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## BREXIT: RECOVERY OF SOVEREIGNTY OR LOSS OF POWER?

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### Introduction

A country split in the interests of politicians; 2 years of uncertainty; changes daily here and in the EU on how things may develop; no let up by either side. How could I have had an idea, when this lecture's title was fixed months ago, of what might still be relevant today and that has not been 'talked out' by journalists and commentators?

So I imagined what the late great Rabbi Lionel Blue might say on 'thought for the day' on the BBC radio 4 'Today' programme (see video of lecture) using examples of two couples having to move house and being unable to agree whether Eastbourne / Bournemouth (1 couple who make the postman decide) or in the Lake District the area of Eskdale / area of Borrowdale (2<sup>nd</sup> couple who get their children to decide).

Assume Brexit will happen. The most important thing we citizens can now do is to ensure we can live together in contentment despite the split forced on us unnecessarily. Why say unnecessarily? It is clear that there is a split in preference for being in or out of the EU. So there are splits on such issues as capital punishment, abortion, assisted dying. Divisions of these kinds are sometimes managed by the political process, the issues having come to prominence because of the strength of public concern, or for other reasons. Sometimes they are issues that can be deferred on the basis they will eventually go away (capital punishment may be an example). And then there are those properly addressed to the electorate. Brexit falls into this last category, so it cannot be said to be unnecessary *in itself*; it was and is the method that has been unnecessary, and it is the *method* that has split us – unnecessarily.

Whether to be in or out of the EU has generated little *passion*, one way or the other, in most people until aroused by a limited number of determined Conservative Party politicians and UKIP. Many of these politicians may have a sepia-tinted image of pre-WWII UK as something of a model to which we should return. They have been able to make their image of a UK changed *back* from what it is – sepia-tinted or otherwise – appealing and they have been able to force Conservative Party leaders to give the issue absolute prominence. So we had to vote.

Just before the 2010 general election, the House of Lords Constitution Committee published a report on Referendums in the United Kingdom. It concluded that referendums are most appropriately used for 'fundamental constitutional questions', which are hard to define but would include the question of leaving the EU, along with other questions such as whether:

- To abolish the Monarchy;
- For any of the nations of the UK to secede from the Union;
- To abolish either House of Parliament;
- To change the electoral system for the House of Commons;
- To adopt a written constitution; and
- To change the UK's system of currency.



This is not a definitive list of fundamental constitutional issues, nor is it intended to be. And it did not mean there *had* to be a referendum, certainly not in this form, for BREXIT.

Unhappily, our hapless two-party system was incapable of reflecting public sentiment and concern on this issue through a general election not least because the Conservative Party failed to do what it could have done years ago and split to give the electorate pro- and anti- European Conservative parties. They would never do that, I dare say, for fear of being forever out of office losing the hegemony that they still believe to be their entitlement. And so involvement of the electors was thought necessary. Worse than unhappily, our politicians failed to read the party-neutral research papers by the house of Commons library that explained how referenda around the world can work without disturbance of the people's peace or how it could be, as it was, an advisory referendum. A system could readily have been to have two referenda diminishing the risk of easily triggered emotional and over-emphatic reactions by voters. The first referendum, if positive by vote to leave the EU *in principle*, would have led to a measured negotiation with the EU and to *reliable* information being made available to the public thereafter (through an all-party commission for example rather than by project fear or by an NHS slogan on a bright red bus that). (See PP slides for House of Commons Library materials).

