

The Great Brexit Crisis: we are in for an unprecedented shake up of the UK constitution, laws, conventions and politics

*The UK seems to be rapidly heading for one of the most tangled and tumultuous political periods in modern history as Brexit nears its apogee, writes **Colin Talbot**. Whether you think we're headed to Valhalla or Ragnarok, the constitution, law, conventions and politics are all set to be tested in ways rarely seen. In this blog, he presents a quick guide to some of the institutions that will be severely tested over the next days and weeks.*



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Constitution

The UK is fairly unique amongst big, advanced, democracies in not having a written constitution. It's not that there aren't *any* written 'bits' of a constitution, on the contrary, there are many, many, bits – but there is not a single document. And many of the written bits and pieces that make up our ramshackle constitutional arrangements have highly dubious status, and some aren't even written down at all.

It's sometimes claimed that everything from Magna Carta (1215), the Petition of Right (1628), the Parliament Acts (1911 and 1949), Standing Orders of the House of Commons and Lords, Erskine May (first published in 1844), the Fixed Term Parliaments Act (2011 FTPA) etc all form part of our constitution. Some of these are really just historical curios, like Magna Carta. Others have no constitutional or even legal standing (like Erskine May, the so-called 'parliamentary bible').

Countries that do have written constitutions – probably the most famous example being the Constitution of the United States of America – also have a special set of rules about how they can be changed. In the USA an amendment can be proposed *either* by the Congress with a two-thirds majority vote in both the House of Representatives and the Senate *or* by a constitutional convention called for by two-thirds of the State legislatures (the latter process has never happened).

In the UK, by contrast, a simple Act of Parliament can effectively change the constitutional arrangements (as the 2011 FTPA recently did in quite far-reaching ways). There is a serious debate about whether the various pieces of legislation relating to the UK's membership of, and departure from, the European Union were 'constitutional' in nature. Some would argue, for example, that the 2016 EU referendum was constitutional in nature and therefore should have required a 'super-majority' (as in the USA). This was raised in Parliament at the time but was dismissed on the grounds the referendum was purely 'advisory'.

Laws

Laws are in theory much simpler – they just have to be passed through Parliament on simple majorities to become an Act. Except that actually also isn't true. Law – precedents – can also be effectively made by courts – including now a Supreme Court. These are only supposed to fill in gaps or provide interpretations of laws passed by Parliament, but in practice, they can go further. And whilst the UK remains part of the EU structures some of these decisions will be taken by the ECJ.

The role for the courts in both adjudicating legal disputes and cases and in setting precedents is another fundamental pillar of modern representative democracies. The courts provide a check on both executive and legislative power. An important point to make about both constitutions and laws in a democracy is that they both require what is sometimes called 'Losers Consent'. In other words, citizens, and political parties agree to 'play by the rules' and if they lose accept the right of the winners to pass laws or, in the case of constitutions, alter them. But 'Losers Consent' in democracies is also based on the basic principle that at some point in the future – sometimes the fairly near future – there will be opportunities for the losers to become the winners. Without that democracy would rapidly cease to exist.

Conventions

Conventions are rules of political practice that have evolved over time and are generally accepted by the participants in the political game. Some of them have huge import – for example, the (fairly recent) convention (which exists nowhere in law) that the UK Monarch must act on the advice of Her Prime Minister and Cabinet. Breaking such a convention by the Monarch would provoke a massive constitutional crisis and is unlikely to happen (but not impossible).

Other conventions are far flimsier and are, to coin a phrase, not worth the paper they are not written on. They exist only so long as the participants – and especially the government – want them to. A good example of the latter is the 'convention' that law officer's advice to government is not published. This 'sacred principle' has been broken by governments when they wanted to – not often, but it has happened.

Another dramatic example comes from the USA. The 'conventions' that a US President publishes their tax returns and distances themselves from any business interests whilst in office has been shredded by Donald Trump with the acquiescence of the Republican-controlled Congress.

'Conventions' can also be over-ridden by new laws (or constitutional changes). A good example here is the Fixed Term Parliaments Act. Before FTPA there were said to be various conventions about when a government might lose a vote of confidence in the House of Commons, forcing it to resign and call an election (in reality, many of these conventions were fuzzy at best). Since FTPA was passed all such conventions have been superseded by the precise process set out in the Act. Which does not mean there may not be circumstances in which a government – such as the current minority one – might not be forced politically by a major policy defeat to activate the FTPA mechanism to call an election. But they would not be compelled, legally, to do so.

Politics

Which brings us to politics. Conventions only exist as long as there an effective political consensus that they do. Governments may choose to stick to conventions even when they are to the advantage of the Opposition purely because they know one day, they will probably be the Opposition themselves.

But what about when they don't care? President Trump clearly doesn't and is riding rough-shod over many conventions that have survived for decades in US government. It's simply a question of power – if you have enough and don't care, you can override conventions. You cannot do that with laws or the constitution, as Trump is finding out. The courts have already thwarted various gambits and the new Democrat-controlled House will undoubtedly block from 2019.

The Great Brexit Crisis of 2018/19 may well be about to shake up the UK constitution, laws, conventions and politics in ways we have not seen for a very long time.

This post represents the views of the author and not those of Democratic Audit. It was first published on the [LSE's Brexit blog](#).

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