a sound foundation for this evolving constitution.

Why is that so hard to accept? For in one sense, it should be perfectly acceptable to argue that the principle of parliamentary sovereignty as traditionally understood is inappropriate for a new constitution of the UK or the Isles. This would not only be because it was undermined by the UK's membership of the European Union, and the willingness to submit to binding European Law. It would also be because the sovereignty of Parliament was undermined by the very referendum which produced a decision by the UK to leave the EU.

The referendum vote showed that a majority of voters wished to leave the EU, while a majority of MPs wished to remain in it. This was doubly important because the earlier referendum in 1975, where people were asked whether they wished to stay inside the European Economic Community, forerunner of the EU, showed an alignment between the will of the people expressed in the referendum (in that case a 2:1 majority in favour of staying) and the opinion of a majority of MPs. Similarly, the referendum in 2010 on whether to introduce the Alternative Vote (AV) as a replacement for First Past the Post, which was

rejected by the electorate, was also rejected by a majority of MPs, since AV was opposed by the Conservatives, the Democratic Unionist Party and some Labour MPs. The European Union Act of 2011 interestingly declared that any changes in EU treaties extending the competences of the EU should not be approved unless supported by both Parliament and a referendum of the people, perhaps assuming that these two would in practice coincide as they had in the past.[1] The problem with the 2016 referendum was not – or not only – the narrowness of the vote in favour of withdrawal, but the fact that it had produced a clear division between the opinion of the electorate in a referendum and the opinion of the majority of MPs in Parliament, since there were far more 'Remainers' on the Conservative side than there were Leavers on the Labour side, while most of those belonging to other parties supported Remain.

This division between the 'will of the people' and the 'will of the politicians' was played out (though not quite in those terms) over the next four years. Technically, the sovereignty of Parliament meant that the referendum could only be consultative; politically, Parliament found that it could not stand in the way of the 'will of the people' (leaving aside arguments about the narrowness of the vote, the rules about who could or could not vote and so on). By insisting (in effect) that the members of the House of Commons accept the vote in the referendum, popular sovereignty asserted itself over parliamentary sovereignty, even though one of the arguments for leaving the EU was the protection of parliamentary sovereignty.

Since it would appear that the limitations of Parliamentary sovereignty had been revealed in the way the United Kingdom was taken out of the EU despite the wishes of a majority of its MPs, the Welsh *Senedd* was entitled to feel that those limitations might be accepted in the context of strengthening the UK

1 Bogdanor, *Beyond Brexit*, p. 90 gives the result of the 1975 referendum and analyses its consequences. He discusses the Alternative Vote referendum on p. 107 and the European Union Act, of which he says that 'it is doubtful if a more absurd piece of legislation has ever been enacted at Westminster,' on pp. 82–83. But the important point is the root of this absurdity, which is that you cannot at one and the same time pledge to be bound by the result of a popular referendum and declare that the sovereignty of parliament remains paramount. After 2016 Parliament had to consider whether to agree to the outcome of a referendum, with whose result a majority of them disagreed, in order supposedly to restore their own sovereign powers. It is hardly surprising that it took them four years to solve this conundrum, or perhaps to find the best way of living with it.

Union through new constitutional arrangements. But the principle of parliamentary sovereignty, even if arguably something more honoured in the breach than the observance, remains an object of romantic attachment on both sides of the political spectrum, not least the Left side. Part of the Left recalls the campaigns to extend the franchise over the last two hundred years and sees a process whereby parliamentary and popular sovereignty effectively became one. It is this that has given so many on the left of the Labour party a romantic attachment to the House of Commons as if it was the only possible source of reform and as if 'popular' sovereignty and 'parliamentary' sovereignty must always be one. One only has to think of Tony Benn putting up (illegally) a plaque in a broom cupboard in the Chapel of St Mary Undercroft to commemorate the suffragette Emily Davidson, or Michael Foot's unholy alliance with Enoch Powell to prevent reform of the House of Lords, or Dennis Skinner's constant presence on the green benches and his annual quip when Black Rod was barred from entering the Commons.[2] Of course, they did use the Commons to promote important reforms, while their oratory has been wonderfully preserved through their presence in Parliament, but one feels there is something more, the powerful romantic appeal of an institution that fought against monarch, Lords and the 'upper class' to make the people 'masters now' (as Labour famously had it after their surprise victory in 1945). Judges, on the other hand, are seen as representatives of an establishment which fought over the centuries to preserve the status quo, and this inclines the Left to support those who want to maintain the sovereignty of Parliament over 'legal interference'. The idea that Parliament itself might come to be a barrier to the sovereignty of the people is understandably hard for them to accept.

2 Foot and Powell had already campaigned together in order to support a 'No' vote in the 1975 referendum on whether to stay inside the EEC. See Stephens, *Britain Alone,* p. 183. What is interesting is the way in which Foot's opposition to the EEC in the 1975 referendum campaign was similar to his opposition to a reformed House of Lords – it would necessarily undermine the sovereignty of the Commons. Hence he was hostile to proposals for an elected European Parliament just as he was hostile to an elected House of Lords. Democracy was only permissible, it seemed, for the House of Commons. See the fascinating debate between Michael Foot and Edward Heath, the Prime Minister who took the UK into the EEC, from 1975 preserved on YouTube: https://www.youtube.com/watch?v=CuZrzwm6CJs

Back to the 70s?

