SOVEREIGNTY, BORDERS AND CONSTITUTIONAL AMNESIA

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1. Introduction

The term 'border' has several meanings: for example, a frontier, a dividing line or threshold. But borders are paradoxical in nature: they provide protection and shelter but simultaneously confine and imprison; they exclude and deny access to some while enabling a greater sense of belonging of insiders. [1] Borders can be physical and spatial but also conceptual and mental. We can impose them by our own categories. For example, the difference between finding something to be 'Art' or not may be a million £ price tag at Sotheby's. Every discipline seeks to set out its terrain and Law is no different. But who is asserting those borders? And according to what criteria?

1.1. Borders, sovereignty and Law

This paper focuses on one aspect of borders – those legal barriers that have been devised to separate the UK State from other territories, and also to identify it as a Union or unified territory within itself. The concept of sovereignty has been essential here. Sovereignty is co-terminus with, or even preliminary to, barriers and borders. For claiming sovereignty over a territory asserts a control over its inhabitants and jurisdiction to govern matters within it and set the boundaries to it.

For a relatively brief period – about 300 years up to the mid 20th century - the 'Westphalian' order of sovereign States appeared to govern matters in western Europe. Prior to that, sovereignty was convoluted and fragmented, dispersed by, for example, feudalism; a shared Christianity under the ultimate Catholic ministration of the Pope; royal rulers of territories that looked different from the 'nation State'; and arcane entities such as the Holy Roman Empire. However, at least to some extent,[2] a new regime of sovereign States took over from this, and a new epoch ensued, from roughly the end of the Thirty Years War, up until the end of the Second World War. Although, to be sure, this was not an era of thoroughgoing peace and good relations, and disastrous wars occurred during this time. The UK shared in this assertion of sovereignty, although only after the 1707 Acts of Union of Scotland and England did the State of the United Kingdom of Great Britain come into being.

However, in contrast to the earlier Westphalian world, a significant dimension of contemporary law has been its presence at a transnational level, above and beyond the State - a disintegration of national legal borders and barriers. In 2000, then German foreign minister, Joschka Fischer, suggested that, 'The core of the concept of Europe after 1945 was and still is a rejection of . . . hegemonic ambitions of individual States that had emerged following the Peace of Westphalia in 1648, a rejection which took the form of . . . the transfer of nation-State sovereign rights to supranational European institutions.'[3] From 1945, there was a shift to supra, inter, or transnational[4] institutions, such as the UN,[5] EU and Council of Europe, and also a growth in importance of international law. But this development also came in tandem with demands for self-government from sub-State nations, such as Scotland, Catalonia or Quebec. Clearly, both (upward and downward) developments concern the nature and borders of political community and the location of ultimate authority.

Some writers, such as Neil MacCormick,[6] theorised such movements using the idea of 'post sovereignty'. This theory did not argue the concept of sovereignty disappeared, but instead that it had been transformed and was no longer the predominant mode of political organisation. MacCormick's

view was that 'sovereignty and sovereign states, and the inexorable linkage of law with sovereignty and the state, have been but the passing phenomena of a few centuries, that their passing is by no means regrettable, and current developments in Europe exhibit the possibility of going beyond all that.'[7]

Nonetheless, this post-Westphalian order in its turn came under attack. 'Post sovereignty' was seen to create new problems of its own, giving rise to a complexity that could seem overwhelming, explaining an impulse to 'Take Back Control', a desire to make things simpler, more manageable. The stipulation of national borders may suggest some sense of order. Territorial borders had this function under the Westphalian system. Imposing such boundaries can also reinforce a sense of our identity, of what is ours.

And so perhaps State borders do matter after all? Is that a conclusion to draw from that 'annus horribilis' for transnational law, 2016, when voters not only elected an 'America First' Trump President elect, but also when British voters, by voting for the UK to leave the EU, rejected the most successful to date example of supranational law. A mantra of Brexit Leave campaigners was the phrase 'Take Back Control' - an apparent yearning for a sovereignty that could not be reconciled with continuing EU membership - a desire for clear national borders and a clearly national constitutional architecture.[8] Recent years have also witnessed an increase in States' attempts to control immigration as their sovereign right (often at the expense of humanitarian law). Immigration is often presented as a threat to national borders - even if that border has been outsourced as under the UK's agreement with Rwanda on refugee processing.

