Porter later added that Thorpe was 'quite a serious thinker in his way' and had three great principles in his life: the abolition of apartheid, the breakdown of racial divisions in the UK and the United States, and for women to play a wider role in the financial and commercial life of the country. He was one of the first advocates for there being at least one woman on company boards.

Shortly after his election as leader Thorpe met and subsequently married Caroline Allpass. Together they had a son, Rupert born in 1969. According to Porter, Caroline came from roughly the same social background as Thorpe but, unlike him, was not highly politicised. Nonetheless Porter felt that she was a good political wife and supported him wholeheartedly as leader of the party. This seemingly happy life was brought to a devastating end by a road traffic accident in which Caroline was killed shortly after the 1970 general election. Thorpe was left desolate by the news and was on autopilot for several months afterwards.

Thorpe and Marion Harewood were thus both alone when they met at a dinner hosted by the pianist Maura Lympany. Porter rather romantically put it that Marion had declared that she would remarry if Mr Right walked into her life and for her Thorpe was that man. They were married in early 1973 and followed it with a musical celebration. Later that year Marion joined Thorpe on the platform at the annual Liberal Assembly and was shown by Porter looking on approvingly as Thorpe acknowledged the applause.

The year of their marriage was followed by the year that represented the high watermark of the Liberal Party in the post-war era, 1974. The inconclusive February 1974 general election gave the surprising result of Labour winning more seats than the Conservatives despite the Tories winning more votes but with neither able to command an overall majority. Thorpe entered into short-lived talks with Heath regarding another, political, marriage. According to Porter, Thorpe demanded PR from Heath but Heath would only offer a Speaker's Conference. This went down 'like a lead balloon': 'they take minutes and waste years.' Thorpe realised that he was wasting his time and pulled the rug from under Heath. No sooner was Thorpe out the door than Heath was on the phone to arrange an audience with the queen at which he would tender his resignation and recommend that Wilson be invited to form a government.

Porter noted that some had said that Thorpe was desperate for high office. This he believed was 'largely untrue'. Nonetheless, there had been talk during this brief period of Thorpe being defence secretary or leader of the House of Commons. Heath later told the Times that Thorpe would have been Home Secretary. Richard Moore noted at the end of the meeting that Thorpe would have been a bad defence secretary, as he didn't understand the technicalities at all well. He added that he would have been worse as Chancellor of the Exchequer as he understood little about economics.

However, these passing opportunities were not to be and a little over two years later in May 1976 Thorpe was forced to resign as a result of the scandal that engulfed him. He remained as an MP until 1979, when he was roundly defeated by the Tory candidate. A few days after that, 'he faced the scales of justice at the Old Bailey'.

Porter talked through the case in quite some detail at both the start and the end of the evening. It seems to me to be a familiar tale recorded elsewhere that does not need further repeating here. What was perhaps most interesting was that music emerges again in Thorpe's life, with a satirical song about the case, 'Jeremy is Innocent'. It deals amusingly if not subtly with the central allegations in the case. There are two versions available on YouTube and Porter regaled the room with the version recorded by Doc Cox, later famous for his work on That's Life, under the name of Rex Barker and the Ricochets.

Thorpe left the court a free man, though with not all the country was convinced of his innocence, as evidenced by Peter Cooke's parody of the judge's summing up. Consequently, he could not return to what Porter described as the love of his life, British politics, though he clearly tried intermittently. He participated at the margins through attendance at meetings like that of the Channel Tunnel Association in a church hall on an estate in Dover, where Michael Steed met him for the penultimate time.

According to Porter, Thorpe hated his retirement life spent in 'shallows and miseries', even before Parkinson's ravaged him. Moore felt that Porter slightly overdid the misery of the retirement years noting that his friends largely stuck by him (including from other political parties, such as Michael Foot and Julian Amery), though some of his immediate political colleagues did not, and that he survived so long. In summing up, Porter regarded Thorpe as one the bravest men in British politics and closed with a recording of Sullivan's 'He is an Englishman' despite the piece's ironic intent.

Moore, who had known Thorpe from 1952 to his death, shared Porter's view about his courage but also remarked on his humour and argued that his one weakness being that 'he was not always wise in his choice of friends'.

