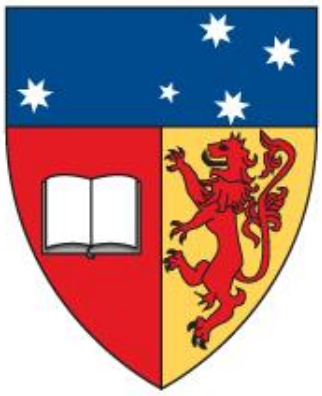

Emmanuel College

Papers

Legal issues of Brexit

by

The Honourable Justice James Edelman

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Emmanuel College
The University of Queensland
Enriching lives since 1911

Emmanuel College is Australia's ninth, and with St John's College, The University of Queensland's first residential college to gain affiliation. It was founded by the Presbyterian Church of Queensland in 1911 with the first students taking up residence in Wickham Terrace in 1912. As the Presbyterian Church moved towards partnership with other religious denominations during the 1970s, Emmanuel College also came under the auspices of the Uniting Church. Upon its inauguration, Emmanuel College was an all male residence but this changed in 1975 when women were admitted as collegians. Now, the College numbers around 340 students with half our population being female.

Further change was experienced by the College when it moved in 1956 from its original site in Wickham Terrace to its present location on the main university campus in St Lucia.

Since 1911, Emmanuel has stood for excellence in all round education and has had seven Rhodes Scholars during its history. Its graduates have gone on to make a major contribution to Australia in many areas, including as doctors, scientists, teachers, engineers, lawyers and judges, politicians, ambassadors and diplomats, and church leaders.

THE AUTHOR

The Honourable Justice James Edelman

The Honourable Justice James Edelman is a judge of the Federal Court of Australia, based in Brisbane. He was previously a judge of the Supreme Court of Western Australia, having been appointed to that position in 2011. He obtained his degrees of Bachelor of Economics (1995) and Bachelor of Laws (first class honours 1996) from the University of Western Australia and a Bachelor of Commerce from Murdoch University (1997). He was Associate to his Honour Justice Toohey, of the High Court of Australia, in 1997 and completed his articles with Blake Dawson Waldron. He was admitted to practice in Western Australia in 1998.

Justice Edelman was awarded a Rhodes scholarship in 1998 and obtained a Doctor of Philosophy in Law (2001) from the University of Oxford. He took up a teaching position at Keble College, Oxford University in 2005, and was appointed Professor of the Law of Obligations at Oxford in 2008. He is an Adjunct Professor at The University of Queensland and the University of Western Australia. He is also a Conjoint Professor of Law at the University of New South Wales. He practised as a barrister at the Chambers of Mr Malcolm McCusker QC in Perth from 2001, and at One Essex Court at the English Bar from 2008.

This speech was delivered at the Sir Harry Gibbs Law Dinner held at Emmanuel College on 1 September 2016.

Legal issues of Brexit

It is an honour to be invited to give the Sir Harry Gibbs Law Dinner speech this year for two reasons.

The first is that this will be the last of these dinners with Dr Stewart Gill as the Principal of Emmanuel College before he departs to take up the position as Master of Queen's College at the University of Melbourne in January 2017. The College will welcome Professor David Brunckhorst who will succeed Stewart as Principal. I welcome David, who is here this evening, and look forward to watching him implement his vision for the future of Emmanuel.

I had the pleasure of meeting Stewart at a dinner hosted by Roger and Sarah Derrington last year shortly after I arrived in Brisbane. I have heard nothing but glowing praise for his work as Principal of Emmanuel College, and the heights to which he has taken the college. I spent more than a decade as a student or a Fellow of Oxford colleges and I have seen how the whole ethos of a college is shaped by the Principal. This dinner is one of the academic events which typifies Stewart's focus on a core academic focus to the college. In that spirit, I have focused this speech upon interesting and difficult legal issues.

