

## Brexit: a challenge *for* the UK constitution, *of* the UK constitution?

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*The United Kingdom 2016 referendum on membership of the European Union – challenges of pursuing the decision to withdraw – challenges for the UK constitution in commencing, executing, concluding, and legitimising EU withdrawal – domestic constitutional requirements for triggering Article 50 TEU – roles of UK government, UK Parliament, and devolved institutions in Brexit – a second referendum or a national general election on withdrawal terms – exiting the EU as a challenge of the UK's political constitution – Brexit as exposing limitations of the UK's current constitutional arrangements and architecture – Brexit as an unprecedented event and the centrality of politics – constitutional factors contributing to the outcome of the referendum – concerns about sovereignty and the (im)possibility of a national response – potential implications of the referendum for the UK and for the EU*

On 23 June 2016 a majority of the UK electorate voted at a national referendum to leave the European Union. It is set to be a defining moment in the constitutional politics of the UK. The notion of Brexit – British exit from the EU – has as a result changed from a familiar but remote spectre, shaping the UK constitution (and more besides) as a touchstone of domestic political discourse, to a sudden, tangible reality. Brexit is no longer a vision of the future which was unlikely but influential, instead it is the prompt for a potentially remarkable recalibration of the UK constitution which was neither expected nor prepared for.

The referendum result induced the hasty resignation of the defeated Prime Minister David Cameron, now replaced by Theresa May, who was also (yet much less visibly) a campaigner for the UK to remain. In circumstances of intense uncertainty about the meaning and consequences of the Brexit vote, the new Prime Minister has been quick to attempt to impose clarity: 'Brexit means Brexit',

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we have been assured.<sup>1</sup> Yet while no doubt a necessary and effective guarantee through which to bolster her nascent authority, and buy her new government time, May's slogan is of course a circular placeholder: Brexit may mean Brexit, but it is still far from clear what Brexit means. The scramble to fill this temporary void is now underway, but as a more substantive future vision is developed (or the unachievable is eliminated until only the possible remains) Brexit is not yet a process or event, but a state of mind.

In one sense, it seems clear that there is no way for the UK to back away from Brexit. The Prime Minister's stance may be deceptive in its lack of specificity, but the overarching message is stark: the UK government is committed to giving effect to the vote to leave the EU. From a national perspective, what this means for the UK's future relationship with the EU remains up for grabs – whether Brexit is to be hard or soft, max or lite, it is arguably there to be shaped. From an EU perspective, however, there will be abundant constraints on what the UK can expect to achieve – even once the UK's negotiating position is established, compromise will surely be needed if a benevolent settlement is successfully to be obtained. In that sense, what Brexit comes to mean is far from just a British matter; rather it will be the most delicate of European projects.

In this context and at this point, where Brexit is almost everything and nothing, to anticipate and map the many and varied challenges which will be posed is a complex undertaking. This paper, however, will seek principally to focus on the UK dimensions of the constitutional challenge that will inevitably be posed by Brexit, whatever that comes to mean. There are two potential elements to this challenge. First, the pursuit of exit from the EU will clearly raise a range of challenges *for* the UK's constitution. These challenges will include, but are not limited to, questions as to the domestic process for commencing the UK's departure, the institutional involvement in the negotiation and execution of exit from the EU, the domestic legal provision necessary to undo UK membership of the EU and to establish a new relationship (if any) with the remaining member states, and the legitimation and scrutiny of key decisions made by UK actors on behalf of the nation as a whole. How exactly Brexit will be achieved, and what shape the UK's legal system post-EU membership will take, are no doubt interrelated issues; they are also obviously constitutional challenges of huge significance.

Second, although perhaps less obviously, is the idea of Brexit as a challenge *of* the UK constitution. Again, we may see such a challenge arise in multiple ways. Brexit may expose limitations of the UK constitution itself, especially concerning the question of whether a traditionally 'political constitution' can facilitate and

<sup>1</sup> See 'PM-in-waiting Theresa May promises "a better Britain"', *BBC website*, 11 July 2016, <[www.bbc.co.uk/news/uk-politics-36768148](http://www.bbc.co.uk/news/uk-politics-36768148)>, visited 1 October 2016.

structure an appropriate response (whatever that may be) to the far-reaching change which departure from the EU is almost certain to require. Yet just as significant as such concerns as to the UK's current constitutional capacity is the question of whether the nature of the constitution itself was a cause of, or contributing factor to, the decision to exit the EU. For if the ostensibly exceptionalist constitutional culture of the UK is representative of a distinct susceptibility to a euroscepticism which cannot be reconciled with continuing EU membership, there are implications both for how we understand the solidity of the remaining European project, and the UK's own constitutional future. In essence, is the UK outside the EU the inevitable result of an enduring disjunction between very particular national and supranational ambitions, or rooted in some deeper unease? And is the dissatisfaction which has driven us to Brexit a function of a desire for a national constitutional architecture which can no longer exist, and if this is realised, what might be the consequences?