However, the 'Take Back Control' approach is overly simplistic. It asserts a clarity for sovereignty that does not exist and fails to capture ways in which pooling sovereignty, and removing legal barriers and borders, eg by EU membership, may actually empower a State.

1.2. The problem of sovereignty

There has been much talk of sovereignty, but much less clarity on what it actually means.[9] This incoherence is illustrated by examples from Britain's past and Britain's Empire, neither of which, perhaps, are adequately remembered today (at least not by lawyers and politicians). The core of my argument is that Britain developed its constitutional law (especially the law asserted to govern territories outside England) all too casually. The jurisdiction of the Westminster Parliament was never very clearly established. Borders were ignored or asserted where convenient. But, at the same time, Britain sometimes chose to assert an absolute sovereignty for which there was too little support. So there was an insouciance, or 'a fit of absence of mind,' (as the historian Seeley described the development of the British Empire). There existed a disjunct between what was claimed and what could actually be legally asserted. But 21st century Britain has developed a 'constitutional amnesia'. This paper discusses legal sovereignty in the light of Britain's history.

To start, a clarification. At its most basic, there are at least three notions of sovereignty relevant to the UK (and to Brexit), and they are too often confused.

First there is *external sovereignty* (also frequently described as 'national' sovereignty) whereby a country is sovereign and recognized as independent by the international community. The UK's external sovereignty was unaffected by its EU membership, and unchanged by EU withdrawal. The other two types of sovereignty are *internal* in nature, relating to a State's domestic affairs. There is the conception of *parliamentary sovereignty,* said to have particular resonance in the UK where the Westminster Parliament has been recognised as a body with unlimited legislative power. Yet parliamentary sovereignty may seem at odds with *popular sovereignty* as exercised in a referendum. However, popular sovereignty is insufficiently developed in UK constitutional law to ground an argument that it has replaced parliamentary sovereignty as a mandate for action. Popular sovereignty also has other implications, such as in Scotland, where an indigenous Scottish tradition claims that

sovereignty resides in the Scottish people, in spite of alternative claims of Diceyan parliamentary sovereignty.

What recent claims of retaking sovereignty and control, but also earlier claims for British sovereignty, appear to boil down to is an (unsubstantiated) claim for a unified English/Westminster/governmental sovereignty to the exclusion of other parties. These excluded parties included international organizations, courts, constituent nations and territories of the UK (eg Scotland, Northern Ireland, Gibraltar) and relevant persons (ie EU citizens denied a vote in the EU referendum, and UK nationals in the EU; Catholics – especially Irish – in past centuries; colonial inhabitants). However, the exclusive, unified sovereignty claim is incoherent and not born out by history, although history is often wrongly prayed in its aid.

1.2.1. Parliamentary Sovereignty

To be sure, sovereignty has a particular connotation in the UK, where due to the vagaries of the UK's uncodified Constitution, the domestic constitutional order has recognized the sovereignty of the Westminster Parliament as a body with unlimited legislative power, whose laws are not subject to challenge by any other institution such as the judiciary. This contrasts with the constitutional position in many other States, where legality of legislation may be reviewed by a Supreme Court, Constitutional Court or similar institution.

But there is confusion over the sources and ambit of this parliamentary sovereignty. In part, this is a consequence of the absence of a codified UK Constitution. Some interpret parliamentary sovereignty as a 'common law construct'[10] while others, such as Goldsworthy, argue it has theoretical roots in English writers from the 13th Century (although Parliament was quite a different Institution in medieval times) , and is the product of a political consensus.[11]

After the 1688 'Glorious Revolution', it was increasingly argued that sovereignty was located in Parliament, which was supreme and illimitable, rather than the king, who had lately been ousted for abusing the law. But this meant that no legislation, however special and valued, i.e. Magna Carta, could be entrenched, or protected against subsequent parliamentary legislation, because to do so would limit Parliament's supremacy, its future freedom of action. So for example, 19th century jurist and constitutional doyen, AV Dicey, whose work has been so influential in developing English constitutional theory, denied the Acts of Union between England and Scotland could have fundamental effect. He famously wrote that: 'neither the Act of Union with Scotland, nor the Dentists Act, 1878 has more claim than the other to be considered a supreme law.' [12] This absolutist theory also interpreted Parliament's sovereignty as stretching beyond England, to the whole British Empire.

