Brexit: A Drama in Six Acts

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Abstract

The referendum concerning the UK's membership of the EU took place on June 23 2016, resulting in majority voting to leave the EU. This article traces developments in this area in six stages. It begins with an explanation of why the Prime Minister promised a referendum in 2013; this is followed by the significance of the balance of competence review conducted by the Coalition government; the focus then shifts to the PM's renegotiation with the EU after his electoral success in 2015; there is then discussion of the issues that shaped the referendum debate; the final two parts address respectively the political and legal fall-out from the referendum.

Introduction

Brexit was drama and dramatic in equal measure. The referendum was initially promised in January 23 2013 and took place on June 23 2016. In the intervening years the issue remained largely in the political background, casting the occasional shadow, but rarely if ever dominating debate outside a self-select group of Conservative Eurosceptics. This was unsurprising given that the EU consistently registered low on the issues felt to be important by voters, barely ever coming above seven or eight in this regard.[1] It was also unsurprising even within the Westminster village, since truth to tell it was not clear that the Prime Minister

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[1] Concerns about immigration featured higher, https://www.ipsos-mori.com/researchpublications/researcharchive/3447/Economy-immigration-and-healthcare-are-Britons-top-three-issues-deciding-general-election-vote.aspx.

would have to honour the promise. This would only be so if he won an outright victory at the 2015 election. The opinion polls indicated a hung parliament where coalition government would be the order of the day, thereby allowing uncomfortable promises to be kicked into the political long grass. Matters turned out rather differently. David Cameron delivered the outright victory that had not been predicted and basked briefly in the glow of praise that attends such gladiatorial contests. It was to be short lived. The Conservative Eurosceptics left the Prime Minister in no doubt that his promise would indeed have to be kept. They pressed him to name the day, hoping that it would lead not to connubial bliss, but to the break-up of a union. The issue that had simmered on the political back burner assumed centre stage, and the run up to the referendum saw ever more heated debate. The Leave Camp won, and their principal protagonists set a new record for resiling from more promises in a shorter period of time than anyone could recall. Those who favoured Remain sincerely hope that all the rest is not just history.

This article charts the course of Brexit from the Bloomberg speech through to the referendum and beyond. It takes the drama that was Brexit and uses it to structure the subsequent analysis. Being cognizant of place and time, and the fact that it is 400 years since the death of Shakespeare, the ensuing discussion is therefore broken down into six Acts, each of which is foreshadowed by some select Shakespearian quotations that are pertinent to the discourse. I hope that it thereby enriches the analysis. Act 1 considers the road to Bloomberg and the origins of the promise to hold the referendum, followed in Act 2 by examination of the importance of the Balance of Competence Review, which was a major government exercise in which each department assessed the impact of EU law in its area. Act 3 picks up the story after the Conservative electoral victory in 2015, analysing David Cameron's renegotiation of the UK's terms of EU membership, while Act 4 concerns the referendum debate and the principal arguments deployed by the Leave and Remain camp respectively.

Act 5, entitled the 'political fall-out, a week is a long time in politics', continues the story in the aftermath of the referendum, and contains three more specific scenes, politics as blood-sport, politics as party and politics as responsibility; it is followed by Act 6 'the legal fall-out, two years is a short time in law', which also has three particular scenes in which key issues concerning the beginning, middle and end of the negotiation process under Article 50 TEU are explored.

Act 1: The road to Bloomberg and the origins of the referendum

'There is a law in each well-order'd nation
To curb those raging appetites that are
Most disobedient and refractory', Troilus and Cressida

'Have More than You Show, Speak Less than You Know', King Lear

'Being of no power to make his wishes good: His promises fly so beyond his state
That what he speaks is all in debt', Timon of Athens

The origins of the referendum might be traced back to the last millennium, insofar as scepticism concerning the EU was readily apparent among some in UK politics. Space precludes the telling of this story, which therefore takes as its starting point the promise to hold the referendum made by David Cameron in the Bloomberg speech.

When the Conservative/Liberal Democrat coalition government took power in 2010 the Conservative Eurosceptics were eager for the opportunity to contest the UK's membership of the EU. The prospect of any referendum was, however, held in check by the Liberal Democrats, who were pro-European and opposed to making promises about the holding of some future EU referendum.

The promise of legislation enshrining a referendum lock was contained in the Coalition's Plan for Government,[2] but its inclusion and subsequent passage is credited in part

[2] The Coalition: Our Programme for Government, 20 May 2010, 19, https://www.gov.uk/government/publications/the-coalition-documentation.

at least with the Prime Minister's perceived need to offer something tangible to Tory Eurosceptics, who had been pressing for an in/out referendum on UK membership of the EU. This led to the European Union Act 2011, which enshrined the principle that a positive vote in a referendum would be required for any increase in EU power, and the pressure was also manifest in the decision for the UK to exercise its opt-out from measures enacted under the Area of Freedom, Security and Justice, AFSJ, as it was allowed to do so under the Lisbon treaty.[3]

Both measures were problematic, albeit in different ways: the EU Act 2011 mandated the need for a referendum in a very broad range of circumstances, such that it would be required, for example, for any change to a passerelle clause altering the modality of voting under the Treaty.[4] The opt out from AFSJ measures represented the triumph of ideology over practicality, insofar as the rejection of measures such as the European Arrest Warrant was taken against the advice of almost all those who proffered evidence before select committees of the House of Commons and House of Lords,[5] this being borne out by the fact that the government then chose to opt back in to the most important of such measures.[6]

The Prime Minister nonetheless continued to resist the idea of promising to hold a referendum on EU membership. The line that he took from 2010-2013 was that this would be

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[3] Protocol (No 36) On Transitional Provisions, Art. 10; Protocol (No 21) On the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

[4] Select Committee on the Constitution, Referendums in the United Kingdom (HL 99, 2009-10); Select Committee on the Constitution, European Union Bill (HL 121, 2010-11); P. Craig, "The European Union Act 2011: Locks, Limits and Legality" (2011) 48 C.M.L.Rev. 1881.

[5] http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-sub-committee-f-/Publications/.

[6] A. Hinarejos, J.R. Spencer and S. Peers, Opting Out of EU Criminal Law: What is Actually Involved?, CELS Working Paper, New Series No 1 (2012).

held if and when the Lisbon Treaty was amended so as to grant new power to the EU. His position in this respect changed in 2013, when he made the Bloomberg speech, promising the EU referendum after what was then the next election. There were two factors explaining the change.

First, there was increased and relentless pressure from his Eurosceptic backbenchers. The problem with placating such pressure through giving in to demands is that the placatory effect is merely temporary. The group applying the pressure is calmed in the short term, only for its hunger to reawaken, reinforced as it is by the realization that its pressure has been successful in the past. The Eurosceptics did not recognize the wisdom of the quote from Troilus. Secondly, UKIP, the UK Independence Party, was making some headway in local and EU elections at this time, with the consequence that pressure increased on the Prime Minister to do something to address the problem, more especially because it was eating into Conservative electoral support.

These were the twin rationales for the promise of the referendum made in the Bloomberg speech on January 23 2013.[7] It is worth dwelling on what the speech did and did not say. It was high on rhetoric. There were, said the PM, three major challenges confronting the EU: problems in the Eurozone were driving fundamental change in Europe; there was a crisis of European competitiveness; and there was a gap between the EU and its citizens, which had grown in recent years, this betokening a lack of democratic accountability and consent that was felt particularly acutely in Britain. The PM articulated a vision for the EU grounded on five principles: competitiveness; flexibility; the two-way flow of power, back to the Member States, as well as upward to the EU; democratic accountability, with an enhanced role for national parliaments; and fairness in relation to the arrangements for those inside and outside the Eurozone. The British people would therefore be offered the opportunity to decide

[7] The text is available at: http://www.number10.gov.uk/news/eu-speech-at-bloomberg/

whether they wished to remain in the EU through a referendum, but only after the PM had had the opportunity to negotiate a new deal between the UK and EU. The UK's continued membership of the EU would then be placed before the British people in the light of the deal that had been secured.

