

April 2016

Why staying in the EU would be good for British democracy

In this new CBR podcast Simon Deakin, Director of the Centre for Business Research and Professor of Law at the University of Cambridge analyses the legal and constitutional background to the Brexit debate.

Professor Deakin discusses the argument that the EU has undermined British democracy. He points out that Brexit would return the UK to its uncodified and largely pre-modern constitution, and would harm human rights and democratic participation in decisions affecting Britain and its place in the world.

Deakin ends up by arguing for a modern constitution in the UK and concludes: "We need to have a codified constitution which explicitly protects social and other human rights."

Here we transcribe the questions we put to Professor Deakin and his answers (put link to document here). You can also read his recent longer paper on BREXIT at the bottom of the podcast. (put link here).

1. It has long been argued that membership of the EU and its predecessors would entail a loss of 'sovereignty' for the UK. Why?

As we are in the EU we have to observe European Union law and that prevails over UK domestic law when there is a conflict. When we vote a government in during a general election that parliament then passes laws but these can be over-ridden by the EU. If they conflict with European Law in the end they will be struck down. The argument is often put that participation in the EU involves giving up parliamentary sovereignty and also our national sovereignty and we are therefore transferring powers to unaccountable institutions in Europe.

2. It has also been claimed that the institutions of the EU are 'undemocratic' and 'unaccountable' compared to those of the British state. Is that true?

The EU isn't a state, it is a transnational entity, subject to its own rules and subject to its own law. It has a complex relationship to its member states including the UK. It is true that EU Law elevates certain legal rules above UK legal rules but it does that for reasons that are connected to the nature of our own democracy and are connected to our participation in international relations and global trade.

3. 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? Is that still relevant today and is one system better than the other?

The paradox of our own constitution is that because it is unwritten or what we should call uncodified and because of the doctrine of parliamentary sovereignty, I would argue, we lack checks and balances which are taken for granted in other European democracies. We in fact give too much power to Parliament, we are insufficiently protected from what is in effect what a Conservative politician Lord Hailsham in the 1970s called an "elective dictatorship".

We elect our MPs and for five years or so Parliament has tremendous power, particularly with fixed term parliaments that run for five years now. What the EU Law does is inject into UK Law elements of constitutional checks and balances, in particular human rights protections which we very badly need. We would have to reinvent those if we left the EU. If we were to leave the EU I don't think we would be in a situation of greater democracy and greater accountability because we would just be going back to our old unreformed constitution.

Magna Carta is interesting because it is the origin of the idea that executive power should be subject to law and that there is no power above the law. However, although Magna Carta is equivalent to an Act of Parliament it isn't constitutionally embedded and the provisions of Magna Carta themselves can be overridden by legislation and later Acts of Parliament, and that has happened. It is a good example of the weakness of the British constitution, no Parliament is bound by its predecessors nor can it bind its successors. Even fundamental rules like those contained in Magna Carta can be whittled away, can be amended and can even be over-turned by what later Parliaments do. We are, to a surprising extent subject to an unconditional, unqualified Parliamentary power that can be exercised in a way that is detrimental to human rights.

4. The doctrine of Parliamentary sovereignty is meant to be a cornerstone of British democracy. Sovereignty means, that no Parliament is bound by its predecessors. So does that mean that our rights are dependent on whoever is in power and not on a constitution as other nation states have?

The judges have said that they respect the notion of parliamentary sovereignty so they reject the ideas of embedded constitutional rules in this sense so even rules about how laws are made – the Parliament Acts – it appears that they are subject to a political constraint not to a legal constraint.

Magna Carta says, among other things, that we should not buy or sell justice. "To no-one will we sell justice". Justice is not a commodity. That is a very important aspect of the rule of law, that you can't simply buy justice, it is beyond the market. But this has been ineffective in the case of recent reforms that are marketising our justice system. This is one example of how the rule of law can be undermined by Acts of Parliament that are motivated by a very particular ideological position a neo-liberal, almost a market fundamental position, which calls into question certain key features of the rule of law. Our constitution is no protection against the erosion of the rule of law in this sense.

5. You say that the British justice system, as with so much else of the public sphere, has been marketised. Can you elaborate and what are the implications of this for British justice?

