

Symposium Introduction: The Paradox of Structure: The UK State, Society and ‘Brexit’

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Abstract

Ostensibly motivated by ‘taking back control’, is Brexit an opportunity to enhance the UK’s capacity for self-government? If driven by an aspiration to maximise the central state’s governing autonomy, it confronts a paradox: governance structures at once enable action and constrain it. Exploring this paradox of structure, this article sets Brexit in long-term perspective. As well as reshaping its external relations, Brexit inevitably unsettles the UK’s internal structures, not least in (partly) disentangling the UK state and organised civil society from EU institutions and processes. Equally, those internal structures were themselves rarely static. Brexit has complicated the processes of their flux. The article introduces a symposium which addresses issues of this kind in three important domains: feminist civil society organisations (Minto), Westminster’s role and scrutiny of European affairs (Cygan, Lynch and Whitaker) and the legal rights and access to justice of EU migrants under English law (Barnard and Fraser Burton).

Keywords: Brexit; State and civil society; Feminist organisations; Parliamentary scrutiny; Migrant’s access to justice

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The process of leaving the European Union (EU) has triggered important changes in UK society, in its politics, legal systems and economy. Even after formal exit, the full extent of these changes has yet to be revealed fully, or even completely determined. After nearly half a century of membership, processes of unpicking and remaking the UK’s relationships with its erstwhile partner EU states are hugely complicated. Even if we were able to factor out the confounding consequences of the Covid-19 pandemic and set aside Brexit’s contentious character, this complexity would still make it unlikely we will ever get to a definitive understanding of the impacts on the UK of leaving on the EU.

In a variety of ways, the three contributions to this symposium sit at the intersection of changes caused and un/veiled by Brexit. Each traces its subject matter through Brexit processes and attends to post-Brexit prospects and possibilities. All have links with the UK in a Changing Europe initiative of the UK’s Economic and Social Research Council (ESRC) – those by Barnard and Fraser Burton and by Cygan, Lynch and Whitaker were supported by ESRC Brexit Priority Grants. All three are written by authors who have been closely engaged in tracing Brexit processes – the extraordinary social, political and legal events that marked society, politics and the law across the UK from 2016 to the present day. In

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turn they address the structured relationships between feminist civil society organizations (CSOs) across the UK with their sister CSOs across Europe and at the EU level, the changing role of the Westminster Parliament through and after Brexit and challenges posed for rule of law in enabling access to justice for migrant workers. The articles variously address Brexit-related restructuring of civil society, policy processes, law-making and rights-claiming.

In the first article, Rachel Minto attends to a little studied set of feminist structures, exploring how they have structured participation across the UK as well as into Europe. Second, Cygan, Lynch and Whitaker address a much studied institution – the Westminster Parliament – drawing attention to its flexibility but also to how its ability to know about the EU has been organized and pointing towards the continuing value of that kind of knowledge. The final symposium article sees Barnard and Fraser-Burton address the gap between the formal structure of workers rights and the realities of migrants' (non-)realization those rights in practice, pointing to new possibilities and problems after Brexit.

Each article addresses an aspect or dimension of changes Brexit has caused and continues to drive which is muddled up with equally complex and contested processes of veiling, unveiling and re-veiling. The topics covered – each only addressing one aspect of social, political, legal and economic life – helps to illustrate how extensive is the range of matters on which Brexit touches. It has revealed longstanding problems, begged questions about them and changed the focus on issues they raise for a variety of UK-based social, policy, legal and economic actors.

This complexity means that making sense of Brexit – rendering it analytically tractable – is not straightforward. How should we understand its significance? Is it a critical event – a transformative moment or juncture around which social, political, legal and/or economic life has (or will) pivot (Wincott, 2017)? Or is Brexit better understood as a process – or set of processes – than as an event? Is it an instance of Anglo-British exceptionalism, the local manifestation of a wider phenomenon (populism? nativism? autarkic tendencies? – see Hopkin, 2017 Wilson, 2017) or some combination of the two? (Similarly, we might ask the question 'Of what is Brexit a case?') Was Brexit inevitable, or the product of a conjunction of contingencies (Thompson, 2017)?

