

Brexit, the Nation and the Nations

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Negotiating the terms of the United Kingdom's departure from the European Union, and settling our future EU relationship, is the most demanding project a United Kingdom government has undertaken in peacetime. The deal, if there is to be one, has to be agreed by the EU and ratified by member states in less than two years. It also has to be agreed and legislated for in the UK. With a minority government able to secure a tiny majority only if it sustains an electoral pact with the Democratic Unionists, the chances of the normal processes of government policy-making and parliamentary scrutiny undertaking this task successfully, always low, are now close to zero. Something radically different will be needed. This paper makes a specific proposal for how this might be achieved: a committee of the Privy Council, whose function and composition are discussed below.

The task

The scale of the task which faces the United Kingdom has been described but not accurately measured. The government's White Paper skates over the surface. Other commentators (such as the Institute for Government, Financial Times, UK in a Changing Europe project to name a few¹) have explored the content more deeply, and one can assume that substantial work has been done inside government on the implications of leaving the EU across the range of public policy. Apart from the White Paper, however, none of this has been made publicly available. Nor has the government set out its detailed agenda for the negotiations, and the election has in any event overtaken the approach in the White Paper. The EU, by contrast, has set down a detailed programme of work, and a clear, if rigid, set of processes which will have to be gone through. It can be assumed that the EU will stick to this, as its negotiators in the Commission now have a mandate from the other member states to proceed accordingly.

As for the UK, the default assumption is that this task will be undertaken in what one might describe as the normal way, like a routine EU negotiation. The government will take the lead, formulating its policy largely privately, in Cabinet and its committees, advised by the civil service, and led by the Department for Exiting the European Union. Ministers then negotiate with the Commission and, to the extent that they are permitted, with other member states. Parliament will be informed, though not necessarily fully in order to retain some negotiating flexibility. It will be invited to endorse the final package. The devolved administrations will be consulted through the joint ministerial committees, and where necessary the devolved

¹ See eg <http://ukandeu.ac.uk/>, <https://www.ft.com/brexit>, and <https://www.instituteforgovernment.org.uk/brexit>

legislatures will be invited to legislate to implement the package when it falls within their responsibilities.

Brexit is anything but a routine EU negotiation, even if the government was able to guarantee that whatever it signs up to in the negotiations will be ratified legislatively in the UK. For a government which cannot be sure of winning any vote in the House of Commons as it has no overall majority this approach could be disastrous. Ministers may well find that what they are able to obtain in negotiation, and perhaps themselves are willing to recommend, is not ratified back home. Given the timetable, the effect of this could well be to precipitate the UK's departure from the EU on an unagreed basis – "no deal", which may very well be considerably worse than whatever deal is available.

Securing parliamentary support

It is normal for governments with a small or no majority to navigate their way through the House of Commons vote by vote, or deal by deal. Perhaps different coalitions can be assembled on different issues, as for example in the dying days of the Callaghan government in the 1970s. This will not work for Brexit. A series of votes might well be needed, and a consistent position will have to be taken. It cannot be hand to mouth. Moreover, a government which is dependent on one small party for support may find it has wholly disproportionate influence. If also, as has been the case for many decades, a substantial group inside the Conservative party are determined to ensure that the UK disentangle itself from Europe as completely as possible ("hard Brexit") it can be held to ransom by a faction within its own ranks, for as long as its internal party discipline is otherwise sustained. When that breaks, the government has no majority at all, and can deliver no deal: but the clock is still ticking.

Some politicians on both sides have suggested that a wider consensus needs to be built. In other countries this might be a "Government of national unity". We are too partisan for that. Labour MP's propose a Commission or some sort of machinery inside the House of Commons to ensure that the government's approach is one supported by a majority of MPs so that, if agreed, it can be delivered. This is a recognition of the reality that the deal which must be agreed, given the referendum vote, has to be one which can sustain parliamentary support, ideally as broadly as possible. If one accepts that in the referendum the people have made a binding decision, it is now up to the House of Commons to acknowledge that, but to build as big a consensus as possible around an approach which is strictly consistent with the vote, and will be acceptable to as many people in the country as possible.

