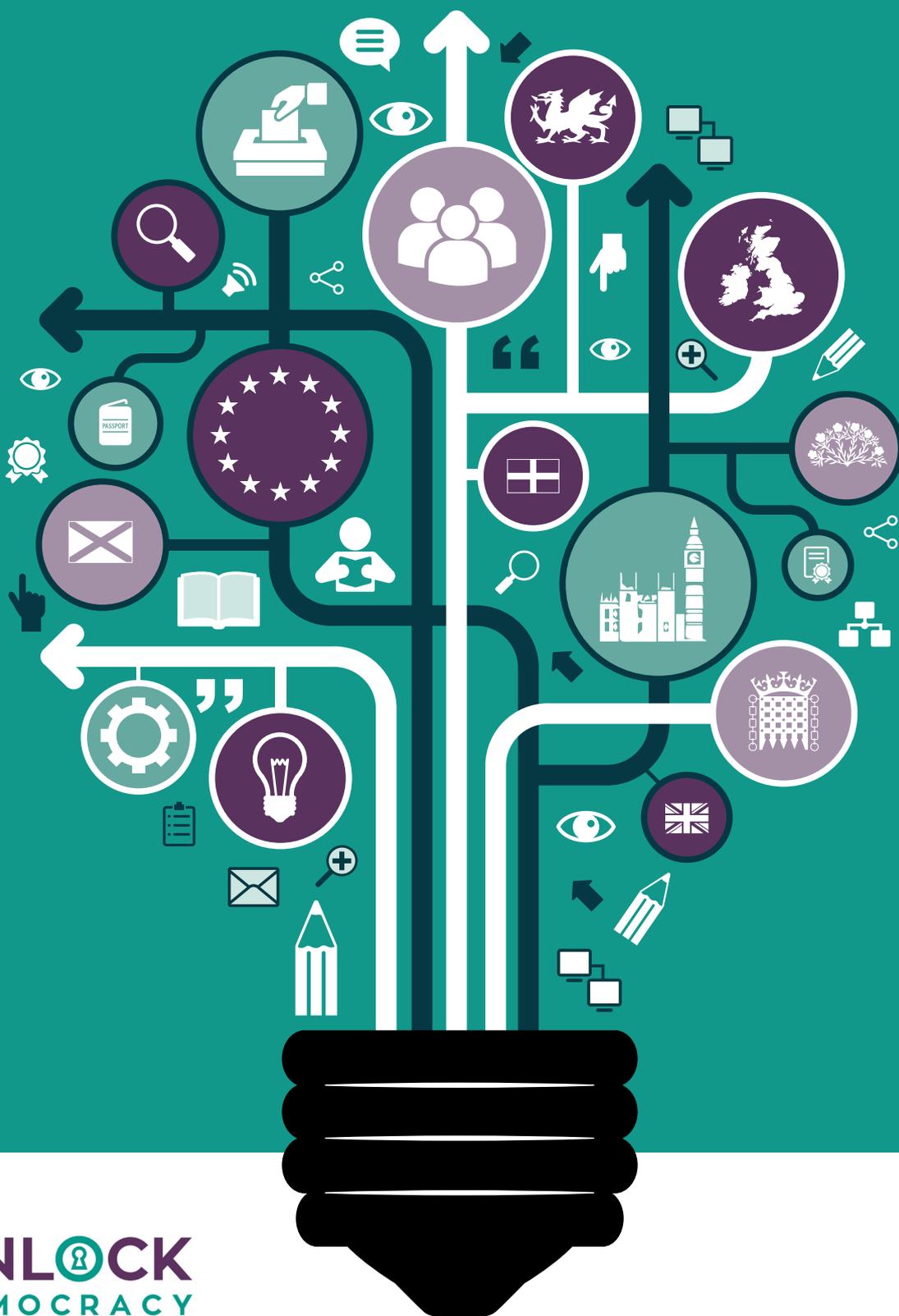


A Democratic Brexit

Avoiding Constitutional Crisis in Brexit Britain



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About Unlock Democracy

Unlock Democracy is the UK's leading campaign for democratic and constitutional reform. We are owned and run by our members.

We exist to put power in the hands of the people and believe that a vibrant, inclusive democracy makes everyone's lives better.

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Foreword

Division has been a defining feature of UK politics in the past few years. The fiercely fought and highly contentious EU referendum split the electorate almost exactly in half. The Scottish National Party renewed calls for an independence referendum scarcely two years since their unsuccessful campaign. The Labour party has been plagued by infighting between the leadership and the parliamentary party. Meanwhile the country faces some of the most significant negotiations in its history.

However, instead of promoting unity the government under Theresa May has been taking a more unilateral approach. Since May took over her party and the government last July, her leadership has been characterised by a bullish refusal to be transparent about her plans and actions. She was reluctant, for example, to release a whitepaper on her negotiating position, and in her Lancaster House speech accused those of scrutinising her plans as going 'against the national interest.'

This is part of an even broader trend towards decreasing government transparency, with the Institute for Government reporting a marked trend under the Conservatives of an increase in the number of Freedom of Information responses being withheld¹.

We live in an age where power in UK politics is overwhelmingly held by the executive, and a Prime Minister that refuses to be open to scrutiny threatens to undermine our democratic processes. Democracy is not only about casting a vote in an election. Without a written constitution to clearly define the rights of the people and limitations on the powers of government, it is increasingly challenging in the UK to effectively hold the government to account.

In April Theresa May went before the country and asked them to endorse her approach. She criticised the dissent from the opposition parties claiming that 'division in Westminster will risk our ability to make a success of Brexit'². However, instead of the resounding approval of a landslide majority she was expecting to receive, her Conservative party lost seats resulting in a hung Parliament. The people rejected the scrutiny shy, unilateral approach to Brexit negotiations.

Inclusive, consensus based processes are now not just constitutionally and democratically important but also a practical necessity. The Conservatives will have to rely on the DUP to pass key legislation, forcing them to pay greater attention the unique needs of Northern Ireland. The new 13 new Scottish Conservative MPs will also play an important role. Their leader Ruth Davidson recently called on Theresa May to 'look again at their Brexit strategy'³. To what extent will the Scottish Conservatives act as a caucus with a different Brexit agenda to their English and Welsh colleagues?

Even with their 'confidence and supply' deal the government's working majority hangs on a knife edge. Theresa May will no longer be able to make decisions without the support of her backbenches. The party's electoral position is now far more precarious, without serious efforts to understand the wishes of the electorate on this hugely important issue it remains unclear whether the government could survive another election.

Like the country, Unlock Democracy members and supporters were divided on Brexit. Some see it as a bright opportunity for national renewal, others fear it will mean the end of hard won rights and freedoms. We started our Democratic Brexit project immediately after the referendum to bring people from all sides of the debate to explore what taking back control of our democracy might look like. We explored how Brexit could lead to a different type of democracy and looked at international examples to see how the Brexit process could be run in a way that brings people together to build a shared future.

This report highlights the constitutional issues that have permitted such an executive dominated Brexit process so far. It also provides recommendations as to how a more inclusive and democratic Brexit could be achieved. It considers how Parliament, the devolved legislatures and the people could be involved throughout. We implore the government to take heed of our suggestions and change their approach so that the next few years can be defined by unity, not yet more division.

Alexandra Runswick
Director

Introduction

On 23 June 2016 the UK electorate voted to leave the European Union. This marked the beginning of a process that will dominate UK politics, certainly for the next few years and potentially the next few decades. Although the referendum answered the question on the UK's membership of the EU, it also highlighted many questions of fundamental constitutional importance.

What, for example, was the legal force of the referendum? Could the government trigger article 50, or would parliamentary consent be required? What are the limits of Royal prerogative powers? Is parliamentary sovereignty really possible? What is the role of the devolved administrations in negotiations? Without a codified constitution to guide us many of these issues remain highly contentious.

For the most part, these questions remain unanswered, or subject to vague speculation, and determination by the executive empowering them at the expense of other branches of government. This report explores such constitutional issues, identifying specific problems that have arisen as a result of Brexit and framing them in the context of wider issues with our uncodified constitution. It will consider what role Parliament, the devolved legislatures, and the people should play in the Brexit process, and make recommendations as to how a democratic Brexit could be achieved. It will also consider how these problems can be avoided in the future, concluding that the UK needs a codified constitution.

It remains unclear what role Parliament will play in the process of the Brexit negotiations in light of the recent election result. The need to restore parliamentary sovereignty was one of the rallying cries of the Leave campaign. Yet, in the Brexit process prior to the election it appeared to be the executive that was being empowered at the expense of Parliament.

Treaty making remains a prerogative power, affording the executive enormous control over the negotiations. The one constitutional restriction, the power for Parliament to object to treaty ratification, will do little to influence the substance of negotiations. The government has promised Parliament a vote on a final deal but unless the government changes course the only choice on offer may be between the deal the government secures, and no deal at all. Should this be the case, Parliament will have little choice but to accept the offer put forward by the government.

The government's approach so far has demonstrated a desire to avoid scrutiny. The government has been reluctant to give Parliament either input in, or information on their negotiating position. It has framed parliamentary scrutiny as undermining the national interest and as a ruse to defy 'the will of the people'. In addition to this the Great Repeal Bill will likely cede more powers to government ministers, allowing the government to bypass Parliament when making legislative changes. There are few official mechanisms available to Parliament to scrutinise and influence the government during Brexit negotiations, but considering their fragile majority will Parliament continue accept this approach? We must ensure that MPs, as the representatives of the people, can be meaningfully involved in Brexit.

Looking beyond Westminster, there are questions as to what role the devolved legislatures will play, if any. Two of the four constituent nations voted to remain in the EU, and all three devolved administrations want to remain in the single market⁴. Thus far the Prime Minister has exercised her constitutional right to ignore the opinion of the devolved legislatures, but such an approach is already creating fractures in the union which could potentially lead to its demise.

The Brexit process has highlighted the lack of legally enforceable mechanisms through which the devolved legislatures can influence the UK government. They are instead reliant on goodwill and promises from the Prime Minister. So far, few have been kept. The government has also failed to announce any mechanism for distributing powers repatriated from the EU to the devolved nations. Given its complexity, the process will be highly contentious and final decisions about how power will be distributed will likely be made in Westminster. Will Holyrood, Stormont and Cardiff be satisfied playing the role of silent, junior partners in the most significant deal the union has undertaken in a generation? If the Prime Minister is serious about her promises for unity, then the devolution agreement will certainly need to be revisited.

The referendum was an expression of people power, but democracy is a process and not an event. Rather than interpreting the result as a blank cheque to implement its own vision of Brexit, the government must use Brexit as an opportunity for public engagement. After we leave the EU the whole statute book of EU laws will be revisited, and the public must play a central role in deciding which laws to keep, amend and repeal. The result of the referendum should not be viewed in terms of 'winners' and 'losers'; labelling those who voted to remain as 'remoaners' and accusing those who voted leave of being 'misinformed' is not helpful to fostering a healthy democratic culture. After a divisive referendum we must engage in deliberation, and aim to create consensus and a united vision of post-Brexit Britain. We also need to think critically about the way people are represented in our political system, addressing the incongruence between public opinion and the way that is represented in Parliament, which was made apparent by the referendum result. A failure to tackle these issues will further undermine public trust in political institutions and compound the alienation from the political establishment that many voters feel.