That was the theory. But, in practice things have not been so simple and the doctrine of parliamentary sovereignty is (and has been) incoherent and contested. I look at historical and territorial challenges to illustrate this. (These are challenges mainly to parliamentary sovereignty, but spread out, where indicated, to other types of sovereignty.)

2. The Historical Challenge

I start with Dicey (because so much of the theory of parliamentary sovereignty derives from him). Dicey wrote that parliamentary sovereignty was a matter of logic, and that 'Limited Sovereignty' was a 'contradiction in terms.' This assertion would rule out federalism for example, where sovereignty is shared between a national federal centre and states or provinces. But why must sovereignty be understood only as unlimited and indivisible? Many others understand it differently.[13] Dicey's answer was that sovereignty was always understood in this way in England. But, even if true (which it probably

is not) that can only be contingent, distinguishable from Dicey's claim for logical truth. And anyway, his theory is not watertight historically, and also omits eg Scottish constitutional history.

Historically, parliamentary sovereignty does not have a long pedigree. It dates only as far back as the Glorious Revolution, possibly only the 18th (or even 19th) century. In 1610, Sir Edward Coke declared the right of common law courts to adjudge an act of parliament void, if 'against common right and reason, or repugnant'.[14] There is no mention in English revolutionary documents, such as the 1688 Bill of Rights, of a sovereign, illimitable Parliament.

In the 18th century, the British Constitution was evolving, but had not yet completely overridden older constitutional ideas, such as an unwritten English Constitution, spoken of as 'fundamental', rather than parliamentary legislation as supreme. JW Gough, writing (in 1955) about the British Constitution, commented that 'two or three centuries ago, everyone (or almost everyone) wrote and spoke as if fundamental law were one of its features.'[15] This doctrine had been the usual currency of law for hundreds of years in England, and it is not surprising that eg when American Colonists challenged the British Parliament's authority to impose on them the 1765 Stamp Act, they did so by appealing inter alia to an understanding of England's ancient Constitution. In this they were supported by figures in England such as Lord Camden, a great 18th century English judge, (who gave judgment in *Entick v Carrington*) who repudiated the doctrine of absolute parliamentary sovereignty. Only with the ascendancy of Benthamite reasoning from later 18th century, then Diceyan dominance of British constitutional law, did parliamentary sovereignty really take hold.

3. The Territorial Challenge

Furthermore, Westminster sovereignty is territorially challenged. British experience in former transfers of power, Acts of Union and Disunion, and their knock-on impact on sovereignty - whether the Acts of Union with Scotland, domination of Ireland by England and subsequent Irish independence, or past constitutional relationships with former colonies - is too rarely considered in contemporary debates. Yet such events are very instructive.

3.1. Other parts of the UK (than England) are less inclined to recognise the Diceyan orthodoxy of parliamentary sovereignty

For example, in 1953 in the Scottish case of *MacCormick v Lord Advocate,* Lord Cooper stated: 'The principle of the unlimited sovereignty of parliament is a distinctively English principle which has no counterpart in Scottish constitutional law….'[16]

Many Scots of different political persuasions support an indigenous Scottish tradition of popular sovereignty claimed to date back to Declaration of Arbroath in 1320. They hold that, before the 1707 Act of Union, sovereignty resided in the Scottish people – and still does so, in spite of Diceyan claims. When the English and Scottish Parliaments united in 1707, the English Parliament did not swallow up the Scottish Parliament. Instead, it was a Union of two Parliaments, and a new Parliament of Great Britain was created. Therefore, it is not logical to say that English theories of sovereignty of Parliament should reign supreme, and Scottish notions of sovereignty of the people should be ignored.