The speech is equally important for what it did not say: it said precious little if anything as to the content of what the PM would seek to negotiate with his EU partners prior to putting a deal to the UK public in the referendum. This might be because of the wise words from King Lear, adumbrated above. It would, however, be mistaken to believe that this was the reason for circumspection. The real rationale was almost certainly more prosaic, which was that the PM did not know what he would take the bargaining table when he made the Bloomberg speech, nor could he give any guarantee that he would be successful, a dilemma shared with Timon of Athens. It might be argued that this was indeed unsurprising given that the referendum was at a minimum three years away from the time when the Bloomberg speech was made, and no sensible PM commits himself three weeks ahead, let alone three years. This may well be true, but there was another reason for circumspection that was less obvious, but more important. It is this that occupies Act 2 of the unfolding play.

Act 2: From Bloomberg to the referendum via the Competence Review

'Mistake me not, I speak but as I find', Taming of the Shrew

'Though thou speak'st truth,
Methinks thou speak'st not well, Coriolanus

'The Better Part of Valour is Discretion', Henry IV, Part I

The logic of renegotiation is that some things should change. It was exemplified most powerfully by the claim that the EU had power that it should not have, or did not need. This was the assumption underlying the renegotiation process, and was the Eurosceptic position.

In the months after the Prime Minister's Bloomberg speech there was, however, much speculation as to the subject matter that would form the basis of this renegotiation. This only became clearer in the Chatham House speech in 2015, to which we shall return in due course.

Discourse over EU competence and power has been influenced by parallel concerns as to those that shaped debate about EU institutions. Thus for some the shift in power upward towards the EU is the result primarily of some unwarranted arrogation of authority by the EU to the detriment of states' rights, which subsidiarity has been powerless to prevent. This is to say the very least an over simplistic view of how the EU has acquired its current power. The reality is that this has always been the result of three factors: the attribution of new competences through successive Treaty amendments; regulations and directives enacted pursuant to these Treaty provisions in accord with the EU legislative procedure; and judicial interpretation of the Treaty provisions and legislation. There is room for some disagreement concerning the relative weight ascribed to these three variables. The reality is nonetheless that it has been the Member States that decided after extensive discussion within Inter-Governmental Conferences leading to Treaty revisions to accord the EU competence in new areas. The legislation enacted pursuant to these provisions has always required consent from the Council representing Member States interests, and post-1986 much has also received the imprimatur of the European Parliament. The crude picture of a smash and grab operation by the EU institutions or the EU courts belies reality.

This still leaves assessment as to whether current EU competence as embodied in the Treaty provisions and legislation made pursuant thereto, is set at the right level, and its impact on the UK. We do not have to speculate about this in abstract, since we have the benefit of the Balance of Competence Review. This was established in 2012.[8] It was the most

[8] Review of the Balance of Competences between the United Kingdom and the European Union, Cm 8415, July 2012, https://www.gov.uk/review-of-the-balance-of-competences.

comprehensive review of EU competence undertaken by any Member State. The object was to assess the impact of EU law broadly conceived on all areas of government action, and to this end each government department considered the effect of EU law on its area.

There is little doubt that the review was launched with the hope by Eurosceptics that it would provide the substance for subsequent renegotiation of the Treaties. The government would then have the ammunition to take to the bargaining table, whereby it could claim that the UK had carried out an unimpeachable, detailed inquiry that revealed the excess of EU competence. Matters turned out rather differently. The inquiry conducted by government departments was indeed unimpeachable in terms of process, and well-judged in terms of substance, but it did not produce the ammunition that the Eurosceptics had hoped for. All of which goes to show that the best laid plans often go off the tracks.

In terms of process, it showed the UK civil service at its very best. It was told to conduct the review and did so. The civil service was, however, determined to ensure that the outcome would withstand serious scrutiny. It was not about to sully its reputation by authoring reports that might be regarded as politically biased. The process was therefore unimpeachable and uniform throughout. The lead department for the particular topic engaged in broad consultation. This took the form of publicising the review process; receiving written consultations; undertaking town-hall type meetings; soliciting views of experts in day long discussions held in the department with those responsible for the report; and studying the relevant literature. The lead department produced a draft report based on the results of the consultation, including research that it had done. This draft report was then subject to rigorous scrutiny in a face to face meeting with a team from the Cabinet Office, which tested its compatibility against the evidence. This team was reinforced by two 'external challengers'. They were, as the title suggests, people from outside government with expertise in the area, who brought a critical eye to the draft report. The external challengers often had

very different views concerning the EU. It was only after this process that the report was submitted to ministers for approval, which was generally given, the exception being the report on free movement that was subject to lengthy delays in the Home Office.

In terms of substance, the reports generally found that EU competence was pitched at about the right level. There were, as might be expected, questions about the wisdom of particular legislative initiatives, but that would inevitably be so in the context of a review into any area where a public authority wielded power, whether at national or EU level. The bottom line was that the Eurosceptics did not get the ammunition that they had hoped for from the review. While the civil service was instructed not to draw direct conclusions from the material, it is nonetheless clear from the reports that the distribution of competence was felt to be about right and that membership on these terms was beneficial to the UK. This was not lost on commentators.[9] In a previous era it might have been possible to bury a report that did not cohere with what the government intended, although it would have been difficult to do so with a report of this size. The reality is that we live in an internet age, with the consequence that interring unwelcome reports produced after public input is simply not an option. There was no putting this particular genie back in the bottle.

The Prime Minister was therefore caught between a rock and a hard place. The positive results from the competence review meant that it was difficult for him to be forthcoming about the subject matter of the renegotiation, because it gave him scant material with which to negotiate. He was, however, faced by the need to come up with a negotiating

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[9] P. Stephens, "The UK Audit of Relations with the EU is Coming up with Awkward Answers", Financial Times, 22 Jul. 2013; M. Emerson & S. Blockmans, "British Balance of Competence Reviews, Part I: 'Competences about right, so far'", CEPS/EPIN Working Paper No. 35, 2013; M. Emerson et al., "British Balance of Competence Reviews, Part II: Again, a Huge Contradiction between the Evidence and Eurosceptic Populism", EPIN Policy Network Paper, No. 40, 2014; M. Emerson et al., "British Balance of Competence Reviews, Part III: More Reform than Renegotiation or Repatriation", EPIN Paper No. 42, December 2014.

strategy that would satisfy UKIP and the Conservative Eurosceptics. UKIP sought UK exit from the EU. The Conservative Eurosceptics produced a *Manifesto for Change, A New Vision for the UK* in Europe in January 2013,[10] which listed five principal changes to the existing Treaties: an emergency brake for any Member State regarding future EU legislation that affects financial services; repatriation of competence in the area of social and employment law to Member States; an opt-out for the UK from all existing EU policing and criminal justice measures not already covered by the Lisbon Treaty block opt-out; a new legal safeguard for the single market to ensure that there is no discrimination against non-Eurozone member interests; and the abolition of the Strasbourg seat of the EP. This was just the tip of the iceberg, since Fresh Start also sought a plethora of other changes, which were said to be attainable within the framework of the existing Treaties.

Viewed from the perspective of the civil service the results of the review were captured by the quote from Taming of the Shrew, I speak but as I find. Viewed from the perspective of the Eurosceptics, the truth was the wrong answer, hence the quote from Coriolanus. Viewed from David Cameron's perspective the response between 2013-2015 was to take a leaf out of Falstaff's book, discretion is the better part of valour, which in this context meant that he said nothing as to what he would negotiate about.

This was more especially so because he never expected to have to honour the promise to hold a referendum that he made in the Bloomberg speech. This pledge would only have to be honoured if he won the 2015 election outright. Truth to tell, he did not expect to do so, and all the opinion polls indicated a hung parliament. If the Conservatives took power once again in a coalition with the Liberal Democrats, the PM could then contend that the promise to hold the referendum might have to be sacrificed or delayed as the price for securing continued alliance with the coalition partner. There was thus a second reason therefore to abide by

[10] http://www.eufreshstart.org/downloads/manifestoforchange.pdf.

Falstaff's stricture, since there was no point in articulating the detail of a renegotiating strategy that was unlikely to become a reality.

