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REFERENDUM E APPELLI AL POPOLO

## Taking Back Control? Appeals to the People in the Aftermath of the UK's Referendum on EU Membership

di KATHRYN WRIGHT

**TAKING BACK CONTROL?  
APPEALS TO THE PEOPLE IN THE AFTERMATH OF THE  
UK'S REFERENDUM ON EU MEMBERSHIP**

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**ABSTRACT**

**ITA**

Il 23 giugno 2016 il popolo inglese ha votato 52% contro 48% a favore dell'uscita del Regno Unito dall'UE, dividendo il Paese. Poiché il seguito istituzionale di tale decisione non è ancora chiaro, il saggio tenta di definire l'inquadramento giuridico del referendum ed analizza il tenore degli appelli al popolo nell'immediato dopo voto. L'articolo analizza, inoltre, il poco chiaro assetto normativo che disciplina l'attivazione, da parte del Regno Unito, della procedura di cui all'art. 50 del Trattato UE ed i ruoli rispettivi del Parlamento e del governo. Una prima lettura dei contenuti dei discorsi politici dei leaders protagonisti della vicenda sembra in realtà rivelare che per i sostenitori dell'uscita dall'UE si tratti in realtà di una tipica vittoria di Pirro. Paradossalmente potrebbe accadere che la perdita di potere politico conseguente all'uscita dall'UE si riveli in forte contraddizione con ciò che gli elettori ritenevano dovesse accadere. A fronte delle false ed ingannevoli prese di posizione durante la campagna referendaria, fortemente demagogica, l'articolo elabora infine alcune proposte per un più corretto utilizzo, in futuro, dell'istituto referendario.

**EN**

On 23 June 2016 the British people voted by 52% to 48% to leave the European Union, dividing the country. While the way forward is still unclear, this contribution lays out the legal framework surrounding

the referendum and analyses appeals to the people in the immediate aftermath of the outcome. The article discusses the UK's less-than-clear-cut 'constitutional requirements' for the purposes of activating the withdrawal process under Article 50 of the Treaty on European Union and the extent of executive or parliamentary approval needed. An original content analysis of the first speeches of political leaders as the referendum result became clear reveals intriguing contradictions, lending weight to the view that this was a Pyrrhic victory for the leaders of the Leave campaign who wanted to 'Take Back Control'. Paradoxically, the ensuing loss of power in leaving the EU may turn out to be entirely at odds with what voters intended. Given the false and misleading claims made during the demagogic campaign, the article also outlines some proposals for the conduct of future referenda.

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by *Kathryn Wright*

CONTENTS: 1. Introduction; 2. The immediate aftermath of the referendum; 3. The legal framework; 4. Conclusions, prospects and proposals; *SITOGRAHY.*

## 1. Introduction

On 23 June 2016 the British people voted by 52% to 48% to leave the European Union, dividing the country. The new Prime Minister Theresa May, herself a very quiet Remain supporter, has categorically and repeatedly stated that «Brexit means Brexit». At the time of writing it is still unclear what sort of Brexit, and the process under Article 50 of the Treaty on European Union which triggers a Member State's withdrawal from the European Union has yet to be invoked (although May very recently indicated that this will happen by the end of March 2017). Nevertheless, the message is that the people have spoken «and their will must be respected»<sup>1</sup>.

This contribution focuses upon appeals to the people in the aftermath of the referendum result, in two senses. The first sense is embodied in the idea of *argumentum ad populum*, and is strongly linked to the demagogic nature of the Leave campaign. *Argumentum ad populum* denotes a fallacious argument that concludes that a proposition is true because many or most people believe it. Significantly, the population's expertise, experience or authority is not taken into consideration. The proposition that the British people could 'Take Back Control', the mantra of the Leave campaign, is a prime example of just such a fallacious argument. The campaign also played upon the idea of the underdog versus the establishment elite and experts.

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<sup>1</sup> D. CAMERON, *Speech. EU Referendum Outcome, Prime Minister's statement, Gov.uk*, 24 June 2016.

The second sense is a more general appeal to the public, for example a plea for support or for unity. In amongst the quite striking number of politicians deserting or stepping down following the result, and the immediate renegeing on ‘promises’ made during the Leave campaign, such as National Health Service funding and control over immigration, these different appeals can be seen in speeches of political leaders immediately after the referendum result.

This contribution will first consider the immediate aftermath of the vote. I carry out a content analysis of the first speeches of relevant political leaders immediately after the result on 24 June 2016. Although this is a crude method, it reveals some intriguing insights and contradictions. The second part will consider the legal framework surrounding the referendum and, more importantly, the ‘constitutional requirements’ of the UK for the purposes of invoking Article 50 of the Treaty on European Union. Given the UK’s lack of a written constitution, defining these requirements is not a straightforward matter. The relevant legislation is the European Communities Act 1972, the European Union Act 2011, and the EU Referendum Act 2015. These Acts will be considered in addition to the Conservative Party Manifesto 2015, given that it was Prime Minister David Cameron’s decision to call a referendum on EU membership in an attempt to placate factions within his own party. This gives rise to consideration of the debate surrounding the role of Parliament in the decision to leave the EU and the conflict between representative democracy and direct democracy as embodied in the referendum and petitions following its outcome. The article concludes with prospects at the time of writing and proposals for the conduct of future referenda.

## **2. The immediate aftermath of the referendum**

As the UK awoke on 24 June, the truth dawned that by a slim majority the electorate had voted to leave the EU. In terms of participation, the turnout for the EU referendum was 72.2% of the UK population.<sup>2</sup> This was relatively high, for example compared with 66.1% turnout for the 2015 General Election and 35.6% for the last European Parliament election in 2014. The question put to the population was:

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<sup>2</sup> Results in *The Electoral Commission*.

‘Should the United Kingdom remain a member of the European Union or leave the European Union?’. 17.4 million voters, or 51.9%, voted Leave, and 16.1 million, representing 48.1%, voted Remain. According to polling, Leave voters were on the whole characterised as poorer, less well educated, and older.