Such a plan could have been roughly similar to the 2011 New Zealand referendum two-part poll where voters were asked whether they wanted to change the existing voting system and to indicate support for one of four reform options: mixed member proportional representation (MMP), the single transferable vote (STV), supplementary member (SM) or preferential vote (PV). If there was majority support for change, the government promised to hold a binding referendum (with a choice between the first past the post (FPP) system and the most popular reform option) the following year. 55% of registered electors took part in the first poll with 85% voting to change their electoral system with 70% favoured MMP. And the result was much closer. MMP was still backed by a comfortable margin, 54% to 46%. New Zealand was to have a new voting system.<sup>1</sup>

There was fierce campaigning in New Zealand of a kind that would not help us here if our politicians could ever be persuaded to give up the pleasure of persuasion of the electorate without supporting evidence. But the time has come in a grown-up world - if it is - where we don't need campaigns for important decisions *if* we the public are to be involved in detail. But doing without campaigns would deprive politicians of their instinctive need to fight. Their pleasure is in fighting and winning, persuading us by arguments, however disingenuous, to be their foot soldiers.

We had no information in 2016. The MP don't have the information now and what came our way 2 years ago was trivial, emotional, misleading etc. What we needed then – and would need now in the unlikely event of a second vote, would include such things as:

- Financial cost/benefit
- No of immigrants per year, and from where
- Effect on economy of reduction in number of immigrants and from which countries
- Number of ECJ judgments harmful to UK
- Evidence of ECJ judges being hostile to UK
- Evidence of Commission decisions being hostile to UK
- Security assessment of increase or decrease risk of UK of separation from EU
- Security assessment to UK of a hard border between Northern Ireland and Eire

We were not provided with that information because we were not being asked to make a decision but to follow a flag. For that reason alone, I have doubts about the wisdom of a second referendum even if offered or obtainable. We the voters would get *some* improved information but politicians on all side would attempt to persuade us to trust one or the other expert, to distrust the others and would drive us to react emotionally, jingoistically, xenophobically, but not rationally. Without an overwhelming result one way or the other, the benefit of whatever change might be achieved by a second referendum could be more than the exercise would be worth. I would welcome a further referendum only if it came with a guarantee of dispassionate information and no campaigning.

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<sup>1</sup> <https://nzhistory.govt.nz/politics/fpp-to-mmp/putting-it-to-the-vote>



This subject is too serious for bunting. All of this shows, to me, that our individual duty as citizens *now* is to do what we can – where our politicians will not – to ensure that we can live together whatever the result, in or out, hard or soft. And what can we do?

Respect all other views, however extreme and be determined to respect those views through the process and for ever after. If BREXIT is a great success it will be easier to forget the present fracture; it will probably be easy enough if there is a true compromise soft BREXIT without too many serious consequences of disharmony. We will need our greatest resolve if a disaster follows BREXIT, and we find ourselves at port or airport queues – or food queues or wherever – and it is then that we must still respect those who we may differed from us. And why? Why should we not blame them loudly? In particular, why should we not blame those of an opposite persuasion whose views were or are extravagant or extreme?

Extreme views, providing not into the realm of criminal, were known to lie in the hearts and minds of some of our citizens. Allowing them influence was not the responsibility of the holders of those views but the responsibility of the politicians who knew they were there. Enforcing restraint from people holding views you might generally regard as distasteful but whose express of support would be helpful to your cause, is probably too much to ask of our or any politicians. They were happy to let things rip.

On this last point I offer the first of two examples of personal prescience, not from vanity but because relevant. In this very hall on ..... I appeared with Dominic Grieve in a debate against Matthew Elliot of Vote Leave and Daniel Hodson. I didn't speak especially well and was probably responsible for the before and after vote moving by one towards leave! Dominic Grieve was very good. But I did observe that the language used by both sides was dangerous. I got ticked off for that by the Provost in his summary, gentle though was my expression of anxiety. Jo Cox MP was murdered a week or so later and it is entirely easy to conclude that the language of the campaigns was responsible. I listened to all or very nearly all of the 'Commons debate devoted to Jo Cox waiting for an MP to confess to culpability for the language used. Nothing, I think. And unsurprising.<sup>2</sup>

And so, to **sovereignty** and now not just in the UK and about BREXIT because there are things to say about the USA as well.