David Cloke is a member of the Liberal Democrat History Group's executive committee.

Who Rules? Parliament, the People or the Prime Minister?

Spring conference fringe meeting, 17 March 2017, with Professor Michael Braddick and Baroness Joan Walmsley; chair: Baroness Lynne Featherstone

The Liberal Democrat History Group's fringe meeting at the Liberal Democrat spring conference in York in March 2017 focused on the issue of Parliamentary supremacy: hard won in the seventeenth century but being challenged by the government response to Brexit, placing under question whether Parliament or the executive – or the popular will, expressed through a referendum – should have the ultimate say. Here we reprint the edited transcript of the recording of Professor Michael Braddick's talk (with thanks to Astrid Stevens for the transcription), and the paper that should have been delivered by Lord Martin Thomas; in fact he was unable to be present and the paper was delivered (in a slightly abridged form) by Baroness Walmsley.

Michael Braddick

I want to talk about two poles of argument in the seventeenth century. One is the relations between Crown and Parliament, culminating in a constitutional settlement which we still broadly inhabit. A second pole is between the individual and the state, because this is also an important period in which many of the institutions of the state took form, and posed new questions about the relationship between the individual and those powers. The thesis I want to advance is that we are really still having those seventeenth-century arguments.

I will talk about liberal democrat views in the lower case, because I think we are still having an argument about liberal democracy and its implications, which started in the seventeenth century. I'm not going to speak to a room full of Liberal Democrats (upper case) about Liberal Democrat thinking on these matters.

So, the Crown and Parliament: well, we all know the story (I hope we all know the story). Charles I came to the throne in 1625. He had five years of rather troublesome parliaments. He had eleven years without parliaments. He called a parliament in 1640 from a position of great weakness, having lost the war and needing money from that parliament in order to pay an occupying force. That parliament demanded more and more constitutional restraint, that culminated ultimately in a civil war, so that the parliament Charles had called in 1640 was the parliament that executed him in 1649, and then continued until 1653 in further constitutional experiments. So we know, in broad outline, this story, which of course I could talk about at great length (indeed, I am *paid* to talk about it), but I'll stop there. So there is a broad picture there of conflict between Crown and Parliament, starting – pick a date – but ending in the execution of the king.

The drivers of that conflict were really two-fold. One is military change. Throughout the sixteenth and seventeenth centuries, gunpowder had been adopted, not just for artillery purposes, but for handheld infantry purposes that required more expensive equipment and more expensive training. It turned what had been a voluntary service into a professional service, and that required cash. So there was a commutation, we call it, in the game of service and cash, that produced an escalating need for money. The only institution capable of providing that money was Parliament, and Parliament was not always willing to provide the money. One line of constitutional conflict comes out of that essential change of the professionalisation and commodification of warfare.

The second driver of change was the Reformation. The Reformation was about purifying the Church, not about establishing a new church. The question was: how much of the old Church needed to go, in order to render the current Church pure? There was a very extreme version, which was that everything not explicitly stated in scripture was forbidden, but there was a much bigger middle ground: everything not stated in scripture which didn't seem too bad was allowed. And that was the Reformation debate which drove a lot of conflict over the shape of the Church of England through the sixteenth and seventeenth centuries. Now, that was a matter between Crown and Parliament because Henry VIII had started the whole process by statute – it was the Parliament which had legislated for the independence of the English church.

So these two drivers of conflict – Reformation, and the cashification of warfare – produced considerable tension between Crown and Parliament. The crisis was precipitated not within England, but by a separate crisis in Scotland. If we were convening a meeting today about history, I might be talking to you, in fact, about relations between England, Scotland and Ireland, which also took shape in this period, but we'll park that as well.

In 1637, the Scots, for completely other reasons, rebelled against the king. The king needed money. That caused constitutional tensions, and the war was designed to enforce the king's view of religion in Scotland, and that raised all the religious concerns. The English failed to support the war, and Charles I's English government unravelled.

What then followed was a period of reform in which Parliament demanded more and more safeguards against royal authority – safeguards on money and safeguards on religion – escalating into armed conflict. As these issues became more entrenched, people tried to take control of arms, stores of arms, strongpoints and so forth, and that became a war by default, not by anyone's will. It was a defensive war, sought to protect gains rather than to dethrone the king.

