

Sixth Annual Bingham Centre Lecture

‘Process of Discovery: What Brexit has taught us (so far) about Parliament, Politics and the UK Constitution’

Speech delivered by the
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Thank you very much indeed for that very kind introduction. It has been a short but sensational session of Parliament. However, I suspect that it will serve as a mere prelude for yet more drama.

Tom Bingham, or to afford him his full title Baron Bingham of Cornhill, was a truly outstanding legal thinker. His death nine years ago yesterday was a huge loss to public life and our national discourse. He had a depth of understanding as to what the term “the rule of law” really meant that had no equal. He was a ferocious critic of absolute executive power whether in a domestic or an international context. He was also the moving spirit behind the creation of the UK Supreme Court, an institution that has already played an important part in the Brexit saga via its ruling in *R (Miller) v Secretary of State for Exiting the European Union* delivered on January 24th 2017 which asserted that Article 50 of the Lisbon Treaty could not be invoked without the approval of Parliament through legislation. Its ruling on prorogation is awaited next week and it may be destined to return to centre stage if the Government does seek to avoid a further extension of Article 50 through a legal challenge to the European Withdrawal (Number Six) Act – the so-called Benn/ Letwin Act - just enacted. What Tom Bingham would have thought of some of the language expressed around that possibility over the past few days can be anticipated with some confidence. He would not approve of it.

In this address today I want to make three central arguments. The first is that the revival of the House of Commons which has been witnessed so spectacularly during the Brexit process is not the one-off product of that issue – as unusual a question as it is – but part of a wider renewal of our legislature which should be welcomed by all those with the best interests of our democracy at heart. The second is to offer some reflections on what would and would not be an appropriate response to the fact that the European Withdrawal (Number Six) Act is now on the statute book. Finally, I would like to offer a few thoughts of my own as to how the Brexit experience has changed my view of the UK Constitution and whether it is now time to think seriously about a fully codified Constitution. I will then subject myself to your questions which as there are some outstanding legal thinkers with us this evening may be a decision which I swiftly come to regret. Fortune, hopefully, favours the brave.

THE REVIVAL OF PARLIAMENT.

Let me be candid. A decade or so ago the House of Commons was not in a very good place. A series of governments with very large majorities had treated it with ever diminishing respect. It seemed to have lost its appetite to contest ministers. It had damaged itself immensely courtesy of the expenses scandal. It was not an entity in which the British people appeared to have much pride. It was in real danger, to borrow from Bagehot, of becoming a “dignified” rather than an “efficient” element of the Constitution, except that, worse still, it appeared on the edge of being dignified without dignity.

The notion then that in 2019 the House of Commons might assert itself as it has done not only last week but over the past two years would have been inconceivable. It would have seemed as plausible as the fabled Dead Parrot returning to life as a Golden Eagle. It was clearly pining for the fjords.

That transformation could not have been triggered by Brexit alone nor by the simple arithmetic that the 2017 general election did not produce a majority for any single party. At the time of dissolution in April 2017 Theresa May had a working majority of 14 seats. As the Withdrawal Agreement that she negotiated with the EU-27 has been defeated on three occasions and by 230 votes, 149 votes and 58 votes respectively, she would barely have been better off if she had not make the fateful decision to seek her own mandate on June 8th 2017. This is about far more than a minority status.

So, let me take you through what have been the decisive factors in the revival of the House of Commons since 2009. We have witnessed a renaissance which has allowed it the necessary confidence to challenge the executive as it has done and to reassert an authority which appeared to have been permanently lost.

The first element, and one where I hope that I have had a modest influence, is in the use of a quite old and another comparatively new institutional device to scrutinise ministers in real time.

The principal machinery here has been the Urgent Question or UQ. This is an instrument with a lot of history to it. It allows any Member of Parliament to petition me to present a question to a minister on some matter which has arisen very recently and is of substantial significance. At but a few hours' notice, a minister will have to respond to that question on the floor of the House itself. This is scrutiny in virtually instant action. Alas, in common with much else about Parliament, the UQ had rather withered away in the first decade of this century. In the last year before I became Speaker (2008-2009) only two Urgent Questions had been heard in the chamber. As those 12 months included the largest global financial crisis since the 1930s, among other events, one might have thought that was plenty of urgent material out there to discuss. Apparently not. I was determined when I was elected to the Chair to reverse matters. As of this week, there have been 658 Urgent Questions during my tenure. They are now an established part of parliamentary life and I believe that most MPs would consider it very strange and thoroughly regrettable if there did not continue to be a regular supply of them. They have also had the benign side-effect of encouraging ministers to offer up formal statements to the House voluntarily rather than having to do what is close to the same thing via response to a UQ instead.

