SPEECH BY THE RT HON LORD OWEN TO THE CAMBRIDGE UNION ON "THE PRESENT STATE OF POLITICS IN THE UK", TUESDAY, 8 OCTOBER 2019

There is a legal way of exiting the EU by 31st October

It is just possible as I speak on 8 October that by 17/18 October at the European Heads of Government meeting, using perhaps even its well-tried mechanism of stopping the clock, an agreement on a EU-UK Withdrawal Agreement under Article 50 can be achieved and the UK leaves the EU on 31st October with Conservative, DUP, some Labour and Independent MPs support. That would be by far the best outcome.

Yet it is much more likely that there will not be a positive response in Brussels and that there will be no EU-UK Withdrawal Agreement before the House of Commons for the fourth time. In which case on 19th of October, on instructions from the European Union (Withdrawal) (No 2) Act 2019, more commonly referred to as the 'Benn' Act passed into law on the 9th September, the Prime Minister will be forced to write to the EU asking for an extension under the terms of Article 50. But issuing that letter cannot preclude the executive taking other legal actions to protect UK national interests. A rather neglected part of the full Supreme Court judgement on prorogation in para 55 says remember "always that the actual task of governing is for the executive and not for parliament or the courts." Extension is a device to delay again a decision. It probably does stop a so-called 'no deal' under Article 50 but it need not stop the UK leaving on 31st October.

What we need to do before writing any extension letter is for the UK government to write, preferably now, to all of the 31 other countries who are contracting parties to the European Economic Area Agreement, EEAA, as well as to the EU, indicating that whether or not an extension is granted by the EU, the UK intends to continue in the EEAA as from the 31st October. A separate letter to the three non-EU EEAA members would also ask that the UK can participate in the EFTA governance pillar. If the extension is granted by the EU the UK will have to continue to talk about a Withdrawal Agreement but it will then be in tandem with the UK being no longer in the EU and still being a contracting party to the EEAA.

Preparations for an exit from the EU on the 31st October 2019 must not be reduced but stepped up. The government has to do this for there is no doubt that some MPs and some in the EU see extension as the mechanism for the UK to remain in the EU. It is a well-used technique in the past for other EU countries who after unacceptable referenda decisions were subjected first to delay and then forced to repeat referendums. Fortunately, continued membership of the EEAA for a transition period outside the EU can only be challenged in law within the Vienna Convention on International Treaties which the UK will fight. In the EEA Single Market there will be no need for the UK to take recourse to WTO tariff schedules for intra-EEA trade. Irish Border problems associated with leaving the EU would be more manageable by virtue of the regulatory harmonisation on SPS and other trade issues that the continued membership of EEA would bring. Even some problems over cross-border customs duties could be reduced and it would be wise for the UK government to start to unilaterally implement in Northern Ireland the new cross border trade and customs

provisions suggested to the EU as part of the Withdrawal Agreement by Prime Minister Boris Johnson.

Throughout the last three years I urged Theresa May not to foreclose the option of transitioning out of the EU through the EEAA option as we leave the EU because I believe all of Europe would benefit from an EEA transition rather than to leave with no deal at all.

It is important to recognise that the former Prime Minister came very close in March 2018 to submitting the necessary letter giving the mandatory 12-month notice, but at the last moment our Ambassador in Oslo was stood down from delivering the signed letter from Theresa May. That letter would never have been even contemplated if it was not thought to be legally desirable before signing a Withdrawal Agreement under Article 50 a year later as she planned to do.

Without having delivered the letter the former Prime Minister has fortunately, intentionally or unintentionally, left open the option of our continuing membership of the EEA but outside the EU. In an EU extension period the UK can compare any likely Withdrawal Agreement stemming from those talks with continuing in the EEAA, having control of our own fishing negotiations on conservation and other fishing matters and starting our own trade negotiations with other non-EU countries worldwide.

Single Market transitional arrangements underpinned by the European Economic Area Agreement is something which we were anyhow continuing under the terms of all the drafts of the Withdrawal Agreement so far, albeit in an attenuated form since it prevents us from exercising our rights on fishing and to enter free trade agreements. This relationship to the EEA was purposely obscured for those MPs who wanted to pretend that there was no involvement with the Single Market for a transition period in all the three Withdrawal Agreements offered to us by the EU. Had we accepted without giving the statutory notice we would have claimed it was justified by saying de facto we were still in the EEAA in the Withdrawal Agreement.