Tom Nairn recognised, when a devolution bill was introduced in the House of Commons in 1976, that the question would become one 'of building up a new, fairer, more federal British order, not the dingy, fearful compromise of 'devolution' but a modern, European, multi-national state'.[3] But he also saw that such a multi-national state was very unlikely to arise given the outlook of the Westminster government. He understood the nub of the problem fifty years ago, when the prospect of devolution in the 1970s and at the same time British entry to the EEC raised important constitutional issues during the same decade. In *The Break-Up of Britain* (first published, it should be remembered, in 1977) Nairn argued that 'though modern constitutions typically locate the source of sovereignty in "the people", in Britain it is the Crown in Parliament that is sovereign.'[4] It is this that makes UK citizens technically 'subjects' rather than 'citizens.' It also runs risks of an elected dictatorship. It is still unnerving to read the standard authority on such matters, A.V.Dicey's *Introduction to the Study of the Constitution*, which affirms that

> The principle of parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English constitution, 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.[5]

Quite apart from the fact that Dicey talks about the 'English' constitution and the 'law of England', thereby opening up all sorts of questions about whether this principle should apply to the rest of the UK, it is unnerving because it suggests that a Parliament of rogues would have carte blanche to pass whatever laws it wished.

When Nairn wrote his book, some half a century ago, there was still a degree of complacency about the constitutional status of the United Kingdom. A Royal Commission on the Constitution under Lord Kilbrandon had deliberated between 1969 and 1973. The Kilbrandon Report was a typical celebration of the status quo. Nairn quotes its extraordinary remarks about the Isle of Man and the Channel Islands, two crown dependencies that it calls 'unique miniature

3 Nairn, Tom *The Break-up of Britain*, p. 81.

4 Nairn, Tom *The Break-up of Britain*, p. 30.

5 Dicey, *Introduction to the Study of the Law of the Constitution*, p. 39.

states with wide powers of self-government.' So full of 'anomalies, peculiarities and anachronisms' are they, that they are 'not capable of description by any of the usual categories of political science'. More 'logical and orderly races' would have swept them away long ago. Yet since they are perfectly happy with the status quo, they have been left in peace. They understand the point of the argument that was later used to defend the continuing existence of the House of Lords in its present form – 'if it ain't broke, don't fix it.' The implication would seem to be that if only the Welsh and the Scots could be equally content with their lot, however apparently 'anomalous and anachronistic', they could be as happy as the Channel Islanders. Such mystification was hardly an approach which demonstrated a serious attempt by Lord Kilbrandon to get to grips with the constitutional issues raised by the United Kingdom.[6]

Such an approach coincided with the first stirrings of devolution to Scotland and Wales, the collapse of the Sunningdale agreement in Northern Ireland and the devolution of decision-making power to the people in referenda (the first referendum, on whether to stay inside the European Economic Community or EEC, took place in 1975). Yet significant though these moves were, they were rarely seen as challenging the fundamental belief in parliamentary sovereignty, even though all three represented precisely such a challenge. The introduction of referenda into the UK political system opened up the possibility of a clash such as we have just described between the will of the people and the will of their politicians. Entry into the EEC meant agreeing to be bound by European Law and disapplying legislation that conflicted with it – this also has been illustrated in earlier chapters. And the introduction of devolution, which was eventually delayed until the end of the 1990s, meant that there was bound to be a question of how parliamentary sovereignty could be reconciled with the devolved powers of Cardiff, Edinburgh and Belfast.

Nairn noted that when the devolution debate took place in Parliament in 1976, Michael Foot, Leader of the House of Commons, emphasised it would 'strengthen and sustain the unity of the United Kingdom.' But he could only maintain this view by suggesting that whatever powers were afforded to the proposed Welsh and Scottish assemblies would not, in his words, 'mean that

6 For a more charitable view of the Kilbrandon Report, see Daintith, Kenneth, 'Kilbrandon: The Ship That Launched a Thousand Faces?' *The Modern Law Review* Vol. 37, No. 5 (September 1974), pp. 544–555.

the House of Commons need not retain its full power to deal with these matters in the future.'[7]

It is difficult to see what this means. What Nairn called Foot's belief in the 'mystic unity' of the UK essentially involved a conviction that parliamentary sovereignty need not be shared in the context of devolution. The belief seemed to be that somehow one could hand down power to the devolved nations without infringing the sovereignty of the Westminster parliament. Ironically a year earlier, when the first referendum on UK membership of the EEC took place, Foot had consistently argued that parliamentary sovereignty could not be maintained in the context of joining the European Community and was one of those who voted against it. He was consistently opposed to any sharing of sovereignty, whether inside the EEC or within the UK. The same outlook also informed his consistent opposition to trying to reform the House of Lords, in which he allied himself (as he did on the issue of remaining inside the EEC) with the Right in the form of Enoch Powell. He was afraid that a reformed House of Lords might end up entitled to a share of power with the House of Commons.

