"Brexit": A Constitutional, Diplomatic and Democratic Crisis. A View from the Trenches

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Abstract

A discussion of the recent referendum in the United Kingdom (UK) on membership of the European Union (EU) and, in particular, to consider the immediate aftermath and longer-term implications of the decision to leave.

Keywords

Brexit; referendum; European Union; constitutional law; international law

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May I thank the Dean and Faculty of Law (North-West University, Potchefstroom) for giving me this opportunity to discuss the recent referendum in the United Kingdom (UK) on membership of the European Union (EU) and, in particular, to consider the immediate aftermath and longer-term implications of the decision to leave. It is no understatement to say that the referendum was a monumental event in the governance, political and popular life of the UK but I would argue that its global ramifications are only beginning to be truly understood. It is also very difficult for me to disentangle the personal from the political as a British citizen, someone who voted remain, and someone deeply concerned by the impact that "Brexit" will have. Thus, I very much see the issue as a crisis; not one that is irresolvable but nevertheless one which will take many years to overcome. Moreover, as the title of my talk indicates, it is a crisis with multiple layers; domestic, regional and global on the one hand, and economic, political and legal on the other.

The summer of 2016 was also notable in the UK (and elsewhere) for the commemoration of the one hundredth anniversary of the beginning of the Battle of the Somme, the deadliest battle in the First World War. It is said that 57,000 British soldiers alone were lost on the first day of battle. The casualties on all sides were truly horrific by the end. I do not seek to equate this historic battle with Brexit in a glib way, but it does occur to me that there are three key connectors that I would want to draw out. First, it underscores for me how much Britain has been, and should always be, part of Europe. It might be an island, but its political and historical links have been with Europe since (and before) William the Conqueror in 1066. The two great world wars of the twentieth century reinforced that inseparable bond. Secondly, despite the bloodiness of the battle, the movement forward in the trenches was relatively speaking narrow; a matter of miles. Despite the anguish and the hostility, progress was not great. We might find that the distance between where we start and where we conclude post-Brexit is equally not that far apart. And thirdly, and perhaps most significantly of all, there was the gap in lived experience between the soldiers and their leaders. After the battle General Haig remarked: "The results of the Somme fully justify confidence in our ability to master the enemy's power of resistance". This perspective that the result is what is necessary at any cost has been a driving force behind

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** This sought-after lecturing occasion, called after the first Dean of this Faculty, presents the floor to invited experts to share their field of research with those interested.

much of the Leave campaign, often resulting in the presentation of dogmatic arguments with little evidence to support them. Indeed, to introduce a theme I will come back to, the referendum revealed a new post-factual politics, where facts were lacking, the views of experts were said not to be trusted, and open untruths were told in the hunt for political support.

However, there are some facts which can be provided. On 23 June 2016 the UK was asked to vote on whether or not it wished to remain a part of the EU. With a significant turnout of over 72%, 51.9% (17,410,742) of the valid votes were cast in favour of leaving, whereas 48.1% (16,141,241) of the voters preferred to remain. Despite divisions between and within the UK political parties over Europe, the final outcome shook the political establishment to the core, with many "Leave" leaders also seemingly unable to comprehend the outcome. The polls had swung between leave and remain throughout the campaign but the majority had indicated that they would vote to remain. It was always going to be close, but there had been a sense amongst commentators that the traditional conservatism which operates at moments like these would correct any initial enthusiasm for change. But what the vote revealed was a hugely divided society, where old political boundaries no longer prevailed. While London, Scotland and Northern Ireland voted to remain, much of the rest of England and Wales did not. The leave vote was evident in the old industrial heartlands of northern England, in the agriculture-dominated areas of eastern England, and in the more remote regions in the West. Notwithstanding the significant amount of EU funding given to areas of regional deprivation such as south Wales, they too voted to leave. The Leave campaign had tapped into a general feeling of a lack of control that was not just about European governance – there is an equal dislike of the central government in Westminster – to which the referendum gave a voice. And with a significantly high turnout, many people chose the opportunity to use that voice.

Of particular note was the variation in voting by age groups: those aged 45 and over were more likely to vote to leave, while younger voters were much more likely to vote to remain. Indeed, the polarisation was extreme. So in the 18-24 age group, 73% voted to remain whereas in the over 65 age group 60% voted to leave. Moreover, there was a general view that older voters were more likely to make the effort first to register to vote, and then to take the opportunity to do so. So what begins to emerge is a picture of societal division, between generations, and between cities and more rural areas, which division was not invariably connected to whether

the EU had or had not directly benefited someone but was instead linked to an overall impression of how the voters want to be governed and what role they see for the UK. Some Leave campaigners were very adamant that leaving the EU was about establishing a new arena of global leadership, beyond the parochialism of a narrow regional identity. But that seemed to me a minority view. Many Leave campaigners simply wanted to "take back control" – to "make Britain Great again" – as if it were possible to return to some Churchillian past. This is a possible partial explanation for the division in voting between the age groups, perhaps.

Of course, the referendum result occurred in a context. It was the consequence of a particularly fractious and bitter campaign – more on which in a moment – but also, more significantly, it grew out of Britain's changing relationship with Europe, which was never easy, was often strained, and was always subject to close domestic scrutiny. Despite the UK's dominant position at the end of the Second World War, it was not involved in the establishment in the 1950s of the Economic Coal and Steel Community and European Economic Community, as they were then called, and indeed the first two attempts by the UK to join (in 1963 and 1967) were roundly and infamously rebuffed by French President, de Gaulle. Ultimately, the UK had to wait until the French presidency changed to gain membership, which it did in 1973, but even then it was a domestically contentious matter, leading to the first ever national referendum in 1975 on membership (the 2016 referendum being only the third ever national referendum the UK has held). The debate was surprisingly similar: British jobs, sovereignty, and whether the focus should be on Europe or the rest of the world. An important missing theme at the time was migration, as the full impact of the free movement rules had not seemingly entered the political or national consciousness as yet. As with the 2016 referendum, the vote on Europe created strange bedfellows, and members of both the left and the right saw the issue very differently. Nevertheless, the Remain campaign carried the vote with a substantial 67% vote.

But the endorsement of Europe was to prove illusory, especially on the right of British politics. The changing nature of the European project – mandated by its preamble to strive for an "ever increasing union" – from free trade through a regulatory single market to much more overtly political objectives, leading in the 1991 Maastricht Treaty to the European Union and EU citizenship, and then in 2007 to the Lisbon Treaty (containing many of the same constitutional provisions that the draft European Constitution of 2004 had failed to convince the people of France and

Netherlands to support in popular votes) was raising the ire of a noisy group of British politicians. They saw these developments as presaging the incremental emergence of a super-state with overarching regulatory governance from Brussels and diminishing national sovereignty. The rise of anti-EU sentiment led to the creation of factional political parties, notably the UK Independence Party (UKIP), which also had the potential to affect the traditional voter base of the mainstream Conservatives. The Conservatives had long struggled to maintain cohesion over the "Europe" question. By the latter half of her time in office in the late 1980s, Margaret Thatcher had become resolutely more anti-Europe, and the memory of her symbolic "handbagging" of her fellow European leaders into giving a monetary rebate at one diplomatic conference emboldened a group of the party's Members of Parliament (MPs) to make Europe an ongoing thorn in domestic political life. This led eventually to Prime Minister David Cameron's so-called "Bloomberg" speech in 2013, in which he promised that if he won the next election in 2015 (as a single party majority, whereas at the time he was in coalition), he would seek to renegotiate Britain's membership of the EU and submit it to a popular referendum.[1] For good or ill, he did go on to win the election and the Conservatives had sufficient seats to form a single party government.

