

The UK is heading towards a frightening constitutional crisis over Brexit



*As the clock runs down on Article 50, a political crisis is looking increasingly likely. However, **Iain Begg** argues that this could become a more damaging constitutional crisis if Parliament is unable to settle how Brexit proceeds.*

With barely five months to go until the 29 March deadline for the UK's withdrawal from the EU, all eyes are on whether the two sides can cobble together a deal at one of the forthcoming European Council meetings this autumn. On the UK side, there is then to be a 'meaningful' vote in Parliament, while the European Parliament also has to approve the agreement and is broadly expected to do so. Intriguingly, a ruling from the European Court of Justice (ECJ) on whether the Article 50 process for leaving the EU can be withdrawn is also expected before the end of the year.

There has been feverish speculation in the UK about what will happen when the meaningful vote takes place. Will enough Conservatives oppose the government to block the deal? Will some Labour MPs defy their party whip to support the government, allowing it to squeak home? How much more money or what political concessions will have to be promised for Northern Ireland to keep the Democratic Unionist Party (DUP) on board?

The permutations are endless. The default expectation is that somehow the government will prevail, but there is a very real possibility that there will be no majority in the House of Commons for any of the options under consideration. What then? Clearly, the UK would face a major political crisis. The trouble is that, as the March 2019 deadline approaches, the constitutional process for what happens next is far from evident. Although much of the debate has been about what model for Brexit—Canada (with or without various plusses), Chequers, and so on—best captures the will of the people expressed in the referendum, the mechanism for delivering (or contesting) the form of Brexit cannot be neglected.

The UK is renowned for the flexibility of its system of governance, unencumbered as it is by a formal written constitution which prescribes how to proceed. Nevertheless, a political crisis could well become a constitutional crisis, because it has become unclear where power and responsibility now lie for dealing with Brexit. The roots of such a crisis lie in the authority vested by the UK political class in the result of the UK's 2016 referendum on EU membership. Although formally an advisory vote, it has acquired a status of untouchability, captured in the tautology "Brexit means Brexit" and Theresa May's repeated assertion of variants on "we are leaving the EU". What has happened is that the doctrine of parliamentary sovereignty articulated by the 19th-century constitutional theorist, A.V. Dicey, has been supplanted by one of the sovereignty of the people.



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Leaving aside the narrowness of the majority in the 2016 referendum and the fact that the 52 percent of voters who chose Brexit amount to just 37 percent of the electorate (29 percent did not vote) these are uncharted waters at a time of great political uncertainty. There is no simple roadmap for how to move on from the current impasse.

If the UK Parliament is unable to achieve a majority for whatever withdrawal deal the government puts to it, or to come up with a viable alternative, what happens next is unpredictable. Likely consequences might include the resignation of the prime minister and a vote of confidence. If only to preserve its own standing, a deeply split Conservative party might rally sufficiently to defeat such a vote, with a little help from the DUP, and try to stay in power with either a new leader or the present incumbent continuing to defy gravity. But it would be an even more precarious government, still at the mercy of the DUP, and the clamour for a general election would become deafening.

However, it is far from obvious that a general election would settle how Brexit proceeds. UK general elections almost invariably turn on how the electorate perceives the two main parties in relation to economic policy competence and the National Health Service. In the 2017 election, both these parties tacitly endorsed leaving the EU, but the result cannot be interpreted as decisive on the nature of Brexit. If the Labour Party were to campaign explicitly for remain in a further general election, as some are now hinting they would, it might translate into a clear choice for voters between hard Brexit and no Brexit. But the result could easily be a hung parliament or further ambiguity on Brexit.

Timing comes into all of this. The defeat of a Brexit deal in a meaningful vote before the end of 2018, followed by a general election, would see the uncertainty stretch into February, yet might still not permit a clear decision on what form of Brexit is pursued—if, indeed, it continues to be pursued. The only remaining constitutional mechanism would then be again to consult the people. A second referendum would take time, because it requires an act of Parliament, certain statutory checks and sufficient time for a campaign. Careful work by the Constitution Unit at University College London suggests it could be done faster than any previous UK referendum, but would still need a minimum of five months once Parliament agreed to go for it. Moreover, there is no consensus on what the question (or questions) would be in a further referendum. If it is a ‘yes/no’ question, permutations could include a re-run of the 2016 referendum on staying or leaving, or a choice between the withdrawal deal presented to Parliament and no deal. There could be a three-way question—remain, leave with deal, or leave with no deal—possibly using an alternative vote to enable voters’ second preferences to be counted.

Giving the final decision back to the people would require a postponement of the Article 50 deadline, allowed under the Treaty, but requiring the consent of both sides (the EU27 and the UK), and has a number of ramifications. This could lead to challenges for the EU side. Even as little as a three-month extension would raise interesting constitutional questions, not least whether there should be European Parliament elections in the UK in June 2019. Common sense might say ‘no’, and there is something of a precedent for the UK being excluded from EU27 meetings of (notably) the European Council, but the formal position might be different. Nigel Farage may yet have the opportunity to continue to rile his fellow MEPs.

Then there is the question of whether EU law would allow the UK to rescind its exit from the EU if the 2016 result were reversed. A case sent to the ECJ by the Scottish Court of Session, concerning whether Article 50 can be unilaterally withdrawn, is due to be heard on 27 November 2018. If the ruling is that it can be, it may encourage those who would like to see a postponement of the process, perhaps as a prelude to withdrawing it altogether. If the further resort to the people were to lead to an outcome perceived as contrary to what the 52 percent voted for in 2016, the outcry would be intense. Constitutionally, it would raise questions about the future role and status of such votes in UK democracy, whether on the EU (best of three?) or other topics. As Vernon Bogdanor, one of the country’s leading constitutional scholars, put it in an article in the Financial Times on 9 December 2016: “Our exit from the EU depends upon the continuing consent of the people. The notion of finality is quite alien to the spirit of democratic politics. For it must always remain open for a sovereign people to reassess its verdict”.

It is always possible that a rabbit will be pulled from the hat in the negotiations, leading to a Brexit deal that Parliament can accept. But if it does not, there is likely to be a constitutional morass, and that is a frightening prospect.

This article gives the views of the author, not the position of LSE Brexit or the London School of Economics. It first appeared on the [Dahrendorf Forum](http://blogs.lse.ac.uk/brexit/).

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