To explore these challenges, this paper first locates Brexit in its constitutional context, briefly tracing the developments which have led us to this point. The second section of the paper then addresses the ways in which Brexit represents a challenge *for* the UK constitution. The domestic constitutional path to Brexit will be assessed, with a focus on: (i) commencing the exit process; (ii) key challenges in the execution of the UK's departure from the EU; and (iii) concluding and legitimising the process. The third section will consider Brexit as a challenge *of* the UK constitution, with particular attention given to: (i) whether any limitations of the UK's constitutional arrangements have been revealed; and (ii) whether the nature of UK constitutionalism was itself a contributing factor in generating the national decision to withdraw from the EU. The paper will conclude by reflecting on some broader future implications, both for the UK and the EU.

In sum, the paper will argue that exiting the EU will be a near unprecedented challenge both for, and – in some senses – of, the UK constitution. Brexit heralds a period of potentially profound uncertainty and change, during which many of the foundations of the UK as a constitutional state will be tested. Indeed, we may be about to experience a significant lesson in the transformative force of democracy, and the (in)capacity of national and supranational constitutionalism to reshape their core precepts in the fluid, contested, even erratic, political environment which now exists in Europe.

## THE BREXIT REFERENDUM IN CONSTITUTIONAL CONTEXT

To understand the challenge and implications of the Brexit referendum, we must first locate it in its constitutional context. There is a well-established and influential

strand of euroscepticism in the UK's domestic politics.<sup>2</sup> Following the UK's accession to the then European Economic Community in 1973, a referendum held on continuing EEC membership in 1975 (producing a decisive decision to remain 'in')<sup>3</sup> did not prevent these debates enduring and intensifying. There is, in particular, an expectation among many of its MPs and members that Conservative Party leaders will take a hard line on Europe – David Cameron showed few signs of deviating from this pattern, suggesting, as leader of the opposition, that a domestic referendum would be required to ratify the changes made by the Treaty of Lisbon, although this position was conveniently revised (albeit under some pressure) by the time he had assumed office as Prime Minister in 2010.<sup>4</sup>

The UK government formed by Cameron following the 2010 general election was not, however, a Conservative majority administration – instead, a hung Parliament necessitated the compromise of coalition, with the Liberal Democrats as the minority partner.<sup>5</sup> Yet Europe did not disappear from the coalition government's agenda, and Conservative manifesto commitments to create 'referendum locks' – blocking further transfers of power or competence to the EU without approval at a national referendum – and legislative guarantees of domestic sovereignty were pursued and implemented.<sup>6</sup> While these constitutional changes were of potentially far-reaching importance in their effect, and a significant statement as to the UK's attitude to EU membership, they were still not sufficient to satisfy the eurosceptic wing of the Conservative party, nor to respond to a domestic political agenda increasingly being set by the UK Independence Party, led by the MEP Nigel Farage.<sup>7</sup>

<sup>2</sup> See e.g. A. Forster, *Euroscepticism in Contemporary British Politics: Opposition to Europe in the British Conservative and Labour Parties since 1945* (Routledge 2002).

<sup>3</sup> See 'Archive: How the Guardian reported the 1975 EEC referendum', *The Guardian*, 5 June 2015, <[www.theguardian.com/politics/from-the-archive-blog/2015/jun/05/referendum-eeec-europe-1975](http://www.theguardian.com/politics/from-the-archive-blog/2015/jun/05/referendum-eeec-europe-1975)>, visited 1 October 2016.

<sup>4</sup> See 'David Cameron to tell voters: no vote on Lisbon Treaty', *The Telegraph*, 2 November 2009, <[www.telegraph.co.uk/news/politics/6488240/David-Cameron-to-tell-voters-no-vote-on-Lisbon-Treaty.html](http://www.telegraph.co.uk/news/politics/6488240/David-Cameron-to-tell-voters-no-vote-on-Lisbon-Treaty.html)>, visited 1 October 2016.

