# Whose mandate is it anyway?  Brexit, the constitution and the contestation of authority

by

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**Abstract**

Over the past year, a seemingly relentless barrage of Brexit-related challenges has besieged the constitution, which together have called into question the legitimacy of the British political system. Yet although it is tempting to regard the decision to hold a referendum on Britain's membership of the European Union as precipitating an acute constitutional crisis, this article argues that political and democratic dilemmas arising from Brexit are symptomatic of a wider constitutional malaise, the roots of which extend far beyond 23 June 2016.  Flowing out of this, the article contends that the current crisis is one of 'constitutional myopia', fuelled by decades of incoherent reforms and a failure to adequately address democratic disengagement; and that the EU referendum and its aftermath have merely exposed the extent to which the foundations of the constitution have been eviscerated.

**Key words**

Representative democracy, parliamentary sovereignty, strong government: it is clear to any observer of British politics that the cornerstones of Westminster democracy are under severe stress.  Over the past year, a seemingly relentless barrage of Brexit-related challenges has besieged the constitution, which together have called into question the legitimacy of the political system.  Whilst the decision to hold a referendum on Britain's relationship with Europe was explicitly framed by then Prime Minister David Cameron as providing the electorate with 'an important choice to make about our country's destiny', the bitter conduct of the campaign has instead exacerbated widespread dissatisfaction with the way in which Britain is governed.  Moreover, the outcome has starkly revealed the profound divisions that exist within British society, pitting remainers against leavers, liberals against

the 'left behind', young against old.[1]  Brexit has also pitted Parliament against 'the people', and the road to Article 50 witnessed the inglorious spectacle of the government seeking to bypass the House of Commons (and sideline the Scottish Parliament) in the name of 'democracy', necessitating the intervention of the Supreme Court to determine the parameters of parliamentary sovereignty.  Indeed, far from settling the issue of Britain's relationship with Europe, the perceived closeness and geographical unevenness of the referendum's result has led to fierce contestation as politicians of all stripes have sought to legitimise their conflicting visions of Britain's (post-)EU future.  At the same time, Theresa May's surprise decision to hold snap election in order to strengthen her mandate for a 'hard' Brexit has backfired spectacularly; and the promise of 'strong and stable leadership' has instead given way to minority government, and all of the uncertainties associated with a hung parliament.

Yet although it is tempting to regard the decision to hold a referendum on Britain's membership of the European Union as precipitating an acute constitutional crisis, this article argues that political and democratic dilemmas arising from Brexit are symptomatic of a wider constitutional malaise, the roots of which extend far beyond 23 June 2016.  Flowing out of this, the article contends that the current crisis is one of 'constitutional myopia', resulting from decades of incoherent reforms and a failure to adequately address democratic disengagement; and that Brexit has merely exposed the extent to which the foundations of the constitution have been eviscerated.  As such, Brexit provides a critical opportunity to return to first principles, not only to assess the extent to which constitutional 'form' adequately reflects constitutional 'practice', but also to ask whether the extant institutions of the British state provide a vision of democracy that energises the citizenry.  As bodies such as the Hansard Society and the House of Lords Select Committee on the Constitution have made clear, the moment is now upon us to have such a 'national conversation'.

It is to this conversation that this article contributes, locating recent events within the broader context of constitutional drift.  The article demonstrates how successive governments have failed to address the widening gap between constitutional rhetoric and reality; highlighting the way in which ad hoc or incremental reforms have merely papered over the cracks in the UK's uneasy settlement.  Specifically, it identifies three interconnected 'fuels' that have served to destabilise the constitutional compact: the short-term opportunism of constitutional bargaining; the emergence of 'discretionary spaces' and alternative sites of legitimacy; and, changing patterns of political participation and public (dis)engagement.[2]  Building on this, the article then analyses the events leading up to the referendum and its aftermath.  It demonstrates that Cameron's support for a referendum on Britain's relationship with Europe can be attributed to a confluence of these pre-existing fuels, which in turn provided the conditions for this decision to be executed.  Flowing out of this, the article shows how the aftermath of the referendum has been a 'perfect storm', as the dilemmas arising from Brexit have dramatically exposed the extent to which the guiding principles of the constitution have been hollowed-out.