Act 3: Electoral success and renegotiation

'Uneasy lies the head that wears the crown', Henry IV, Part 2

'Go to, a bargain made: seal it, seal it; I'll be the witness', Troilus and Cressida

'According to the fair play of the world,
Let me have audience', King John

The Prime Minister's outright victory in the 2015 elections increased his power within the Conservative party, for a short time at least. He had delivered the victory that the political pundits and polls suggested was unattainable. It also meant that he could no longer equivocate about the terms of the renegotiation. This was finally unveiled in November 2015 in the PM's Chatham House speech.[11] A deal was then struck at the European Council meeting in February 2016.

In political and indeed literary terms the Chatham House letter and subsequent missive to the European Council President are revealing. They are quintessentially political documents, with the same core content, but differences around the periphery, given that they were addressed to more than one audience. Thus aspects of the Chatham House letter were written for members of the Prime Minister's party, as exemplified by the material that concerned EU competence over human rights, in which he sought to reassure his MPs that the EU Charter of Rights would not be allowed to stand in the way of the UK's renegotiation of its relationship with the Council of Europe and the ECHR, nor would it be allowed to impede enactment of a UK Bill of Rights to replace the HRA. The Prime Minister was addressing the

[11] A New Settlement for the United Kingdom in a Reformed European Union, 10 November 2015, https://www.gov.uk/government/speeches/prime-ministers-speech-on-europe.

same audience when expressing affinity to the kind of ultra vires and identity locks used by the German Federal Constitutional Court. By way of contrast the UK general public was the intended audience of the PM's remarks concerning the economic and security benefits of staying in the EU. The EU Member States were yet a third audience.

We should not, however, allow the detail to mask the headline issue, which is that while the Prime Minister carried through on his promise to hold a referendum, the demands placed on the negotiating table were mild compared to those sought by the Eurosceptic wing of the Conservative party. The Prime Minister knew that a wish list akin to that in the Fresh Start manifesto could never be attained. It is, moreover, very doubtful whether the authors of Fresh Start ever thought that it could be. It was in reality merely a stepping stone towards their campaign for exit. There were four elements to the negotiating package and subsequent deal.

First, there should be protection for countries outside the Eurozone. This was required in order to protect the single market and ensure that all twenty eight Member States decided its rules; to prevent discrimination against non-Eurozone countries; and to ensure that non-Eurozone countries did not have to shoulder additional costs from integration of the Eurozone.

Secondly, there should be increased emphasis on competitiveness and the cutting of red tape, thereby removing unwarranted regulatory burdens on industry, the idea being that competitiveness should be written into the 'DNA' of the EU.

Thirdly, there should be change that impacted on sovereignty and subsidiarity. Thus the Treaty commitment to ever closer Union should no longer apply to Britain. For the Prime Minister this meant a clear, legally binding and irreversible agreement to end Britain's obligation to work towards an ever closer union. There should in addition be some red card

regime, such that if a certain number of national parliaments objected to a measure it could be prevented from becoming law, and there should also be greater emphasis on subsidiarity.

The fourth and final part of the renegotiation package concerned free movement and immigration. The Prime Minister did not press for change to the basic right of free movement, acknowledging that it was a key part of the single market. He nonetheless sought change that would prevent what he termed abuse of the right to free movement, and facilitate greater control over immigration in line with the Conservative manifesto. This meant ensuring that when new countries acceded to the EU free movement would not apply until their economies converged much more closely with existing member states, and dealing with abuse of free movement. EU migrants should moreover have to live in the UK and contribute for four years before they qualified for in-work benefits or social housing, and the practice of sending child benefit overseas should cease. The Prime Minister was cognizant that such changes could pose difficulties for other Member States, and said that he was open to different ways of dealing with them, while insisting that the basic demands should nonetheless be met.

The European Council agreed the terms of the renegotiation in February 2016.[12] Some demands were easier to meet than others. The deal concerning the first category involved some subtle finessing, in the sense that although the PM sought something akin to a substantive emergency ‘brake’ of the kind found in Articles 82-83 TFEU in order to protect non-Eurozone countries, the deal that was struck embodied what could more aptly be termed a procedural emergency ‘break’, whereby there would be extended discussion in the event of disagreement. The second set of demands that sought reduction in EU red tape was pushing at an open door. The third demand for extra red card powers for national parliaments gained

[12] Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, EUCO 1/16, Brussels 19 February 2016.

approval from other Member States. The other limb of this demand, viz an end to ever closer union at least as it applies to the UK was also accommodated, insofar as it was agreed that the UK was not committed to further political integration. By way of contrast the fourth demand, changes to benefits for EU migrants, particularly those in work, raised complex legal issues and greater political opposition. The end result was nonetheless that the UK demands in this respect were largely, albeit not completely, accommodated in the agreement.

The Prime Minister engaged in extensive shuttle diplomacy during this period. There were numerous ‘bilaterals’ with other prime ministers and heads of state. There was a feeling in some quarters that this was just for show, to convince people in the UK that David Cameron had won an important new deal for the UK. I am sceptical of this view. The deal might well have been of limited significance, but I do not think that the extensive shuttle diplomacy and bilaterals were a sham, masking an underlying easy acceptance of the entire renegotiation package by the other Member States. The truth was rather captured by the quotations at the outset of Act 3. The Prime Minister was fully aware of the difficulty of securing agreement and the importance of doing so, this being a necessary step to being able to argue for continued membership of the EU in the ensuing referendum. He needed the ‘audience’ with the other EU leaders, and not surprisingly extolled the virtues of the ‘bargain’ that had been sealed.

There was, as might be expected, extensive academic discussion about the precise legal nature of the overall deal struck between the UK and the European Council, and whether it was really binding on the EU. These issues have now been rendered moot, since the deal was only to take effect if the referendum resulted in a vote to remain in the EU. However, it remains to be seen whether other Member States might seek to draw on aspects of the agreement, which address concerns that they have concerning the functioning of the EU.

Act 4: The referendum debate

'If chance will have me king, why, chance may crown me', Macbeth

'Be simple-answer'd, for we know the truth', King Lear

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'No; he doth but mistake the truth totally', Tempest

What art thou mad? Art thou mad? Is not the truth the truth?', Henry IV, Part I

The reality was that the precise terms of the renegotiation package played almost no part in the ensuing discourse, except insofar as the Leave Camp derided the deal as achieving little of substance. The debate was shaped by politics and personality. Boris Johnson chose at the eleventh hour to side with the Leave Camp, notwithstanding that he had in the recent past expressed some pro-EU sentiment. He proved to be their most effective advocate and his choice was determined primarily by careful calculation as to his chance of becoming the next Prime Minister,[13] hence the quote from Macbeth. The denouement in this regard rendered the border between fact and fiction illusory, as will be seen in Act 5. The fierce referendum debate was shaped by substance and rhetoric on a broad range of issues, including the impact of Brexit on the UK's security, and on the stability of the EU. The 'truth' was contested every step of the way, as captured by the juxtaposition of the quotes from King Lear, the Tempest and Henry IV. The principal issues that shaped the outcome were nonetheless the economy, migration, sovereignty and an anti-establishment sentiment. They will be considered in turn.

The Remain Camp secured the advantage on the economy. The detrimental impact of Brexit on the UK economy was attested to, inter alia, by the IMF, OECD, Bank of England, Treasury, the Institute for Fiscal Studies, and the London School of Economics and Political Science. That is quite apart from the voices of individual economists who came to the same

[13] If Johnson fought with the Remain Camp, and if it had won then he would probably still have been number three in the pecking order to be the next PM, lining up behind George Osborne and Theresa May.

conclusion. There were dissenting voices, who argued that the UK would be better off outside the EU, but they were a minority. There were also contestable issues concerning the size of the economic hit that the UK would suffer if it left the EU. This does not alter the fact that the majority of voices, institutional and individual, believed that the UK would suffer some serious economic detriment. For most of the time the Leave Camp failed to engage with the argument: each time a detailed report emerged showing the negative impact of Brexit, the response was that this was just another instance of project fear, or that the relevant group was in a conspiracy with the UK government, or that all such groups were in a plot. The absurdity of these claims was exemplified by the response to the IFS report concerning the economic impact of exit, where the Leave Camp claimed that this reputable think tank was colluding in some way with Brussels. To the extent that the Leave Camp engaged with the economic argument, its claims were patently misleading: the Boris Johnson Bus toured the UK emblazoned with the slogan that EU membership cost the UK £350 million pounds per week. This was blatantly wrong, as was pointed out by numerous commentators and parliamentary select committees, which strongly criticized the Leave Camp for this depiction of the cost of membership and said that it should be removed. Needless to say this did not happen. The Remain Camp did not, however, help its economic case by occasional exaggerated rhetoric concerning the size of the economic hit that would occur if the UK left the EU.

