A great deal has happened since I wrote the April 2017 update. In this update I will briefly discuss three of the most significant things to have occurred since April – namely the General Election of June 2017 and the hung parliament which emerged from it; the progress of the European Union (Withdrawal) Bill 2017-2019 previously known as the Great Repeal Bill; and the elevation of Lady Hale to the office of President of the UK Supreme Court, and of Singh J to the Court of Appeal, and the wider question of the diversity of the judiciary.

General Election 2017

There is much which could be said about the outcome of the 2017 General Election, but from a constitutional point of view, the issues which demand consideration are first, that the election process produced a hung parliament; secondly that this in turn led to a minority government and a confidence and supply agreement with the Democratic Unionist Party of Northern Ireland (DUP), and thirdly that this series of events raises wider constitutional questions.

Hung Parliament

On 18th April the Prime Minister, Theresa May, announced that she wanted to call a general election to be held on 8th June 2017. Prior to the passage of the Fixed Term Parliaments Act 2011, the Parliament Act 1911 set the maximum length of a Parliament at 5 years. It had become the prerogative of government, particularly the prime minister, to call a general election at any time within the maximum life of a Parliament. The 2011 Act was intended to stabilise the electoral cycle and deprive the government of the day of the profound political advantage of choosing the timing of the next election. In order for a general election to be called early after the passage of the 2011 Act, it was necessary for the government of the day to secure a super-majority in the House of Commons (i.e. 2/3 of the Members of Parliament, MPs). Theresa May secured the necessary votes (522 – 13). At the time it was thought that Conservative Party’s considerable lead in the opinion polls of the day would allow them to secure a larger majority than that of her predecessor, David Cameron. This, it was claimed by the government, would provide a greater amount of legitimacy in the negotiations that will set the terms of the United Kingdom’s exit from the European Union.

It should be noted that while there was a change in Prime Minister following the 2015 General Election, but preceding the 2017 General Election, this did not mean that an election needed to be held. This is because it is the party able to command the confidence of the House of Commons which is able to form a government. Individual MPs are elected to seats, and the government of the day is then formed from MPs and members of the House of Lords taking on roles in government. The fact that the head of that government changes is legally immaterial if the governing party’s majority in the Commons remains intact. Of course, such a change may affect that political legitimacy of the government, and require an election victory to regain this. This demonstrates that public law questions combine legal and political issues in ways that require due consideration be given to both elements.
In any event, the opinion polls which likely provoked the government to seek a general election proved to be inaccurate, and the Government lost its majority. The June 2017 General Election in the United Kingdom produced a hung parliament. A hung parliament is a Parliament in which no party wins an overall majority of the seats. Parties ostensibly require 326 seats for a majority, but because Sinn Féin do not take their seats, and the Speaker of the House of Commons – who is also a Member of Parliament (MP) – does not vote, the figure really required for majority is generally less than 326. Four outcomes are possible following such a result.

i. **The largest party, in the first instance, attempts to form a minority government.** That is the leader of that party will meet with the Queen and state that they believe they can form a government. The proposed government will present its legislative programme to Parliament for a vote (the Queen’s Speech). If it wins that vote, it is said to be able to command the confidence of the House of Commons and becomes the Government. Constitutional convention dictates that on matters contained in the Queen’s Speech to which Parliament has given its assent, the Government’s programme will be allowed – in principle – to proceed through the legislative process. All other matters will require the Government of the day to form voting coalitions with other parties to secure sufficient votes to pass legislation. It is also possible that changes in public sentiment, or other factors may motivate opposition parties to block the Government’s programme. A minority government may seem to be in a politically weak position, but it will depend on the wider socio-political context.

If the largest party is unable to form a minority government it is not inconceivable that the next largest party could seek to form a minority government. The difficulty for such a government is that it will have even fewer seats than the largest minority party. Regardless of the number of seats, a minority government is by definition in a precarious position.

ii. **Some combination of parties comes together to form a coalition government.** While a coalition government could also be a minority government, one would expect any coalition to seek to create a comfortable majority by combining the seats won by coalition members in the General Election into a substantial voting bloc. A coalition government must go through the same procedure as a minority government, approaching the Queen, presenting a legislative programme to Parliament, and winning the vote on the Queen’s Speech outlining that programme. A coalition government requires inter-party negotiation.

iii. **A large, but still minority party, reaches a confidence and supply agreement with one or more smaller parties.** That party then forms a government. Under such an agreement the other party or parties agree to support the government in votes of no confidence in the House of Commons. If a government loses such a vote constitutional convention requires that it should resign and a general election should be held. The other party or parties will also support the government’s budget, providing it with the necessary supply of monies to continue the work of government, and of support for the government’s programme. It is possible that support will be negotiated issue by issue, especially if the supporting party has particular interests to defend. On all other matters the government of the day will be required to secure the votes necessary to support its efforts in the House of Commons by negotiation.
Where a Parliament is returned by a General Election that gives one party only a very slim majority – i.e. not a hung parliament, but where the parliamentary arithmetic, and internal politics of the parliamentary parties are such that the majority is insufficient to secure the government’s position over the course of that Parliament – that party may seek a confidence and supply arrangement in order to minimise the risk that a confidence vote would be lost, and to ensure that its budget and programme are supported. The political circumstances may make either governing in the absence of such an agreement, or a coalition undesirable.

iv. Another general election is held. If no party is able to secure the confidence of the House of Commons via the means outlined above, another General Election will be held.