<sup>5</sup> See 'David Cameron and Nick Clegg pledge 'united' coalition', *BBC website*, 12 May 2010, <[news.bbc.co.uk/1/hi/uk\\_politics/election\\_2010/8676607.stm](http://news.bbc.co.uk/1/hi/uk_politics/election_2010/8676607.stm)>, visited 1 October 2016.

<sup>6</sup> See e.g. P. Craig, 'The European Union Act 2011: Locks, Limits and Legality', 48 *CMLRev* (2011) p. 1915; M. Gordon and M. Dougan, 'The United Kingdom's European Union Act 2011: "Who Won the Bloody War Anyway?"', 37 *ELRev* (2012) p. 3; J.E.K. Murkens, 'The European Union Act 2011: a failed statute', 3 *Tijdschrift voor Constitutioneel Recht* (2012) p. 396; S. Peers, 'European integration and the European Union Act 2011: an irresistible force meets an immovable object?', *Public Law* (2013) p. 119.

<sup>7</sup> See generally R. Ford and M. Goodwin, *Revolt on the Right: Explaining Support for the Radical Right in Britain* (Routledge 2014).

Ultimately, David Cameron chose to escalate his response, and in his Bloomberg speech in 2013,<sup>8</sup> committed to include a promise to hold an ‘in/out’ referendum on EU membership in the Conservative manifesto for the 2015 general election.<sup>9</sup> A diluted version of this position was set out by the Labour Party in response – an ‘in/out’ referendum would be held in the event of major change to the EU treaties.<sup>10</sup> Yet while the idea of a national referendum on EU membership – in one sense or another – seemed therefore to be attracting support from both major political parties, many regarded the prospect of it actually coming to fruition as unlikely. Key indicators, such as opinion polls and historical precedent,<sup>11</sup> meant that another hung Parliament was widely expected to be the outcome of the 2015 election, and there was consequent suspicion that, if Cameron was returned to office at all, the EU referendum manifesto pledge would be something he would gladly bargain away with prospective coalition partners, despite advance protestations to the contrary.<sup>12</sup>

The surprise result of a Conservative majority government in 2015 meant that the returning Prime Minister could not rely on coalition with the Liberal Democrats to dilute his manifesto commitment.<sup>13</sup> With the referendum to be held at some point before the end of 2017,<sup>14</sup> David Cameron launched an attempt to renegotiate the UK’s membership of the EU.<sup>15</sup> Proposals for change were agreed across four ‘baskets’ representing key concerns on immigration, sovereignty, euro governance, and competitiveness. Many were surprised at the

<sup>8</sup> See ‘EU speech at Bloomberg’, 23 January 2013, <[www.gov.uk/government/speeches/eu-speech-at-bloomberg](http://www.gov.uk/government/speeches/eu-speech-at-bloomberg)>, visited 1 October 2016.

<sup>9</sup> See *The Conservative Party Manifesto* (2015) p. 72-73, <[www.conservatives.com/manifesto](http://www.conservatives.com/manifesto)>, visited 1 October 2016.

<sup>10</sup> See *The Labour Party Manifesto* (2015) p. 76-77, <[www.labour.org.uk/page/-/BritainCanBeBetter-TheLabourPartyManifesto2015.pdf](http://www.labour.org.uk/page/-/BritainCanBeBetter-TheLabourPartyManifesto2015.pdf)>, visited 1 October 2016.

<sup>11</sup> The incumbent Prime Minister defied expectations with David Cameron’s Conservative Party increasing both its share of the vote and number of seats in the House of Commons compared with the 2010 election; see ‘The 2015 General Election: A Voting System in Crisis’, *Electoral Reform Society* (2015) p. 8, <[www.electoral-reform.org.uk/sites/default/files/2015%20General%20Election%20Report%20web.pdf](http://www.electoral-reform.org.uk/sites/default/files/2015%20General%20Election%20Report%20web.pdf)>, visited 1 October 2016. Such was the level of surprise in the final results, an independent inquiry into the performance of the polls was ordered by the British Polling Council; see *Report of the Inquiry into the 2015 British general election polls*, 31 March 2016.