This was not the expected result. Having gambled and lost, Prime Minister David Cameron announced his pending resignation, leaving it to the winners to sort out the chaos.<sup>3</sup> Immediately, prominent Leave members reneged<sup>4</sup> on the promises which were the foundation of their campaign. The appeals to the people during the campaign included the strong insinuation that the UK’s supposed £350 million a week contribution to the EU (an amount discredited, but repeatedly parroted anyway) would be spent on the National Health Service - by individuals on record as wanting to privatise the NHS. The message on the side of the campaign bus had read «We send the EU £350 million a week. Let’s fund our NHS instead». The other significant claim was that the UK could take back control of its borders by reducing EU immigration - despite it not being part of the Schengen Area in the first place. Over breakfast, Nigel Farage, leader of the UK Independence Party, announced that the NHS message had been a «mistake»<sup>5</sup>. That evening, Daniel Hannan, a Conservative Leave campaigner, asserted that there would not be a radical decline in immigration by leaving the EU<sup>6</sup>.

The atmosphere at the victory press conference<sup>7</sup> given by Michael Gove and Boris Johnson was funereal. It quickly became painfully clear that there was no plan for what should happen in the event of a Leave vote (except from the pro-Remain First Minister of Scotland Nicola Sturgeon who seized the opportunity to reopen the question of

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<sup>3</sup> «I will do everything I can as Prime Minister to steady the ship over the coming weeks and months, but I do not think it would be right for me to try to be the captain that steers our country to its next destination» (D. CAMERON, *op. cit.*).

<sup>4</sup> Or ‘backpedalled’: an appropriate term for the former Mayor of London, Boris Johnson, who introduced the London bikes scheme...

<sup>5</sup> *Good Morning Britain*, ITV, 24 June 2016. See also: *Nigel Farage: £350 million pledge to fund the NHS was “a mistake”*, *The Telegraph*, 24 June 2016; *Nigel Farage backtracks on Leave campaign’s “£350m for the NHS pledge hours after result”*, *The Independent*, 24 June 2016.

<sup>6</sup> *Newsnight*, BBC, 24 June 2016. See also *Free movement of labour might not end after Brexit, admits Tory Leave campaigner Daniel Hannan*, *The Independent*, 25 June 2016.

<sup>7</sup> B. JOHNSON, *Brexit victory speech. Full transcript*, *Newsweek*, 24 June 2016.

Scottish independence). Having been so keen to ‘take back control’, Johnson stalled for time, emphasising that there was no need to set in motion the process for leaving the EU: «it is vital to stress there is no need for haste... There is no need to invoke Article 50». There were a striking number of desertions in the face of this victory. Six days later, unable to count on the support of his Leave compatriot Gove, Johnson withdrew his candidature from the Conservative leadership contest.<sup>8</sup> Nigel Farage, having at least partially achieved his goal, resigned (for the second time) as UK Independence Party leader on 4 July – but remains as a Member of the European Parliament with the benefits that entails.

The subtle and not-so-subtle language used in appealing to the people during the campaign and following the result is clearly important. Even the Remain campaign took on the terminology of the Leave camp to try to get its message across, stymied by years of myths and erroneous coverage in the tabloid press. For example, referring to trade ‘with’ Europe rather than ‘within’ it – subtly reinforcing a separation between the UK and the rest of the continent, and a ‘them and us’ outlook.

Continuing the linguistic theme, this section reports on an original content analysis of the first speeches of relevant political leaders immediately after the result. This analysis includes the speeches on 24 June 2016 of (outgoing) Prime Minister David Cameron,<sup>9</sup> leading Leave campaigners and Ministers Boris Johnson<sup>10</sup> and Michael Gove,<sup>11</sup> UK Independence Party leader Nigel Farage,<sup>12</sup> First Minister of Scotland Nicola Sturgeon,<sup>13</sup> and Opposition Leader Jeremy Corbyn.<sup>14</sup> I also consider Theresa May’s brief speech on 11 July 2016 when it became clear she would be the Brexit Prime Minister.<sup>15</sup> This is a crude analysis, particularly as the speeches are different lengths and sometimes include other purposes such as appealing to internal

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<sup>8</sup> *Boris Johnson dramatically rules himself out of Conservative election race*, *The Telegraph*, 30 June 2016.

<sup>9</sup> D. CAMERON, *op. cit.*

<sup>10</sup> B. JOHNSON, *op. cit.*

<sup>11</sup> N. FARAGE, *4 a.m. victory speech. The text in full*, *The Independent*, 24 June 2016.

<sup>12</sup> *Ibidem.*

<sup>13</sup> N. STURGEON, *Speech in full after EU referendum result*, in *Stv.tv*, 24 June 2016.

<sup>14</sup> J. CORBYN, *Brexit Speech*, *YouTube «EU Debate» channel*.

<sup>15</sup> *Theresa May launches conservative leadership*, *The Telegraph*, 11 July 2016.

party politics – for example, Jeremy Corbyn spoke for 18 minutes, whereas the other speeches are between around 2 and 10 minutes long. However, it gives some intriguing insights and reveals considerable contradictions between campaign strategy and views expressed after the result. The table shows the incidences of the words I initially searched for in all speeches – ‘people’, ‘citizens’, ‘democra\*’ (the root of ‘democracy’ or ‘democratic’ etc), ‘control’ (given the importance of this word in the campaign) as well as other concepts which recurred in particular speeches such as ‘independence’, ‘country’, ‘nation’ and ‘community’. Obviously, the weight given to these words depends on their context.

