Article 50 of the Lisbon Treaty famously says that any Member State ‘may decide to withdraw from the Union in accordance with its own constitutional requirements’. Brexit will have many effects. However, possibly its most important has already occurred, namely its highlighting of the peculiarly improvised nature of the UK’s constitution. What does it mean to say that the UK is acting in accordance with its own constitutional requirements, when those requirements have to be made up as we go along? And what does the improvisation mean for the principles of constitutional democracy and the constraining of government power?

In proposing answers to these questions, I am going to suggest that the Brexit referendum creates a political paradox. Ostensibly the use of referendums gives control to the people. In practice, within the UK, however, a referendum reinforces executive power. To understand the paradox, we need to grasp the basic principle of UK constitutional practice. Despite many changes in recent years, that principle is one of identifiable party government, with the governing party responsible to the people through the electoral process. Since a referendum only determines a broad direction of policy, the party in government, as the executive, needs a parliamentary majority. When that majority is threatened, it will need to enhance its party support by risking a general election, a logic nicely
revealed in Theresa May’s calling a sudden election, in order to secure support for any likely Article 50 agreement. The large majority she sought, but ultimately failed to obtain, would have overcome the objections from the opposition and the Lords to those elements in the EU (Withdrawal) Bill that explicitly enhance executive discretion. The same logic of executive dominance means the neglect of the contrary voices of the peoples who make up the compound polity that is now the UK. Constitutionally the fault is in ourselves.

The British constitution

Once upon a time, as they say in all the fairytales, the British political system held a special place in the study of comparative constitutions. The tale ran as follows. If the USA represented the liberal, France the republican and the USSR the socialist route to modern politics, Great Britain (the UK, Britain, England – the names were used interchangeably, significant in itself) exemplified an evolutionary path. Its democratic politics represented new wine in old bottles. The continuity of its institutions and practices reflected a deep national identity and a widespread willingness to defer to legitimate political authority. Its political strength drew support from the UK’s peaceful transition from a monarchical to a democratic regime. Its parliament had avoided the instability of the Third and Fourth French Republics; the UK had not fallen prey to the revolutionary upheaval undergone by Russia; and it had fought successful wars under the continuing scrutiny of parliamentary government. Even a left-wing critic like George Orwell in The Lion and the Unicorn (Orwell 1941) thought that England was like a family, its problem being that the wrong members were in charge. The fault was not in the institutions but in those who controlled those institutions.

As with all fairytales, there was much by way of selective perception in this account. The constitutional struggle over Irish Home Rule and independence at the end of the nineteenth and the beginning of the twentieth centuries had to be written out of the picture, as did the UK’s colonial reach. The tale also ignored the price paid for continuity and stability. The institutions and practices of the UK constitution often seemed anomalous. How, for example, could one account for the existence of an unelected parliamentary chamber in the form of the House of Lords? Why, in order to resign, did MPs have to accept a notional royal appointment to the Chiltern Hundreds rather than just hand in their notice? How was it possible for a legislative chamber also to function as a supreme court in defiance of the elementary principles of the separation
of powers? However, these anomalies could be excused as representing merely the formal elements of the constitution. Writing about the constitution in the nineteenth century, Walter Bagehot (1867, 59) said that it was like an old man who still wore the fashions of his youth: what you see of him is the same; what you do not see is wholly altered.

If all unseen was altered, what was it altered into? Bagehot suggested that the ‘efficient secret’ of the constitution was its concentration of power in the executive in the form of cabinet government. The cabinet is formed from the members of that party that can secure a parliamentary majority. Since Bagehot wrote, the electoral system has usually delivered a bonus of parliamentary seats to the party winning a simple plurality of the popular vote. The effect has been to underwrite cabinet government, giving governments a secure parliamentary majority on which they could rely. Parliamentary majorities thus manufactured by the electoral system did not require a popular majority. Since 1935 no political party in the UK has won a majority of the popular vote, and a popular minority could be translated into large legislative majorities: 1945, 1979, 1983, 1987 and 1997 being stand-out examples. With little devolution of power, a judiciary that interpreted the public interest as being coextensive with the public policy of the government of the day and with a relatively weak second chamber, UK governments exercised considerable power, revealed most obviously in the significant and frequently mutually self-cancelling alterations of policy from one government to another. British government is party government, and that means government by the party that controls the Commons. As Arend Lijphart (1999, Chapter 2) has shown, the UK system contrasts with many other examples of European governments where there is a greater sharing of power among political parties and political institutions.

Of course, since the UK’s first application to join the European Economic Community in 1961, there have been considerable constitutional changes, well identified by Anthony King in his study *The British Constitution* (King 2007). The winnowing of local government under Thatcher, large-scale privatisation programmes, the devolution of powers to Scotland and Wales, the settlement in Northern Ireland, the creation of a separate supreme court, the ending of automatic inheritance of the House of Lords, even a period of coalition government have been significant. But none of these changes has overturned the core principle that a government of the day has the constitutional right to pursue its manifesto commitments provided that it can secure a majority in the House of Commons, or the fact that it is easier in the UK than in other jurisdictions to maintain a secure majority.
Given that a cabinet can carry out its programme, the principal security against misrule is supposed to be electoral accountability. If the UK's electoral system did not deliver a broadly representative legislative chamber, it was at least supposed to deliver responsible government, with this responsibility upheld through the ballot box. However, the use of the referendum as a tool carries one major and unique implication: it abandons the principle of responsible government at a crucial point in the public policy process. Governments cease to be responsible for their programme. A new principle emerges, namely that the policy of the government, and not just the party forming the government, should be determined by a popular vote. To the doctrine of cabinet government has been added a mandate theory of representation, a theory that coheres badly with the principles of constitutional democracy.