So the 1640s' resolution came to be the execution of the king. But that was not the intention of Parliament in 1640. The intention was not to abolish the monarchy; it was to restrain the monarchy. And Parliament's negotiating position throughout the 1640s was a negative one: 'don't do this … don't do that … don't do that … don't do that… this is the settlement that we require'. The king was executed, in the end, in order to prevent further war, not to establish a republic. A very controversial statement: in a similarly sized roomful of historians, I'd now be facing a lot of abuse, but I can tell you it's true, and that's the end of things!

So, in 1649, the king was executed to prevent a further war, and Parliament instituted a set of constitutional trends which were about restraint of the monarchy, not about a positive view of a republican settlement. Similarly, the Church of England was abolished by default. It was not a view of religious toleration; it was a failure to agree what the Church of England should be. So, two of the great outcomes of the 1640s – the abolition of the monarchy and the abolition of the Church of England – were really wrong turns taken from a position that was initially defensive, about establishing a balance between Crown and Parliament that safeguarded property rights (the money stuff) and safeguarded religion (the Reformation stuff).

And all that carried on through until 1689, skating over a similarly long period of similarly complicated history, with a settlement that has been celebrated as achieving the balance between Crown and Parliament.

There is one long argument there, about Crown and Parliament, which was driven by two of the key issues of the age – money and salvation. But what they produced was a constitutional settlement which established that sovereignty lay with the king in parliament. The king had accidentally, more or less, been executed – I'm getting more and more outrageous – the king had been executed in order to prevent a further war, not to establish absence of monarchy in England. It had been to establish a peaceful settlement. So there's one big narrative about the seventeenth century.

The second big narrative about the seventeenth century is a related one. During the 1640s, when war really came to England. It was a huge war, this, in which one in ten adult males were in arms, the armies constituted the equivalent of the second, third, fourth and fifth largest cities in the country put together, all of them taken out of agricultural and productive labour and becoming simply

A full audience for the History Group meeting

a burden on an economy that did not have a large surplus – it was a huge burden to undertake. That produced administrative reform and taxation reform, which was frighteningly effective. The proportion of the GDP being taxed in the 1640s doubled, and it doubled again in the 1690s. And in the 1690s, all these men (all men of fighting age, taken out of productive labour) were sent to Belgium with sacks of money to fight continental wars. This was a massive administrative achievement, and it was a huge burden on the English economy. And that involved, of course, all the current property right questions that produced hostility to the king.

So fighting a war to defeat the king actually seemed to make the cure worse than the cause. And in the course of the 1640s, people began to argue that the war was not between king and Parliament, but between the individual and tyranny. And it is at that point that more radical arguments emerged.

A similar case could be made for the Reformation. In 1640, the Church of England was looking purified from Charles I's crypto-Popery (from a certain point of view), stripped of all that, but there were people who felt that it now needed stripping right back to the real core of Protestantism. There was a debate within parliamentary ranks which was much more rancorous than the debate between Royalists and Parliamentarians on religion – a rancorous debate within the parliamentary cause about what would constitute a purified Church. And in that argument, lots of people made arguments that *sound* like religious toleration: 'don't persecute me, because I am godly'. But lots of those arguments actually were: 'don't persecute me; I am godly – persecute him instead; he is ungodly'. The argument against persecution was not an argument for toleration, it was an argument for persecution of the right people. But there were people in the 1640s who argued that no human institution could be perfected, no one could understand the mind of God sufficiently perfectly, we all have to pursue our own path to righteousness, and we have to be set free. Government should have no role in interfering with the individual's pursuit of their own salvation.

And so in the 1640s, with that argument about the individual and the state on money, there was also an argument about the individual and the state on religion. 'I must be set free, to pursue my religious conscience. If we *all* truly follow God's promptings inherited through our conscience, society will automatically be perfected.'

So there was an argument, then, for toleration in the 1640s. Now that argument is, I think, a different argument from the parliamentary sovereignty argument. It's not an argument about the balance between Crown and Parliament; it's about the individual and the state. And I think we're still having this kind of three-cornered argument. Parliament protects us from executive tyranny – but who protects us from the tyranny of parliaments?