Considering the key message that a vote to leave the EU would mean the British people ‘taking back control’, we might expect to see that phrase repeated in the victory speeches. Boris Johnson did mention ‘control’ 3 times, and ‘democracy’ a similar number. Nigel Farage did not refer to ‘control’ but used ‘independence’ (as in *Independence Day*) twice, unsurprisingly given that he was the leader of the UK Independence Party. Michael Gove’s speech was the most intriguing. There was no mention at all of ‘control’, but conversely 6 mentions of ‘openness’: «We have always been an open, inclusive, tolerant, creative and generous nation – open for business, open to trade, open to other cultures, open to the world. Now, we have a new chance to extend that openness even further». He also invoked our «European friends» and «friendly cooperation». On the other side, Theresa May, Remain supporter and incoming Prime Minister, did however raise the idea of control, attempting to link it to unity: «...we are going to give people more control over their lives and that’s how together we will build a better Britain».

‘Taking back control’ also appeared to mean being less interested in the advice of experts. During a question & answer debate on Sky News on 2 June 2016, Gove famously said «People in this country have had enough of experts» when he was unable to point to any economic evidence supporting his position. His victory speech showed a change of heart: «We should draw on the wisdom of great minds outside of politics».

Boris Johnson stated that he was looking forward to «continuing to interact with the peoples of other countries in a way that is open and friendly and outward-looking». Interestingly, these words exactly echo the view of Nicola Sturgeon, an enthusiastic Remain supporter.

In her speech she twice stated that «...we [Scotland] voted to renew our reputation as an outward looking, open and inclusive country». That Johnson's view after the result seems out of step with his attitude during the campaign itself is not surprising given that he apparently drafted two positions, one for Remain and one for Leave, before deciding that being a leading voice in the Leave campaign would best serve his personal ambition of becoming Prime Minister.

There were mixed messages in a number of speeches. Outside 10 Downing Street, David Cameron said that «I was absolutely clear about my belief that Britain is stronger, safer and better off inside the European Union...» However, «I have said before that Britain can survive outside the European Union, and indeed that we could find a way». This ambivalence is also apparent in the Conservative Party Manifesto for the 2015 General Election, discussed in the next section. For his part, Boris Johnson appeared to acknowledge that it is actually Parliament's role to take this kind of decision: «Today I think all of us politicians need to thank the British people for the way they have been doing our job for us. They hire us to deal with the hard questions and this year we gave them one of the biggest and toughest questions of all». However, in the next breath he said «Some people are now saying that was wrong and that people should never have been asked in that way. I disagree, it was entirely right and inevitable and there is no way of dealing with a decision on this scale except by putting it to the people». He finished by saying «The most precious thing this country has given the world is the idea of parliamentary democracy. I believe the British people have spoken up for democracy...», which does seem to sidestep the distinction between parliamentary and direct democracy as expressed through a referendum.

The speakers invoked 'people' in different ways. Most evidently, reference to 'the people' was made in the sense of *demos* or the populace of the United Kingdom. David Cameron used the phrase 'the British people' 5 times, colloquial 'Brits' once, 'the people' twice, 'our people' once, and 'people' from elsewhere 3 times. Boris Johnson referred to the 'British people' twice, 'the people' in the sense of populace 4 times, and 'the peoples of other countries' once. Johnson also made reference to the people who govern once, and the people to whom they are accountable once. It is notable that Cameron and Sturgeon both used 'people' to refer to the domestic electorate and 'citizens' to refer to EU citizens in the UK (Sturgeon: from other EU

countries; and Cameron ‘European’ citizens, and ‘Brits’ in ‘European’ countries). As national leaders, they adopt the more precise EU terminology. No other speakers refer to ‘citizens’.

We might expect the leader of a nationalist party to pay homage to the ‘British people’. Farage’s 4.00 a.m. speech did not do so. Instead he announced «a victory for real people, a victory for ordinary people, a victory for decent people», which implied that Remain voters had none of those attributes. Interestingly, he also claimed to be acting on behalf of the «rest of Europe». In his brief speech, Farage was the only speaker not to mention democracy, which all other speakers referred to more than once.

Appeals for unity were present in speeches from both sides. From the Remain side, David Cameron said: «The British people have made a choice. That not only needs to be respected — but those on the losing side of the argument, myself included, should help to make it work». Jeremy Corbyn also emphasised the importance of «bringing people together», especially referring to the economic inequality that played a large role in the Leave vote. He was also the speaker, surprisingly together with Michael Gove, who placed most importance on ‘communities’. Conservative Theresa May, with a seemingly rather socialist vision, urged that «We need to unite our country and ... we need a strong, new positive vision for the future of our country - a vision of a country that works not for the privileged few, but that works for every one of us». Among the Leavers, Johnson appealed twice to ‘young people’ in particular, who on the whole did not vote for the outcome he supported. Gove was particularly keen that people from all communities and political backgrounds work together, and suggested that «calmly and united, [we can] take our country forward in the spirit of the warm, humane and generous values that are the best of Britain».

### **3. The legal framework**

Having established reactions in the immediate aftermath of the referendum result, what happens now? As is now well known, Article 50 of the Treaty on European Union, introduced by the Lisbon Treaty, provides for a Member State to withdraw from the EU and establishes the procedure it must follow.

SPEAKER (WITH LENGTH OF SPEECH)	INCIDENCE OF WORDS FOUND IN SPEECH (TOP 3 CONCEPTS FOR EACH SPEAKER IN BOLD)				OTHER
	'PEOPLE'	'CITIZENS'	'CONTROL'	'DEMOCRACY'	
CAMERON (7:09)	14	1 (of other European countries)	0	4	Country 7 National interest 2 Brits 1
JOHNSON (1:48)	14	0	3	3	Country 9
GOVE (3:20)	3	0	0	3	Open 6 Friend* 2 Nation 2 Country 2 (but 1 in tribute to Cameron) Community 1
FARAGE (2:25)	5 (2 incidences referring to campaign people)	0	0	0	Independent* 2 Nation 2 Friend 1
STURGEON (10:11)	5	1 (of other EU countries in Scotland)	0	2	Independence (of Scotland) 5 Community/ies 3 Country 3 Freedom (of movement) 1 Communities 8
CORRYN (18:00)	15	0	1 (of exploitation of workers)	2	Protections (working rights, human rights, environment) 3 Country 2 Cohesion 1 Divided/divisive Freedom (to shape economy) 1

At this stage two points are particularly important to note. First, according to Article 50(2) TEU, «A Member State which decides to withdraw shall notify the European Council of its intention». That is, the onus is on the withdrawing Member State to make the notification, and therefore the timing of that notification is within the control of that Member State. The other Member States and the EU institutions have no competence, at least from a legal perspective, to push the withdrawing Member State - of course, political pressure may be a different matter. Another element of this is the meaning of 'Member State'. Practically speaking, who should be involved in making the notification? This leads to the second point: Article 50(1) states that «Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements». It is therefore imperative to establish the UK's 'constitutional requirements'.

