David Cameron's Three Big Mistakes

Jonathan Cooper

Introduction

The UK's referendum on whether to remain in the EU once again proves that the UK system of government – or lack of a structured scheme – is unhelpful, even counter-productive for those who govern. The lack of a clear constitutional framework which sets out the rules for how the UK works caused David Cameron to make three big mistakes which led to the outcome of the UK's referendum on whether to remain in the European Union (EU) and his subsequent resignation as Prime Minister. How does the UK work? Depending upon who you ask, you will get a different answer, but (probably) the key to grasping the UK system of government is an understanding of two nebulous concepts: Parliamentary Sovereignty and the Rule of Law. How four distinct nations become one, as well as the way the EU fits into this tapestry that is the British constitution is also part of the picture. In theory that constitution is nimble, flexible and pragmatic, but in reality it is rarely any of these. Perhaps this was Cameron's undoing; that he thought he could train this system to work the way he wanted it to.

One of the ironies of British colonial rule is that the British left a coherent constitutional tradition across the Commonwealth, but omitted to include themselves as a beneficiary. Time and time again the UK is let down by its constitutional framework (or lack of one). The Chilcott Report into how the UK ended up at war and administering parts of Iraq charts just one recent example; the ambivalence about how to protect human rights and the politicisation of the Human Rights Act is another. And now the muddle that the British system of government can cause brings us to the brink of leaving the EU: because just over a third of those eligible, voted to leave. Only in the UK could this happen. David Cameron could embark on a cause of action – the three big mistakes that ended his career – because there is no effective constitutional framework to guide good governance and sound administration.

The first mistake

Cameron's first mistake was to propose a referendum in the first place. The UK is a representative democracy. Despite odd exceptions that prove the rule, the British don't do referenda. Direct democracy does not fit well with the UK's constitutional arrangements. The peoples of the UK are romantics at heart and have an abiding, if not naive, belief that those we elect to represent us act in our best interests. For better or for worse, representative democracy underpinned by the rule of law has guided British democracy. If the UK has a constitutional tradition, that is it. It was representative democracy that gave the UK universal suffrage, trades union rights, social justice and welfare rights and equality laws. Representative democracy can get it wrong, and then either the courts, the executive and/or Parliament have corrected earlier mistakes. The persecution of LGBT people offers a straightforward example: Parliament criminalised and then Parliament decriminalised (with help from international courts). And it was representative democracy that took the UK into the EU, albeit that this decision was subsequently (overwhelmingly) confirmed by a referendum.

It is representative democracy that forges the UK's identity. Others might go for referenda, but, just like ID cards, there is something fundamentally un-British about them. To the extent that we have one, how do they fit within the British system? Our representative democracy is always seeking to perfect itself, but it is packed full of safeguards and checks and balances. These safety nets do not sit comfortably with direct democracy. Not exclusively, but referenda are frequently resorted to by populist, less democratic administrations. They give the veneer of democracy, but in reality they are a blunt and unsophisticated tool susceptible to demagogy and manipulation, hence why the UK has customarily rejected them. How can referenda be reconciled with representative democracy and those British constitutional traditions? Would the outcome of a referendum trump Parliamentary sovereignty?

Last June the Government turned that system on its head by offering a referendum to the British people on whether or not we should remain within the EU. The back story of this decision is well known: David Cameron made a tactical choice prior to the 2015 General Election in an attempt to lance the UK Independence Party (UKIP) boil. UKIP had tapped into aspects of the Conservative psyche by calling for a withdrawal from the EU.

With uncharacteristic lack of judgment, David Cameron, instead of engaging with these UKIP arguments head on and exposing their folly, chose to kick the issue into the long grass by offering a referendum in the event that the Conservative Party won the Election in 2015. To his (and everyone else's) surprise they did win and had to give effect

to that manifesto commitment. Ironically, it is likely that the Conservative win was down to David Cameron rather than his party, and had he had more faith in himself and the UK's representative democracy, he could still have won the election for the Conservative Party without recklessly conceding UKIP's referendum.

Had the decision to remain or leave the EU been left to representative democracy and put to MPs, even on the basis of a free vote, the overwhelming majority would have voted to remain. The Tory Party majority is slender – just 6 seats. Approximately half the Conservative Party's MPs support remaining in the EU, the overwhelming majority of Labour MPs are committed to the EU. The bulk of the remaining parties with seats in the Commons are all pro EU. UKIP, with its one MP, is an exception. Given a vote, the UK's representative democratic institutions would have chosen to remain. We elect these people to make informed and expert decisions. We pay them to obsess about detail as well as consider the big picture.

The second (and biggest) mistake

Faced with the obligation to hold a referendum, Cameron made his second big mistake. The Referendum Act (RA) 2015 required only 50 per cent of the votes cast plus one in order for that referendum to have been won or lost. If it is right that the process of holding referenda can be vulnerable to populist rhetoric which may skew the outcome, the RA 2015 took no account of this. Neither did it factor in how the outcome of the referendum might sit within the UK system of government, nor did it take into account what would happen if that referendum were to be won by a minority of those eligible to vote, or if the nations making up the UK voted differently.

This meant that when the votes cast on 23 June were counted 37 per cent of those registered voted to leave, 36 per cent voted to remain and the rest (27 per cent) did not vote. The majority of the Scots who voted wanted to remain with a similar picture in Northern Ireland and Gibraltar (where the vote was overwhelmingly in support of Remain). London likewise – by a healthy majority – voted to remain, as did other big cities. Leave pipped Remain to the post, but was it a mandate to leave? Conversely had the vote gone the other way with the same margins, could that be seen as a mandate to remain?