The balance of advantage on migration was, by way of contrast, firmly with the Leave Camp. It tapped into voter concerns about the overall number of migrants and the fact that EU free movement rules limited the degree to which we could control our borders. The concerns were heightened by the fact that immigration does not fall evenly across the UK, but is concentrated in particular areas, which bear the immediate financial and social cost of the influx. The uneven impact of migration was a real issue, but it could have been dealt with while remaining in the EU.

There were nonetheless significant fictions that shaped this aspect of the debate, none more so than the picture that is painted of the paradigmatic EU migrant, who sought to enter the UK only to access welfare benefits. EU law does not countenance benefit tourism. More significant is the fact that this picture cohered so badly with reality.

The most comprehensive study was undertaken by a group at UCL in 2014. It revealed the following:[14] European immigrants to the UK paid more in taxes than they received in benefits, helping to relieve the fiscal burden on UK-born workers and contributing to the financing of public services. EU migrants who arrived in the UK since 2000 contributed more than £20bn to UK public finances between 2001 and 2011. Moreover, they have endowed the country with productive human capital that would have cost the UK £6.8bn in spending on education. Between 2001-2011 EU migrants from the EU-15 countries contributed 64% more in taxes than they received in benefits, while those from Central and East European countries contributed 12% more than they received. The positive net fiscal contribution of those arriving since 2000 from these new Member States amounted to almost £5bn, while the net fiscal contribution of recent European migrants from the rest of the EU was £15bn. Migrants who arrived since 2000 were 43% less likely than natives to receive state benefits or tax credits. They were also 7% less likely to live in social housing. EU migrants post-2000 were on average better educated than UK citizens,[15] and had higher employment rates.[16] There was moreover the positive benefit that the UK secured through free movement, as attested to by the great many from the UK who lived elsewhere within the EU.

[14] https://www.ucl.ac.uk/news/news-articles/1114/051114-economic-impact-EU-immigration ; C Dustmann and T Frattini, 'The Fiscal Effects of Immigration to the UK' (2014) 124 Economic Journal F593.

[15] In 2011, 25% of immigrants from the new Member States and 62% of those from EU-15 countries had a university degree, while the comparable share is 24% among UK citizens.

[16] In 2011, the figures were, 81% for new Member States, 70% for EU-15 and 70% for UK natives in 2011.

Notwithstanding such detailed studies the reality is that concerns about migration fuelled the Leave Camp, fostered by rhetoric that bordered on the xenophobic, and in some instances crossed that line. The numerical estimates of the impact of immigration were designed to fuel such fears, as exemplified by the Minister of Justice's claim that the UK population would rise by 5 million in 2030 if the UK remained in the EU, a figure that was predicated, inter alia, on Turkey gaining full membership of the EU, with no limits on free movement rights. The Leave Camp was, moreover, repeatedly content to conflate the numbers of migrants to the UK, repeatedly iterating a global figure that included immigration from EU and non-EU countries, notwithstanding that the latter would be unaffected by exit from the EU and notwithstanding also that non-EU migration exceeded migration from within the EU.

There was also concern about non-EU migration, as exemplified by those seeking to enter from North Africa, Afghanistan or Syria. This is not the place to engage in detailed exegesis on the proper response to the migration crisis. Suffice it to say the following. The problems of dealing with such migration flows will almost certainly be greater when we leave the EU. The reason is not hard to divine. We already control our own borders in relation to non-EU migration, subject to the demands of international law concerning asylum. While we remain in the EU such migrants can, however, be returned to the first EU country that they entered. When we leave the EU this regime ceases to exist for the UK; we would have to consider all claims for asylum directly in the UK, subject to negotiation of any bilateral agreements with other countries. The problems posed by such migration will therefore be exacerbated if we leave the EU.

The third major issue concerned sovereignty, the desire to take back control and make our own laws, and the Leave Camp reaped dividends on this issue. The argument however concealed far more than it revealed. The message constantly portrayed by the Brexit camp

was of a top-down Brussels machine imposing rules on Member States against their will, the corollary being that we could reclaim our sovereign birth-right in a post-Brexit world. This bore little if any relation to reality. The Member States are the principal architects of the Treaty rules that govern the EU. It is they who crafted the initial rules and it is they who modified them in every subsequent Treaty amendment. The Member States determine the EU decision-making schema. Most EU legislation requires approval from the European Parliament and the Member States in the Council, and the UK has voted in favour of the very great majority of this legislation.

The argument was equally misleading as to the degree of 'sovereign freedom' that the UK would have in a post-Brexit world. The reality is that irrespective of the withdrawal deal that is struck between the UK and the EU, anyone seeking to do business in the EU will continue to be bound to comply with EU rules if they wish to sell goods or services into the EU. The real difference in a post-Brexit world is that the UK will have no seat at the table and hence no voice when the relevant regulations are being drafted. The UK's sovereignty over economic and regulatory issues is also significantly circumscribed in relation to non-EU trade. This is because a great many standards that regulate safety and the like are set at the global level, through transnational or international regulatory organizations. These standards are binding factually and legally in the UK and this will not change in a post-Brexit world. What will change is that the UK will, once again, have little or no voice in the framing of these rules. The principal players in this regard are the EU and the USA, and while we currently have influence through the former, this will cease if we leave the EU. This point is equally relevant in relation to the new breed of trade deals, such as the emerging Transatlantic Trade and Investment Partnership, TTIP, currently being negotiated between the EU and the USA. There are valid concerns about the content of such deals. The reality is

nonetheless that the UK will have no influence in this regard if we leave the EU, but we will be very significantly affected by the rules if the agreement is finalized.

The degree of sovereign autonomy ‘regained’ over social and environmental issues broadly conceived will depend on a plethora of factors, which were not presented to voters. These include the nature of the post-Brexit deal struck with the EU and how far this will require us to comply with EU social policy; the extent to which we will remain bound by subsisting international agreements on matters such as the environment; how far a post-Brexit government will seek to reduce worker protection, an issue studiously ignored by the Leave Camp; and the downside cost of increased sovereignty, as exemplified by the fact that post-Brexit the UK will no longer benefit from the European Arrest Warrant, whereby thousands of criminals have been sent back to other EU countries to face trial, which will have to be replaced by 27 separate extradition treaties, a situation which law enforcement agencies view with extreme unease.

The fourth factor that determined the referendum outcome was the desire to hit back at ‘established elites’, which for these purposes connoted London and Brussels. There is much in elections that is not determined by rational choice, and this is true even more in relation to a referendum on a complex issue. The reality is that many people were angry in the broadest sense of the term, this being fuelled by inequality and austerity. There are doubtless significant problems in this respect. The reality was that the UK austerity regime had little if anything to do with the EU. Our problems flowed primarily from the US financial crisis in 2008-2010, and not from the subsequent banking and financial crisis in the EU. Funding from the EU had helped to alleviate these difficulties, most especially in large urban areas, which explains the forthright support for the Remain Camp by the leaders of the largest UK urban conurbations.

The referendum campaign was also notable for what was not talked about. An important issue in this respect was the competence review. It hovered at the back of this feast like Banquo's ghost in Macbeth. The Leave Camp ignored it for obvious reasons, viz that it contained detailed studies showing that the balance of competence was about right, and that the UK benefited from membership. It might be thought that the Remain Camp would naturally draw on this document, but it did not do so, the rationale seeming to be that it placed the PM in a difficult position, since it prompted the obvious inquiry as to why a renegotiation was needed at all if the status quo was in pretty good shape. This observation has political force, but is nonetheless regrettable. It would have been perfectly possible to finesse the preceding point, more especially so in a referendum campaign that was about 'message and impact' rather than 'fine print'. It could well have been argued that the renegotiation was still warranted in order thereby further to improve the UK's situation, in relation to matters such as child benefits or increased power for national parliaments.