There has been no rush to invoke Article 50 following the referendum. Instead the government is playing for time while scrambling to establish a negotiating position since a Member State will automatically cease to be a member of the EU two years after notifying its intention to leave unless that deadline is unanimously extended (Article 50(3) TEU). However, Prime Minister Theresa May has recently indicated that the Article 50 notification will happen before the end of March 2017.

The rest of this section considers the UK's constitutional requirements. First, it examines the Conservative Party Manifesto 2015 as the political basis for the referendum. It then considers the European Union Referendum Act 2015 which gave effect to the manifesto commitment for a referendum. Following that, we consider the European Union Act 2011, which provides for the 'double lock' of a referendum as well as parliamentary approval in a wide range of situations, together with the European Communities Act 1972, the 'constitutional statute' which enacts the UK's accession to the EU and the effect of EU law. It then discusses parliamentary sovereignty and the debate over the need for parliamentary involvement following the June referendum which goes to the question of who represents the Member State and on what authority they can make the Article 50 notification to the European Council.

Eurosceptic Members of Parliament in the Conservative party unsuccessfully tried to push through a proposal for an in-out referendum on EU membership following a House of Commons debate in October

2011.<sup>16</sup> Under the Labour government of Tony Blair, referenda had been mooted, but did not ultimately take place, on joining the euro currency and on the pre-Lisbon Constitutional Treaty 2004. The Lisbon Treaty was ratified in the UK solely by legislation, with no referendum. In November 2009, David Cameron as leader of the Conservative Party committed, if the Party was elected, to a United Kingdom Sovereignty Bill, repatriation of some powers from the EU to the UK, and a referendum lock on future transfer of powers to the EU: «Never again should it be possible for a British government to transfer power to the EU without the say of the British people»<sup>17</sup>. In due course the Conservative Party, together with the pro-EU Liberal Democrats as coalition partners, came back to power following the General Election 2010. Cameron's speech informed the Conservative Party's manifesto, and subsequently the Bill which became the European Union Act 2011.

Consequently, an 'in or out' referendum on the UK's EU membership was one of the pledges in the Conservative Party's Manifesto for the 2015 General Election.<sup>18</sup> The relationship with the EU appeared under two topics: 'Controlled immigration that benefits Britain' and 'Keeping our country secure'.

In the 'Keeping our country secure' section, on 'real change in our relationship with the European Union', the Manifesto tends not to focus on the benefits of EU membership. Rather, it states:

*«For too long, your voice has been ignored on Europe. We will: give you a say over whether we should stay in or leave the EU, with an in-out referendum by the end of 2017; commit to keeping the*

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<sup>16</sup> The motion was «That this House calls upon the Government to introduce a Bill in the next session of Parliament to provide for the holding of a national referendum on whether the United Kingdom should (a) remain a member of the European Union on the current terms; (b) leave the European Union; or (c) re-negotiate the terms of its membership in order to create a new relationship based on trade and co-operation». The motion calling for a referendum was defeated by 482 to 111 votes (HOUSE OF COMMONS, *Debate about National Referendum on the European Union*, [Hansard Parliament.uk](#), Vol. 534, 24 October 2011).

<sup>17</sup> D. CAMERON, *A Europe policy that people can believe in*, [ConservativeHome.com](#), 4 November 2009. See also: *David Cameron ditches referendum and backs away from EU "bust-up"*, [The Guardian](#), 4 November 2009; *EU Lisbon Treaty: David Cameron promises vote on future EU changes*, [The Telegraph](#), 04 Nov 2009.

<sup>18</sup> CONSERVATIVE PARTY, *Manifesto 2015. Strong leadership a clear economic plan a brighter, more secure future*, [Conservatives.com](#).

pound and staying out of the Eurozone; reform the workings of the EU, *which is too big, too bossy and too bureaucratic*; reclaim power from Brussels on your behalf and safeguard British interests in the Single Market; back businesses to create jobs in Britain by completing ambitious trade deals and reducing red tape»<sup>19</sup>.

This type of emotive and scapegoating language obviously does not help to make the case for remaining in the EU, despite Cameron's position for Remain. This is an indication of what Jean Claude Juncker, European Commission President, meant when he told the German newspaper *Bild* on 25 June 2016: «If someone complains about Europe from Monday to Saturday then nobody is going to believe him on Sunday when he says he is a convinced European».

Under the heading 'Controlled immigration that benefits Britain', the Manifesto states: «Our plan to control immigration will put you, your family and the British people first» including «control[ling] migration from the European Union, by reforming welfare rules»<sup>20</sup>. Furthermore, «We will negotiate new rules with the EU, so that people will have to be earning here for a number of years before they can claim benefits, including the tax credits that top up low wages. Instead of something-for-nothing, we will build a system based on the principle of something-for-something»<sup>21</sup>. These statements immediately brand workers and citizens from other EU Member States as 'welfare benefit tourists'. The Manifesto also emphasises several times that the UK is creating more jobs than the rest of the EU put together.<sup>22</sup> It makes clear that any changes to welfare benefits will be put to the people in a straight in-out referendum. «After the election, we will negotiate a new settlement for Britain in Europe, and then ask the British people whether they want to stay in the EU *on this reformed basis* or leave»<sup>23</sup>. In fact it was not these changes that were put to the British people. There was no causal link in the referendum campaign between the deal reached by Cameron and the 'in or out' membership question. The changes negotiated were not prominent in the Remain campaign.