God and the British Constitution

Writing in *The Scotsman* in 1977, Neal Ascherson commented at a Rowntree Trust conference on 'The Future of Parliament' in the following terms:

> The English doctrine of the absolute, arbitrary, illimitable sovereignty of Parliament, born in the 17th Century carried into the new Parliament of the Union and reaching its full, preposterous stature in the Victorian age, still holds.[8]

Back in 1977 Ascherson insisted that 'imagining a House of Commons which was limited, which could be defied…was as impossible… as imagining the world the morning after one's own death.'[9] It is as if some logical inconsistency was involved – as if by speaking of limiting parliamentary sovereignty you were revealing the fact that you didn't understand what the term meant. There cer-

7 Nairn, Tom *The Break-up of Britain*, p. 54.

8 See Nairn, *The Break-up of Britain*, p. 292.

9 See Nairn, *The Break-Up of Britain*, pp. 292–293. Ascherson's comment is from an article entitled 'Divine Right of Parliaments' in *The Scotsman* published on February 18th, 1977.

tainly are lawyers who have claimed that Parliament's sovereignty is supreme and by definition cannot be shared. This was the argument used at the time of the European Communities Act by Lord Hailsham, the Lord Chancellor and Sir Geoffrey Howe, the Solicitor-General. Yet as Bogdanor points out, it was not the argument of Dicey himself, the one who first codified the theory of parliamentary sovereignty in his classic *Introduction to the Study of the Law of the Constitution*.[10] Dicey wrote:

> The impossibility of placing a limit on the exercise of sovereignty does not in any way prohibit, either logically or in matter of fact, the abdication of sovereignty.[11]

Dicey points out that an autocratic Czar may relinquish supreme power by choosing to abdicate, and so may a sovereign Parliament. It is a fascinating example of how what might be called the political establishment chooses to bypass the question of whether a limitation of parliamentary sovereignty is a good or bad thing by simply claiming that it is logically impossible.

Bogdanor compares their argument to those theologians who claim that it is impossible for God to be unaware of the future because this would compromise Her omnipotence.[12] They claim that even a self-limitation of God's power chosen by God Herself is something She cannot do – because it would contradict Her own nature. The theological answer to this is that an omnipotent God can choose to limit Her powers if She wants to, and one must beware claiming to know the nature of God better than God does. As the great theologian Karl Barth put it, God cannot be made the prisoner of Her own power.

Theological tangents, fascinating though they are, should perhaps be avoided, but there is a parallel with the argument about the sovereignty of Parliament. One side points out that if 'what the King enacts in Parliament is law', that does not prevent Parliament from choosing to limit its own powers if it wishes to do so. The other side insists that this would be akin to a contradiction – Parliament doing what it is by definition unable to do. If one followed the proposals outlined by the Welsh *Senedd* in the last chapter by saying something like: 'what the King enacts in Parliament is law, so long as it does not override the powers of the devolved nations as laid out in the Constitution of the Isles,'

10 See Bogdanor, *Beyond Brexit*, p. 64.

11 Bogdanor, *Beyond Brexit*, p. 64.

12 Bogdanor, *Beyond Brexit*, p. 67.

the accusation would be that one had somehow failed to understand what the very idea of 'Parliamentary sovereignty' entailed.[13]

There is nothing quite so difficult to challenge as a lawyer confident about the meaning of a legal term, unless it is a theologian confident in a doctrine. Nevertheless, this book would follow Bogdanor's reasoning in saying that just as an all-powerful God may voluntarily choose to limit Her powers (as the so-called kenotic theologians attest) so it is within the powers of a sovereign Parliament to limit its powers too. Otherwise, both God and Parliament would effectively be subject to a higher authority laying down what they might do, and that might be a little much to claim even for the late Lord Hailsham.

However, there is an important distinction to be made, which connects with the discussion of constitutional reforms proposed by the Welsh government and discussed above. The real problem is not that sovereignty cannot be given away by Westminster; it is that it cannot be shared – precisely the principle underlying the European Union. For Westminster clearly has given sovereignty away in practice – for instance to the self-governing dominions in the Statute of Westminster in 1931. In principle, one could say that the UK government was willing to give it away in the event of a referendum on Scottish independence producing a 'Yes' vote. This might have happened in 2014 and (assuming that those who say that referenda can only be once-in-a-generation events should be taken literally), it might happen in 2039. It is difficult to see how David Cameron could have refused surrendering sovereignty over Scotland in 2014 had the vote produced a majority favouring independence. It is the sharing of sovereignty that Westminster governments find so difficult to accept and that is why they feel driven to interpret devolution as a process of giving away powers rather than a way of sharing them. One can argue with the devolved nations over 'who does what' but bringing them together in a mechanism for the joint exercise of power in decision-making that affects them all has received very little attention.

13 Hence Howe's language in 1977 suggesting that 'the ultimate supremacy of Parliament will not be affected, and it will not be affected because it cannot be affected.' It is as if any other suggestion was akin to trying to defy the law of gravity. See Bogdanor, *Beyond Brexit*, chapter 2: 'Europe and the Sovereignty of Parliament', pp. 51–86, esp. pp. 64–72. Howe's comment is discussed on p. 64.

Another narrative arc

Chapter Two of this book called for an appreciation of the 'narrative arc' which demonstrates how firmly what has become the United Kingdom has been tied to the rest of the European continent. But there is another narrative arc where the history of England and later the United Kingdom is concerned, one which portrays ancient rights preserved through the centuries by a Parliament which certainly had limited powers in earlier times, but which became the means by which the powers of the sovereign were held in check.