Sovereignty has featured much on all discussions about UK and EU in this referendum and on all earlier occasions. But what is it? And Should it be discussed as something part of which has been lost by being in the EU? Should it be considered now as sovereignty to be regained?

To all these questions one person at least might have spoken had he lived an impossibly long life. Winston Churchill said this:

*“The Movement for European Unity must be a positive force, deriving its strength from our sense of common spiritual values. It is a dynamic expression of democratic faith based upon moral conceptions and inspired by a sense of mission. In the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law. It is impossible to separate economics and defence from the general political structure. Mutual aid in the economic field and joint military defence must inevitably be accompanied step by step with a parallel policy of closer political unity. **It is said with truth that this involves some sacrifice or merger of national sovereignty. But it is also possible and not less agreeable to regard it as the gradual assumption by all the nations concerned of***

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<sup>2</sup> I added a note to the video Gresham published of the debate that started as follows:

‘UK Member of Parliament Jo Cox’s murder was a shock; but not a complete surprise. Thousands, perhaps millions, of our citizens realised that our politicians were taking risks with our often peaceable natures by the language they have been using. Those perceiving risk said nothing or little so as not to scare-monger, not to make self-fulfilling prophesies. They watched and listened with despair waiting for some politician who would concede real sense in her/his opponent’s argument and invite the audience to weigh things up carefully, just as you might hope would happen if you were a cabinet minister being briefed by civil servants, or a decent ‘Captain of Industry’ being advised on how a particular decision should be made. Instead, with our politicians persisting in the belief that aggressive, gladiatorial, adversarial debate is as useful as it is entertaining, we have been bombarded by competing arguments we cannot possibly evaluate.

See: <https://www.gresham.ac.uk/lectures-and-events/eu-debate-should-the-uk-leave-or-remain>



***that larger sovereignty which can alone protect their diverse and distinctive customs and characteristics and their national traditions all of which under totalitarian systems, whether Nazi, Fascist, or Communist, would certainly be blotted out for ever.*<sup>3</sup>**

But this does not really tell me much about what sovereignty is.

Five or so years ago asked this question, I would have drawn a line round a map of England and along the Northern Ireland/Eire border and said that sovereignty was being in charge of all within the line and of all things – such as gunboats, aircraft carrier, tornado planes and nuclear submarines – sent out from within that line. And so it may be and certainly no one should be criticised for thinking of sovereignty like his, naïve, and out of date though that may be. I might have understood the necessary difference between sovereignty over a people within the pencilled line and sovereignty as against other nations. Some consideration of how the concept of sovereignty developed may be helpful to our present understanding of whether the concept is properly applied and of whether allowing it a prominent role in BREXIT discussions may now be aligning us with unattractive tendencies developing elsewhere, especially in the USA.

First, to jog us from the standard concept of sovereignty, is a defined geographical area an essential element of sovereignty? Consider our forefather hunter gatherers who may have had other incidents of what we may feel instinctively are a part of sovereignty – some coherence as a group, leadership of a group – would not have had a defined geographical area as they went from one part of the forest to the next. Likewise, with *any* wandering or nomadic tribe; maybe the Roman empire gives examples of the difficulties of squaring the concept of sovereignty with the need for its expression on a defined territory. Roman citizens of differing ranks lived throughout the Roman Empire along with people not holding citizenship of any kind and slaves. Over what - territorially – did Rome or its emperors exercise sovereignty? Or was sovereignty only ever a reality in Rome itself. What of our own modern diaspora, people who have earned their living and pension in the UK but prefer to live in retirement abroad. For them does the two-way relationship of sovereignty – assuming it is two-way – vanish the second their Ryanair plane takes off in, they hope, the same direction as their luggage and the removal vans? Does their sovereign owe them nothing, do they owe their sovereign nothing from that moment?