On the toleration issue, though, suppose the majority of the population are misled about religion, and they are persecuting a righteous minority – who protects the righteous minority? And there the issue is against the tyranny of the majority. And my guy, John Lilburne [Michael Braddick is shortly to finish a study of John Lilburne and the English Revolution], squared all this with an argument that sounds rather like liberal democracy. We need parliamentary sovereignty to protect us from executive tyranny, but we need the parliament to be responsive to the people's will – so it has to be grounded on popular sovereignty – but we need protections from the tyranny of the majority when that impinges on such fundamental rights as our religious conscience.

And I think those are the arguments that are in play, really, in the referendum versus parliamentary sovereignty and so forth. A slender majority dictating

about the legal rights of a slender minority seems to be at the heart of this (lower case) liberal democrat question. How do we have both a sovereign parliament answerable to the will of the people but also protection of the individual from the tyranny of the majority? I think that argument would not have been familiar to Henry VIII, but it would have been very familiar to the Levellers of the 1640s. I think we're still having an argument that was kicked off by the crisis of the 1640s.

Martin Thomas / Joan Walmsley

The question is sparked by the decision of the Supreme Court in *Miller* v. *Secretary of State for Exiting the EU* and the subsequent reluctant introduction of a tiny bill, the European Union (Notification of Withdrawal) Bill, to give the government authority to press the Article 50 button. The government was taken to court because the prime minister was claiming the right to exercise the royal prerogative to make or unmake treaties with foreign powers, without the necessity for parliamentary approval. She asserted that she was carrying out the 'Will of the People' as expressed in the referendum.

In 1807, the British Navy seized a strategic island situated in the German Bight, off the coast of Schleswig Holstein, but belonging to Denmark. It was Heligoland – less than a square mile in extent and occupied by a small population speaking their own dialect of the Frisian language, Halunder. The admiral's purpose was to beat Napoleon's Continental System, which barred British merchants from Europe, simply by creating a base for smuggling. Denmark ceded the island to Britain in 1814, so the inhabitants became officially British subjects. It became a fashionable holiday resort for wealthy Europeans in the nineteenth century, noted for its free and easy atmosphere.

But in the latter part of the century, the European powers were engaged in the scramble for Africa. In 1890, the Tory government under Lord Salisbury did a deal with the Germans. Britain entered into the Heligoland-Zanzibar Treaty under which Heligoland was ceded to Germany in return for a large chunk of the African continent, including Zanzibar and Uganda. Lord Salisbury considered it necessary for the treaty to be ratified by an Act of Parliament and introduced the Anglo-German Agreement Bill. The reason for involving parliament was stated to be that it dealt with the rights of the Halunder-speaking British subjects, some 1,300 of them, then living on the island.

Mr Gladstone, briefly out of office and leading for the Liberal opposition, was incensed that a precedent was being set to involve parliament in the use of the royal prerogative in treaty-making. But he conceded that there were exceptions:

> No one doubts, Sir, that this power of Treaty-making lies in this country with the Crown, subject to certain exceptions, which, I believe, are perfectly well understood. Wherever money is involved, wherever a pecuniary burden on the State is involved in any shape, I say, it is perfectly well understood, and I believe it is as well known to Foreign Powers as to ourselves, that the Government is absolutely powerless without the assent of Parliament, and that that assent, if given, is an absolutely independent assent, upon which the Crown has no claim whatever, presumptive or otherwise. I believe it to be also a principle—and I speak subject to correction—that where personal rights and liberties are involved they cannot be, at any rate, directly affected by the prerogative of the Crown, but the assent of Parliament, the popularly elected body to a representative chamber, is necessary to constitute a valid Treaty in regard to them.

He went on nevertheless to complain at length about the introduction of a bill into parliament. He did not believe that either of the exceptions he referred to applied to this particular treaty. No doubt he expected soon to be back as prime minister, as indeed he was in 1892, and wanted his hands free to conduct his own foreign policy.

It is these exceptions – particularly the second – which have recently come under scrutiny in the Supreme Court.