The minor legislative changes necessary eventually for completing this move for the UK leaving the EU simply mirror the changes but in the opposite direction to when Austria, Finland, and Sweden, members of EFTA, acceded to the EU. The changes in legislation then were so minor that the legislative changes to the Treaty were not completed for nine years. So, there is no need at this stage to put these minor changes about non-EU membership into the European Union (Withdrawal) Act 2018 which states we are leaving our current status as EU members of the EEA. It is noteworthy that Croatia is already in a different category for EEA membership called 'provisional'. What is being done is making a minor adjustment to an existing Treaty and such international documents quite often only make the legislative adjustments much later.

Given the build-up of negativity in the EU over whether a Withdrawal Agreement under Article 50 can be negotiated 20 Days before the 31st, now is a good time to indicate to all EEAA members, including the three non-EU members, that we will be continuing our membership but as a non-EU member after 31st October. This non-EU EEAA transition period can in no way be reasonably depicted as 'crashing out' of the EU. In the absence

of agreement under Article 50 it takes every possible measure open to us to soften leaving while not being forced into an EU customs union. It renders the Irish backstop null and void which all along has in reality challenged the core principle of consensus between the parties to the Good Friday Agreement. After a period of adjustment non-EU EEA membership for the UK during the transition offers a better chance of restoring consensus in Northern Ireland and it is a weakness in the Good Friday Agreement that the Assembly can stay suspended for such a long period and one we all need to try to bring to an end.

What was never given any civil service consideration by David Cameron's government was Article 50. He simply announced we would exit through it without any understanding of the very nature of Article 50. It is not a conventional international negotiation. It was designed by two distinguished figures, the former UK diplomat, Lord Kerr, and by the former Italian Prime Minister, Giuliano D'Amato, both ardent federalists who have made it abundantly clear in public and private that their design of the Article 50 for the Lisbon Treaty was deliberately weighted against the country wishing to leave the EU, in a way that no sensible government would ever invoke it. I have never ceased to argue that the UK should not have used Article 50 of the Lisbon Treaty, since it was a mechanism fraught with so much difficulty for us and that we should have exited through the arbitration procedures within the terms of the Vienna Convention on International Treaties.

The crucial error that the UK Government made in presenting their case before the Supreme Court which started on 17 September 2019 following the government decision on a long prorogation of Parliament on 9 September was in not demonstrating that the concept of Parliamentary sovereignty involves much more than just how long and when Parliament sits. It involves governing in a complex increasingly international world.

We in the UK have evolved over the centuries two separate systems: firstly a separation of powers between the judiciary and parliament; and secondly, a fusion of powers between the executive, consisting mainly of MPs on the frontbench of the House of Commons, and the official Opposition who communicate through the "usual channels" and backbench MPs from different parties as well as a few independents. The current deadlock in Parliament and postponement of exiting the EU after the referendum, which has gone on for three years, has meant that the functioning of the fusion of powers between the executive and MPs has broken down and that should have been stated from the outset by government lawyers to the Supreme Court.

The government should have understood from the start that the Supreme Court was going to be very wary, in the light of the long delay over Brexit and the arguments over independence for Scotland, of simply coming out against the decision of the Inner House of the Court of Session in Scotland on grounds of precedent. Lady Hale summarised the Scottish judgement that the case was "justiciable, that it was motivated by the improper purpose of stymying Parliamentary scrutiny of the Government, and that it, and any prorogation which followed it, were unlawful and thus void of no effect." Lady Hale went on to say in giving the Supreme Court's own judgement, "It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason – let alone a good reason – to advise Her Majesty to prorogue Parliament for five weeks. We

cannot speculate, in the absence of further evidence, upon what such reasons might have been. It follows that the decision was unlawful."

Perhaps history will show that the Supreme Court's sensitivity, in this case to the Scottish Court's different legal position, saved the union of Scotland with England and Wales and bought time for what must surely follow in terms of constitutional change UK-wide reforms but it did not help to achieve an agreed EU-UK Withdrawal Agreement.

Why were there no witness statements produced in the latter part of the hearing as were repeatedly asked for by Lord Pannick? It seemed that government lawyers had convinced politicians in government that a simple rerun of the arguments in the High Court of England and Wales would be sufficient, where the three justices chaired by the Lord Chief Justice had delivered a judgement that the issue was not justiciable in a court of law.