Eight hundred years ago Magna Carta declared that the King had no right to tax his subjects arbitrarily. The date of the agreement in 1215 between King John and the barons at Runnymede, June 15th, was proposed as a public holiday in 2006. It hardly spelt out precisely how curbs upon royal power could be managed, but it seemed logical to suppose that some kind of Parliament was the only means of doing so (in fact both sides soon broke the agreement).

In later centuries it was King John's agreement with the barons at Runnymede that was seen as the first step in a long process of curbing the arbitrary exercise of divine power.[14] When the writer Rudyard Kipling wrote his famous poem *The Reeds of Runnymede* in 1922, the barons are presented as those who first challenge the so-called Divine Right of Kings, the idea that the institution and powers of the monarchy were a direct expression of God's will:

> When through our ranks the Barons came,
> With little thought of praise or blame,
> But resolute to play the game,
> They lumbered up to Runnymede;
> And there they launched in solid time
> The first attack on Right Divine--
> The curt, uncompromising 'Sign!'
> That settled John at Runnymede.[15]

These days, when the monarchy seems well established as a symbol of national unity, it should not be forgotten that in the seventeenth century a king was executed (in 1649) and the country became a republic for eleven years, over a century before the same thing happened in France, at that time ruled by a king with absolute powers. The belief in a divine right of kings insisted that God

14 See Starkey, David *Magna Carta: The True Story behind the Charter*.

15 See Rudyard Kipling, *Collected Poems*.

willed kings as God had once willed the patriarchs and the kings of Israel. It was for those who rejected this view in the seventeenth century to show that they were not dangerous revolutionaries but were somehow reaching back to an earlier tradition, including the Anglo-Saxon principles enshrined in Magna Carta.

Hence Charles I was accused by his opponents of subverting the ancient laws and liberties of the nation – it was the King, not his ministers, who was the 'subversive radical', seeking to restore arbitrary government. For this reason, Edward Coke's *Petition of Right*, approved by both houses of parliament in 1628, was received with bonfires and the ringing of church bells. For the rights and liberties which it proclaimed, including freedom from taxation without parliamentary approval, were seen as going back four hundred years to the agreement at Runnymede. Those who found themselves opposing the king were therefore able to present themselves as the traditionalists.[16]

After the interregnum what happened in 1660 has become known as a 'restoration', restoring what might be seen as the proper balance between the monarch and his or her ministers. Then just 28 years later James II was forced to abdicate (alongside his infant son) because he had supposedly upset this balance. Out of his forced abdication came the Bill of Rights in 1689, which laid down limits on the powers of the monarch and set out parliamentary rights, including the requirement for regular parliaments, elections, and freedom of speech in Parliament.

Magna Carta became the white noise of seventeenth century political discourse. It was the standard under which Parliament fought the Civil War, and it can be argued that it remained the standard in later centuries. In the 1840s the Chartist movement took its name from the People's Charter, which petitioned for parliamentary reform in six areas, including the need for secret ballots, the payment of MPs, and the right for all adult males to have the vote. At the time they were unsuccessful, but apart from annual elections all their demands were eventually met. Their choice of the word 'Charter' was significant and drew consciously on the powerful symbolism of Magna Carta, the 'Great Charter' being the foundation of English liberties which the People's Charter would secure for working men (they were not yet calling for women to have the vote). But as agitation for women's rights grew at the end of the nineteenth century, Magna

16 See John Witte, *The Blessings of Liberty*, Chapter 2: Magna Carta Old and New: Rights and Liberties in the Anglo-American Common Law', pp. 45–76, especially 51–55 discussing Coke and the *Petition of Right*.

Carta was cited once more. It was invoked by suffragettes and a 1911 issue of their official newspaper *Votes for Women* depicted the barons presenting Magna Carta to King John. An accompanying article defended the direct action of the suffragettes as a modern equivalent of the direct action of the barons in compelling King John to sign.[17]

Thus, one can observe a long tradition during which over some seven centuries Magna Carta was seen as the lynchpin of the slow and ultimately successful fight for democracy in what was to become the UK. Moreover, insofar as that long campaign was focussed on the powers of parliament, initially to curb the arbitrary behaviour of monarchs but later in order to ensure that all the people were represented within its walls, the long campaign for the sovereignty of the people could easily be identified with a long campaign for the rights of Parliament and the rights of all adults to have the vote. It has even become embedded in the national consciousness that the House of Commons is the great defender of our liberties. The ritual of Black Rod knocking three times at the door of the Commons, which accompanies the annual state opening of Parliament, is based on the moment where in 1642 King Charles I sought to arrest five members. The attempt to protect the rights of Parliament against arbitrary divine rule is turned into an event to dramatise the protectors of liberty resisting any challenge to their authority. It is an interesting aspect of the British attraction to monarchy that it is associated with a successful campaign to limit its powers, something that links with the point that having lost real power it has come to play a crucial symbolic role in maintaining the unity of the Kingdom.