The fact that this valuable information resource was not placed before the people was also regrettable for reasons of principle. Renegotiation provided the window for constitutional voice. The government exercises voice on behalf of its people, not just those who voted for it. To be sure the government of the day may well have a view as to what constitutes the public interest on a particular issue. This is entirely legitimate and part of the very *raison d'être* of government. It does not however alter the point being made here. The government exercises voice on behalf of the people when engaged in renegotiation of the UK's treaty obligations, and must do so responsibly. This connotes a constitutional obligation to present the case in relation to the EU in an even handed manner, notwithstanding the fact that this might not be agreeable to those with Eurosceptic leanings. This in turn should have obliged the government to be open about the results of the balance of competence review. The discourse concerning the terms on which to renegotiate has been conducted without

reference to the fact that the most far-reaching review conducted by the UK government reached the conclusion that the balance of EU competence was generally correct and beneficial to the UK. The general public should surely have been told this, and it was part of the government's constitutional responsibility to do so. Most ordinary UK citizens had no idea that the review existed, or its findings. This was quite wrong. One can but imagine the demands of the Leave Camp for summary publication of this material if the substantive conclusions had inclined in their direction. They would have been right to do so. It is axiomatic that the constitutional principle does not alter, or cease to be applicable, just because the substantive conclusions reached by the review were less attractive for those of this persuasion.

Act 5: The political fall-out, a week is a long time in politics

'I have no spur to prick the sides of my intent, but only vaulting ambition, which o'erleaps itself, and falls on the other', Macbeth

'*The raven himself is hoarse*
That croaks the fatal entrance of Duncan
Under my battlements', Macbeth

'Trust nobody, for fear you be betray'd', Henry VI, Part II

'Get thee glass eyes
And, like a scurvy politician, seem
To see the things thou dost not', King Lear

Scene 1: Politics as blood sport

The political fall-out from the referendum was bloody and immediate. The Prime Minister resigned on Friday 24 June, notwithstanding many Conservative signatories to a letter encouraging him to stay in order to conduct negotiations with the EU, and has been succeeded as PM by Theresa May. Truth to tell his decision was unsurprising. If he remained

longer he would merely have been hostage to a cabinet composed of prominent Leave campaigners, forced in effect to do their bidding. He had little appetite for the conduct of such difficult and protracted negotiations with the EU.

The talk in the next 48 hours was of when, rather than if, Boris Johnson would be crowned as the next PM. He was the front-runner. The imagery was gripping, one Etonian dispatching another from the political stage, both having also been prominent members of the elite upper-class Bullingdon Club while at Oxford. When I gave an earlier version of this paper in Copenhagen a week before the referendum, and conjectured on what might happen if the Leave Camp won, I cautioned that Johnson would not have the field to himself, and that Theresa May and Michael Gove would both join the fray. Theresa May duly declared her candidacy, but it seemed that my conjecture about Michael Gove was misplaced, since he initially positioned himself as the principal supporter, the 'consigliere', for Johnson's prime ministerial bid.

By mid-week all had changed. Gove 'awoke' and decided that Johnson was not in fact fit for such high office, informing him of this minutes before the latter was formally to declare his candidacy. Gove regarded it as his 'duty' to go public about this, and felt that he had an 'obligation' to stand as PM, notwithstanding more previous personal disavowals of his suitability to hold such office than one could count. Johnson the assassin was consigned by co-conspirator Gove in double-quick time, given that Johnson's support drained rapidly away. Lest any one should doubt his political downfall the Tory grandee Michael Heseltine delivered a withering attack on Johnson of a kind that one has not seen for some considerable time.

Gove meanwhile was bearing the consequences his actions. My view remains that he was intent on a leadership challenge from about midway through the campaign, and there can be few instances better suited to the first Macbeth quote. The dramatic metaphor was heightened

given that it is clear from media coverage that his wife played a significant role in encouraging such ambition. The second Macbeth quote, spoken by Lady Macbeth, whereby she plots the death of Duncan, the king, is especially apposite. The world of politics remains extraordinary, no more so than here. That Gove could have seriously believed that his action would be regarded as acceptable, even by the moral standards of politics, stretches credulity. It quickly became clear that there are some things that even some politicians regard as beyond the moral pale, and his action was condemned as treacherous, perfidious and the like by members of his party and media alike. Yet even more remarkable is Gove's self-portrayal as the person to unify the country in a post-Brexit world. There is no doubting Gove's hubris, it is his connection with reality that is more questionable. The very fact that he could seriously think that he was best placed to unify the country after being one of the two leading campaigners for the Leave Camp, and after having assassinated Johnson, defies belief. If he really believed this it disqualified him for office, and if it was a mere intentional façade it should likewise disqualify him. Proof positive that you cannot keep an old-Etonian down for too long was evident but a few days later when Boris Johnson declared his support for Andrea Leadsom, emphasizing when doing so that she was kind and trustworthy, thereby further increasing Gove's discomfort. Gove duly lost out in the race to become the next Conservative Prime Minister, coming third in the voting among Conservative MPs, and Theresa May was duly crowned as the next Prime Minister when Andrea Leadsom pulled out of the contest.

It would nonetheless be wrong to think that the Conservatives had the monopoly of politics as blood sport. The Labour Party was certainly not willing to allow such a competitive advantage to their Conservative rivals. Thus it was in the immediate aftermath of the referendum that pressure mounted on Jeremy Corbyn, the beleaguered leader of the Labour Party, for not doing enough to convince Labour supporters to vote Remain. His

support ebbed away, this turning into a haemorrhage when most of the Shadow Cabinet resigned. Politics as blood sport combined with politics as gallows humour when the Prime Minister, at the outset of his speech to a packed House of Commons on Monday 27 June, duly welcomed a newly elected Labour MP with the quip that she might find herself in the Shadow Cabinet before lunchtime.

UKIP was moreover not to be left out of this bonfire of the vanities. It assuredly achieved a new record for an inverse relationship between the number of MPs, which was one, and the number of schisms that affected the party, which was considerably higher. It was also distinct for being the only party where the leader Nigel Farage walked into the political sunset declaring a job well done, rather than being pushed off the edge of the political cliff as had become standard practice across the remainder of the political spectrum. What this move betokened about responsibility and seeing through the complex process that Farage had helped to create is another matter entirely. The motif here was more aptly 'let others reap the consequences of the seeds that one has sown'.

Scene 2: Politics as party

There are in addition more serious dimensions to the politics of the referendum. There was in reality no need to call this referendum. It might, to the contrary, be contended that the country was divided; that it was right that it should be given the choice of whether to stay in or leave the EU; and that David Cameron was correct to allow this to happen. There are considerable difficulties with this argument. The factual reality was that for the ordinary voter the EU never ranked higher than about number 7 or 8 on the list of things that most concerned them when deciding how to vote, although concerns about immigration ranked higher. The EU was always way below health, crime, education, the economy, and other such matters. There was to be sure a reasonably high voter turnout at the referendum, but this does not undermine the

point being made here. It merely shows that if the people are offered a choice about something that will markedly affect them one way or another then they are likely to vote, more especially after six weeks when it was the lead issue in all forms of media.

It does not alter the fact that the decision to hold the referendum was, as set out earlier, prompted by internal divisions within the Conservative Party and the desire to fend off UKIP. It was a decision driven by party not country. The idea that the outcome of the referendum, whatsoever it might be, would heal divisions on this issue was equally far-fetched. The UK post-referendum is a country divided as never before, and the divisions are not going to disappear any time soon, more especially given that over 70% of young people voted Remain. That leaves entirely aside the issue of whether the UK will even remain as presently configured, which will not happen if the Scots vote for independence in the referendum that thy are likely to be offered, flowing from the fact that they voted by a significant majority to remain in the EU.[17]

Scene 3: Politics as responsibility

The referendum is also significant for what it tells us about politics as responsibility, including in this respect constitutional responsibility. I have made the argument in detail elsewhere.[18] Suffice it to say the following in this regard. Joseph Weiler is surely right that the EU is presently suffering a social legitimacy deficit, manifest in low voter turnout, and

[17] http://blog.politics.ox.ac.uk/uk-vote-leave-european-union/

[18] P. Craig, "The Financial Crisis, the EU Institutional Order and Constitutional Responsibility", in F. Fabbrini, E. Hirsch Ballin and H. Somsen (eds.), *What Form of Government for the European Union and the Eurozone ?* (Hart, 2015), Chap. 2

the rise of more anti-EU parties.[19] The causes of this deficit are complex, but the failure to articulate any developed conception of Member State constitutional responsibility for their actions, whether concerning the EU's overall decision-making architecture or individual decisions made pursuant thereto, is assuredly a factor in this regard. It should come as scant surprise that such a deficit exists if Member States are allowed to avoid constitutional responsibility for their actions, and offload blame on to the EU, while being cognizant that they are often architects of the relevant rules and that they would reject many changes that would address the root causes of the critique. It should equally come as no surprise that more extreme parties follow the lead of mainstream parties in this respect. The blame for failure to acknowledge such a conception of responsibility resides not just with the states themselves, but also with the broader community, including the academic community. We should, to be sure, continue to subject the EU political ordering to critical scrutiny. We should in doing so also reflect on the rationale for the current disposition of power, what alternatives are feasible and which players set the limits in this respect. The accepted critical discourse on the EU's political ordering is in reality only telling half the story, thereby ignoring conceptions of Member State constitutional responsibility that are central to a rounded understanding of the status quo and viable reform options.