The nature of this machinery, however, needs better definition. If it is simply consultative – like a departmental or other select committee, able to produce reports and to scrutinise – it will not build consensus. In a partisan political system that has to be negotiated. That means more than simply accepting or rejecting a proposal from the government which may already have been explored and perhaps even provisionally agreed in negotiation with the European Union, because to present it to Parliament beforehand would expose the government's negotiating hand. Normal parliamentary processes will not do when rejection of the government's proposals against a ticking clock could mean that the whole negotiation process

collapses. Some process is needed by which senior politicians of all parties can have access to the information and thinking behind the government's approach, its chances of success, what it might mean in practice, how the negotiations are proceeding. There needs to be space for frank discussion across political parties about the shape of the overall package that the EU will accept; what will and will not be acceptable to the UK; what would work in practice and be realistically achievable in negotiation; and what the different stages of leaving might mean – for example continued membership of the customs union and single market until some alternative relationship might be agreed.

The devolved dimension

One further substantial complication suggests that the normal approach to policy-making will not be successful here. The devolved administrations are entitled to be consulted about the nature of the deal with the European Union insofar as it affects devolved interests, and that is to a substantial degree. None of them will have the power of veto, as the Supreme Court has made clear in its judgement in the case of *Miller*² Nevertheless they will be entitled to refuse to legislate on devolved matters to implement parts of the agreement with which they are unhappy, or indeed if they are unhappy with other aspects of it.

The normal way to deal with this is through consultation in the joint ministerial committees but these are talking shops, without actual authority, with no authoritative way of resolving disputes other than continued disagreement under which each administration simply acts under its own powers. Normally this is not seriously problematic: the boundaries between devolved and reserved matters are relatively well defined, and no unresolved problem has arisen that has had serious practical consequences, as opposed to political ones. That is unlikely to be true for the EU negotiations. It is not possible at this stage to say what problems will or might arise, but it is likely to be very difficult for the UK government if it has made promises in the European negotiations which it is unable to deliver because the matters are devolved.

The joint ministerial committees however have one advantage; they are bodies of the executive, rather than the legislature, and each administration to some degree has access to civil service support, and to some degree to shared civil service support in the form of the joint secretariat. So the ministers involved here (unlike MPs) are more likely to be able to obtain and query official advice on relevant matters. This is important because, ultimately, the negotiations with the European Union are an executive rather than a legislative task. Experience of the joint ministerial committees, however, suggests that they are slow and cumbersome, more often an opportunity for political theatre than actual discharge of business: it would be wrong to describe them as part of the “dignified” part of the constitution, but equally difficult classify them as effective.

It's worth noting, however, that just as the UK government is now a minority, so too is the Scottish government in Holyrood and Labour has no majority in the Welsh Assembly. Neither

² <https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/>

can guarantee to command majority in their legislature, so a similar argument of consensus building applies to the devolved administrations as to Westminster. (When it is in operation the Northern Ireland Executive is a forced coalition, so this issue does not arise there.)

An alternative model

This unprecedented problem needs an unprecedented solution. A different way of doing things must be found if the EU negotiations are not to crash and burn, leaving the UK outside the EU with its terms of departure unresolved and its new relationship undecided. The economic consequences of that for trade, jobs and many other aspects of our national life are incalculable.

Here, therefore, is a suggestion. One of the more dignified parts of the UK constitution is the Privy Council. It grew of course from the advisers to the monarchy in a pre-democratic age, but it still retains more than purely ceremonial functions and has some real strengths. First, it contains senior politicians from all parties. Second, it has established a precedent of confidentiality: politicians are sometimes given information from government on "Privy Counsellor" terms, in which secrecy is normally respected. Thirdly, and perhaps unexpectedly, it contains some, although not many, senior politicians from the devolved administrations.

The Privy Council can form committees. Indeed, the Cabinet is still, somewhat quaintly nowadays, described as a committee of the Privy Council. It should now form a cross-party committee whose membership broadly reflects the support of the parties in the House of Commons, plus a small number of Privy Counsellors (or to be treated as such) from the devolved legislatures in Edinburgh and Cardiff also reflecting their composition, roughly. (One imagines the Conservatives would jump at the chance of getting the redoubtable Ruth Davidson into the room.) Such a group need not be much larger than the present UK cabinet. It could be Chaired by the Prime Minister, or perhaps a senior neutral figure. It cannot be a strictly an executive body, but a place where the country's leading politicians can share the best available information and analysis, discuss frankly and confidentially (it is after all a "Privy" Council) and come to a consensus which can be supported in Parliament and the devolved legislatures. It should have direct and unmediated access to civil service advice, and should be serviced by the Cabinet Secretary.

This is not a "government of national unity": it is a cross-party and cross-legislature task and finish group. It will not be responsible for any other aspect of government policy, such as budgets, domestic legislation unrelated to Europe et cetera, and when the European negotiations are complete, and ratified, it would be wound up. Desperate times need desperate measures.