Wilson, G

 Making Sense of Brexit

http://researchonline.ljmu.ac.uk/id/eprint/10816/

Article

MAKING SENSE OF BREXIT

Gary Wilson[1]

Introduction

In June 2016, the UK voted in a referendum by a 52%-48% margin to leave the European Union. The result came at the end of a bitterly divisive campaign, which in turn had its origins in the political divisions which had troubled the ruling Conservative party over several years in respect of the relationship between the UK and the EU, exacerbated by the emergence of and surge in support for the anti-EU UK Independence Party (UKIP). For a period approaching three years, the UK's withdrawal from the EU (Brexit) has dominated political discourse. There have been divisions within the government, the major political parties, parliament and the population at large as to the most appropriate means for effecting Brexit.

This article is concerned with placing Brexit in its broader context. It attempts to make sense of the 2016 referendum vote and the subsequent withdrawal process by reference to a broader understanding of the UK's constitutional framework and the longer term history of relations between the UK and EU, as well as considering the possible future implications of Brexit for the UK, the EU and the wider world. The article is structured under seven main headings. We begins by setting out some of the key feature of the UK's constitutional framework, necessary for any understanding of the Brexit process. We then move on to consider the historical development of UK-Europe relations, which is central to the decision to hold the 2016 referendum and its outcome. The article next considers the nature of the referendum mechanism within the UK constitutional framework, drawing upon lessons to be taken from the 2016 referendum as well as earlier experiences of the use of referendums. The focus then shifts to centre on more practical matters, beginning with an exploration of the key parameters of the debate which took place during the 2016 referendum campaign, leading on to consideration of the factors which caused the 'Leave' vote outcome. A discussion of the Brexit process since the referendum then takes place, before the article concludes by pointing to some of the potential implications of Brexit for the UK, Europe and the World.

I. The Constitutional Framework of the UK

THE UNCODIFIED CONSTITUTION

---

[1] Dr Gary Wilson, Phd, LLB (Hons), FHEA, Senior Lecturer in Law, Liverpool John Moores University, UK. E-mail: G.Wilson@ljmu.ac.uk

Unlike almost any other country in the world,[2] the UK lacks a codified constitution. There is no single document comprising the UK's constitution. Rather it is said to be uncodified, taking the form of a flexible framework which has evolved over time. The UK constitution is found in a variety of sources, consisting of statute law made by Parliament, common law found within court decisions, European law, the Royal Prerogative, constitutional conventions and constitutional principles.[3] A brief restatement of these will be helpful by way of background to understanding some aspects of the Brexit process.

Much of what constitutes the UK constitution is found in ordinary law. Statute law, the primary legislation of Parliament, is the highest source of law and is regarded as unlimited in its potential scope owing to the doctrine of parliamentary sovereignty, to which we shall return. Most significant constitutional developments have been implemented through statute, including the incorporation of the European Convention on Human Rights into domestic law,[4] the restriction of the legislative power of the House of Lords vis a vis the House of Commons,[5] the application of European law within the UK,[6] and the various acts of devolution of legislative powers from the UK Parliament to Scotland, Wales and Northern Ireland.[7] By virtue of its automatic application within UK law, European law itself has become a source of the UK constitution. The courts have contributed towards the development of constitutional law through their interpretation of legislation and case precedent, the significance of their role within the Brexit process being underlined by the Supreme Court's ruling on the activation of Article 50 of the Treaty on European Union to commence the UK's withdrawal from EU membership,[8] a point to which we shall also return.

The royal prerogative has waned in significance over time, but theoretically certain powers continue to reside in the monarch, although they are exercised in practice by the prime minister.[9] There are also a series of conventions which are followed within the UK's constitutional practice, which do not technically enjoy legal force, but which are followed as though they did.[10] Of special significance within the context of the 2016 referendum is the convention of collective ministerial responsibility which entails that government ministers collectively share responsibility for government decisions: they will publicly support these; they must maintain the confidence of parliament; and they maintain the confidentiality of

---

[2] Other states with uncodified constitutions include Israel and New Zealand.

[3] For an overview of sources of the UK Constitution, see, eg., Elliott, M & Thomas, R., *Public Law*, 3rd ed (Oxford: OUP, 2017), pp.42-65; Barnett, H., *Constitutional & Administrative Law*, 9th ed (Abingdon: Routledge, 2011), pp.26-43.

[4] Human Rights Act 1998.

[5] Parliament Acts 1911 and 1949.

[6] European Communities Act 1972.

[7] Scotland Act 1998, Government of Wales Act 1998, Northern Ireland Act 1998.

[8] R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5.

[9] On the scope of the royal prerogative, see, eg., Barnett, supra n3, pp.91-113.

[10] On the scope of constitutional conventions, see, eg., Elliott & Thomas, supra n3, pp.49-60; Barnett, supra n3, pp.34-41.

2

cabinet proceedings.[11] Very occasionally, differences of opinion are permitted, for example during referendum campaigns such as took place in 2016 and 1975 on EU/EEC membership, where ministers where permitted to campaign freely for either side. However, such dispensations with the doctrine of collective responsibility underline the divisive nature of the issues involved.[12] Significantly, the requirements of collective responsibility since the referendum have resulted in several ministerial resignations because the ministers concerned could not publicly support the May government's policy, both because the form of Brexit being proposed was considered insufficiently hard or soft.[13]

The sources of the UK Constitution do not represent any higher source of law, but rather constitutional law is found within multiple sources which generally take the form of ordinary law. As illustrated, these have all played a part within the Brexit process. However, especially significant in constitutional terms is the role of Parliament. Traditionally, the UK constitution is said to rest on two key pillars identified by the famous 19th century constitutional writer AV Dicey: the rule of law, models of which are common to most modern legal systems, and the doctrine of parliamentary sovereignty, special to the UK.[14] Parliamentary sovereignty represents the very cornerstone of the UK constitution and an appreciation of its meaning is central to understanding the Brexit process that has taken place.

PARLIAMENTARY SOVEREIGNTY

Parliament is the UK's sovereign law-making body, comprising the democratically elected House of Commons and the largely appointed House of Lords, whose legislative powers are significantly curtailed under the terms of the Parliament Acts of 1911 and 1949.[15] In addition to serving as the legislature, Parliament exercises important functions in relation to subjecting government to scrutiny and accountability, providing a forum for political debate on the most pressing issues of the day, and giving representation to the electorate who elect those MPs who sit in the House of Commons.[16]

The doctrine of parliamentary sovereignty was defined by AV Dicey as meaning that Parliament has *"the right to make or unmake any law whatsoever,"* there being *"no person or body… having a right to override or set aside the legislation of Parliament."[17]* The idea is straightforward. Parliament may pass any legislation that it wants to and there are no limits

---

[11] For an overview of collective ministerial responsibility, see, eg., Bradley, A.W & Ewing, K.D., *Constitutional and Administrative Law*, 13th ed (Harlow: Pearson, 2003), pp.106-110.

[12] On the impact of referendums more generally on collective ministerial responsibility, see Bogdanor, V., *Beyond Brexit: Towards a British Constitution* (London: I.B. Tauris, 2019), pp.113-134.

[13] As of 26th March 2019, 29 government ministers (including at both Cabinet and junior minister level) had resigned for reasons related to the Brexit process since June 2018.

[14] Dicey, A.V., *The Law of the Constitution*, 10th ed (Oxford: OUP, 1959).

[15] As a result of these acts, the House of Lords cannot block legislation which has passed through the House of Commons but may only delay its entry into force by up to one year.

[16] On the functions performed by Parliament, see Bradley & Ewing, supra n11, pp.184-213.

[17] Dicey, supra n13, pp.39-40.

to this power. Theoretically it does not matter if legislation made by Parliament is considered highly inappropriate. In Madzimbamuto V Lardner-Burke, Lord Reid said, "It is often said that that it would be unconstitutional for Parliament to do certain things, meaning that the moral, political and other reasons against so doing are so strong that most would regard it as highly improper…but this doesn't mean that it's beyond its power to…the courts couldn't hold an Act of Parliament invalid."[18] This is obviously very different from the position in many jurisdictions with codified constitutions, where the legislature's powers are curtailed by higher norms of constitutional law.

There are two important aspects to the idea of parliamentary sovereignty. Firstly, Parliament may not bind its successors. That is to say that a Parliament sitting at one moment in time cannot restrict what later Parliaments may do. It cannot prevent them changing or repealing earlier legislation, or require that laws have to be made in a certain way. This was emphasised by Herbert CJ in Godden v Hales, when he said that "if an Act of Parliament had a clause in it that it should never be repealed, yet without question, the same power that made it may repeal it."[19] Secondly, there is the doctrine of implied repeal which provides that if a later piece of legislation is enacted which conflicts with an earlier piece, the latter is said to implicitly repeal the earlier one.

Parliamentary sovereignty is not unproblematic. Potential difficulties have been discussed in respect of challenges to its relevance posed by grants of independence to former colonies, statutes made contrary to the correct procedures, and conflicts between domestic and international law. More recently, the advent of devolution of legislative power to the UK's constituent parts has posed some potential challenges to parliamentary sovereignty. However, these have been primarily theoretical in nature.[20] Undoubtedly the major challenge to have been encountered by the doctrine of parliamentary sovereignty has been that posed by the UK's membership of the EU, a factor which played a significant part in debates on membership during the 2016 referendum campaign, and which would inform from a legal perspective the process of UK withdrawal thereafter.

The UK's membership of the European Union has radically altered perceptions of parliamentary sovereignty.[21] The UK joined the European Community on 1st January 1973 and European Community law (as it then was) began to take effect in domestic law under the terms of an Act of Parliament, the European Communities Act 1972. Of particular significance was Section 2 of the Act, which provided that laws made within the EC under its respective treaties were to be given legal effect in the UK without the need for any special incorporation.[22] Thus, much EC law would become part of domestic law automatically. The question of what would happen in the event of a conflict between provisions of domestic and EC law appeared to be addressed by section 2 (4) which provided that domestic law passed subsequently would have effect subject to the foregoing provisions of section 2, the implication being that Acts of Parliament passed subsequently may only be legally applicable to the extent that they do not conflict with EC law. Case-law within the European

---

[18] Madzimbamuto v Larnder-Burke [1969] 1 AC 645, at p.723.
[19] Godden v Hales (1686) 11 St Tr 1166.
[20] For discussion of potential challenges to parliamentary sovereignty, see Jackson, P & Leopold, P., *Constitutional and Administrative Law*, 8th ed (London: Sweet & Maxwell, 2001), pp.57-72.
[21] See Bogdanor, supra n12, pp.51-75.
[22] Section 2 (1).

Court of Justice had established for some time that when states' domestic laws clashed with European law, the latter should prevail in accordance with the principle of the supremacy of EC law.[23] However, the express treatment of clashes between European law and domestic UK legislation did not come to a head until the case of Factortame,[24] a revolutionary case in UK constitutional law. The case centred on the issue of a conflict between provisions of a UK Act of Parliament, the Merchant Shipping Act 1988, and provisions of European law. A fundamental question to be addressed by the court was whether it could disapply and set aside provisions of an Act of Parliament to the extent that these conflicted with European law. Following a referral to the European Court of Justice, for the first time in UK law the House of Lords set aside the conflicting provisions of the Merchant Shipping Act.