This mattered in terms of the referendum debate, and the public's perception of the EU. Some have already noted that the Remain Camp felt constrained when presenting any positive case for the EU independent of the economic argument. There were to be sure statements concerning its importance in relation to peace and security, but the point being made here nonetheless remains true. The reality is that the public has become inured over the years to a negative image of the EU. Politicians of all political hues were content to negotiate

[19] J.H.H. Weiler, "Europe in Crisis – on 'Political Messianism', 'Legitimacy' and the 'Rule of Law'" [2012] Singapore Jnl. of Legal Studies 248.

deals in Brussels, and then critique the very deal to which they had assented when landing on home soil. If the political buck could be passed to Brussels for problems then this would be done, even if the problems were the result of choices to which all Member States assented. Small wonder that the image was so negative, more especially when it was constantly reinforced by a largely anti-EU media.

Act 6: The legal fall-out, two years is a short time in law

'The first thing we do, let's kill all the lawyers', Henry VI, Part II

'I am not in the giving vein today', Richard III

'*We have strict statutes and most biting laws'*, Measure for Measure

'I will withdraw: but this intrusion shall
Now seeming sweet convert to bitter gall', Romeo and Juliet

There are difficult legal issues flowing from Brexit, more especially because this is uncharted territory. We should therefore resist the temptation to follow the advice in Henry VI, since we may need a few lawyers for some time yet. The process is governed by Article 50 TEU, which is the sole mechanism for exit. Thus while the right to exit may flow from the Vienna Convention of the Law of Treaties 1969, VCLT, it makes clear, as will be seen below, that withdrawal must be done in accord with procedures under the particular treaty, where they exist.[20] The ensuing discussion focuses on three key issues: the trigger for invocation of Article 50, whether the process can be stopped when it has begun, and the nature of the resulting agreement. There are therefore issues that relate to the beginning, the middle and the end of the Article 50 process.

> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall

[20] See also, *The Process of Withdrawing from the European Union* (HL 138; 2015-16), para. 14.

> negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
> 4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
> A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
> 5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

Scene 1: The beginning

Article 50(1) is clear: the trigger for withdrawal is a matter for UK law to be decided in accord with our constitutional requirements. There has, however, been heated debate via blogs and the like as to what those constitutional requirements are, more particularly the degree of Parliamentary involvement that should be required before notification is given. It may be helpful to distinguish three different models concerning the constitutional trigger.

The first view is what may be termed the classic parliamentary power model, which can be presented as follows. The referendum was not formally binding on Parliament, but merely advisory. This flows from the nature of Parliamentary sovereignty as a principle of UK constitutional law, and from the fact that MPs are perceived as Burkean representatives and not as delegates of the voters. Parliament could therefore in theory ignore the referendum, although this is very unlikely in reality. It would, however, be perfectly legitimate for Parliament to demand a debate prior to the triggering of Article 50, and/or legislation to authorize invocation of Article 50(1), in order that the implications of exit could be considered. There is a strong argument that Parliament should exercise voice in this manner, because of the seminal importance of the issue, and the widespread feeling that

notwithstanding efforts by various organizations to keep the referendum debate factually honest, the voters were nonetheless misled repeatedly, most especially by the Leave Camp.

It is nonetheless also acknowledged as part of this first model that the executive has prerogative power under the UK constitution, which includes the conduct of foreign relations. It falls within the executive's prerogative power to negotiate international treaties, and this includes amendments thereto and withdrawal therefrom. Those who subscribe to this first view would therefore conclude that the executive can, acting pursuant to the prerogative, trigger Article 50 by making the requisite notification, unless Parliament demands further consideration of the issue prior to this being done. Parliament thus has the onus of seeking further debate/legislation, and if it does not do so then the executive can decide when it wishes to invoke Article 50(1), which includes in this respect the possibility that the executive would consider it advisable to seek parliamentary authorization before doing so, even where the Parliament has not demanded this.

The second model is a modification of the first, and is framed in terms of parliamentary power plus executive duty. It is central to the second view that the scope of prerogative power can be altered by constitutional convention. Thus whereas an issue might hitherto have been regarded as falling within prerogative power to be exercised by the executive, this might be constrained by the need to seek parliamentary approval. This is exemplified by the prerogative in relation to the making of war and peace, which traditionally fell within the untrammelled authority of the executive.[21] It is, however, now generally accepted that the executive must seek parliamentary authorization before committing the UK to war. It is exemplified once again by the Ponsonby rule, whereby post 1924 it came to be accepted that ratification of an international treaty would only occur after Parliament had the opportunity to consider the text of the treaty.

[21] R. Joseph, *The War Prerogative, History, Reform and Constitutional Design* (Oxford University Press, 2013).

It could therefore be argued that while the executive has the power to negotiate treaties, including withdrawal, it should nonetheless be required to seek parliamentary approval before embarking on such an exercise where a major treaty change is involved. The crucial difference is that on the second view the onus would lie with the executive to secure the requisite approval, and if it did not do so then the exercise of the prerogative power would be regarded as unconstitutional. It is not however clear whether this is regarded as the constitutional status quo, or something that would be constitutionally desirable. The empirical foundation for the former claim has to be sustained, and the line between 'is' and 'ought' cannot be magically wished away. Nor moreover is the form of such parliamentary authorization clear. There are important differences between demanding approval through parliamentary resolution and through formal statute.

The third model is that of actionable legal constraint. On this view prerogative power is legally constrained and these constraints are applicable to the instant situation, such that invocation of Article 50(1) would require some form of statutory approval. The essence of the argument is as follows. The *Case of Proclamations*[22] established that the King did not possess any general regulatory economic power that could be exercised independently of Parliament, and that the prerogative could not alter the common law, statute or custom. The *De Keyser* case[23] carried this logic one stage further. It established that where Parliament had spoken on an issue the executive could not have recourse to any prerogative power that touched the same subject matter. The decision, therefore, denied that prerogative power and statutory authority could exist in parallel. Where the democratically elected Parliament had regulated an area then the executive had to follow the conditions laid down in the relevant

[22] (1611) 12 Co. Rep. 74.

[23] *Attorney General* v. *De Keyser's Royal Hotel* [1920] A.C. 508; *R.* v. *Secretary of State for the Home Department, ex p. Fire Brigades Union* [1995] 2 A.C. 513.

statute, and could not seek a more advantageous result by claiming that a prerogative power could still be relied upon. It has been argued that triggering Article 50 TEU through the prerogative will render the European Communities Act 1972 nugatory.[24] The contention is that there is a clash between the prerogative and a statute, and that in accord with the principle in *De Keyser* the former must be constrained, such that the ECA 1972 can only be modified by a later statute.

There are considerable difficulties with this argument. The invocation of Article 50(1) has no legal effect as such on the ECA 1972, nor does the 1972 Act say anything about the procedure for withdrawal from the EU Treaties. The analogy with *De Keyser* is therefore misplaced. To be sure if the withdrawal agreement is concluded then the ECA 1972 will have nothing to bite on and will be duly repealed. The repeal will, however, be through a statute enacted in the proper manner by Parliament. It is of course inevitable that if the UK decides to withdraw from any treaty then the legislation that duly incorporated the treaty into UK law will be repealed. To regard this as coming within the *De Keyser* principle would however radically change it. The new principle would be that the executive could not exercise the prerogative power to begin the process of amending or withdrawing from a treaty, because this very initiation would impact on, or cut across, the legislation through which that treaty had earlier been incorporated into UK law. There is to my knowledge no case that comes close to establishing this proposition.