3.2. Loss of the American colonies

Much of the conflict of the American War of Independence was caused by arguments about sovereignty. From 1764 to 1776, the first British Empire confronted a crisis regarding the authority of the British Parliament over colonial America.[17] Many in Great Britain itself thought of 'Empire' as a

unitary State, with sovereignty vested only in the Westminster Parliament, and the authority of the colonies as merely 'privileges' that could be curtailed. This view was reflected in the 1765 Stamp Act (which taxed all paper on which documents were printed) - an unprecedented direct taxation by Parliament of the colonies. Although the Stamp Act was repealed in March 1766, this was accompanied by the Declaratory Act, (almost identical to the Irish Declaratory Act 1720) which asserted Parliament's authority to 'bind the colonies…and peoples of America …in all cases whatsoever' – an assertion of sovereignty and control, if ever there was one. Lord Mansfield exemplified this expansive view of parliamentary sovereignty, stating that Parliament represented 'the whole British Empire' and had 'authority to bind every part and every subject without the least distinction' in tax as well as legislation.[18] However, many Americans rejected parliamentary sovereignty, viewing Parliament's authority as circumscribed by custom and law (such as Magna Carta), which set borders to Westminster's reach. Therefore, this was a rejection of an omnicompetent Parliament, and the Declaratory Act was seen as a 'lawless usurpation'.[19] Americans relied on an older notion of the fundamental Constitution. And given the fact that even in Britain, in the 18th Century, that concept still carried weight, this was not an unreasonable contention. According to the 'American' theory of Empire, it was a shared monarch that connected colonies legally to Britain. Just as the king-in-Parliament could legislate and impose tax in Britain, so the king-in-the-New-York-legislature could legislate and impose tax in New York.

The earlier Union of the Crowns of Scotland and England was used to support this argument – a monarch could reign over two legally distinct countries, each with separate parliaments. By this argument, Britain might regulate colonial trade – as an 'external' measure (and the Navigation Acts might be justified by 'long usage and acquiescence') – but not internal taxation. But the British Government would not accept this view. Warnings, such as Burke's, who argued it was better to allow American legislatures some independence than force compliance from afar, were ignored. [20]

However, what is interesting is that, in the middle of the American war of independence, the British proposed a Conciliation Plan. Great Britain was prepared to make all sorts of concessions: ie banning taxation of colonies; suspending operation of any post 1763 statute; agreeing that no colonial Constitution could be modified by Parliament save on petition from that colony; no standing army in peacetime save with consent; Declaratory Act to be repealed. According to Berriedale-Keith, this proved beyond doubt that earlier British measures were based on no fundamental principle essential to the Empire. Keith's comment is extraordinary, coming from a constitutional lawyer elsewhere swift to condemn the colonial approach.[21] This incident illustrates that parliamentary sovereignty was not nearly as well established as Britain had formerly insisted. By overreaching themselves, they lost America. In any event, the Conciliation Plan was rejected by Americans, and the rest, as they say, is history.

3.3. The British Empire

Dicey's long 'Introduction' to the 8th edition of his work published in 1915 included a lengthy description of the constitutional structures of Empire, describing the 'Imperial Constitution' as a central feature of the British Constitution. For Dicey, Parliament's supreme law-making power applied throughout Empire. It did not end with the British Isles, and this meant colonies could not be sovereign.

But the reality of the British Empire undermined that. The constitutional law of the British Empire was no clearer than it had been for the American colonies in the 18th century. For the Empire was diverse and incoherent. Indeed, an almost anti-formalist attitude prevailed, and the Empire was often perceived as a family, managed by informal assurances, customs, conventions. This encouraged a vague approach to jurisdiction and borders. There was no unitary law. There was no attempt to establish a uniform legal code, (akin to the Napoleonic code). The Empire remained a byzantine network of territories, jurisdictions, institutions, and peoples, which hindered the emergence of a

unified imperial law. And the sovereignty of the Parliament in London was only one of many types of sovereignty that existed. According to John Darwin, the British Empire encompassed 'an extraordinary range of constitutional, diplomatic, political, commercial and cultural relationships.'[22] Darwin lists at least 10 diverse species of management: '*colonies of rule* (including the huge 'sub-empire' of India), *settlement colonies* (mostly self-governing by the late nineteenth century), *protectorates*, *condominia* (like the Sudan), *mandates* (after 1920), *naval and military fortresses* (like Gibraltar and Malta), *'occupations'* (like Egypt and Cyprus), *treaty-ports and 'concessions'* (Shanghai was the most famous), *'informal' colonies of commercial pre-eminence* (like Argentina), *'spheres of interference'* (a useful term coined by Sellar and Yeatman) like Iran, Afghanistan and the Persian Gulf, and (not least) a rebellious province at home.' Darwin suggests the lack of any agreed term may have led to 'Pax Britannia' as a convenient umbrella term.