Having firmly established the supremacy of European law over domestic law, the status of parliamentary sovereignty became called into question as it seemed that prima facie Parliament no longer enjoyed the power to legislate on any matter it so wished, with the courts being unable to set aside such legislation. However, a better view of the status of parliamentary sovereignty would arguably be to recall that it was an Act of Parliament that gave effect to European law within the UK, and that according to the traditional theory of parliamentary sovereignty no Parliament may bind its successors. Thus, by choosing to repeal the 1972 Act – as it would indeed do following the 2016 referendum – Parliament could reassert its sovereignty and remove the restraints placed upon its legislative capacity by the effects of the UK's membership of the EU. Indeed, the reassertion of parliamentary sovereignty was a central plank of the 'Leave' campaign during the referendum.

It is worth noting briefly the relevance of the separation of powers doctrine within the context of parliamentary sovereignty. Theoretically, under the separation of powers doctrine, Parliament makes the law; government proposes it and executes it. In reality, however, government is ordinarily drawn from the majority party within Parliament, and as a result will usually control Parliament and be able to push through its proposals with little difficulty. However, in this respect the situation since June 2017 has proven to be rather unusual. Having called a general election to be held at that time, the Conservative government led by Theresa May lost its majority in Parliament and has functioned since as a minority administration reliant upon the support of the small Democratic Unionist Party. As a result, the ability of the May government to pass its proposals through Parliament has become more problematic, as has been seen with the defeat of the government on a number of Brexit related votes.

II. The Historical Development of UK-Europe/EU Relations

The phenomena of Brexit can only be understood by reference to the history of the UK's relationship with the European continent, the EU and its predecessor organisations. It has often been argued that the UK's physical status as an island has contributed to the extent to which it has also regarded itself as an island metaphorically, and not identified itself as closely with the continent of Europe as may have been the case if it had physically been part

---

[23] The doctrine of supremacy of European law was first set out in detail by the ECJ in Costa v ENEL [1964] ECR 585. For an overview of the development of the doctrine within the ECJ's case law, see Kaczorowska-Ireland, A., *European Union Law*, 4th ed (London: Routledge, 2016), pp.271-292.
[24] R (Factortame Ltd) v Secretary of State for Transport (No 2) [1991] 1 AC 603.

of it. There is certainly a long history of conflict between the UK and states on the continent which can be traced back through the centuries. However, this represents only part of the picture and the history of the UK's relationship with Europe is better seen as one of both conflict and cooperation. The UK has throughout history formed strategic alliances and partnerships with other European states, and further afield has demonstrated a capacity to strengthen global cooperation through its central role within bodies such as the League of Nations, the UN Security Council, NATO and the Commonwealth.

Although the aftermath of the Second World War served as the impetus for various initiatives to foster European integration and cooperation, the UK remained a bystander when six states created the European Coal and Steel Community in 1951,[25]and the European Economic Community six years later with a wider remit to promote economic integration through the creation of a common market and customs union.[26] The UK increasingly came to project a role for itself within the EEC, for which domestic support arguably had grown in response to the beginning of the decline of the UK's standing on the international plane,[27]reinforced by the aftermath of the Suez crisis which dispelled any notion that the UK remained a great power.[28] However, while the UK applied for EEC membership in 1963 and 1967, on both occasions this was vetoed by French President De Gaulle, who regarded the UK's economy as being incompatible with the demands of the EEC, but also doubted its commitment to the larger pan-European project, for which the other members shared greater enthusiasm.[29] This might also be understood in the context of the UK's wider international interests, such as the Commonwealth, and close ties to Washington.

THE UK AS AN EEC MEMBER, 1973-1993

The departure from office of President De Gaulle in 1969 removed a major obstacle to the UK joining the EEC, which coincided with the Conservative Party led by Edward Heath coming to power in 1970. Heath was arguably the most pro-European Conservative prime minister that the UK has had. In fact, the Conservative Party around that time was relatively pro-European, and it was the Labour Party that suffered the greatest divisions in terms of views about the relationship between the UK and EEC. Having negotiated the terms of the UK's membership of the EEC, Heath secured the endorsement of the House of Commons by a margin of 356-244. Significantly, in a stark contrast to the present day, only 39 Conservative MPs opposed membership, while only 69 Labour MPs supported it. However, while the Labour leadership opposed membership this was on the terms that had been agreed, rather than in principle. Significantly, Heath declined to seek public approval of

---

[25] The ECSC was created by France, West Germany, Italy and the Benelux countries under the Treaty of Paris.
[26] The EEC was created by the Treaty of Rome 1957. The EEC and Euratom were merged into the EEC in 1965.
[27] In the aftermath of the Second World War, the British Empire essentially came to an end as former colonies gained their independence.
[28] See Peden, G.C., 'Suez and Britain's Decline as a World Power,' *The Historical Journal*, 2012, v.55, n.4, pp.1073-1096.
[29] See Davis, R., 'The problem of de Gaulle: British Reactions to General de Gaulle's Veto of the UK Application to Join the Common Market,' *Journal of Contemporary History*, 1997, v.32, n.4, pp.453-464.

membership in a referendum, preferring the traditional constitutional position that referendums are not compatible with representative, parliamentary democracy, it being Parliament who must decide such matters. The UK signed the Treaty of Accession in January 1972, and the European Communities Act 1972 was enacted on 17th October,[30]this being the statute which would provide for European law to have effect within the domestic legal system. The UK became a member of the EEC on 1st January 1973.

In a situation remarkably similar to that which the Conservative Party would find itself in four decades later, in an attempt to resolve its internal disagreements over the issue, the Labour Party fought the October 1974 general election on a manifesto which included a commitment to renegotiate the terms of the UK's EEC membership, before holding a referendum on the question of the UK's continued membership. Upon coming to power, the Labour government of Harold Wilson reached an agreement on revised membership terms and recommended that the public support continued EEC membership. The referendum on EEC membership was held on 5th June 1975. As would happen in 2016, to address internal party divisions, Prime Minister Harold Wilson suspended the doctrine of collective ministerial responsibility, and ministers and MPs were essentially free to campaign for either side. Both the 'Yes' (remain in the EEC) and the 'No' (leave the EEC) campaigns were cross party in nature. A majority of the cabinet campaigned to stay in the EEC, although only about half of Labour MPs supported the campaign. The Conservative Party overwhelming backed the campaign to stay in,[31] as did most other political parties. The campaign to leave was fronted by prominent Labour left wingers, supported by seven cabinet ministers, about half of Labour MPs, and a small number of Conservatives.[32] On a 65% turnout, 67.2% of voters supported the UK remaining as a member of the EEC.

In the context of the history of UK-Europe relations, the period following the 1975 referendum up until the late 1980s was relatively calm. The issue of the UK's membership of the EEC was largely settled. While some tensions continued to be apparent,[33] the UK ratified the Single European Act in 1985 and joined the ERM in 1990. The major source of Euroscepticism came from the Labour Party which drifted towards the far left in the early 1980s and fought the 1983 general election on a campaign pledge to withdraw from EEC membership. However, this policy was soon abandoned as the party began to moderate its position under the leadership of Neil Kinnock and his successors.

THE UK AS AN EU MEMBER, 1993-2016

Negative political attitudes towards the UK's relationship with Europe really started to gain in prominence during the 1990s, principally within the Conservative Party, in a period which coincided with the creation of the European Union. In an about turn from the 1970s, the Labour Party had become increasingly pro-European and the Conservative Party gradually

---

[30] By a vote of 301-284.
[31] 249 of its 275 MPs supported continued membership.
[32] The DUP, SNP and Plaid Cymru also supported EEC withdrawal.
[33] For example, the UK opted out of the EMS in 1979 and the Schengen Agreement in 1985.

became more divided in the face of further initiatives towards EU integration, some of which, such as the single currency, the UK opted out of. For many Brits, the relationship with the EU was never intended to be anything more than an economic one, prompting opposition to moves towards greater social and political integration. It should be noted, however, that outright opposition to EU membership remained very much a minority view during the 1990s. For example, the Referendum Party, established in 1994 to campaign for a referendum on EU membership, only polled 2.6% in the 1997 general election, demonstrating low levels of support for such hard line positions on EU membership.

Rifts within the Conservative Party were still relatively modest in the 1990s, although opposition within the party to further European integration grew, demonstrated by a small core of backbench opposition to Parliament's ratification of the Maastricht Treaty, creating the European Union. For opponents, a major objection to the Maastricht Treaty lay in the move beyond the economic union focus of the EU towards the creation of greater political union, amid fears over an increasingly centralised and federal Europe. [34] A significant event in the growth of Conservative Euroscepticism was the so-called 'Black Wednesday' of 1993 when the UK crashed out of the European exchange rate mechanism (ERM), having spent $3 billion attempting to remain in it, widely regarded as contributing to the scale of the UK's recession during the early 1990s. After the Conservatives' election defeat in 1997, the election of William Hague as party leader, and subsequently Iain Duncan-Smith, was driven in no small part by their perceived Euroscepticism over the publicly more popular, yet pro-European, Kenneth Clarke. As leader, Hague famously launched a campaign to "save the pound," which the Conservatives claimed was under threat from pressures to join the newly introduced European single currency,[35] reinforcing the portrayal of the EU as some sinister force which the Conservative Party would stand up to.

The election of the Labour government of Tony Blair in 1997 meant that government stances towards the EU became more favourable. The Labour party was now broadly united in a relatively pro-European stance, notwithstanding some tensions, such as were believed to exist between Tony Blair and his chancellor, Gordon Brown, over the possible adoption of the Euro by the UK.[36] At the same time, Conservative divisions increasingly plagued the party, prompting leader David Cameron to tell a party conference that they needed to 'stop banging on about Europe'.[37] In 2009, however, the Conservatives withdrew from the mainstream centre-right bloc within the European Parliament (the European People's Party) and aligned itself with more right wing, Eurosceptic parties. Euroscepticism also appeared to be on the increase among the general public during this period.[38] A BSA survey found an

---

[34] See, eg., Winn Davies, P., 'Tory MPs in record revolt: Lamont leaves open door for ERM re-entry,' The Independent, 21 May 1993.

[35] See, eg., 'Hague: last chance to save the pound,' BBC News, 31 January 2001, available at
http://news.bbc.co.uk/1/hi/uk_politics/1146210.stm

[36] See, eg., 'Brown and Blair at war over euro,' The Guardian, 27 July 2001, available at
https://www.theguardian.com/politics/2001/jul/27/uk.euro1

[37] See 'Cameron places focus on optimism,' BBC News, 1 October 2006, available at
http://news.bbc.co.uk/1/hi/uk_politics/5396358.stm

[38] See Baker, D & Schnapper, P., *Britain and the Crisis of the European Union* (Basingstoke: Palgrave Macmillan, 2015), pp.61-90.

increase in those identifying as Eurosceptic from 38% in 1993 to 65% in 2015.[39] The rise in support for the withdrawal supporting UK Independence Party (UKIP) was also startling, it coming first in the 2014 EU Parliamentary elections with a large 27.5% share of the vote. The influx of large numbers of citizens of Eastern European states, accompanied by media (tabloid) hysteria over their numbers, arguably had some effect on attitudes towards the EU which was now being closely associated with high immigration numbers.