The fact that the Withdrawal document proposed by 27 EU countries has been defeated three times by the present Parliament raises profound questions for the government about UK MPs readiness to ever endorse the EU referendum decision. This political change in the conduct of government and accountability to Parliament following a referendum should have been the central argument raised by government lawyers during the hearings in the Supreme Court to explain the background to the decision of the government on prorogation. Nor did they bring before the Supreme Court the government's view, repeatedly expressed in Parliament and elsewhere, that Speaker Bercow, whose favourable views on the UK's continued membership of the EU he had made abundantly clear, had called in question the most precious attribute of a Speaker – namely, their impartiality. Nor did the government in the Supreme Court question in depth the legality of the very recent but highly relevant changed procedure of the House of Commons allowing the 'Benn' Act to pass rapidly into law on 9 September 2019. Nor did they challenge the Cooper/Letwin Act passed earlier. The Supreme Court was never told in unequivocal terms that prorogation was a failsafe against this type of legislation affecting the ability of Her Majesty's Government to fulfil the referendum result through Article 50. Now it may be argued these events coming after prorogation were not relevant to the case, but clever advocacy could have got around that objection.

Lady Hale quoted the words of Lord Bingham: "the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy." Would that it was that simple. Firstly, nothing has done more to change Westminster democracy than the UK being in the European Community, now European Union, from 1973-2019.

Secondly, the classic description of Cabinet collective responsibility and accountability has been changed, as is well documented in the Iraq Inquiry and by its chairman, Sir John Chilcot. It has given way to "sofa government" in 2002-2007 where "things were decided without reference to Cabinet." Some of those security decisions taken without any papers were very important. Also, papers were not circulated in advance which is also very important, reducing the capacity of those few Cabinet Ministers who were attending to be briefed by their departments. That was the situation also in the all-day Chequers Cabinet meeting on the EU which Theresa May held on 6 July 2018.

Cabinet government has been progressively bypassed by Prime Ministerial decision-making in different ways ever since Tony Blair tried to ape within No 10 a Presidential system of government, soon after winning the second General Election in 2001. He brought into No 10, as distinct to the Cabinet Office, two very senior diplomats to create an independent machinery to allow him personally to conduct foreign defence and security policy as well as European policy. This system has been retained in part and by the Prime Minister now chairing the new National Security Council introduced by David Cameron.

Even the controversial decision to prorogue Parliament under Prime Minister Johnson was made before the Cabinet was informed. Progressively, this sidelining of Cabinet has led to a fundamental disconnection between the executive and MPs in general.

A most dramatic change in the executive's capacity to govern came with the introduction of the Fixed Term Parliament Act in May 2011 as a response to the creation of the coalition government between the Conservatives and the Liberal Democrats in 2010. At a stroke the convention that a Prime Minister who had been in office for more than six months had the right to ask the Queen for a dissolution of Parliament was overridden by a complex procedure that was not fully spelt out in the legislation during any 14 day period between the loss of two confidence motions. In that period a majority of MPs appear to believe it may allow a House of Commons, that has been unable to decide on how to implement the referendum decision to leave the EU, to perpetuate its existence with a new government perhaps even lasting until June 2022 unless two-thirds of the 650 members of the House of Commons vote for a dissolution of this Parliament. This would stretch our constitution to breaking point and in such a deadlock in present circumstances there must be a General Election. MPs have already voted twice on whether to have a dissolution and General Election prior to 31st October and the result was fewer than two-thirds of MPs voted for a dissolution on 4 September 2019 and only 293 MPs voted in favour on 10 September.

Had the Fixed Term Act legislation been matched by the introduction of proportional representation for the Westminster Parliament during the period of the coalition government prior to 2015, then the legislation might have been constitutionally sustainable. But the Liberal Democrats accepted the Alternative Vote, which is not proportional, and the referendum in May 2011 was heavily lost. In the light of that referendum vote, the Fixed Term legislation, for the good governance of the country, should have been repealed by the incoming majority government under Prime Minister David Cameron in 2015. There is a strong case for its repeal to be included in the Queen's Speech on 14 October and if Labour MPs would support it, it could also have an agreed date on which a dissolution would be applied for to the Queen, and quickly carried through both Houses of Parliament.

Another massive change in the relationship between the executive and MPs in the Westminster Parliament and the people of this country has been the introduction of referendums. First introduced by Edward Heath on 8 March 1973 for Northern Ireland, this right to periodic referendums was further reinforced in the Good Friday Agreement of 1998 and this was followed by a referendum in 1999. The first actual UK-wide referendum was held in 1975 on whether the country should stay in the European Union. The overwhelming Yes vote was helped by cross party agreement to stay in the

EU but there was never any doubt that Prime Minister Wilson would have remained in office to implement leaving the EU if the electorate had decided otherwise. Other referendums followed on devolution to Scotland, Wales and Northern Ireland, and then on Scottish independence. City Mayoralties in various UK cities, were introduced and in ALL cases the results were respected by the Westminster Parliament.