The intoxications of mandate theory

Go back to Article 50 and the rule that any Member State ‘may decide to withdraw from the Union in accordance with its own constitutional requirements’. The difficulty for the UK, given its flexible constitution, is that there are no established constitutional principles widely accepted as authoritative for making a serious decision on a major question of national destiny. All that the legislation on the referendum said was that a referendum would be held. It said nothing about its constitutional status or significance. In consequence, the surprise result, unsurprisingly, has led to constitutional improvisation. Suddenly, we are all supposed to believe in a mandate theory of British government.

The basic principles of mandate theory can be expressed in three propositions. Firstly, the people is sovereign. Second, the people expresses its will on matters of public policy through a referendum in which a simple majority is decisive. Third, the function of the government is to implement the will of the people as decided by the referendum. Consult almost any government statement since the referendum to see this theory of political authority at work. I cite, almost at random and as just one example, the White Paper on legislating for the UK’s withdrawal from the EU: ‘The result – by 52 per cent to 48 per cent – was a clear instruction from the people of the UK to leave the EU’ (Department for Exiting the European Union 2017, Paragraph 1.7).

An instruction from the people to the government appears at first sight to embody an obviously democratic principle. Yet, as Max Weber (1968, 1126–7) pointed out, the logic of the plebiscite can be to
legitimate executive domination. This may seem paradoxical, but it is not. The mandate from a referendum is necessarily an incomplete basis for public policy. A referendum can at best only state a decision of principle, it cannot determine a course of public action. In so far as there is popular will in the result of a mandate, and this is doubtful in itself, that will must be given effect in the circumstances of the day that prevail.

In this context, executives come to see themselves as embodying the higher interests of the nation over the claims of competing political parties. Anything that frustrates the will of the people is simply antidemocratic. The holding of a referendum enhances executive dominance. This logic was at work in the government’s wanting to use the royal prerogative, free of parliamentary accountability, as the legal basis for triggering Article 50. Although the High Court and the Supreme Court in the Miller case (see Eeckhout, Chapter 18) upheld the principle of parliamentary sovereignty, the result of the Commons vote was to give the government back the mandate that it sought. Yet, because any mandate is essentially incomplete, it raises deep questions about the role of Parliament, the rule of law, and, of course, the assumption that there is a unitary people whose will is to be given expression.

The demands on Parliament

As is well known, the Brexit negotiations involve at least two elements. The first is the settling of the outstanding house-keeping arrangements relating to such matters as the existing budgetary commitments of the UK and the liability for civil servants’ pensions. The second, and by far and away the most important in constitutional terms, is an agreement on the framework for future relations between the UK and the EU. Straddling the two is the question of retained rights of EU citizens living in the UK and of UK citizens living in the EU. The choice to leave the EU was not a choice for a singular option, but a choice to enter into negotiations over which of a range of hypothetical options might be adopted. Although it may be clear what the referendum decision was against, it is not clear what it was for. At some point, hypothetical options will have to be turned into practical choices. How will that process be managed?

The prime minister in her letter to the Council president spoke of the UK seeking ‘a deep and special relationship’ with the future EU. To some ears that sounds suspiciously like an association arrangement as envisaged by Article 217 of the Treaty on the Functioning of the European Union (TFEU). The advantages of an association agreement
from the point of view of the UK government is that it encompasses ‘a deep and comprehensive free trade area’ in which there is freedom of movement for goods, services and capital. It also gives tariff free access for goods and passports for services, alongside customs cooperation. Since the movement of labour is subject to work permits, the government could claim to be delivering on its manifesto promise to reduce migration. Moreover, an association agreement would allow participation in such common EU programmes as Horizon 2020 and Euratom, common transport, aviation, environment, employment and consumer protection policies, creating a link with policy areas, particularly security cooperation, where a UK government would be able to make a serious contribution to the European interest (see Duff 2016).

The snag, however, is that the UK would have to respect EU disciplines on competition, state aids, anti-dumping and public procurement, and these agreements would have to be policed by an agreed authority in which the jurisprudence of the CJEU would play a decisive role. This would be unacceptable to Conservative Eurosceptic backbenchers. Even if it were to offer sufficient guarantees on migration, an association agreement is also unlikely to meet the demands of those same backbench MPs on any budgetary contributions required to participate in specific programmes. We shall never know the full calculations that went into the prime minister’s decision to call an election. But it is at least a plausible hypothesis that she wanted to increase her party majority in order to have sufficient control over an otherwise unstable Parliament, so as to be able to secure an association agreement that would have been unacceptable to a significant portion of the backbenchers inherited from the 2015 election. Calling an election at a high point of popularity for the government and a low point of popularity for the opposition held out the promise of greater freedom of action unavailable with a small parliamentary majority. As we know, however, the decision backfired spectacularly.