While Euroscepticism is not a uniquely British trait,[40] from 2013 the UK was on course for a referendum on EU membership. In face of growing support for UKIP, believed to be taking votes disproportionately from the Conservative Party, and increasing anti-European feeling in large sections of his own party, David Cameron sought to settle the tensions once and for all by committing himself to holding an In/Out referendum on the UK's membership of the EU in a speech given in 2013.[41] That the Conservatives were in a coalition government with the very pro-European Liberal Democrats from 2010-2015 meant that there was no prospect of this going ahead insofar as the coalition lasted. The 2015 election manifesto, however, formally committed the Conservatives to this referendum to be held by 2017,[42] and following their surprise gain of a parliamentary majority allowing them to govern alone, Cameron was obliged to keep to this commitment. Like Harold Wilson in 1975, Cameron sought to broker a new deal with the rest of the EU on some concessions to the UK in an attempt to appease those with some concerns over the future relationship between the UK and EU. He then moved to call the referendum on EU membership for June 23rd 2016. We return to the actual Referendum campaign below, but it proved very divisive, especially to the Conservative party with key figures on either side of the argument. The outcome was a 51.9%-48.1% vote in favour of the UK leaving the EU. David Cameron resigned the next day, and following a short leadership contest was replaced as Conservative leader and Prime Minister by Theresa May.

III. The Referendum Mechanism within the UK's Constitutional Framework: Lessons from the 2016 EU Membership Referendum

Historically, the UK knew no practice of holding referendums. However, they have become more common in recent years. The UK's first nationwide referendum was the 1975 ballot on the UK's membership of the then European Economic Community, although referendums followed on Scottish and Welsh devolution in 1979, and again, together with similar votes on devolution for Northern Ireland and London, in 1997 and 1998 respectively. However, the first UK wide referendum since 1975 did not take place until 2011 on the introduction of the alternative vote (AV) system. Following the election the same year of a majority SNP government in Scotland, whose manifesto had contained a commitment to hold a

---

[39] Curtice, J., *How Deeply Does Britain's Euroscepticism Run?* (London: National Centre for Social Research, 2016), p.6.

[40] A number of referendums held on EU Treaty ratifications led to their rejection in several member states, including Denmark (rejected EU Treaty with 51%), Ireland (rejected Nice Treaty with 54%), France (rejected the Constitutional Treaty with 55%), and the Netherlands (rejected Constitutional Treaty with 62%).

[41] EU Speech at Bloomberg, available at https://www.gov.uk/government/speeches/eu-speech-at-bloomberg

[42] Conservative Party, *The Conservative Party Manifesto 2015* (London: Conservative Party, 2015), pp.72-3.

referendum on Scottish independence, an agreement was reached with the UK government on terms for such a referendum to be held in September 2014, in which independence was rejected. The 2016 referendum on the UK's membership of the European Union has, however, been the most controversial in terms of its outcome and for the extent to which it represented a break with earlier experiences. Thus, consideration of the merits of the utilisation of the referendum mechanism to resolve constitutional questions such as the UK's membership of the EU is well justified.

REFERENDUMS AND REPRESENTATIVE, DELIBERATE DEMOCRACY

In the absence of a codified constitution, the referendum enjoys no formal status within the UK. Under the doctrine of parliamentary sovereignty, Parliament enjoys unlimited legislative powers and its laws cannot be overridden by any other body. Thus, unless Parliament legislates to give binding force to the outcome of a referendum, it can only ever be advisory in nature. Similarly, Parliament has the ultimate veto over any decision to hold a referendum, which is initiated by legislation on an ad hoc basis in fitting with the UK's status as a representative democracy. This contrasts with models of direct democracy in which voters are able to directly participate in decision-making processes, referendums providing one means of doing so. Traditionally, the interests of deliberative decision-making – in which decisions are reached following a careful process of deliberation – have been regarded as better served by representative democracy. The assumption is that elected representatives enjoy the time and expertise necessary to carefully evaluate the issues on which they must make judgment in light of the extensive sources of information to which they over time are exposed, but which is underpinned by their accountability via the ballot box at election time. By contrast, direct democracy potentially facilitates decision-making on the basis of positions adopted by the masses which have not been grounded in meaningful deliberation. In evidence to the House of Lords Select Committee on the Constitution, Professor Stephen Tierney opined that, "Elected representatives bring expertise and time to problems that ordinary citizens don't have…they may be more detached and hence objective; and they see the bigger picture of how different issues inter-relate – a referendum addresses single issues one by one without proper regard to the larger canvas."[43]

While it may be felt that referendums infringe the principle of parliamentary sovereignty, the lack of any constitutional status for referendums in the UK means that they are only held where Parliament decides they ought to be. However, it might be reasonably asserted that the more referendums are held, the greater the pressure for their use, with a cumulative weakening of the system of representative democracy.[44] In the aftermath of the Scottish independence referendum, Tierney argued that "one outcome of the Scottish process is likely to be a greater demand at UK level for the use of direct democracy in processes of significant constitutional change."[45] While constitutionally referendums can only ever be advisory, this is likely to be politically problematic in the face of the pressures

---

[43] House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom* (2009-10), para 48, available at https://publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/9902.htm

[44] The precedential value of referendums is considered by Bogdanor, supra n12, pp.101-107.

[45] Tierney, S., 'Reclaiming Politics: Popular Democracy in Britain after the Scottish Referendum,' *The Political Quarterly*, 2015, v.86, n.2, pp.226-233, at p.226.

which elected representatives face to give effect to popularly asserted views. While representative democracy rests upon the assumption that elected representatives act in the best interests of their constituents, Lord Higgins has noted that 'critics of referendums warn that they may undermine parliamentary democracy…when there is a clear difference of view, between…a majority of the public and the majority of parliamentarians'[46] Of course, this is what happened in 2016 when an overwhelming majority of MPs favoured a 'Remain' vote, yet were subsequently tasked with acting upon the referendum outcome which was a narrow majority in favour of 'Leave'. Given the emergence of a consensus that the referendum outcome must be "effected", the consequence is that Parliament is left trying to implement a course of action which it does not support. This sits at odds with the Burkean view of representative democracy, which requires that while listening to representations of constituents, an elected representative must not surrender his own judgment to theirs.[47] The task faced by Parliament when seeking to further the expressed wishes of those they represent becomes all the more problematic when there are genuine doubts as to what those wishes exactly are.

THE DANGERS OF THE CONSTITUTIONAL REFERENDUM

Constitutional referendums have been subject to criticism on various grounds. Five criticisms are considered here with particular reference to the UK's 2016 EU membership referendum.

Resolving matters governments are unable to

Governments use referendums to resolve matters that they are unable to. The Independent Commission on Referendums noted that they are frequently "used as a political device to resolve disputes and shut down arguments inside the government."[48] The 1975 EEC Membership referendum sought to resolve an issue which had divided the governing Labour party; the 2011 AV referendum derived from a fundamental disagreement between the two partners in the then coalition government over reform to the voting system; and it was a desire to end long running divisions within the Conservative Party which led David Cameron to hold the 2016 referendum.

The effective delegation of decision-making for political reasons represents an abdication of responsibility on the part of elected representatives, giving rise to the danger of an outcome produced by a process that is void of the kind of considered deliberation which would ordinarily be expected to take place within parliamentary discussions. However, perhaps even more dangerous is that rather than resolving an issue for divided governments or political parties, the outcome of a referendum may only serves to produce more questions than answers. This is especially so "where a referendum takes place on an imprecise

---

[46] Hansard Online, 'Referendums: Parliamentary Demococy', House of Lords Debate, *Hansard Online*, 19 July 2018, Vol 792, available at https://hansard.parliament.uk/lords/2018-07-19/debates/7F970B24-8242-4F70-8DAE-04D5B27C86AE/ReferendumsParliamentaryDemocracy

[47] Burke, E., 'Speech to the Electors of Bristol', 3 November 1774, in *The Works of the Right Honourable Edmund Burke* Volume I (London: Henry G Bohn, 1854-6), at p.446.

[48] Independent Commission on Referendums, *Report of the Independent Commission on Referendums* (London: Constitution Unit, 2018), para 2.39.

proposal…[as] parliament can find itself left with an instruction from voters, but with wide disagreement on what that instruction means."[49] This is arguably what happened in the aftermath of the outcome of the 2016 EU Membership Referendum, where the 'Leave' vote gave rise to intense debates over the most appropriate means of settling terms for the UK's withdrawal from the EU. According to Lord Sherbourne, "The problem is that politicians cannot decide among themselves, which has resulted in Members of both Houses claiming that they have somehow been able to divine what people voted for: to take control, leave the customs union, not leave the customs union, not be worse off or whatever. Frankly, we do not know what they voted for, because people vote the way they do for hundreds and thousands of different reasons, many of them absolutely bizarre."[50] Thus, while decision-making on this issue was initially surrendered to the electorate at large in order to resolve a contentious issue, Parliament has been compelled to reopen its debate to flesh out the details of furthering a rather general instruction. The divisions which the referendum was designed to end soon fiercely reignited, as shall be seen.[51]

Referendums as framing exercises

Referendums invariably present voters with a binary choice. While this may be appropriate where there are two clear, distinct alternative outcomes from which to choose, as the Constitution Society has noted, "There may be specific circumstances in which a binary question is unable to capture the views of the electorate."[52] This was arguably true of 2016 EU Membership referendum, in which voters were asked to choose between the UK remaining within the EU and leaving it. While prima facie a straightforward choice, in reality the 'leave' option entailed various quite wide-ranging possibilities, meaning that it was never actually clear what it would mean in practice. This problem received much attention in the House of Lords debate on referendums, Lord Wilson suggesting that "everyone should be clear, with all the options, what will happen if they vote for them. We cannot have options put forward in a referendum where no one knows what they mean at the beginning of the process."[53] Lord Norton added that, "We keep hearing from some that the 17.4 million who voted to leave voted for a hard Brexit. We hear from others that, in fact, electors voted for a soft Brexit. We know definitively that a majority voted leave. We do not know definitively why they voted leave."[54]

On complex issues a binary choice is incompatible with the demands of deliberative democracy, which requires more careful consideration of the implications of different options. That the 2016 referendum did not include a wider range of choices for voters between different possible models for a post-withdrawal relationship with the EU has meant that for over two years Parliament has been arguing fiercely among itself what the referendum outcome requires or permits. As Lord Bruce has noted, MPs have come to constantly face "the argument…that having had a referendum, anybody who suggests that we should do anything other than implement that referendum – even though we have no

---

[49] Ibid, para 4.35.
[50] Hansard Online, supra n42.
[51] See below.
[52] *Independent Commission on Referendums*, supra n44, para 8.29.
[53] Hansard Online, supra n42.
[54] Hansard Online, supra n42.

idea in what way to do it – is frustrating the will of the people and despising the democratic process."[55]

The issues are simplified for an uninformed electorate

Deliberative decision-making requires that those tasked with taking political decisions are possessed of sufficient information to enable them to evaluate the merits of different alternatives. By contrast, the danger of involving the whole population in a decision-making exercise is that at least a large proportion of participants will not be particularly well informed about the issue on which they are voting. This is especially so where the referendum involves complex policy issues, potentially undermining the legitimacy of the outcome. Although concerted voter education programmes can go some way towards increasing public awareness and understanding of the issues which a referendum raises,[56] this is often lacking. Polling at the time of Ireland's referendum on ratification of the Nice Treaty, for example, suggested that at most 63% of voters had at most a vague idea as to the issues raised by the treaty.[57] Similarly, a survey conducted at the time of the 2011 AV referendum found that 51% of voters only partially understood or didn't understand at all the issue at stake.[58]

In the aftermath of the EU referendum, media and polling surveys of voters demonstrated that many had not fully understood both the implications of the vote or the issues raised. During the campaign itself the House of Commons Treasury Select Committee suggested that, "The public debate is being poorly served by inconsistent, unqualified and, in some cases, misleading claims and counter-claims."[59] However, some of the discredited claims made appeared to resonate with the electorate.[60] Reflecting on the referendum over two months later, a report of the Electoral Reform Society found that the public had been ill-informed by the campaigns,[61] which had negatively focused on the consequences of EU membership for immigration and the economic risks posed by withdrawal.[62]

The influence of the media and other interests

The extent to which referendums permit deliberative decision-making to take place is undermined by the influence exerted by other interests, such as the media. Although the same criticism can be made of election campaigns more generally, they involve a much

---

55 Hansard Online, supra n42.

56 See Seyd, B., 'Regulating the referendum,' Representation, 1998, v.35, n.4, pp.191-199, at pp.196-7.

57 Murphy, E. 'The Nice Treaty and the Irish Referendum,' Studies: An Irish Quarterly Review, 2002, v.91, n.362, pp.114-124, at p.115.

