

Brexit: What are the lessons?

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THE POLITICAL SETTING

In June 2016 the electorate in the United Kingdom voted in favour of leaving the EU where the UK had been a member since 1973. Turnout was high (over 70%) but the margin was small (52% for leave and 48% for remain).

The vote in favour of leaving ushered in a period of great instability in British politics, unprecedented since the end of the Second World War. It lasted until December 2019 when the Conservative party won a general election under a new Prime Minister (Boris Johnson) providing it with a decisive parliamentary majority that has enabled it to pass the Withdrawal Agreement. The UK is now no longer a member of the EU.

During this same period, the EU itself has been under strain for reasons in addition to the UK's exit. There has been a lack of agreement on the appropriate fiscal policy stance across countries belonging to the Eurozone. The construction of a more resilient single currency is seen as "unfinished businesses". In addition, a number of member

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states in Eastern Europe are seen to be in breach of the 1993 Copenhagen criteria relating to the requirement for member states to adhere to democratic values, human rights and the rule of law.

Adding to the stresses has been the sense that the middle ground of European politics, long sustaining European integration, has been eroded by populism from the right and the left. The centre ground has become much less stable within member states, and also less dominant within the institutions of the Union such as the European Parliament.

THE POLITICAL INSTABILITY IN THE UK

The vote in the UK in June 2016 in favour of leaving the EU led to the immediate resignation of the then Prime Minister, David Cameron, who had called the referendum and who had led the campaign to remain. His successor, Theresa May, formally notified the EU of the UK's intention to leave in March 2017 under Art.50 TEU. This article provides a two-year period for negotiating the terms and conditions of any departure of a member state from the EU after formal notification, unless extended. Formal notification thus set the clock running.

With a majority in the House of Commons of only around 20, Theresa May then took the fateful decision to call a fresh general election in May 2017 in order to increase her majority and to provide more leeway in the negotiations. Instead, the outcome of the election deprived her of a working majority and left her dependent on the 10 Ulster Unionists MPs that represent the Protestant and Unionist community in N. Ireland. It also left her position vulnerable to the factions within her own party at the different ends of the spectrum about the nature and content of the withdrawal agreement. The minority position of the government was the leading reason for the instability that followed.

What added enormously to the instability was the internal tensions within each of the main parties. Both the two main political parties, Labour and Conservative, themselves represent longstanding coalitions of interests and values. In normal times intraparty differences within these coalitions remain muted. There is a premium on overall party loyalty. Whatever their internal differences, no faction wishes to let in the other party.

However, the question of EU membership exposed these internal divisions. It put the pro-business urban wing of the conservative party at loggerheads with the grass roots membership and the rural wing. In the labour party, a significant part of grass roots support favoured leaving, together with the intellectual left and party activists, suspicious of a “neo-liberal” EU. They contended with more pro EU elements, including important Trade Unions.

The minority position of the government, together with the internal tensions within each of the main parties, meant that the range of possible outcomes of parliamentary voting on any Brexit withdrawal agreement was thus extraordinarily wide. For most of this period even Brexit itself was in doubt.

Continued infighting within the Conservative party eventually led to the replacement of Theresa May by Boris Johnson in July 2019. He called the general election in December 2019 in order to try to bring instability to an end. He achieved a decisive parliamentary majority with a conservative parliamentary party now clearly committed to Brexit. It enabled the passage of the Withdrawal Agreement in Jan. 2020.

THE POLITICS OF THE EU

The political difficulties have not all been on the side of the UK government and the British parliament. A key element in the EU’s response to its own internal sources of strain has been to emphasise its character as a “rule-based order”. This somewhat defensive posture has introduced a rigidity into the EU’s negotiating posture with the UK. In addition, negotiating with the EU has a special character and dynamic.

The main consideration is that the Brexit agreement needed only a qualified majority of Council members in favour. However, in practice, the European Council has a long history of trying to act by consensus. Moreover, in this case, faced with the exit of a major member state, the remaining members have had every reason to wish to show their collective solidarity. Thus, the Commission, acting on behalf of the Council (under Art. 218 TFEU) as the negotiator for the Council, has aimed for a common position. This is rarely easy to achieve, and it means that, once agreed, a position is difficult to amend and becomes inflexible. Member states

have an incentive to stick with a position, once agreed, rather than to risk unpicking everything.