Changes to our laws do happen incrementally and if we look at how access to employment tribunals now depend upon the ability of a claimant to pay at least several hundred pounds to bring a claim we are now marketising justice and restricting justice to the well-off and we are penalising the poorest in our society by denying them access to the courts.

When we make access to the justice system dependent upon means we are failing to protect fundamental social rights that protect the poor, protect those without means, and protect victims of discrimination. These involve fundamental social rights, the rights against discrimination, or the rights to a living wage, and other employment law rights which are respected in international conventions and treaties and they are regarded as fundamentally important human rights and most constitutions in mainland Europe respect these rights. Elsewhere they can't be taken away by statute and they can't be taken away by lack of means, but in this country they can be, we can remove the mechanisms by which these social rights and human rights can be enforced but it is not a breach of our constitution.

Unfortunately the EU isn't a complete answer either, because the issue of whether reforms to employment tribunals also infringe European law has gone before our own courts and so far they have rejected the argument that European law prevents this from happening. The EU is not perfect either but what we need here is a constitutional settlement in this country which respects human rights and introduces checks and balances. BREXIT would make us worse off in this respect, it would take us back to an ancien regime – a pre-modern constitution! That is not to say the EU is perfect it can be improved and the role of human rights within the Union law can be strengthened but BREXIT is a step backwards not a step forwards in this respect.

6. You say EU laws are essentially of two types. The first type consists of rules aimed at creating the single European market. How do they work?

The first are rules about creating access to the market and they are about free movement for labour and capital, and they are also about standardisation. This allows goods to be sold across the whole of the EU consistently and fairly. Without those rules there would not be a single market space, we undoubtedly benefit from participation in that single market space. It is a positive sum game, everybody gains, but without the rules this couldn't happen. Markets are not self-forming, markets require legal rules they require transnational legal rules. If we were not inside the EU many of those rules would in effect be binding on us anyway. We would have to agree to them. They could either be imposed on us by WTO membership or in other cases we would have to renegotiate the terms by which we had access to the single market and we would have to enter into bi-lateral negotiations with third party countries outside the EU about the basis on which we trade with them.

Many of these rules about market access about standardisation we would almost certainly end up accepting anyway. One exception is the free movement of labour. If we are not in the EU or in the single market we might not have to accept free movement of labour if there was a BREXIT but we would still want to be part of an international and economic system where there is a certain amount of free movement for labour and for capital. If we wanted to stay within that global trading system we wouldn't be able to put a complete ban on free movement of labour. At the moment it appears slightly more people enter the UK to work from outside the EU under our immigration law than from inside the EU and so exiting the EU will not stop migration into the UK for work purposes.

If we BREXITED we would have to recreate these legal regimes by bilateral negotiations one by one with third party countries and renegotiate in due course a new basis for participation in the single market, which would involve accepting many of these rules so in a sense it is a purely formal distinction. We would have to accept these rules unless we wanted to close the UK off from participation in global trade.

7. And that 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. You argue that these are, on the whole, precisely the type of laws which British ministers *should* be constrained by. So are they or in reality are they able to opt out or interpret them differently?

Ministers have said in the BREXIT campaign that they feel they have been prevented by the EU from doing things that they regard to being in the public interest. It is not clear exactly what they mean by that, but I feel ministers should feel constrained not just by their own judgement but by certain principles of Human Rights law from doing certain things. What EU law does is impose upon ministers the rules of the European trading regime. The second type of law, is protection of human rights, contained in the charter of fundamental rights of the EU and it does have an impact on UK law. It is helpful where we do not protect human rights in particular social and employment rights. So when ministers who support BREXIT say they feel constrained by Europe from doing things they would like to do I think we need to know which rules they feel are constraining them. If we had a modern codified constitution they would be constrained by exactly that type of rule. In the absence of that codified constitution EU law is the best we have got, it isn't perfect but we certainly shouldn't lose it.

At the moment the same people campaigning for BREXIT are some of the same people campaigning for the repeal of the Human Rights Act, which isn't in fact underpinned by EU law

except indirectly. It derives from another non EU legal instrument, the Council of Europe's European Convention on Human Rights. I don't think it is practical to imagine that BREXIT would lead to the type of constitutional settlement that I am advocating. It is more likely to lead to the opposite, to the removal of the limited protection of our human rights that we enjoy because of the protection of the EU law.