Ultimately, many of the problems that are highlighted in this report are the result of an overly powerful executive. Our piecemeal uncodified constitution has not been designed in a way that clearly defines the powers each part of government possesses, and the checks and balances on each. It has evolved over time from an absolute monarchy, leaving imbalances in power and uncertainty around constitutional rights. In this context, executive overreach has been left unchallenged and has become normalised in our political system. Relying on a mix of ancient royal powers, strong party discipline, and a relative abundance of resources, the government has almost complete control over Brexit. This report proposes some recommendations for how we could make Brexit more democratic. However, they largely represent temporary fixes. Ultimately, the UK needs a codified constitution.

Parliament



Parliamentary sovereignty is a fundamental principle of the UK's uncodified constitution. Only Parliament has the power to make and unmake laws, or give and take away citizens' rights. However, far from Parliament playing a central role in Brexit, the last parliamentary term saw the government holding all the power. For example, the government attempted to bypass Parliament when they moved to trigger article 50 without parliamentary consent and were only thwarted by a public legal challenge⁵. They limited Parliament's ability to scrutinise their plans by revealing only limited information about their negotiating position. They reluctantly released a white paper after months of pressure, which ultimately contained little detail or insight. Far from acting transparently and welcoming scrutiny, the government has framed scrutiny as being damaging for the UK. In her 12-point plan speech given at Lancaster House in January 2017, the Prime Minister stated that those seeking more information on the government's approach "will not be acting in the national interest"⁶. So far the government has been taking a unilateral approach to Brexit, seeking to bypass Parliament at key stages and avoid scrutiny. Theresa May sought a mandate for her Brexit strategy and approach to negotiations when she called a snap election in April this year. However, the Conservative party lost seats and as a result their majority in Parliament, strengthening the case for Parliament to play a leading role in negotiations.

Going forward, the government will negotiate two deals; the first an exit treaty sometimes referred to as the 'divorce deal', the second an agreement on the new EU-UK relationship. It is the government's position that they will be negotiated concurrently (even though, at the time of publication this approach had not agreed by the EU), and this report will refer to them collectively, except where it is necessary to distinguish between them. Royal prerogative powers allow the government to dominate the treaty making process; if Parliament is given no choice other than to accept the deal the government has negotiated, they will be reduced to nothing more than a rubber stamp. Parliament's power to object to treaty ratification will provide no opportunities for meaningful engagement. MPs must be given the opportunity to influence the government's negotiating position throughout the process and provide genuine scrutiny – and at this stage these mechanisms are simply not in place.

Concurrently, the executive is also pursuing powers to amend legislation without consulting Parliament as part of legislation that, at the time of this report being published, was being referred to as the Great Repeal Bill. This presents the potential for executive abuse of law making. If the government continues with its previous approach to parliamentary involvement and scrutiny the most important decisions in a generation will be made, not democratically, but by a handful of people behind closed doors. The referendum instructed the government to leave the EU but it did not hand them a blank cheque to do so unilaterally. The election result has demonstrated that the government's approach in the last Parliament is untenable.

A Real Choice?

In a speech outlining her 12-point plan for Brexit, the Prime Minister promised the final deal with the EU would be put to a vote in both Houses of Parliament⁷. In the last Parliament, the Minister of State for Exiting the European Union at the time, David Jones, made it clear that "The vote will be either to accept the deal that the Government will have achieved or for there to be no deal"⁸. As democratically elected representatives, Parliament should be involved in decisions on the future of the country, not just asked to rubber stamp deals made by government. Parliament's vote on the final deal should be a real choice, involving a genuine decision between a number of acceptable options.

Currently it is unclear what would happen if Parliament rejected the final deal, and there are a number of possibilities for how this could play out. Firstly, the UK may request to restart negotiations with the EU in an attempt to reach a better deal, which would almost certainly require an extension of the two year deadline and approval from the European Council, which is comprised of the heads of governments of all member states⁹. It seems unlikely that all 28 member states could reach a unanimous agreement, at least in what would likely be a very short time frame, and this outcome could not be relied upon when MPs vote on the final deal.

Another option would be leaving the EU with no deal at all. In this circumstance the UK would fall back on World Trade Organisation (WTO) rules. In such an instance, the UK could face billions of pounds of tariffs on imports, potentially raising food prices and creating additional costs for UK businesses¹⁰. This option would be unpalatable to most MPs.

A third option would be remaining in the EU. If this were an option Parliament would be making a real choice in deciding whether to accept the government's deal or not. This option would allow Parliament to make a real choice, deciding whether to accept the government's deal or remain in the EU. However, whether this is possible depends on whether article 50 is revocable which, even if it is possible legally, may be politically difficult.

Academic and legal opinion on the revocability of article 50 is split, and the text of the article does not offer much clarity. Some legal commentators, including the author of article 50¹¹, have argued that article 50 can be revoked as “there is nothing in the wording to say that you cannot” revoke it¹². There are provisions for re-entry into the EU once the state in question has left¹³ but none stated for use during the negotiation proceedings. Legal expert, Professor Wyatt told the House of Lords European Union Committee this means the UK is free to change its mind before negotiations have concluded¹⁴. Conversely, other academics have argued that the time bound negotiation period of two years indicates that once a state has notified the EU of its intention to withdraw, there is no turning back. Only the terms of exit are negotiable, with the exit itself being inevitable¹⁵.

A report by The UK in a Changing Europe questioned whether the UK would be able to revoke its notification of exit under the terms of the Vienna Convention, which informs international law on treaties. Articles 65-8 say that until a state actually leaves a treaty it is free to change its mind. However, it also suggests these articles are intended for treaties without a ‘get out clause’ and the Vienna Convention also states that once notification has been given, the state cedes the right to change its mind¹⁶.

Legal speculation aside, the government's position in the last parliament was that article 50 will not be revoked. It maintained this position during the Supreme Court case on the triggering of article 50, despite this closing one potential line of argument¹⁷. As article 50 is part of EU law, the only way to get a definitive answer on this question is by referral to the European Court of Justice (ECJ). As the matter was uncontested in the Supreme Court case, it was not referred and the court took no view on this particular matter.¹⁸ There was a court case in the Irish courts whose plaintiffs sought to refer this question to the European Court¹⁹. However, the case was struck out in May on the request of both Ireland and the plaintiffs²⁰.

Without an answer from the ECJ, the UK government's stance on article 50 is conclusive as far as Parliament is concerned. Unless in light of the election result the government reconsiders its position, remaining in the EU is not an option that will be available to MPs when they vote on the final deal. MPs will be forced to choose between accepting the deal the government has negotiated or face no deal at all. The lack of a real choice does not seem to be consistent with parliamentary sovereignty. The reason the government is able to exercise so much control over the options, and the final deal put to Parliament is due to the powers they have inherited from the monarchy.

The Royal Prerogative

A feature of the UK's uncodified constitution is the existence of exceptional powers for the executive known as prerogative powers. They are relics from monarchy rule, but still serve an important purpose in allowing the government to act quickly in emergencies. These kinds of powers are a common feature in democracies worldwide, but are usually governed by written/codified constitutions which place limits on their use and provide mechanisms for scrutiny. As the UK lacks a codified constitution, use of these powers goes largely unchecked, presenting the potential for abuse²¹.

Treaty making is a prerogative power and so the government has considerable control over the Brexit negotiations and deal. This permits the government to act unilaterally, without the consent of Parliament. The few restrictions that exist often rely on conventions, which can be ignored by the government. Perhaps even more problematically, these powers are ill-defined so it can be difficult to identify when the government is acting beyond its power. Without clearer definition of these powers and checks and balances on their use, the government will be able to bypass Parliament when making important decisions about the future of the UK.

Prerogative powers were historically exercised by the reigning monarch, and have been gradually eroded or transferred to the government as the UK has evolved into a democracy. The monarch still maintains some of these powers which are exercised on the advice of ministers, such as the appointment of Lords. Other powers have been transferred directly to ministers themselves. Examples include the power to deploy armed forces overseas, to issue or revoke passports, and to make and unmake treaties. Parliament can remove or limit prerogative powers by explicitly legislating against them, and has done so in the past. The Fixed-Term Parliament Act 2011, for example, removed the power of the monarch to dissolve Parliament²². There are also a number of conventions in place to allow Parliament to scrutinise the use of prerogative powers. For example, after the Iraq war Gordon Brown introduced a convention that the government must seek Parliament's consent before deploying troops abroad. David Cameron adhered to this convention when Parliament voted against military action in Syria in 2013²³. However, it has not always been applied consistently. Two years previously in 2011 the same government held a vote on military action in Libya three days after announcing it would participate²⁴. Like all conventions, these are not legally binding, and the government could simply use prerogative powers to overrule the will of Parliament should it choose to.

A further problem with prerogative powers is that they are ill-defined. The only attempt to write a definitive list of these powers was in 2009 in the government's Governance of Britain Report. The report acknowledged the indeterminate nature of prerogative powers and in particular the difficulty interpreting them:



The scope of the Royal prerogative power is notoriously difficult to determine. It is clear that the existence and extent of the power is a matter of common law, making the courts the final arbiter of whether or not a particular type of prerogative power exists. The difficulty is that there are many prerogative powers for which there is no recent judicial authority and sometimes no judicial authority at all. In such circumstances, the Government, Parliament and the wider public are left relying on statements of previous Government practice and legal textbooks, the most comprehensive of which is now nearly 200 years old.²⁵



Interpretation by the courts was required most recently when a case was brought against the government regarding the triggering of article 50. The government took the position that they could trigger article 50 without seeking parliamentary approval using their prerogative power to break treaties. The claimants argued that to do so was illegal as it would begin a process that would affect the rights of UK citizens, and only Parliament has the ability to remove or create rights. The court ruled in favour of the claimants²⁶ and the government introduced a bill to obtain the authority to trigger article 50. Crucially, had this case not been brought to the attention of the courts by members of the public, the government could have easily overstepped their constitutional powers and set a precedent for changing the rights of citizens without the consent of Parliament. The absence of a codified constitution in the UK has meant a long, expensive and complicated legal process was necessary to establish the answer to a question that in any country with a constitution would have been straightforward.

With ill-defined prerogative powers, it is a challenge for Parliament to legislate against them. Scrutiny and accountability are difficult, as neither the government nor Parliament knows precisely where the limits of these powers lie. The ambiguous nature of prerogative powers and the ease at which they may be abused poses serious challenges to democracy in the UK. For our democracy to function, Parliament must be able to act as a check and balance on the powers of the executive.

Recommendations

Defining and Limiting Prerogative Powers

- There should be a **comprehensive government review of prerogative powers**.
- Those powers which are deemed necessary functions of the executive should be **clearly defined and put on a statutory basis**. This will allow parliamentarians, the public, and the government itself to clearly understand the limits of the power of the executive, and therefore enable appropriate action if the government acts beyond these limits.
- Mechanisms for parliamentary approval or scrutiny, such as the convention on war powers, should also be put on a statutory basis so that they may be legally enforceable.

A Meaningful Role In Negotiations

A treaty is any formal agreement made between states. As treaty making is a prerogative power Parliament has no role statutory role in the negotiation process, and so this has broad implications for Brexit. There are no requirements for the government to seek consent for their negotiating position, or even provide Parliament with information the progress of negotiations. This is problematic as there was no plan for Brexit prior to the referendum on leaving the EU and so no mandate for a particular type of Brexit, such as what has been characterised as a 'hard' or 'soft' Brexit. The electorate did not strongly endorse any political party's parties plan for Brexit in the June election. Therefore it is of utmost importance that decisions are made on a cross-party basis and not according to the vision of a small group of ministers.

