

The British Constitution's failure to manage existential risk: back to basics

 blogs.lse.ac.uk/brexit/2016/12/08/the-british-constitutions-failure-to-manage-existential-risk-back-to-basics/

08/12/2016

*Brexit comes at a precarious time for the UK – with an ineffective Opposition, continuing calls for Scottish independence and a referendum result that gives no guidance on what kind of exit the British people want. In the second part of a lecture delivered at the Goethe University in Frankfurt on **23 November**, **David Kershaw** warns that the UK's constitutional arrangements, unlike those of most European countries, provide a relatively open door to populist drivers for radical change. Given the risks associated with Brexit, much weight is accordingly placed on the representative function of the Commons – but there is concern that the reliance on direct democracy has undermined it. If the Commons fails to perform this role then the Lords must do so.*



A perfect storm of risk

The United Kingdom is in a precarious position, facing many foreseeable and significant economic, political and existential risks. It is a perfect storm of risk consisting of six components which exacerbate rather than control and manage the risks arising from the Brexit vote. I only have time to touch on most of these briefly here.

- First, as outlined, we have a referendum that does not, and cannot, give any majoritarian instruction or guidance about the nature of an exit arrangement and the range of acceptable trade-offs that it entails – but a referendum whose meaning has been expropriated by populist control of “the story” of “the meaning of the referendum”.
- Secondly, we have a Conservative government which has used Brexit to position itself within the more nationalistic, anti-immigration and, at times, implicit anti-foreigner components of the Brexit campaign; that is, a government at one with the story of the democratic majoritarian “mandate” to control free movement as a “red line”.
- Thirdly, we have the absence of political discipline which is normally generated by effective political opposition. This results from a separate and leftist, progressive insurgency within the Labour party. An insurgency that, to all but the most stalwart supporters of Jeremy Corbyn, renders the Labour Party a powerful pressure group and not a plausible government in waiting. An insurgency that allows the United Kingdom Independence Party (UKIP), as well as the Conservatives, to court the disillusioned white working class vote that for decades has been strongly pro-Labour. This leaves little doubt on the part of most commentators that however the UK exits, and however damaging it will be for the UK, the Conservative's parliamentary majority will not decline, but increase, at the next election.
- Fourthly, Brexit is taking place in the wake of other nationalist fault-lines which have arisen in the UK in the past decade, most importantly the Scottish Nationalists. The Scots voted to remain in the United Kingdom in 2014 by a majority of 55% on a turnout of 84%; the Scots voted 62% to 38% to remain in the European Union. Scotland has been given no role or veto in the Brexit negotiations. As a result, the likelihood of a second and successful Scottish referendum is not insignificant, although the economics of separation remain very difficult for Scotland.
- Fifth, there is a sense of great urgency on the part of the Brexiteers, if not clearly Prime Minister May. A sense of urgency driven by the fear that events may drain the current momentum from the idea of a radical exit connected to a clear populist mandate. If foreseeable or unforeseen events intervene to stop or truncate a radical Brexit, then they fear that it is unlikely to happen in most Brexiteers' lifetimes.

- And then there is a sixth, and in my view centrally important, component in this perfect storm of risk and its management. This final component of this perfect storm is the structural weaknesses of both the British constitution and our modern conception of representative democracy when faced with pressure for fundamental change. Weaknesses in the elements of a constitution that should, and in most jurisdictions do, enhance the probability of good decision making when faced with fundamental decisions that generate significant economic, social and existential risks.

In the political life of a nation, or any organisation for that matter, the constitutional settlement is a centrally important component for managing and controlling risk, and for maintaining certainty and stability in political, social and economic life. A constitutional settlement typically renders fundamental or game-changing events very difficult to implement. Such barriers to change take the form of either, or both, high-threshold voting hurdles or the co-approval of multiple organs of the state or the organisation. In a corporation, for example, constitutional changes cannot take place without crossing high-thresholds or several hurdles. In a UK Plc or German AG, to change the articles or the Satzung requires 75% of the votes cast by the General meeting; a Delaware corporation requires a vote of both the board and a simple majority of the shareholder body, but of all the outstanding shares. Similarly, pursuant to Article 79 of the German Grundgesetz, to change the Grundgesetz requires a two-thirds absolute majority of the Bundestag and two-thirds of the votes cast in the Bunderat, the Federal Council of the sixteen German Laender. In the United States, Article 5 of the US Constitution requires a two-thirds vote of both the House and the Senate in order to propose a constitutional amendment, which must then be approved by three-quarters of State legislatures. In a corporate context, such high and multiple hurdles are also applied to transformational events that do not involve constitutional changes, for example mergers.

These barriers to constitutional and fundamental change increase the probability that such game- changing decisions, when they occur, are good decisions. There must be overwhelming support to make them. Accordingly, such decision-barriers to fundamental change reduce the probability that short-termist, populist pressures can generate existential risks to the state or the organisation. They also dampen debate and demands relating to such fundamental change, as the probability that change can be generated is low. These barriers also generate positive economic effects, both within countries and corporations, as they provide long term jurisdictional and organisational stability.