And how to make of the sense of nationhood that feels connected to sovereignty: at the end of his History of England 100-1945 Historian A J P Taylor spoke of the British as the ‘only people who went through both World Wars from beginning to end’ and then defined the United Kingdom British as including ‘perhaps for the last time’, he said as the peoples of the Dominions and of the Empire as well as of the United Kingdom<sup>4</sup>. Does sovereignty attach to individuals caught in a common enterprise – as dominion soldiers fighting on behalf of the Allies were, despite their having no geographical continuity with the rest of us? Who are they – or is it we?

Sir Konrad Schieman, of whom more later, said:

*“I am very conscious that our feelings about sovereignty are, as a result of history, deeply engrained in us. A challenge to a man's virility may result in a bloody nose. A challenge to a country's sovereignty may result in a war with millions of dead. So it is worth considering what is behind the concept of sovereignty whose magic seems to imprison us all.”*

He also asked how to deal with Problems that can and do arise when the boundaries of the State do not coincide with the boundaries of any particular group which sees itself as a national entity, whether or not the changes have been forced on the state by outside forces or settled internally by civil strife. The group may overspill the boundaries of the State or it may be a group within the State. Where then are the boundaries of sovereignty? And, observes Sir Konrad, ‘any reflection on the history of Anglo-Saxon England and, more recently, on English relationships with the island of Ireland and with Scotland shows that we too have not been immune from change’.

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<sup>3</sup>[https://www.cvce.eu/en/obj/address\\_given\\_by\\_winston\\_churchill\\_at\\_the\\_congress\\_of\\_europe\\_in\\_the\\_hague\\_7\\_may\\_1948-en-58118da1-af22-48c0-bc88-93cda974f42c.html](https://www.cvce.eu/en/obj/address_given_by_winston_churchill_at_the_congress_of_europe_in_the_hague_7_may_1948-en-58118da1-af22-48c0-bc88-93cda974f42c.html)

<sup>4</sup> English History, 1914-1945, The Oxford History of England p 600 OUP, 1965 reprint 1988

<sup>5</sup> Konrad Schieman, Europe and the Loss of Sovereignty 56 Int'l and Comp L Q 475, 490 (2007);

[https://www.jstor.org/stable/4498086?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/4498086?seq=1#page_scan_tab_contents)



To find out more of the history of sovereignty I dug around and found a paper presented in 1913 by American Robert Lansing titled: 'A definition of Sovereignty' at or for the American Political Science Association. It is interesting for the theory of sovereignty Lansing expounds, the history he relates, and the fact that he was to become the US Secretary of State in WWI<sup>6</sup>

His theory first is built on: 'attributes found in nature', 'gregarious impulse inherent in human nature', 'an energy ... [that] keeps the members of the community united'. As in the case of gregarious animals so with savage man, because of superior muscular development and vigour, compels his fellows in a community to submit to his will either by the employment of force or from fear of physical punishment. Lansing was dealing with a then current discussion about sovereignty being rooted in law or the will of the people and he rejected all arguments about law or will coming back to brute force. Without the ability to force something through, you have no sovereignty. This is a brutal concept, he accepted. But, even today, it may well fit with the concept of many like me with a pencil and a map and an added romantic determination to allow nothing onto our patch.

Lansing's history is incomplete, but interesting for us. He notes that sovereignty could *not* be found in King John when he yielded to the Barons at Runnymede over Magna Carta in a process of the shifting of what *might* have been called sovereignty that was not complete until the 17<sup>th</sup> Century.<sup>7</sup> He fails specifically to note what is for Europeans particularly important in the mediaeval age namely how Popes had to be obeyed elsewhere revealing that sovereignty was never to be found (in expression or reality) in countries like ours where Henry VIII could not marry Anne Boleyn. Similarly, he overlooks the importance for European conceptions of sovereignty of Jean Bodin's principal writing, *The Six Bookes of a Commonweale* (1576), that won him immediate fame and was influential in western Europe into the 17th century. The bitter experience of civil war and its attendant anarchy in France had turned Bodin's attention to the problem of how to secure order and authority. Bodin thought that the secret lay in recognition of the **sovereignty** of the state and argued that the distinctive mark of the state is supreme power that does not depend, for its validity, on the consent of the subject. Bodin assumed that governments command by divine right because government is instituted by **providence** for the well-being of humanity. Government consists essentially of the power to command, as expressed in the making of laws according to whether sovereign power rests in one person, in a minority, or in a majority. Bodin himself preferred a monarchy (to a democracy or aristocracy) that was kept informed of the peoples' needs by a **parliament** or representative assembly.<sup>8</sup>