So far, the government has been unwilling to allow Parliament to participate in the development of the UK's negotiating position, and it has been reluctant to provide even basic information²⁷. Brexit will have a profound effect on the country for decades to come. It should therefore not be carried out on the whims of the government of the day, but rather after a process of inclusive deliberation. Parliament needs a meaningful role in negotiations, which means having the opportunity to influence the substance of the government's negotiating position, hold the government to account, and shape the final deal. After a divisive referendum and inconclusive election, parliamentary involvement would help build cross-party and cross-country consensus by encouraging the government to appeal to a broad range of interests. If the government continues to view the negotiations as the expression of its own will, and continues to sideline Parliament, it will lack legitimacy and further entrench divisions.

The referendum gave the government a political mandate to leave the EU, but voters did not endorse any particular negotiating position. Infamously, the government did not plan for the eventuality of a vote in favour of leaving the EU,²⁸ and the various Leave campaigns set out competing visions of post-Brexit Britain. The 2015 Conservative Party manifesto committed to remaining in, and even expanding, the single market.²⁹ Yet in January the Prime Minister announced Britain would not stay in the single market.³⁰ In April, Theresa May announced her plans for a snap election, asking voters to endorse her and her Brexit negotiating position. She said 'every vote for the Conservatives means we can stick to our plan for a stronger Britain and take the right long-term decisions'. However she did not receive the mandate she was hoping for, and the Conservative party lost seats.

Given that it is not clear that the country has endorsed the government's negotiating position, it is even more important that the government involves Parliament, as the representatives of the people, in negotiations. Failure to do so risks the most important decisions of a lifetime being made without consensus and on the basis of a handful of people's interpretation of an answer to a single question.

Parliamentary involvement in treaty making is not without precedent. Ahead of the Maastricht conference, then Prime Minister John Major put a motion before the House of Commons asking MPs to endorse his negotiating position³¹. The current government has justified their approach by repeatedly claiming that to involve or even inform Parliament of their plans would weaken their negotiating position. The Secretary of State for Exiting the European Union, David Davis, said that a proposed amendment to the European Union

(Notification of Withdrawal) Bill which would put a parliamentary vote on statutory footing and require a vote in the event of 'no deal' "would not only restrain the negotiating power of the Government but would create uncertainty and complications throughout the negotiating process while lessening the chances of the mutually beneficial deal we are seeking"³² However, many European countries have procedures which put their national parliaments at the heart of EU negotiations, without jeopardizing their national interests.

Some legislatures in Europe are involved in mandating their government's negotiating position in treaty negotiation. For intra-EU negotiations this is often done by a committee with special responsibility for EU affairs. In Denmark, prior to an EU Council meeting the minister concerned is required to appear before the European Affairs Committee. They give an oral presentation outlining the government's negotiating position, including potential criticisms and the parameters they will operate in. The Committee is able to ask questions and debate the matter. The Committee is then asked to accept or reject the position, and if members representing more than 90 of the 179 seats have stated their opposition to the position the minister must return with a revised proposal at a later date³³. Similar systems are also in place in Finland³⁴ and the Netherlands³⁵, although the mandate in these countries is politically but not legally binding. Whilst comparable committees exist in the UK Parliament, their powers are much more limited.

The UK Parliament has no committee specifically responsible for scrutinising treaty negotiations. Unlike some of its European counterparts, the European Scrutiny Committee (EUSC) in the House of Commons does not have a role in mandating the government's negotiating position prior to European Council meetings. It is responsible for sifting through proposed EU legislation and identifying pieces of particular importance. However, by relying on documents as the trigger for scrutiny the committee misses the opportunity to influence early stage decision making where the substance of the government's policy position is usually formulated. They have the power to refer a proposal to an ad-hoc EU sub-committee or recommend it for debate. However, it is still up to the government to decide whether a debate gets any time. The committee also has the power to conduct inquiries,³⁶ but the government is able to ignore any recommendations. While the committee's work is important, their capacity for influencing government policy is very limited. There is a scrutiny reserve, which prevents ministers from agreeing to proposals without being 'cleared' by the EUSC or passed by resolution of the house. However, the meaning of 'cleared' is vague, and Ministers also have the power to override the scrutiny resolution should they wish to.³⁷ Even if the EUSC do oppose an EU proposal, the government is not bound to follow their advice. The European Union Committee in the House of Lords performs a similar role. It also has 6 sub-committees responsible for scrutinising specific policy areas within EU competencies.³⁸ It considers EU documents deposited in the House by a minister. Like its counterpart in the Commons, much of its work is related to the scrutiny reserve – however, it falls prey to the same criticisms as the Commons committee whilst also lacking a democratic mandate. The existing structures of EU scrutiny so not provide mechanisms through which Parliament can influence Brexit negotiations.

Nevertheless a parliamentary committee is an appropriate place to build legitimacy for a negotiating position. The cross-party nature of committees fosters cooperation and deliberation, in contrast to the often adversarial nature of debates on the floor of the

house. As decisions about Brexit will bind future Parliaments for decades to come, it is important that they are not made on the whim of the governing political party. Parliamentary committees also allow members to develop a high level of expertise, allowing them to scrutinise the government more effectively and bring forward innovative recommendations. However, the rewards of this are only realised if the committee have sufficient power to make a meaningful contribution to government policy. The House of Commons Exiting the European Union Committee (ExEUC) could play a vital role in shaping the government's negotiating position and scrutinising negotiations. But they must be given the power to enable them to do so.

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As well as having decisive power to influence the government, Parliament needs to be able to provide effective and meaningful scrutiny. In their white paper on Brexit the government promised that Parliament would have the opportunity to scrutinise negotiations through backbench debates, parliamentary questions, and select committee hearings. However, Parliament will not be able to provide purposeful scrutiny unless the government discloses the information necessary to do so. Theresa May and her government have already indicated they will not be revealing much of what happens in the negotiating room. They said in their white paper:

“To enable the Government to achieve the best outcome in the negotiations, we will need to keep our positions closely held and will need at times to be careful about the commentary we make public.”³⁹

It must be recognised that a certain level of confidentiality may be required. However, provisions can be made for the viewing of confidential documents, and indeed they have for other treaty negotiations. For example, draft versions of the Transatlantic Trade and Investment Partnership (TTIP) were made available to MEPs and MPs in secure reading rooms.⁴⁰ If the government has total control over the flow of information there is a risk they will use this to limit scrutiny. The Committee for Exiting the European Union is able to meet in secret and will be a more impartial judge of what information should be given to the house, balancing secrecy and scrutiny.

The government has at least committed to providing Parliament with as much information as the European Parliament will receive⁴¹. So what does that entail? The European Parliament has stringent guidelines for what information must be provided by the European Commission. It remains to be seen whether the UK government has the structures in place to meet these requirements. The Treaty on the Functioning of the European Union states that:

“The European Parliament shall be immediately and fully informed at all stages of the procedure.”⁴²

The details of what this entails are specified in the 2010 Framework Agreement between the European Parliament and the European Commission. This requires that all draft negotiating objectives be presented to the European Parliament at the same time as the European Council, and that the same information should be provided to both bodies. Sufficient time must be allowed for the European Parliament to give feedback and the European Commission must explain how Parliament's views have been taken into account.⁴³ This level of information is not provided in existing UK arrangements for scrutinising EU negotiations.

At present, the UK parliamentary committees responsible for EU scrutiny – the European Scrutiny Committee in the House of Commons and the European Union Committee⁴⁴ in the House of Lords – receive less information than their European counterparts. For example, the UK Parliament does not automatically receive *Limité* documents, which are EU documents that are not public and for which circulation is restricted. Both committees are able to request these documents, but they are not told what documents exist. Therefore they are unable to know which documents are useful for the purpose of scrutiny⁴⁵. For the government to fulfil its promise of providing as much information to Parliament as the European Parliament receives, new arrangements will need to be put in place. The government's actions thus far have not indicated a willingness to do so.

The UK government have been unwilling to reveal much information when it comes to their negotiating position. They were reluctant to produce a white paper, which was eventually published only after MPs had voted at second reading in favour of the European Union (Notification of Withdrawal) Bill⁴⁶. Now published, it has provided little detail about the government's strategy. For example, the white paper confirms that the government intends to leave the single market but makes broad and general claims:

"The Government will prioritise securing the freest and most frictionless trade possible in goods and services between the UK and the EU."⁴⁷

The government has provided no details as to what "the freest and most frictionless trade" would look like, or how the government intends to achieve this. The ambiguous nature of such a statement makes it difficult to critique. A report by the House of Lords European Union Committee suggested that David Davis favoured an "accountability after the event" approach to scrutiny of negotiations⁴⁸. If such an approach were to continue Parliament would have limited opportunities to influence the substance of negotiations. The only tools for scrutiny available to them will be to criticise elements of a deal that will already have been made, and that they are powerless to change. To prevent Parliament being sidelined, further measures for parliamentary involvement must be put in place.

There are far fewer opportunities for Parliament to influence and scrutinise treaty negotiations than there are for the national parliaments of our European counterparts. Such monumental negotiations should be conducted on the basis of a national position with broad consensus. Parliament should be involved in formulating and approving such a negotiating position. There should also be structures in place to ensure that they have sufficient information with which to scrutinise the government in the negotiation proceedings. At present, there are insufficient opportunities for Parliament to be meaningfully involved in the Brexit process.

Recommendations

1. A Greater Role for Parliament

- The House of Commons **Exiting the European Union Committee should be given a central role** in the Brexit negotiation process and should be afforded extra powers;
- Before each key negotiation stage the Prime Minister or relevant minister should be required to appear before the Exiting the European Union Committee and **seek a mandate for their negotiating position.**
- The relevant minister should give an oral presentation outlining their position including the limits within which they will operate. The committee should then be given **the opportunity to accept or reject the position.**
- The relevant minister should be required to **report back to the committee at key stages in the negotiation process.** These key stages are to be agreed with the committee prior to entering negotiations. The committee should have the power to require the minister to appear before Parliament if it believes it to be necessary.

2. Enhancing Transparency

- The government should **provide the committee with all negotiating documents, including confidential documents. At a minimum they should be provided with as much information at the European Parliament** and equivalent information on British negotiating objectives should be provided. Documents should be supplied as soon as possible, preferably in advance of the European Parliament. The committee should then decide which documents to distribute to Parliament.
- Provisions should be made for the examination of confidential documents and the committee may meet in secret.

3. Parliamentary Resources

- Scrutinising the Brexit negotiations themselves and the subsequent review of EU legislation will require a huge amount of parliamentary time and resources. A lack of resources could hamper parliamentary scrutiny and empower the executive further. The efforts of every MP will be required to effectively hold the government to account whilst executing this mammoth task. For this reason **the government should reconsider its decision to reduce the number of MPs from 650 to 600.**
- Furthermore, it is likely that important some scrutiny work of negotiations and Brexit legislation will at times be highly technical in nature. **Parliament, and in particular parliamentary committees, should have access to expert advice.** One potential model for this could be the relationship between the Public Accounts Committee and the National Audit Office.

Treaty Ratification

Treaties can have significant implications for signatories and their citizens. The treaties that will be signed as a result of Brexit negotiations will undoubtedly have a huge impact on the future of the UK. They will affect everything from our trading relationship with Europe; and what rights UK citizens have to live, work, and study in European countries; to the regulation of what we eat and drink. However, unlike many other countries that have provisions in their constitutions, in the UK the government does not need the consent of Parliament to ratify treaties. The only power Parliament possesses in relation to treaties is the negative power to object to ratification. This does not present an adequate counterbalance to the government's comprehensive power of treaty making.