58 Whiteley, P et al, 'Britain says NO: Voting in the AV Ballot Referendum,' Parliamentary Affairs, 2012, v.65, pp.301-322, at p.305.

59 House of Commons Treasury Select Committee, The economic and financial costs and benefits of the UK's EU membership, May 2016, p.4, available at
https://publications.parliament.uk/pa/cm201617/cmselect/cmtreasy/122/122.pdf

60 Goss, Z & Renwick, A., 'Fact-checking and the EU referendum,' Constitution Unit Blog, 23 August 2016, available at https://constitution-unit.com/2016/08/23/fact-checking-and-the-eu-referendum/

61 Brett, W., *It's Good To Talk: Doing referendums differently after the EU vote* (London: Electoral Reform Society, 2016), p.8.

62 Brett, ibid, pp.25-6.

greater range of policy issues at stake and, furthermore, the periodic nature of elections means that voters can effectively change their mind. By contrast, the outcome of constitutional referendums may be de facto permanent to a large degree. The role of the mass media is particularly significant. Unlike broadcast media, which is required to provide balanced reporting of both election and referendum campaigns, the print media enjoys considerable scope to influence its readership through its reportage of events and endorsement of one side or another. Four points might be made in particular about the role of the media in the 2016 EU membership referendum. Firstly, negative misleading or inaccurate tabloid reportage of EU affairs have contributed over a period of many years to the high levels of Euro-scepticism present by the time the referendum was held and which arguably made it more difficult for the 'Remain' campaign to win over many voters.[63] Second, the choice of issues and personalities to focus on in their reporting of the campaigns undoubtedly informs the way in which the debate is received by the electorate. It is, perhaps, notable that during the 2016 referendum the media focused its coverage on a small group of leading Conservative figures on both sides of the debate, in particular David Cameron, George Osborne, Boris Johnson and Michael Gove. The close association of a side in a referendum with particular figures can be central to its outcome as will be explained further below. Third, the media had an important potential role to play in "fact-checking", verifying the various claims made by either side where facts or figures were cited. While some outlets made some effort to do this,[64] in general the media's performance of this task was patchy. Finally, as with elections, the print media were free to endorse either side in the referendum campaign. Although it is debatable as to how much effect this would have on the outcome, the weight of newspaper endorsements came down on the side of 'Leave'. It might, however, be noted that at the same time the overwhelming weight of opinion of business leaders, economists, and prominent media figures supported the 'Remain' side of the debate, albeit with apparent little effect.[65]

Voters do not answer the question asked

Referendums do not take place in isolation from other political factors, which may have some bearing on their outcome. This can stem in part from the confusion which complicated issues may raise among the electorate, two experienced pollsters suggesting that, "At worst, this confusion allows voters to turn the question they are being asked into a different question they would prefer to answer."[66] Leduc notes that, "Voting choice in referendums can also become entangled with other short-term political factors, above and beyond the issue presented on the referendum ballot… shifting attitudes towards domestic political actors, or the relative popularity or unpopularity of the government of the day, can sometimes provide a more plausible explanation of outcomes than feelings about the referendum issue itself."[67] For example, the outcome of the 2011 AV referendum has been

---

[63] Copeland, P & Copsey, N., 'Rethinking Britain and the European Union: Politicians, the Media and Public Opinion Reconsidered,' *Journal of Common Market Studies*, 2017, v.55, n.4, pp.709-726.

[64] Goss & Renwick, supra n56.

[65] See further below.

[66] Lowe, K & Suter, K., 'The trouble with referendums,' Politico, 6 July 2016, available at http://www.politico.eu/article/brexit-direct-democracy-trouble-with-referendums-eu-leave/

[67] Leduc, L., 'Opinion change and voting behaviour in referendums,' *European Journal of Political Research*, 2002, v.41, pp.711-732, at p.712.

attributed in part to its close association with Nick Clegg, the deputy prime minister and Liberal Democrat leader, who at the time was the most unpopular party leader in the UK. The 'No' campaign targeted Clegg heavily and sought to exploit his unpopularity.[68]

Tying the EU membership referendum outcome to the popularity of any party or leader is more difficult given that the leadership of all major parties officially backed the 'Remain' campaign, with the exception of UKIP, led by Nigel Farage. However, it does seem apparent that for many voters the referendum was an opportunity to express dissatisfaction with the political status quo and, rightly or wrongly, the 'Leave' campaign was regarded as a vehicle to deliver a kick to the establishment.[69] It is difficult to regard a vote which flew in the face of the overwhelming voices of political, economic, and academic opinion in any other way. The extent to which the electorate's insufficiently informed status impacted upon this was highlighted by John Curtice, who wrote that "the EU is a relatively remote institution, about which people may consequently not have very well-informed views. Instead they may rely on proxy measures…or on cues they get from elites, including not least the political party they support…voters…may use the vote to protest against the performance of the national government rather than express their views on the merits of the proposition on the ballot paper."[70]

IV. The Parameters of the Debate over the UK's Membership of the European Union

Prime Minister David Cameron announced on 20th February 2016 that the referendum on the UK's membership of the EU would take place on June 23rd, essentially paving the way for a four month long referendum campaign. A number of important points can be observed concerning the nature and conduct of the referendum campaign itself, concerning principally the choice specifically provided to voters, the organisation and techniques of the respective campaign factions, and the key issues which dominated the referendum discourse over the campaign period.[71]

We have already noted the potential problems of offering voters a binary choice where there may be a spectrum of views on a given issue, but that is exactly what voters were presented with in 2016. The original proposal for the referendum question to be posed was to ask voters, "Should the UK remain a member of the European Union?' Under the terms of the Political Parties, Elections & Referendums Act 2000, the Electoral Commission are required to present their view on proposed referendum questions. They felt that this

---

[68] See Stevens, D & Banducci, S., 'One voter and two choices: The impact of electoral context on the 2011 UK referendum,' *Electoral Studies*, 2013, v.32, pp.274-284, at p.279; Qvortrup, M., 'Voting on Electoral Reform: A Comparative Perspective on the Alternative Vote Referendum in the United Kingdom,' *The Political Quarterly*, 2012, v.83, n.1, pp.108-116, at p.112.

[69] Hobolt, S.B., 'The Brexit vote: a divided nation, a divided continent.' *Journal of European Public Policy*, 2016, v.23, n.9, pp.1259-1277.

[70] Curtice, J., 'Why Leave Won the UK's EU Referendum,' *Journal of Common Market Studies*, 2017, v.55, s.1, pp.19-37, at p.20.

[71] For detailed accounts of the referendum campaigns, see Oliver, C., *Chasing Demons: The Inside Story of Brexit* (London: Hodder & Stoughton, 2016); Shipman, T., *All Out War: The Full Story of Brexit* (London: William Collins, 2016).

question favoured the status quo (remaining within the EU) and proposed instead: "Should the UK remain a member of the EU or leave the EU?" Voters would tick either the choice to 'Remain' or 'Leave'. This was the question ultimately contained on the ballot paper. No real consideration appears to have been given to the question of what 'Leave' would actually require, even though it gave rise to various possible blueprints for a post-membership relationship between the UK and EU, ranging from very close to more distant relationships.

THE CAMPAIGNS

Several campaign groups were active on either side of the debate, although the Electoral Commission granted official recognition to one group on either side in April 2016, making them eligible for public funds to conduct their campaigns[72]: *Britain Stronger in Europe* and *Vote Leave*. *Vote Leave* was backed by prominent Conservative party figures Boris Johnson and Michael Gove, who were the biggest names associated with the Leave campaign. *Britain Stronger in Europe* was the only campaign to bid for the status of the official Remain campaign, and was chaired by prominent businessman Stuart Rose and an umbrella organisation for cross-party activity. Although David Cameron suspended the operation of the doctrine of collective ministerial responsibility in order to enable government ministers to campaign for either side of the referendum debate, the kinds of divisions which this dispensation recognised the existence of were largely confined to the Conservative party, with other parties being far more uniform in their approaches to the referendum.

The Remain campaign enjoyed by far the greatest level of support by prominent political, business and other key figures. It was officially backed by the Conservative government, notwithstanding the freedom enjoyed by individual ministers to campaign for a leave vote, with the Prime Minister, most senior ministers and about 70% of government ministers backing a remain vote. They were joined by the Labour party, Liberal Democrats, Green party, SNP, Plaid Cymru, Sinn Fein, SDLP, Alliance Party, and UUP in supporting the UK's remaining a member of the European Union. An overwhelming majority of MPs supported Remain, as did all living former Prime Ministers. Business opinion was heavily on the side of Remain, most business leaders and prominent companies backing Remain, while a series of endorsements from prominent groups within society were also received by the Remain campaign.[73] Insofar as they intervened in the debate at all, most international political figures and bodies expressed support for a Remain vote, including President Obama. The ultimate outcome of the referendum appears all the more remarkable when the huge scale of support enjoyed by the Remain campaign here demonstrated is noted. The only political parties campaigning for Leave were UKIP and the DUP. Less than ten Labour MPs backed Leave, although approaching half of Conservative MPs and several government ministers did

---

[72] £600,000 per campaign.

[73] These included open letters published in support of the UK's continued membership of the EU by senior healthcare professionals, members of the Royal Society, University leaders, eminent figures within the creative industries, economists, historians, military officials, and Nobel prize laureates.

so. There was some support for a Leave vote in the print media,[74] although this was balanced by support for the Remain campaign on the part of other newspapers.[75] The very few international political figures endorsing the leave campaign were typically character such as Donald Trump and Marianne Le Pen.