**The destabilisation of the constitutional compact**

The UK is frequently invoked as an exemplar of majoritarianism, in which the executive dominates the legislature and the wider policy process, its power reinforced by the absolute and indivisible character of parliamentary sovereignty. Normatively, this power-hoarding is justified in terms of decisiveness of action and clarity of responsibility; and within the comparative literature, the UK is generally portrayed as the empirical antithesis of the power-sharing polities of Western Europe.[3] Procedurally, Westminster's electoral rules are intended to reconcile the potential conflict between the principles of parliamentary sovereignty and strong government by 'manufacturing' legislative majorities; and the closely related principle of representative democracy casts Westminster's parliamentarians as Burkean 'trustees', at liberty to exercise both their 'industry' and their 'judgement' in the best interests of their constituents. Of course, there has always been a degree of license in the application of these principles, and this flexibility has hitherto allowed the constitution to endure.[4] Nonetheless, the norms of Westminster majoritarianism provide what Marshall has termed the 'critical morality' of the British constitution, wherein the 'rules that political actors *ought* to feel obliged by' underpin 'the relationship that *ought* to exist between "the people", parliament and the executive'.[5] In recent years, however, the credibility of this compromise has been steadily eroded and the constitution has been variously described as 'a mess… a bombed-out ruin left over from a major war', haunted by 'Dicey's ghost', and riddled with a 'set of anxieties over the contemporary nature and operation of constitutional processes… [and] a growing sense of systemic maladjustment'.[6] This 'major war' has been fought on many fronts, and the three interconnected fuels introduced above provide critical insights regarding the main drivers of these reforms and the tensions in which they have resulted.

Firstly, whilst the British constitution had previously been famed for its capacity for 'muddling through'[7], successive governments have embarked on wide-ranging reforms to the constitution without a final destination, or even a roadmap. Under New Labour, numerous reforms were instigated in quick succession, including the granting of operational independence to the Bank of England in 1997, the incorporation of the European Convention of Human Rights in 1998, and devolution to Scotland and Wales in 1999. Yet despite their magnitude, these changes lacked an overarching rationale and were executed without a full appreciation of their wider constitution bearing or of the potential for instability and spillover. The limits of Labour's constitutional forethought have since been made painfully clear in comments by former Prime Minister Tony Blair. Regarding devolution, for example, he claimed 'I was never a passionate devolutionist. It is a dangerous game to play. You can never be sure where nationalist sentiment ends and separatist sentiment begins'. An ad hoc and unprincipled approach to the constitution was also evident under Coalition. During the 2010 coalition negotiations, David Cameron offered a significant package of commitments to court the support of the Liberal Democrats, including a referendum on the alternative vote and the introduction of fixed-term

parliaments.  Similarly, on the eve of the 2014 Scottish independence referendum, the Prime Minister sought to 'save the union' by issuing a last-minute pledge for 'a major, unprecedented programme of devolution with additional powers for the Scottish Parliament', and quickly established the Smith Commission to put this into effect. The short-term political expediency driving such measures is evident.  In the run-up to the 1997 general election, the prospect of a hung parliament encouraged the Labour leadership to forge closer links with the Liberal Democrats, and constitutional reform was quickly identified as an area on which co-operation could brokered.  In the event, a landslide majority of 179 rendered this support unnecessary; and whereas reforms that would strengthen Labour's powerbase (devolution) were still instigated, those that would directly challenge it (electoral reform) were quietly sidelined.  Similarly, despite self-righteous claims that 'Labour have meddled shamelessly with the electoral system to try to gain political advantage', the concessions granted to the Liberal Democrats were either absent from (fixed term parliaments) or in direct contradiction to (electoral reform) the 2010 Conservative manifesto.[8]