A second, very basic, feature of the way in which modern societies and organisations manage decision-making risk (both generally and in relation to game-changing decisions) is that they deploy representative democracy not direct democracy. It is, of course, banal and self-evident that direct democracy is an unworkable form of government in large societies, and banal and self-evident that representative democracy enhances the quality of high-level decision making, as representatives are more likely to be skilled in decision-making and, as full time representatives, they have the time and the incentive to become more informed.



Photo: [UK Parliament](#) via [parliamentary copyright](#)

Whilst party control of Parliament, together with the Whip system, may lead us to lose sight of the effective functioning of representative democracy, the idea remains clear. It is about electing a representative who will represent the interests of her constituents; who will make an informed decision in the best interests of those constituents. A representative is not a pure conduit for the majoritarian views of her constituents. As part of our social contract empowering the representative we recognise that a neutral and more informed representative may act in ways that do not accord with the majoritarian, even our super-majority majoritarian view. We empower a representative to make an informed decision on our behalf; we defer in part to her expertise and skill. And whilst she may belong to a party, her loyalty in making such decisions belongs to her constituents. Her decision must be what she thinks, not what her party thinks, furthers her constituents' interests. Such a representative bargain generates better decisions and thereby, as compared to direct democracy, enhances our social welfare. Of course such a representative operates within the constraints of re-election, but again constitutional rules, such as mandatory term periods, facilitate freer, independent representative action.

This representative bargain is acutely important when it comes to game-changing fundamental decisions. Whilst "the idea" of the representative role may seem somewhat quaint or utopian in the context of the everyday cut, thrust and compromise of Parliamentary life, in the context of fundamental changes the representative role is a key constitutional bulwark enhancing the quality of decisions around pressure for radical change. Reliance on representative democracy lowers the probability that any game-changing decision will be made unless the "case for" is very strong. This is because representatives are more informed about the risks associated with such decisions than their constituents, and also because representatives are aware that they will have to answer for the consequences of the decision when they materialise, which may be some time after the popular demands for action subside.

In the United Kingdom we do not have a written constitutional settlement; we have never written down, at least fully and in one document, the terms of the British constitutional settlement and the terms upon which it can be amended. We have several core understandings of our constitution and multiple conventions which guide those core understandings. Most importantly, the Crown in Parliament is sovereign. Which, in theory, means Parliament can make any decision it elects to make. Absolute power resides with Parliament: it can distribute or retain power in any way it elects to. All exercises of power are made by simple majority vote, of the votes cast, of the two Houses of Parliament, namely the elected House of Commons and the unelected House of Lords – although the House of Commons has the legislative power to override the objections of the Lords, subject only to a time delay of

approximately a year before the Act can come into force following rejection by the Lords. Furthermore, under the UK constitution the Executive retains certain powers known as prerogative powers, for example the foreign affairs power to negotiate and make treaties. In the theory of the British constitution such prerogative powers are the residue of pre-18th century Kingly or Crown power. They are the Crown powers that are left by Parliament in the hands of the Executive, and could at any time be taken away by Parliament.

The effect of this constitutional structure is that there are no constitutional rules placing high voting hurdles on fundamental changes and, in theory, one organ of the British state – the House of Commons – can act alone; a power relationship that, together with the unelected nature of the Lords, drives a deferential outlook on the part of the Lords to Commons's decisions. In simple summary, the UK constitution provides no break, no distinctive barrier to radical and fundamental change. It provides a relatively open door to populist drivers for radical change. The UK constitution, therefore, is poorly designed to ensure good decisions are made in relation to game changing questions like Brexit.

The idea of representative democracy, as outlined above, is therefore of profound importance in the UK to good, long term decision-making in relation to game-changing events. Given the weakness of the constitutional settlement that I have just outlined, the effective functioning of representative democracy carries much more weight on its shoulders in the UK than it does in other jurisdictions. Its effective functioning is, therefore, of profound importance to the actual form Brexit will take and to the consequences of Brexit. The problem, however, to continue the metaphor, is that Parliamentary representatives do not appear to want to carry this weight.

More precisely, the problem is that the meaning and primacy of representative government in the United Kingdom has been challenged, and undermined, by the increasing acceptance of a role for direct democracy. For issues of fundamental concern there has been a marked shift in the UK in this decade towards using referenda. Since 2011 we have had three – on voting systems, Scottish independence, and the EU. Yet without a written constitution we have not set down any rules on the appropriate form or effects of referenda. We have not thought in any systematic way about the appropriate voting thresholds for such referenda. It is for this reason that the terms of the Brexit referendum could be set by David Cameron and his MPs. A referendum of fundamental and long term significance for the UK, on 50% of the votes cast, no super majority, no threshold of the overall electorate, and no four-country lock requiring support from each of the four countries of the United Kingdom. And furthermore, we have no clear rules on the authority effects of referenda: how to specify whether they are binding or advisory, and if the later, what does advisory mean in relation to a vote that is a binary choice for an outcome that is an awfully long distance from a binary choice.