The rule of law

The rule of law embodies the requirement that a government acts on principles of legal impartiality and the due authorisation of political authority by the legislature. In the modern state, these principles come under constant pressure from the large volume of administrative regulations that governments need to adopt in order to ensure the good working of a modern economic and social order. Many hold that already the legislative scrutiny of executive regulation is defective by virtue of the
volume of work that has to be undertaken. In the UK since 1973, much of this administrative activity has been increasingly embedded in EU policy processes. So, the UK’s departure from the EU requires the repatriation of the legal powers associated with administrative regulation (in the general sense, not the specific EU sense of that term), known as the EU’s *acquis*. This is the domain of the so-called ‘Great Repeal Bill’.

The House of Lords Delegated Powers and Regulatory Reform Select Committee (2017) has drawn attention to the dangers of enhancing executive power and discretion as a result of the Great Repeal Bill. That Committee points out that although the government’s announced intention is simply to domesticate the powers currently exercised within the framework of the EU, simple transposition of those powers into UK law cannot be assumed to have an equivalent effect. Thus, an existing legal duty on the UK government to send information to an EU body, for example on oil and gas projects, cannot have the same force if the relevant procedure is domesticated. All that the duty could simply mean is that a UK government had a duty to send information to itself. Repealing existing obligations to EU institutions will not leave the legal powers of a UK government unaltered.

Here again we can see how the seemingly democratic logic of the referendum increases executive power. The only way in practical terms of repatriating EU law is to allow the government of the day wide-ranging discretionary powers to determine the details of administrative procedure. These are the so-called ‘Henry VIII’ clauses, which the proposed bill duly enshrines. The decision of principle in the referendum is inherently incomplete in the context of inherited commitments that have to be unstitched one by one. Within the two-year timescale allowed for by Article 50, it is easy to see the dilemma for the government. Unless the powers under which administrative action is empowered is legislated for in UK law, the government would have no legal powers with which to undertake vital functions. So an omnibus bill is needed. On the other hand, precisely because the legislation has to be omnibus, the transfer of the large number of powers that it entails inevitably means that the significance of many individual elements in the transfer escapes proper scrutiny.

**The plurality of the people**

A mandate theory of the referendum presupposes a unitary people. To act as a people’s agent assumes that the government is responding to the mandate of a single people whose will is determinative. Formally
speaking, the UK is a unitary state. There are no constitutionally protected spheres of action assigned to sub-national government. Although the devolution legislation had constitutional effects, its status is that of ordinary statute law. The corollary is that there is a ‘British people’ whose will was expressed in the referendum result.

However, while this is the formal legal position, the political reality is quite different, and it would be unwise to construct a theory of the popular will based upon the principle that devolution law is merely ordinary statute law. No one supposes that in the foreseeable future the devolution of powers to the Scottish government can be rolled back, and there are few who want any other arrangement other than a substantial devolution of political authority to Northern Ireland. Whatever may be true in legal principle, the UK has become a compound polity over the last twenty years. The peoples of the constituent nations of the UK have a substantive political existence in their own right. A UK government needs to accept the restriction of its authority that has emerged since devolution.

The principle of public choice in compound polities is not that of a simple majority of ‘the people’ but rather concurrent majorities of the different peoples, in which the majority decision of the whole is a function of the component majorities of the parts. In the case of the Brexit referendum, this condition was not met. The majorities for ‘Leave’ in England and Wales were complemented by majorities for Remain in Scotland and Northern Ireland. Setting the simple majority principle applied to the UK as a whole against the principle of concurrent majorities, it is clear that there can be an inconsistency, as was the case with Brexit.

There is an interesting contrast in the scope of the UK government’s powers between Scotland and Northern Ireland. Section 30 of the 1998 Scotland Act gives the UK prime minister the power to refuse a request for a referendum in Scotland, whereas the Good Friday Agreement (GFA) commits both the Irish and UK governments to recognising a united Ireland if majorities in both countries favour that option. Although if there were a clear majority for independence in Scotland, it might be as difficult politically to resist the move as to resist Irish reunification. Moreover, there are significant differences in the way that executive action would play out, not least because Irish reunification would enable the current Northern Ireland to remain within the EU, whereas an independent Scotland would have to go through the same application process as other candidate countries. The limit of the mandate of the people is found in the existence of a plurality of peoples in the UK.
Conclusions

The paradox of a referendum is that it is often presented as a device of popular control by which political power is returned to the people. In practice, it increases executive power, as the government seeks the freedom from Parliament and legal constraint in order to implement what it sees at the popular will. A popular decision of principle creates the field of power in which a government can seek to act. With an improvised constitution like that of the UK, the paradox is heightened, since the meaning of the referendum result becomes a contest of political wills rather than an interpretation of a basic constitutional process. That is the legacy of an evolutionary and flexible constitution. There is no one else to blame. The fault is in ourselves.