Lord Neuberger, President of the Supreme Court, summarised in *Miller* the clash which he saw had arisen between two principles of the UK's constitutional arrangements. They were as follows:

(a) the principle that the prerogative power of the Crown may be exercised by its ministers freely to enter into and to terminate treaties with foreign powers without recourse to parliament; and

(b) the principle that the Crown through its ministers, may not normally exercise that prerogative power if it results in a change in UK domestic law affecting rights, unless an Act of Parliament so provides.

We live in a real democracy under the rule of law. From Trump, to Farage, to Marine le Pen, to Putin it is a despised 'liberal democracy' run by the enemy, the liberal elite.

There are other systems which have the trappings of democracies – they have elections and votes – but these are not much use when there is only one candidate or one party. Where the power rests in just one hand and one person or one body is able not only to make the laws, but also to administer and execute the laws, and finally, to judge whether those laws have been broken, there you have arbitrary government.

My own experience is of appearing in a Singapore court, in a libel action brought against my client by the prime minister, Lee Kuan Yew. Lee was the founder and leader of the People's Action Party, which has won virtually every seat in every election in Singapore since its foundation as a republic in 1965. The PAP explicitly reject effete Western-style 'liberal democracy'. My client was the leader of the Workers' Party who had the misfortune to win a by-election and to become the only opposition member of parliament. I was appearing before judges appointed by the prime minister. I lost.

Over our long history, Britain once subject to the arbitrary government of the Crown, slowly developed a system of checks and balances:

Law making. The power of *making* laws remained in theory with the Crown, but only subject to the assent of the Lords and the Commons, constituting parliament. Hence today every Act of Parliament is enacted by 'the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same'. The queen has no legislative power of her own to make laws, although under her royal prerogative, she alone can call parliament together and dissolve its authority. It follows that her ministers also have no power to make either primary or secondary legislation. Ministers may only introduce procedures into parliament to obtain the assent of parliament to their bills or their statutory instruments.

Executive power. The power of administering and executing the laws remained with the Crown. The king or queen is the supreme executive. In the course of time, that executive power was placed in the hands of ministers. It is still the queen's prerogative to call upon a member of parliament to form a government and the members of the government kiss her hand upon appointment and thereby derive their executive power from her. But it is not unrestrained executive power. No one is above the law, not even the queen and therefore she, and her ministers, can act only within the law. In the *De Keyser Hotel* case (1920) much quoted in *Miller*, Lord Parmoor described the royal prerogative in these terms:

> The Royal Prerogative connotes a discretionary authority or privilege, exercisable by the Crown, or the Executive, which is not derived from Parliament, and is not subject to statutory control. This authority or privilege is in itself a part of the common law, not to be exercised arbitrarily, but 'per legem' and 'sub modo legis'.

But royal prerogative power may be constrained or removed by Act of Parliament. It happens in this way: the assent of the reigning monarch is necessary to every act – 'La Reine le veult'. To the extent that the act in question limits or removes the royal prerogative, the scope of the prerogative is thereby diminished and cannot be regained.

As an example, the royal prerogative to dissolve parliament was abrogated by our own dear coalition's Fixed-term Parliaments Act 2011, a demand of the Liberal Democrats. If parliament were to repeal the act, the Queen would recover her power to dissolve parliament by reason of *that* act and not at common law.

The judges. Interpreting the law is the province of judges. In the history of Britain, the judiciary though appointed by the monarch on the advice of her ministers, have judicial *tenure*. The Act of Settlement of 1701, which brought the protestant George I to the throne following the reign of William and Mary, provides that judges are appointed *quamdiu se bene gesserint* (during good behaviour) and can be removed only by both Houses of Parliament. They are therefore independent and not subject to political interference. They decide what an Act of Parliament means. It is also the body of their decisions from time immemorial which, through the following of precedent, constitute the common law. Unlike the continental systems of law, the common law continues to adapt and evolve and is consequently much more flexible. Hence in *Miller,* it was the Supreme Court which decided whether the executive could trigger Article 50 merely by the use of the royal prerogative, or whether only an Act of Parliament could give the executive that power.

