Constitutional Principles Surrounding British Withdrawal from the European Union

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Executive summary

Overview

This report focussed on the three dimensions to the British constitutional settlement most touched by membership of the European Union (EU) and, therefore, most vulnerable to change in the case of withdrawal. It did so with a couple of assumptions in mind. Union membership had been associated with wider processes of constitutional change which extended beyond the formal obligations of such membership. Withdrawal might generate the possibility for converse processes. In addition, in the event of withdrawal, the European Union is likely to continue to cast a shadow over the United Kingdom (UK) both because of the legacy issue of how to manage the pre-existing corpus of EU law and because it is likely to remain the largest trading bloc and one of the dominant regulatory players within the world with the UK on its door step.

These dimensions are, first, the relocation of the system of rule. Withdrawal from the EU allows the UK to be formally self-governing. It is worth gauging the scale of this opportunity, the substitutes which might be deployed in place of EU law, and, insofar as it is possible, the likelihood of EU law not being used in the event of withdrawal. Secondly, membership of the European Union has contributed to configuration of the British State. Most saliently, it has offered the judiciary and the executive opportunities at the expense of parliament and has contributed to the machinery of regulation within the UK. The second dimension considers what pressures and possibilities for reconfiguration of the British State might emerge in the event of withdrawal. The third goes to ideas of political community within the British constitutional settlement. EU law has been central to the development of recent ideas of freedom and equality within the British constitutional settlement and the establishment of mechanisms with their own sense of democratic values to counterbalance those of representative democracy.

Main trends and gaps

Withdrawal is that it relocates legal authority as it allows the UK to be formally self-governing. The implications of this are unclear. The scale of self-government which could or would be recovered is unclear. There is little research on the scale of activities currently governed by EU law which could be formally susceptible to repatriation. In addition, there is little research on substitute external processes which might emerge to stymy self-government. There is thus little research on extent to which neighbours of the EU are governed by international treaties with the Union or which replicate EU law or on other substitutes, such as legal transplants, whereby courts in non-EU jurisdictions autonomously
apply EU law. There is also research on the nature of the processes for managing such legal change and for considering which EU laws to keep in place, which to discard and when to parallel EU law-making. Research is thus needed on the procedures deployed across the world to manage moments of significant legislative or regulatory change.

Secondly, European Union membership is associated with an increase in the power of non-majoritarian institutions at the expense of parliament. There is little research, however on the fields of EU legislative and administrative activity with which Westminster currently engages most; the conditions which induce parliamentary engagement; and the fields of activity in which non EU parliaments engage and the conditions under which these do so. Conversely, we know little about the actual scope of activity by other institution: the scale and incidence of judicial review, the extent to which membership creates opportunity structures or constraints for devolved assemblies; or how dependent British regulatory processes are on Union resources and the conditions under which this takes place.

Thirdly, withdrawal would raise questions about the democratic values instituted by the European Union within the British constitutional settlement, namely whether these are desirable and, if so, what substitutes will be used to protect and articulate them. In particular, there are questions over the substitutes which might be found for the European Union Charter of Fundamental Rights and the European Convention on Human Rights, the nature of these substitutes and the relationship these would draw between the judiciary and other parts of the British constitutional settlement. EU law has also been one of the central protectors of diffuse and minority interests within the UK in recent times. There are questions about how these interests would be protected in the event of withdrawal.

Research into all these questions will depend to some extent on assumptions about the style of relationship the UK would have with the EU in the event of withdrawal as this relationship would generate its own constraints and expectations. There are, broadly, three models available. The first is a heavily institutionalised multilateral regime, such as the European Economic Area (EEA). Whilst any such regime involving the UK might be different, it would nevertheless have to be informed by the insights generated by the EEA. There is, thus, space for research on the extent of EFTA State input into EU law-making; EFTA State parliamentary input into EEA law and the control of EFTA States parliaments over their executives.

The second type of regime is one where the UK agrees a series of bilateral treaties with the EU. The model for this is the relationship between the Union and Switzerland. There is relatively little research on this. Interesting questions concern the conditions governing the incidence of treaty-making between Switzerland and the EU, and who pushes it forward. There is also evidence that autonomous adaptation, whereby the Swiss parliament unilaterally adopts EU law in whole or in part, plays a larger role in securing EU law influence within that State. Of particular interest is the political economy of such a process, the stakeholders which cluster around it and the level and quality of parliamentary deliberation involved.

The third type of relationship is one which is not substantially governed by treaty relations other than general multilateral ones. The predominant model is that between the United States (US) and the EU. A number of processes have been noted whereby EU law is applied on the territory of the US. One would expect the UK to be more exposed to these. One is the ‘Brussels effect’ whereby large companies apply EU law irrespective of the home State
standard. Another is territorial extension, whereby EU law takes account of activities in the
non EU State in determining whether EU law has been complied with or whether certain
benefits should be granted by the Union. At the moment, there is no systematic research on
how widespread these are or the conditions under which they take place.

Conclusions

The conclusions follow from the main trends observed in the previous section. Research
should focus on the extent to which EU law affects the UK and is likely to affect the UK, be
it directly through treaty mechanisms or indirectly through other processes, in the event of
withdrawal. The institutional mechanisms for adapting British law in the light of withdrawal
remain something of a black hole. Alongside these questions of how much scope for action
is secured from external norms and the procedures for determining this, a further
important avenue of research is what changes will occur to institutional relations within the
British State, not simply in terms of the opportunities provided but also in terms of the
take-up. Furthermore, insofar as EU law has been deployed to safeguard certain interests
historically poorly represented through parliaments, thought will have to be given to
whether or how these are to be safeguarded.

Finally, all these questions have to be considered against the wider contexts in which they
occur, part of this is likely to be a pull effect from EU law and EU institutions. The incidence
and strength of any possible pull is, to be sure, uncertain, but some prediction will be
necessary to inform debate about the realistic choices available for reform of the British
constitutional settlement in the event of withdrawal.