Indeed, it would have been impossible for Westminster to bind nearly a quarter of the globe with its legislation. The colonies were not represented in Westminster. Westminster was not organized like the EU Parliament where British citizens had directly elected MEPs, in a Parliament with a co-say or veto on legislation. The colonies had no say in Westminster, but instead their own legislatures, their own people on the ground, really determined what was going on, except in a few cases. And the sovereignty of the Parliament in London was only one of many types of sovereignty that existed. Much of the British Empire lent itself to a more pluralistic type of sovereignty – one that was divided, shared, indeterminate. It used legal devices such as the mandate, or protectorate, and other fuzzy concepts, where sovereignty had no one single source. Benton and Ford identified a 'middle power'[23] at work in British colonies, not always in line with the Government in London. This middle power included the judges, magistrates, and commissioners who applied a form of legal governance of the colonies, often very much of their own, creating a 'vernacular' Constitution.

Although some constitutional theorists claimed the sovereignty of the Westminster Parliament over the whole British Empire, this was often rejected, as reactions by Americans to the Stamp Act illustrates. Westminster also had a complicated relationship with 'settler colonies', such as Canada and Australia, which rested on conventions of non-interference by Britain in their affairs, similar to those crafted to operate between Westminster and devolved legislatures since 1998. The contemporary 'Sewel convention' provides that normally Westminster will only legislate on devolved matters with the devolved Parliament's consent. The problem is that such conventions are not legally enforceable, and if they are ignored (as the UK Parliament did in adopting several Brexit bills without the consent of devolveds) then there is no legal recourse. If what Peter Hennessey called the 'good chaps' are no longer observing the rules of government, then much of the British Constitution (ie the part that is political only, such as conventions) is inoperable because seen as legally unenforceable. In the case of Britain's Dominions, the conventions of non-interference were generally observed, and the problem was worked out by providing legal autonomy in the 1931 Statute of Westminster, and then by complete independence. With no equivalent of the Statute of Westminster in the offing for Scotland, for example, the independence route might seem the only alternative.

It was likely that *power* underlay the Empire. Yet that power could not be derived from a unified, coherent account of legal and political sovereignty. And power by itself lacks legitimacy – it must be validated by something else – which is where sovereignty becomes relevant, in providing that grounding. Yet the claims of sovereignty made by the British Empire were often mutually self-contradictory.

3.4. The EU Challenge

Perhaps the most viable challenge posed to parliamentary sovereignty was posed by Britain's EU membership. The supremacy of EU law, meaning its priority over conflicting member State laws, is a

fundamental principle of the EU's legal system. Under the European Communities Act (ECA) 1972, the UK Parliament gave effect to the UK's EU obligations in national law. Section 2(4) ECA provides that all statutes must be read and given effect to consistently with EU law, providing national courts with an exceptional power, including disapplying statutory provisions, which challenged the traditional notion of parliamentary sovereignty. In *Factortame (No.2*[24]*)* the judicial House of Lords accepted the supremacy of EU law and disapplied the Merchant Shipping Act 1988 (which directly conflicted with (then) EEC law).

A confused attitude to sovereignty was exemplified by the UK Government Brexit *White Paper* which stated: 'The sovereignty of Parliament is a fundamental principle of the UK constitution. Whilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that.'[25] This admission, that Parliament had been sovereign during the UK's EU membership, is at odds with the Government's *Foreword* to the 'Great Repeal Bill' White Paper, where it cited regaining sovereignty as the motivation for Brexit and demonstrates muddled thinking.