What Nairn criticised as Foot's belief in the 'mystic unity' of the UK was earthed in a belief in the incontestable sovereignty of the House of Commons. Such a belief on the Left is often based on a reading of history which sees the House of Commons fending off those who would challenge its powers as if it was a case of the 'workers' parliament' being threatened by upper-class peers, foreigners from Brussels and in earlier centuries by the overweening powers of the monarchy. They are prepared to talk in terms of the sovereignty of Parliament – or at least of the Commons – rather than of the people because they simply identify the two. It is, after all, the 'commons', the parliament of the 'common' people. It therefore becomes very difficult for sections of the Labour Party – one might call them the Little Englanders of the Left – to view the 'sharing of sovereignty' as anything other than an invitation to compromise with the

17 Votes for Woman, Vol IV No. 151, produced on Friday, January 27th, 1911. See https://imagesonline.bl.uk/asset/157581/

privileged classes. Even a radical like Dennis Skinner often seemed to be glued to the green benches during his long career as an MP. He became known above all for preparing an annual quip for when Black Rod arrived at the doors of the Commons, a habit which put him in danger of being adopted as a 'national treasure' for his devotion to the central institution of state.[18]

The limitations of parliamentary sovereignty

The trouble with this view of Parliament, as pointed out earlier, is that it assumes that a body of (now) around 650 men and women, elected under a system which can give a single party a majority of seats in the lower house on the basis of support from only 35% of the voters, will always be the champion of liberties that the tradition outlined above has tried to make it. A closer study of history reveals that there are limitations to the view that Parliament (or even the elected House of Commons alone) is the guarantor of liberty.

The complexities of the fascinating period during which the English beheaded their King before 'restoring' his son make that clear enough. A number of movements emerged during the Civil War period, not all of them convinced that Parliament, whatever its difficulties with the King, was always the protector of their liberties. One of the most notable among them was the Levellers, a group of whom produced a manifesto in July 1646 called *Remonstrance of Many Thousand Citizens*. Addressed to the House of Commons, it argued that the very parliamentarians who were attacking the King for arbitrary practices did the same once they were in power[19]. After all, the so-called Long Parliament, origi-

18 This is inevitably an impression, but a good way to consider how justified it is would be to read the excellent trilogy of diaries by Chris Mullin, who was Labour MP for Sunderland South between 1997 and 2010, and who was a close friend but not uncritical supporter of Tony Benn. See (among other things) the presentation of a brass plaque to Tony Benn in a broom cupboard in the Crypt beneath Parliament (*A Walk-On Part*, p. 79), enthusiasm for an appointed rather than elected House of Lords (*A View from the Foothills*, pp. 343–344), and later the admission that 'fogies such as me were against ('democratising' the Lords) on the grounds that an elected upper house will only undermine the authority of the Commons' (*Decline and Fall*, p. 156). A fourth set of diaries on the period after he left the Commons is due to be published in June 2023.

19 Article IV of the *Remonstrance* declared that 'Seeing divers Parliament-men, Committees, Sequestrators, Excize-men, and others, have enriched themselves these times of trouble; If any two honest men can testifie upon Oath what every such Parliament-man, Committee-man, Excize-man, or Sequestrator, &c. was worth in Personal Estate

nally elected in 1640, had given no clear indication of when it would cease to sit. Meanwhile, two of the Levellers' own leaders, John Lilburne and Richard Overton, had been imprisoned and had received no help by appealing to the House of Commons. The only recourse was to appeal over the heads of parliament to the people.

There was a certain ambiguity to the Levellers' approach. Sometimes they petitioned Parliament for the radical reforms they wished to see, presumably convinced that Parliament might legislate to achieve them. But at other times, as in the final version of their *Agreement of the People*, a written document published in May 1649, they appeared to be going beyond an appeal to the Parliament. It is notable that Gary S De Krey refers to the Levellers in the following terms:

> their pre-1649 efforts can be tied to popular opposition to the Cromwellian Protectorate, to popular support for the revived Commonwealth of 1659, to sectarian hostility to the re-establishment of religious coercion in the reign of Charles II (1660–1685) and even to approval of a fundamental law in the reign of James II (1685–1688) that would have established religious toleration and placed it beyond parliamentary repeal.[20]

The idea of being able to put a measure of toleration 'beyond parliamentary repeal' reminds us both of the way in which the forced abdication of James was not necessarily a victory for toleration and of the fact that the role of parliament might be to hinder radical measures rather than to promote them.

There was a similar ambiguity in the way the Levellers read the past. The 'narrative arc' linking *Magna Carta* to the *Petition of Right* had begun after the Norman Conquest. But some of the Levellers chose to look further back to a period before 1066, when Saxon laws had supposedly not yet been superseded by what they called the 'Norman yoke'. The *Remonstrance* had dubbed Magna Carta a 'beggarly thing' and tried to look beyond it, though this was more the

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> at the beginning of this Parliament, or how much he stood indebted at such time as this Parliament began, he shall enjoy only that Estate he then had, and no more: and if indebted, the Debts he hath paid since, [as well as the Estate he hath since got] shall be liable to make Satisfaction to all and every Free Commoner that hath been any wayes damnified either by *KING* or PARLIAMENT, since the beginning of these un-natural troubles'. The Levellers recognised, then as now, that Parliament might be an avenue for personal enrichment and corruption and was not the inevitable agent of radical change.

