

# Impact of brexit on the uk's constitution



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Constitutional law coursework

What impact is the Brexit process having, and is likely to have in the future, on the UK's domestic constitutional settlement? You should consider in particular its effect on the sources of constitutional law and constitutional conventions.

The future of the UK's international power, influence and domestic constitutional settlement lie entirely with the outcome of Brexit. Brexit will take place on the 29<sup>th</sup> of March 2019 at 23: 00, although at this time the UK will have ' theoretically' severed ties with the European Union (EU); the European Union (Withdrawal) Act 2018[1](EUWA). Although Britain is in mid-process of exiting the EU, ever since the people voted to leave, hostility rose, and the country divided. Hence the following impact on constitutional conventions, the subtle power shifts at Westminster, devolution issues and the changing constitution. The UK's main selling point of Brexit was to regain sovereignty; it is unknown if repealing the European Communities Act 1972[2]has obtained this; has the UK created more of a problem than a solution?

The UK has an unwritten constitution built upon principles used by the legislative and executive branches of the UK, and relevant case-law used by the judicial branch. Parliament and Government are sovereign in the UK (excluding the EU); the government composes the legislation and assisted by both chambers of parliament - both the House of Commons and the House of Lords, the Lords scrutinise the bill before it goes back through parliament. Although, throughout the Brexit process, it has shown that the legislative has

had to intervene, as if the government alone couldn't be left to continue this work; as the UK doesn't have absolute clarity where the Brexit process is going and what will the government do in the coming month as exit-day nears.

However, due to the Brexit process much of the current government has crumbled due to indecisiveness of the conservative party and Theresa May's (PM) failed Brexit deal; for the UK's unwritten constitution principles to work, there must be harmonious work done from both branches to ensure the right legislation is introduced. Due to Brexit, there has been a struggle for power and a 'my deal or no deal approach' from the PM. This has backfired spectacularly; therefore, backbench MP's are given more power and influence with other MP's; the PM's leadership has now been jeopardised by her own rebel MP's and is losing party members - this is now an uprising of the parliament and the downfall of the government. Now you see a sudden power shift as although government usually retains the ultimate ability to introduce legislation, parliament also now has the potential to drag their Brexit legislation through parliament. Many of the conservative and DUP MP's are not supporting all plans from the PM.

Recent speculation has suggested that the UK will have a much further extension onto exit day from the European Union[3], an extension to article 50 - as long as 2021. Senior European officials have suggested this as the House of Commons continues to reject the PM's deal, nearing a No Deal scenario. 318 MP's voted to block a no deal scenario, although this win is not legally binding, this increases the pressure to secure a good deal with the EU and to keep a 21-month transition period - this would help Britain and the EU

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sort much of the detail out, like what happens when we leave the single market. Although, if it turns to be a no-deal, the transition period is gone and is bad for the UK, we then have very limited control, we also have no room to negotiate laws etc. A deal scenario would be the best outcome for the UK as it would most likely have positive and/or minimal affect on the constitution,

One primary source of the UK constitution is the conventions and how ' they are also crucial to understanding how the constitution functions'[4].

Conventions are crucial to how the nations in the UK - especially Scotland - approach reserved and devolved issues, including the constitution. The *R Miller* case, gave the UK complete clarity on conventions, the case also highlighted ' weakness in the UK constitution' and heavily discussed the scope of how conventions should be applied in the UK

Conventions are now merely a custom rather than legally binding laws. A Dicey explains "' conventions of the constitution' consists of maxims or practices which, though they regulate the ordinary conduct of the crown, of ministers, and of other persons under the constitution, are not in strictness laws at all" [5] - this is to help apply the checks and balances to the UK constitution. Due to the recent decisions made on Brexit, the PM has heavily ignored the pleas from other countries during negotiations. Even though conventions are only a custom, they could make or break relationships between other UK countries, the UK cannot simply ignore these conventions as they make up part of the foundations the constitution was built upon

One convention which concerns devolution is the Sewel convention; used when the government wants to legislate on devolved matters. This applies

heavily to Scotland and Northern Ireland; who have been ironically undermined during the Brexit process; this could give a good indication of what could come after Brexit. Many Scottish devolved matters (law) are covered by EU law, Westminster might choose after Brexit to retain this power, causing more hostility between both parliaments. Not only has the government received much backlash from the Scottish parliament, but also the DUP who assisted the government to stay in power; now the Irish border or ' Backstop' is under threat.