In addition, there is what is known as a “hold out” problem. In a “hold out” situation, a single member state can insist on a particular position of importance to itself being included in the overall agreement as the price of it joining the common position. In this case, Ireland has played that card over the treatment of the Irish border.

The Irish border has taken on importance because it becomes the new land border between the UK and the EU after the UK leaves both the Single Market and the customs union. The treatment of the border is both a technical issue about the inspection of goods crossing the border, and a highly charged symbolic ‘community’ issue, with its own background in the “Troubles” and the 1998 Good Friday Agreement between the British and Irish governments.

Also complicating the politics from the EU side has been the need to take into account the position of the Commission itself, as well as the need for the eventual approval of any agreement by the European Parliament. The position of the European Court of Justice has been a further complicating factor.

While it is difficult to characterise these institutional positions, it may be fair to say that the Commission sees itself as the “guardian of the Treaties” and has been determined to uphold the EU as a “rule-based” system. The EP has an integrationist majority that has not wished to see exit made “too easy”. The ECJ, while not a direct participant in the negotiations, has had its own position to be upheld as the ultimate interpreter of the Treaty on any matter concerning EU law and its supremacy over member state law.

None of this, on either the UK or the EU side, is consistent with a simplified image of a “give and take” negotiation between two sides where a middle ground becomes identifiable. It has been a multi-sided negotiation where some participants, on each side, have been ready to block agreement rather than to relinquish their preferred position.

INSTITUTIONAL AND CONSTITUTIONAL QUESTIONS

Leaving aside the further intricacies of the politics of Brexit, and the importance of “hold out” positions and veto players in game theoretic analysis,

there are five issues that have emerged of general interest to political scientists and constitutional scholars. These are questions around agenda setting, parliamentary “sovereignty”, the legitimacy of referendums, the framing of exit provisions in constitutions and the nature of the re-election constraint.

AGENDA SETTING

The power to set the agenda and the power to keep matters “off” the agenda has long been a focus of attention for political scientists. In the case of Brexit, it is the power to keep something “off the agenda” that has played a critical role.

Since the UK joined the EU, and despite a referendum on membership in 1975 when 67% voted in favour of membership, successive British governments, both Labour and Conservative, have continually been frustrated by latent opposition to membership within their own parties. The exception has been the Liberal Democrats, always strongly in favour of both economic and political union. As a result, successive governments of both the main parties have emphasised the economic benefits of membership, but, at the same time, have downplayed the goal of an “ever closer” political union. They have preferred not to talk about the political goals of the EU at all. Their hope was to make use of what, in the context of the law, is sometimes referred to as “the constructive use of silence”.

The cross-party interest in keeping political union “off the agenda” meant that questions relating to consent to institutional change in the EU and to “ever closer” political union, have been given little space in public debate by party leaderships. Any public reservations about the 20 treaties related to the EU and agreed since 1973, including the Single European Act 1987, Maastricht 1992, Amsterdam 1997, Nice 2001 and Lisbon 2007 were afforded little scope for airing and downplayed by party leaderships.

In addition, immigration from the EU became a “hot button” issue with little effective response from the parties. This added what can be perceived as a type of “performance failure” to what was already potential “support failure”. The two together provided the opening for a new party that challenged membership: UKIP.

The rise of UKIP was a challenge to both the main parties, but particularly to the conservatives. Britain’s first-past-the-post electoral system made

it unlikely that UKIP itself would become a major force in the House of Commons. (It gained 1 seat in the 2015 general election and none since). But with 4 million votes in the 2015 election and a 12% share of the vote, unless checked, it had a growing potential to take votes away from mainstream candidates, particularly conservatives, and to swing results away from incumbents in particular constituencies. It was this growing challenge that Cameron had hoped to confront and extinguish with the call for a referendum.

The lesson from this is that agenda control in democratic practice is perhaps more important than political scientists have allowed.

