Brexit would make the UK less democratic, not more

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From the very beginning of the debate over Britain's place in Europe, it has been argued that membership of the EU and its predecessors would entail a loss of 'sovereignty' for the UK. It has also been claimed that the institutions of the EU are 'undemocratic' and 'unaccountable' compared to those of the British state.

To evaluate these claims, we need to consider the relationship between UK domestic law and EU law. This relationship is complex because of the unusual nature of the constitutional arrangements on both sides.

Britain lacks a codified constitution, which puts it in a unique but not particularly desirable position among liberal democracies. The result is that power is routinely exercised within the British state in ways which are neither democratic nor accountable. Membership of the EU is the nearest thing the UK has to a constitution which protects human rights and the rule of law. To support Brexit is to argue for a return to the constitutional *ancien regime* which prevailed in the UK prior to the 1970s.

How can this be when we are constantly told that Britain has a uniquely stable and effective 'unwritten' constitution which can be traced back to the origins of the rule of law in Magna Carta itself? The unwelcome truth is that Magna Carta has no more status than any other legal enactment and, as a medieval document of uncertain meaning, arguably somewhat less.

Take one of the cardinal principles of the rule of law as set out in Magna Carta, namely that justice is not a commodity ('to no one will we sell… justice'). This principle is regularly infringed in Britain today, as a result of changes brought about under recent governments. For example, from 2013, claimants in employment cases must pay fees of several hundred pounds to take their case to a tribunal. In effect they have to buy access to justice.

Britain's uncodified constitution places no constraint on the marketisation of civil justice. Thanks to the doctrine of Parliamentary sovereignty, even a law apparently as fundamental as Magna Carta can be overridden by a legal instrument adopted by a simple legislative majority or by the exercise of ministerial power in the form of delegated legislation.

The doctrine of Parliamentary sovereignty is meant to be a cornerstone of British democracy. Sovereignty means, in this context, that no Parliament is bound by its predecessors. As the House of Lords is unelected and essentially a reviewing chamber, while the monarch's power to veto laws is never exercised, power vests in what a Conservative politician and senior lawyer, Lord Hailsham, referred to in the 1970s as an 'elective dictatorship'.

Defenders of this model claim that it allows for the democratic will to be directly reflected in legislative and governmental action. Another way of looking at it is that political power in Britain is exercised, between general elections, without the checks and balances which are taken for granted in other liberal democracies. If the UK has a constitution at all, it is a pre-modern and unreformed one, which lacks the means to hold the British political class to account on a regular and continuing basis.

Ministers now arguing for Brexit complain that EU law stops them doing what they would like to do. But what this means in practice is that constitutional checks and balances which are normal in other countries are being brought to bear on the actions of British ministers, through the route of EU law.

Let's now examine EU law making in more detail. EU laws are essentially of two types. The first type consists of rules aimed at creating the single European market. These include the rules which require the member states to respect free movement for goods and services, and which standardise the production and circulation of goods and services. If the UK were not in the EU, many of these rules would end up being binding by other means, through membership of the World Trade Organization and via bilateral trade agreements. Brexit would change the rules on movement of labour, but unless the UK wanted to cut itself off entirely from the global economy, rules governing cross-border labour flows would still be needed. It is currently the case that most migrants entering the UK to work come from outside the EU.

Thus as long as the UK wants to be part of the global trading system, transnational rules on trade and migration, and on product standards, would still affect the British economy. If the UK stays in the EU, British citizens can exercise more influence, not less, over the making of those rules. This is partly because being in the EU means that the UK has a say in making the rules of the single market, which would not be so if it were in the position of Norway or Switzerland.

But EU membership also means that the UK can have a more effective voice in the design of the transnational trading regimes. Thanks to the collective negotiating strength of the EU, the UK has more of an input into WTO rules and trade agreements than would be the case if it negotiated these deals in isolation from its European neighbours.

The second type of EU rules are human rights protections of the kind contained in the EU Charter of Fundamental Rights, general principles of EU law, and various parts of Treaties, directives and regulations. It may be argued that these rules are precisely the type of laws which British ministers should be constrained by.

The problem with these EU rules is not they are too strong, but that they are too weak as constraints on national governments. EU law is a patchwork quilt, which is selective in the human rights protections it confers, and it is weighted in favour of economic interests at the expense of social and environmental protections. It is not enough of a bulwark against the erosion of the rule of law, which will be the inevitable consequence of the policies of marketisation currently favoured by British political elites. EU law is becoming more neoliberal over time, largely as a result of rulings of the Court of Justice which have elevated economic freedoms over social rights.

So what is ultimately at stake in the Brexit debate? It is only partially about Britain. A British exit would return the UK to its pre-modern constitution. For the EU, Brexit could favour a rebalancing of EU law in favour of social and environmental rights. But it is more likely that the neoliberal turn in EU law would continue as there are many factors now driving it, separately from British influence. The EU, as much as the UK, is in need of a constitutional settlement which addresses the risks posed by market fundamentalism.

What if the UK votes to stay in? The danger here is that a British 'near miss' will discourage attempts to reverse the EU's recent neoliberal turn. If that happens, the supporters of Brexit will have got much of what they wanted. A vote to remain must be the trigger for the strengthening of democratic institutions in both Britain and the wider EU.

End.