Although the devolved matters being legislated on at the UK parliament is protected by the Sewel[6]convention, it is only a convention. In the case of *R Miller* [7] , it was ruled by the supreme court that even if the parliament went against the Sewel convention, it isn't legally binding at all. However, usually the UK parliament will follow this convention but are highly likely to ignore the Sewel convention if it means the devolved parliaments don't become intrusive in the Brexit process - this could mean after Brexit this convention is no longer acknowledged leaving the devolved countries on the side-lines and Westminster as the sole ruler - pushing out devolved powers and pulling in parliamentary sovereignty. Causing a hostile United Kingdom after Brexit may cause the Scottish Government to trigger another independence referendum, and if the Scottish Government fail to listen to their own country who overwhelmingly voted to remain in the European Union, they will be facing implications from the public.

Scotland may choose to go independent, in that case they would most likely be open to negotiate themselves back into the EU; this would also tear apart the Act of Union[8]after over 300 years of union. In this scenario, Scotland

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would have to then construct their own constitution, re-establish much of their judicial system, as the highest court of appeal for Scotland is the Supreme court of the United Kingdom. Clear cut plans would have to be made before Scotland should leave the UK, Scotland relies heavily on much of English law, conventions and the unwritten constitution which would no longer stand if Scotland left.

It is ambiguous if there will be a change to the Scotland Act 1998[9], specifically about the European Communities Act 1972[10]. The Scottish parliament is unable to legislate on certain provisions on what this Act covers, nor the European Union (Withdrawal) Act 2018[11], and often on other matters concerning the EU law. There's also a question on how much of the EU law and if any EU law will still apply on Scottish soil. After Brexit, it is most likely that the decisions of the CJEU (Court Justice of the European Union) will only be persuasive, they won't have any binding case-law for any courts in Scotland; though until the UK has been through the transition period, all UK courts apart from the UK Supreme Court will still be bound by EU case law. However, because a vast amount of EU applies in Scotland, case-law in courts may choose to adopt approaches displayed by the CJEU – whereas English courts might choose to ignore it more, to display the actual return of sovereignty.

EU derived legislation will continue to influence Scots law after Exit-day, but any EU-derived legislation made after exit-day will most-likely not have any effect after exit day[12]. No Scottish court, or any British court can refer any cases to the CJEU[13]on or after exit day. The UK, at this time, may operate on the primary legislation EU law, to continue or to create new legislation on <https://assignbuster.com/impact-of-brexit-on-the-uks-constitution/>

these laws with the EU, secondary legislation will have to be made. The government has exclusive access to make these laws form the ' Henry III's Clause' which allows the government to make new secondary legislation concerning EU law. This goes very much against the conventions of the UK, as the clause can ' vary the degrees on scrutiny'[14]which could potentially make these laws law-quality and rushed - as the vast amount of legislation which has to be overturned or amended will simply take too long; thus making a ' no-deal scenario' would crush the government. Situations like this would cause Scotland and other nations in the UK question its role within the country.

To conclude, many areas of Brexit will effect the UK and it's long standing constitution

- <https://www.parliament.uk/about/how/role/relations-with-other-institutions/parliament-crown/>
- <https://www.bbc.co.uk/news/uk-politics-32810887>
- <https://gulfnews.com/opinion/op-eds/leadership-crisis-as-uk-heads-toward-march-mayhem-1.62129132>
- <https://www.theguardian.com/politics/live/2018/dec/12/tory-mps-trigger-vote-of-no-confidence-in-may-amid-brexit-uncertainty-politics-live>
- <https://www.gov.uk/government/speeches/speech-devolution-after-brexit>
- <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-36599102>

- <https://www.nortonrosefulbright.com/en/knowledge/publications/1995cbf8/brexit—uk-and-eu-legal-framework#section6>
  - <https://www.theguardian.com/politics/2019/feb/24/brexit-could-be-delayed-until-2021-eu-sources-reveal>
  - <https://www.parliament.uk/site-information/glossary/henry-viii-clauses/>
  - <http://www.europarl.europa.eu/factsheets/en/sheet/6/sources-and-scope-of-european-union-law>
  - <https://www.hansardsociety.org.uk/blog/will-brexit-change-the-uk-constitution>
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[1]European Union (Withdrawal) Act 2018 c. 16

[2]European Communities Act 1972 c. 68

[3]European Union (Withdrawal) Act 2018 c. 16

[4]Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis*

[5]A Dicey, *An Introduction to the Study of the Law of the Constitution*, 10<sup>th</sup> edn (Basingstoke, Macmillan, 1959), 24.

[6]Scotland Act 2016 c. 11 s 2 (8)

[7] *R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5*

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[8]Union with England Act 1707 c. 7 (Historical Scottish Act)

[9]Scotland Act 1998 c. 46 Sch 8, European communities act

[10]European Communities Act 1972 c. 68

[11]European Union (Withdrawal) Act 2018 c. 16

[12]European Union (Withdrawal) Act 2018 c. 16 s 2

[13]European Union (Withdrawal) Act 2018 c. 16 s 6 (1)

[14]Henry III's Clause