Now President Trump, amongst many failings, does not understand the American constitution fashioned in 1787, fundamental to which is the separation of the three powers: legislative, executive and judicial. Without delving into it too deeply, Article II of the constitution provides: 'The executive Power shall be vested in a President of the United States of America.' This was the equivalent of the royal prerogative of George III. Using that executive power, presidents have from the beginning issued 'executive orders' which do not require the consent of Congress – although Congress can deny the supply of money to carry them out. George Washington issued 8 – Roosevelt over 3,000 and Obama 276. Trump has scored 18 or so to date. Almost all of these orders have been upheld when challenged in the courts – for example, Roosevelt's executive order of 1942 for the internment of Japanese Americans living in the USA in the Second World War. But these orders must comply with the constitution. Trump's executive order banning the refugees of seven countries from entering the USA was restrained by Federal Judge Robarts in Washington State on the grounds that it breached the guarantees in the American constitution of religious freedom and equal protection. Judge Robarts, the 'So-called Judge' as Trump termed him, was able to act in this way, because he enjoys 'tenure'. The British principle set out in the Act of Settlement of 1701 was followed by the founding fathers in the constitution of the USA. On Wednesday, a Hawaiian district judge restrained Trump's revised order on the grounds that, coupled with his many public statements, it is motivated by religious prejudice against Muslims, contrary to the guarantees of religious freedom in the constitution.

So all these principles are alive and well and active in the modern world.

One aspect of the royal prerogative which still survives is the granting of honours and peerages. Only the queen can make the grant; parliament plays no part. In most cases, she follows the advice of her prime minister but she has the power without such advice to make distinguished people Companions of Honour, Knights of the Garter and to make awards under the Royal Victorian Order to retainers and friends. One of the more amusing aspects of the Regency was that George, Prince of Wales, finally became Prince Regent in 1811 on the final illness of his father George III, but only by Act of Parliament. His prerogatives were limited by that statute so that he could not appoint his cronies peers, make viscounts into earls, earls into marquises and marquises into dukes for a full year. When Spencer Percival, the prime minister, was assassinated in 1812, the regent's Whig friends who had supported him for decades expected to be swept into office. Prinny hesitated, ran around in circles for days, and finally turned back to the Tories, using his royal prerogative to appoint the Earl of Liverpool as prime minister – the longest to serve continuously as such.

The royal prerogative more importantly survives in the realm of foreign affairs. It is the monarch who recognises foreign states. Ambassadors still present their credentials to the Court of St James. Your passport is issued under the royal prerogative and is entirely discretionary: there is no statutory right to a passport. It is the monarch who issues declarations of war and peace, and forms international treaties. That's the basic principle.

However, from early days, the royal prerogative did not control foreign trade and commerce. Clause 41 of Magna Carta says:

> All merchants, unless they were openly prohibited before, shall have safe and sure conduct to depart out of England, and to come into England, and to tarry in and go through England, as well by land as by water, to buy or sell, without any evil tolls, by the old and rightful customs, except in time of war; …

In an interesting foretaste of our current debate concerning EU residents in the UK and the one sided assurance we in the House of Lords sought to give them last week, clause 41 goes on:

> … and if they be of land at war with us, and if such be found in our land at the beginning of the war, they shall be attached without harm of body or

> goods, until it be known unto us, or our Chief Justice, how the merchants of our land are entreated who shall be then found in the land at war against us, and if ours be safe there, the others shall be safe in our land.

Many statutes were passed in subsequent centuries governing foreign trade. A statute in the time of Edward III declared 'que la mare soit overt' – that the sea 'shall be open to all manner of merchants to pass with their merchandise (where it shall please them).'

> All merchants, strangers and denizens, or any other may sell corn, &c. and every other thing vendible to whom they please, foreigners or denizens, excepting the King's enemies, and any charter, proclamation, allowance, judgment, &c. to the contrary shall be void.

A famous jurist Sir Matthew Hale writing in the early part of the eighteenth century, observed:

> … that upon the whole matter, it will appear from the several Acts of Parliament that have been made for the support and increase of trade, and for the keeping of the sea open to foreign and English merchants and merchandise, that there is now no other means for the restraint of exportation or importation of goods and merchandises in times of peace, but only when and where an Act of Parliament puts any restraint.
>
> Several Acts of Parliament having provided, que la mere soit overt, it may not be regularly shut against the merchandise of English, or foreigners in amity with this Crown, unless an Act of Parliament shut it, as it hath been done in some particular cases, and may be done in others.