<sup>12</sup> See e.g. ‘Nick Clegg risks party split over vote on EU, rivals warn’, *The Guardian*, 21 March 2015, <[www.theguardian.com/politics/2015/mar/21/nick-clegg-liberal-democrats-party-split-eu-referendum](http://www.theguardian.com/politics/2015/mar/21/nick-clegg-liberal-democrats-party-split-eu-referendum)>, visited 1 October 2016.

<sup>13</sup> See ‘Election results: Conservatives win majority’, *BBC website*, 8 May 2015, <[www.bbc.co.uk/news/election-2015-32633099](http://www.bbc.co.uk/news/election-2015-32633099)>, visited 1 October 2016.

<sup>14</sup> European Union Referendum Act 2015, s. 1.

<sup>15</sup> See ‘PM’s Letter to President of the European Council Donald Tusk’, 10 November 2015, <[www.gov.uk/government/publications/eu-reform-pms-letter-to-president-of-the-european-council-donald-tusk](http://www.gov.uk/government/publications/eu-reform-pms-letter-to-president-of-the-european-council-donald-tusk)>, visited 1 October 2016.

level of concessions ultimately made by the EU,<sup>16</sup> but even this package was never likely to satisfy the most ardent eurosceptics. While it was sufficient – finally – to convince the Prime Minister that he could recommend a vote to remain to the electorate,<sup>17</sup> the Cabinet was split,<sup>18</sup> and the ensuing campaigns left much to be desired. Little attention was ultimately given to the terms of the deal agreed through the renegotiation, and still less to the major ‘balance of competences’ review conducted between 2012 and 2014 under the coalition government, which explored in some detail the suitability of the existing division of power between the EU and the UK.<sup>19</sup> Instead, the ‘leave’ campaign prioritised concerns associated with immigration and sovereignty, and made deceptive claims about the extent of the UK’s financial contribution to the EU, and about the possibility of repurposing those funds to support the National Health Service.<sup>20</sup> The ‘remain’ campaign, in contrast, focused on the economic benefits of single market membership and our magnified national influence, yet also could not resist conjuring apocalyptic visions of a post-EU future in what came to be known as ‘project fear’.<sup>21</sup> Yet despite heavyweight domestic and international support, David Cameron ultimately failed to deliver a remain vote – by 52% to 48%, the UK electorate voted for Brexit.

There are two related issues which have received much attention in the immediate aftermath of the Brexit vote. First, was holding the 2016 referendum a mistake? No doubt this will be debated for many years, and it will certainly come to define for David Cameron that which seems most cherished by many modern leaders: his Prime Ministerial legacy. Yet when understood in constitutional context, it is strongly arguable that the Brexit referendum was an inevitability. There may have been errors in the timing of the vote and the tactics of the campaign to remain, but the trajectory of British politics had been set on some

<sup>16</sup> See e.g. M. Dougan, ‘The draft deal on UK membership of the EU’, *The Liverpool View*, 3 February 2016, <[news.liverpool.ac.uk/2016/02/03/the-liverpool-view-the-draft-deal-on-uk-membership-of-the-eu/](http://news.liverpool.ac.uk/2016/02/03/the-liverpool-view-the-draft-deal-on-uk-membership-of-the-eu/)>, visited 1 October 2016.

<sup>17</sup> See ‘David Cameron launches Tory campaign to stay in the EU’, *The Guardian*, 24 February 2016, <[www.theguardian.com/politics/2016/feb/24/david-cameron-launches-tory-campaign-to-stay-in-the-eu](http://www.theguardian.com/politics/2016/feb/24/david-cameron-launches-tory-campaign-to-stay-in-the-eu)>, visited 1 October 2016.

<sup>18</sup> See ‘EU vote: where the cabinet and other MPs stand’, *BBC website*, 22 June 2016, <[www.bbc.co.uk/news/uk-politics-eu-referendum-35616946](http://www.bbc.co.uk/news/uk-politics-eu-referendum-35616946)>, visited 1 October 2016.

<sup>19</sup> See *Review of the Balance of Competences*, 18 December 2014, <[www.gov.uk/guidance/review-of-the-balance-of-competences](http://www.gov.uk/guidance/review-of-the-balance-of-competences)>, visited 1 October 2016.