Lansing overlooked how the Peace of Augsburg was significant for Europeans allowing individual monarchs in Europe, who had battled over the reformation of Luther, to choose which religion which of Catholicism or Lutheranism their country should follow. This was a significant move away from the control of the Popes and the Holy Roman Empire and a move towards modern conceptions of sovereignty. Lansing did however, clearly follow John Austin (1790–1859) attracted by his approach of analytical jurisprudence and legal positivism.

Perhaps Lansing's most surprising omission – given his theory – is the 1648 Westphalian Treaty that ended the Thirty Years War(s) allowing clear national boundaries to be drawn and signalling the end of power of the Catholic Church through the Holy Roman Empire, a treaty often turned to by those saying national sovereignty can be defined by territorial boundaries

Lansing picks up on our history where Charles 1<sup>st</sup> exercised no sovereignty in the end except over the number of shirts he wore at his 1649 execution to stop an appearance of shivering through fear.

Back on track Lansing notes how in the Glorious Revolution of 1688 William and Mary were on the throne, but only on terms of conditionality about their powers – sovereigns without complete sovereignty. A sovereignty that I think I heard Professor David Starkey describe as being the sovereign in parliament, an accurate phrase but not necessarily one on the lips and in the minds of those many voters who voted for BREXIT e.g. in Bolsover, a heavily pro BREXIT constituency in part on 'sovereignty' grounds.

Lansing turned to the American Civil War and asks where sovereignty is when a nation is at war with itself. He suggests two things. First that this was another historical event in which the locus of the sovereignty was

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<sup>6</sup> [https://www.jstor.org/stable/3038417?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/3038417?seq=1#metadata_info_tab_contents)

<sup>7</sup> A late medieval term as used; see dictionary definitions on slides

<sup>8</sup> <https://www.britannica.com/biography/Jean-Bodin>



conclusively shown through an exercise of force. And second, ‘the sovereignty of the state is, in its legislative operation, suspended until such time as domestic peace and order are restored and enacted law resumes its function in the regulation of human conduct in the state’.

We are not in a state of civil unrest (let alone war) but by forcing a decision on the public that should have been made by the government or by referenda processes entirely different from the one used, then the government has indeed suspended its own power to exercise sovereignty on this topic. And if you doubt me, think what would happen now if the government suddenly said it had reviewed the evidence and concluded we should not leave and it would take authority for withdrawing the decision to leave by a free debate in Parliament on the relevant bill.

Lansing says nothing of the developments on the 19<sup>th</sup> Century of international control over sovereign states through the Geneva and Hague conventions on the operation of war. And that brings us to WWI.

Many sovereignty issues arose in WWI. Armenia provides material for consideration of the workings of concepts of sovereignty. A story beautifully told by Samantha power in ‘A Problem from Hell, America in the Age of Genocide’<sup>9</sup> can be seen from the point of view of sovereignty, its dangers and, in this particular case, a positive outcome bought at the most terrible of all costs. The world was aware of the massacre of hundreds of thousands - up to a million and more - of Armenians with little or no excuse and certainly none for the expulsion and massacre of the innocent women children and other civilians. The US Ambassador to Istanbul Henry Morgenthau did all he could to get the US to act, being told in Turkey it was none of his business and having to face the principle author of the slaughter, Mehmed Talaat Pasha, who said to him such revealing things as ‘why are you so interested in the Armenians anyway? You are a Jew these people are Christians .... What have you to complain of?’ In the course of the general refusal of the US to act Lansing as Secretary of State said

*“I could see that the Armenians well-known disloyalty to the Ottoman Government and the fact that the territory which they inhabited was within the zone of military operations constituted grounds more or less justifiable for compelling them to depart their homes.”*

Here was his (and others’) theory of sovereignty at work and it was not to end there.