Deep tensions marked UK–EU relations well before 2016. That they were the manifestations of a basic contradiction, which, in turn, made inevitable a fundamental fracture between UK and EU, is an argument powerfully made by Helen Thompson (2017). If some basic change in the UK–EU relationship was unavoidable, the UK's experience since 2016 suggests that Brexit remains steeped in contingencies – or perhaps more precisely, Brexit is a cluster of contingent processes of determination. This introductory article will pick through some of those processes by way of situating the symposium articles in a broader context of Brexit analysis. First, briefly, it juxtaposes the question of how Brexit might be set in a long-term perspective with the extraordinary and muddled quality of Brexit processes for the UK. Second, it touches on the connections between Brexit as a renegotiation of the UK's external relationships – with the EU and with other parts of the world – and its internal structure.

The internal implications of Brexit for the organization of civil society, lawmaking and the legal system are major themes for the articles in this collection. For good or ill, Brexit unsettles the practices and structures of the UK state; it makes reorganization of the state unavoidable. It also creates an opportunity for a more wide-ranging and fundamental

restructuring of the state. A series of Johnson administration initiatives suggest it may be pursuing a basic restructuring of this kind. This article will sketch an argument that the pursuit of governing autonomy for the core executive of the UK government has emerged as the core purpose of Brexit. However, aiming to maximize autonomy is likely to prove a frustrating, damaging and quite possibly a self-defeating goal.

Governing autonomy (Bulpitt, 1983) must confront a paradox of structure (relatedly see Jablokow, 2003) – that any structure is and at once a medium of, and a constraint on, the exercise of power. The paradox is that constraint and facilitation are intimately interwoven, perhaps even distinct ways of reading the same feature of structure. Crudely put, as structures make some things easier to do, their operation makes others more difficult to achieve. By constraining some possibilities they facilitate others and *vice versa*. Schattschneider famously called organization ‘the mobilization of bias’ (1960, p. 71). Of course, some structures offer a bigger universe of possibilities than others – as the extensive social science discussion of Pareto optimality and frontiers suggests.

In relation to the question of long-term perspectives, when analysing the role of ‘critical junctures’ in historical institutionalist research Cappoccia and Keleman (2007) rejected the idea that critical change is momentary, while Davis (2008) has exposed how problematic understandings become normalized through imposition of unconsidered periodizations onto history. Brexit – the referendum and UK–EU future negotiation period – came in the midst of unsettled or muddled times; it seems unlikely that their conclusion will settle UK politics down (for all that ‘Get Brexit Done’ was a powerful political slogan). Recall that, for Gourevitch (1986), after 1900 key Western states spent longer periods in muddle, confusion and crisis than ‘normal’ economic growth (see Hay and Wincott, 2012, pp. 29–30; Wincott, 2017). For all that the four or five years since David Cameron called the referendum on EU membership have been remarkable, we should not be surprised if, even after the end of the transition period, the UK still seems to be in a muddle.

Those four and a half years seem rich in irony and contingency. Immediately after the referendum, Boris Johnson seemed to be in a mood to compromise. After his victory as a leading member of the Leave campaign, Johnson’s (2016) solution to the ‘Brexit dilemma’, seemed to be to embrace a formal departure from EU institutions while cleaving as close as possible to the to Europe (Wincott, 2017, pp. 685, 681). Following a devastating intervention by Michael Gove, Johnson’s failure to replace Cameron as Prime Minister (PM) had an ironic consequence.

Although no exuberant campaigner for the cause, as a Remain voter in the 2016 referendum, Theresa May had to work hard to establish her *bona fides* with Leave supporters as the person to lead the UK out of the EU (see Martill and Staiger, forthcoming on the sources of the UK government’s choice of a ‘hard bargaining’ stance). If she never quite managed to persuade the Brexit faithful of her credentials, this stance nevertheless made it impossible for her to pursue the kind of approach towards which Johnson was gesturing in late June 2016. Instead, she sought to dissolve the Brexit dilemma in a rare solution. For May, ‘Brexit means Brexit’ meant a ‘bespoke’ ‘deep and special’ deal mixed with a domestic politics seeming to pivot towards an Industrial Strategy. Having rejected the option of returning to the electorate to strengthen her position at Westminster, May chose to call an election in the spring of 2017 (Hobolt, 2018). That tactic backfired spectacularly and left May as PM, but dependent on support from the DUP to form a government. The

range of possible internal and external 'outcomes' of Brexit for the UK remained surprisingly open for the three years after the referendum – or at least the UK's Brexit position did not develop through a sequence of choices, negotiations and decisions. Partly as a consequence, Johnson had scope to revisit the negotiation and the terms of Withdrawal Agreement.

The dynamics of Brexit politics, particularly within the Conservative Party, created strong incentives for Johnson to oppose May's 'compromises'. The logic of internal party opposition shifted the substance of Johnson's Brexit position towards an 'ever looser' future relationship with the EU. By the time he eventually emerged as Prime Minister, Johnson had moved away, decisively away, from initial hints that the UK–EU relationship should remain close. In the autumn of 2019, he achieved a Withdrawal Agreement with the EU. Critically it included provisions to maintain in place important aspects of EU market regulation and customs provision for Northern Ireland, in the interest of sustaining smooth passage across the border on the island of Ireland. These provisions largely revived terms of a relationship for Northern Ireland May had rejected earlier. Equally, however, the UK government also seems to suggest that Northern Ireland will be integrated with what they call the domestic 'Internal Market' in an 'unfettered' manner.

The Johnson administration includes advocates of Global Britain (Kwarteng *et al.*, 2012), in a form that seems to set the UK's relationship with the EU at odds with strengthening links with many other parts of the world. At the time of writing more than four years after the referendum it remains unclear whether or not the UK will leave the EU on the terms of a negotiated agreement. What does seem clear is that even if an agreement is agreed in the autumn of 2020, its terms are likely to be thin (Hix, 2018 predicted a 'basic free trade agreement' outcome) – a long way from May's ambition for a bespoke, deep and special deal. The scope and range of trade agreements beyond Europe that the UK might pursue remain equally unclear. For four years UK politics was marked by a breathlessly manic stasis. But, as we have seen, something did seem to change: the form of Brexit pursued by Johnson.

Whether with the EU or the rest of the world, under Johnson ever greater priority was given to the maximization of the UK core executive's governing autonomy to make 'deals', without much consideration of what their substance would turn out to be (compare Rosamond, forthcoming). Achieving maximal autonomy might prove to be a hollow achievement if the deals themselves prove elusive or of limited value. Some of its advocates supported Brexit in the name of a globalist reorientation of the UK. Events since the referendum may make it appear as an earlier step away from globalism. Later steps could include Trump's victory in the US Presidential election, the worsening US–China political relationship (with implications for their trade relationship) and subsequent deterioration in UK–China relations. (Although, of course, some of these shifts might themselves be temporary and reversible.)

Changes to the UK's external relations interact with the state's internal structure in powerful ways. The treatment of Northern Ireland in Brexit processes provides the clearest illustration of this interaction and its challenges. Johnson was able first to repudiate May's 'backstop' and, in the autumn of 2019, agree terms of withdrawal that he himself then called seriously into question through domestic legislative proposals for a UK Internal Market less than a year later. The 'internal' and 'external' are entangled in ways that might suggest the distinction itself is difficult to maintain.

All the articles in this symposium illustrate that UK EU membership led to a large range of ‘domestic’ activities becoming shot through with EU practices and structures. Disentangling the UK from (some of) these EU influences will be a lengthy and complex process – analyses by Murray and Brianson (2019) and Hix (2018) suggest it is unlikely ever to be fully achieved. Even with a form of Brexit that establishes relatively minimal set of formal relationship between the UK and the EU, the symposium reveals a number of ways in which UK organizations will remain engaged with EU institutions into the future.

Each symposium article attends to important internal consequences of Brexit for the UK. While it makes considerable internal change unavoidable, in itself Brexit does not determine the extent or form of this restructuring. For example, the EU framework was both written through the structure of UK devolution and served as a kind of scaffolding within which devolution operated in the absence of a clear or robust domestic form of UK intergovernmental relations (McEwen, forthcoming). As PM, May made the choice to pass the EU Withdrawal Act, 2018 in the face of opposition from Scotland. This approach broke with the so-called ‘Sewel convention’, that the UK Parliament would not pass legislation encroaching on devolved competences without the consent of the relevant devolved legislature. Sewel is regarded by devolved governments as a cornerstone of the territorial constitution. May’s choice placed it under huge strain – arguably to the point of fracture. Her willingness to stretch constitutional conventions under the extraordinary pressures of Brexit did not save May from coming to be caught on the horns of a domestic territorial dilemma: how might a coherent UK–EU relationship after Brexit be reconciled with issues around the border on the island of Ireland?