There are likely to be two main treaties negotiated as part of the Brexit process. The withdrawal agreement, often referred to the 'divorce deal', concerns issues such as the rights of EU nationals in the EU, the fate of EU agencies in the UK, regulation, and cross border security arrangements. This will need to be approved by qualified majority vote in the European Council, consented to by the European Parliament, and ratified by the UK. The second is the deal on the future UK-EU relationship. This will essentially be a trade deal, and will probably need to be ratified separately by all 27 states⁴⁹. Given the constitutional requirements in most EU countries to obtain the consent of their legislatures prior to ratification, the UK Parliament may ironically be the one of the only national legislatures which is not guaranteed a legally binding vote before the deal is ratified. Theresa May has promised Parliament a vote but this is not a legal requirement. For this reason, it is possible that if she did not agree with the result, the government could simply ignore it.⁵⁰

Parliament has the power to object to treaty ratification. This power has existed since the 1920s as a convention, and was only recently put on a statutory footing in the Constitutional Reform and Governance (CRaG) Act 2010. It requires the government to lay treaties before both Houses of Parliament along with an explanatory memorandum, and Parliament is given 21 sitting days to object to ratification of the treaty. If it does, the government must then publish a statement outlining why the treaty should be ratified, and the Commons has a further 21 days to object again. Although the Lords may only object once, the Commons has the power to delay ratification indefinitely.⁵¹

There are however, many limitations to this power. There is no opportunity to amend the treaty, which can only be wholly rejected, and this power still falls short of an affirmative vote. Furthermore, in the House of Commons there is no process for holding a debate and vote to object to ratification. The house must pass a resolution, and unless there is the opportunity for an opposition day debate in this short time frame, they are largely reliant on the government making time to hold a vote. In 2000 the government committed to making time for important treaties if requested by a relevant select committee and the Liaison committee but so far no requests have been received. Since the CRaG Act was came into force Parliament has not objected to the ratification of a single treaty⁵². Parliament's powers in regards to treaty ratification hardly constitute meaningful involvement in the treaty process.

Most other European countries require a vote in their parliaments before a treaty can be ratified, with requirements often laid out in the country's constitution. In Spain, the state can only enter treaties "of a political nature" with "prior authorization of the Cortes

General"⁵³. The Italian constitution requires that most treaties go through a multi-stage process similar to legislation⁵⁴. According to the French constitution, the President ordinarily has the power to ratify treaties, but it also states:

“Peace Treaties, Trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament.

They shall not take effect until such ratification or approval has been secured.”

According to article 167 of the federal constitution of Belgium, all regional parliaments must approve treaties before they are ratified⁵⁵. It was for this reason that the region of Wallonia was able to block the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada, until it received concessions. In practice, Wallonia could have vetoed the deal, as could any other parliament – regional or national – in the EU. The picture in the UK is starkly different. The Secretary of State for International Trade Liam Fox said in October 2016 that MPs would not be offered a debate on the CETA deal until after it had been ratified⁵⁶. Objecting at this point would have been politically impossible. Other governments around the world are successfully able to perform their functions relating to international relations, including treaty making, whilst also obtaining the consent of their respective parliaments. Theresa May has claimed that giving Parliament a meaningful vote would “incentivise” the EU to offer the UK a “bad deal” . To the contrary, there is evidence to suggest that negotiators who require approval from their national parliaments have a stronger negotiating position, as they are less able to concede . Furthermore, it is best democratic practice to ensure legislatures approve treaties. The government may have conceded that it will give MPs a vote on the final deal, but it is not a power that should have to be fought for.



Theresa May has claimed that giving Parliament a meaningful vote would “incentivise” the EU to offer the UK a “bad deal”⁵⁷. To the contrary, there is evidence to suggest that negotiators who require approval from their national parliaments have a stronger negotiating position, as they are less able to concede⁵⁸.



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It should also be noted that the CRaG Act contains a ‘get out’ clause. In exceptional circumstances, a treaty can be ratified without being laid before Parliament⁵⁹. Emergencies may require a degree of flexibility in which the government can act swiftly and decisively, and treaties may need to be signed quickly in war time situations or for security purposes. However, the act provides no guidelines for what should be deemed exceptional; this is entirely at the discretion of the minister. The lack of safeguards leaves this mechanism vulnerable to abuse.

The limited legal power which Parliament possesses in relation to treaties is insufficient to balance the government's power in this area. The negative power to object falls well short of affirmation, and by this point there are few opportunities to amend the terms of the treaty or seek renegotiation. There are also practical difficulties Parliament may encounter when trying to exercise this power. They remain dependent on the government making time for a vote so that they can block ratification. After Brexit, when trade deals that are applicable by virtue of EU membership no longer apply, the UK will need to negotiate many more treaties. This will have a profound effect on the UK economy and the way in which the country operates. The government should be compelled to seek the consent of Parliament, not act alone.

Recommendations

Parliamentary Consent for Treaties

- Introduce legislation that states that the **government may only ratify a treaty once the consent of Parliament has been obtained**. Parliament should vote on all treaties and be given the opportunity to debate any treaty.
- **A treaty committee should be established** in the House of Commons. This committee will be responsible for scrutinising treaties in detail and may conduct inquiries and publish reports where necessary. The committee should have the power to decide which treaties are debated on the floor of the house.
- There should be a **provision for the government to ratify a treaty prior to obtaining Parliamentary consent in exceptional circumstances** such as matters of war and peace. This provision should have **suitable safeguards to prevent abuse**. One option would be to give the treaty committee the power to grant the government permission to ratify a treaty. The government would then need to call an emergency meeting of the treaty committee and seek permission in order to use this provision.

The Great Repeal Bill And The Dangers Of Delegated Legislation

In October 2016 the government announced its intention to introduce legislation referred to as 'the Great Repeal Bill'. The legislation will repeal the European Communities Act 1972 – the legislation that gave EU law supremacy over UK law. The main purpose of the bill is to put all EU law into UK law, so that on the day we leave the European Union there will be continuity⁶⁰.

The bill will include powers to enable ministers to make changes by delegated legislation. The majority of delegated legislation is made in the form of statutory instruments (SIs) which can be used to fill out, update or even amend primary legislation without Parliament having to pass a new act. The Great Repeal Bill will also include powers for ministers to amend and repeal primary legislation by SI – also known as Henry VIII powers.

Whilst we accept that these powers may be necessary to ensure that EU law functions effectively in UK law, the changes made through delegated legislation must be only technical and should not stray into policy decisions. Pre-legislative scrutiny and effective parliamentary oversight will be essential safeguards against this.

The House of Lords Constitution committee identified two processes which will be applied to former EU law after we leave:

“(1) the initial preservation of EU law by converting it into UK law; and

(2) a longer-term process that will determine the extent to which (what was) EU law remains part of UK law.”⁶¹

Delegated legislation powers are justified in relation to the first process. There will be thousands of references to EU institutions and regulators that will need to be changed. There is simply not enough parliamentary time to make all these administrative changes through primary legislation before we leave the EU. The government has stated it only intends to use delegated legislation powers in relation to the first process.⁶² However, affording the government powers to make changes to primary legislation with little parliamentary scrutiny could present the potential for abuse. The House of Lords Constitution Committee, which does not normally comment on legislation before it is published, released a report on the Great Repeal Bill due to the exceptional nature of the legislation. In it they warned:

“The ‘Great Repeal Bill’ is thus likely to involve a massive transfer of legislative competence from Parliament to Government. This raises constitutional concerns of a fundamental nature, concerning as it does the appropriate balance of power between the legislature and executive.”⁶³

Without appropriate safeguards ministers could make more substantial changes to legislation. This risk is amplified if the powers are broadly or vaguely defined. We risk the possibility that many laws will be changed by ministers without the consent of Parliament.

These concerns are not unfounded. The Hansard Society has highlighted that the use of secondary legislation has “drifted into areas of principle and policy rather than the

regulation of administrative procedures and technical areas of operational detail,"⁶⁴ which has historically been its intended use. There have been examples in the recent past where the government has introduced significant policy changes through these powers. The abolition of university maintenance grants⁶⁵, allowing fracking in national parks,⁶⁶ and major changes to voter registration⁶⁷ were all brought in using statutory instruments.

“**Without appropriate safeguards ministers could make more substantial changes to legislation. This risk is amplified if the powers are broadly or vaguely defined.**”

All UK law that has been introduced or influenced by EU legislation is potentially at risk of being amended or removed without going through the more rigorous primary legislative process. In the Great Repeal Bill white paper the government stated:

“we will ensure that the power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU derived law arising out of our exit from the EU.”⁶⁸

However, the government have provided no details as to what measure they will take to limit delegated legislation powers to prevent this. The white paper says they will consider restrictions for retrospective provisions and imposing taxations⁶⁹ but these will do virtually nothing to stop policy change being made through SIs. Furthermore, they have reiterated that the scope of such powers shouldn't be too narrow, calling for a balance between scrutiny and the speed of the process.⁷⁰ Regardless, with such a vast range of rights and freedoms at stake, the government's position does not give sufficient priority to the former.

The government have also argued that Parliament will provide oversight of delegated legislation, therefore preventing ministers from overreaching their authority⁷¹. However, given the complexity of delegated legislation and the poor and frequently archaic scrutiny mechanisms the quality of scrutiny is likely to be poor. Statutory instruments can be subject to a number of different scrutiny procedures, although there is little consistency for how this is applied. Some SIs are not subject to any parliamentary scrutiny as they are deemed of little significance.⁷² A small number⁷³ are subject to affirmative procedures which means they must be approved by Parliament⁷⁴. However, this does not necessarily mean a debate on the floor of the House of Commons.

The majority of affirmative SIs are debated by a Delegated Legislation Committee, in the 2015-16 parliamentary session this was 75% of affirmative SIs.⁷⁵ These debates are often of low quality, MPs often lack knowledge of the policy area for which the SIs have implications. Many MPs see it as a punishment to serve on this general committee and there are reports that party whips encourage MPs to use it as an opportunity to catch up with constituency correspondence.⁷⁶ The average debate lasts just 26 minutes, and one has been as short as 60 seconds.⁷⁷ The committee cannot accept or reject SIs; they merely 'consider' them. A motion to approve the SI must then be passed in the Commons, without debate. An even smaller number of SIs are subject to one of 11 types of super-affirmative procedures; common features include the requirement to consult before laying before Parliament, powers for a committee to veto a draft order and obligation for the minister to consider recommendations.⁷⁸ Given the large volume of SIs that will be generated by the Great Repeal Bill, it would not be practical to require in the bill itself that

all SIs be subject to these procedures. However, super-affirmative procedures should be within the options available to the committee that will decide which scrutiny mechanism to apply to each SI. This would require an adequate system of oversight and sifting to determine when this would be the case.

The majority of statutory instruments are subject to negative scrutiny procedures⁷⁹, where an SI becomes law on a stated date unless a motion is passed in either House annulling (rejecting) the instrument. This has to be done within a certain time period (usually 40 days). These processes are often complicated and antiquated. To reject an SI of this type in the House of Commons, an MP, often the Leader of the Opposition, will table an early day motion praying to the Queen that the SI be annulled. They are then dependent on the government allocating this motion parliamentary time for debate and winning a vote for the SI to be annulled⁸⁰. In the 2015-16 parliamentary session the Hansard Society found that just five SIs prayed against by the Leader of the Opposition were given time for debate, around of quarter of those prayed against in total⁸¹. Furthermore, the Hansard Society found that many MPs were not even aware of such procedures, and some were even amused by them⁸². These procedures are not effective tool for scrutiny and further depend on the opposition or MPs being aware of which SIs are being made.