At the end of the war Lansing’s same approach led to his opposing war trials and the trial of the Kaiser in particular. He said

*“The essence of sovereignty was the absence of responsibility. When the people confided it to a monarch or head of State, it was legally speaking to them only that he was responsible, although there might be a moral obligation to mankind. Legally however there was no super sovereignty”<sup>10</sup>*

Eventually ordered to allow the Kaiser’s extradition, his formulation of the relevant provisions may have been designed to allow it to fail<sup>11</sup>. I have argued elsewhere<sup>12</sup> that it is at least conceivable that the 20<sup>th</sup> Century might have been a different theatre for war had the Kaiser been tried and had he defended himself on the grounds of killing masses for the greater good. But that was not to be. Lansing’s absolute belief in absolute sovereignty which paralleled the view of many others we might have advanced more rapidly to the global world some believe to hold the answer to our continued existence.

Samantha Power’s account takes us elsewhere. Mehmet Tallat – tried and sentenced to death in his absence in Istanbul – escaped to Berlin and to what he hoped would be freedom. A young Armenia Soghomon Tehlirian had been on one of the Caravans of death in Armenia in June 1915 to see his sisters (he had three) dragged by the gendarmes to be raped, his brother killed by an axe blow splitting his head and his mother shot. Other family members were killed on the march. In total 85 family members were lost. Tehlirian survived among a pile of corpses and later found his way to Berlin. He shot Talaat dead and waited to be arrested, saying in broken German

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<sup>9</sup> Samantha Power, ‘A Problem from Hell’ Flamingo 2003

<sup>10</sup> James F Willis Prologue to Nuremberg Greenwood 1982 p 74; Minutes of the Fourth Meeting, 13 March 1919 ‘Commission on Responsibility Minutes’ p 38 Polk Papers

<sup>11</sup> *ibid* p 80

<sup>12</sup> Geoffrey Nice Justice For All, Scala 2017, p 15



'I a foreigner, he foreigner, this not hurt Germany – this nothing to do with you'. A statement of international sovereignty – irrelevant today? Or is it? Putin would make a similar claim if inclined to tell the truth were he to answer questions about Alexander Litvinenko, the Skripal poisonings or the attempt to steal from the OPCW building in The Hague last week. Sovereignty unbridled means limitless power over your citizens at home, unhindered power when you fight abroad and also, it seems, limitless interference in foreign countries affairs by old fashioned assassination and modern cyber espionage.

Tehirian was acquitted by the jury in less than an hour on the basis of a defence that included how he had responded to a dream of his mother saying he would no longer be her son if he did not avenge their many family deaths. Were I a juror, I think he would not have been convicted at my hand either!

During the trial a 21-year-old Polish Jew studying in Lviv was concerned that Talaat had never been tried. His professor said 'Consider the case of a farmer who owns a flock of chickens – he kills them, and this is his business. If you interfere you are trespassing. The student could not accept that sovereignty – properly aimed he conceived at improving the lot of the people of a nation – could be conceived as a right to kill millions. In short, he became determined to create law that would change this state of affairs, spoke at conferences, lost his job as a prosecutor, carried on learning languages and after WWII – in which he lost all his family in the Holocaust but for one brother - and went worrying prosecutors at the Nuremberg war crimes trials. He was Rafael Lemkin and he introduced the term genocide – first used in those trials and ultimately the subject of the Genocide convention that imposes on all countries that have signed up by its very first article this obligation:

**'Article I:** The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'

An international law that insular sovereignty cannot disregard.