You may recall that between 2010 and 2015 the United Kingdom had a coalition government which comprised the Conservative Party as the major partner, and the Liberal Democrats as the minor partner. That particular arrangement was made necessary by the fact that none of the parties contesting the election secured a sufficient number of seats to command a majority in the House of Commons. In addition, it could be argued that the political circumstances were such that a coalition government which combined the electoral legitimacy of multiple parties was more attractive than any of the other options outlined above. The 2010 General Election was held in the wake of the 2008 global financial crisis, the Conservative Party did secure a small majority in the 2015 General Election, winning 330 seats, and was almost 100 seats ahead of the Labour Party. This difference was important because although the Conservatives had a relatively small majority, the parliamentary arithmetic was such that it would have been highly unlikely that such a majority could have been overborne. This is because the views of the other parties in Parliament were unlikely to align in a way that could consistently oppose the Government, and were unlikely to attract sufficient support from rebellious Conservative MPs to out-vote the Government’s majority.

While the Conservative Party was the largest party following the 2017 General Election (with 317 seats – not counting the Speaker of the House of Commons who is nominally a Conservative Party MP, but is neutral for the purposes of Commons votes), this was insufficient to secure their position in government. As such, the Conservative Party entered negotiations with the Democratic Unionist Party of Northern Ireland (DUP), which had won 10 seats in the election. Taken in conjunction with Sinn Féin (7 seats) not taking their seats in the Commons, the agreement reached between the Conservatives and the DUP gave the Conservatives a small working majority.

This arrangement is not without constitutional difficulties however. It has been claimed by, among others, the Labour Party, that the confidence and supply agreement prejudices the Government’s neutrality on matters relating to Northern Ireland. The neutrality of the UK Government is a requirement of the Good Friday Agreement. The Good Friday Agreement is central to the peace process in Northern Ireland and requires, inter alia, that Republican and Unionist political parties share devolved executive power. The Governments of the United Kingdom and the Republic of Ireland are required to act as neutral arbiters under the Good Friday Agreement where an impasse is reached between the Unionists and Republicans.
In view of the fact that the political parties in Northern Ireland have struggled to form a power-sharing government recently, the possible appearance of bias on the part of the United Kingdom’s government could be problematic. The appearance of the potential for bias arises because the DUP are the largest Unionist party in Northern Ireland, and thus one of the presumptive members of any power-sharing government. The argument made by those opposed to the confidence and supply arrangement between the DUP and Conservative Party is that the loss of DUP support may destabilise the Conservative minority government. To avoid this, it is claimed, the Conservative government may act in a manner which favours the DUP over their Republican colleagues. The Government of the Republic of Ireland’s neutrality is unaffected by the United Kingdom’s internal political arrangements.

It is plainly in the political interest of the Labour Party to claim that the confidence and supply arrangement should not continue, as failure of the agreement at a future date might lead to the collapse of the government, and the opportunity for the Labour Party to form a government following an election.

**European Union (Withdrawal) Bill 2017-2019**

The EU (Withdrawal) Bill, formerly referred to as the Great Repeal Bill is a Bill intended to repeal the European Communities Act 1972, and to provide statutory continuity following the United Kingdom’s withdrawal from the European Union. As Jack Simson Caird outlines in his detailed blog for the Constitution Unit and Constitutional Law Association Blog this entails a combination of change and continuity. For example, the Bill creates a new category of law, retained European Union law, and this in turn requires amendments to the legislative capacity of the devolved legislators in terms of how they interact with that new category of law. The Bill also gives direction to how the courts should interpret this new category of law.

While the Bill accommodates transitional arrangements for many forms of EU law, some elements of EU law in force before exit day will no longer make sense following exit. For example, they might anticipate the existence of a European-wide regulator which no longer has authority in the UK, or the existence of a treaty between the EU and a third country. The Bill provides powers to the government to enable them to make changes to the law of the United Kingdom using delegated powers. The framework created by the Bill imposes 2 year limit – a sunset clause – on the use of this aspect of the Bill’s powers. Two years after exit these powers will no longer be available to government.

The Second Reading of the Bill, when detailed examination and amendment of the Bill’s contents begins, is currently due to begin in September 2017.

For clause-by-clause summaries of the Bill see:


Mark Elliott - [https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/](https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/)

Lady Hale and Judicial Diversity

On 21st July it was announced that Lady Hale would succeed Lord Neuberger as the President of the United Kingdom Supreme Court, crowning an illustrious legal career. Lady Hale will be joined by three other new justices on the Supreme Court, including the second woman other than herself to be elevated to the highest court, Black LJ. While this is unarguably a step forward for gender diversity in the Supreme Court, and society in general, other factors should be borne in mind. For example, 12 judges sit on the Supreme Court bench, but only two are women, all are white, and all went to Oxford, Cambridge and Durham Universities. In the Court of Appeal, almost all of the judges are white (with the exception of Rabinder Singh J whose elevation to the Court of Appeal was also announced on 21st July 2017) and only 9 out of 38 are female. Of the 7 appointees to the Court of Appeal, only one did not attend Oxford or Cambridge Universities (Coulson J attended Keele).

All of this is not to say that meritocracy per se is not working. However, the ongoing lack of diversity in the judiciary, and lack of diversity in recent appointment rounds suggests that the pool of prospective candidates is insufficiently diverse. It will be necessary to consider the diversity of the potential pool – i.e. those meeting the eligibility criteria whether or not they make an application – of candidates here. To learn more about this you may wish to read:


