

Pandora's Box and the Dog's Breakfast

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The past 50 years have seen a new innovation in British politics: the referendum. Although it seems odd from the perspective of 2019, prior to 1973 the UK had never held one. Needless to say, the referendum as a construct is therefore rather alien to the UK's parliamentary democracy, in which politicians are elected in order to represent a particular area and its interests and legislate on behalf of those who elect them.

It is interesting that every single one of these votes (bar one) have been on the same issues: the governance of constituent parts of the UK or the UK's membership of the EU. Aside from the famous 1975 referendum on membership of the European Communities, referenda also occurred on the unification of Ireland and devolution in Scotland and Wales. In all cases, the *status quo ante* was maintained (although Scotland in fact voted narrowly in favour of devolution, the result did not surpass the threshold set by the government of the day). It is noteworthy that had such a threshold been put in place prior to the EU referendum of 2016, the UK would not now be engaged in the process of leaving.

The first referendum – in 1973 on the unification of Ireland – was constitutionally interesting but rather divisive, being effectively boycotted by the nationalist side. Nevertheless, whilst significant it effectively represented a development of existing British policy, certainly as far back as the Statute of Westminster 1931 and arguably as far as the 1921 Anglo-Irish treaty. In effect, it was an opportunity for the population of Northern Ireland to exercise a (probably already recognised) right^[1] to self-determination, albeit within limited parameters^[2].

It is certainly arguable that the Wilson referendum on continued membership of the EC in 1975 was of greater significance. In practical terms, withdrawing from the EC at that point would not have posed nearly the issues that leaving the EU does 40 years later. In part this is due to the fact that the UK had only just joined and was in the process of aligning with the rest of the EC. To a large extent, however, it simply represents the fact that the European Union (which

replaced the European Communities) has evolved substantially over the prior 40 years^[3].

In any event, the fact that the 1975 referendum was handily won tends to obscure the fundamental point that it established a precedent: the referendum was a valid tool in the UK's parliamentary democracy and could be used to establish popular consent for major constitutional changes. In contrast, the use of referenda as devices by the Callaghan and Blair governments were interesting but did not fundamentally change the constitutional *status quo ante*. They were merely plebiscites on whether to establish regional assemblies (or, in the case of London, an elected mayor).

Of course, this trend obscures two important facts: firstly that support for changed subnational governance in Wales and Scotland increased significantly through the Thatcher/Major years and secondly that their establishment was an implicit acknowledgement of the changing structure of the UK. The referenda of the Cameron governments opened a constitutional Pandora's Box, which the UK is ill-equipped to deal with. The first – now long forgotten – referendum was on whether to alter the system used to elect MPs in the UK. The public voted to maintain the current plurality-based system by a large margin (albeit on a very low turnout).

This should have immediately alerted us to the fact that something was amiss. Neither of the two systems proposed were particularly satisfactory, but the fact that only a minority of UK electors were interested enough in a fundamental part of the country's democracy to bother to vote should have raised concerns. Indeed, of the two systems it seems likely that, more often than not, the (rejected) alternative would reflect true voter preferences somewhat better than the *status quo*.

The second referendum – on Scottish independence – was, unlike the EU referendum, binding. Unlike the EU referendum, the franchise was extended to include both EU nationals and 16 & 17 year olds. Expanding the franchise in this way might have been understandable, but it then raises thorny questions for the EU referendum. Arbitrarily changing the franchise based on political convenience, expediency or perceived legitimacy is deeply problematic.

However, irrespective of the result, the very fact of holding the referendum raises other concerns. Holding a referendum implicitly acknowledges the fact that Scotland has the right to self-determination just as the Irish have. That Scotland chose not to exercise that right in 2014 does not change its existence. Thus, the UK is not a nation-state but rather a state made up of sovereign nations. That has quite powerful and important ramifications, for it implies that ultimately sovereignty does *not* lie with Westminster, as it hitherto has, but has rather been delegated to Westminster by the people of Scotland.

Scotland presumably then has the right to withdraw that delegated sovereignty at any point. Presumably this would need to be done through the device of a referendum (and not simply via the request of Scottish MPs or MSPs), although as the UK has no written constitution nor any convention upon which to fall back on this is rather unclear. In any event, this drives something of a cart-and-horses through the UK's constitutional conventions. It also raises difficult questions over the appropriate level of representation for Scotland in the UK's parliament: traditionally supra-national parliaments (as in the EU but is also practiced at a national level in the USA) give excessive weight to smaller members, in spite of the fact such practices are patently undemocratic when looking at the rights of individuals in the federation as a whole.

This also raises the interesting question of whether Scotland (and/or Northern Ireland) should be permitted to unilaterally block Brexit. In any event, the difficult constitutional questions asked by the Scottish independence referendum could be ducked in the immediate aftermath, since the government of the day won the vote. The same was not true of the 2016 referendum on EU membership. As eloquently pointed out by A.C. Grayling, it is at a minimum highly debateable whether the outcome of the 2016 referendum could be termed 'safe'[\[4\]](#). The upshot of all of this is that the UK's "unwritten constitution" is under pressure like never before and is probably no longer fit for purpose.

As such, it is hardly surprising that the government finds itself at loggerheads with Parliament: a bizarre situation for a government that needs to have the confidence of a majority of MPs. Indeed, the Speaker of the House of Commons has had to make several

interesting and controversial interpretations of parliamentary tradition in order to ensure that Parliament can remain an adequate check on the executive. There is no parliamentary majority for most courses of action, and an unwillingness to countenance leaving the EU without a Withdrawal Agreement because they believe that to do so would not be in the best interests of the UK (which is, in fact, their job)

We are thus left with the bitter irony that the rallying cry of Brexiters – the desire to “take back control” to Westminster – can only be achieved by wresting control away from Westminster, potentially killing parliamentary democracy in the process. What we are left with is a bizarre hybrid between some form of direct democracy (hence the recourse to referenda), demagoguery (with threats to dissolve parliament, under the guise of implementing the will expressed in a direct vote, which asked a different but related question) and the representative democracy that the UK has hitherto been.

What the final outcome of this ongoing toxic mess will be, I cannot say. However, it is rapidly becoming clear that there need to be clear constitutional safeguards in place and that we need to formalise the appropriate role of plebiscites, including when they should and when they should not be held and what valid questions must look like. Further down the line, there will need to be proper clarification on territorial issues, which I hope to address in a future blog.

[1] Whilst it's certainly arguable (per the interpretation of the Irish Free State) that the 1921 treaty itself gave Ireland the right to self-determination. If we accept this interpretation then the same treaty and granted the North specific rights in this regard in terms of choosing which state to be part of. If not, then the UK government only fully recognised the right of self-determination for Ireland with the passing of the Statute of Westminster 1931. Since by this time, Northern Ireland was firmly part of the UK and not the Irish Free State, the 1973 referendum could be argued to be weakly innovative. This notwithstanding, since Ireland was de facto a completely independent state from 1921 (and not 1931) this would all appear to be something of a technicality.

[2] The limitation being the fact that the referendum, as in 1921, merely gave the choice between being a part of one country – Ireland – and another.

[\[3\]](#) *Indeed, whilst for many Eurosceptics this is precisely why they seek to leave, it is ironic that it is UK governments – who we as voters have returned to power again and again – that have been in the vanguard of many of these developments. It was the Thatcher government that pushed for the establishment of the Single Market in the late 1980s and the Thatcher government that entered the Exchange Rate Mechanism (ERM). The UK (alongside France) was a driving force behind the creation of the European Aviation Safety Agency (EASA), providing a significant proportion of technical expertise.*

Likewise, the UK has been hugely supportive of Open Skies within Europe, which has allowed the flourishing of low-cost aviation within the EU. The UK is the major beneficiary of huge chunks of the audio-visual media services directive, due to the role played by the English language. The Blair government – elected in the UK by a huge majority – pushed hard for the inclusion of new Eastern European member states and immediately adopted a vastly more liberal approach to migration than most of the rest of Western Europe (alongside Ireland and Sweden). The government then handily won the next election in 2005. It is difficult to argue that the UK populace have not had their say in the EU.

[\[4\]](#) *A. C. Grayling (2019). 'Brexit and the Question of the UK Constitution', in Alex de Ruyter & Beverley Nielsen (ed.) Brexit Negotiations After Article 50: Assessing Process, Progress and Impact (Brexit Studies Series). Emerald Publishing Limited, pp. 15-29*