Under May, the UK polity was not able to bring Brexit to a resolution of any kind. Even so, the political terrain for Brexit was being discursively shaped throughout this period, establishing the contours across which Brexit came to be prosecuted and contested. Some of this terrain was reshaped surprisingly quickly, in ways that made some paths through it easier to follow than others. Consider the particular language in which changes caused by Brexit and realities it has un/veiled has been and is wrapped. It was rapidly normalized, and even came to be taken for granted. Processes that at once showed particular conceptualizations or ways of framing the issues then hid them in plain sight.

The Brexit label itself – the neologism used for the overall process – seems to embody the difficulties that the world of politics at Westminster has had grasping the implications of leaving the EU for the whole territory of the UK state. Implicitly, the term focuses on one of the two major islands in the North Atlantic archipelago: Britain rather than the UK as a whole, Brexit rather than UKexit. Of course, ‘Brexit’ processes have brought much more attention to the distinctive situation of Northern Ireland than it has garnered in ‘normal’ political times.

Key Brexit themes – such as the campaign slogan ‘take back control’ (which Rosamond, forthcoming has called a ‘usefully inchoate mantra’) and the notion of ‘left behind’ people and places – have come to hold an increasingly important place the UK government’s internal politics since Johnson became PM. The notion that the ‘left behind’ – people and places – were key to explaining Brexit is a particular way of framing questions of inequality and exclusion in the Brexit context. Subsequently the idea of ‘levelling up’ as a means of addressing post-Brexit challenges has the same quality.

Debates carried on in this lexicon engage very little with longstanding debates on similar underlying social, political and economic questions that, for example, use the language of inequality.

Even beyond Brexit, 'taking control' seems to be a leitmotiv for the Johnson administration. Some of its proposed changes have a clear connection to Brexit. The Department of Business, Energy and Industrial Strategy (2020) White Paper on the UK Internal Market seeks to create domestic structures to replace those previously provided by the EU. Although they may have roots in Brexit politics, others – such as potentially wide-ranging changes to the machinery of government in Whitehall or the Ministry of Justice (2020) Independent Review of Administrative Law – do not seem to be immediate UK requirements of leaving the EU.

Although presented as a means of transferring powers held at the EU level to the devolved governments, the UK internal market proposals can also be read in a different way. The UK is dominated economically and in population terms by England, a country also governed directly by the UK level state. In this setting a system of mutual recognition and non-discrimination may well bear heavily on the autonomy of the devolved authorities, unless it includes clear safeguards for them. Yet the emphasis in the White Paper is on new powers for the UK government, across its whole territory. It suggests state aids policy should be reserved to the UK level and proposes a new UK-level funding stream for projects that facilitate the functioning of the UK market.

Since 2016 numerous top-rank civil servants have left Whitehall. Johnson's administration has added potentially wide-ranging changes to the machinery of government in Whitehall to the continuing trend of senior figures leaving the civil service. There are, no doubt, many ways in which Whitehall could be improved. But if public administration is perceived mainly as a constraint on executive action, there is a risk that the ways in which it facilitates policy may be neglected and undermined.

The articles in this symposium on Westminster and on migrant's access to rights both illustrate that the challenges posed by Brexit to courts and judges across the UK are only likely to deepen (compare with Cardwell, 2019 on the continuing dilemmas facing the EU legal order despite the exit of the UK 'awkward partner'). The Conservative's 2019 election manifesto expressed concern that judicial review might be 'abused to conduct politics by other means or to create needless delays' (Conservative and Unionist Party 2019, p. 48). At the end of July 2020 an Independent Review of Administrative Law was announced presumably partly with a view to eliminating any abuses of these kinds. Equally, though, proposals in the Internal Market White Paper may well generate litigation around mutual recognition and non-discrimination.