Prior to proposing a referendum with such potentially overwhelming consequences, Cameron should have thought through how the referendum would work. A referendum is a not a debate where the motion put is either rejected or approved. Referenda are alien to the UK system of government, but if we are to have them, we need Parliament to consider how they work. We need a Referenda Act which sets out the rules and the consequences. Are they binding? Do they trump

an Act of Parliament? If only advisory, what does that mean? What does it take to win a referendum? A simple majority of the votes cast or a significant majority which might better reflect the entire electorate? Can the nations of the UK be coerced into accepting the outcome? These and other questions should have been considered before putting the question on whether to remain in the EU to the people of the UK in a referendum. An effective constitutional framework would have already considered these issues.

Of course, because Parliament is sovereign it can – in principle - do anything, but that doesn't mean that what Parliament does will work or be in the country's best interest. Cameron's Referendum Act 2015 is a classic example of using Parliament to create a novel mechanism which doesn't take into account the checks and balances of the UK system of government. No safeguards were put in place. Despite being law, the Referendum Act 2015 is not suffused with the rule of law. Cameron's recklessness and his biggest mistake was setting up the referendum as he did. But where was the Opposition? Why didn't they challenge the 2015 Act and seek to mitigate its potential consequences?

If put to a referendum, it would be inconceivable, for example, that the death penalty or the re-criminalisation of homosexuality could be reintroduced on the basis of just over a third of those eligible to vote. How then can it be appropriate to leave the EU on the same basis?

Again, a proper constitution underlining our system of government would have anticipated all these problems.

The third mistake

Cameron's third big mistake was his clumsy handling of the Remain campaign. Arguably this has little to do with the law or the constitutional framework, but Cameron was the Prime Minister and he should have stood above the campaign. On many levels that campaign was an unedifying spectacle with those involved from all sides of the debate coming out of it badly. Despite the fact that Cameron was able to secure preferential terms for the UK and its place within the EU from the EU leadership as well as member states' governments, he was kept on the back foot. The Remain campaign was unable to grasp the initiative. Remarkably, the fact that the UK economy will shrink between 3 per cent and 5 per cent as a consequence of leaving the EU was dismissed as scaremongering and the leave campaign's unfounded assertions that £350 million would be available each week for the NHS if the UK left the EU was able to be presented as fact. The ultimate casualty in the whole process was evidence-based truth.

The Prime Minister himself was caught up in the tawdry mudslinging. David Cameron's third big mistake was becoming too closely associated with the Remain campaign. He should

have distanced himself from the process, sat back and observed, listened and learned, and only reached a final conclusion in the days leading up to the vote. Too many people want to trip up the prime minister of the day, and David Cameron walked right into that trap.

And part and parcel of this was the real dilemma facing the UK electorate: what was the referendum for and what did it mean? We were being experimented on with this novel, albeit crude, constitutional development, but there was too much at stake. This is where Cameron really let us down by dragging us through a process without the checks and balances that would normally underpin such decisions but which our hazy constitution could not supply in this context. UK citizens are old hands at voting and we know why we vote; however, motives may change whether the votes are cast in a general election, a bye-election, local elections or elections for the European Parliament. Are those voting skills that the British people have transferable to a referendum? Why did people vote as they did? Was it only to leave or to remain in the EU or were other factors at play? Anarchy? Austerity? Apathy? Or even anger? Cameron's simplistic formula for the referendum took no account of those who voted out of sheer bloody-mindedness.

Consequences

Cameron's three mistakes set up an artificial and simplistic debate about the EU. The EU was able to be branded as a bogey man that kept the British people down and was eating away at the British state. What's more, the referendum was characterised by some as an opportunity for the dispossessed to stand up to vested interest, as if we were voting for some revolutionary liberation movement. And all of this on the back of years of austerity. The black and white structure of a referendum plays into this type of diatribe, whereas representative democracy requires nuance.

The reality is that the EU has made no meaningful impact on the institutions that make up the UK. Our courts, legislature and executive continue to flourish. The EU sits under our system of government but the only demand it makes is that the UK cannot undermine the single market. And the UK gets the single market and how it works. We have, after all, been one for 300 years. On every level, the British were creaming it within the EU. That Union plays to all our strengths. It enhanced our status across the globe. It delivered on social justice across Europe. The EU could be transformed into more of a representative democracy but the member states are unwilling to do that (and they may have a point), so we muddle along with the current clumsy system of MEPs, a Commission and the members states controlling the show through the Council. None of this subtlety could come across in the simulated clash that was set up by the referendum.

Cameron's three big mistakes cost him dear. He was a Prime Minister for our times and his loss will be tangible. But the real losers as a consequence of those three big mistakes are the British people, as well as the wider European and global communities. Unless we can review the whole exercise, all we can do now is hope to mitigate the effects of Brexit and more importantly, a lesson for us all, is to learn from where Cameron went so disastrously wrong. But the upside to the exercise is that it has shown that the UK's lack of an effective constitutional framework causes tangible harm. The UK should now turn to the Commonwealth and learn from Commonwealth constitutional traditions and reflect upon how best to create a Constitution that will work for Britain.

[Jonathan Cooper is a London-based barrister practising from Doughty Street Chambers.]