<sup>20</sup> See e.g. ‘FactCheck: Is Britain sending £350m a week to Brussels?’, *Channel 4 News*, 9 October 2015, <[blogs.channel4.com/factcheck/factcheck-britain-sending-350m-week-brussels/21733](http://blogs.channel4.com/factcheck/factcheck-britain-sending-350m-week-brussels/21733)>, visited 1 October 2016.

<sup>21</sup> See e.g. ‘EU referendum: a timeline of Remain’s ‘Project Fear’ campaign’, *The Telegraph*, 20 June 2016, <[www.telegraph.co.uk/news/2016/06/20/eu-referendum-a-timeline-of-remains-project-fear-campaign/](http://www.telegraph.co.uk/news/2016/06/20/eu-referendum-a-timeline-of-remains-project-fear-campaign/)>, visited 1 October 2016.

fundamental democratic reconsideration of our relationship with the EU for some time. Whether such a reconsideration of the UK's position in the EU was necessary or not is, again, a matter for debate, yet the Brexit referendum – both in its occurrence and outcome – was clearly years, even decades, in the making. Perhaps the greatest mistakes of the departed Prime Minister were of opportunism and hubris: opportunism in the sense that, like successive generations of Conservative politicians, David Cameron had exploited the EU as a convenient 'other' to be criticised to accelerate his ascent to power; and hubris in the sense that it was anticipated that years of hostility projected towards the EU could be displaced in the minds of the public by a last-minute discovery of faith in the European project, following a few months of renegotiation, and followed by a ten-week referendum campaign.

Second, and regardless of whether the referendum was a mistake, the question of the authority of its result arises. The EU membership referendum, as a matter of formal legality, was an 'advisory' referendum. This is partly a result of UK constitutional principle, and partly a matter of statutory construction. From the perspective of constitutional principle, the fundamental domestic doctrine of parliamentary sovereignty means that the UK's legislature cannot be considered absolutely bound as a matter of law by any referendum result.<sup>22</sup> What this means in practice may be more complex than initially seems to be the case, for it is nevertheless possible for Parliament to legislate to prescribe certain automatic outcomes in the event of a referendum vote against the status quo, as, for example, was done in the legislation authorising a referendum on the voting system to be used for elections to the House of Commons held in 2011.<sup>23</sup> The European Union Referendum Act 2015, which provided statutory authorisation for the 2016 Brexit referendum, did not, however, prescribe any automatic consequences in the event of a vote to depart from the EU, and does not trigger any definitive legal action or process.

Nonetheless, in constitutional reality, the result of the referendum is authoritative – the UK government has been given clear instructions by the electorate to negotiate an exit from the EU, and the UK Parliament, despite its legal sovereignty, is democratically and politically bound to respect the outcome. The referendum was held at Parliament's instigation, on the basis of a manifesto commitment from an elected government. The result was narrow but decisive, and the authority of the decision is reinforced by the high turnout (in relative terms) at this referendum: at 72.2% it was higher than at any general election since 1992, higher than the turnout of 64.6% at the 1975 referendum on continuing EEC

<sup>22</sup> See M. Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015) p. 264-265.

<sup>23</sup> Parliamentary Voting System and Constituencies Act 2011, ss. 8-9.

membership, and very considerably higher than the turnout of 42.2% at the 2011 referendum on an alternative voting system for the House of Commons. It did not reach the heights of the 84.6% turnout at the Scottish independence referendum in 2014, but the 2016 referendum on EU membership exceeded most expectations as to the ultimate level of popular participation. There is much to lament when confronted with emerging evidence that the leave campaign misled voters with claims about immigration and the funding of the National Health Service that could never be delivered, yet such deception cannot be leveraged to invalidate the result.<sup>24</sup> Whatever our view about the outcome, the democratic credentials of this referendum<sup>25</sup> must be understood to afford the result a clear constitutional authority.

With the Brexit referendum – and its outcome – now located in constitutional context, we turn to the challenges posed for the UK constitution.

#### BREXIT AS A CHALLENGE FOR THE UK CONSTITUTION

Untangling and re-establishing a relationship with the EU (and perhaps Europe more broadly) will have economic, social, cultural and diplomatic effects on the national life of the UK, as well as on the remaining member states. But Brexit is crucially a constitutional phenomenon, and the legal and political decisions taken and acted upon as the process of negotiating departure from the EU unfolds will create the framework within which the wider national future of the UK will be settled (at least on a contingent basis). Understanding the process according to which the terms of the UK's exit from the EU will be agreed – and the constitutional challenges likely to arise – is an important first step to navigating Brexit. We can break this process down into three phases: commencing, executing and concluding Brexit.