Part of the confusion lies in conflating different types of sovereignty mentioned earlier. As already stated, *external sovereignty* was never lost as Britain was able voluntarily to join and leave the EU. In contrast, *parliamentary sovereignty, internal* in nature, was exercised by Parliament in adopting the ECA and deliberately according priority to EU law in certain circumstances. The only aspect of parliamentary sovereignty apparently eroded was that under the 'implied repeal' rule, whereby a UK statute must give way to EU law if inconsistent with it, even if the UK statute postdates the EU law. And even then, it was acknowledged and asserted in UK legislation that Parliament would still be sovereign if it expressly and deliberately legislated in contravention of EU rules.

3.5. To summarize the territorial challenge to sovereignty:

a) Adhering to unlimited parliamentary sovereignty involves ignoring the traditions of Scottish law (and some older Irish law) and assuming that, post 1707 Acts of Union, the GB Parliament simply was the English Parliament writ large.

b) A major cause of the American Revolution was disagreement about sovereignty, arising from different views about its role in the first British Empire.

c) In spite of claims made for Westminster parliamentary sovereignty, the British Empire was in fact very diverse, and underpinned by many types of sovereignty.

d) Regarding the EU – Britain's external sovereignty was never lost, and the UK of its own free will, exercised both its external and parliamentary sovereignty for the benefits of EU membership.

4. Conclusion

It was argued above that a major cause of the American Revolution was disagreement about sovereignty, arising from different views about its role in the first British Empire. Today, there is evidence for a similar disjunction of views on sovereignty. These reflect conflicting views of how jurisdiction and borders operate *within* the UK State.

One current view of British sovereignty, and the Constitution, views the UK as a unitary, centralized State, with an omnicompetent Parliament controlled by the UK Government. According to this view, because of parliamentary sovereignty, Westminster retains its right to legislate on any matter, including matters formally devolved. Non-legal mechanisms (ie the Sewel convention) are interpreted as *legally* unenforceable. As a result, devolved authorities are seen as having few legal rights in this area, and at most, may be consulted as a matter of courtesy. This effectively disenfranchises whole territories of the UK.

However, the UK Government view contrasts with a different view. This alternative approach identifies the UK as a union founded on treaties (eg Treaty of Union 1707, Good Friday/Belfast Agreement 1998). The Union continues, but only with consent of both parties. This view also recognizes that the UK has been transformed by external developments (such as EU and ECHR membership) and recalibrated internally by devolution (but also by the Human Rights Act, and a desire for a more principled constitutional development than parliamentary sovereignty allows). It acknowledges that the Constitution has recently become more legalized and susceptible to judicial review, as cases such as *HS2* and *Miller* illustrate. Furthermore, the Scotland Act 2016 and Wales Act 2017 (both Westminster legislation) declare the permanence of the Scottish Parliament and Welsh Assembly, provisions which, if not simply redundant padding, fly in face of orthodox constitutional law's assertion of an omnicompetent Westminster Parliament.

Why does this matter? Because the stakes are high.

The UK no longer has an Empire. It has also left the EU. But it has lessons to learn from this past, this history of belonging to, or managing, larger organizations. The UK is still a conglomerate or Union State of four nations. If the UK is to function effectively as single State, then its constitutional structures must acknowledge this variety. Yet, at present, they do not. We have a Constitution that is full of synergies and political conventions, supposedly flexible. Except that they it is not. Because most of this flexible Constitution is political, and when it suits, Britain retreats into a hard minimal legal Constitution shell - a highly eccentric, and even incoherent, understanding of parliamentary sovereignty as impermeable, indivisible and unshareable. This concept of sovereignty makes federalism or effective home rule impossible. And because we have a fused system with an Executive drawn from Parliament, this system of sovereignty empowers the Government, at least where it has a majority.

And to conclude - even Dicey, parliamentary sovereignty's greatest advocate, was inconsistent. Dicey himself, in his energetic opposition to Irish Home Rule, was prepared to depart from his doctrine of parliamentary sovereignty. In 1913, Dicey contended that if Asquith's Home Rule Bill for Ireland was enacted by Parliament, it 'it would be justifiable to oppose it if necessary by armed rebellion.' In pledging himself to rebellion by Covenant was Dicey not undermining representative democracy and the rule of law? Indeed, if the doctrine of parliamentary sovereignty was compromised even by its greatest exponent, there is all the more reason to recognize its inconsistencies and the folly of adhering to it in all circumstances.