His position was nuanced and, as it has proved, difficult to accept. He was a proponent of the EU and wanted Britain to remain in it. But not under any terms, nor without seeking to tackle what had now become the biggest issue – that of the free movement of peoples to the UK from within the EU, especially by now from the enlarged EU, including East European countries. If he were able to get a new arrangement, he would campaign vehemently for the UK to stay where it was. That was to be the position of the government, but individual members of the government could campaign for the opposite. Such a breakdown of party discipline was to show itself to be especially troublesome during this campaign.

The campaign was a period of unenviable politicking in UK, the like of which I would not like to see again. Indeed I wrote to a national newspaper during the campaign and indicated my concern as to the divisions that it had the potential to cause in society more generally. Both sides ran increasingly desperate and almost wholly negative campaigns. The Remain campaign – led by the Prime Minister – was often accused of running "Project Fear", relying on international reports from institutions

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[1]   Accessible   at   https://www.gov.uk/government/speeches/eu-speech-at-bloomberg (date accessed 27 September 2016).

such as the World Bank to show what would happen to the economy, jobs and overall life opportunities if the UK voted to leave. There was a general sense that only by staying in the EU could the economy be saved. This surely was a difficult message for a Prime Minister to sell who had just said that the EU was not worth staying in unless he got a renegotiated deal. Moreover, the failure of the two main parties to coordinate their Remain campaigns meant that few positive or coordinated messages were heard. Instead, international visitors such as President Obama were heard to lecture the British people on the importance of the EU. This was a tactical error, surely, by the Remain campaign.

But if the Remain campaign lacked strategy, the Leave campaign developed a number of cogent, strategic – but not invariably truthful – messages. Led by Boris Johnson, the enigmatic ex-Mayor of London, who surprisingly came out for Leave very late in the day – some thought opportunistically so – the campaign ran on a discrete few media memes. First, "take back control".[2] Second, "give back our money". Third, "stop free movement". In particular, the campaign in a very populist move sought to show how if the UK left the EU, the £350 million the UK sent each week to the EU could be spent on British priorities such as the National Health Service (NHS). Splashed infamously across a bright red Leave campaign bus, this above all of the claims was the most successful, but arguably the least truthful. First, the £350 million figure is incorrect. According to *InFacts*, the figure is perhaps closer to £120 million once the British rebate is removed, and the support the EU gives to the UK is taken into account.[3] Secondly, the suggestion that "all" £350 million could go to the NHS was fictional, as it failed to take into account the areas of funding that the UK would have to now support in the absence of EU funding; farmers, regional development, UK university research, *et cetera*. Nevertheless, this claim amongst all others found its way into the public consciousness and formed the principal discourse of the debate. The print media split down the usual lines, with the leading tabloid suggesting on the day of the vote that this was the UK's "Independence Day". A second, more unnerving aspect of the Leave campaign was the issue of migration, especially where it was conflated with the pressing issues of asylum being faced more acutely elsewhere in Europe. UKIP in particular sought to capitalise on this amalgamation of the "other", and the rise in hate crime during but especially since the referendum vote shows that political

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[2]   See   http://www.express.co.uk/news/politics/681706/Boris-Johnson-vote-Brexit-take-back-control (date accessed 27 September 2016).

[3]   See   https://infacts.org/uk-doesnt-send-eu-350m-a-week-or-55m-a-day/   (date accessed 27 September 2016).

leaders must be very careful how they demonise minority groups within society.

Nevertheless, the vote has been cast and the implications are now to be worked through. The remainder of this paper thus looks at both the immediate aftermath and the longer-term effects, many of which are still uncertain and unknown. The immediate aftermath was, of course, dominated by two factors: first by the economic impact, notably the drop in the value of the pound (against the dollar it went to a thirty-year low, and it has still not recovered) - and the political impact. David Cameron resigned as Prime Minister with almost immediate effect, to be replaced by a Remain supporter (though admittedly a relatively quiet one), Theresa May, the former Home Secretary. The champions of Brexit seemed to leave the political stage relatively quickly also, either through their own volition (*eg* Nigel Farage as UKIP leader) or through other nefarious tactics (*eg* Boris Johnson, who had his leadership chances pulled from under him by another Brexit leader in a last minute withdrawal of support). But politics is a strange business and Boris Johnson was recalled by Theresa May to be Foreign Secretary, though significantly he was not given direct responsibility to negotiate the terms of the UK's withdrawal. The Labour party was equally unnerved by the vote, recognising that its heartlands did not vote the way the majority of its MPs had done; and there remains an ongoing debate over leadership in that party.

