An institutional mismatch: Why 'taking back control' proved so appealing in the Brexit debate

'Taking back control' was a key element of the Leave campaign's case for Brexit, but why did the principle find such resonance among the British public? Drawing on a new study, **Susanne K Schmidt** *writes that it is important to recognise some core features of the UK polity that contrast with the EU's political system. These institutional differences formed the foundations for Britain's decision to leave.*

The political process leading to the Leave vote in the UK's EU referendum was fraught with contingencies. If David Cameron had not promised a referendum, if the tabloids had not been so nationalistic, or if austerity measures had not hit social spending to the extent they did, the picture today could be very different. Many analyses have focused on political preference formation and the politicisation of EU membership against an English lack of European identity. Others have focused on the economic underpinnings of the vote. Surprisingly, however, scant attention has been paid to the institutional foundations of Brexit.

A case of institutional mismatch

Vis-à-vis other EU member states, the UK is unique with its strong majoritarian traits. As a common law country with a tradition of parliamentary sovereignty, there is a significant mismatch between the UK's institutional features and the prevailing mode of policymaking in the European Union. Integration in the EU is very much 'integration through law' with rulings of the European Court of Justice (ECJ) giving important impulses.

Once the ECJ declared the Treaty's direct effect and supremacy in the 1960s, case law interpreting its rules as quasi-constitutional requirements was able to push integration beyond what legislative majorities could have achieved. Dieter Grimm has coined the term 'over-constitutionalisation' to characterise the resulting limits for majoritarian decision-making. It comes as no surprise that the way the ECJ can shape policymaking in the EU stands in stark contrast to the UK's pronounced majoritarian traits.

This is particularly true if we consider another feature of the UK polity: it is a common law country, implying that legal principles set by judgments are treated as law. The UK administration is well versed in implementing case law directly. While its majoritarian tradition lets the UK be particularly sensitive to the loss of sovereignty rooted in over-constitutionalisation, the common law tradition means that these constraints will likely be implemented with explicit reference to the ECJ!

The importance of intra-EU migration…

In the Brexit process, the extent of intra-EU migration to the UK was a major concern. Given the high salience of this issue, it is revealing how strongly ECJ case law structures the rights of EU citizens working and living in other member states. The right to freedom of movement of workers was already included in the Treaty of Rome, including 'the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment' (Article 48 (2) now Article 45 TFEU, Treaty on the Functioning of the European Union). Expecting that other member states would immediately grant free movement rights after the 2004 eastern enlargement, the UK renounced the possibility of a transition period.

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The non-British resident population grew from 5% in 2004 to 8.4% in 2014, and migration from Poland during that time has been described as possibly the largest movement between two countries in peace times. The extent of migration was not only substantial; it also has to be seen in the context of several institutional characteristics of the UK.

To begin with, inhabitants in the UK are not obliged to register with the authorities. Official data on migration therefore works with estimates. The British welfare state relies in part on non-contributory provisions. In-work benefits complement a flexible labour market, giving incentives for taking up work, even if it is low-paid. Labour regulations are hardly enforced. This combination leads to a propensity to attract lower skilled migration, causing workers with lower wages to come under pressure while higher wages profit from additional labour supply. Although analyses have shown benefits overall from intra-EU migration, these benefits were not equally distributed.

…and judicialised rights to equal treatment

For our context, it is important to understand how crucial ECJ case law was for shaping the free-movement regime, and to elucidate the constitutional requirements following directly from the Treaty as well as the conditions resulting from secondary law. After the Treaty of Maastricht took a further step by introducing EU citizenship rights in Article 18 TEC, the Court embarked on a journey that appeared to promise equal rights to EU citizens regardless of their financial means. It continued doing so even after the Citizenship Directive of 2004 made clear that member states were keen to uphold differences in entitlements between economically active and inactive EU citizens. Only in autumn 2014, with the case of *Dano* (C-333/13), did the Court start to take the restrictions on equal treatment introduced by the directive seriously.

Because a non-contributory, tax-financed welfare system is very open to claims by migrants, particularly as there is no registration requirement, the UK had introduced a habitual residence test as early as 1994. Previously, income support had been granted irrespective of length of residence in the UK. For the definition and determination of habitual residence, the UK government uses criteria established by the ECJ in its case law, reflecting the common law tradition.

At the time of the eastern enlargement in 2004, the government introduced a right-to-reside test to ensure that EU citizens settling in the UK are either self-sufficient or economically active. As UK nationals do not need to pass the test, it discriminates against EU citizens. The European Commission started an infringement procedure in 2010 that was handed to the ECJ in 2013. Just days before the June 2016 referendum, the ECJ ruled in favour of the UK (C-308/14).

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The common law tradition allowed judicial principles to directly inform administrative practices, leaving the reference to the ECJ's interpretations intact. Thus, a revised habitual-residence test with more individualised questions, including queries regarding efforts to get into work, mirrored the ECJ's requirement for individual assessments in its ruling in *Brey* (C-140/12). The Genuine Prospect of Work test introduced in mid-2014 follows the case *Antonissen* (C-292/89), whereby the eligibility of EU citizens for jobseekers' allowance is linked to their 'genuine chances of being engaged' (No. 21). ECJ criteria for the status of 'worker' were also taken up: employment needs to be 'genuine and effective' and not only 'marginal and ancillary' (case 53/81 *Levin*).

The institutional roots of 'taking back control'

Intra-EU migration was the single most important political issue leading to the politicisation of EU membership, resulting in the vote for Leave. Once the decision against a transition period was taken, Britain's flexible labour market and wage differentials motivated significant and unexpected migration from the new eastern member states.

That the slogan 'take back control' could find such resonance is rooted in the institutional mismatch between an EU that has constitutionalised and judicialised many policy choices, and the UK common law tradition that made the stark contrast with legitimacy rooted in parliamentary sovereignty so evident. But Brexit also shows how constitutionalising policy choices, and accepting case law rather than political preferences to shape policy decisions, carries a danger of shifting political contestation to another level.

For more information, see the author's accompanying article in the Journal of European Public Policy

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