The secondary element has been a more flexible approach towards emergency debates that are requested of the Speaker under Standing Order 24 and what an individual MP can do with them. This became the means by which the House chose on Tuesday last week to exercise what I deem to be its right to secure control over the Order Paper if it so wishes and to set aside time, Wednesday last week in this instance, to debate and legislate for an Act of Parliament in the course of a single day. I concede that this has been the subject of controversy in some quarters. I

do not think, however, that parliamentarians will now want to abandon or constrict the SO 24 facility once Brexit has been concluded one way or the other.

This has not been the only example of the House of Commons taking back control. There are others which I think form part of the backdrop to the enhanced collective courage we now see.

A crucial aspect of this has been the transformation of the Select Committees of the House over the past decade. Until March 4th 2010 when the House voted to change its rulebook wholesale, there was a fundamental inconsistency and irony which afflicted the Select Committee system. These were committees which were supposed to oversee the executive as it discharged departmental duties. But the chairs of these select committees and the membership of them were very largely under the command of the Whips, who were the agents of the executive or the aspiring executive. To put it mildly, this was not exactly a level playing field. Ministers rarely lived in fear of a Select Committee.

They would not be wise to be too relaxed about them today. From 2010, the chairs of select committees have been elected by the whole House in secret ballots. Their membership is also determined by election within the various parliamentary parties - once again by secret ballot. Candidates are unlikely to endear themselves to their electorates by stressing how little independence of thought they possess and how enthusiastic they are to help ministers out. These are highly prized places as the contest to succeed Nicky Morgan as the Treasury Select Committee Chair is currently demonstrating. For many MPs they are an alternative career path.

An additional factor has come with the creation of the Backbench Business Committee in 2010. This allows considerable influence over the schedule of the House, especially on Thursdays. Indeed, when the history of Brexit comes to be written (and who knows when that will be) it will be observed that the drive to acquire a referendum started life with this committee. It has also facilitated valuable work in other far less controversial areas, such as establishing the true character of the Hillsborough disaster of 1989. No one will win a vote to abolish this committee.

Indeed, it is probably my single biggest regret as Speaker that the Backbench Business Committee has not been supplemented, as it should have been, by a separate House Business Committee so that control over parliamentary prime time was not exclusively in the hands of the executive. The House endorsed the principle of a Business Committee in 2010. The Conservative-Liberal Democrat coalition agreement reached after the 2010 election accepted this recommendation too and pledged to introduce such a committee within two years. It never happened. It is unfinished business for me.

All of these institutional innovations needed a shift in cultural attitudes to render them viable. Weapons in the hands of pacifists do not make much impact. I think it is important to acknowledge how much has changed at Westminster over the last decade because it is another reason to believe that the new assertiveness of the House of Commons is not a passing fashion but is with us to stay.

That cultural shift has a number of sources. The first is that the 2010 election produced a House in which 35 per cent of members were new. This new blood was thus a clean break from the past. It has not been ground down by the long period of decline that other MPs had endured. It was much more willing to ask questions about why the House operated as it did. In many cases, these were questions which were long overdue and for which change was the answer.

The blood was, however, not merely new but different. We have a long way to travel before we will see a House of Commons which is truly representative of modern Britain but only the churlish would fail or refuse to recognise just how much progress has been made in this regard over the last ten years. There are so many more female MPs – 208 - many more who enjoy an ethnic

minority heritage – 52 or eight per cent - and many on both sides of the House who are not heterosexual. There is more variety in the past employment of those who sit on the green benches. The House is also, on the whole, a younger place than it used to be although I think it is extremely important that we do not deny ourselves the talents of those who want to continue as Members of Parliament well beyond the conventional retirement age. In their different ways, the likes of Ken Clarke and Dennis Skinner contribute much to our proceedings.

To conclude this section then, I think that the Brexit episode and the restoration of parliamentary will should not be seen in isolation. That restoration is about something bigger and better, namely the willingness of the House to be a much better check and balance on the executive, an ambition which I believe we should all applaud vigorously. I would be willing to stake a lot of money that Tom Bingham would cheer this change to the rafters if he had had the opportunity to witness what I have described here.