If the UK was shocked by the vote, the capitals around Europe, and especially the institutions of the EU, were stunned. There was a mix of a sense of unreality and anger which have yet to be fully tested, as proper exit negotiations – discussed below – have yet to start. The UK has created a new ministry for exiting the EU but has not yet issued the formal notice that it wishes to do so – triggering the so-called article 50 process (under the Treaty on European Union as inserted by the Treaty of Lisbon).Theresa May has indicated that "Brexit means Brexit", but this catchphrase remains devoid of substance at the present time. Many questions remain unanswered, largely because the Leave campaign did not articulate what leave would look like (ie what new relationship would exist in its place), nor would the Government be bound by a campaign it did not support, in any event. One of the key issues is whether the UK will wish to retain access to all (or part) of the EU single market and what obligations on the free movement of people it might have to retain to do so. There are diametrically opposing views as to whether access to the single market is politically desirable post Brexit (regardless of the legal

complexities), nor does the referendum result give any guidance on this (or any other) matter.

Part of the issue is that the UK has no written constitution and no clear legal or political clarity on how to handle the referendum result. The 2015 EU Referendum Act,[4] which created the referendum, made no provisions for the consequences of the vote. Legally the referendum result could be ignored, but politically that would be nigh on impossible. Much more complicated is the role of Parliament in giving effect to the referendum result. Should Parliament be asked to endorse the result, thus combining popular and representative democracy? The Remain MPs are divided. Many accept the result but are questioning what the best "leave" outcome could possibly be. A much smaller group of such MPs wants to seek to stop the process altogether, either by using the supremacy of Parliament or by calling for a second referendum on the outcome of future negotiations. The Government, however, is committed to giving effect to the result.

But withdrawal is not straightforward domestically, within the rules of EU law, and under international law. Under EU law, which must be considered the *lex specialis* under international law for these purposes, article 50 sets out a process for a Member State to exit. It is both a unilateral act (commenced by the formal indication of a Member State that it wishes to leave) followed by multilateral negotiations to conclude a withdrawal agreement. Once triggered, the article 50 process is expected to last two years unless the agreement is negotiated within that time, or the time period is extended by mutual agreement. During this period, the UK remains a full Member State with its previous all rights and responsibilities.

Under UK law, the matter is as complicated. Since the referendum result was announced, particular disputes have arisen as to whether or not the Government can trigger article 50 without Parliamentary approval. This must be distinguished from other roles for Parliament, including reviewing and approving the final withdrawal treaty, repealing the original enacting law that gave effect to UK membership (European Communities Act 1972) and bringing into domestic force new legal arrangements. But the question presently is: does Parliament have a role – a right – in commencing the withdrawal process or is that a matter for the executive in conducting international relations? A number of court cases have commenced, and

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4   See   http://www.legislation.gov.uk/ukpga/2015/36/pdfs/ukpga_20150036_en.pdf
        (date accessed 27 September 2016).

presently remain outstanding, on this issue. The matter can be broadly divided into three positions. First there is the "traditional" argument (one held by the Government), namely that initiating withdrawal, just as negotiating international treaties, is a matter of international relations, which under English constitutional law is a matter of the Royal Prerogative, which is exercised by the Government, unless otherwise circumscribed by statute. The second position is that such statutory provisions exist, namely within the 1972 Act, which include provisions on the role of Parliament in the case of "enabling rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties" (section 2). Supporters argue withdrawal is such a right to be "enjoyed" and thus cannot occur without Parliamentary approval. Critics would point out – rightly I would argue – that the rights referenced here relate to individual rights to be developed under EU law to be incorporated into UK law, and not the "higher" membership rights of the Member States themselves in regard to entry, amendment and withdrawal. A third argument, slightly more nuanced, is that Parliamentary approval is required to prevent the arbitrary use of Executive power to nullify statute-based rights. Again, there is precedent for such a position, but I would argue that triggering article 50 *per se* does not nullify such rights. They remain extant by virtue of English law until they are repealed. The contrary position is conceptual conflation of cause and effect. It remains to be seen how the courts approach and decide on such matters of great national significance.