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<sup>19</sup> *Ivi*, p. 72.

<sup>20</sup> *Ivi*, p. 29.

<sup>21</sup> *Ivi*, p. 29-30.

<sup>22</sup> *Ivi*, p. 7, p. 17.

<sup>23</sup> *Ivi*, p. 72-73.

Whereas the Conservative Manifesto and the party's success in the 2015 General Election provides the political basis for the referendum, the EU Referendum Act 2015, which came into force in December 2015, lays down the legal basis for this particular referendum, such as the question to be asked, the timing of the campaigning period, and the use of campaign funds. According to section 6(1) of the 2015 Act, «The Secretary of State must publish a report which contains... (a) a statement setting out what has been agreed by member States following negotiations relating to the United Kingdom's request for reforms to address concerns over its membership of the European Union, and (b) the opinion of the Government of the United Kingdom on what has been agreed». This outlines the fact that a 'deal' as promised in the Manifesto above should be secured and then communicated to the public. Furthermore, it implies that the referendum should be decided on the basis of that deal. If that were the case, a more apt referendum question would have been whether the public did or did not support the outcome of the deal secured in February 2016.

The elements of that deal at the European Council in February 2016<sup>24</sup> were:

- an opt out from the concept of 'ever closer union', clarifying that the UK had no commitment to further political integration;
- changes to welfare benefits. This had two parts: (a) limiting access to in-work benefits for 4 years from when a person started work in the host State, graduated to acknowledge the increasing connection of the worker with the labour market of the host state. This emergency brake on benefits could only operate for a total period of 7 years; (b) concerning exportation of child benefit, that benefit would be indexed to the conditions of the Member State where the child was resident;
- the UK would not have to contribute to Eurozone bailouts;
- a commitment to enhancing competitiveness and lowering administrative burdens.

As was made clear at the European Council, this agreement would become void in the event of a decision to leave the EU, and the UK is

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<sup>24</sup> European Council meeting (18 and 19 February 2016) – Conclusions, EUCO 1/16, [Consilium.Europa.eu](http://Consilium.Europa.eu).

therefore now back to square one in terms of negotiating its future relationship.

While the EU Referendum Act 2015 applied only to the June 2016 referendum, the domestic legislation governing the UK's membership of the EU is the European Communities Act 1972 preceding the UK's accession in 1973, and the more recent European Union Act 2011. Section 2 of the 1972 Act provides that all rights, powers, liabilities, obligations and restrictions created or arising by or under the EU Treaties are part of UK law. In the seminal *Factortame* case, Lord Bridge ruled that «whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was *entirely voluntary*»<sup>25</sup>. This case law emphasises the *domestic* basis of the supremacy of EU law. This reasoning is significant as the doctrine of Parliamentary sovereignty is a foundation of the UK's unwritten constitution. According to Dicey's classic conceptualisation, Parliament has the power «to make or unmake any law whatsoever», so that each Parliament cannot bind its successors<sup>26</sup>. As a result, the tenet of implied repeal means that any Act of Parliament can simply be repealed by a subsequent Act of Parliament on the same subject matter. Following the classic view, there is no hierarchy of statutes. However, in a newer understanding of sovereignty, there are some limitations on this – for example, the concept of the 'constitutional statute'; and mechanisms within legislation that can make repeal more difficult such as requirements for referenda, specifying that future legislation must be created through a particular 'manner and form'.<sup>27</sup> In the context of the EC Act 1972, Lord Justice Laws in *Thoburn v Sunderland City Council*, asserted that the Act was a 'constitutional statute'<sup>28</sup>, meaning that it was not subject to implied repeal but could only be *expressly* repealed by Parliament.

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<sup>25</sup> *R v Secretary of State for Transport ex parte Factortame (No. 2)* [1991] 1 AC 603 at 659.

<sup>26</sup> A. V. DICEY, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edition, 1915, Macmillan), pp. 37-38.

<sup>27</sup> W. I. JENNINGS, *The Law and the Constitution* (5<sup>th</sup> edition, 1959, University of London Press). For further discussion in relation to the EU Act 2011 see M. GORDON & M. DOUGAN, *The UK's EU Act 2011: "Who Won the Bloody War Anyway?"*, 2012, 37(1) *E L Rev* 3-30, pp. 23-24.

<sup>28</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), the 'Metric Martyrs' case paragraphs 62-69.

Echoing Dicey's orthodoxy, the Ministerial statement announcing the Bill which became the European Union Act 2011 expressed an intention to underline that «what a sovereign Parliament can do, a sovereign Parliament can always undo»<sup>29</sup>. Paradoxically, this only serves to underline the redundancy of the so-called sovereignty clause in the 2011 Act<sup>30</sup>. This clause received the most attention as the Bill was going through Parliament. Section 18 provides that:

«Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act».

Section 18 in fact stops short of mentioning sovereignty, and instead affirms that the status of EU law is dependent on a continuing UK statutory basis. In that sense there is nothing novel in this provision and it is merely declaratory.

The other significant feature of the 2011 Act is the system of 'referendum locks', which aligns more closely with the 'manner and form' view of UK parliamentary sovereignty. The referendum lock means that any future EU Treaty transferring powers from the UK to the EU must be put to a referendum (sections 2, 3 and 6). A number of changes require both a referendum and parliamentary approval. Other changes or decisions require only an Act of Parliament (section 7) or other lesser parliamentary approval (section 10). There are a number of detailed provisions defining the triggers for referenda, and the range of situations covered is extremely broad.