CAMPAIGN ISSUES

Campaign events featuring prominent political figures were held on a daily basis and reported upon in the news media. Most attention centred on David Cameron on the 'Remain' side and his party colleagues, Michael Gove and Boris Johnson, on the 'Leave' side. Although there were some cross-party events, in which senior figures appeared together, Labour leader Jeremy Corbyn declined to appear with David Cameron. Cameron did, however, carry out shared events with former Labour leaders and the current and former leaders of other parties, such as the Liberal Democrats. There was also a series of three televised debates between key figures from either campaign, as well as prime time interviews with key figures on either side, as the campaign drew towards its conclusion. Based upon media reportage, the most dominant issues of the campaign were the economy, immigration, and sovereignty. Research conducted on media reportage by Kings College London found that 7,028 news articles concerned the economy, 4,383 immigration, and sovereignty featured in almost 2,000.[76] However, immigration as an issue grew the most during the campaign and was the most common front page news story.

The Remain campaign largely focused upon the economic benefits of EU membership. While sometimes extolling the positive benefits of membership from time to time – for example, membership of the largest free trade market in the world – the Remain campaign placed considerable emphasis upon the alleged negative economic consequences of leaving the EU, often framed around the presentation of specific claims, for example that an average family would be £4,300 a year worse off if the UK left the EU.[77] More generally, the effects for business and employment were often restated. Various other benefits of EU membership were alluded to from time to time, and in pro-Remain literature, but very much understated in the campaign. For example, employment rights derived from EU membership, were stressed more by Labour figures, but not reported on greatly. The benefits of free movement, security and criminal cooperation, environmental protection and the role of the pan-European project in the maintenance of peace and security on the continent were also understated, as was the role of EU funding for numerous projects across the UK.

---

[74] The Sun, the Star, the Daily Express, the Daily Mail and the Daily Telegraph all expressed support for a leave vote.

[75] The Guardian, the Times and the Daily Mirror all endorsed a remain vote.

[76] Moore, M & Ramsey, G., *UK media coverage of the 2016 EU Referendum campaign* (London: King's College, 2017), pp.8-9.

[77] See 'EU Referendum: Vote to leave Europe would make British households £4,300 worse off, according to Treasury report,' *The Independent*, 17 April 2016, available at https://www.independent.co.uk/news/uk/politics/eu-referendum-vote-to-leave-europe-would-make-british-households-4300-worse-off-according-to-a6988786.html

The Leave campaign focused primarily upon concerns over immigration and alleged economic costs of membership, tying these to the theme of sovereignty with the popular slogan of 'Taking back control,' which became closely associated with its campaign. There was a general sense conveyed that the UK would reclaim ultimate sovereignty over domestic law making by leaving the EU. Fears over immigration levels to the UK were exploited to attack the role of freedom of movement in increasing EU migration to the UK, sometimes through the perpetration of misleading or inaccurate claims. For example, a UKIP poster showing a long line of non-EU migrants under the heading "Breaking Point" implicitly linked the refugee crisis with freedom of movement.[78] Another campaign poster stoked up fears over immigration with the claim that "Turkey (population 76 million) is joining the EU."[79] Leading Leave campaigner Michael Gove also wrote a newspaper article warning of the potential influx of Albanian and Turkish migrants, even though there were no plans to admit either country to EU membership.[80] Various related claims were made to suggest that membership of the EU placed an economic burden on the UK which would be lifted by withdrawal, resulting in savings which could be invested in public services such as the NHS, including the now infamous Leave campaign banner which implied that the UK would be able to spend £350 million a week on the NHS should it leave the EU.[81]

Most opinion polls conducted throughout the campaign were relatively close, with the lead fluctuating between both sides. While Leave was ahead in most polls taken during May and June, Remain appeared to gather momentum in the final week, leading in seven of the final ten polls. This shift may be attributable in part to the murder of the Labour MP Jo Cox just a week before the referendum by a far right extremist with views that were linked to some of the more extreme factions associated with the Leave campaign. Nonetheless, the final outcome resulted in a narrow 51.9%-48.1% victory for Leave.

V. The Causes of the 'Leave' Vote

Since the outcome of the referendum, the task of the UK's political institutions became to decide upon the most appropriate course for effecting the UK's withdrawal from the

---

[78] See 'Nigel Farage's anti-migrant poster reported to police,' *The Guardian*, 16 June 2016, available at https://www.theguardian.com/politics/2016/jun/16/nigel-farage-defends-ukip-breaking-point-poster-queue-of-migrants

[79] See 'Vote Leave embroiled in race row over Turkey security threat claims,' *The Guardian*, 22 May 2016, available at https://www.theguardian.com/politics/2016/may/21/vote-leave-prejudice-turkey-eu-security-threat#img-2 For further discussion of the issue, see Ker-Lindsay, J., 'Turkey's EU accession as a factor in the 2016 Brexit referendum,' *Turkish Studies*, 2018, v.19, n.1, pp.1-22.

[80] See 'Think the EU's bad now? Wait until Albania joins: With piercing logic and passionate eloquence, Michael Gove warns that EU expansion will open our borders to 88 million from Europe's poorest countries,' *The Daily Mail*, 30 April 2016, available at https://www.dailymail.co.uk/debate/article-3566620/Michael-Gove-warns-EU-expansion-open-borders-88-million-Europe-s-poorest-countries.html

[81] See 'Why Vote Leave's £350m weekly EU cost claim is wrong,' *The Guardian*, 10 June 2016, available at https://www.theguardian.com/politics/reality-check/2016/may/23/does-the-eu-really-cost-the-uk-350m-a-week

European Union. Understanding the leave vote was central to this process, as debates about the terms on which the UK should leave the EU became largely driven by arguments about what specifically people had voted for when choosing to leave the EU. While people obviously voted 'Leave' for various reasons, the causes of this outcome can arguably be loosely broken down into long term, medium term, shorter term and immediate factors.

LONG TERM FACTORS

It is arguable that some of the roots of the UK's vote to leave the EU date back long before the UK was even a member of the EU. The UK's island status means that it has always been detached from Europe physically, but as a consequence has psychologically found it more difficult to identify with the continent. McCormick describes the UK as having been "always something of an outlier."[82] The UK has always demonstrated a greater reluctance to commit to EU integration than have other states, the opt-out from membership of the Euro being a classic example. The UK was not an original member of the earliest incarnation of the EU, the EEC, and there has long been a significant undercurrent of anti-European feeling within the country. Polling data over time has shown that Britons felt less integrated than any other EU state.[83] However, in 1975 the UK endorsed membership of the EEC by a wide margin and at various stages during the 2016 referendum campaign polls pointed to a Remain vote, so while potentially significant, longer term factors were not fatal to the UK's prospects of voting to remain within the EU.

MEDIUM TERM FACTORS

There are a number of factors which can be traced back over a number of years and which arguably contributed at least towards a climate in which a 'Leave' vote was more likely or possible. These centre around public perceptions of the EU informed by both the media and successive governments, developments within the EU relating to freedom of movement and eastward expansion, and divisions within the Conservative party. The UK public has never been particularly well educated about the EU: what it does, how it operates and the benefits of membership. This has not been helped by the scapegoating of the EU by politicians and governments, and the portrayal of news items concerning the EU in the press. Successive governments have found it convenient on occasion to portray the EU as some kind of 'bogeyman', furthering an agenda that is at odds with the needs of the UK. This was underlined by the fact that the UK had more 'opt-outs' from EU measures than other states. At the same time, the tabloid press in particular has long been responsible for the publication of stories which trivialise or mislead the public on the operation of the EU. For example, stories concerning EU regulation of the size and shape of fruit and vegetables are

---

[82] McCormick, J., *Why Europe Matters for Britain: The Case for Remaining In* (London: Palgrave, 2016), p.1.

[83] See, generally, Baker & Schnapper, supra n38, pp.42-90.

just one example of news items which have contributed towards public perceptions that the EU represents an interfering menace which undermines national sovereignty.[84]

The Treaty on European Union marked a new stage in the process of European integration, ushering in the principle of freedom of movement of peoples. Initially this did not prove particularly controversial within the UK, but would become so following the expansion of the EU in 2004 in which membership was extended to several former communist states from Eastern Europe.[85] Under the principle of freedom of movement, the UK received significant flows of migrants from these states which would contribute to domestic concerns about immigration levels, a key issue in the 2016 referendum. Of course, given general support for EU membership on the part of the major political parties, withdrawal would only be conceivable in the face of a public vote in favour of such a step. Conservative party divisions from the 1990s onwards gradually increased the prospect of a referendum being held on EU membership, to the point that by 2013 David Cameron had committed to hold one, making a decision to leave the EU a realistic prospect.

SHORT TERM FACTORS

Developments in the years immediately leading up to the 2016 referendum exacerbated anti-EU feeling within the UK, evidenced by the surge in support for UKIP in successive elections, culminating in its first placing in the 2014 European parliamentary elections. A Sky News report suggested that a key turning point in attitudes towards the EU occurred around 2012.[86] Up to that point, most polls had typically shown that 55-60% of voters routinely supported the UK remaining a member of the EU. Two factors were particularly significant from around this time: the Euro crisis and the European refugee crisis. The Euro crisis, which plunged Greece particularly into crisis and led to a combination of extreme austerity measures with an EU bailout package, played to fears of Eurosceptics about the degree of power exercised by the EU and its perceived influence over domestic social and economic policy decision-making. At a time when the UK was still experiencing austerity, amid concerns over growing levels of inequality, the EU did not appear in the best light. The European refugee crisis which was unleashed following mass movements of refugees towards Europe, particularly those fleeing the Syrian civil war, generated extensive media coverage. While not a crisis of the EU's making, it contributed towards concerns over increased migration into Europe and was ultimately seized upon by the 'Leave' campaign to conflate two separate issues: refugee flows into Europe and ordinary EU migration under freedom of movement policies.[87]

---

[84] See Startin, N., 'Have we reached a tipping point? The mainstreaming of Euroscepticism in the UK,' *International Political Science Review*, 2015, v.36, n.3, pp.311-323.

[85] Research by the Migration Policy Institute found that 1.5 million migrated to the UK from new EU member states between 2004 and 2009. See Sumption, M & Somerville, W., *The UK's New Europeans: Progress and challenges five years after accession* (London: Equality & Human Rights Commission, 2010), p.13.

[86] See 'Brexit became inevitable while we were all looking the other way,' Sky News, 23 January 2019, available at https://news.sky.com/story/brexit-became-inevitable-while-we-were-all-looking-the-other-way-11614522

[87] See, further, Taggart, P & Szczerbiak, A., 'Putting Brexit into perspective: the effect of the Eurozone and migration crises and Brexit on Euroscepticism in European States,' *Journal of European Public Policy*, 2018, v.25, n.8, pp.1194-1214.

