

# Assuming Brexit takes place, we are at the beginning of a fundamental transition – but we do not know where it will lead us

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By Democratic Audit UK

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*The political ramifications of Brexit keep making themselves known, with Labour pondering Leadership change, the Prime Minister resigning, and Scotland perhaps heading for a second independence referendum. Here, **Andrew Blick** looks at the constitutional ramifications of Brexit, arguing that if it goes ahead, we are on the brink of fundamental constitutional change.*



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Brexit is, at root, a constitutional issue. It engages the fundamental values, sources of legitimacy and systemic structures of our society; and the prospect of major changes to them. Brexit has a series of manifestations deriving from its constitutional nature, that in turn prompt wider reflections on the UK system and how it might develop in future. They include:

## The role of referendums

The 2016 EU vote provides an exemplary case-study to inform a discussion of the merits of referendums in the context of the UK constitutional system. It is possible to make a democratic case for this referendum. It was effective in stimulating a wide public debate. It enabled members of the public to take part in what was a crucial political decision. The turnout was higher than it has been at any General Election this century. Indeed, an interesting feature of the referendum is that members of social groups that tend normally to be less influential on political processes, such as those with few educational qualifications, have been on the winning side.

Conversely, those who vote on a more regular basis, such as university graduates, were more likely on this occasion to find themselves on the defeated 'remain' side. In this sense, the EU referendum was a democratic episode, reversing the normal power relationship. It accorded with the view expressed by Colonel Thomas Rainsborough at the Putney Debates in 1647 that 'the poorest he that is in England hath a life to live, as the greatest he'. Some of the poorest hes and shes, who do not normally take part, let alone achieve the outcome they seek, got what they wanted. Whether they were acting on a basis of what Marxists used to describe as 'false consciousness', voting against their own material interests, is a separate discussion.

On the other hand, referendums can jar with the principles of representative democracy that have underpinned the UK constitution. It is not entirely clear why a referendum was needed now on this particular issue, other than the internal politics of the Conservative party creating an imperative that David Cameron felt he had to heed. Immense publicity around the referendum did not equate automatically with informed debate. Indeed, it was impossible for anyone who supported 'leave' to know what exactly they were voting for. A single coherent set of proposals regarding the policy that would follow a Brexit vote was not on offer, and would have been difficult to develop, given the many variables involved. Whether it is appropriate to take a decision as momentous as leaving the EU on a basis of a small simple majority of those who turned out, who amount to less than half the total electorate, is questionable. Moreover, the referendum, rather than uniting the country as a community taking decisions for itself, has exposed and exacerbated divisions. Sharp divergences are apparent as never before, on social, generational and territorial lines. However events play out from here, it is inevitable that a substantial body of the population will feel aggrieved.

## **The UK Parliament**

Part of the case advanced in favour of Brexit has been that it will restore the supposed sovereignty of Parliament. Yet the UK Parliament has curiously appeared a bystander to the whole process. A majority of MPs in the House of Commons are opposed to Brexit. In legal terms, if one accepts the principle of parliamentary sovereignty, the final decision rests with them. But the political pressure to enact the Brexit verdict will be immense, even if what precisely it means is not clear. The rise of direct democracy creates problems for parliamentarians in other ways. Since Cameron has announced his resignation, the Conservative Party will certainly be obtaining a new leader shortly; and in the wake of the referendum, Jeremy Corbyn is under pressure. Yet since it is members of the Conservative and Labour parties outside Parliament who make the final decision about who will be their leader, it is possible that many MPs will feel that they have a leader imposed upon them to whom they are opposed.

Whatever the weaknesses of Parliament, however, ultimately, a government must be able to command the confidence of the House of Commons. What kind of administration at the present time could actually achieve this essential support is hard to discern. If creating any kind of viable government becomes challenging, one means of seeking to break the deadlock is to trigger an early General Election. Before the passing of the *Fixed-term Parliaments Act 2011*, it was the monarch not Parliament who authorised early elections. But now they can only take place in advance of the five-year limit following specific votes in the Commons. It is theoretically possible that MPs could refuse to support any government, but at the same time not allow a General Election to take place. Alternatively, a newly installed Conservative Prime Minister may seek to contrive a vote of no-confidence in her or his own government in order to comply with one of the two procedures set out in the 2011 Act for obtaining an early General Election.