20 De Krey, Gary S. *Following the Levellers*, p. 2.

view of William Walwyn, one of the movement's leaders, than John Lilburne. Levellers like Walwyn idealised supposedly Saxon laws and institutions and in October 1645 he published *England's Lamentable Slaverie*, his famous rebuke to John Lilburne, calling Magna Carta 'a small set of concessions wrestled out of the pawes of (Norman) conquerors.'[21]

Less radical voices than the Levellers were prepared to extend the narrative arc even further. Rather than seeing Saxon rights swamped by the Norman invasion, they believed that there was continuity between Saxon times and life after the Norman Conquest. Proponents of the theory of continuity, represented best by Sir Edward Coke, and later by the parliamentarians during the Civil War, argued that whatever happened in 1066 it wasn't a 'conquest'. William had claimed the throne by ancient right, they argued, and English laws and customs remained inviolate. It was the same desire for continuity evidenced by those who insisted that 1660 was a 'restoration'. This was the basis of Coke's emphasis upon 'common law', whose defining characteristic was that it was based upon precedent. A common law court would look to decisions of the relevant courts in the past and apply them to present facts. It was Coke who first attempted a comprehensive compilation of centuries of common law in his *Institutes of the Lawes of England*.[22]

Continuity was therefore established in the legal system, the monarchy (lost for a decade but then 'restored') and Parliament. Parliament itself was believed to have had Saxon origins and then continued to develop under the Normans. The sovereignty of Parliament, rather than being a Norman 'invention' established through Magna Carta, was extended backwards to the misty origins of England itself.

Yet Walwyn's objection that Parliament might be a usurper rather than a defender of human rights had not been answered. He observed that many believed Parliament to be above *Magna Carta*, whatever the deficiencies of the

21 For a discussion of seventeenth century attitudes to Magna Carta, see Foxley, Rachel 'More Precious in Your Esteem than It Deserveth'?: Magna Carta and Seventeenth-Century Politics' pp. 61–78 or *Magna Carta: History, Context and Influence*, edited by Lawrence Goldman.

22 See Davies, Norman *The Isles*, p. 328. Coke, he writes, 'formulated the ultraconservative and quite unsustainable theory that England possessed a body of immemorial law of Anglo-Saxon vintage which had been regularly 'reaffirmed', most prominently by Magna Carta.' Unsustainable it may have been, but as Davies goes on to say 'Coke's ideology was adopted by the victorious parliamentary cause, and it became the basis of a lasting national tradition.' (p. 329).

latter, that it remained unbounded by its own laws, and could dispose of lives and properties at its own pleasure, simply because it was chosen by the people and allegedly entrusted with their safety.[23] Moreover, there were no courts or judges who could enforce the liberties of the people against the tyranny of Parliament. His justification for making this claim might have been a questionable one, namely that all the legal authorities in England were the offspring of the Norman Conquest, but his general argument was worth consideration. It was the point that the sovereignty of Parliament gives no weight to the possibility that parliamentarians may themselves act against the liberties of the people. There were – and after Brexit there are – no legal constraints upon its activities – those that the Supreme Court in the USA, for instance, can exercise to reign in the executive and the legislature.

What the seventeenth-century debates brought out was that there was something more to the narrative arc than a conflict between an increasingly constrained King and an increasingly empowered Parliament. There was a conflict between what Lilburne called the law of Equity and those who would threaten it, whether Kings or Parliaments. For the law of Equity could save people from the tyranny of parliaments as well as the tyranny of kings. Moreover, such a view would have been a natural conclusion for many of those who lived through the tumultuous two decades leading up to the 'restoration'.

During these years parliaments had come and gone, able to do little to check the exercise of arbitrary power. The Long Parliament continued from 1640 until it was eviscerated by the army in 1648 in Pride's Purge (Colonel Thomas Pride reduced its numbers by more than half, removing all those who favoured a deal with the King). The following year the King was executed. In 1653 the so-called Rump Parliament created by Pride's Purge was dissolved and a nominated assembly of religious zealots replaced it which became known as Barebone's Parliament (one of its members was called Praise-God Barebone). Barebone's Parliament came and went in a single year.[24]

This was followed by Oliver Cromwell assuming the position of Lord Protector, during which time (1653–1658) two protectorate parliaments met and

23 See the article by Eunice Ostrensky, 'The Levellers' conception of Legitimate Authority,' Araucaria, 20 (39) pp. 157–186. Ostrensky argues that for the Levellers it was the people as a 'collective agent' rather than parliamentary representation which would improve the life of citizens.

24 Still useful as an account of events is Godfrey Davies' *The Early Stuarts: 1603–1660*, part of the Oxford History of England Series.

an attempt at a codified constitution was made, the *Instrument of Government.* The Lord Protector would be assisted by a Council of about 20 members and a Parliament. It would be unfair to describe the *Instrument of Government* as a dictator's charter and indeed some American constitutionalists saw it as anticipating their own separation of powers, but its life was in any case short, to be followed by another attempt at a codified constitution, the *Humble Petition and Advice* (at this time Cromwell was offered and refused the title of monarch).[25]

When Cromwell died, his son Richard became Lord Protector but was forced to dissolve Parliament by the army, which restored the Rump Parliament. Richard then resigned as Lord Protector and an army under General Monck marched south from Scotland to London, restored the Long Parliament with the members who had been excluded by Pride's Purge, and prepared the way for Charles II to return.