IMMEDIATE FACTORS

Notwithstanding longer term trends which arguably created fertile ground for a 'Leave' vote, the outcome remained on an edge until the conclusion of the referendum campaign and several factors from the campaign itself might be regarded as relevant to understanding the outcome. Five points might be made here. Firstly, support for a leave vote was clearly underpinned by large populist backlash against the perceived political establishment.[88] This can be seen in the context of the success of populist causes around the world, stretching from the election of Donald Trump in the US to the surge of populist political parties, especially on the right, across several European countries. The roots of the most recent populism are generally attributed to the effects of the global banking crisis, ensuing austerity measures, and grievances at growing disparities in wealth and economic inequality and has been dubbed the 'Left behind' hypothesis.[89] The 'Leave' vote can certainly be understood as an example of an anti-establishment backlash, the perceived 'establishment' being the strongest supporters and defenders of the UK's membership of the European Union. In this sense, the referendum became a proxy for other issues. There had been no effective efforts taken to positively promote the role played by the EU in at least a generation. In stating that "people in this country have had enough of experts," 'Leave' campaigner Michael Gove tapped into a strong desire to "kick" the establishment.[90]

Secondly, although most parties and their leaders officially endorsed 'Remain', media coverage centred predominantly on the role of Conservative Party figures on either side of the debate. This was not helped by the refusal of the Labour leader, Jeremy Corbyn, to engage in any joint activities or share a platform with David Cameron. As a result, the referendum was seen by many as largely a Conservative Party issue. Despite the fact that 96% of Labour MPs backed the 'Remain' campaign, Jeremy Corbyn offered somewhat lukewarm support, in one interview suggesting he would only rate the EU 7/10. Labour voters appeared to struggle to understand the party's position, with one poll the month before the referendum finding that 47% of Labour supporters believed Labour figures to be mainly in favour of 'Leave'. This may have negatively affected the likelilhood of Labour supporters voting 'Remain.'

Thirdly, critics have suggested that the 'Remain' campaign suffered from critical failings, in particular a negative tone. The campaign centred on the risks posed to the UK by leaving the EU, rather than attempting to sell a positive message about the value of EU membership and the UK's role within it. This allowed the 'Leave' campaign to label many of the 'Remain' campaign arguments "Project Fear", which resonated with voters discouraged by the

---

[88] The general atmosphere within the UK leading up to the referendum is effectively captured in Jonathan Coe's novel *Middle England* (London: Viking, 2018).

[89] See, eg., Culkin, N & Simmons, R., *Tales of Brexit Past and Present: Understanding the Choices, Threats and Opportunities in our Separation from the EU* (London: Emerald, 2018), p.9 et seq.

[90] 'Britain has had enough of experts, says Gove,' *The Financial Times*, 3 June 2016, available at https://www.ft.com/content/3be49734-29cb-11e6-83e4-abc22d5d108c

negative tones of the campaign. By contrast, irrespective of their merits or validity, 'Leave' found it easier to set out a positive message which sought to extol the alleged benefits of withdrawal from the EU. Ideas about regaining sovereignty, giving the UK greater autonomy in striking new global trade deals and partnerships, and restricting immigration to the UK were all marketed as positive outcomes of a 'Leave' vote. A fourth, related point, is that various simplistic claims were made, particularly by the 'Leave' side, which played on voters' fears or hopes. Regardless of their accuracy, they were difficult to rebut once made. We have already highlighted examples of these, such as claims about Turkey joining the EU, linked to fears over greater levels of EU migration, or that by leaving the EU the UK would save £350 million a week which could be spent on the NHS.

Finally, the demographic profile of the electorate which turned out to vote in the referendum favoured a 'leave' outcome. At 72.2%, the turnout was much higher than in a typical general election,[91] it being estimated that 3 million voters participated in the referendum who did not vote in the previous year's general election. This effectively meant that the outcome could have been swung by non-traditional voters, who were also more likely to represent disenchanted groups within society. Older voters also voted in larger numbers and all polls indicated that the proportion of voters voting 'Leave' increased with every generation, older voters being far more likely to back 'Leave' than younger people.[92]

VI. The Brexit process post-Referendum

Although constitutionally the 2016 referendum was only advisory, there was virtually unanimous agreement amongst politicians that it must be 'respected' and 'implemented'. However, as has already been noted, the simple binary choice presented to voters meant that it was not clear what exactly the effects of a 'leave' vote should be, given the various different forms which a post-withdrawal relationship could take. As a result, ever since the referendum, the UK's political institutions have become embroiled in a divisive process that has sought to determine the terms of the UKs' withdrawal from the EU and its future relationship with it.

THE COMMENCEMENT OF WITHDRAWAL NEGOTIATIONS: ARTICLE 50

The process for a member state's withdrawal from the European Union is governed by Article 50 of the Treaty on European Union (inserted by the Lisbon Treaty). This provides for a maximum two year notification period, during which the member state and EU will undertake negotiations to conclude a withdrawal agreement, following which in the absence of any agreement having been reached the member state concerned will leave the

---

[91] Turnout in the 2015 general election was 66.4%, while it was 65.1% in the 2010 general election.
[92] For a breakdown of voters, see IPSOS Mori's 'How Britain voted in the 2016 EU referendum,' available at https://www.ipsos.com/ipsos-mori/en-uk/how-britain-voted-2016-eu-referendum

EU without any agreement unless the European Council unanimously decides to extend the notification period.

Article 50 was not triggered immediately following the referendum. Immediate attention turned to the appointment of David Cameron's successor as Prime Minister. Upon assumption of office, the new prime minister Theresa May determined not to rush to trigger Article 50. As this would effectively commence a two year period at the end of which the UK would leave the EU, with or without an agreement in the absence of an extension agreed to by all member states, there was an imperative to ensure that the UK was clear about the terms upon which it would seek to reach a withdrawal agreement. This was particularly necessary because the referendum had provided no specific instructions in respect of the terms on which the UK should leave the EU or its future relationship with it. Although on December 7th 2016, Parliament voted by a large margin of 461-89 to call upon the government to invoke Article 50 by 31st March 2017, this process became influenced by legal action brought seeking a ruling that the authority to trigger Article 50 did not vest in government, but that this must be done by Parliament. On 24th January, the UK Supreme Court gave a ruling to this effect in an 8-3 decision.[93] The basic reasoning for the decision was that the UK is a member of the EU and its law applies in domestic law by virtue of the European Communities Act 1972. The effect of withdrawal from the EU would be to effectively invalidate that act. Under the doctrine of parliamentary sovereignty, there is no law-making authority higher than Parliament. If its prior legislation is to be "undone," then the consent of Parliament is necessary in order to do so.

In February 2017, the government set out its starting position on the terms of withdrawal in a white paper, *The UK's exit from and new partnership with the European Union*. The paper set out a series of objectives which would inform the UK's approach to the withdrawal process. These included proposals to convert existing EU law into domestic law; ending the jurisdiction of the European Court of Justice over UK law; maintaining a common travel area with Ireland; controlling the movement of EU nationals to the UK, while securing the status of EU citizens already in the UK and UK citizens in other member states; protecting workers' rights; creating a new partnership with the EU; cooperation on scientific and security matters; and a phased implementation of withdrawal terms. Subsequently, the European Union (Notification of Withdrawal) Act 2017 passed through the House of Commons with a majority of 494-122, and received royal assent on 16th March. The Act empowered the prime minister to give the Council of the European Union formal notification, as required by Article 50, of the UK's intention to withdraw from membership of the EU. This notice was formally being given to Donald Tusk, President of the Council, on 29th March 2017. In accordance with the terms of Article 50, this meant that in the absence of any later extension to the notification period, the UK would leave the European Union (with or without having reached any withdrawal agreement) on 29th March 2019.

Withdrawal negotiations were delayed, however, as a result of Theresa May's decision to call a general election for 8th June 2017. Claiming that opposition parties were not sufficiently committed to supporting her efforts to broker a successful withdrawal from the

---

[93] Miller case, supra n8.

EU, May wanted to strengthen her hand ahead of negotiations with EU.[94] However, her position was surprisingly weakened as the Conservative Party lost its slim majority and became reliant for its power upon the support of the 10 MPs of the Northern Irish pro-UK and Brexit-supporting Democratic Unionist Party (DUP). In their election manifesto, the Conservatives advocated leaving the EU single market and customs union;[95] Labour proposed different negotiating priorities;[96] and the Liberal Democrats campaigned to stay in the single market and customs union, and to hold a referendum on any withdrawal agreement.[97] Surprisingly, Brexit played only a small part in the campaign.

THE OPTIONS FOR BREXIT

The major source of contention within UK political circles since the triggering of article 50 has concerned the nature of the terms of withdrawal which the UK should be prepared to accept and, more controversially, its future relationship with the EU. There are too many perspectives upon these issues, but they might fit broadly into what might be termed 'hard,' 'moderate' and 'soft' forms of Brexit. Those favouring a harder form of Brexit favoured leaving the EU without reaching a withdrawal agreement, or did not attach too much significance to the need to reach to such an agreement, and were prepared to move immediately to trade with the EU on WTO terms. A more moderate Brexit, as arguably reflected in the terms initially reached between the UK government and the EU, envisaged agreement being reached on as many issues as possible and a transitional period following the UK's withdrawal from the EU, yet did not involve the UK remaining within the single market or customs union. Those favouring a softer Brexit advocated the UK's continued membership of the single market and/or customs union. As negotiations progressed, support also gradually grew for a second referendum to be held in which voters would be asked to endorse the terms agreed for the UK's withdrawal from the EU or opt to remain within the EU.

At an early stage in the negotiation process, Theresa May set out 'red lines' which would govern her approach to negotiations and on which she was not prepared to compromise.[98] She has sought to maintain an approach which balances the different factions within the Conservative Party and for a long time was unprepared to consider other alternative approaches which might command a majority within Parliament. While officially advocating terms for a softer Brexit, including continued membership of the customs union, the Labour Party was also divided between those who feel the referendum outcome must be given effect to and those who support a second referendum on the terms of any withdrawal

[94] See, eg., 'Theresa May calls for UK general election on 8 June,' *The Guardian*, 18 April 2017, available at https://www.theguardian.com/politics/2017/apr/18/theresa-may-uk-general-election-8-june

[95] Conservative Party, *Forward, Together: The Conservative and Unionist Party Manifesto* 2017 (London: Conservative Party, 2017), pp.38-39.

[96] See 'Negotiating Brexit,' available at https://labour.org.uk/manifesto/negotiating-brexit/#first

[97] Liberal Democrats, *Change Britain's Future: Liberal Democrat Manifesto 2017* (London: Liberal Democrats, 2017), pp.7-11.

[98] See, eg., Miller, V., 'Brexit: red lines and starting principles,' *House of Commons Library Briefing Paper 7938*, 21 June 2017.

agreement, which will allow voters to opt to remain within the EU. Over time we have seen a shift in public attitudes with many recent polls suggesting growth in support for the UK remaining within the EU.[99]

THE BREXIT NEGOTIATIONS, 2017-18

At the outset, the EU agreed 2 phases of negotiations. The first would cover the divorce bill, rights of EU citizens in the UK, and the question of the Irish border; the second would address the issue of the post-Brexit relationship between the UK and the EU. In March 2018, a draft agreement showed 75% of the proposed text had been agreed, with outstanding issues to be resolved concerning police and judicial cooperation, but more significantly the question of the Northern Irish border.[100] In June 2018, Parliament passed the European Union (Withdrawal) Act 2018. Known as the great repeal act, the act requires Parliament's approval of any withdrawal agreement made between the UK and EU, and will also have the effect of repealing the European Communities Act 1972 and converting into domestic law all existing applicable EU law at the point of the UK's withdrawal from the EU. Deep divisions within the UK government on the terms of withdrawal were exposed in July 2018 following the Cabinet's discussions at Chequers, which resulted in the resignation of both the Foreign secretary and Brexit secretary, who were unable to support the position taken by the government at that point.[101] Eventually rejected by the EU, the Chequers plan envisaged a close customs relationship between the UK and EU, and a "common rule book" on aspects of trade. The objections of the resigning ministers centred on the view that the plan envisaged too close a relationship with the EU in which the UK would remain subject to control by EU rules. Again, this demonstrated the extent to which the conclusion of a withdrawal agreement was hindered by disagreements among government ministers and Conservative MPs on what would represent an acceptable form of Brexit.