The second reason for the honour of the invitation to speak this evening is also the reason for my choice of topic. That is the man in whose honour this dinner was named. I never had the privilege of meeting Sir Harry Gibbs. Francis Douglas QC described him as a man of "unfailing courtesy and modesty notwithstanding the enormous breadth of his intellect". In a speech given by Sir Ninian Stephen at a previous one of these dinners, he spoke of Sir Harry Gibbs as "a firm yet gentle force for right". He said that although those six words described a great deal about a great and modest man, they did not capture the strength of Gibbs' character and the force for good that he exerted as a member of Australia's highest court. In the most testing stage of his time as Chief Justice of the High Court he was required to walk a fine line between the need to preserve courtesy and dignity and the strength of his beliefs about propriety.

Amongst the core of Sir Harry's beliefs were three powerful themes. These were his views of parliamentary supremacy, constitutional federalism, and his commitment to a constitutional monarchy. There is perhaps no more dramatic illustration of the three themes concerning parliamentary supremacy, constitutional federalism, and constitutional monarchy than the circumstances surrounding the momentous event that took place two months ago. This is the referendum colloquially described as Brexit.

I will divide this speech on the legal aspects of Brexit the way that a great chess game would unfold. First, there is the pre-game manoeuvring - the publicity, the noise, and the event that brings the players to the table. Secondly, there is the opening - the vital beginning of the game. If this goes wrong then everything that follows can be tainted. Thirdly, there is the middle game - the intensity, the tactics, the sacrifices for greater gain. Finally, there is the end game.

The pre-game manoeuvring

The most significant legal aspect of the pre-game manoeuvring can be described in a word which was precious to Sir Harry Gibbs: "sovereignty". This was one of the rallying calls of the forces in the "leave" campaign. Unfortunately, there was not a great deal of explanation about what the speakers meant in their claims that Britain had "lost sovereignty". It is necessary to separate at least three different conceptions of sovereignty, which are sometimes confused.

The first is external sovereignty. This is the sovereignty of a country in the international community under international law. There are various indicia of external sovereignty, and there can be intensely difficult questions about external sovereignty in areas such as State succession. It is not necessary to say anything about those. There is no doubt that the United Kingdom had, and has, external sovereignty.

Then there is the concept of popular sovereignty. This is the sovereignty of the people. This concept can be used in different ways. It might describe indirect popular sovereignty so that people are sovereign when they are governed through their elected representatives. More commonly, popular sovereignty focuses upon the manner in which the people directly exercise a vote for change, such as at a referendum. There are interesting debates about the extent of participation or the structure of a referendum can make sovereignty genuinely popular as well as democratic governance debates about popular sovereignty. All of those cases also be put to one side because this concept of sovereignty was not really the focus of the reference by the Brexit forces to reclaiming sovereignty.

The last, which was perhaps the most relevant to Brexit, is parliamentary sovereignty. The best known thesis on parliamentary sovereignty is that of AV Dicey, the Vinerian Professor of English law at Oxford. Dicey's views on women and minorities are scarcely mentioned these days, but he is still revered for his

strong thesis on parliamentary sovereignty. The concept of parliamentary sovereignty defended by Dicey was set out in his lucid style in 1885 as follows:

> The sovereignty of Parliament is, from a legal point of view, the dominant characteristic of our political institutions. … The principle, therefore, of parliamentary sovereignty means neither more nor less than this, namely that "Parliament" has "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.* (Emphasis added).

As recently as 1990, there were many English constitutional lawyers who defended the Diceyan notion of parliamentary sovereignty. Perhaps the first major erosion was in *Factortame v Secretary of State for Transport*. In that case, UK legislation, the *Merchant Shipping Act,* was held by the European Court of Justice to be contrary to EC law. The House of Lords granted an injunction, restraining the application of UK legislation in favour of EC law. Sir William Wade described the issue of the injunction as a judicial revolution. In 1999, the courts went further. A claim for damages came before the House of Lords. The claim was brought by Spanish fishermen on the basis that the *Merchant Shipping Act* which had contravened EC law should give rise to damages for the losses they had suffered from the legislation. They claimed damages from the State. The House of Lords held that they were entitled to damages for losses which flowed from a sovereign act of the UK parliament.