WHAT NEXT FOR PARLIAMENT AND BREXIT?

What next then for Parliament and Brexit? What may occur when we return on Monday October 14?

It strikes me that constitutionally, legally and morally there are only three plausible possibilities.

The first is that a new Withdrawal Agreement and Political Declaration will be placed before the House of Commons. If it is and if there is the sense that it might well command majority support, we may need to have some very long days and nights in order that it can be decided upon before October 31. If heavy lifting is required to that end, we should not hesitate to undertake it. If a majority can be found for leaving with a deal without a further extension of Article 50, it would manifestly be legitimate for ministers and indeed the House to proceed.

The second is that the House either is not provided with a new Withdrawal Agreement or will not accept it and declares itself in a majority vote prepared to leave on October 31 without a deal. A No Deal result which has been pro-actively procedurally blessed by the House is obviously legitimate.

The third and final option is that in the absence of either a more tolerable Withdrawal Agreement or a positive vote for a No Deal exit then the provisions of the legislation passed last week are met and the Prime Minister and Government properly seeks an extension to Article 50. Such a potential chronology of events has been set out with microscopic clarity in what is known as the “Benn Bill”. This is clearly legitimate. To recap, an approved deal, an approved no deal, or an approved request for a further extension would all be credible parliamentary scenarios.

That is the range of options on the menu. I cannot see any other legitimate possibilities. Not obeying the law must surely be a non-starter. It is astonishing that anyone has even entertained it. It would be the most terrible example to set to the rest of society. One should no more refuse to request an extension of Article 50 because of what one might regard as the noble end of departing from the EU as soon as possible than one could excuse robbing a bank on the basis that the cash stolen would be donated to a charitable cause immediately afterwards. We should not be in this linguistic territory.

If we come close to being there, I would imagine that Parliament would want to cut such a possibility off and do so forcefully. If that demands additional procedural creativity to come to pass, it is a racing certainty that this will happen and that neither the limitations of the rulebook nor the ticking of the clock will stop it doing so. If I have been remotely ambiguous so far, which I

hope that I have not been, let me make myself crystal clear. The only form of Brexit which we will have, whenever that might be, will be a Brexit that the House of Commons has explicitly endorsed.

A BIGGER CONSTITUTIONAL QUESTION.

I want to conclude with some reflections on a larger constitutional question, the constitution itself. We would not be having the discussion which I have just outlined if we had a single codified form of constitution that would be taken as essential in the vast majority of modern democracies. The UK is in a small set of three countries that do not have a classic national constitution. It is really a set of only one because the other two nations, Israel and New Zealand, do have much of their institutional infrastructure set out in a Basic Law of 1950 and a Bill of Rights of 1986 respectively.

In truth, we have been travelling in the direction of a constitution. The process of devolution has obliged us to think more forensically about the distribution of powers between Westminster and Edinburgh, Cardiff and hopefully once again Belfast. The arrival of a Supreme Court has added an absolutely essential new aspect to our constitutional arrangements. A number of leading public figures, not least Will Hutton of late, have made an eloquent case for finishing that process and taking the first steps towards what I concede would not be the straightforward task of drawing up such a document. Having been a sceptic in the past about either the desirability or practicality of writing a UK constitution I have come to conclude that at a minimum it is worth establishing a Royal Commission or a Speaker's Conference of some form to explore the idea further. As interim insurance, a Parliamentary Powers Act might be introduced to entrench the authority of the House of Commons and ensure that the rule of law is never distorted or perverted by executive malpractice. I believe the arguments for this approach are sound whatever the eventual resolution is on Brexit.

I am now, you will be pleased to hear, very nearly at the end. I would like to leave you with one last observation. It is what a tragedy it is that Tom Bingham is not with us to participate in a debate on our constitutional situation. If he had lived, even though he would be 86 years old next month, he would doubtless have held strong views on how we should proceed and would have expressed them with incredible force and not inconsiderable charm. We would have been so enlightened by him.

Sadly we will have to do without his contribution although the volume of work which he left behind enables us to estimate his assessment of what to do next. I am proud to have been part of a House of Commons which has recovered its self-belief, indeed its very soul, over the past decade. It has been a wonder to witness but we are not at the completion of that extremely desirable process. It is time to ask whether a written constitution is what we need to allow us to complete the voyage.