The jostling over agenda control by committees managing business in the US Congress, or between legislatures and executives, or between the European Commission and the EP and Council of Minister over who is setting the direction of EU policy, can each be viewed as examples of settings where the aim is for rival actors to achieve greater political salience with the electorate.

However, when the aim is to use “constructive silence” in order to keep something salient off the agenda, then agenda management can result in a basic lack of congruence between governments, party offerings and public opinion. Instead of a closer congruence between political leadership and public opinion, agenda management in this case led to increasing divergence. Silence is not always “constructive”.

In theory, electoral contest between the two main parties should have closed this gap. In theory, the leaderships of political parties change their offerings to the electorate (that is assumed to have fixed preferences) in order to gain or to retain office. On alternative assumptions, the electorate persuades the parties to change their position.

In this case, because of their internal divisions, neither the leadership of the conservative party, nor of the labour party, wished to change their position on the EU. Instead of party leaderships changing their offerings to the electorate, the electorate faced party leaderships with fixed preferences until the Brexit campaign, followed by reluctant conversion to Brexit after the vote. Eventually, a changed conservative leadership under Boris Johnson re-attached itself to the party’s electoral base, and to “leave” sentiment, with a clear campaign position favouring Brexit and to “get Brexit done”.

The emergence of a public opinion narrowly in favour of Brexit thus should not be dismissed as a superficial “populism” or anti-elitism. It touches on a more fundamental issue about how party politics works in democracies and how supposedly representative institutions can become detached from their base of popular support.

Moreover, in this case, the gap created by agenda management between the political leadership and grass roots public opinion was not simply over one particular, burning issue of public policy, notably immigration. EU membership involved the more fundamental question about consent to the framework under which people were being governed. The importance of consent to the basic framework itself was underestimated.

PARLIAMENTARY SOVEREIGNTY

In representative democracies with a separation of powers the question of where ultimate political power, or “sovereignty”, resides has no answer. It is deliberately divided up. In the British system however, the House of Commons has traditionally claimed sovereignty.

The referendum can be seen as a challenge to this tradition because referendums belong to a different democratic tradition —participatory or direct democracy. The challenge was in full sight in the Brexit case because, while the electorate voted for Brexit, a large majority of their 650 representatives in the House of Commons were believed, on the basis of surveys of their views, to have voted in the referendum in favour of remain. Thus, the conventions of representative democracy were themselves challenged. The tension between direct political expression and expression through the intermediation of elected representatives became acute.

Adding to the confusion between two different concepts of democracy, the status of the referendum itself was ambiguous. The ambiguity was reflected in the view prevailing at the time that referendums in the UK were to be considered advisory, because of the sovereignty of Parliament, but, at the same time, Parliament would find it difficult to ignore any decisive expression of public opinion. Reflecting this ambiguity, the 2015 Act authorising the referendum did not make provision for any consequences of either possible outcome.

In the key case arising from the referendum that went to the UK Supreme Court (*Miller v Secretary of State for Exiting the European Union*) the Court drew a distinction between the political effect of the referendum and the legislative effect.

In its judgment the Court accepted the traditional argument (citing a distinguished 1915 scholarly source) that “Parliamentary sovereignty is a fundamental principle of the UK constitution”. It therefore found that the ministerial prerogative could not be used to give notice of withdrawal without the authority of primary legislation. It found furthermore that “where as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution provides, namely through parliamentary legislation”.

It remains to be seen how long this traditional view of parliamentary sovereignty will stand the test of time. The relevance of ideas about participatory or direct democracy has become very much greater in the light of the apparent distance that voters now feel from their representatives in modern circumstances. If electorates look for the kind of directness and immediacy of the Internet age, they are sadly disappointed by representative politics. Referendums and popular initiatives seem to have an important role in bridging the gulf. If this is so, it seems inevitable that the traditional doctrine of parliamentary sovereignty as expressed by the Court will undergo change.

THE LEGITIMACY OF REFERENDUMS

If ideas about participatory or direct democracy are becoming more relevant in today’s world, and if referendums and popular initiatives are taking on a more important role, then the terms and conditions surrounding their use have also become correspondingly more important.