But even in 1999 it was still possible still to see UK law, and this case, as consistent with parliamentary sovereignty. *Factortame* could be understood as a case of breach of statutory duty with the statutory duty being s 2(1) of the *European Communities Act 1972* which gives domestic legal effect to EC Treaties which included the right to an effective remedy for breach. In other words, Parliament itself, by *earlier legislation,* had recognised that these claims might be made against the State for the consequences that might arise from a later exercise of State legislative power which contravenes EC law.

From around 2005 this explanation became more difficult. The English courts began using the language of “disapplying” UK legislation which was contrary to European law. The traditional conception of Diceyean parliamentary sovereignty had become almost impossible to defend in its full vigour.

I might fairly be accused of reading too much into the catchcry of the Brexit campaigners to “reclaim sovereignty”. It might fairly be said that those campaigners, and many of the 51.9% who voted for “leave”, were not really

fundamentally concerned with the erosion of the purity of a constitutional law thesis written by an Oxford academic 150 years ago. But this is the type of issue in the pre-game Brexit manoeuvring that would have so fascinated Sir Harry Gibbs.

I turn then to the next three stages of the Brexit chess game that has now begun. As I have mentioned there is the opening. There is the middle game. And there is the end game. At each stage the legal questions, involving constitutional and sovereign questions are immensely difficult.

The opening

I start with the opening. This concerns the "trigger" for withdrawal in Article 50 of the 2009 Lisbon Treaty. That article provides that "any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements". The article continues, requiring that once the decision to withdraw has been made, an agreement is to be negotiated with the European Council (with the consent of the European Parliament), acting on behalf of the Union.

The opening question is how the United Kingdom can "pull the trigger" to leave the European Union? There is no precedent here. Some commentators have pointed to the withdrawal in 1985 of Greenland. But Greenland withdrew in circumstances in which it was a self-governing territory of Denmark which remained an EU member. Also, Greenland's withdrawal was nowhere near as complicated as the UK's will be. Greenland had a population of around 55,000 people and practically a single product: fish. Its referendum to withdraw was the consequence of a dispute with the EU over fishing rights. Most fundamentally, the Article 50 trigger is concerned with the constitutional requirement of each State. The United Kingdom is not Greenland.

An important part of Article 50 is the two year ticking clock. If a withdrawal agreement is not reached within two years, then unless the European Council and the United Kingdom mutually agree to extend time, all the European Treaties simply cease to apply to the United Kingdom with nothing in their place.

So, the question is: What are the "constitutional arrangements" by which the United Kingdom can decide to withdraw under Article 50(1). One point is certain. Those constitutional arrangements were *not* the vote in the Brexit referendum. That vote was politically powerful but it had no legally binding force at all.

There are two basic contentions. The first is that legislation is required. The second is that it could be done by act of the executive. The difference between these two is the subject of numerous court proceedings at the moment. This is probably one reason why the executive government, through the Prime Minister, has said that Article 50 will not be invoked in 2016.

There might be real differences in consequence between the two approaches. It was argued by Geoffrey Robertson QC in *The Guardian* that the trigger can only be pulled by Parliament and that parliamentarians should not regard themselves as bound to follow the popular vote if, for example, their constituency voted by majority to "remain" or if their conscience required them to vote to remain. Similarly, AC Grayling, writing in *The New European* argued that a representative democracy should not descend into crude populism and that parliamentarians should regard the referendum as merely advisory and vote in the best interests of the nation. A similar approach was advocated by more than 1,000 barristers in a letter to the Prime Minister on 9 July 2016. They argued that a parliamentary vote should not be bound by the advisory referendum and that the Parliamentary vote should take place with a greater understanding as to the economic consequences of Brexit, as businesses and investors in the UK start to react to the outcome of the referendum. Of course, these same arguments might be made even if the Article 50 trigger were pulled by the executive. This is because the process of leaving Europe will, at some stage, require Parliament to repeal the *European Communities Act 1972.* However, that repeal is not the opening game. Once the opening has occurred, and Article 50 triggered, and terms negotiated, then it will be far more difficult, even for those parliamentarians who shared the view of these barristers, Robertson and Grayling, to vote against repeal of the 1972 Act.