8. You also mention the case study of the controversy over the adoption of TTIP by the EU and point out that whatever hostility there is to it if we opted out Britain would not even have to debate it, is that true?

If we say, for example, that we don't like TTIP because it gives too many powers to international companies or undermines the NHS, we have to remember that TTIP has been debated in the European parliament and it has a say over the adoption of TTIP. If we are not in the EU there is no guarantee it seems that we could stop TTIP. Because the argument is mediated by European institutions British opponents of TTIP can join with other European opponents of TTIP and make their voice heard. It may be more effective than would be the case if there was a national debate in each EU member state. I think translating that TTIP debate to European levels strengthens those who regard TTIP as an attack upon democracy.

Democracy is not just about voting, it is about deliberation and voice and participation, and it is open to us as citizens of the UK to engage in this process of deliberation at European level and where it really matters, because in a globalised World, these things are not any longer realistically just matters for individual nation states. I do not accept the argument that returning formally some of these decision making powers to our own Parliament and to our own government will better protect us from the effects of globalisation where they are negative. I think that it makes things much more difficult.

9. You conclude that: "A British exit would return the UK to its pre-modern constitution, *the consequences of which are hard to predict, but which I think do not bode well for the future of liberal democracy in this country.*" What might happen if the BREXIT vote to leave camp win the forthcoming referendum?

BREXIT is not just a debate about economics and it is not just a question of trading off sovereignty for economic growth. It is very difficult to predict what the economic effects of BREXIT will be. It is much easier to see what the constitutional and legal effects would be. I think they would be negative and they would be anti-democratic.

10. Do you think that the EU's recent neoliberal right leaning turn might be reaffirmed if we vote to say in Europe but by a slender "near miss"?

I have said that being in the EU makes it possible to engage the forces of democracy against trends within globalisation that might undermine our democratic rights. Nevertheless the EU is not perfect, and the EU contains human rights protections and contains the rules for creating a single market, and in many ways creates more social rights than UK law would do, without the EU, but there are also elements within the EU Law, which are consistent with the market forces neo-liberal agenda which have been coming to the fore over the last decade. The judgments of the European Court of Justice have been criticised for elevating so called economic freedoms over social rights, therefore I am not saying the EU is perfect but leaving the EU is not an answer to this either. If we leave the EU on the grounds that the EU is becoming too neo-liberal then we give up any possibility of influencing the EU in any social democratic direction and that won't help us as we will still be subject to the influence of the EU to a very large extent even if we are formally outside it.

11. If that happens, the supporters of Brexit will have got much of what they wanted?

Some of those arguing for BREXIT have been explicit about saying they want the EU to disintegrate, particularly the social dimension of the EU, and its replacement by a single free trade zone which wouldn't have any social regulations in it. It would just be about trading and market access. The bigger agenda behind the BREXIT campaign is to take the UK out and in a more neo-liberal direction and also to change the EU and to confirm its neo-liberal move. I think a BREXIT vote would have negative implications for Britain. In the short run it might actually help the EU to remain socially progressive because the UK would no longer be influencing European rules but I don't think that would last for very long. I think the best hope for a socially progressive EU which combines commitment to free trade with protection of social rights is for the UK to remain within but for the debate we are having about BREXIT to be the occasion for a re-think about the nature of British and also European constitutionalism.

12. Do you think our democratic institutions in both Britain and the wider EU need strengthening and should Britain have a written constitution?

We need to have a different constitution in Britain we need to have a codified constitution which does explicitly protect social and other human rights. The European Union also needs to have a constitution it needs to have a constitutional settlement which at international and transnational level strikes a different balance between social rights and economic rights but that debate will ultimately have to be played out within the EU. It cannot be played out in each of the individual member states, and it cannot just be played out here in the UK. So those of us who believe in the case for human rights the case for participative democracy and for social rights should be making a reasoned case for remaining in the EU on constitutional and human rights grounds and not just by reference to economic grounds.

The BREXIT debate is just part of the continuing debate about the nature of the British polity but also the European polity what is at stake here is much more than BREXIT what is at stake is the nature and the future of the EU itself.

End.