This parliamentary discussion has so far focused on the lower chamber, the House of Commons. But what of the House of Lords? Legislation facilitating or arising from Brexit will be scrutinised and voted on by Peers. They, like members of the Commons, may be reluctant to accept that their role is purely to give effect to the referendum result. Once again, parliamentary sovereignty could – in theory – be a barrier to Brexit, rather than a beneficiary of it. Assuming that Parliament nonetheless submits to the political force of the referendum result, what will be its role in the constitutional system that consequently appears?

## **The legal system**

Brexit means, on the surface at least, withdrawal from a legal order that has occupied a position of supremacy within the UK system since we joined in 1973. Under the terms of the *European Communities Act 1972*, Parliament has not been able to legislate in a way that violates European law, unless it does so explicitly, an action that would be difficult to reconcile with membership of the EU. Objections to this (self-imposed) restraint on Parliament, and the supposed violation of its sovereignty that was entailed, were an important motivation for the Eurosceptic cause. Post-Brexit, the UK Parliament *might* be free to legislate as it sees fit with a need to adhere to European law. However, the precise exit deal that is negotiated might contain certain conditions. In return for retaining access to some or all of the European Single Market, the UK might have to agree to abide to some extent by European law, continuing limitations on parliamentary freedom of action.

Furthermore, in as far as it is able to diverge from European law in future, Parliament will need to develop special mechanisms enabling it to do so. Alterations to the vast volume of measures that have accumulated since 1973 could surely not all be scrutinised in detail by Parliament. It will probably be necessary to delegate powers to ministers enabling them to issue statutory instruments effecting these changes. The role Parliament plays in overseeing such secondary legislation is often minimal, and never as extensive as its part in scrutinising primary legislation. In this sense, while it might in a theoretical sense restore parliamentary sovereignty, Brexit could in practice empower the executive more than the legislature.

## **The Union**

While the UK as a whole has voted for Brexit, the territorial picture is one of greater diversity. A majority in Wales backed the 'leave' option, while Northern Ireland and Scotland it did not. England outside Greater London wanted Brexit, but Greater London preferred to 'remain'. From this perspective, certain parts of the UK are faced with the prospect of being forced to leave the EU against their wishes. On this basis, the Scottish government is moving towards trying to hold another independence referendum; while Sinn Fein has made a similar demand in Northern Ireland. It is also arguable that Brexit, or aspects of it, requires approval from the devolved legislatures, and they could choose to withhold it. Ultimately, the 'sovereign' UK Parliament could force the issue and impose its will on the devolved legislatures. Yet the handling of the devolved territories in relation to Brexit is a challenging task. A break up in the Union could accompany UK departure from the EU.

## **The nature of constitutional change**

Some concluding observations arise. There is a myth that the UK constitution is characterised only by piecemeal, incremental change. This thesis is flawed on at least two grounds. First, the idea of a dichotomy between gradual and major alteration is problematic. This binary classification is difficult to apply to some reforms. For instance, devolution may seem, from the perspective of Westminster/Whitehall, a significant but contained concession to a particular geographical portion of the country. But from the perspective of the devolved territory, it seems far more dramatic. For many in Scotland, for instance, the advent of devolution represented the resumption of a national Parliament as an expression of the sovereign will of the Scottish people. Another problem with the distinction between types of change is that a particular modification may have radical implications that take time fully to express themselves, as with the introduction of the departmental select committee system into the House of Commons in 1979.

The second defect with the incremental change thesis is that there have been changes in the UK constitution that without doubt represent clear breaks with continuity. A development clearly matching this description was entry into the European Economic Community (EEC) in 1973. At this point, the UK incorporated into its domestic system a new legal order, with laws that originated somewhere other than Parliament taking precedence over Acts of Parliament (albeit by virtue of an Act of Parliament). With the anticipated departure from the European Union (EU), a further radical change is now in prospect. Assuming Brexit does indeed take place, we are at the beginning of a fundamental transition, but we do not know where it will lead us.

*Note: This piece represents the views of the author and not those of Democratic Audit or the LSE. Please read our [comments policy](#) before posting.*

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