Parliamentary oversight of statutory instruments is weak and almost non-existent in the House of Commons. Delegated legislation committees mainly debate affirmative SIs and provide little scrutiny of negative SIs unless they are prayed against. The Joint Committee on Statutory Instruments solely considers whether SIs are functional and legally compliant with their parent act, not their policy content or possible effects⁸³. The House of Lords provides much better scrutiny. It has two committees concerned with delegated legislation; the Delegated Powers and Regulatory Reform committee which examines what powers ministers are asking for in primary legislation; and the Secondary Legislation Scrutiny Committee which looks at the secondary legislation which results from the exercise of those powers⁸⁴. The House of Lords also has a number of important powers. They can pass a critical resolution, which calls on the government to change its policy, although the government is not bound by this. It can also pass a fatal motion, in which it rejects a statutory instrument⁸⁵. However these powers are rarely exercised, and when they are, often provoke strong backlash as the House of Lords lacks any democratic mandate. The Strathclyde review recommended the removal of these powers on the basis that the House of Commons should have primacy⁸⁶. However, the House of Commons has fewer structures for the scrutiny of statutory instruments so this would mean that scrutiny would be weakened further.

It should be noted that other legislation passed prior to the UK exiting the EU may also contain delegated powers to implement the final deal made with the EU. The problem of delegated legislation extends beyond the Great Repeal Bill. Delegated powers present a problem the basic principle of parliamentary sovereignty; that only Parliament has the power to make and unmake laws. They also present the serious potential for abuse. The government can bypass Parliament and implement policy changes without any resistance. Nonetheless their necessity is apparent in the mammoth task of making former EU legislation functional post-Brexit. Therefore, scrutiny of both the powers afforded to ministers and the resulting actions is of utmost importance. So far, the numerous calls for better scrutiny of these potentially dangerous powers have fallen on deaf ears.

Recommendations

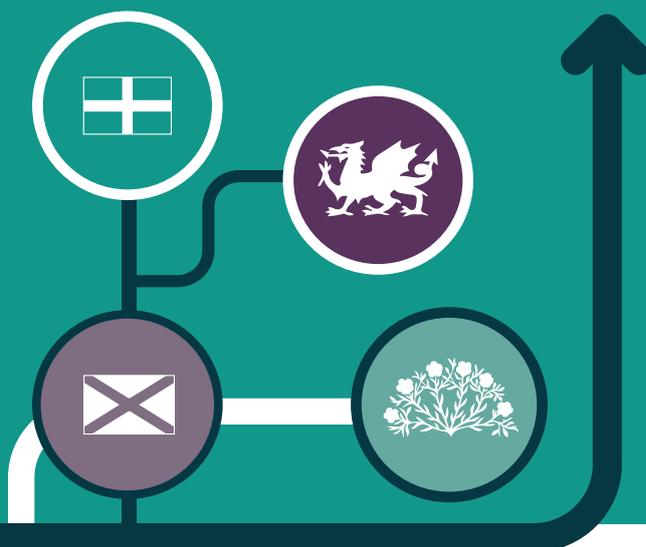
1. Limiting Secondary Legislation Powers

- A draft version of the Great Repeal Bill should be published as soon as possible and subject to a substantial period of **pre-legislative scrutiny by a specialist committee**.
- The delegated legislation **powers afforded to ministers should be defined as clearly and narrowly as possible**. Delegated legislation powers should only be used to make EU law functional in UK law or to implement the outcome of negotiations.
- Sunset clauses are clauses which state that a law or provision will cease to have effect on a specified date unless a further legislative action is taken to extend it. The government have indicated that powers in the Great Repeal Bill will be time-limited. We welcome this promise and urge the government to ensure they are applied comprehensively.⁸⁷

2. Parliamentary Scrutiny of Secondary Legislation

- The Great Repeal Bill will produce a large volume of statutory instruments. There will also be tight constraints on Parliamentary time during and after the Brexit process. Therefore the House of Lords, with sufficient time and structures, may be best placed to provide detailed scrutiny of statutory instruments. We recognise that the second chamber lacks democratic legitimacy. **An ideal solution would be to replace it with a more democratic second chamber**. However, we understand that this is unlikely to be achieved in the immediate future.
- As an alternative we recommend that **committees parallel to the Delegated Powers and Regulatory Reform committee and the Secondary Legislation Scrutiny Committee be established in the House of Commons**. Another option would be to create committees tasked with examining secondary legislation powers and their usage specifically for the Great Repeal Bill however, this would only provide a short term solution.
- Committees in both houses should be involved in the sifting through secondary legislation and determining the appropriate scrutiny procedures. This should include the **possibility of requiring super-affirmative procedures**. The committees should have the power to refer SIs for a debate on the floor of their respective house.
- The committees involved in scrutinising statutory instruments should be provided with **expert legal help** to enable them to determine the consequences of various amendments.
- **The negative scrutiny process of statutory instruments should also be reformed and simplified**. The wording of the Early Day Motion should be updated and the government should be required to make parliamentary time for a motion signed by a specified number of MPs.

The Devolved Legislatures



Devolution has been a key and evolving feature of democracy in the UK, particularly since the creation of the devolved legislatures in the late 1990s. In recent years there has been a growing shift in public opinion in favour of greater autonomy for the devolved legislatures, particularly in Scotland and Wales. Since the establishment of the Scottish Parliament, support for Scottish independence has been gradually increasing, seeing a surge in the past few years surrounding the 2014 independence referendum. In 1999, 59% of Scots favoured devolution but just 27% supported independence. In contrast, by 2016 only 42% named devolution as their constitutional preference, while 46% wanted independence.⁸⁸ Similarly, despite only narrowly voting in favour of establishing a Welsh Assembly, by 2015 more Welsh people wanted greater powers for Wales than those who felt the existing settlement was sufficient.⁸⁹ As the desire for greater devolution of powers grows, the relationship between the UK and the devolved administrations will become increasingly uneasy. If Westminster fails to respond to this sentiment and treat the devolved administrations as equal partners rather than subsidiaries, then the breakup of the Union may draw ever closer.

Brexit has served as a stark reminder that devolution remains the gift of Westminster. Both Scotland and Northern Ireland voted to remain in the EU, and all of the devolved administrations have lobbied the UK government to remain in the single market. But neither the devolved legislatures nor the devolved governments have any statutory powers with which to influence the Brexit negotiations. International relations and treaty making are powers reserved for the UK government alone, and so unlike Westminster, the legislatures in Holyrood, Cardiff and Stormont will not even formally have the opportunity to object to ratification of the final deal.⁹⁰ All national, and even some regional, parliaments in the EU will have a vote on the final deal but Scotland, Wales, and Northern Ireland will not. There are further questions about how the powers repatriated from the EU will be divided and how much of a say, if any, the devolved legislatures will have in this process.

“
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If the devolved administrations are sidelined in the Brexit negotiations, the risks for the future of the UK are very real. When calling for a second Scottish independence referendum, Scottish First Minister Nicola Sturgeon cited the UK government's unwillingness to compromise as the central reason for doing so.⁹¹ Although the government have said they want a soft border between Northern Ireland and the Republic of Ireland, in practice this may be difficult to achieve should the UK leave the customs union.⁹² The Irish Taoiseach, Enda Kenny, has even called for a provision for fast-track EU membership for a united Ireland to be part of the Brexit deal.⁹³ While these calls may have been made regardless of Brexit, the UK government's handling of Brexit so far has strengthened the case for these call to be made, at least in the eyes of those supporting a united Ireland and an independent Scotland. The Conservative's decision to strike a deal with the DUP also risks inflaming tensions with Irish republicans should the Northern Irish Assembly not be reinstated and consulted during negotiations. Despite the claim that one of its key Brexit priorities is "strengthening the union"⁹⁴ the UK government has done little to compromise or reach an agreement with the devolved administrations. It is looking increasingly likely that the good faith devolution agreement will be put to a serious constitutional test by Brexit.

A Matter Of Politics, Not Law

Many aspects of the relationship between the UK government and devolved legislatures operate on the basis of political conventions, which are politically but not legally binding. The most important convention is the Sewel Convention, which reserves the UK's right to legislate on matters relating to devolved competencies. It does, however, also oblige the UK government to seek legislative consent when exercising this right.

This convention was put on a statutory basis in the Scotland Act 2016. Section two of the act reads:

*"it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."*⁹⁵

In January 2017 the Supreme Court ruled unanimously that the Scottish Parliament did not have a veto on triggering article 50.⁹⁶ Leaving aside the argument of whether the Sewel Convention is applicable to triggering article 50, the court ruled that it was not legally enforceable in any case. It ruled that the text of the Scotland Act was intended to recognise a political convention but not create any legal obligations. Political conventions, they said, are a matter for Parliament not the courts.⁹⁷ Without any legal obligations to seek consent from the devolved legislatures, the extent of their role in the Brexit process is almost completely at the discretion of the Prime Minister.

Shortly after the EU referendum Theresa May promised she would not trigger article 50 until she had established a UK-wide approach to negotiations.⁹⁸ Certainly in the opinion of the leaders of the devolved administrations, this was not achieved. The main vehicle for cooperation between the UK and the devolved nations is the Joint Ministerial Committee (JMC). Established in 2001 by the Memorandum of Understanding on Devolution,⁹⁹ the original purpose of the committee was to build consensus in areas like foreign policy and European matters, which are reserved for the UK government but affect Scotland, Wales, and Northern Ireland. Prior to the referendum it existed in three formats; JMC (Europe); JMC (domestic); and JMC (plenary), the latter of which is attended by the Prime Minister and First Ministers.¹⁰⁰ In October 2016 the JMC (plenary) established a format specifically for Brexit: the Joint Ministerial Committee for European Negotiations (JMC(EN)), the aim of which was to establish a joint approach to Brexit negotiations.¹⁰¹

The Prime Minister's enthusiasm for consensus appears to have waned as the Brexit process has progressed. The majority of the electorate in two of the four nations voted in favour of remaining in the EU¹⁰² and the Welsh, Scottish, and Northern Irish governments all remain committed to single market membership. The Scottish and Welsh governments both published detailed proposals for their post Brexit visions.¹⁰³ Yet at least in the early stages of Brexit, the Prime Minister has shown no signs of compromising on her government's position of leaving both the single market and the customs union. More importantly, she is not required to do so. The JMC has no statutory basis, and the UK government is not bound by its agreements or advice. This is made clear in the Memorandum of Understanding that established it:

“The JMC is a consultative body rather than an executive body, and so will reach agreements rather than decisions. It may not bind any of the participating administrations, which will be free to determine their own policies while taking account of JMC discussions.”¹⁰⁴

Key figures in Scotland, Wales, and Northern Ireland have expressed frustration over the Joint Ministerial Committee and its lack of formal power. Welsh First Minister Carwyn Jones called it a “Westminster creation” and complained that it was not “jointly owned.”¹⁰⁵ These comments were made even before Brexit. Nicola Sturgeon was “deeply frustrated” by the JMC meeting in January 2017.¹⁰⁶ In her speech calling for a second Scottish independence referendum she claimed that Scotland’s “efforts at compromise have instead been met with a brick wall of intransigence.”¹⁰⁷ Sinn Féin threatened to pull out of the JMC in January 2017, calling it a “talking shop”¹⁰⁸. John O’Dowd, a Sinn Féin Member of the Legislative Assembly (MLA) said: “British Prime Minister Theresa May treated the council with utter disdain” after making her big Brexit announcement, including indicating her intention to leave the customs union, days before the JMC was due to meet.”¹⁰⁹ Yet they remain powerless to do anything. The sidelining of the devolved legislatures has been further cemented by the rejection of amendments to the bill to trigger article 50 which would have required the government to seek an agreement with all the devolved administrations and put the JMC on a statutory footing.¹¹⁰ In February 2017, the Scottish Parliament voted to oppose the triggering of article 50,¹¹¹ but without any legal force behind it this resolution is purely symbolic.