Even as recently as the 2017 General Election, it should not be forgotten that all three of the UK-wide major parties – Conservative, Labour and Liberal - fought on the basis that they would respect the 2016 judgement of the people's decision to withdraw from the EU. Since then there has been a gathering constitutional crisis where many MPs have shown, in their actions if not in some cases also in their words, a readiness to block the electorate's decision in the referendum on the EU.

There is a commonsense conclusion from the Supreme Court decision in September that the government should have been franker in admitting that the Queen's Speech was not their only motivation and the Supreme Court should have been given arguments that both the 'Cooper/Letwin' and the 'Benn' Acts were destructive of good governance.

The UK executive has had, over many centuries, powers in relation to Treaty negotiations to preserve the confidentiality of their negotiating position, to trade positions around difficult compromises and settle on an overall deal without the interference of Parliament in the negotiating process. But the Supreme Court is not like the US Supreme Court; it does not have the power to 'strike down' the 'Benn' Act. It is the last Act which is the law and our Supreme Court does not have the power to declare an Act of Parliament illegal. The US Supreme Court does have that power as does the French Constitutional Court. For this reason, it is fanciful talk to say we can ignore the 'Benn' Act. We have to circumvent it with another legal way of leaving the EU and what I propose is, I believe, the ONLY way.

Even though under 'Benn's' European Union (Withdrawal) (No 2) Act 2019 ordering the Prime Minister to write asking for an extension of Article 50 in the event of no agreement on the 19th October, when it may be clear to the UK government and even the 27 EU governments that there is no realistic chance of reaching an Agreement under Article 50, the UK has to send the letter. If the 27 EU countries were wise they would in this situation refuse any extension request, and accept the UK's intention to leave the EU under the EEAA and cooperate with the UK on this new transitional exit that would be to the mutual advantage of all countries in the EEAA.

Now that some, but hopefully few, political decisions made by the executive are going to be justiciable in future we will, as a people in the UK, have to reconsider many delicate and difficult decisions relating to our existing UK constitution.

1. Do we need, as I suspect we do, a new Act of Union Bill? If so, a draft Bill called the Act of Union is before the House of Lords but has not yet had a Second Reading. It is a serious piece of potential legislation worth careful study.

2. Do we need, as I believe we do, a new second Chamber with representation of the four national people that make up the UK? If so, the Act of Union has in Part 7 two options in it, abolition or restructuring of the Lords. Direct elections for any Second

Chamber has been consistently rejected by the Commons. I have put forward the German Bundesrat model (http://www.lorddavidowen.co.uk/lord-owen-sets-out-proposals-for-a-federal-uk-council/) of indirect election of Lander members which accommodates large and small Landers as we would have to do in the UK with large differences in sizes of the constituent elements.

3. Do we need to change the voting mechanism for a House of Commons UK Chamber? After the overwhelming referendum rejection of AV, it is hard to envisage even a proper proportional system carrying support. But the Independent Committee on Voting Systems set up by Tony Blair when Prime Minister in Chapter Five in the section on solutions without constituency changes, reads: "A cousin of SV is the French system of two ballots or deuxieme tour. This cannot be convincingly dismissed by Labour and Conservatives opposed to any change in the electoral system for it is near to the method they have both recently used for the choice of their party leaders and therefore in many cases of an actual or future Prime Minister."

I believe the House of Commons will not abandon constituencies but just might be attracted by the merits of a second thoughtful vote reflecting on the results so far.

Finally, the novel 'Benn' Act ordering any UK Prime Minister to ask for anything in the midst of a negotiation, let alone on 19 October for an extension by the EU, is an intolerable intrusion into the international negotiating strategy of any British government, past, present or future.

Any executive and the Labour Party, in particular wanting soon to be in government, should rethink their position for they in government would have more than most at risk from the sort of procedures adopted by Hilary Benn, Yvette Cooper and Oliver Letwin. As for a House of Commons rejecting the referendum result to leave the EU; any government is entitled to use ALL its existing powers to the fullest extent possible. That power exists in the right of the government to continue as a member of the European Economic Area Agreement as a non-EU member, it might be challenged by other countries but the UK could and should conduct its defence under the Vienna Conventions with the utmost vigour. It does not represent an illegal challenge to the 'Benn' Act. It involves paying much less than £39 billion to the EU drawing on a formula for the three existing non-EU members. Norway has many side deals with the EU for which it pays extra and could cover agreed wording from the last Withdrawal Agreement before we exit the EEA, hopefully with a trade agreement along the lines of the EU-Canada Agreement. This is the best way to resolve our present constitutional crisis.