With an unformed and uncertain idea of direct democracy and the rhetorical power of “people power” comes a diminished and less effective idea of representative democracy. Opening a door to direct democracy has compromised British representative democracy, which in turn enhances the risks associated with Brexit. We see in the wake of the referendum a real risk that the central tenets of representative democracy will be sacrificed to a manufactured idea of the people's will and the meaning of The Vote. For this reason, although Parliament is now likely to have a vote on triggering Article 50 of the Treaty of the European Union, many Remain Conservatives and Remain Labour party members appear likely to put up the white flag of surrender when faced with the rhetorical gun of “the people have spoken”. As of the date of this lecture, it seems probable that (assuming the Supreme Court affirm the position that Parliamentary approval is required to give an Article 50 notice) that Parliament will approve, on relatively short notice, a one line authorisation bill, with limited debate – the scope for debate being constrained by the limited wording of the bill itself.

To be clear, it is not that parliamentary representatives true to the ideal of their role should stop exit at any cost. Clearly they must give great weight to the exit preference articulated in The Vote when they decide whether to authorise the triggering of Article 50. But rather the point is that, as representatives, MPs should only allow Article 50 to be triggered following a detailed and informed debate about the range of Brexit options, including debate about the probability of various possible outcomes and their effects. And that they should consider placing conditions on

exit if preferred options are unattainable or improbable. Such sensible conditions are easily envisaged. For example, prior to triggering Article 50 the Government must determine definitively whether it is unilaterally revocable; or, for example, assuming unilateral revocability, that authority given to the Executive to negotiate is limited and that Brexit may not take its hard form, given the economic dislocation it is likely to generate.

This is a necessary part of the representative role, if representatives consider it to be in the interests of their constituents to impose such requirements and conditions. The claim that Parliament should not act in this way as it would force the Government to publicly show its hand, is so weak that it is quite remarkable that it can still be repeated or relied upon. The range of available “hands” are considered publicly in the newspapers every day. The Government does not have any “hands” that it has not revealed; or that have not been discussed in detail in multiple newspaper columns; or that will not be publicly revealed the day after the negotiations commence.

With regard to any possible conditions imposed by parliamentary authorisation – such as a no hard-Brexit condition – one could argue that they would undermine the executive’s negotiation strategy. However, the balance of considerations to determine whether such conditions are necessary are an inimical part of the representative role. In any context in which authority is delegated for a defined purpose, it is a truism that the more unconstrained the authority the greater the possible return. But given the risks associated with unconstrained authority it does not, of course, follow from that truism that an authority delegation will not be subject to limitations and conditions. The delegator of authority must always balance, on the one hand, the claims of the agent that more extensive authority will generate a better return, with, on the other hand, the risks of loss that such extensive authority may create. As a corollary of such balancing, a principal will often sacrifice a “best case” possible return and limit the agents authority in order to obtain a lower targeted-return that involves less risk of significant loss.

To use a driving metaphor to make this point, one could say that this would involve balancing the risk that an executive who is subject to no authority constraints may elect to drive very dangerously, versus the fact that we may not be able to go so fast if we include some brakes. Following such balancing, representatives may of course elect to impose no conditions on the authority delegation. However, at a minimum the representative function requires them to seriously consider them, and to impose them where they conclude that the risks and costs of driving dangerously exceed the likely negotiating advantage of not including any brakes. MPs must, therefore, resist the perfunctory acceptance of the notion that “the government must not show its hand” or “the government’s negotiating position must not be compromised” as a justification for compromising their representative function. The risks of loss may exceed the benefits of granting an unconditional authority to the Executive trigger Article 50. The failure to seriously consider such risks of loss and possible mitigating conditions would amount to a real abdication of their representative responsibility.

I hope that these concerns are not well founded and that the Commons will stiffen its resolve when the authorisation legislation is put before it. But if it does not do so then it is incumbent on the unelected chamber, the House of Lords, to stiffen its resolve and do the representative job that the British constitution has given it. This is likely to be presented as establishment coup by the unelected. However, such criticism would confuse the current constitutional role of the Lords, with the broader questions of the legitimacy of an unelected chamber and possible reform options. Such legitimacy concerns and ideas for reform are worthy of serious consideration, but until such reforms take place the Lords has the constitutional function to perform what it has been given: a representative function, not a rubber stamping function.

This post represents the views of the author and not those of the Brexit blog, nor the LSE. It is the second part of a lecture delivered by David Kershaw at the Goethe University, Frankfurt. [Read the first part.](#)

[David Kershaw](#) is Professor of Law at the LSE and Director of the Executive LLM Programme.

- Copyright © 2015 London School of Economics