Despite the volume of the calls for Parliament to vote independently of the referendum outcome, it might seem unlikely that Parliament would vote against invoking Article 50. One view, described by Dr Richard Ekins, is that it would come as quite some surprise to the 33 million or so who voted to be told that Parliament will not honour the outcome of their vote. If this is correct, and if Parliament is unlikely to vote against an Article 50 withdrawal, then the really important consequence of whether Article 50 is invoked by Parliament or the executive may be whether the opening of the process is valid or invalid. If Article 50 is invoked by the executive, and it is invalid to do so, then it is just possible that the whole of the subsequent game, the negotiations and any revised treaty or the lapse after two years of EU treaties, could be found to be invalid.

So what are the arguments upon which the executive government might rely to assert that it has power to invoke Article 50 without Parliament? There are a number, but I will just briefly mention two. The first, and the most common argument, is that the executive has a prerogative power to do so. AV Dicey argued that *all* of the non-statutory powers of the Crown were prerogative powers. That was another of Dicey's errors. As Sir William Wade said, so pithily, "one essential of 'prerogative', if I may be forgiven for saying so, is that it should be prerogative". An administrative power that the Crown shares with everyone else - such as the power to buy paperclips - is not truly described as a prerogative power. However, the power to invoke Article 50 is an exercise of a power over the foreign affairs of the United Kingdom. That is undoubtedly a prerogative power of the Crown, which is a power based upon customs of the Crown not possessed by others. Distinguished English constitutional lawyers such as Professor Elliott have argued that the power to invoke Article 50 is an example of an unfettered prerogative. One difficulty with this argument is decision in *The Case of Proclamations* in 1611. In that decision, Sir Edward Coke advised the King of his power to issue proclamations, and said that the prerogative could not alter statute, common law, or custom. In 1920, the House of Lords in *Attorney General* v *De Keyser's Royal Hotel* held that where Parliament had taken control of a hotel in 1916 that act could not be done by exercise of the prerogative because it was now governed by the Defence of the Realm regulations, enacted under the *Defence Act*. The difference was that the legislation required compensation to be paid.

A powerful argument has been made by three constitutional law academics, Barber, Hickman and King, that the 1972 *European Communities Act* is an exercise of statutory power concerning the subject matter of the UK's place in Europe. They argue that the executive cannot, by prerogative power, invoke Article 50 which would have the effect of rendering that legislation nugatory. This argument has garnered considerable support. But it must be recognised that it involves an extension of the *De Keyser's Royal Hotel* principle. It is one thing to say that a prerogative is lost when the identical power is enacted by statute and conditioned upon payment of compensation. It is quite another to say that the prerogative is lost because its exercise would commence a process which might ultimately result in legislation having no practical effect.

There are other arguments for an executive power to invoke Article 50. One of those relies on a Henry VIII clause in the European Communities Act. Henry VIII clauses have had a long history of criticism. They are clauses which empower the executive to amend or repeal legislation. Sometimes they are found in surprising places. For instance, in the wake of the GFC, the UK Parliament passed the *Banking Act 2009* which permits *any other laws* to be amended or

"disapplied" as necessary by the Treasury, including retrospectively, to give effect to the purposes of the Banking Act.

The Henry VIII clause in the *European Communities Act 1972* is relied upon in an argument as follows. If the prerogative has not been abolished on the basis that the 1972 Act would be nugatory then its exercise is, at least, *related to* the 1972 Act. Then it is argued that the exercise of the prerogative is empowered by the Henry VIII clause in s 2(2) of the *European Communities Act*. This requires the process of withdrawal from the Union to be construed as a power "for the purpose of dealing with matters … related to EU Obligations". Could an act to commence the purpose of withdrawing from the EU be an act for *dealing* with matters related to EU obligations? Would this be within the meaning of a Henry VIII clause designed to facilitate the *performance* of EU obligations?

I have said enough about the opening game. These remarks are just a very preliminary precis of some the difficult legal questions in the opening of the Brexit game. Assuming the trigger is pulled in a way which survives judicial scrutiny then the UK will move to the middle game.