The difference between the *De Keyser* principle and the present situation is also evident at the remedial level. The remedial position in *De Keyser* flows inexorably from its central logic: the state is compelled to apply the relevant statutory rules and cannot circumvent these through the prerogative. There is no such analogy in relation to the ECA

[24] N. Barber, T. Hickman and J. King, 'Pulling the Article 50 'Trigger': Parliament's Indispensable Role', 27 June 2016, https://ukconstitutionallaw.org/blog/.

1972, since it says nothing about the procedure for withdrawal, and notification under Article 50(1) TEU does not affect its legal status. This begs an interesting question as to what the court would be declaring if it acceded to the type of argument considered here. It could not require that the 1972 Act be repealed prior to an Article 50 notification, since the UK remains a member of the EU until the withdrawal agreement is concluded, and repeal would remove the basis on which EU rights take effect in the UK. The assumption appears to be that the court might declare that a statute approving the Article 50 notification process is necessary, with the hope that this will provide the forum for more considered parliamentary reflection as to whether we should proceed to exit or not. UK courts would, however, be reluctant to intervene in the parliamentary process in this manner, and there is no guarantee that it would provide the discursive forum desired. There would by definition be no details of any future negotiation on the table at this time, and the danger is that it would quickly become a re-run of the referendum debates of the previous two months. It would in reality be difficult for Parliament to do anything other than give the green light to triggering Article 50. There is a real problem with safeguarding parliamentary voice, but as will be seen below this is more acute during the latter part of the Article 50 process, not the inception thereof.

Scene 2: The middle

The debate concerning the constitutional trigger for invocation of Article 50 has been affected, as seen above, by differing views as to whether the process can be stopped when it has begun. The interpretation of Article 50 is a matter of EU law, and it is contestable. The better view[25] nonetheless is that it can be stopped by the Member State once it has been

[25] See also, *The Process of Withdrawing from the European Union* (HL 138; 2015-16), paras. 10-13, where the same conclusion was reached by Sir David Edward and Derrick Wyatt.

invoked in the circumstances set out below. This is supported by arguments of principle, text and teleology.

The argument of principle is as follows. The right to withdraw from an international treaty flows from public international law, more specifically the VCLT. Article 42 VCLT stipulates that withdrawal of a party may take place only as a result of the application of the provisions of the particular treaty, or of the VCLT; and Article 54 VCLT provides that withdrawal of a party may take place in conformity with the provisions of the particular treaty, or at any time by consent of all the parties after consultation with the other contracting States.[26] Article 50 TEU regulates the process through which withdrawal occurs; it is the mechanism through which the withdrawing state exercises the preceding right. It is moreover clear as a matter of principle that prior to withdrawal the Member State remains bound by all rights and obligations under EU law.

The textual argument hinges on the wording of Article 50(3). It is clear from Article 50(1) that notification of intent to withdraw is a unilateral decision for the Member State.[27] It has been argued that once the notification has been given the Member State cannot rethink its position, since there is no provision within Article 50 allowing it to reverse the process. This ignores the specific wording of Article 50(3). It sets out two scenarios as to when the Treaties cease to apply to the State. This is either from the date of entry into force of the withdrawal agreement; or, failing that, two years after the notification, unless the European Council, in

[26] See also VCLT Art. 56, which provides that a treaty which contains no provision regarding withdrawal is not subject to withdrawal unless it is established that the parties intended to admit the possibility of withdrawal; or a right withdrawal may be implied by the nature of the treaty.

[27] There is no express time limit for invocation of Art. 50(1), but it is highly likely that the CJEU would regard it as subject to some implied limit, since otherwise it would be open to a Member State post a Brexit-type referendum to equivocate for years before deciding whether to withdraw, which could have serious negative consequences for the EU.

agreement with the Member State concerned, unanimously decides to extend this period. These are alternative scenarios, as is readily apparent from the wording and from the use of the disjunctive, 'or failing that'. It follows that before the two-year clock has run the Member State that has given notification could decide to rethink its position.[28] This is not reading a right into Article 50(3) that is not there. To the contrary it is the natural textual meaning. Prior to the two year period the Treaties continue to apply to the Member States until a withdrawal agreement has been made, and such an agreement requires the consent of the Member State and the EU. The Member State can, during this period, change its mind and withdraw from the exit negotiation. A further argument in favour of the Member State's ability to change its mind could be derived from Article 50(1), since it could be argued that if this occurred there would then no longer be a valid decision to withdraw, since the original decision had been changed in accordance with national constitutional requirements.[29]

The contrary interpretation precluding reversal would, moreover, lead to the following untenable conclusion. It would mean that invocation of art.50 could not be altered within the two-year period, even if there had been a change of government following an intervening national election fought on whether the Member State should exit; it would mean that withdrawal would have to proceed even if invocation of art.50 threatened or triggered an economic meltdown in the country; and it would generate intractable problems if the state required a referendum to complete the exit, since the withdrawal agreement might be rejected by the voters.[30]

It might be argued by way of response that the preceding interpretation would allow a Member State repeatedly to invoke Article 50(1), and then exit the process before the two-

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[28] See also, *The Process of Withdrawing from the European Union* (HL 138; 2015-16), paras. 10-14.

[29] I am grateful to Jukka Snell for this suggestion.

[30] I am grateful to Alison Young for this point.

year period in the manner adumbrated above. This would indeed be abusive, but it does not undermine the previous argument. The way to deal with such abuse is through legal interpretation that precludes it. Courts do this all the time. There is the world of difference between a Member State deciding bona fide that it does not wish to continue with withdrawal, and a Member State that seeks to play fast and loose by repeatedly invoking Article 50 and then resiling from it in order thereby to secure some hoped for advantage under the Treaties. This latter scenario is in any event far-fetched and would not be tolerated politically by the other Member States. The CJEU would have no difficulty in interpreting Article 50 to prevent its use in this manner. There would, moreover, be very real difficulties concerning the legal nature and enforceability of any such agreement/concession that the miscreant state sought to extract in this manner.

The preceding arguments of principle and text are supported by those of teleology, viewed from the perspective both of the EU and the Member State. From the EU's perspective the disruption caused by invocation of Article 50 should be duly acknowledged. It would nonetheless be outweighed by the very considerable gain where a Member State decided to remain in the EU when on the brink of departure, having realized the benefit of membership. The EU would not wish to be forced to push out of the door a state that had bona fide changed its mind. The construction of Article 50 as a one-way street to exit once invoked therefore makes no sense when viewed from the EU's perspective. The same is true when viewed from the Member State's perspective. Let us imagine that the attempt to negotiate access to the single market without having to accept free movement has failed. The resultant deal would therefore be for the Member State to enter the EEA, pay large amounts into the budget, be bound by free movement rules, and social policies, but have no seat at the table when the EU rules are made. The Member State response might be to walk away from this deal, exit the EU, forego access to the single market and take its chances in negotiating

some trade deal in the medium term. It might alternatively think that single market access really is very important, as attested to by the post-referendum downturn in economic performance, which would be further exacerbated if such access is not secured for the future. It might then think that the EEA option is in reality worse than continuing to remain in the EU, and that the voters should at the least have the opportunity to express an opinion on this before the matter was concluded. It would be extraordinary if this were to be precluded by an interpretation of Article 50 based on the assumption that once it was triggered it was a one-way street to exit.

Scene 3: The end

There are numerous contestable legal issues concerning the endgame of the Article 50 process. Space precludes detailed treatment of all such issues, which could well occupy a separate article. The ensuing discussion will focus on issues that are directly related to Brexit, and connected to matters discussed earlier.