But even once withdrawal negotiations start, that would only raise questions about what is being negotiated and to achieve what objectives. Brexit may mean Brexit but what Brexit may look like even Leave campaigners do not have a clear idea. There is also an initial procedural aspect. The article 50 negotiations are technically only on matters of withdrawal, not invariably on a future relationship (ie. should it concern budgetary and staffing matters, and ancillary issues on pensions and the like?) Of course, it is inconceivable that the UK would not wish to seek to ensure its future relationship within such negotiations at the same time, but as a matter of sequencing, whether they occur during or after these initial negotiations is still unclear. Perhaps, at best, substantive transitional arrangements will be put in place, with further negotiations taking place at a later stage.

Of the greatest concern is the economic trading relationship with the remainder of the EU. Does the UK wish to have access to the single market, and if so how? There are, of course, some models that could be followed. Norway, for instance, is not a member of the EU but is part of the

European Economic Area (EEA) which, for the acceptance of much EU law (including that pertaining to free movement) and a reduced fee, has access to the single market. Would that work for the UK or would that be too much like EU membership for UK leave voters and politicians? In any event, would the EU be willing to grant the UK such status? On the other hand, Turkey is part of the EU customs union, but with less access to the single market. For a third model one might look to Switzerland, which through a series of bilateral accords has sector-by-sector access, but this is a diplomatically fraught relationship, as the Swiss insist on greater autonomy than, say, the Norwegians within the more institutionally-framed EEA,[5] and it is unlikely to be a model the EU would want to replicate. Finally, the UK might seek to negotiate an *ad hoc* status or a more general free trade agreement with the EU, as Canada has recently done. Failing all of that, the UK could fall back on the general international trade principles of "most favoured nation" as found in World Trade Organisation (WTO) law. None of these choices are easy and making any of them would require compromising the extreme positions taken during the referendum campaign, particularly those pertaining to controlling the movement of workers. Moreover, the City of London is especially vulnerable and is seeking particular protection.

Negotiating with the EU is not the only diplomatic headache for the UK. Under EU law, international trade is an exclusive competence of the Union, and thus negotiating trade agreements with third parties is something the UK has not had to do since 1973. With few home-grown trade negotiators, this is likely to prove a practical as well as a legal challenge. The UK will, however, not be able to sign – or arguably even negotiate – such agreements until it has left the EU. How will other countries approach such negotiations whilst also balancing their relationships with the EU? Moreover, though the UK is a member of the WTO in its own right, it does not possess its own schedule of concessions as required of a member. Thus, until it does so, even its full membership of the WTO has something of a question mark against it. Negotiating a new international trade status could take years, if not decades, and such agreements would also probably include not only provisions on trade in goods but trade in services, government procurement, investment protection, intellectual property, and a myriad of other topics. Negotiating more than one such an agreement at a time will be difficult, complex and

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[5]   See http://www.eureferendum.com/blogview.aspx?blogno=85604 (date accessed 27 September 2016).

administratively burdensome, especially for a country which has had almost no trade negotiators for forty years.

Of course, not everything will change. The UK remains a key member of the UN with its permanent seat on the Security Council and its prised veto. It is a member of NATO and the Council of Europe, it is a signatory to the European Convention on Human Rights (for the moment, at least), and it is a part of the G7, the Commonwealth and a host of other international organisations and networks, including the "Five Eyes" Spy Alliance. It has important bilateral relations with many EU countries and others on many matters of national security, culture, development and external partnership. And let's not forget, the UK was already enjoying the benefits of asymmetrical membership of the EU, not having joined the euro currency, nor being part of the Schengen visa-free travel area. Thus, to some extent the UK was already on the outside of many of the key integrationist projects of the EU.