Such a summary as this is woefully inadequate in relation to the nuances of two extraordinary decades, but it does illustrate that in the explosive environment of England's temporary life as a republic more was in play than a simple contest between the power of kings and that of parliaments. The 'purging' of parliament by military force, the attempts to arrive at a codified constitution, the continuing demands of radical voices that ancient liberties be respected, all pointed to issues that went beyond that contest. There were also the issues that lead people now to talk about the need for a written constitution and, linked to that, the need for the legislature to be bound by the rule of law rather than simply prescribe what that law is. Finally, there is the irony of the fact that this 'civil war', often now referred to as the 'war of three kingdoms' to point out the importance of what was happening in Ireland and Scotland at the time, not only shows the limitations of parliamentary sovereignty but also the fact that it was not the Westminster parliament alone that was involved in the events of these years. Studying the so-called Civil War period not only helps to illustrate what constitutional arrangements are necessary to prevent what Lord Hailsham called an 'elective dictatorship', but also helps us to recognise the 'war of three kingdoms' as part of the formation of the multinational state that has emerged from the struggles of earlier centuries.

25 For a perspective more focused on the radical movements emerging at the time, see Christopher Hill's *The World Turned Upside Down.*

Human rights and parliamentary sovereignty

One of the most famous passages of Magna Carta runs as follows:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land…

Should we see 'the lawful judgment of his equals' or 'the law of the land' in terms of a judgment by parliament or the judgment of a jury in a court?

In 1997, shortly after the election of the first Labour government in the UK in eighteen years, a bill went to Parliament entitled *Rights Brought Home: The Human Rights Bill*.[26] Three years later, in 2000, the Human Rights Act was passed and introduced into UK law rights contained in the European Convention. The purpose of the bill was to allow people to go to British courts rather than have to go to Strasbourg in order to enforce their rights under the European Convention on Human Rights. Yet whereas the Convention was incorporated into devolved law by the devolution statutes, so that devolved legislation could actually be struck down by the courts if it conflicted with the Convention, the courts could not strike down Westminster laws. They could make a statement of incompatibility between the Convention and Westminster law, but it was for Parliament to have the last word on what to do.

The role of the court became an issue again in 2022, when the UK government sought to avoid a ruling by the European Court of Human Rights concerning its plan to deport certain asylum-seekers crossing the Channel to Rwanda. At the start of 2023, it remains unclear what form the proposed Human Rights Act will take. However, it is unlikely that the rights given by the Westminster Parliament will match those enshrined either in the Charter of Fundamental Rights, now disapplied, or the European Convention on Human Rights, likely to be partially dismantled. As was pointed out in the chapter of Northern Ireland, this is another way in which Brexit causes problems for the future of Ireland, since there will be different rights for people North and South of the border and the rights of Irish citizens North of the border will not be those which apply to other members of the EU.

26 It can be read at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf

Though the actions of the Blair government could be considered progressive, the position it took on the sovereignty of Parliament was not. The Human Rights Bill presented to Parliament in October 1997 considered 'whether it would be right … to go further and give to courts in the United Kingdom the power to set aside an Act of Parliament which they believe is incompatible with the Convention rights.' The 1997 bill insisted that there is 'an essential difference between European Community law and the European Convention on Human Rights, because it is a *requirement* of membership of the European Union that member States give priority to directly effective EC law in their own legal systems. There is no such requirement in the Convention.'[27] This is perfectly true, but there was nothing to stop the Labour government from permitting the courts to disapply acts of parliament that were believed to be incompatible with Convention rights. Instead, the bill merely allowed the courts to make a 'declaration of incompatibility' between the two, leaving it to Parliament itself to decide whether it would take any action to remedy the incompatibility. It is worth quoting one section of the bill in full (section 2.12):

> The Government has reached the conclusion that courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty. In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, Parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of Parliament in the House of Commons possess such a mandate because they are elected, accountable and representative. To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly, this Government has no mandate for any such change.[28]

27 See paragraphs 2:12 and 2:13 of the Bill.

28 This is discussed in Bogdanor, *Beyond Brexit,* pp. 143–6, where he makes clear what the Human Rights Act did and did not manage to do.

It is very odd to see the bill claiming that 'Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes.' This was not true – as the Bill itself elsewhere admits – because of the European Communities Act. However, it could be true post-Brexit. On the other hand, if there is to be an adequate constitutional settlement for what is called preserving the Union (British, not European), it is the argument of this book that it will be necessary to consider precisely the 'conferring on the judiciary of a general power over the decisions of Parliament' that we see here condemned in 1997 as something neither desired by the courts nor the public. It is precisely parliamentary sovereignty, which we see Labour governments committed to as strongly as Conservative governments, that will have to go if the sort of constitutional settlement proposed by the Welsh *Senedd* is to have any hope of succeeding.

Keating concludes a discussion of what he calls 'the sovereignty conundrum' with a remark that:

> What we are left with is a tantalising series of suggestions that devolution may have changed the way that sovereignty and parliamentary supremacy work, but reluctance on the part of the judges to take the matter beyond speculation.[29]

This would appear to be a fair comment. Judges will use an expression to try to give special status to the devolution settlement, such as 'constitutional law', but however grand the expression is it always falls at the last hurdle when confronted by parliamentary sovereignty. Lord Justice Laws in 2002 (*Thoburn v Sunderland City Council*) considered an issue concerning a greengrocer's right to advertise his products in imperial rather than metric measures. The issue blew up as the 'metric martyrs' took their concerns to higher courts. Eventually it went to the high court where Lord Justice Laws declared that the European Communities Act was a 'constitutional law', but he also claimed that Parliament could amend or repeal such a law if it wanted to, something that was difficult to square with the primacy of EU Law which he also affirmed.[30] This issue died down with later common-sense provisions concerning the possibility of displaying both measures but illustrated how easily 'little issues' could provoke a storm of 'us-against-them' feelings that might have been avoided in the first

29 Keating *State and Nation*, p. 67.

30 See Bogdanor, *Beyond Brexit*, pp. 80–81.

place. Sunderland was to vote overwhelmingly for Brexit in the 2016 referendum.