A thread may run through these initiatives: each would be tempting to UK core executive motivated to enhance its governing autonomy. Perhaps radical reform is called for. Leading analysts of the UK state have long pointed to its unenviable record of policy disasters (Dunleavy, 1995) or fiascos (Moran, 2003). Yet the logic of their arguments is – emphatically – not that a unilateral strengthening of the central power of the UK core executive would resolve these problems: quite the reverse. Even if guided by effective, high-powered analysis of huge amounts of data, unconstrained units at the heart of government will not be able to solve, say, the problems of spatial inequality currently known as the 'levelling up agenda'. The paradox of structure suggests that effective spatial governance necessarily operates as and through constraints on the centre. The allure of

maximizing unconstrained central governing autonomy could lead to more and more control over less and less.

The symposium opens with Rachel Minto's analysis of the implications of Brexit for the UK Joint Committee on Women (UKJCW), the UK's representation in the European Women's Lobby (EWL). Her study attends to civil society structures created some 30 years ago, which had as an aim the organization of feminist concerns onto the EU agenda. Minto presents pathbreaking account of the territorial structuring of the UKJCW around the nations/jurisdictions that make it up, from nearly a decade before UK political devolution. She traces the mixed prospects for UK representation in the EWL after Brexit – marked by both pan-European feminist solidarity and some concerns about access to resources.

Until recently, UKJCW had not been the focus of extensive academic analysis; Brexit may have triggered a new urgency in this respect. Tracing its origins to a 1987 conference in London, in 1990 the European Commission provided support for the EWL's foundation with a Brussels based secretariat. The UKJCW came into being at the same time. Although nearly a decade before legislative powers were returned to Northern Ireland and devolved anew to Scotland and Wales, Minto reflects on the remarkable fact that UKJCW's structure always reflected the UK's internal territorial differentiation. Her analysis shows a strong appetite for continued partnership both across the EWL and within the UK. Equally, though, possible limits to UK involvement in funded projects through EWL seem likely to weaken the position of the UK organizations – particularly those which do not have robust sources to support a wide range of core functions.

Cygan, Lynch and Whitaker consider the Westminster Parliament's handling of Brexit. In the process they unveil the ways in which Parliament has managed its scrutiny of EU policy and law-making processes and reflect on how Westminster might scrutinize EU laws and regulations – and the UK's relationship with the EU – in the future. Once the UK is fully outside the EU, they point to real challenges for UK parliamentarians in scrutinizing laws, regulations and policies that emerge from the EU, including in terms of simple access to relevant information. More generally, they argue, EU membership, has had the effect of 'deparliamentarizing' politics – not just in the UK. On the other hand, in itself, Brexit will not generate a 'reparliamentarization' of UK-level politics. Indeed, in some respects, it may lead to a further entrenchment of executive power.

New challenges for the UK judiciary feature prominently in the Cygan, Lynch and Whitaker analysis. Courts in the UK may well play a key role in the adjudication of matters of retrained EU law. The structure of the EU – its law and courts – has been a key element in the development of the roles played by as courts in the UK, particularly since the early 1990s. They will play their new role outside this structure, and potentially in contentious circumstances.

Barnard and Fraser Burton attend to the framework of formal rights and uncover ways in which these formal rights are not realized in practice. They contrast the rights held, in principle, by migrant workers in the UK with the reality of their limited practical impacts. Even more than it may restrict their formal rights, an emerging consequence of Brexit may be even more profound. Legal rights may be rendered almost wholly inaccessible to important categories of migrant workers. Of course, the gap between legal rights that exist in the books and their practical reality for people who, in principle, hold them is hardly a novel outcome of Brexit or product of Brexit processes.

Like Cygan, Lynch and Whitaker, Barnard and Fraser Burton guide our attention to the role of the courts in the UK, after Brexit. They see some hints that the courts may turn to English common law to provide an underpinning for rule of law principles that might, hitherto, have been partly grounded in EU membership and European law. In general, though, if access to justice for is already weak in practice for EU migrant workers, they argue it is likely to weaken further. Loss of free movement rights and related enforcement principles are likely, they suggest, to be exacerbated as by the complexities of the UK's new migration system. An effective and integrated employment rights enforcement capacity might mitigate some of these risks, but only if the relevant bodies receive sufficient funds to carry out the role.

A period of unsettled UK politics set the stage for the Brexit referendum. That vote only stirred things up more. So far from settling things down, just as it is 'getting Brexit done' the Johnson administration seems to be setting off new, unsettling processes of change. The articles in this collection provide invaluable analysis key areas of society, politics and law that will be deeply implicated in the waves of change likely to break over the UK in the next few years.

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