First, Article 50 is uncharted territory and therefore the content of the withdrawal agreement is uncertain. This is so not merely with respect to the precise details of the future relationship between the EU and the UK, but also more fundamentally with regard to what is put into the withdrawal agreement and what remains for resolution through some later treaty. Article 50 is ambiguous in this respect, and this is readily apparent from the wording of Article 50(2) TEU, which states that "in the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union." This wording leaves open a range of possibilities. At one end of the scale there could be an agreement that deals only with the core essentials of terminating the UK's current relationship with the EU, while leaving details concerning the future to be decided by

a later treaty; at the other end of the scale there might be a much thicker withdrawal agreement that includes the detailed architecture to govern future interaction between the EU and the UK, being mindful of the warning from Richard III that the EU may not be in a giving mood at that time. There are of course intermediate possibilities along a spectrum. There are in addition complex issues concerning the inter-relationship between the two agreements. They might be negotiated and concluded at the same time, but it is nonetheless unlikely. Whether this occurs will depend in part on the respective content of the withdrawal agreement, and subsequent treaty. This in turn will impact on the parties to the respective agreements, since if there is a mixed agreement the Member States in addition to the EU will have to signify their consent in accord with their constitutional requirements.

Secondly, this will have constitutional implications for the UK. We have well-crafted rules concerning the ratification of international treaties. The modern position dates from 1924 and is known eponymously as the Ponsonby Rule. It provides that the executive, having concluded an international agreement pursuant to prerogative power, should place this before Parliament for 21 days before it is ratified. This rule was placed on statutory footing by the Constitutional Reform and Governance Act 2010, section 20 of which states that if the House of Commons resolves within 21 days that the treaty[31] should not be ratified then, subject to certain exceptions, it would be unlawful to do so.[32] The rule thus prevents the executive committing the UK at the international level through ratification of a treaty of which Parliament disapproves. It is in addition to the dualist requirement that an Act of Parliament is necessary to give effect in domestic law to matters embodied in such an agreement. The

[31] The definition of treaty includes an agreement between the UK and an international organization, Constitutional Reform and Governance Act 2010, s. 25(1).

[32] The House of Lords can also so resolve, but if does so and the House of Commons does not, then the HL resolution can be overridden by the minister, Constitutional Reform and Governance Act 2010, s. 20(7)-(8).

two operate as 'constitutional belt and braces', the former ensuring that Parliament has voice before the executive commits the country on the international plane, the latter preventing the executive making binding rules at national level independent of the legislature.

Thirdly, there is a further twist to the rules on ratification as they pertain to the EU. It is difficult to unravel, but potentially significant. The 2010 legislation contained exceptions to the rules concerning ratification. It is clear from the explanatory memorandum that these were justified because parliamentary scrutiny was manifest in other ways.[33] Section 23(1)(b) of the 2010 legislation as initially enacted provided that the rules on ratification did not apply to a treaty covered by section 5 of the European Union (Amendment) Act 2008. This was because the 2008 legislation demanded greater involvement from Parliament, viz an Act of Parliament was required for any amendment to the EU Treaties that took effect through Article 48(2)-(5) TEU. Section 23(1)(c) of the Constitutional Reform and Governance Act 2010 was then amended so that it now provides that the requirements of section 20 concerning ratification do not apply to a treaty that is subject to a requirement imposed by Part I of the European Union Act 2011. The 2011 Act stipulates that an Act of Parliament plus a referendum must be secured prior to any ratification by the UK of a treaty that amends or replaces the TEU or TFEU.[34] The principle is clear: the default position is that ratification requires parliamentary approval, except where some greater parliamentary involvement through statute is felt necessary, this being so in the context of changes to the EU Treaty which must be approved through an Act of Parliament. Viewed from this perspective the European Union Act 2011 was simply updating this principle so as to render change to the

[33] Constitutional Reform and Governance Act 2010, Explanatory Memorandum, para. 144.

[34] For a different argument that draws on the 2011 Act, see Pavlos Eleftheriadis, 'A New Referendum is a Constitutional Requirement', July 4 2016, https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/new-referendum-constitutional-requirement.

EU Treaties subject to the requirements of Part I of that legislation, which happen to include a referendum as well as an Act of Parliament.

Fourthly, it could then be argued that a withdrawal agreement made pursuant to Article 50 TEU would have to be approved by Act of Parliament and subject to a referendum because it would constitute a replacement of the EU Treaties and hence come within Part I of the 2011 Act. It might be argued by way of response that a withdrawal agreement does not constitute for these purposes either an amendment or a replacement of the EU Treaties, and thus these conditions are not applicable. It would moreover be open to Parliament to displace the requirements of the 2011 Act in this instant case if it wished to do so, but that would require a statute.

Fifthly, if the 2011 Act is distinguished in this manner, the principle underlying the 2010 legislation still remains. The default position is that treaty ratification requires parliamentary approval through the process set out therein; there are exceptions to this process where greater parliamentary involvement is required; and it thus follows that if the exception does not apply it is all the more important not to forget the default rule. This is directly relevant here.

Consider the situation where no withdrawal agreement is secured within two years, the UK does not rethink exit, and the treaties simply cease to apply because the other Member States are unwilling to agree an extension. In this situation both parts of the 'constitutional belt and braces' whereby Parliament is given voice are undermined. There is no treaty concluded between the UK and the EU, and therefore nothing on which the 2010 Act can bite. Parliament would be deprived of voice as to whether to disapprove ratification of a new treaty because no such treaty would exist. The other dimension of parliamentary voice would also be 'muted'. The repeal of the ECA 1972 would still have to be done through an Act of Parliament, and in that sense legislative choice would be preserved, but it would be

purely formal, since the UK would no longer be party to the treaties to which the ECA 1972 gave effect.

The 'constitutional belt and braces' provided by standard UK doctrine would also be placed in jeopardy where there is a withdrawal agreement that is closer to the thin end of the spectrum. The reason is not hard to divine. It will be more difficult for Parliament to exercise its statutory power in relation to ratification if the withdrawal agreement is relatively thin, with much left to be decided through a subsequent treaty, the details of which will not be available when Parliament makes the salient choice as to whether to object to the ratification. Real legislative choice as to whether to accept repeal of the ECA 1972 would be equally difficult, since this decision would be made in circumstances where the nature of any future relationship between the UK and the EU would be very unclear.

A strong argument to the following effect can therefore be made. The Constitutional Reform and Governance Act 2010 is a constitutional statute, and thus in accordance with the principles laid down by the Supreme Court in *HS2*[35] it should be read such that it can only be repealed or disapplied where this is made expressly clear, or by way of necessary implication. Legal provisions that can impact on the principle in the 2010 legislation should be interpreted accordingly. Viewed from this perspective the executive should not legally be able to allow the two year period to run out, with the consequence that the treaties cease to be applicable to the UK henceforth, without a fully informed parliamentary debate concerning the state of the negotiations, in which views could be expressed as to whether to proceed with exit in this manner, to accept the best withdrawal deal that is on offer or to remain within the EU. This would be giving effect to the legal principle contained in the Constitutional Reform and Governance Act 2010 as it pertains to this situation, and it should be regarded as a cognizable legal constraint that could be actionable in the courts. Where a withdrawal

[35] *R (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

agreement is secured then the 2010 legislation will perforce lock on, but the government should give assurances that there should be a fully informed debate of the kind set out above, justified by the importance of the issue, and not merely the bare opportunity for Parliament to object to the draft agreement.

Towards Act 7

The drama that is Brexit will run for some considerable time yet. There will be no attempt to summarise the preceding argument. It is by way of conclusion for the present worth remembering a paradox that has not been mentioned thus far. The UK has shaped the EU and has attained a very great deal of what has been on its wish list over the years. This includes, of course, the numerous opt-outs and special deals that it has negotiated repeatedly since 1972. It however goes further than this, since the UK has played a major role in shaping the EU as we know it today. Consider in this respect the fashioning of the single market project, which the UK pressed for so stridently in the 1980s; the many AFSJ initiatives that the UK supported; and the EU's eastward expansion that was backed by the UK under the banner of widening not deepening. The myth that the UK has been put upon as a member of the EU is just that, a myth. The pretence that problems said to flow from free movement are the result of Treaty choices concerning EU membership to which the UK did not accede is just that, a pretence. There will doubtless be considerable political, economic, social and legal fall-out in the months and years to come. With the effluxion of time we may have some better sense of whether the ship of state can be diverted from its present course.