Lord Hope, ten years after the 'metric martyrs' ruling, declared that the Scotland Act was also a 'constitutional' act, but once again accepted that Parliament could amend or repeal it. It simply had to be an 'express' rather than 'implied' repeal – but the power for Westminster to repeal was still there.[31] One might also cite Douglas-Scott's argument that when the UK ignored the refusal on the part of the devolved nations of legislative consent to the EU Withdrawal Act it was acting in a way that was not 'constitutional' but was 'legal'.[32] The real impact of these terminological niceties is the absence of reason at the heart of them, as so many people scurry around trying to square the circle. They are desperate to find a form of words which can allow one to preserve the absolute sovereignty of the Westminster Parliament and its supposed role in history as the defender of all our liberties, while at the same time appearing to make the maximum possible concessions to the devolved bodies. In the end it is always made clear that the sovereignty of the Westminster parliament trumps the judiciary and the devolved parliaments, while Brexit makes the ambiguity of its position when the UK was part of the European Union irrelevant.

Conclusion

The book mentioned 'the invention of tradition,' and among those traditions was one surrounding the monarch, who once effectively without power in the realm was reinvented as a glamorous symbol of imperial and later national unity. Alongside this tradition runs another of the steady emergence of parliament as the vehicle of human liberty. The arc extends from the barons who (in Kipling's presentation) ordered King John to sign up to Magna Carta at Runnymede through the seventeenth century debates on royal power, reaching their climax in the execution of Charles and the 'restoration' of his tamed son as successor, before moving on to nineteenth-century demands for a widened franchise in the 'People's Charter' and finally the taming of the House

31 Keating, *State and Nation*, p. 67. See pp. 71–74 for an account of how courts tried to introduce distinctions to muddy the waters rather than to enlighten.

32 Douglas-Scott, Sionaidh. 'The Constitutional Implications of the EU (Withdrawal) Act 2018: A Critical Appraisal'.

of Lords and the emergence of a House of Commons elected by all adults and empowered to protect the liberties of the people.

The romance of parliamentary sovereignty presents a narrative arc in which an ancient constitution is preserved through the ages to become the foundation of English (and presumably later British) liberties. It is not a written constitution, but lies embedded in a set of precedents and practices, the principle underlying the development of the common law. It enables a degree of continuity to be claimed, through Saxon origins and the time of the 'Norman yoke.' Words like 'precedent' and 'convention' describe the mystical continuity that weaves its way through the ages, surviving regime change and the lack of written form. It is the basis for Burke's magnificent *Reflections on the French Revolution*, with its emphasis upon the power of tradition, a contrast between a country that has had sixteen constitutions since 1789 (Bogdanor recalls how someone asked in a French bookshop for a copy of the French constitution and was told that they didn't stock periodicals) and one that has not repeatedly tried to tear up the past and start afresh with everything changed including even (in the case of the 1789 Revolution) the calendar.[33] The emphasis is on terms like 'adaptation' and 'evolution' rather than root-and-branch renewal.

Yet there is an element of complacency in this view, an absence of any sense that a universal franchise can lead to tyranny, as it arguably did in Germany in 1933. What is lacking in a narrative such as this is the need for an independent judiciary with the right to hold the government in check and ensure that it has respect for human rights. Yet as the Human Rights Bill of 1997 shows, the courts are not allowed the power to disapply acts of Parliament that conflict with the European Convention on Human Rights. Parliamentary sovereignty trumps the power of the judiciary. Perhaps for this reason the ideas of the Levellers, who certainly saw how parliament could act against them as much as it could be their champion, had more influence in the USA than the UK. When Walwyn complained that Parliament 'when they might have made a newer and better Charter, have falne (fallen) to patching the old', he was calling on them not simply to legitimate their demands in terms of an ancient constitution and even the principles of *Magna Carta*, but to embrace a new constitution based on reason, rather than custom and precedent, an approach more suggestive of the

33 See Bogdanor, 'Europe, subsidiarity and the British Constitution' *RSA Journal* Vol. 142, No. 5448, April 1994, pp. 41–54.

French and American Revolutions a century later.[34] New wine does not belong in old wineskins. (Mark 2:18-22)

As an ex-imperial power, the UK is used to giving power away, and might even be willing to do so to parts of the UK that vote for independence. It is the sharing of power that UK governments find it so difficult to accept. They interpret devolution as a process of giving away powers rather than a way of sharing them in a joint management of the 'four nations.' By doing this, they risk giving up what would be an essential condition of continuing with a United Kingdom. As we move through the 2020s, that risk has certainly not gone away.

34 'From his work in 1645, Englands Lamentable Slaverie', to be found in J. R. McMichael and B. Taft (eds.), *The Writings of William Walwyn*, pp. 147–148.