
Brexit and the Melting of the British Constitution

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Introduction

The British constitution seems to be in a more molten condition now than at any other point in anyone's lived lifetime. The experience of Brexit has raised or reopened a host of questions. The British constitution is high on the list. It has in many ways gone live again. As a contribution to the debate, which is always difficult on constitutional affairs because of the uncodified nature of the constitution, these are our shared thoughts regarding the issues that Brexit has, is and could be about to touch.

The following descriptive list comprises matters that merit attention – and are likely to continue to do so – whatever the precise future nature of the position of the United Kingdom (UK) with respect to the European Union (EU). Some have come about as an immediate consequence of the effort by the UK government to implement Brexit. Others are associated more with the political turbulence that this episode has generated. We propose a series of general headings, with specific subjects under each. It is a provisional account, potentially subject to amendment and expansion.

The Executive

The Collective Responsibility of Cabinet

The viability of this principle; whether it requires redefinition in documents such as the *Ministerial Code* and the *Cabinet Manual*; whether the means by which it is interpreted and enforced are adequate.

Caretaker Principles

How effective are existing conventions at restricting prime ministers who may be – or definitely are – about to hand over to a successor, preventing them

from making decisions that would inappropriately bind that successor.

The Civil Service

There have been signs that the Northcote-Trevelyan model has been under pressure for some time. But Brexit could produce a different level of intensity of pressure. Issues that arise include whether the Civil Service has the capacity – in skills and personnel – to take on prospective increases and changes in the responsibilities of the UK government after departure from the EU. Whether the Brexit episode has demonstrated a danger of individual career officials being targeted for personal criticism. If, in an environment of heightened political polarisation, the underlying principle of impartiality, including open, competitive recruitment and promotion on merit, might be increasingly under threat. If ministers might seek to intervene more directly in appointments, and import favoured candidates from outside. The possibility of the politicisation of appointments to other public offices outside the immediate Civil Service.

Executive-Parliament Relations

The proper division of responsibility between executive and Parliament in areas including the conduct of diplomacy.

The implications of sustained difficulties for governments in securing the support of Parliament for their legislative and other measures.

The extent to which Parliament should be a vehicle for executive business, or should control its own agenda. The respective positions of the House of Commons and House of Lords within this balance.

The ability of the executive to circumvent Parliament; and of Parliament to deploy its 'sovereignty' and impose itself upon the executive.

The definition of House of Commons 'confidence' in the government and how it is enforced. The impact of the Fixed-term Parliaments Act 2011 upon this concept. The lack of guidance in the 2011 Act or elsewhere as to the handling of the 14-day period following a 'no-confidence' vote within the terms of the Act itself.

The creation of delegated powers, and their use by the executive.

The proper role of the House of Lords, including its function as a custodian of constitutional principles.

The Judiciary and the Rule of Law

The role of the courts in resolving matters of a constitutional and politically controversial nature.

The exposure of the judiciary to political and other pressure.

The status of 'retained' EU law in a post-Brexit environment.

External Policy

The means by which Parliament, devolved institutions and the people can and should influence or determine the external policy of the UK government, including its negotiation and conclusion of international agreements.

The future relationship between the UK constitution and external entities, under whatever post-Brexit arrangements are established (assuming departure takes place).

The Union and Devolution

The future balance of power between devolved and central tiers of governance. Means by which the devolved authorities might influence or fully participate in central decision-taking.

The status of Northern Ireland.

The possibility that one or more parts of the UK might leave the Union.

Devolution in England.

Representative and Direct Democracy

The sustainability of the present electoral system.

When it is appropriate to hold - and not to hold - referendums. How a referendum 'mandate' should relate to the authority of representative institutions.

The quality of the regulation of referendums and elections.

Who should be allowed to vote in elections and referendums.

The merits of engagement devices such as 'citizens' assemblies'.

Technology and the Constitution

The implications of communications technologies, in particular those associated with the Internet and social media, for the UK constitution.

The ethics and implications of the use of 'big data' for political campaigning and other purposes.

The appropriate forms of regulation in these areas;

and the challenges of doing so from outside the EU, if the UK leaves.

The People and the Constitution

The constitutional implications of attitudinal trends and divisions among the wider public.

Whether these tendencies create difficulties for the functioning of a democratic constitution.

How to define 'populism'. What the constitutional implications of populism might be, particularly if a government with strong 'populist' tendencies took office.

Political Parties and the Constitution

The implications of internal party rules – for instance for the election of leaders and selection of parliamentary candidates – for the constitution.

Whether present tendencies in the political orientation of parties create difficulties for the UK constitution.

Whether divisions within parties entail sustained constitutional dysfunctionality in areas such as collective responsibility and the relationship between Parliament and the executive.

Whether parties should be regarded as a component of the UK constitution. If so, the implications that follow for the way in which they are regulated.

The Monarchy

Peril can lurk where raw politics touches the Queen's personal prerogatives. A current source of

concern involves whether the role of the monarchy as the ultimate source of legal authority in certain key areas potentially exposes it to party political controversy, damaging to it and the democratic integrity of the constitution. These areas include: the appointment (and removal) of prime ministers; the granting of Royal Assent to bills; and the prorogation of Parliament.

Constitutional Conventions

The effectiveness of conventions as a means of constitutional regulation.

Whether convention-based rules determining important constitutional processes are sufficiently clear. For instance, how far it is possible to discern the principles that apply to the appointment of a new Prime Minister in circumstances where no one party has an absolute majority in the House of Commons.

The role of documents such as the *Cabinet Manual* and *Ministerial Code* in defining and promoting conventions. The way in which these texts are drafted and amended, and their constitutional status. What their legal status should be.

Constitutional Change: Content and Form

How we should go about making decisions of major constitutional significance in future. Whether there is a need to introduce formalised amendment procedures. If so, how they should operate.

Other Matters

What important constitutional issues have escaped attention as a consequence of Brexit turmoil?

In the British system, the constitution is the rules of the most important game in the Kingdom. In times of anxiety and uncertainty it needs constant attention, because on this occasion muddling through may not be enough. It's time to call upon the best traditions of our constitutional past and the better angels of our nature.

About the Authors

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