The jurist Joseph Chitty in his *Treatise on the Royal Prerogatives of the Crown*, published in 1820, was able to say:

> As these statutes contain comprehensive and positive enactments which bind the Crown, it may be laid down as a general rule, that the King does not possess any general common law prerogative with respect to foreign commerce.

Chitty concluded that the king may not, from mere political motives, and independently of any treaty or legislative provision, prevent his subjects from carrying on, or being concerned in, any particular trade in a foreign country at peace with this (however prejudicial such trade may be to the interests of this country).

This was the legal context when negotiations to join the Common Market began in 1960. After several false starts, and De Gaulle's 'Non', a Treaty of Accession was eventually signed by ministers on 22 January 1972 and Britain entered the Common Market. It is noteworthy that in October 1971, prior to the treaty being signed, Ted Heath secured resolutions in both Houses of Parliament which were to 'approve HMG's decision of principle to join the European Communities on the basis of the arrangements which have been negotiated'. Those arrangements were fully debated.

Furthermore, the Accession Treaty was not binding unless and until it was formally ratified by the UK. A bill was laid before parliament which received the royal assent in October 1972 as the European Communities Act 1972.

In the years that followed upwards of twenty treaties were made relating to the EU – including the Maastricht Treaty, the Amsterdam Treaty, the Treaty of Nice and the Treaty of Lisbon. The latter introduced the fatal Article 50, which contained a provision entitling a member state to withdraw from the EU. Each of these treaties was signed by ministers. But each required an amending Act of Parliament to add them to the list of 'Treaties' in Section 1(2) of the 1972 Act. Their terms were thereby incorporated into British law.

Under the European Union Act 2011 passed by the coalition government, you will recall that the most important restriction was that where a treaty or a decision increased the competences of the European Union, it had to be approved in a UK-wide referendum. The use of a referendum in this area began of course, with Harold Wilson's *confirmatory* Common Market Referendum of 1975. Note that we were *already* in the Common Market by the treaty signed under the royal prerogative in 1972 and the European Communities Act passed by parliament in 1972. It was not a referendum to *negotiate* terms, but to confirm what had already been done. If the country had voted No, presumably Wilson would have introduced another Act of Parliament to revoke the 1972 act.

So we come to today. I know of no respectable lawyer – and I exclude a number of Tory lawyers from that appellation – who ever thought the government could win the *Miller* case. It is so obvious that that the population of Britain gained rights under the 1972 act and its successors which could only be removed by legislation through parliament. Look at Heligoland and Mr Gladstone's pronouncement. The only way in which Mrs May could win was to concede that notice under Article 50 is revocable and that therefore giving notice did not inevitably lead to a loss of entrenched rights. Lord Pannick used the analogy of pulling the trigger of a gun – the bullet is discharged and cannot be deflected from its target. But if she did say it was *revocable*, and Pannick said it was *irrevocable*, the only way in which the interpretation of Article 50 could be determined finally would be to refer the dispute to the European Court of Justice! Further, by conceding it was revocable, she would give fuel to the Liberal Democrat demand for a referendum on the final deal: No to the deal would leave Britain within the EU – not the outer darkness of WTO rules.

So the Supreme Court was not asked to determine whether the Article 50 notice can be revoked: they were asked by all sides to proceed on the basis that pressing the button was the end of the matter – the entrenched rights of the people of this country would inevitably be prejudiced.

So who rules? The truth is that the supine, derelict and divided Labour Party have allowed Mrs May to have her way. It need not have been so. Parliament could have asserted its primacy. That's what we have called for. The royal prerogative exercised by the Brexit Brigade could and should have been curbed.

What about the referendum on the deal? If the Brexit negotiations fail, surely there must be a general election and the people will have their say. If the Brexit deal is negatived by parliament, surely there must again be a general election. But if a Brexit deal is done and is pushed through parliament, the people will not have their say at all. The important point is that the British people will not then have *ownership* of the deal. If as we all believe, the deal goes wrong, they will blame the political elite. That way madness and instability, social and political, lies. It will be as my family motto says: Ar bwy mae'r Bae' – Who can we blame?