Across these three phases a number of more general thematic issues will emerge. First, the appropriate levels of input in the process of the core constitutional institutions of UK central government: in particular, the executive, the legislature and the courts. Second, the level of engagement of the institutions of the devolved systems of government in Scotland, Wales and Northern Ireland. Third, the relationship between decisions taken by 'the people' (understood to include the various electorates in existence across the UK) and decisions taken by

<sup>24</sup> See e.g. 'Leave campaign rows back on key immigration and NHS pledges', *The Guardian*, 25 June 2016, <[www.theguardian.com/politics/2016/jun/25/leave-campaign-rows-back-key-pledges-immigration-nhs-spending](http://www.theguardian.com/politics/2016/jun/25/leave-campaign-rows-back-key-pledges-immigration-nhs-spending)>, visited 1 October 2016.

<sup>25</sup> See e.g. S. Tierney, 'Was the Brexit Referendum Democratic?', *UK Constitutional Law Association*, 25 July 2016, <[ukconstitutionallaw.org/2016/07/25/stephen-tierney-was-the-brexit-referendum-democratic/](http://ukconstitutionallaw.org/2016/07/25/stephen-tierney-was-the-brexit-referendum-democratic/)>, visited 1 October 2016.



the institutions operating in the UK's increasingly fragmented constitutional arrangements. These issues are not likely to be neatly resolved as the process of Brexit develops. Instead, they suggest overarching complexities which further complicate the more specific, detailed constitutional challenges which will be presented by the UK's departure from the EU.

### *Commencing Brexit*

In the immediate post-referendum frenzy, public and political debate has largely revolved around the now (in)famous Article 50 of the Treaty on European Union – this hitherto unknown and untested provision is framing domestic argument about how Brexit will be commenced. The terms of Article 50 are relatively straightforward. To withdraw from the EU, the provision requires the UK to notify the European Council of its intention to do so, which triggers a period in which the Union is to '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'.<sup>26</sup> The period for negotiation, conclusion and entry into force of such a withdrawal agreement is time limited at two years from the date of notification – at which point the Treaties will simply cease to apply to the departing state – although this is extendable by unanimous agreement in the European Council, and with the consent of the withdrawing state.<sup>27</sup> There are complexities concerning what precisely Article 50 permits to be negotiated in this period: is it simply an agreement for withdrawal, or does the reference to taking account of a future framework indicate that formal negotiation of a new relationship can run in parallel?<sup>28</sup> Whether this is practical or desirable (which is, of course, a matter of perspective) may be more significant than the broad, general terms of Article 50 – this aspect of the withdrawal process established as a matter of EU law is nevertheless likely to be the subject of further debate.

For present purposes, however, the crucial provision of Article 50 is the seemingly innocuous requirement – if indeed it can be described as a requirement, as opposed to a mere description of the inevitable – that a withdrawal decision of the kind that provides a basis for notification to the European Council is to be made by the UK 'in accordance with its own constitutional requirements'.<sup>29</sup> It is sensible that the government has decided to take time to establish a clearer

<sup>26</sup> Art. 50(2) TEU.

<sup>27</sup> Art. 50(3) TEU.

<sup>28</sup> See e.g. the discussion in C. Grant, 'Six Brexit Deals that Theresa May Must Strike', *Centre for European Reform*, 28 July 2016, <[www.cer.org.uk/in-the-press/six-brexit-deals-theresa-may-must-strike](http://www.cer.org.uk/in-the-press/six-brexit-deals-theresa-may-must-strike)>, visited 1 October 2016.

<sup>29</sup> Art. 50(1) TEU.

position regarding withdrawal from the EU before triggering Article 50, which the Prime Minister has confirmed will not be done until the first quarter of 2017 at the earliest.<sup>30</sup> This also creates time to fill with debate about what precisely the UK's domestic constitutional requirements for a withdrawal decision might be.