“ The current devolution settlement is untenable. Brexit has demonstrated how powerless the devolved legislatures are to influence a Westminster government intent on pursuing its own agenda. ”

The current devolution settlement is untenable. Brexit has demonstrated how powerless the devolved legislatures are to influence a Westminster government intent on pursuing its own agenda. Dissatisfaction on the part of the devolved administrations is translating into calls for radical change. If the UK government wants to keep the union together then a new settlement is necessary. The current deal based approach to devolution is premised on elite bargaining, and ignoring the identities, wishes and opinions of those who are affected by these decisions. The UK needs to revisit some important questions about where power lies, but it should be the people who decide the answers – not elites in Westminster or elsewhere.

Constitutional conventions allow citizens to engage in public deliberation and build consensus on important constitutional issues. They enable groups of citizens to consider complex policy matters with the help of evidence from experts in order to reach a position on a particular issue. They have already been used by governments in Canada, the Netherlands, and Ireland.¹¹² In 2015 the Democracy Matters project¹¹³ ran citizen’s assemblies in the UK looking at the issue of devolution in England. It found that there was an appetite for stronger public involvement in devolution, and that people did not want top-down change imposed on them.¹¹⁴

There are many different models for constitutional conventions involving various proportions of citizens, parliamentarians, experts, and civil society groups. The various options for the models of constitutional conventions are discussed in more detail in a paper by Alan Renwick published jointly by Unlock Democracy and The Constitution Society¹¹⁵. We take the view that the public must be involved in shaping the future of the country including where power lies. While experts have a key role to play, they do not necessarily need to be full members of the convention. Rather, constitutional conventions should be primarily comprised of randomly selected citizens. The presence of elected representatives may be beneficial for their knowledge of how government works. In addition to this, giving them a stake in the process means they are more likely to take the recommendations forward. A clear process must also be followed after the conclusion of the convention to prevent it becoming a solely academic exercise, and to avoid the potential conflict between popular and parliamentary sovereignty explored in more detail later in this report.

Without a constitution clearly setting out the devolution settlement and enshrining key principles in law, the devolved legislatures will continue to be marginalised. They will be denied influence over decisions which will nevertheless have a profound effect on them, for generations to come. Not only is this undemocratic, but denying the Welsh, Scottish and Northern Irish people the right to determine their own future puts the very future of the union at risk. We need a citizen-led solution to the challenges posed to devolution in the UK.

Recommendations

1. The Short-Term: Giving the Devolved Legislatures a Voice in Brexit

- The **Joint Ministerial Committee should be put on a statutory basis** and each of the devolved administrations should have the power to call a plenary. The UK government should be bound by the JMC's decisions.
- Policy making in the UK would benefit from greater cooperation between legislatures, and so a system for joint learning should be devised, particularly in areas where legislatures are doing similar work. For example reviewing former EU laws.

2. The Long-Term: A Constitutional Convention on the Future of Devolution in the UK

- The government should hold a citizen-led **constitutional convention** on the future of devolution in the UK. Citizens should be randomly selected and there may also be spaces for parliamentarians. Experts such as campaign groups and academics will also play a role by giving evidence to the convention. The proportion of members from each nation should be carefully considered so that citizens from the four nations are adequately represented.
- The convention should also consider **the unsolved problem of devolution in England**, looking at how matters that only affect England should be decided. The issue of further devolution within England, particularly in the north of the country, should be revisited.
- The **process for considering proposals put forward by the convention should be laid out in the legislation establishing it**. We recommend the proposals be put to Parliament, but there should also be a mechanism for triggering a referendum if Parliament ignores the proposals of the convention.

Repatriating EU Powers

After Britain leaves the EU, powers in a wide range of areas that previously came under EU competency will be handed back to the UK. In the government's white paper outlining its negotiating objectives, it claimed:

"We use the opportunity of bringing decision making back to the UK to ensure that more decisions are devolved."¹¹⁶

However, they have made no indication of what powers will be devolved or how and by whom this will be decided.

Some powers which will be returned to the UK from the EU are already devolved powers under the various devolution agreements. These vary according to the different settlements but the most significant include: agriculture; environmental policy; fisheries (completely in Scotland and with the exception of quotas in Wales); and Civil Judicial Cooperation (with the exception of Wales).¹¹⁷ Returning these powers may be complicated; when all the devolved legislatures were bound to abide by EU law, differences in policy were minimal. When this requirement is removed it is possible that each nation could develop divergent policies which would create four competing internal markets. This could create problems in the future. The government has raised the necessity of joint frameworks on former EU competencies in their Great Repeal Bill white paper, they have promised "intensive discussions" on this subject.¹¹⁸ It is likely that even repatriated powers already within devolved competencies will not be solely under the control of the devolved legislatures.

Furthermore, there are also questions as to whether the resources necessary to develop and implement new policies in these areas would be granted by Westminster. For example, it is unlikely that Westminster would provide enough funding to fill the hole left by the subsidies from the Common Agricultural Policy. The leader of the Scottish Conservatives, Ruth Davidson, has even suggested that if money for farm subsidies were to come from Westminster the UK government may control how they are distributed.¹¹⁹ Returning these powers to the devolved legislatures will not necessarily be a straightforward process and will require negotiations with the UK government.

A report commissioned by the Culture, Tourism, Europe and External Affairs Committee of the Scottish Parliament found that the majority of powers that will be returned to the UK are actually reserved matters.¹²⁰ This means they will automatically go back to Westminster after the UK leaves the EU. The government has indicated that some of these might be devolved¹²¹ but has not clarified how many will be repatriated and how this will be decided. Like in the Brexit negotiations the devolved nations have no real powers to influence these decisions. In her common's statement on the day article 50 was triggered Theresa May said:

"we will consult fully on which powers should reside in Westminster and which should be passed on to the devolved administrations."¹²²

However, even if the devolved administrations are consulted, the extent to which their wishes are respected will depend on the level of generosity in Westminster. Welsh economist Gerald Holtham told the House of Lords EU Committee:

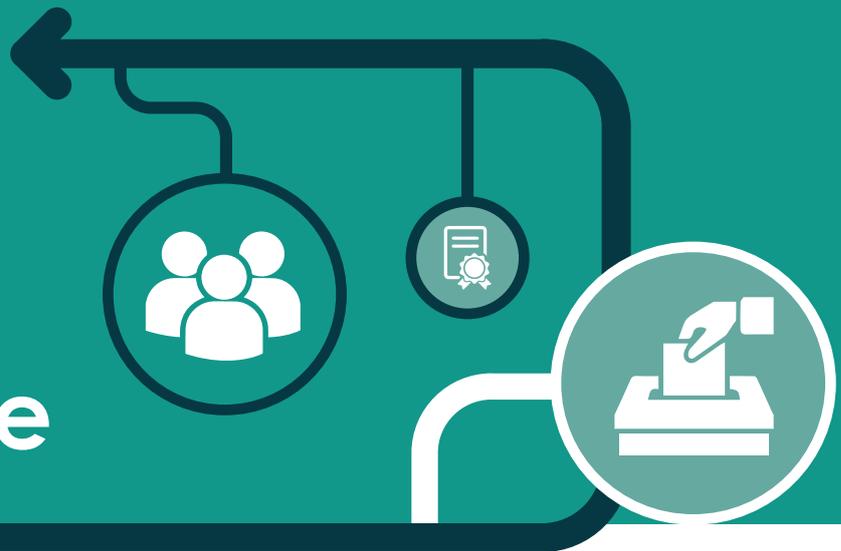
“The outcome will be decided by political weight. We will be consulted to death, but it will not change the outcome.”¹²³

The repatriation of EU powers must be a matter of joint determination, not the decision of Westminster alone.

Recommendation

- The **constitutional convention** should also review what powers should lie with Westminster and with the devolved legislatures. They should also consider mechanisms for establishing joint competencies or enhancing collaboration in areas where this may be beneficial.

The People



The referendum in June 2016 gave people the power to make a decision about the UK's membership of the European Union. The message to 'take back control' resonated with millions of voters. However, in the absence of a clear process to be followed in the event of a vote against the status quo, popular sovereignty came into conflict with parliamentary sovereignty. This left both those who voted remain and those who voted leave feeling let down by the parliamentary process, and contributed to entrenching divisions that had arisen during the referendum campaigns.

Dissatisfaction, alienation and disillusionment with politics are by no means new. Voter turnout has been declining over the past few decades,¹²⁴ and trust in politicians has remained stubbornly low, falling to 15% this year¹²⁵. In 2016 just 35% of people felt that if people like them got involved in politics they could really change the way the UK is run.¹²⁶ Brexit should be an opportunity to promote public engagement. If decisions continue to be made exclusively by political and economic elites then the perception that politics doesn't change anything will be reinforced. We need to think critically about how the people are engaged in the political decision making process and how we can ensure we are truly represented. These are fundamental principles of democracy.

Referendums

Referendums can be powerful tools of direct democracy. They can empower the public, promote understanding of important issues, and build consensus – but only if used correctly. There need to be clear rules governing the use of referendums, and setting out the process to be followed in the event of a particular vote. Otherwise, we risk alienating voters and fostering mistrust in the political system.

One danger with poorly designed referendums is the potential to create conflicting sources of sovereignty. The basis of the UK's uncodified constitution is parliamentary sovereignty, but when the electorate expresses its opinion, usually in an election or referendum, they exercise popular sovereignty. This happens every five years in general elections. However, if there is not a binding process to be followed in the event of a particular result these two sources of sovereignty can come into conflict.

This conflict between popular and parliamentary sovereignty was exemplified in the wake of the EU referendum, when Parliament voted on whether to trigger article 50. The result of the referendum was a majority vote in favour of leaving the European Union, but the referendum was not legally binding. Unlike the referendum on whether to implement an Alternative Vote (AV) electoral system in 2011, in which a Yes vote would have automatically begun a process to introduce the new voting system,¹²⁷ it did not commit Parliament to take any particular action. Many have suggested this was due to the fact that those in power did not expect to have to implement a Leave result. The result was two competing sources of democratic legitimacy: the people who voted to leave; and Parliament, where the majority of members were in favour of remaining.¹²⁸ This created a crisis for many parliamentarians and highlighted some fundamental questions of representative democracy. Do MPs, as elected representatives, have a duty to vote with their conscience, or with the views of their constituents? It is not clear in situations such as these whether popular or parliamentary sovereignty should prevail.

Not only did this highlight some fundamental constitutional questions, it also damaged public trust. Both those who voted to leave and those who voted to remain felt let down by Parliament. Public trust was undermined as people who had voted to leave, many of whom had previously been disillusioned with politics, feared that Parliament may ignore them. The public were given confusing messages prior to the referendum, being told that the legally advisory referendum was in fact binding¹²⁹, and this further exacerbated the uncertainty and frustration felt by many. Conversely, the 48% who voted to remain felt they were being ignored. Those who criticised the government's approach to Brexit or pushed for a greater role for Parliament were accused of defying 'the will of the people'¹³⁰. The conflict of competing sources of sovereignty was mirrored in society, where division and dogma were fostered. These divisions are likely to continue long into the Brexit negotiation process and beyond.