The middle game

The middle game will concern the two year clock for negotiating the terms of withdrawal from the EU. Perhaps the most legal question here has been obscured by the metaphor I have used so far. I have spoken of Article 50 as a trigger which is pulled. A trigger when pulled, shoots a bullet from a gun. Once shot, a bullet cannot be unshot. But can the Article 50 process be reversed?

Article 50(3) provides:

> 3. The Treaties shall cease to apply … from the date of … the withdrawal agreement **or, failing that, two years after the notification** [unless the parties agree to extend the time]

Suppose it became clear in the first year of negotiations that the terms which were demanded by the European Council for withdrawal were catastrophic for the UK. The UK might call an urgent referendum which could vote in favour of "remain". Would it be too late to remain?

Or suppose that the two year deadline is looming and the European Council refuses to agree to extend the deadline for negotiations. Could the UK revoke its Article 50 notice as a tactic to extend time, preserving its right to reissue it?

These questions might not be fanciful. In 1757, Admiral Byng was executed for his failure to "do his utmost" in the Battle of Minorca in the seven years' war. Voltaire satirised the execution in *Candide* when Candide was told after the execution of an officer that "in this country, it is good to kill an admiral from time to time, in order to encourage the others". *Pour encourager les autres.* We are already hearing this language from some of the EU countries about the negotiations with the UK. The potentially fraught negotiations might very well lead to questions about the scope of Article 50. The consequent questions of construction of Article 50 would fall to be determined by the *Vienna Convention on the Law of Treaties*. But, like a dog chasing its tail, article 54 of the Vienna Convention just directs the question of withdrawal to the terms of the Lisbon treaty.

There is no express provision in the Lisbon which deals with whether an Article 50 notice can be withdrawn. The answer might be affected by whether a *notice* as described is construed as a *continuing* notice. In Art 50(1) the Lisbon Treaty refers to the "notice of intention". An intention might be construed as a continuing matter. However, even if it is, there might be doubt whether the intention could be "gamed" by withdrawing a notification only for the purpose of reissuing it so that time could be extended.

The end game

This then brings us to the end game. After persevering through the dense legal aspects of this speech you may be forgiven for thinking that the end game is your dessert. I will try to be brief. The end game could occur in one of two ways. Either a treaty for withdrawal is negotiated within two years (or a longer agreed extension) or the EC Treaty will simply lapse in relation to the UK after two years.

But even within these apparently simple options there are difficult legal questions. What will suffice as a treaty for withdrawal? Will it be necessary for the withdrawal treaty to deal with all matters such as trade, economic terms, regulations and so on? Or could the treaty reserve those matters to subsequent agreement? Would a treaty which leaves many matters incomplete be void for uncertainty?

Then there are the domestic constitutional questions for how the withdrawal will be effected. The Ponsonby Rule, which has had statutory force since 2010, requires any treaty entered into by the executive to be put before Parliament within 21 days. The same rule would, by logic, apply to withdrawal. So, there is a strong argument that Parliament will need to decide the end game as well.

Which brings us back to where we started. And brings me back to Sir Harry Gibbs.

Conclusion

It is difficult in a short speech to express any conclusions about the momentous event of Brexit when the opening of the game has only just begun. It suffices to make three points from the very brief sketch of some of the legal issues that arise. The first is that although it is the people of the United Kingdom (or the 52% of the 70% of them who voted to be precise) who started the Brexit process, it may be the Parliament which will have a major role in the legal aspects of the opening, the middle game, and the end game. Secondly, the extent of Parliament's role may depend on the decisions given by the courts. It seems likely that the courts are involved at every stage of the Brexit process. Fundamental issues will be visited and revisited: the prerogative, the function and effect of Henry VIII clauses, and possibly even the notion of parliamentary supremacy. Thirdly, and most fundamentally, it would be a bold lawyer who would try to predict the constitutional shape of the United Kingdom in the next decade. As I have tried to show, we can only watch and understand the developments through the prism of our understanding of basic constitutional and federal legal principles. And those were much of the life's work of Sir Harry Gibbs. And for that, as with his life in the law, I honour him tonight as well as Emmanuel College in this fitting annual academic tribute.

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