Secondly, and as a direct consequence of this constitutional brinkmanship, the British political system has become permeated with alternative sites of legitimacy and pockets of 'discretionary spaces'.  This has been most starkly demonstrated in the context of devolution. Comparative research reveals a clear correlation between increased decentralisation and rising levels of nationalism, which is often attributed to the opportunities it provides for regional parties to garner electoral support and acquire office-holding experience.[9]  This has been borne out in Wales and Scotland, as Plaid Cymru and the SNP have become significant forces with the devolved parliaments; and although the electoral system was intended to limit the influence of the SNP, the party has been the sole party of office since 2007 and the main party of Scotland at Westminster since 2015.  Yet despite the former Prime Minister's supposed awareness of such 'dangers', inter-governmental relations proceeded on the basis of informal bilateralism, with formal structures falling into abeyance. Whilst informality may have sufficed when the same party dominated the central and devolved administrations, the emergence of executives of different political hues has revealed the ineffectiveness of formal structures such as the Joint Ministerial Committee.[10]


As well as introducing the potential for conflict between administrations, the devolution settlement effectively usurped the sovereignty of parliament, entrenching the devolved legislatures on the basis of popular consent.  Until 1997, referendums were a rarity.  Yet, in quick succession the Labour Government held referendums regarding devolution to Scotland and Wales (1997), a London mayor (1998) and the Belfast Agreement (1998), whilst promising further referendums on the issues of electoral reform and membership of the Euro.  In a similar vein, the Coalition held a nationwide vote on electoral reform (2011), referendums throughout England regarding elected mayors (2011), consulted the people of Wales on the extension of devolution (2011) and authorised a referendum on the issue of Scottish independence (2012).  The net effect of this is a pattern of 'constitution-by-

consent', equipping the electorate with a powerful voice – even veto-player capacity – in relation to key constitutional decisions.[11] Indeed, referendums have an important anticipatory power, as politicians react to avert an unwanted outcome, as illustrated by the Coalition's kneejerk response to the gathering nationalist support during the Scottish independence referendum campaign.

More broadly, the prevalence of referendums feeds into the third fuel of changing political participation and public (dis)engagement. Notwithstanding the unexpected result of 2017, successive elections have witnessed the burgeoning impact of 'other' parties and steady decline in the vote accorded to the two main parties. An inevitable corollary of this has been the erosion of the vote basis of government, which significantly challenges the majoritarian compromise. In particular, the 2005 general election saw Labour returned with a majority of 68 seats, despite being supported by only 35% of voters. Perhaps unsurprisingly, faith in Westminster politics has diminished, as evidenced by decreased turnout, a gap in participation between young and old, and persistently low levels of satisfaction with the way in which Britain is governed. At the same time, electoral volatility has raised the spectre of hung parliaments, which has encouraged politicians to make bold – and often undeliverable – pledges to secure the much-needed support of floating voters. It has also encouraged parties to engage in pre-election deal-making and post-election bartering; and as detailed above, constitutional reform has often been deployed as a bargaining chip. Yet whilst such brokering may be a rational response to the exigencies of a (potential) hung parliament, the ceding of discrete reforms underlines the extent to which politicians have remained willing to sacrifice constitutional principle on the altar of political power.

**Brexit as a confluence of pre-existing constitutional fuels**

For over twenty years the issue of Britain's relationship with Europe had riven the Conservatives, and its obsession was blamed by many for shutting the party out of office. Yet despite these divisions, the party's official stance was to support Britain's continued membership. This was made clear in its 2010 manifesto. Whilst promising that any extension of the EU's powers would be subject to a 'referendum-lock', the Conservatives nonetheless declared that '[w]e believe Britain's interests are best served by membership of a European Union that is an association of its member States'. It should be noted that David Cameron was not a passionate Europhile, and in 2011 stated that 'we sceptics have a vital point' about 'refashion[ing] the EU so it better serves this nation's interests'. Yet Cameron was also driven by a personal political ambition to unite the Conservatives, using his first leader's speech in 2006 to urge the party to stop 'banging on about Europe' in order to achieve electoral success.[12] Indeed, regular Ipsos MORI polls demonstrated that few thought that Britain's membership of EU was one of the most important issues facing the UK; and at the point that Cameron became Prime Minister in 2010, just 1% of those surveyed described it as a priority.