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As well as failing to lay out a process to be followed in the event of a vote to leave, the European Union Referendum Act 2015 failed to stipulate any conditions to ensure a sufficient mandate for such an important decision. Leaving the EU is the most significant constitutional change since Parliament passed the European Communities Act 1972, and yet this momentous and potentially irreversible decision was made on the basis of a small majority of just 1.9%, and supported by only two of the four nations in the UK.

Many countries around the world have strict rules governing the use of referendums, such as turnout thresholds and supermajorities. By contrast, in the UK there are few requirements of this nature. It was partially for this reason that the legitimacy of the EU referendum has been called into question. Over four million people signed a petition calling for a second referendum if the first referendum did not reach a majority of 60% and a turnout threshold of 75%.¹³¹ It is worth noting that although the petition received the majority of its signatures after the referendum result, it was created prior to the referendum by a leave voter who had been expecting a remain result¹³².

While a second referendum may be appropriate in some circumstances, it is not feasible at this stage. A second referendum on a final deal could have been beneficial had it been legislated for in the original act. For example, New Zealand held two referendums on its national flag. The first asked voters to rank five new flag designs, and the second asked them to choose between the flag selected in the first referendum and the existing flag.¹³³ However if a second referendum is called for retrospectively, it can undermine public trust as voters feel their vote is being ignored. Nonetheless, the existence of the petition draws attention to the lack of consideration of the process, and raises the question of how best to achieve consensus and democratic legitimacy.

Many countries have supermajority requirements in the event that constitutional changes are being proposed. This is to prevent major changes being made on the whim of the government (or public) of the day and ensures that there is broad consensus on the issue rather than a simple majority. In Denmark, any proposals for constitutional amendments must be put to a referendum and approved by at least 40% of the registered electorate.¹³⁴ Such a requirement would not have been met in the EU referendum, in which just 37% of the registered electorate voted in favour of leaving.¹³⁵ In Switzerland and Australia, double majorities are required for constitutional amendments. In Switzerland, a majority of voters and a majority of states must vote in favour of the amendment for it to pass. Similarly in Australia there must be an overall majority and a majority in four out of six states.¹³⁶ The UK has no supermajority thresholds as standard practice; these may be stipulated in an act mandating a referendum, but they are rarely used. Supermajority thresholds may be beneficial for the UK, especially in relation to the devolved nations.

Turnout thresholds are also a common feature in referendums around the world. However, there is evidence to suggest that turnout thresholds can encourage abstention.¹³⁷ Turnout thresholds can incentivise those against a change proposed in a referendum to encourage voters not to vote, as this is often easier than convincing them to vote a particular way. In a 1991 Italian referendum on changing the electoral system, former Prime Minister Bettino Craxi told people to “go to the beach” instead of voting.¹³⁸ Furthermore, thresholds rely on the electoral register to determine the number of eligible voters. The electoral register contains thousands of inaccuracies, such as cases where voters are deceased, fictitious, or are registered in multiple constituencies. The Electoral Commission found that even in the event of the registers being 100% accurate after the annual canvass, by May the following year 5-10% of the entries on the registers nationally would relate to people who are no longer at that address (the proportion is considerably higher in inner London boroughs).¹³⁹ As all inaccuracies would by default vote ‘No’ as they would count as abstentions. This can determine whether the threshold is met and prevent change even if the majority of actual voters have voted yes. Although turnout thresholds may seem practical in theory, in practice they can have negative effects.

The lack of regulation surrounding the exercise of referendums in the UK has fostered confusion, mistrust, and a loss of faith in the political system. The failure of the government to lay out a process to be followed in the event of a vote to leave the EU meant some voters feared their decision would be overturned by Parliament. The lack of supermajority criteria has meant that a huge constitutional change was mandated by a narrow majority. Instead of building consensus around the issue this has caused some to question the legitimacy of the referendum, and divisions have become further entrenched. The UK needs to reform its haphazard approach to referendums so that they may be tools for democratic engagement instead of division.

Recommendations

A Referendums Act

- The government should introduce a **referendums act** that creates clear rules governing the use of referendums. It should require all governments to have a **process in place in the event of each outcome** and assign responsibility for carrying this out.
- The government should **automatically hold referendums on constitutional issues**. The referendums act should contain a list of all clauses or acts that will require a referendum to be repealed.
- While we do not recommend turnout thresholds, the issue of **supermajority requirements** should be explored further to consider which option is best for the UK.

People Powered Policy

Referendums are not the only way to engage the public in decision making. The UK electorate voted to leave the European Union in the referendum of June 2016, but the binary question on the ballot paper could not possibly reflect the diversity and nuance of people's views. There are limits to this restrictive form of expressing an opinion. This type of winner-takes-all outcome can lead to the polarisation of public opinion and an adversarial approach to politics if not supplemented with opportunities for deliberation and debate. The result of the June election is testament to the divided state of the country. Deliberation should provide citizens with the opportunity to discuss issues in an accessible and informative manner. This can help foster mutual understanding between citizens who hold different opinions, build consensus around issues, and promote cooperation. It can also give people a sense of ownership – too often people feel politics is done to them, not with them. The referendum was just the start of the Brexit process. To ensure post-Brexit Britain truly represents the will of the people, we need to be continually consulted and involved in the process of leaving the EU and beyond.

Once we have left the EU, the government has promised to restore sovereignty by amending or repealing EU laws we no longer want, and yet the referendum told us nothing about people's attitudes towards specific EU laws. The Brexit white paper promised that "any significant policy changes will be underpinned by other primary legislation."¹⁴⁰ The government must engage the people in deciding which laws will govern the UK and not make top-down decisions. The referendum was a demonstration of democracy, but it was not a blank cheque for the government to implement their vision of the future of the UK, however they see fit.

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The government has claimed to be undertaking consultations around their negotiating position. They say they are listening to relevant stakeholders and "talking to as many organisations, companies and institutions as possible."¹⁴¹ So far these efforts have been focussed on talking to organisations, looking at the distinct sectoral interests of business or industry, which are often framed as being in competition. They are not attempting to understand the core values that people subscribe to and how these have guided them towards a certain position. They are not providing opportunities for people to understand each other's position or point of view and engage in deliberation. The lack of public deliberation has exacerbated divisions within the population and created an 'otherness'; vote choice in the EU referendum is beginning to give rise to conflicting identities. Genuine deliberation is the best way to build consensus around these big issues and unite the country going forward. It would give an insight into the real 'will of the people' and help politicians to act in line with this.

It is often argued that direct public involvement in policy making is not practical as the average citizen lacks the knowledge necessary to make such decisions. However, there are many options for forms of deliberative public engagement that have been used to inform policy making both in the UK and throughout the world. For example, the Danish Board of Technology (DBT) was set up by the Danish government to engage with the public on technology issues and advise both government and the Danish Parliament. Parliamentary committees can request that the Danish Board of Technology hold public hearings on issues they are investigating. It holds public consultations in various formats; one example being a consensus conference which has dealt with topics such as genetically modified foods, electronic surveillance, and road pricing. Around 2,000 participants are randomly selected and asked to apply, and between 14 and 16 citizens are then chosen for a citizen's panel. After two weekends of preparatory work a four day conference is held. The panel hears from experts and engages in discussion and deliberation, after which they write a report as they reach consensus.¹⁴²

Institutions closer to home also have mechanisms for public involvement in policy development. The BBC has four national councils comprising of the leaders of regional sub-panels who help advise the BBC Trust.¹⁴³ The NHS also embarked upon a deliberative public engagement project called NHS Citizen.¹⁴⁴ There are plenty more models that could also be explored and various design aspects considered.

The people should be involved in building post-Brexit Britain, and in deciding which laws they want to govern them. Deliberative public engagement not only has the potential to build trust and understanding between people and policy makers, but also between people themselves. Deliberation can help unpick public opinion so that politicians can truly understand the values that people in Britain prioritise. The government should use Brexit as an opportunity to engage the public, not shut them out.

Recommendations

Public Deliberation

- Departmental select committees, in Westminster and the devolved legislatures, should be given responsibility for reviewing EU legislation in their area. If significant policy changes in that area are proposed the select committees should commission **deliberative forms of engagement** around the country to gauge public opinion and fully understand people's concerns and desires.
- The select committees should then make recommendations on the basis of this information which should then be implemented by the government.

Representation

The vote to leave the European Union in the referendum highlighted some major challenges to the concept of public representation in Parliament. The vast majority of MPs voted to remain, many representing constituencies that voted to leave. There is incongruence between public and parliamentary opinion which extends to many issues, not just the question of membership of the European Union. Governmental responsiveness to public opinion is one of the fundamental premises of democracy, but our unfair electoral system means there are fewer incentives for the government and MPs to listen to voters.

First Past the Post means that during the 2015 general election 56% of seats were 'safe seats'.¹⁴⁵ In these seats a particular party has such a large majority that the incumbent party is almost certain to win each election. As a result MPs in these seats are less susceptible to electoral accountability for their actions while in Parliament and therefore have less need to act in accordance with the preferences of their constituents. First Past the

Post favours the two largest parties. Smaller parties may be able to achieve a substantial percentage of the vote share but often find it difficult to translate this into seats, meaning there is less competition overall. In the 2015 General Election for example, UKIP received 12.6% of the vote, yet hold just one seat in the House of Commons.¹⁴⁶ Similarly, the Green Party won over a million votes and yet this translated into only one seat.¹⁴⁷ A comparative study of Britain and Denmark concluded that "policy responsiveness is more pronounced in proportional democracies compared with majoritarian democracies, because the higher degree of party competition and government vulnerability in proportional democracies makes the executive more responsive to public preferences."¹⁴⁸ If we are to have a government that listens to the people and their preferences, we need a new voting system.

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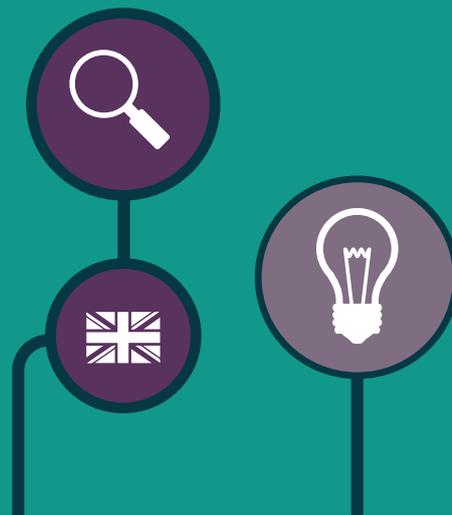
Our majoritarian voting system could also be partially responsible for the low levels of voter turnout experienced in Britain. The referendum on membership of the EU achieved a much higher turnout (72.2%)¹⁴⁹ than the 2015 General Election (66.1%)¹⁵⁰ suggesting that previous non-voters were mobilised. Turnout was better in the 2017 General Election, with 68.7% casting their vote but it still did not match the referendum. This could be the result of individuals feeling that their votes would be more likely to make a difference in the referendum than in a General Election.¹⁵¹ For those who live in 'safe seat' constituencies, a vote for anyone other than the incumbent will likely be a wasted vote. Therefore, individuals may see little benefit in voting. This argument is supported by the fact that voter turnout in marginal seats tends to be higher than in safe seats.¹⁵² Evidence from Scotland found that voters were more likely to vote in the independence referendum than an election as they felt that there was more at stake and their vote was more likely to make a difference. Furthermore, of those who do vote, many do not vote for the party that best represents their views if they feel they have little chance of winning, choosing instead to vote tactically. To put the people at the heart of decision making in the UK we need a Parliament that truly represents people's preferences.