Section 2(2) of the EU Act 2011 requires that an Act of Parliament approving a Treaty amendment cannot come into force until there has been a positive majority vote in a national referendum. Section 2 covers Treaty amendment by the ordinary revision procedure detailed in Article 48(2)-(5) TEU. This also applies to any EU decision using the

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<sup>29</sup> FOREIGN AND COMMONWEALTH OFFICE and THE RT HON LORD HOWELL OF GUILDFORD, *Announcement. EU Bill to include Parliamentary sovereignty clause*, [Gov.uk](http://gov.uk), 6 October 2010.

<sup>30</sup> For a fuller discussion of the provisions and effect of the EU Act 2011 see P. CRAIG, *The EU Act 2011: Locks, Limits & Legality*, 48(6), *Common Market Law Review* 1915-1944; M. GORDON & M. DOUGAN, *op. cit.*

passerelle clause in Article 48(7) TEU, which would involve a shift from unanimity to qualified majority voting, or from the special to the ordinary legislative procedure. Section 3 of the EU Act relates to changes made using the simplified revision procedure under Article 48(6) TEU, and section 4 lists the areas where a referendum would be required.

A new Treaty, or a Treaty change, which does not transfer power from the UK to the EU would not require a referendum, according to the exemption in section 4. However, it is arguable that there will be grey areas surrounding the extension of competence, a new competence, or codification of an existing competence. In the case of changes made using the simplified revision procedure only, there is a further potential escape from the need for a referendum in the case of specific transfers of power or competence that are not significant to the UK (section 3(4)).

Section 6 of the Act sets out trigger events – that is, decisions requiring approval by both Act and by referendum. Section 6(5) states that a statute or referendum approval is needed in other EU decisions which are not passerelle provisions. Examples include the UK joining the euro, extension of the powers of the EU Public Prosecutor's Office, removal of UK border controls by amendment to the Schengen protocols, and 42(2) TEU decisions in relation to common EU defence. This also includes extension of qualified majority voting – that is, if there is a threat to the UK's veto in a given policy area. Schedule 1 lists the Treaty provisions where an amendment removing the need for unanimity, consensus or common accord would attract a referendum.

The range of situations which should be subject to a referendum laid down in the EU Act 2011 is clearly very wide, and features nuanced issues upon which the electorate is unlikely to be able to form a considered opinion. Despite all this detail, a referendum based simply on the fundamental question of membership of the EU is not among them. The EU Act 2011 only covers situations which are triggered by changes *at the EU level*, whereas the membership referendum was triggered by political forces at the domestic level.

Essentially, from a legal perspective the British people were not voting in June 2016 on what the legislation provided for - neither Cameron's deal from February 2016 as suggested in Art 6(1) of the EU Referendum Act 2015, nor a change in the EU Treaties as laid

down as a reason for a referendum in the EU Act 2011. Instead they were voting on a blunt ‘in or out’ question from a political manifesto commitment. Notably, there was not even any mention of the EU Act 2011 in the Conservative Manifesto 2015.

Referenda have tended to play a rather limited role in UK public life. There were devolution referenda concerning Northern Ireland, Scotland and Wales,<sup>31</sup> in 2011 a referendum on proposed changes to the electoral system in parliamentary elections to reflect proportional representation,<sup>32</sup> and the Scottish independence referendum in 2014. In terms of the UK’s relationship with the EU, following the EC Act 1972, the 1975 referendum on EU membership was an ex post consultative event. Referenda were mooted, but did not ultimately take place, on joining the euro currency, and on the pre-Lisbon Constitutional Treaty 2004 which was rejected by the French and Dutch plebiscites. The wide range of situations in which a referendum could be triggered under the EU Act 2011 may suggest an increasing appetite for referenda in the UK.

This does not mean that the current referendum result is binding. Legislation must be enacted by Parliament to give effect to the result, to repeal the EC Act 1972, to deal with existing UK legislation based upon EU law, and to enact whatever new relationship is negotiated. In the House of Commons, Members of Parliament could in theory vote according to their consciences rather than their constituents’ choices, and the House of Lords is likely to put up opposition. While some have called for a second referendum before Article 50 is invoked, and/or on the UK’s negotiating position with the EU, and/or on any agreement on the future relationship with the EU, others would prefer to steer clear of the risks of another referendum. As things stand, the Prime Minister Theresa May has ruled out a further referendum altogether, and continues to reiterate that «Brexit means Brexit». However, there is much greater support for Parliamentary involvement in these decisions. The battleground for now is over how, rather than whether, the referendum result should be implemented, and the extent of executive over Parliamentary approval. This concerns the UK’s

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<sup>31</sup> Northern Ireland (Entry to Negotiations) Act 1996, Referenda (Scotland and Wales) Act 1997 [previous referenda also held in Scotland and Wales in 1979.

<sup>32</sup> On the Alternative Vote system proposed by the Liberal Democrats, who had formed a coalition government with the Conservatives - Parliamentary Voting System and Constituencies Act 2011.

‘own constitutional requirements’ for the purposes of Article 50 TEU. Should the notification to the European Council be done under executive legislation, Prerogative, Parliamentary decision or with Parliamentary scrutiny? Theresa May has said that Parliament will be involved – but this does not mean that Parliament will have a veto.

Many have argued that the sheer level of misinformation in the campaign meant that the referendum was undemocratic and the result cannot be binding.<sup>33</sup> A significant group of 1,054 barristers signed a letter to the Prime Minister and all Members of Parliament along similar lines: «There is evidence that the referendum result was influenced by misrepresentations of fact and promises that could not be delivered. Since the result was only narrowly in favour of Brexit, it cannot be discounted that the misrepresentations and promises were a decisive or contributory factor in the result». This letter called for a Royal Commission or independent body to hear evidence and to report on the risks of invoking Article 50 – wresting back control for the experts who were so derided by the Leave campaign. The barristers also asserted that primary legislation is required to trigger Article 50 and therefore that it is for Parliament to make the final decision<sup>34</sup>.