As this suggests, Cameron's decision to hold a referendum was not an inevitable product of principle or policy; and can instead by explained by the fuels identified above. Firstly, the promise of a referendum was a direct response to shifts in party competition and the attendant implications for office-holding. In the run-up to the 2015 general election a second hung parliament was widely regarded as the most likely outcome, driven by the surge in support for the SNP and UKIP. Having been returned as the most popular party in the 2014 European Parliament elections, UKIP had made plain its intention to target the working-class heartlands of both Labour and the Conservatives. It was in response to this threat that David Cameron first pledged in 2013 to renegotiate Britain's relationship with the EU, and confirmed in January 2015 that he would be 'delighted' to hold a fast-track referendum if the Conservatives were returned to government. Secondly, and related to this, the promise of a referendum was a product of Cameron's short-term and increasingly instrumental constitutional statecraft. As detailed above, Cameron had already demonstrated his willingness to gamble the cornerstones of the constitution for the prize of political power. In this instance the stakes were higher, and a number of commentators suggested that Cameron was speculating on one of three scenarios coming to pass: firstly, that the pledge could be dropped as part of coalition talks with the Liberal Democrats in the event of another hung parliament; secondly, that he could secure favourable terms for the UK in his renegotiations with the EU; and thirdly, that the electorate would welcome these terms and vote to remain.[13] As we now know, the first assumption was confounded, the second ill-founded; and on 23 June 2016, the British electorate went to the polls to determine whether 'the UK should remain a member of the European Union or leave the European Union'.

Notwithstanding concerns about the quality and veracity of the campaign, the EU referendum should be regarding as an important exercise of mass political participation. At 72.2%, the turnout was the highest of any UK-wide poll since the 1992 general election, with around 1.8 million more votes being cast than in the general election held just one year earlier. Moreover, in contrast to general elections, which routinely 'manufacture' majorities, the outcome of the referendum was clear: 51.9% of the electorate voted to leave the EU, which received 1.27 million more votes than the remain option. In terms of the arithmetic of Brexit, Cameron's third calculation had failed. In terms of constitutional principle, however, the referendum's result was less certain. In principle, unless Parliament specifically chooses to bind itself, a referendum can only have advisory status; and in contrast to the legislation that allowed for the referendum on the alternative vote, there was no requirement in the EU Referendum Act 2015 to bring into force the result. Yet, as demonstrated above, the increased frequency of referendums has entrenched a pattern of 'constitution-by-consent', and in doing so has created a competing source of legitimacy and authority. To describe referendums as merely advisory therefore neglects how their prevalence has fuelled public expectations regarding the way in which governments should respond to the popular will; and in doing so, downplays the high political risk that they entail. For the first time, however, UK government was on the 'losing' side on a matter of profound national importance, which has made painfully clear how any attempt to overrule 'the people' is politically untenable. This was underlined by Cameron, who in announcing

his resignation on the steps of Number 10, insisted that '[t]he will of the British people is an instruction that must be delivered'.[14]

The de facto paramountcy of popular sovereignty has been further underscored by the conflict over the triggering of Article 50. Despite campaigning to remain, the current Prime Minister Theresa May has repeatedly asserted that 'Brexit means Brexit', stating that 'it is the job of this Government to deliver it'. Initially, the Government claimed that its prerogative powers enabled it to act without Parliament's consent, and when in November 2016 the High Court ruled otherwise, the Government appealed to the Supreme Court. Summing up for the Government, Attorney General James Eadie QC argued that in passing the EU Referendum Act 2015, 'Parliament definitively and deliberately assigned [the issue] to the public vote and to prerogative action'; and that 'the imposition of a legislative pre-condition by the courts, which Parliament did not choose to impose itself, cannot be supportive of parliamentary sovereignty'. Ultimately, the Court disagreed and in January 2017 ruled by an 8-3 majority that whilst 'the referendum is of great political significance', 'the UK's constitutional arrangements require such changes to be clearly authorised by Parliament'.[15]