In this context, the Brexit vote has been challenged by those who have argued that the result should not be regarded as authoritative. According to this view, a 52% vote in favour of leaving was not sufficient to legitimize a decision of such fundamental importance for this and future generations. Moreover, it was a result that reflected the preference of the older generation rather than the younger.

In addition, British experience with referendums is recent and infrequent. The 2016 referendum was only the third national referendum. Other referendums have been on devolution in Scotland, Wales and N. Ireland, and on Scottish independence. This lack of experience added to reservations about what exactly was decided by the result. In the light of their inexperience, people may have been voting for other things, rather than on the particular question and its implications that they were asked to vote on.

One obvious possibility in cases where the issue is of fundamental importance is that passage should meet a high voting threshold, such as a two thirds majority in favour. Alternatively, a dual threshold such as a high majority of votes, together with two thirds of the electorate voting, might be justified.

The difficulty is that any required majority that has a higher threshold than a simple majority gives a minority the power to block. For example, if a two thirds majority is required for passage then only 34% are able to block it. In a dual threshold, a blocking minority will also have a choice between two instruments—a vote against, or simple abstention. High thresholds thus will appear as an attempt to load the dice in favour of blocking minorities and the status quo favouring current power holders.

High thresholds may still be justified for decisions of far reaching importance, as in Brexit. However, what seems of more general importance is that referendums should not become instruments for political manipulation by those in power. At the least, the calling of a referendum, its terms and conditions and applicable thresholds, all probably need to be placed in the hands of a body independent of those in power through electoral politics.

EXIT PROVISIONS IN CONSTITUTIONAL ANALYSIS

The Brexit experience has also underlined the importance of further reflection on the framing of exit provisions in constitutions. Generally speaking, political theorists since Spinoza, and, more particularly, constitutional economists, have been in favour, in principle, of exit or secession provisions in any voluntary union.

Exit provisions are seen as a means for allowing for changes in the perceived balance of advantage from membership in a voluntary union for a member, compared with the balance of advantage at the time of the original

contract. The perceived balance could change for economic reasons. Or, it could change for political reasons. Among the possible political reasons for a change of view, constitutional economists give particular weight to any increased possibility of a member being over-ruled by other members on matters of importance to it. However, there has been little said about the substance of exit provisions.

The difficulty with this rather minimalist view is that it does not deal with the complexity of the issues and interests that arise when a territory does decide to separate. Art. 50 in TEU is about procedures. It was not drafted with the UK situation in mind. It was intended as a more general signal to show that the Union was not a rigid organisation offering no possibility to leave.

With international and supranational organizations under fresh challenges, there is a case for developing international law and practice on exit provisions. This might mean elaborating the UN's Vienna Convention on the Law of Treaties.

There are perhaps three aspects of exit provisions that would merit further consideration and elaboration. The first is about the possible inclusion of a remediation provision as a first line of response to a demand for exit. The second is about the role of an independent third party to counter hold-out behaviour. The third is about the role of a neutral forum, outside the institutional setting that may itself be in contention. A neutral forum would offer a venue separated from one where the institutions are themselves partisans in the negotiation on exit.

THE RE-ELECTION CONSTRAINT

As long as politicians and parties are motivated to seek power, political scientists point to the importance of the re-election constraint in democratic politics. The desire for re-election provides a critical source of feedback for democratically elected governments. It is a major incentive to change their platforms if public opinion polls suggest they are losing support and face punishment at the next polls. It encourages individual representatives to toe the party line because they need the party label and backing.

However, in the case of Brexit, for much of the period, electoral feedback and the re-election constraint was not operating with the clarity so often assumed.

First, with public opinion remaining rather evenly divided on leave or remain, both the main parties were equally afraid of negative voting. Nor were they sure what to be most afraid of. Negative voting could have gone either way—for failure to deliver Brexit cleanly, or for failure to offer remain as an option.

Secondly, there was a significant voice in each party calling for a second referendum. In such a case, the referendum would trump the general election as the opportunity for feedback.