After several more months of discussion, on November 13th 2018 it was announced that the text of a comprehensive withdrawal agreement between the UK and EU had been agreed. This was endorsed by EU leaders on 25th November.[102] Running to 585 pages, the agreement contained a number of contentious issues which meant that it encountered the immediate opposition of many MPs. The agreement provided for an extendable transition period lasting until December 2020, during which the UK would remain subject to EU rules and regulations, while it sought to reach a future trade agreement with the EU. Even more

---

[99] See, eg., 'Poll shows support for second EU referendum,' ITV News, 22 June 2018, available at https://www.itv.com/news/2018-06-22/poll-shows-support-for-second-eu-referendum/

[100] Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, available at https://www.gov.uk/government/publications/draft-withdrawal-agreement-19-march-2018

[101] See, eg., 'Boris Johnson resigns as Foreign Secretary following Theresa May's Chequers Brexit deal,' The Independent, 9 July 2018, available at https://www.independent.co.uk/news/uk/politics/boris-johnson-resigns-foreign-secretary-brexit-theresa-may-david-davis-chequers-cabinet-summit-a8438836.html

[102] Withdrawal Agreement and Political Declaration on the future relationship between the UK and the EU as endorsed by leaders at a special meeting of the European Council on 25 November 2018. See https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration

controversial was the so-called 'Irish backstop.' In the absence of concluding any new arrangements, and in order to avoid the imposition of a 'hard border' on the island of Ireland, it would be necessary to conduct extra checks on goods passing between the UK and Northern Ireland. The backstop could only be ended with the agreement of both sides and under its terms, the UK must commit to abiding by various EU regulations in relation to taxation and state aid.

The withdrawal agreement immediately encountered widespread opposition from both 'Remain' and 'Leave' supporters, it being apparent that there was insufficient support in Parliament for it to be passed. For 'Hard Brexit' supporters, the agreement did not sufficiently sever the UK's relationship with the EU and remove it from the jurisdiction of the ECJ. While some may have been prepared to accept some compromises as the first step towards bringing about the UK's withdrawal from the EU, the Irish backstop was a red line for most as it theoretically meant that the UK may be effectively tied to the Customs Union in perpetuity. The DUP, whose support the government relied on, also objected strongly to the backstop as it risked imposing an effective border within the Irish sea between Northern Ireland and mainland UK.[103] 'Remain' supporters also objected to the withdrawal agreement on the general grounds that it represented a surrender of much national power without retaining the benefits of EU membership. If the UK was to be bound by these terms, it may as well remain a member of the EU and at least enjoy participation within its decision-making processes. In response, some junior ministers, including Jo Johnson, resigned from the government and called for a second referendum on the UK's membership of the EU.[104]

THE FAILURE OF THE WITHDRAWAL AGREEMENT, 2019-

Parliament finally voted on the withdrawal agreement on 15th January 2019, rejecting it by 432-202, the largest ever defeat for a sitting government (although the government did survive a vote of confidence the following day, by a margin of 325-306). Since then, the process of effecting the UK's withdrawal from the European Union has been thrown into chaos as Parliament has been unable to agree upon terms of withdrawal. On 29th January, Parliament considered various proposals for amendments which might bear upon the terms upon which the UK could leave the EU. Most of these were defeated, including ones designed to extend Article 50 and thus delay the UK's withdrawal from the EU (the Cooper and Reeves amendments), as well as one designed to give Parliament the opportunity to consider various alternative models. Two significant amendments were passed, however. The Spelman/Dromey amendment, which stated that the UK would not leave the EU without having reached a withdrawal agreement, passed 318-310. Although not legally binding, this gave a clear indication of Parliament's opposition to a no-deal Brexit, and

---

[103] See, eg., 'DUP stands firm on backstop opposition after 'robust' talks with Irish deputy PM,' *The Belfast Telegraph*, 10 January 2019, available at https://www.belfasttelegraph.co.uk/news/northern-ireland/dup-stands-firm-on-backstop-opposition-after-robust-talks-with-irish-deputy-pm-37700589.html

[104] See, eg., 'Jo Johnson quits as minister over Theresa May's Brexit plan,' *The Guardian*, 9 November 2018, available at https://www.theguardian.com/politics/2018/nov/09/jo-johnson-quits-as-minister-over-theresa-mays-brexit-plan-boris

suggested that it may attempt to block this from happening at a later stage. The Brady amendment (passed 317-301) suggested that the Irish backstop should be replaced with alternative arrangements to avoid a hard border. Although lengthy negotiations have failed to identify any realistic alternative to the Irish backstop, the vote here confirmed that this remained the main obstacle to securing the necessary support for the withdrawal agreement to be approved by Parliament. A number of hard Brexit supporters who had reservations about other parts of the withdrawal agreement suggested that they were prepared to accept other parts by way of compromise if the Irish backstop could be replaced.

As March 29th loomed, the government made further attempts to build support for its withdrawal agreement, although Parliament yet again rejected it,[105] forcing Theresa May to appeal to the European Council for an extension. The UK was then given until April 12th to approve a withdrawal agreement, before it would leave the EU or need to seek a further extension.[106] As the deadline loomed, Parliament seized control of the agenda by presenting MPs with an opportunity to hold a series of indicative votes on forms of Brexit which they were prepared to support. Although none obtained a majority, some came very close and certainly closer than the withdrawal agreement that Theresa May had brokered. At the same time, support for a second referendum which would provide voters with the opportunity to reject withdrawal from the EU grew, culminating in a mass march through London.[107] Realising the unlikelihood of its agreement passing through Parliament, the government entered into discussions with the Labour Party to attempt to find some common ground which might lead to their supporting a withdrawal agreement,[108] which concluded without success in May 2019. The European Council approved a further extension to the period during which the UK would attempt to gain Parliament's approval of a withdrawal agreement until 31st October 2019.[109]

On 23rd May 2019, due to the absence of any conclusion to the Brexit saga, the UK was required to participate in the European Parliamentary elections. The outcome served to reinforce the deep divisions which continue to exist within the UK. The newly formed Brexit Party, created to push for a 'no-deal' departure from the EU at the end of October, topped the poll. However, the most pro-European party, the Liberal Democrats, which has campaigned for the UK's remaining within the EU, overtook the major Conservative and Labour parties to come second. The combined vote share of parties explicitly campaigning to hold a second referendum and remain within the EU actually exceeded the vote share obtained by the Brexit Party. In anticipation of dreadful results for the ruling Conservative Party – which ultimately came fifth with a mere 9% vote share – Theresa May was

---

[105] By 391-242 on 12th March 2019.
[106] On 21st March 2019.
[107] See, eg., '1m estimated to march through London demanding new Brexit referendum,' The Belfast Telegraph, 23 March 2019, available at https://www.belfasttelegraph.co.uk/news/uk/1m-estimated-to-march-through-london-demanding-new-brexit-referendum-37943632.html
[108] See, eg., 'Government and Labour plan more talks to break Brexit deadlock,' ITV News, 4 April 2019, available at https://www.itv.com/news/2019-04-04/government-and-labour-plan-more-talks-to-break-brexit-deadlock/
[109] On 10th April 2019.

27

compelled to announce her intention to resign as prime minister on June 7th, following which the Conservative Party will elect a new leader to replace her. Several of the leading candidates have suggested that they are prepared to take the UK out of the EU without reaching an agreement on withdrawal terms, meaning that there may be yet another twist in the long-running story of Brexit.

VII. The Implications of Brexit: For the UK and the European Union

Assessing the implications of Brexit is problematic and highly speculative. Not only is it difficult to predict the longer term consequences of something which has yet to happen, but assuming that the UK does eventually leave the European Union, we nonetheless do not know on what terms this withdrawal will take place or what future relationship with the EU the UK will have. However, there are a number of outcomes of Brexit which might be envisaged as realistically possible or likely. We make brief reference to some of the most significant of these here, separated for convenience into possible effects upon the UK and the EU respectively.

THE UK

Domestic politics and the political parties

British politics has been considerably affected by the ongoing Brexit debate. Huge splits have emerged in both of the major political parties in respect of the Brexit issue. Within the Conservative Party this has largely centred upon divisions between those favouring "harder" and "softer" forms of withdrawal from the EU, while within the Labour Party they have been between those favouring a second referendum on the terms of any proposed withdrawal and those opposed to this.[110] On 18th February 2019, seven Labour MPs resigned from the party to form a new group,[111] with one of their main grievances concerning the party leadership's handling of the Brexit issue. An eighth Labour MP and three Conservative MPs subsequently joined them,[112] leading to the creation of a new pro-European political party, Change UK, which supports a second referendum on the UK's withdrawal from the EU. While it is too early to draw any firm conclusions in this respect, there appears good cause to believe that there may be a pending realignment of the British political party system. If

---

[110] It should be noted, however, that a number of Conservative MPs have expressed support for a second referendum, including prominent former ministers such as Justine Greening and Dominic Grieve. At the same time, a very small number of Labour MPs, such as Kate Hoey, have indicated willingness to support a hard form of Brexit.
[111] The seven were Chuka Umunna, Luciana Berger, Chris Leslie, Mike Gapes, Angela Smith, Ann Coffey and Gavin Shuker.
[112] Joan Ryan was the eighth Labour MP to join the group, the Conservatives being Heidi Allen, Anna Soubry and Sarah Wollaston.

both main parties are perceived to facilitate Brexit, there may also be a surge in support for the pro-European Liberal Democrats, the Green Party or Change UK. At the same time, support has grown for the new Brexit Party, led by former UKIP leader Nigel Farage, which might expect to do very well in the pending European parliamentary elections by consolidating the pro-Brexit vote.

Constitutional implications

The possible constitutional implications of Brexit are potentially considerable, and concern respectively the doctrine of parliamentary sovereignty, the status of referendums, and the constitutional integrity of the United Kingdom. A central argument of the 'Leave' campaign during the 2016 referendum concerned the notion of 'taking back control' over areas of law which involve some element of EU legislative provision, by "repatriating sovereignty" to the UK Parliament and ending the jurisdiction of the European Court of Justice over aspects of domestic law. Depending upon the form of withdrawal which takes place, the force of EU law may cease, whether immediately or in the longer term, to have any effect within the UK, essentially restoring the doctrine of parliamentary sovereignty to its pre-1972 status. The 2016 referendum represented a major milestone in that it was the first occasion on which the public backed an outcome opposed by most of the political 'establishment,' and was only the third UK wide referendum ever held. It may herald in an era of increased pressure for the use of referendums to resolve political issues. However, it has also become apparent in light of failings of the 2016 experience that there is a genuine need to give much greater consideration to the regulation of referendum exercises.