The present situation posits Westminster parliamentary sovereignty and independence (ie of Scotland) as two extremes. There seems to be no halfway, no sharing of sovereignty. However, lest we suffer another bout of constitutional amnesia, we should remember that, in the past, independence from Britain was often only achieved with war and violence, as in America and Ireland. This is not a desirable precedent to follow.

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(This paper is a very general summary of some of the arguments in my forthcoming book – *Brexit, Union and disunion: the evolution of British constitutional unsettlement*.)

[1] The UK Government's 2014 *Scotland Analysis* declared: 'All activity to manage, control and secure the UK's border, wherever it is undertaken, and every penny spent, regardless of where it is invested, is of direct benefit to every UK citizen regardless of where they live or work.']

[2] There were, of course, exceptions, most notably the British and Dutch East India companies, which were (nominally at least) private chartered companies, but controlled large areas of the globe.

[3] At Humboldt University Berlin, 'From Confederacy to Federation - Thoughts on the finality of European integration'.

[4] In supranational law, nations explicitly submit specific of their sovereign rights to a set of common institutions.

[5] The UN operates both to preserve the sovereign State, through the principle of territorial integrity (Art 2 UN Charter) and to further intergovernmental bargaining and international law.

[6] N McCormick, *Questioning Sovereignty* (OUP: 1999).

[7] N McCormick, 'Beyond the Sovereign State' (1993) 56 MLR at 1.

[8] *Foreword* to the Government White Paper on the 'Great Repeal Bill' stated, 'At the heart of that historic decision was sovereignty. A strong, independent country needs control of its own laws. That, more than anything else, was what drove the referendum result: a desire to take back control.' *Legislating for the United Kingdom's withdrawal from the European Union,* Cm 9446 (March 2017) at 7.

[9] A great deal has been written about sovereignty, most of which cannot be explored here. Jean Bodin, writing in the 16th century, is often described as the 'father' of modern conceptions of sovereignty. But there has been a vast amount of scholarship since. Minkkinen, in 2009, observed that about 330 books with sovereignty in their title had been published in the past decade [Panu Minkkinen, *Sovereignty, Knowledge, Law* (Routledge, 2009), 6].

[10] eg Lord Steyn, '[T]he supremacy of Parliament…is a construct of the common law. The judges created this principle.' (*Jackson v Attorney-General* [2005] UKHL 56, at 102).

[11] Jeffrey Goldsworthy: *The Sovereignty of Parliament. History and Philosophy* (Oxford: Clarendon Press, 1999).

[12] A V Dicey, *An Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1959) 10th ed, at 145.

[13] Eg divisible sovereignty was well understood by the Framers of the US Federal Constitution. *see The Federalist* No. 39.

[14] [1606] 8 Coke Rep 48.

[15] JW Gough, *Fundamental Law in English Constitutional History*, (Oxford: Clarendon Press, 1955) at 2.

[16] *MacCormick v Lord Advocate* 1953 SC 396.

[17] John Adams, writing as *Novanglus*, declared, '*colonization* is *casus omissus* at common law.' *The Works of John Adams*, (Boston, 1850-1856), 121.

[18] House of Lords Debate on Repeal of the Stamp Act, Feb 10, 1766, *Cobbett's Parliamentary History*, XVI 173.

[19] See eg Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States* (New York, 1990); Charles H. McIlwain, *The American Revolution: A Constitutional Interpretation* (Macmillan, 1924); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Harvard University Press, 1967).

[20] Edmund Burke, *Address to the People on the Subject of the Contest between Great Britain and America* (London, 1776).

[21] Arthur Berriedale-Keith, *Constitutional History of the First British Empire*, (Oxford: Clarendon Press, 1930) at 385.

[22] John Darwin, *The Empire Project: The Rise and Fall of the British World-System*, 1830–1970 (CUP, 2009) 1.

[23] *Rage for Order*, 181, 196.

[24] *ex p Factortame and Others (No 2)* [1991] 1 AC 603.

[25] HM Government, The United Kingdom's exit from and new partnership with the European Union' CM 9417, (February 2017) chap 2 'Taking control of our own laws', 13.