Thirdly, the minority position of the government, and the divisions within each party, put considerable power in the hands of individual MPs who were prepared to disregard party voting positions. In the end, the conservative party leadership deselected about 10 parliamentary members in order to present a clear position to the electorate in the *Dec.2019 general election*.

This blunting of election or re-election incentives highlights two questions. The first is again about the interplay between the conventions of representative democracy (elections) and the conventions of direct democracy (referendums). In this case, the interplay seemed to provide inconsistent incentives for two groups of representatives: for labour members in “leave” voting constituencies; and for conservative members in “remain” voting constituencies.

The second is about the role of institutional incentives, such as party deselection procedures, constituency recall procedures, and constitutional term limitations. Each technique can affect the political behaviour of representatives in the absence of clear electoral incentives and feedback. In the case of the conservative party, party deselection procedures proved more effective than constituency recall procedures for establishing a clear party position.

A LASTING IMPACT?

The approval of the Withdrawal Agreement marks the end of an important stage in the Brexit process. A one-year transition period is now running while the longer-term relationship between the UK and EU is worked out.

Nevertheless, there may still be turbulence ahead. All aspects of the future relationship remain still to be settled, from defence cooperation to fisheries. In particular, the future trading relationship has to be hammered out, including agreement on trade in services. The UK government has set a target for the talks to conclude by the end of 2020. Few observers think that this will be possible.

If the target is achieved, or placed within sight, the question that remains is whether politics in the EU and UK will then revert back to the “normal” that existed before the UK vote to leave the EU.

There are three reasons why politics in the UK will probably not revert to the pre-Brexit “normal”. First, the role of direct democracy, expressed through referendums, has been strengthened for the long term. Parliamentary sovereignty in its pure form has gone. It is unclear whether, or when, referendums may take place in Scotland or N. Ireland, but neither can be ruled out. The consequences for the UK are unpredictable.

Secondly, the role of judicial review has been asserted strongly. The new relationship between the executive and the courts will take further time to establish. Important elements, such as the circumstances under which the Supreme Court will accept cases for review, and the circumstances when the Court will defer to the political branch, remain to be more fully worked out.

Thirdly, the “machinery of government” has been severely tested. In particular there is likely to be a lasting impact on the already fading idea of the life-time, career civil servant observing some abstract notion of the “public good”. In this case it is believed, without clear evidence, significant elements in the civil service, foreign and domestic, were opposed to Brexit and found some notion of a higher public good a way of rationalising reluctance. Shorter term appointments, drawing on more varied professional backgrounds, and placing greater weight on personal career paths, are likely outcomes.

As far as the EU is concerned, the impact of Brexit is also likely to be long-lasting. On the one hand it removes a member state that has been frequently seen as a brake on integration in the EU. It can now move ahead with fresh policy goals. On the other hand, other member states may now give voice to their own hesitations about the future direction of the EU as a political union.

The President of the Commission is convening a “Conference on the Future of Europe”. This will provide for a stock-taking and for new momentum in the EU. Different visions will be put forward. One possibility is that the EU will look for new arrangements for flexibility in the forms of association it offers to its members. Greater flexibility could allow different visions of Europe’s future to co-exist more easily together rather than to pull in different directions.

Underlying future debates in both the UK and in the EU is a profound struggle over identity.

For most European countries, membership in the EU has been seen as offering a key symbolic validation as a modern democratic state. Membership in the EU club offered validation in a post war, or post dictatorship, or post-communist, world. The EU continues to face continued pressures to expand from the four candidate countries in the Balkans still looking for this validation.

By contrast, the UK has felt no need for a similar validation. It responded to a perceived shift of interests. When it lost its credibility as an individual actor on the world stage and looked for a post imperial identity, it sought association in the 1960s with Europe as the way to provide a new role. This alignment of interests seems to have provided only shallow roots for a new European identity.

Today we live in a global world of multiple overlapping identities. Perhaps the British people may still come to see a European identity and membership of the EU as consistent with their world of multiple associations. Perhaps the EU may also look to accommodate wider overlapping identities rather than wanting to impress and project a single dominant idea of a European one. Both have to rethink their role. ●