The constitutional integrity of the UK is potentially threatened as a consequence of the different attitudes towards Brexit demonstrated by its constituent parts. While a majority of voters in England and Wales voted in favour of the UK's withdrawal from the EU, a clear majority in favour of remaining within the EU existed in both Scotland and Northern Ireland. In respect of Scotland, one of the major arguments advanced against its independence during the 2014 Scottish Independence referendum was that this would result in Scotland's effective withdrawal from the EU by virtue of its secession from the UK. The reverse argument can now be made that to retain or obtain EU membership will require Scottish independence, and the Scottish SNP government has indicated that it will now push for a second referendum on Scottish independence.[113] Although Northern Ireland backed remaining within the EU, withdrawal is unlikely to significantly increase support for unification with the Republic of Ireland given that this is an issue upon which the Northern Irish electorate divide on sectarian lines. However, there may be effects from Brexit for the Northern Irish peace process which stem from the approach taken to the border issue. A major sticking point in negotiations between the UK and the EU, and for building sufficient support within Parliament for the withdrawal agreement reached between Theresa May

---

[113] See, eg., 'Sturgeon outlines new Scottish independence referendum plans,' *The Guardian*, 24 April 2019, available at https://www.theguardian.com/politics/2019/apr/24/sturgeon-outlines-new-scottish-independence-referendum-plans

and the EU in late 2018, has concerned this point. Under the terms of the Good Friday peace agreement, no hard border exists between Northern Ireland and the Republic of Ireland. A return to a hard border would likely have negative implications for the peace process, yet avoiding this may prove problematic if the UK does not commit to remaining within customs union or accepting the Irish backstop part of the withdrawal agreement. There are also a number of all-Ireland bodies which operate across the whole of the island of Ireland and are based upon cooperation between the UK and Ireland. While these may continue to operate, problems may arise in those cases where they have an economic/trade remit, and if Northern Ireland and Ireland become governed by different rules, the latter remaining bound by EU rules where Northern Ireland may not be. Both UK and Irish governments are committed, however, to the preservation of a common travel area between the two countries, so there is an expectation that the historic close relationship between the two countries will continue to operate at least on some level.

Employment & Social Welfare protections

Many legal protections enjoyed by UK citizens in the arena of social welfare, employment and equality/discrimination matters stem from EU legislative provisions. Many of these are now enshrined in domestic UK law and will continue to afford protection to workers and citizens. However, unlike at present, it will be theoretically possible for the UK Parliament to simply repeal these. Furthermore, the UK will not be bound to implement future protections which develop under EU law. Many on the political left are concerned that the UK will slowly erode workers' rights, or at least not keep up with the levels of protection developed under EU law, as part of a "race to the bottom" if the UK – as some in the Conservative Party favour – seeks to reposition itself as a low tax, low regulation free market economy to attract external investment. Affording guarantees of workers' rights has proven a key issue in discussions between the Conservative and Labour parties upon withdrawal terms.[114]

Immigration

Controlling immigration was a major issue in the 2016 referendum, with the UK's withdrawal from the EU prima facie meaning an end to freedom of movement for EU citizens wishing to live and work in the UK. The UK government made the end of freedom of movement one of its red lines within withdrawal negotiations. Subject to any transitional stage, Brexit will mean that EU citizens no longer have an automatic right to live and work in the UK, but will have to satisfy similar tests as are currently applied to non-EU migrants. However, there is some doubt that the end to freedom of movement will substantially affect the UK's immigration levels. This is because most immigration to the UK does not come from other EU member states,[115] and successive governments have failed to meet

---

[114] See, eg., 'Brexit: May to offer workers' rights pledges to gain Labour support,' *The Guardian*, 28 February 2019, available at https://www.theguardian.com/politics/2019/feb/27/may-to-offer-workers-rights-pledges-to-gain-labour-brexit-support

[115] See, eg., https://www.migrationwatchuk.org/statistics-net-migration-statistics

their own self-imposed targets on immigration caps. Concern has been expressed by various employer organisations that an end to free movement may deprive key sectors of the workers they need to address shortfalls in the labour market. Significantly, the 'Leave' campaign appeared to implicitly acknowledge this weakness of their own key campaign platform, suggesting that there may be scope for increasing immigration levels from other areas of the world to fill gaps left by declining EU migration.

Economic and trade implications

Most economic forecasts suggest that the UK economy will be negatively affected by Brexit, irrespective of the form which it takes. The UK is already starting to see a number of key companies deciding to relocate their headquarters and operations to other EU member states, concerned that the effects of Brexit will make it disadvantageous to be based in the UK. This is particularly true of the financial services market, with Frankfurt an attractive alternative for banks and other financial services providers, among other locations. A report from EY (Ernst & Young) in June 2018 reported that 34% (75/222) of companies it monitored had "publicly confirmed, or stated their intentions, to move some of their operations and/or staff from the UK to Europe."[116]

Under the terms of the withdrawal agreement negotiated between the UK government and the EU in late 2018, the UK would continue to trade with EU member states for a transitional period on current terms, although thereafter trade relations would be subject to the agreement of a new trade deal. In the event of the UK leaving the EU with no agreement having been effected, the UK would immediately trade on less favourable WTO terms including the impositions of customs and tariffs. This would make trade more costly and would be anticipated to lead to a decline in the demand for British exports, while imports may become more expensive and result in increased prices for certain products. The UK will also cease to enjoy the benefits of the free trade agreements which the EU has negotiated with other states, and will need to broker new agreements of its own.

While the UK has expressed its intention to strike a range of new international trade agreements, it has acknowledged that it is behind schedule with this. At present it has only struck agreements with 7 of 69 countries governed by EU free trade deals (Switzerland, Chile, Mauritius, Madagascar, Zimbabwe, Faroe Islands and Seychelles), representing just £16 billion of £117 billion trade. It should not be underestimated how long it may take to broker new trade agreements. The EU took several years to broker some of its larger agreements, for example with Canada, so it cannot be assumed that a comprehensive agreement with the UK can be reached quickly. From the other perspective, some major states may prioritise concluding agreements with the EU –and its market of 600 million citizens over the UK's market of just one tenth of this size.

---

[116] See https://readyforbrexit.co.uk/the-list-of-companies-setting-up-hqs-or-bases-on-mainland-europe-ahead-of-brexit-grows/

The UK's international standing

By withdrawing from the EU, there is a danger that the UK becomes increasingly inward looking and isolated globally. Much will depend upon the future development of UK-EU relations, but it is possible that UK influence upon the continent will decline, and that Europe's voice in global bodies will be increasingly represented by Germany or France. The UK's permanent seat on the UN Security Council, which has already been challenged in some quarters as representing an outdated status of international power balances, may come under further challenge if the UK's international standing is seen as having diminished. An interesting issue to be resolved will be where the UK chooses to position itself internationally – at the heart of major debates, or more withdrawn; with major powers such as the US, or former Commonwealth powers, or with the European continent. This may go to the heart of the kind of country the post-Brexit UK is.

THE EUROPEAN UNION

EU citizens

EU citizens living and working in the UK prior to Brexit are entitled to apply for settled status, which means that they may remain freely post-Brexit. However, following the UK's withdrawal from the EU, citizens from other member states will not enjoy the right of freedom of movement to take up residence and employment within the UK, but will be subject to the immigration and residence rules which apply to non-EU nationals.

Euroscepticism in member states and further integration

The UK is not the only EU member state which has experienced high levels of euroscepticism. There was always a danger that Brexit would unleash surges in support for withdrawal from the EU in other states. Whether this will be the case remains to be seen. It is possible, certainly if the UK becomes very economically successful post-Brexit. However, the more likely effect of Brexit is to weaken euroscepticism in other EU states. The difficulties experienced in the process, which has now run for almost three years since the referendum was held, have illustrated the extent to which the consequences of a 'Leave' vote were not really given full consideration. This may ensure that any appetite for leaving the EU elsewhere is significantly undermined. As the major power least supportive of continuing further European integration, the UK's withdrawal from the EU may embolden the supporters of further integration. However, it may be that in order to prevent further possible challenges to the EU from similarly aggrieved member states, the EU moves more in the direction of a programme of differentiated integration.

The balance of power within the EU

The departure of the UK from the EU stands to have some bearing upon the dynamics of balances of power within the EU. Alongside France and Germany, the UK is one of the biggest powers within the EU, although it is has traditionally been less supportive of measures aimed at greater European integration than France and Germany. This may embolden a Franco-German alliance in setting out the course of the EU's future direction moving forward. At the same time, traditional allies of the UK within the EU – for example, Hungary, Netherlands, Sweden – may feel weakened by the loss of their main champion. In other respects, the loss of the UK may weaken Germany at the expense of France, given their different economic outlooks. While the UK represented a free market ally for Germany (along with the likes of Austria, Netherlands, Finland), France has typically favoured a more interventionist economic model (along with EU member states along the Mediterranean).

Foreign and defence policy within the EU has, perhaps, been one of the more controversial issues. The UK and France have been the most active states in terms of military deployments, and the departure of the UK may undermine any efforts to further cooperation on the deployment of EU military operations, for example that deployed in the DRC in 2003. There has also been some tension over the role of the EU and NATO in safeguarding Europe's security. Atlanticists, such as the UK, put greater emphasis on the role of NATO, while the likes of France favoured a greater EU capacity being developed for this purpose. The departure of the UK may strengthen the hand of the Europeanists.

Conclusion

At the time of writing the issue of Brexit remains unresolved. The UK remains a member state of the European Union. Unless Parliament is able to agree upon the terms of any withdrawal agreement to be reached with the EU prior to then, the UK will remain a member until at least the end of October 2019. At that point, any of four outcomes are possible: the UK will leave the EU without reaching an agreement on terms of withdrawal; withdrawal terms will be reached, including the likely prospect of a transitional period during which the UK continues to be bound by and enjoy certain benefits of EU membership; a further extension may be afforded to the UK which postpones its departure from the EU; or the UK decides to revoke its Article 50 notification and remain a member of the EU.

The ongoing uncertainties make it difficult to draw firm conclusions about the longer term effects of Brexit, if indeed the UK eventually even comes to leave the European Union. Instead, for the most part this article has sought to make some sense of the context within which the 2016 EU membership referendum took place and the process which has unravelled since. We first demonstrated the relevance of the UK's constitutional framework to this process, before illustrating how the UK's relationship with the EU has developed over time, central to any understanding of the 2016 referendum. Drawing upon the UK's constitutional framework, we then highlighted some of the inherent problems of using constitutional referendums as a means of settling disputed issues such as the UK's

membership of the EU. Attention was then given to understanding the main parameters of the referendum campaign, before we considered the various factors which underpinned the outcome, a majority voting in favour of leaving the EU. From this stage onwards it has been more difficult to make sense of the Brexit process. While we have traced the key stages in the UK's withdrawal negotiations post-referendum, these remain unresolved and it is unclear how they will develop moving forward. As a result, while we can highlight some of the most likely implications of the UK's departure from the EU, to a large extent such forecasts are speculative until we are able to see how the Brexit process develops yet further. However, it can confidently be stated that regardless of the outcome of this process, the phenomena of Brexit has radically shaken up British and European politics, and highlighted deep levels of discontent with existing institutions and processes. Arguably, any longer term assessment of Brexit will need to take account of how such concerns come to be addressed by those tasked with the responsibilities of governing. Responses in this respect will fundamentally shape what both a post-Brexit UK and post-Brexit European Union look like.