Yet despite being given authority by the Supreme Court, parliamentarians proved loathe to challenge the popular will. Whatever the outcome of a referendum, the interconnected principles of parliamentary sovereignty and representative democracy *ought* to empower parliamentarians to exercise their judgement *in spite* of popular opinion; and the opportunity for deliberation within the legislative arena *should* provide an important corrective to the reduction of an interminably complex issue to a single, zero-sum question. Yet although three-quarters of MPs campaigned to remain, the bill to trigger Article 50 was approved by a margin of 498 to 114. Far from acting as Burkean trustees, most MPs responded in full delegate mode; and it is estimated that only 10 MPs who represented areas that voted to leave actually opposed the bill. In justifying their decision, many MPs made explicit reference to how their constituents had voted. St Helens North MP Conor McGinn, for example, stated 'I would find it very difficult to ask that my mandate to represent people in St Helens North in the House of Commons is accepted and respected if I chose not to accept or respect the referendum result in my own constituency and nationally'. Those who had hoped that the opportunity for deliberation within the Commons would lead to a 'softer' Brexit were disappointed, and many remainers now focused their attention on the House of Lords. Indeed, Lord Mandelson said that he hoped 'the House of Lords will not throw in the towel early' in challenging the government's Article 50 bill.[16] That a former minister, whose own government had (half-heartedly) tried to reform the unelected upper house, was now calling upon the same House to defy the Salisbury-Addison convention (because the pledge to 'respect the outcome' was, after all, a Conservative manifesto commitment) almost defied belief. It also underlined once more the extent to which the unfinished business of successive governments' reforms has riddled the constitution with discretionary spaces, the widening gap between constitutional form and practice creating opportunities for competing claims to legitimacy to be advanced.

The burgeoning of discretionary spaces has also been laid bare by the conflict between the UK and Scottish governments.  Constitutional and foreign affairs are reserved matters; and whilst the leaders of the devolved assemblies had demanded a vote on Article 50, the Supreme Court ruled unanimously that EU relations are a matter for the UK government.  Although the Prime Minister stressed that she is 'determined from the start that the devolved administrations should be fully engaged in this process', she declined to accede to demands made by First Minister Nicola Sturgeon for any deal to be subject to the consent of the Scottish Parliament.  Yet with 62% of people in Scotland voting to remain, the First Minister has argued that Scotland is 'being taken out of the EU against our wishes'; demanding a second independence referendum to ensure the best deal for Scotland in Europe.  In justifying her demands, the First Minister laid claim to numerous sources of authority.  These include the SNP's 2016 manifesto commitment to hold a second vote 'if there is a significant and material change in the circumstances… such as Scotland being taken out the EU against our will'; the party's subsequent re-election 'with the highest share of the constituency vote won by any party in the history of devolution'; and the 'voice' of the majority who voted to remain.[17] It is possible to counter any one of these claims: support for a specific manifesto commitment cannot be inferred from voting behaviour alone; the SNP do not have the support of a majority of Scottish voters and do not hold a majority of seats in Holyrood; and, the referendum was advisory, UK-wide, conducted within a framework approved by the sovereign parliament at Westminster.  Nonetheless the reaction of the Scottish Government is a further manifestation of the ad hoc way that devolution has developed, and draws attention the many anomalies that have persisted.

In particular, tensions between the two administrations have been exacerbated by the existing inadequacies of inter-governmental machinery, with the Joint Ministerial Committee on Europe criticised for failing to involve the devolved administrations in decision-making.  Indeed, no meeting of the Committee was held ahead of the crucial European Council summit of February 2016 where Cameron sought to renegotiate the terms of the UK's membership.  In November 2016, a dedicated Joint Ministerial Committee (EU Negotiations) was established to provide a monthly 'forum to continue the UK Government's work with the devolved administrations in Scotland, Northern Ireland and Wales to secure the best Brexit deal for the whole of the United Kingdom'.  However, the Committee has not been placed on a statutory footing, which has been seen by many representing these regions as a sign of the Government's continued lack of commitment to meaningful co-operation.[18]