Scholars Barber, Hickman and King also contend that the referendum was only advisory – Parliament may decide that the case for exit is not made, or that it was made under false pretences. They argue that Parliament could also conclude that it would be contrary to the national interest to invoke Article 50 without knowing the terms of agreement.<sup>35</sup> (This would give rise to a chicken and egg situation since it implies negotiations and an agreement before Article 50 is invoked.)

A corollary of the referendum result and the split in the UK electorate has been the launch of a large number of e-petitions as an expression of direct democracy. The current system through the House of Commons Petitions Committee was set up in July 2015, having been initiated in 2006 through the Prime Minister’s Office under Tony Blair. A petition with 10,000 signatures will receive a response from the Government, and a petition will be debated in the House of Com-

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<sup>33</sup> Letter to The Telegraph signed by academics in law and political science, *The Telegraph*, 14 June 2016.

<sup>34</sup> In full: *The letter from 1,000 lawyers to David Cameron over EU Referendum*, *The Independent*, 10 July 2016.

<sup>35</sup> N. BARBER, T. HICKMAN & J. KING, *Pulling the Article 50 “Trigger”: Parliament’s Indispensable Role*, *UK Constitutional Law Blog*, 27 June 2016.

mons (albeit without a vote) if it reaches 100,000 signatures. The most significant petition triggering a debate is the proposition that there should be a second referendum, signed by a considerable 4.1 million people: «We the undersigned call upon Her Majesty's Government to implement a rule that if the remain or leave vote is less than 60% based a turnout less than 75% there should be another referendum». As a product of the UK's unwritten constitution, no thresholds for minimum turnout or margins of victory were set before the referendum itself. The EU Referendum Act 2015 is also entirely silent on these questions. Although the government has rejected a second referendum, a debate was held on 5 September 2016.<sup>36</sup> The problem with this petition is that those thresholds could not be applied retrospectively. A petition to invoke Article 50 of the Lisbon Treaty immediately also achieved over 100,000 signatures and will be debated on 17 October 2016. This is likely to be less significant now that Theresa May has indicated Article 50 will be invoked early in 2017. The Government response was «... We should not trigger Article 50 until we have a UK approach and objectives»<sup>37</sup>. Petitions garnering far fewer signatures include one that there should be a second referendum before Art 50 TEU is activated, and, perhaps more realistically, one that there should be a debate in Parliament before Article 50 is invoked.

There are also a number of judicial review applications in the courts seeking to force parliamentary involvement before Article 50 is activated. These applications, represented by the law firm Mischon de Reya, seek a declaration and an injunction to ensure that the UK Government will not trigger the procedure for withdrawal from the EU without an Act of Parliament. The case in question links several claimants, including Deir Dos Santos, a hairdresser, Gina Miller, an investment manager and philanthropist, and Fair Deal for Expats, a campaign group of Britons living in France, and there is potential for others to join. A claimant must first show 'sufficient interest' to be granted permission to bring a judicial review against government action under English law. The preliminary hearing was held on 19 July 2016 and the case has been timetabled before the High Court in October. It is likely to reach the Supreme Court on an expedited appeal in

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<sup>36</sup> *Petition. EU Referendum Rules triggering a 2nd EU Referendum, [Petition.Parliament.uk](#).*

<sup>37</sup> *Petition. Invoke Article 50 of The Lisbon Treaty immediately, [Petition.Parliament.uk](#).*

December 2016.<sup>38</sup> This timing would mean the judicial proceedings going on at the same time as the political decision to invoke Article 50. Depending on one's point of view, this action can be seen as a «legal dream team... launching a last gasp legal bid to preserve Britain's European Union membership»<sup>39</sup> or «an attempt by conniving lawyers to thwart the will of the people»<sup>40</sup>.

The Government Legal Service has advised that Article 50 can be invoked under Prerogative powers, and that will be their main argument in the case. Prerogative powers are customary executive powers held by the Crown since mediaeval times and now exercised by Ministers, which exist outside statute. This means, for example, that the Prime Minister alone could invoke Article 50 without further consultation. However, as argued by a number of constitutional law scholars, there is strong case law on limitation of the Prerogative.<sup>41</sup> The *De Keyser* case<sup>42</sup> established that where statute and existing Prerogative powers overlap, Prerogative powers are suspended for the duration of the statutory power (such as under the EC Act 1972 or EU Act 2011). The *Fire Brigades Union* case states that it would be an abuse of power to use the Prerogative to frustrate the will of Parliament or to preempt parliamentary decisions.<sup>43</sup> *Laker Airways* means the Prerogative cannot be exercised to take away rights recognised by statute, including rights deriving from EU law, or to undermine the aims of a statute.<sup>44</sup> It could be argued that the paradoxical loss of power through leaving the EU would be totally contrary to the purposes of the EU Act 2011. Using established principles of statutory interpretation, judges might take a purposive approach. At the very least, the EU Act 2011 represented a shift towards parliamentary and direct democracy

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<sup>38</sup> October court date for Brexit challenge, [BBC.com](#), 19 July 2016.

<sup>39</sup> A. ALDRIDGE, *Legal dream team fights to make Brexit conditional on parliamentary backing*, [Legalcheek.com](#), 4 July 2016.

<sup>40</sup> The argument reported by C. O'CONNOR, *Why Parliamentary Approval for the Triggering of Article 50 TEU Should Be Required as a Matter of Constitutional Principle*, [UK Constitutional Law Blog](#), 7 July 2016.

<sup>41</sup> See e.g. T. T. ARVIND, R. M. KIRKHAM & L. STIRTON, *Article 50 and the European Union Act 2011: Why Parliamentary Consent is Still Necessary*, [UK Constitutional Law Blog](#), 1 July 2016.

<sup>42</sup> *Attorney General v De Keyser's Royal Hotel Ltd* [1920] UKHL 1, [1920] AC 508 (10 May 1920).

<sup>43</sup> *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513. In that particular case, the legislation was not yet in force.