But in the period after WWII, there was plenty of voluntary surrender of sovereignty in addition to all the treaties to which a country like ours and all others were subject. The UN, THE UNHRC, NATO etc. And so to the joiinder of the Common Market and the first referendum. Where was our concept of sovereignty by now?

The 50-minute debate on television between Roy Jenkins and Tony Benn one week before the 1975 referendum is worth viewing, not just because of the way debate may be improved by old fashioned politeness of the interviewer David Dimbleby and the strained but sustained politeness of the two cabinet ministers – as they were at the time – allowed, just, to appear against each other by Harold Wilson the Prime Minister. In their discussion, probably of a quality better than anything heard recently or ever in the 2016 referendum's media output, they each focus on particular arguments and take a realistic view of sovereignty. Throughout, each articulated the particular gains and losses that would be felt by leaving or staying in the Common Market without attempting to lure the viewers into emotional response to a concept of sovereignty (although Jenkins explained a little later how sovereignty and freedom were to be distinguished). Of course, both speakers did become themselves emotional, but the argument was firmly fixed to identifiable factors, reasonably clearly expressed and listed.

And that is what we do not have this time. We still do not really know what now to expect – positive or negative – from BREXIT.

My understanding of sovereignty was much advanced by reading Konrad Schiemann's 2006 Thomas More lecture on the subject – delivered 9½ years before the Referendum. Sir Konrad Schiemann was the previous UK appointed judge at the European Court of Justice, an institution that generates strong emotions in Brexiters. Sir Konrad, surviving allied bombing on Germany when he was a small boy, was educated in England after WWII and is, unsurprisingly, pro-European. His November 2006 lecture on 'Europe and the Loss of Sovereignty' provides an introduction into the intellectual problems, history and practical realities of sovereignty of the greatest possible value to anyone needing to learn about a subject spoken of too easily but not well. But for my present purposes I rely on what it may show – at a time when sovereignty was indeed being discussed – of *then present* sentiment because you may detect that one conclusion that Sir Konrad could draw about public sentiment, may have already started to change.



He asserts confidently, having reviewed 20<sup>th</sup> c state generated atrocities:

*“a theory of sovereignty which insists on the impermeability of the State should not stand in the way of attempts by outsiders, even against the will of the State concerned, to limit that mass murder. In some circumstances the principle of sovereignty should not prevent even invasion.”*

Might his views now be regarded as overtaken by nationalistic fervour that has a concomitant disregard for the interests of people in faraway places? Ask two questions or maybe three: Would you expect your country to invade and interfere with an immediately neighbouring country engaged in unwarranted mass killing of a constituent race or ethnic group or political opponents of the country? Would you expect the same thing if the country was the other side of the world, populated by people with very different language, appearance and religion? Nobody thought of it in 1965 in Indonesia when 1 million and more opposition communists were massacred by those in support of new president Suharto. Would you expect the same thing of your country if there were mass killing of political opponents by a very powerful country on the other side of the world – or would you expect it to be happy to make commercial deals with one blind eye?

And the question too embarrassing to ask, would we do nothing – as both the USA and UK did nothing substantial – in 1933 when persecution of the Jews on Germany should – and would today – make utterly obvious what would inevitably follow? The persecution was as obvious a warning sign of things to come as could be. Then, willingness to intervene was less accepted than now and there were immense economic problems consequent on the Depression on both sides of the Atlantic and anti-Semitism in both places. So non-intervention may be understood. But would it be any different now? Around the world warning signs have been seen, as with the Rohingya for a decade and more with commentators warning (my second personal prescience) of genocide for at least 4 years but intervention never considered. None of these considerations may seem relevant to BREXIT but two things: first with changes in thinking about sovereignty going backwards, is the prospect of intervention to save our fellow humans reducing? Second is the prospect of intervention greater or smaller for a country like ours if it acts alone rather than as a part of a combination with other nations all bound together by a common set of human rights standards.