Finally, the confluence of fuels identified in this article have destabilised British government itself. Following what was effectively a 'coronation', Theresa May entered Downing Street on 13 July 2016.  With the outcome of the referendum often interpreted as an 'emphatic repudiation of the government', it was unsurprising that the 'takeover' Prime Minister faced demands to acquire her own mandate.  Constitutionally, a general election was

unnecessary.  Despite having an effective majority of just seventeen, the Government still enjoyed the confidence of Parliament, and the Fixed Term Parliament Act 2011 should have served as a bulwark against early dissolution.  Initially, the new Prime Minister was adamant that she was 'not going to be calling a snap election'.[19]  However with growing opposition in both Houses to May's 'hard' stance, and with successive opinion polls showing a surge in support for the Conservatives, the temptation proved irresistible.  On 18 April 2017, the Prime Minister announced her u-turn; and on 3 May 2017 Parliament voted to dissolve itself by a majority of 522 to 13.  The general election was actively framed by the Prime Minister as the Brexit election, and in making the campaign about 'strong and stable leadership', Theresa May gambled that her personal authority would carry her back to Downing Street. Yet as the campaign progressed, she failed connect with voters and failed to demonstrate the steely determination and political agility necessary to carry the UK through one of its most challenging periods.  At the same time, Jeremy Corbyn's star rapidly and unexpectedly ascended as the Labour leader reached out to parts of the country that others parties had failed to touch, particularly the younger generation.  Nonetheless, few foresaw the shock result, which saw the Conservatives returned as the largest party but without a majority of seats.  Indeed, whilst their share of the vote increased from 36.9% to 42.2% (their best result since 1983) the gains made by the Conservatives from the electoral decline of UKIP in England's blue-collar heartlands were offset by significant losses and a shift to Labour in more liberal, affluent and educated areas.[20]  The resultant hung parliament therefore underscored the extent to which changing patterns of party competition and voter volatility have challenged the norms of majoritarianism, whilst demonstrating that first-past-the-post cannot be relied upon to manufacture legislative majorities for plurality winning parties.


**Conclusion**

This article has demonstrated that the disparate reforms inflicted upon the constitution by successive governments have divided authority between multiple sites and created many discretionary spaces in which competing claims to legitimacy can be advanced. Thus, whilst the crisis wrought by Brexit may appear sudden, it should instead be regarded as the culmination of decades of constitutional drift.  The ratcheting of the devolution settlement, the half-reform of the Lords, the establishment of a separate Supreme Court, the extension of direct democracy, the entrenchment of parliamentary terms. Taken together these reforms are suggestive of a constitutional revolution.  Yet the unplanned, unprincipled and often instrumental nature of these reforms has instead resulted in a creeping crisis that few politicians sought to forestall.  Indeed, rather than averting this crisis, successive political leaders have actively engaged in constitutional brinkmanship for short-term political gain.


Set against this wider context, Brexit has therefore been a 'perfect storm', dramatically exposing the hollowing-out of the constitution.  It has also revealed the extent to which Britain has become increasingly divided in terms of both socio-demography (age, ethnicity, education, affluence) and geography (urban, costal, provincial, post-industrial), a trend further confirmed by patterns of voting in the 2017 general election.[21] Yet despite the scale

of these challenges, evidence suggests little appetite within the Government to address the constitutional fuels identified in this article, and it is clear that short-term constitutional expediency remains the order of the day.  Most obviously, this has been demonstrated by the willingness of the Prime Minister to make significant concessions in order to secure a confidence-and-supply arrangement with the Democratic Unionist Party (DUP).  Yet whilst this pact may have kept the Conservatives in office, its minority status has further diminished the Government's capacity to manage the extant socio-political cleavages and constitutional tensions identified above.  Moreover, the decision to enter into an alliance with the DUP risks constitutional spillover by undermining the Government's neutrality in the Northern Irish peace process and its capacity to resolve issues arising from Brexit such as the status of the border with the Republic of Ireland.  Against this backdrop, it is perhaps unsurprising the manifesto commitment to 'repeal the Fixed-term Parliaments Act' has been quietly dropped, presumably to insulate the Prime Minister from mounting calls for the early dissolution of Parliament.  Yet, as the decision to call a snap election in April 2017 demonstrated, the Act should be regarded as little more than a constitutional fig leaf.  Indeed, with Prime Minister's personal authority so clearly and brutally diminished, with deep schisms existing within the Cabinet, with the Government's negotiating strategy attracting widespread criticism, and with opinion polls suggesting varying degrees of Brexit regret, the pressures to call another election may prove irresistible.

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