<sup>44</sup> *Laker Airways Ltd v Department of Trade* [1977] QB 643.

away from executive power. Arvind, Kirkham and Stirton point out that the then Foreign Secretary, William Hague, announced that the purpose of the legislation was to effect «a fundamental shift in power from Ministers of the Crown to Parliament and the voters themselves on the most important decisions of all: who gets to decide what»<sup>45</sup> on questions of European integration. Arvind et al argue that on that basis «an executive action which risked precisely the opposite outcome would *a fortiori* be unconstitutional»<sup>46</sup>.

Another paradox is that UK Members of the European Parliament may have more influence than UK parliamentarians in the UK's exit. Under Article 50(2) TEU, the European Parliament in effect has a power of veto on the final withdrawal agreement and the EU's future relationship with the EU by withholding consent. Its decision will be made on an absolute majority of the votes cast.<sup>47</sup> During the negotiations the European Commission is to take due account of the European Parliament's views. While the European Parliament is not able to amend the agreement, it does have scope to engage in delay tactics, according to its own rules of procedure. For example, under Rule 99(4), «Where Parliament's consent is required for an envisaged international agreement, *Parliament may decide*, on the basis of a recommendation from the committee responsible, *to suspend the consent procedure for no longer than one year*» and, concerning the opening of negotiations under Rule 108(2), «*Parliament may*, on a proposal from the committee responsible, a political group or at least 40 Members, *ask the Council not to authorise the opening of negotiations until Parliament has stated its position on the proposed negotiating mandate* on the basis of a report from the committee responsible». The Parliament could also ask the EU Court of Justice for its opinion on the compatibility with the Treaties of any agreement.

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<sup>45</sup> FOREIGN & COMMONWEALTH OFFICE and THE RT HON WILLIAM HAGUE, *EU Bill passes Second Reading in Parliament*, [Gov.uk](#), 8 December 2010.

<sup>46</sup> T. T. ARVIND, R. M. KIRKHAM & L. STIRTON, *Article 50 and the European Union Act 2011: Why Parliamentary Consent is Still Necessary*, [UK Constitutional Law Blog](#), 1 July 2016. Note that other scholars believe that there is no need for parliament to legislate: see M. ELLIOTT, *On why, as a matter of law, triggering Article 50 does not require Parliament to legislate*, [Public Law blog](#).

<sup>47</sup> *Rules of Procedure of the European Parliament*, 8<sup>th</sup> parliamentary term, Rule 99, [European Parliament web site](#).

#### **4. Conclusion, prospects and proposals**

This contribution has considered appeals to the people in the immediate aftermath of the EU membership referendum. A content analysis of the first speeches of political leaders on 24 June 2016 revealed contradictions between their views during the campaign and after the result was announced, lending weight to the view that this was a Pyrrhic victory for the leaders of the Leave campaign who wanted to ‘Take Back Control’. Paradoxically, the ensuing loss of power in leaving the EU may turn out to be entirely at odds with what voters intended.

The analysis of the legal framework showed that the British people were not voting in June 2016 on what the legislation provided for - neither the February 2016 European Council deal as suggested in Art 6(1) of the EU Referendum Act 2015, nor a change in the EU Treaties or powers moving from the UK to the EU laid down as reasons for a referendum in the EU Act 2011. Instead they were voting on a blunt ‘in or out’ question from a political manifesto commitment.

As Article 50 TEU has yet to be invoked, the article showed that the UK’s constitutional requirements for the purposes of withdrawing from the EU are far from straightforward, and there is considerable debate over the extent of necessary and desirable parliamentary scrutiny. In addition, the Prime Minister has announced a Great Repeal Bill, intended to repeal section 2 of the European Communities Act 1972 so that EU law ceases to apply immediately upon the UK’s exit. By pulling out the foundation of all UK legislation and regulations which are based on EU law, this would leave lacunae in large swathes of UK law. The most likely way of addressing this will be by granting power to Ministers to amend law by statutory instrument. Given the huge amount of legislation which needs to be unravelled, and stretched capacity in the civil service, prospects for effective parliamentary and other scrutiny are not promising.

The story of this referendum is a cautionary tale for future governments. Leaving aside the strong argument that referenda are a poor way to make decisions in the first place, the false and misleading information repeated during the campaign undermined the democratic process, and proposals for the good conduct of future referenda should be brought forward. The UK Electoral Commission’s current objec-

tives for referenda are that «they should be well-run and produce results that are accepted, and there should be integrity and transparency of campaign funding and expenditure»<sup>48</sup>. These objectives should be strengthened and enforced, and the requirement for ‘integrity and transparency’ extended to the claims made during the campaign. The UK Electoral Commission or a similar independent body needs to check and report on the veracity of claims in referenda. The University College London Constitution Unit raises the question of enforceable rules to prevent false or misleading information, and on campaign conduct and use of public funds. It also suggests a review of the application of impartiality rules by broadcasters. There are positive models along these lines in the New Zealand Electoral Commission and the Irish Referendum Commissions.<sup>49</sup> One problem is imposing an appropriate sanction, for example a financial penalty involving paying back public funds. A referendum campaign is unlike a General Election where specific political parties are identifiable; nevertheless it may be possible to make cross-party campaign leaders and funders responsible. In terms of independent fact-checking during the campaign, this must reach the public in a timely and accessible way.<sup>50</sup> While such rules are important, in the context of this referendum they may have missed the point for those who voted Leave in order to register a protest vote against elites who had ignored them for too long.

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<sup>48</sup> *Referendum on the UK’s membership of the European Union*, [The Electoral Commission web site](#).

<sup>49</sup> *Constitution Unit: The UK has voted to Leave. Now we need an inquiry into referendum conduct*, [UCL.ac.uk](#), 24 June 2016. See also COMMISSION ON THE CONDUCT OF REFERENDA, *Report 1996*, [UCL.ac.uk](#).

<sup>50</sup> There were some efforts at fact-checking during the EU referendum campaign e.g. by the BBC, Channel 4, *UK in a Changing Europe*.

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