Sir Konrad covers how – in or out of the EU - no country can contain impact within its borders of outside policies, how the effect of markets from different countries one on another cannot be dealt with internally, how the individual can not necessarily look for defence of his rights to his nation not least because there is no full representation and participation by the citizen in the making of policy (leading separately to the value of the ECtHR), globalisation. the paradigm of a polity ruled by an elected majority and how it is to be contrasted with the values of subsidiarity and a recognition that decisions may be better taken at a lower level contrary to over centralisation in Brussels

He also covers the value of ‘pooling’ sovereignty at some levels and with how the EU serves as a multi centred polity and how the court and the system generally allow for the particular characteristics of all countries thus not to damage their sense of sovereignty.

## **Something About Rights**

I forecast in the title saying something about rights because there has been something of a theme, less now, about how leaving the EU would lose what is given to EU citizens by the EU Charter of Rights. The Charter is broader in scope than the European Convention of Human Rights, to which we remain bound although its decisions are not enforceable against member states of the Council of Europe in the way decisions of the ECJ that maybe based on the EU Charter are. Consequently, things arising from the Charter – e.g. for employee ‘rights’ – may be lost; and so they may be. But the issue has not loomed larger on the general debate, more and more concerned with the Irish border and the general risks of economic, financial and travel difficulties. This, however may be worth saying. The Charter purports to give ‘rights’ and so, in any argument, it is reasonable to use the words ‘rights’. But ‘rights’ like sovereignty can generate emotional response where the particular use of the term may really not merit it. There is at least in present conception a difference between the right to life, the right not to be tortured and the *expectation* to have at least x weeks paid leave per year if you are in in standard employment. The weeks of





leave – or maternity leave for example – are of a different order from the most obviously universal of rights and could and should be distinguished from them (even though the founding 1948 Declaration went far in what it described as rights). So beware any Remainer arguments that draw on emotions just as caution should be observed in dealing with emotional arguments about sovereignty. Check in simple terms what is actually being gained or lost in unemotional terms.

The lawyer and the voter should always look for what is missing. In debates about the ECJ you will have heard little or nothing about cases adverse to the UK or any ECJ judges hostile to the UK. Because there have been none in an environment where judges take oaths of impartiality. There have been complaints - the original Factortame case about Spanish fishing rights, Michael Gove on regulations that affect his ministry, bus passes for both men and women at the same age. Of course, things could change and far right-wing governments may come to power democratically that would want for their citizens less of the fortune afforded by the Charter in the interests of a tougher approach to work, leave, maternity rights and so on. But it has not yet happened.

## Conclusion

As at the beginning – our most important function as citizens is to do what we can to avoid the split harming us, whatever the result. We should have been in the lake district house – but we should also recognise that Eastbourne and Bournemouth just as Eskdale and Keswick are places of beauty – if only you are genuinely interested in finding them. We have been provided with no material to calculate gains against losses and should resist emotional calls from either side.

Sovereignty itself is risky to discuss without proper consideration of how our integrated all societies are.

But in fact, Sovereignty may have featured in a different and even larger way than has been argued. Sovereignty can take shape in certain circumstances where terrible – and often immediate – decisions have to be made by the executive – in times of war or when military action has to be taken. Then sovereignty has to be found where it typically lies in the sovereignty of Parliament or in the Royal Prerogative. BREXIT was not a war-like decision but ending a treaty-based union of this scale was similar in scale and gravity to such a decision. Any such decisions would require of government the best advice given in whatever available time scale for the government to act in the best interests of the public. The longer time scale of BREXIT did not mean the public should have been treated in a way different from how a government would treat itself by getting best advice on an impartial/neutral basis. That didn't happen. The public were asked the equivalent of should we go to war or not. Should we make peace or not. Handing over the exercise of sovereignty to the uninformed masses is not something a sepia-tinted monarch on her/his throne would ever have done. Why did our government do such a thing?