Nevertheless, there are special areas of concern which should be monitored as we move forward. First are those areas which benefited disproportionately from EU assistance through regional development assistance or via the Common Agricultural Policy. Will the UK Government replace the funding, and if so to what extent and in what way? Secondly, the EU has a very extensive development assistance policy with the global South, and the UK plays a notable part in that. This will need to be reaffirmed from both perspectives. Thirdly, membership of the EU has strengthened the UK's labour, health and safety and environmental rules over the decades and it is a concern that withdrawal would see a retreat from a progressive stance on such matters. Fourthly, how will the EU's position as an international actor on issues ranging from climate change and Syrian refugees to sanctions against Russia be affected by the UK's no longer being a member? And fifthly, it seems that UK universities are especially vulnerable in terms of access to the Horizon 2020 research funding scheme, ensuring student exchange via the popular ERASMUS scheme, and general staff mobility.[6] Uncertain times lie ahead for higher education, which will be clarified only following the conclusion of the final intergovernmental arrangements.

But there are three particular consequences that are especially worth mentioning. First, there are the particular demands of the UK's regions. Will the referendum result prompt a further attempt at independence by

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[6]   See http://erasmusprogramme.com/ (date accessed 27 September 2016).

Scotland? Scotland voted very clearly to remain in the EU, and some say that it voted against independence in 2014 precisely because remaining in the UK was said to be the only guaranteed way to remain in the EU. This belief has now proved to be false. And as regards Northern Ireland, as it shares a land boundary with the Republic of Ireland the open nature of which is fundamental to the peace agreement, there are significant questions about how withdrawal will affect both Northern Ireland's economy and its political settlement.

Secondly, while there were questions over the future ability of people to come to work and live in the UK (and for British nationals to do the same in the EU), it was generally hoped that people already settled on both sides would not be affected by the outcome, not invariably through any legal principle of acquired rights, though that might play a part, but rather politically. No Government would want to be seen to be moving – expelling – established families and individuals. In what has been a particularly surprising move by the UK Government, it has refused to protect the rights of EU workers and their families presently in the UK until a final agreement is reached, leading to accusations that such people are being used as pawns in the political negotiations. Even many Leave campaigners have supported a clear statement on the rights of such people to remain.

Finally, there is the matter of the status and future position of Gibraltar. Gibraltar is a British dependency which Spain has consistently sought sovereignty over (from its perspective, has sought to regain sovereignty). Gibraltar is part of the EU through the UK, though subject to certain exceptions. It has greatly benefited from EU law, as well as the protection EU status has given it over Spanish demands for sovereignty. Previous instances of "closed frontier" tactics have notably diminished during the time of EU membership. Gibraltar voted in the referendum; on an 83% turnout, 96% voted to remain. But the die is cast, and its future hangs with the rest of the UK. How will Spain now react? To what extent will Gibraltar be a priority for the UK Government in the withdrawal negotiations? More fundamentally, has the UK let down Gibraltar as its sovereign? Brexit has far-reaching implications.

The referendum campaign was ultimately determined by the electorate's being persuaded to subscribe to two clear propositions: that a vote to leave would allow them to take back control over their destiny, and that it would allow the UK to become a global player again. Of course, both ideas hark back to a supposed golden age of Parliamentary sovereignty, where the UK held an unenviable position in the world. In both respects, these

propositions can be challenged. The UK of 2016 is very different from the UK of 1972. The world has changed beyond recognition in many important respects, politically, economically and technologically. Within the UK, the notion that devolution ensures "taking back control" is simply begging the question – control by whom and of what? And globally, did EU membership detract from or amplify the already fading position of the UK? The Suez Crisis of 1956 had already made it obvious that the UK's role in international affairs was waning. The notion of Brexit held a rhetorical attraction for many, as it allowed and promoted a certain view of Britain in the world. But Brexit needs to be negotiated, and will the world want what the UK thinks it is able to give?