It is generally agreed that the 2016 referendum itself is insufficient to constitute such a decision as a matter of law – from a legal perspective, the referendum result is 'advisory' rather than 'binding', which means that some further action is required. The government's position appears to be that it is entitled to take the formal legal decision to leave the EU, on the basis of the 'advice' of the electorate as expressed in the referendum outcome, by virtue of its power to conduct foreign affairs and international diplomacy under the royal prerogative. On this view, the government could simply notify the European Council that, following the referendum result, the UK had decided to exit the EU at a moment of its choosing.<sup>31</sup>

A number of arguments have, however, been developed to challenge the government's position on triggering Article 50. First, some – most notably, Barber, Hickman and King<sup>32</sup> – have suggested that an Act of Parliament is necessary to provide legal authorisation for a decision to leave the EU. The essential claim here is that a government decision under the royal prerogative would in effect render the European Communities Act 1972 – which establishes the effect of EU law in the UK's legal system – null and void, because at the conclusion of the withdrawal negotiations under Article 50, the UK would be free of any EU treaty obligations. It would not be lawful, from this perspective, to use the royal prerogative to frustrate the purpose of legislation enacted by the sovereign UK Parliament, and therefore a statute must be enacted to authorise the government to trigger Article 50. The difficulty with this suggestion is that notification of a decision under Article 50 would *not* be inconsistent with, or in effect invalidate, the European Communities Act 1972. The 1972 Act is domestic legislation establishing the domestic effect of EU law within the UK – it can only be repealed or replaced by Parliament, and certainly will be during the course of the UK's withdrawal from the EU. The notification of a decision to leave the EU under Article 50, in contrast, has no direct legal implications in the legal system of

<sup>30</sup> See e.g. 'Brexit: Theresa May says talks won't start in 2016', *BBC website*, 20 July 2016, <[www.bbc.co.uk/news/uk-politics-36841066](http://www.bbc.co.uk/news/uk-politics-36841066)>, visited 1 October 2016.

<sup>31</sup> See e.g. 'Theresa May will trigger Brexit negotiations without Commons vote', *The Telegraph*, 27 August 2016, <[www.telegraph.co.uk/news/2016/08/26/theresa-may-will-trigger-brexit-negotiations-without-commons-vot/](http://www.telegraph.co.uk/news/2016/08/26/theresa-may-will-trigger-brexit-negotiations-without-commons-vot/)>, visited 31 August 2016.

<sup>32</sup> N. Barber et al., 'Pulling the Article 50 "Trigger": Parliament's Indispensable Role', *UK Constitutional Law Association*, 27 June 2016, <[ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/](http://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/)>, visited 1 October 2016.

the UK – it simply instigates a period of negotiation at the European level, which follows from a process that Parliament itself legislated to initiate, when authorising the holding of a referendum on EU membership. The doctrine of parliamentary sovereignty does not require that the UK Parliament takes every decision directly; rather, it has the ultimate legislative power to establish whatever framework for decision-making it chooses.

The attempts of Arvind, Kirkham and Stirton<sup>33</sup> to reach a similar conclusion – that an Act of Parliament is required to authorise notification of withdrawal – by drawing a parallel with the European Union Act 2011 also ultimately fail to convince. A decision to withdraw from the EU does not have the effect of amending or replacing the EU treaties under section 2 of the European Union Act 2011 – those treaties will be unchanged, and continue to apply to the UK until the conclusion, not the commencement, of withdrawal negotiations.<sup>34</sup> As such, the statutory ‘referendum lock’ contained in section 2 does not come into play, and the government is not bound by the authorisation process there established. Moreover, in enacting the European Union Act 2011, the government established an extremely (probably unduly) broad scheme governing the authorisation of an array of decisions taken at EU level;<sup>35</sup> that it explicitly chose *not* to bring an Article 50 decision within such a wide-ranging scheme is clear evidence that the statute should not be read to have the contrary effect, especially when we recall that the statutory purpose of the 2011 Act was to *prevent* power and competence being passed from the UK to the EU, rather than the reverse. The prospect of the courts taking a broader view of the requirements of the 2011 Act is extremely slim – in the leading case of *Wheeler v Office of the Prime Minister* the Administrative Court rejected a similar (far less politically contentious) attempt to push an expanded reading of these statutory referendum locks, and endorsed a strictly literal approach to the interpretation of the legislation.<sup>36</sup>

Once it is established that new primary legislation is not required as a matter of domestic constitutional law to authorise a withdrawal decision, a second question

<sup>33</sup> T.T. Arvind et al., ‘Article 50 and the European Union Act 2011: Why Parliamentary Consent Is Still Necessary’, *UK Constitutional Law Association*, 1 July 2016, <[ukconstitutionallaw.org/2016/07/01/t-t-arvind-richard-kirkham-and-lindsay-stirtonarticle-50-and-the-european-union-act-2011-why-parliamentary-consent-is-still-necessary/](http://ukconstitutionallaw.org/2016/07/01/t-t-arvind-richard-kirkham-and-lindsay-stirtonarticle-50-and-the-european-union-act-2011-why-parliamentary-consent-is-still-necessary/)>, visited 1 October 2016.