Recommendation

Proportional Representation

- The government should introduce a **proportional voting system for UK general elections**. Proportional systems, or systems with elements of proportionality, are already in place in Scotland, Wales and Northern Ireland.
- The new electoral system should be broadly proportional but also give voters a choice between both political parties and candidates; Single Transferable Vote, the Additional Member System or an open list system would all be appropriate.

Conclusions



The decision to leave the EU has left the UK's uncodified constitution creaking and under strain. Brexit highlights the lack of constitutional safeguards against the overreach of executive power. So many of the checks and balances we rely on to protect our democracy are insufficient or not legally binding. Our ancient constitution contains relics from the past, giving the executive dangerous powers not suitable for a modern democracy. We are on the brink of a constitutional crisis.

Ancient prerogative powers give the executive enormous autonomy over treaty making. Parliament has no required role in the negotiation process and has little to right to even receive information about it. The weak negative power to object to ratification, only recently introduced into law, hardly constitutes meaningful involvement. Any vote the executive grants will simply be a rubber stamp, taking place far too late in the process to have any influence on the substance of the deal. The government is also seeking secondary legislation powers that could allow ministers to bypass Parliament when making legislative changes. Mechanisms for parliamentary scrutiny are currently far too weak to effectively guard against abuse of these powers.

“ ***Our ancient constitution contains relics from the past, giving the executive dangerous powers not suitable for a modern democracy. We are on the brink of a constitutional crisis.*** ”

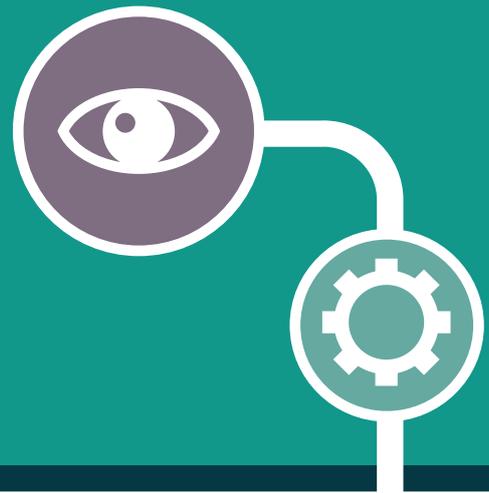
The Supreme Court's judgement in the article 50 case demonstrated the completely subordinate nature of the devolved legislatures. The extent of these nations' influence on reserved matters is almost entirely the decision of the Prime Minister. As powers are repatriated from the EU, it is Westminster alone that will likely be deciding which powers the devolved legislatures will be granted. They will be dependent on Westminster abiding by political conventions and if the government fails to do so, they will remain powerless to enforce them.

The conflict between popular and parliamentary sovereignty that arose after the Brexit vote demonstrated a failure in the way our democracy engages the people. The poorly designed referendum has created a crisis in public trust and deep divisions in society. Our disproportionate voting system has resulted in an unresponsive and unrepresentative government. Going forward, the government must not take the binary referendum result as a blank cheque, but rather as an opportunity to involve the people in shaping post-Brexit Britain.

Brexit has drawn attention to just a few of the problems with our uncodified constitution. Let us not forget that at least in theory, the Queen could refuse to give royal assent to a democratically produced bill; an unelected House of Lords could delay the passage of a bill by a up to year; Parliament could abolish the Supreme Court; the UK Parliament could remove powers from the devolved parliaments and assemblies by a simple Act of Parliament.

We need a written constitution that clearly outlines the role of each branch of government and clearly defines the powers they possess. We need enhanced checks and balances to prevent any branch of government becoming too powerful. We need the inalienable rights and privileges of the people to be enshrined clearly in law. We need a constitution that is written by 'we, the people'. Brexit has created a constitutional crisis, and the only way to solve these problems once and for all is with a codified people's constitution.

Recommendations



Parliament

Defining and Limiting Prerogative Powers (page 13)

- There should be a **comprehensive government review of prerogative powers**.
- Those powers which are deemed necessary functions of the executive should be **clearly defined and put on a statutory basis**. This will allow parliamentarians, the public, and the government itself to clearly understand the limits of the power of the executive, and therefore enable appropriate action if the government acts beyond these limits.
- Mechanisms for parliamentary approval or scrutiny, such as the convention on war powers, should also be put on a statutory basis so that they may be legally enforceable.

A Greater Role for Parliament (page 18)

- The House of Commons **Exiting the European Union Committee should be given a central role** in the Brexit negotiation process and should be afforded extra powers;
- Before each key negotiation stage the Prime Minister or relevant minister should be required to appear before the Exiting the European Union Committee and **seek a mandate for their negotiating position**.
- The relevant minister should give an oral presentation outlining their position including the limits within which they will operate. The committee should then be given **the opportunity to accept or reject the position**.
- The relevant minister should be required to **report back to the committee at key stages in the negotiation process**. These key stages are to be agreed with the committee prior to entering negotiations. The committee should have the power to require the minister to appear before Parliament if it believes it to be necessary.

Enhancing Transparency (page 18)

- The government should **provide the committee with all negotiating documents, including confidential documents. At a minimum they should be provided with as much information at the European Parliament** and equivalent information on British negotiating objectives should be provided. Documents should be supplied as soon as possible, preferably in advance of the European Parliament. The committee should then decide which documents to distribute to Parliament.
- Provisions should be made for the examination of confidential documents and the committee may meet in secret.

Parliamentary Resources (page 18)

- Scrutinising the Brexit negotiations themselves and the subsequent review of EU legislation will require a huge amount of parliamentary time and resources. A lack of resources could hamper parliamentary scrutiny and empower the executive further. The efforts of every MP will be required to effectively hold the government to account whilst executing this mammoth task. For this reason **the government should reconsider its decision to reduce the number of MPs from 650 to 600.**
- Furthermore, it is likely that important some scrutiny work of negotiations and Brexit legislation will at times be highly technical in nature. Parliament, and in particular parliamentary committees, should have access to expert advice. One potential model for this could be the relationship between the Public Accounts Committee and the National Audit Office.

Parliamentary Consent for Treaties (page 21)

- Introduce legislation that states that the **government may only ratify a treaty once the consent of Parliament has been obtained.** Parliament should vote on all treaties and be given the opportunity to debate any treaty.
- **A treaty committee should be established** in the House of Commons. This committee will be responsible for scrutinising treaties in detail and may conduct inquiries and publish reports where necessary. The committee should have the power to decide which treaties are debated on the floor of the house.
- There should be a **provision for the government to ratify a treaty prior to obtaining Parliamentary consent in exceptional circumstances** such as matters of war and peace. This provision should have **suitable safeguards to prevent abuse.** One option would to give the treaty committee the power to grant the government permission to ratify a treaty. The government would then need to call an emergency meeting of the treaty committee and seek permission in order to use this provision.

Limiting Secondary Legislation Powers (page 25)

- A draft version of the Great Repeal Bill should be published as soon as possible and subject to a substantial period of **pre-legislative scrutiny by a specialist committee**.
- The delegated legislation **powers afforded to ministers should be defined as clearly and narrowly as possible**. Delegated legislation powers should only be used to make EU law functional in UK law or to implement the outcome of negotiations.
- **Sunset clauses** are clauses which state that a law or provision will cease to have effect on a specified date unless a further legislative action is taken to extend it. The government have indicated that powers in the Great Repeal Bill will be time-limited.¹⁵³ We welcome this promise and urge the government to ensure they are applied comprehensively.

Parliamentary Scrutiny of Secondary Legislation (page 25)

- The Great Repeal Bill will produce a large volume of statutory instruments. There will also be tight constraints on Parliamentary time during and after the Brexit process. Therefore the House of Lords, with sufficient time and structures, may be best placed to provide detailed scrutiny of statutory instruments. We recognise that the second chamber lacks democratic legitimacy. **An ideal solution would be to replace it with a more democratic second chamber**. However, we understand that this is unlikely to be achieved in the immediate future.
- As an alternative we recommend that **committees parallel to the Delegated Powers and Regulatory Reform committee and the Secondary Legislation Scrutiny Committee be established in the House of Commons**. Another option would be to create committees tasked with examining secondary legislation powers and their usage specifically for the Great Repeal Bill however; this would only provide a short term solution.
- Committees in both houses should be involved in the sifting through secondary legislation and determining the appropriate scrutiny procedures. This should include the **possibility of requiring super-affirmative procedures**. The committees should have the power to refer SIs for a debate on the floor of their respective house.
- The committees involved in scrutinising statutory instruments should be provided with **expert legal help** to enable them to determine the consequences of various amendments.
- **The negative scrutiny process of statutory instruments should also be reformed and simplified**. The wording of the Early Day Motion should be updated and the government should be required to make parliamentary time for a motion signed by a specified number of MPs.

The Devolved Legislatures

The Short-Term: Giving the Devolved Legislatures a Voice in Brexit (page 31)

- The **Joint Ministerial Committee should be put on a statutory basis** and each of the devolved administrations should have the power to call a plenary. The UK government should be bound by the JMC's decisions.
- Policy making in the UK would benefit from greater cooperation between legislatures, and so a **system for joint learning** should be devised, particularly in areas where legislatures are doing similar work. For example reviewing former EU laws.

The Long-Term: A Constitutional Convention on the Future of Devolution in the UK (page 31)

- The government should hold a citizen-led **constitutional convention** on the future of devolution in the UK. Citizens should be randomly selected and there may also be spaces for parliamentarians. Experts such as campaign groups and academics will also play a role by giving evidence to the convention. The proportion of members from each nation should be carefully considered so that citizens from the four nations are adequately represented.
- The convention should also consider **the unsolved problem of devolution in England**, looking at how matters that only affect England should be decided. The issue of further devolution within England, particularly in the north of the country, should be revisited.
- The **process for considering proposals put forward by the convention should be laid out in the legislation establishing it**. We recommend the proposals be put to Parliament, but there should also be a mechanism for triggering a referendum if Parliament ignores the proposals of the convention.
- The **constitutional convention** should also review what powers should lie with Westminster and with the devolved legislatures. They should also consider mechanisms for establishing joint competencies or enhancing collaboration in areas where this may be beneficial.

The People

A Referendums Act (page 37)

- The government should introduce a **referendums act** that creates clear rules governing the use of referendums. It should require all governments to have a **process in place in the event of each outcome** and assign responsibility for carrying this out.
- The government should **automatically hold referendums on constitutional issues**. The referendums act should contain a list of all clauses or acts that will require a referendum to be repealed.
- While we do not recommend turnout thresholds, the issue of **supermajority requirements** should be explored further to consider which option is best for the UK.

Public Deliberation (page 39)

- Departmental select committees, in Westminster and the devolved legislatures, should be given responsibility for reviewing EU legislation in their area. If significant policy changes in that area are proposed the select committees should commission **deliberative forms of engagement** around the country to gauge public opinion and fully understand people's concerns and desires.
- The select committees should then make recommendations on the basis of this information which should then be implemented by the government.

Proportional Representation (page 41)

- The government should introduce a **proportional voting system for UK general elections**. Proportional systems, or systems with elements of proportionality, are already in place in Scotland, Wales and Northern Ireland.
- The new electoral system should be broadly proportional but also give voters a choice between both political parties and candidates; Single Transferable Vote, the Additional Member System or an open list system would all be appropriate.

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