<sup>34</sup> And where an agreement is concluded successfully, the Treaties will also continue to apply to the UK during the period before entry into force. In contrast, where an agreement is not concluded, and the negotiating period is not extended, the Treaties will cease to apply to the UK after two years from the notification of intention to withdraw.

<sup>35</sup> See e.g. M. Gordon, ‘The European Union Act 2011’, *UK Constitutional Law Association*, 12 January 2012, <[ukconstitutionallaw.org/2012/01/12/mike-gordon-the-european-union-act-2011/](http://ukconstitutionallaw.org/2012/01/12/mike-gordon-the-european-union-act-2011/)>, visited 1 October 2016.

<sup>36</sup> *Wheeler v Office of the Prime Minister* [2014] EWHC 3815 (Admin).

arises: could the power claimed by the government to exist by virtue of the royal prerogative have been displaced by a competing, existing statutory power? As Tucker has argued,<sup>37</sup> section 2(2) of the European Communities Act 1972 may be seen to provide such a basis, in that it establishes a general power for the enactment of secondary legislation ‘for the purpose of implementing any EU obligation of the United Kingdom... or of enabling any rights enjoyed... by the United Kingdom under or by virtue of the Treaties to be exercised’. And in contrast with reliance on the prerogative power, any statutory instrument made in accordance with section 2(2) would necessarily be subject to some form of parliamentary scrutiny, and most likely, be presented by the government for the positive approval of both the House of Commons and House of Lords. Yet whether this broad statutory power is applicable to a domestic withdrawal decision, and must be used in preference to the prerogative as a result of the rule established in *De Keyser’s Royal Hotel*,<sup>38</sup> largely turns on whether Article 50 (introduced only in the Treaty of Lisbon reforms in 2009) establishes a ‘right’ to withdraw from the EU, or simply creates an EU level process to acknowledge and channel a pre-existing national right held by all Member States. The vague nature of Article 50 – which for Besselink is a ‘lawyerly deformity’ which may ultimately be subject to raw politics<sup>39</sup> – does not make straightforward the task of working through these competing interpretations. It may be, as Elliott argues,<sup>40</sup> that such an approach to section 2(2) of the European Communities Act 1972 stretches the purpose of this statutory power, which seems intended to make possible the general implementation of EU obligations in domestic law where no alternative pre-existing power is available, whereas the royal prerogative can serve to authorise a decision in the present case. The more fundamental difficulty, however, in circumstances of interpretive ambiguity, is that the government may be unlikely to accept that a right to withdraw from the EU exists ‘by virtue of the Treaties’, as would be necessary if relying on the power contained in section 2(2) of the 1972 Act. Indeed, the government would have considerable justification for regarding this as primarily a right grounded in

<sup>37</sup>A. Tucker, ‘Triggering Brexit: A Decision for the Government, but under Parliamentary Scrutiny’, *UK Constitutional Law Association*, 29 June 2016, <[ukconstitutionallaw.org/2016/06/29/adam-tucker-triggering-brexit-a-decision-for-the-government-but-under-parliamentary-scrutiny/](http://ukconstitutionallaw.org/2016/06/29/adam-tucker-triggering-brexit-a-decision-for-the-government-but-under-parliamentary-scrutiny/)>, visited 1 October 2016.

<sup>38</sup>*Attorney General v De Keyser’s Royal Hotel* [1920] A.C. 508.

<sup>39</sup>L. Besselink, ‘Beyond Notification: How to Leave the European Union without Using Article 50 TEU’, *UK Constitutional Law Association*, 30 June 2016, <[ukconstitutionallaw.org/2016/06/30/leonard-besselink-beyond-notification-how-to-leave-the-european-union-without-using-article-50-teu/](http://ukconstitutionallaw.org/2016/06/30/leonard-besselink-beyond-notification-how-to-leave-the-european-union-without-using-article-50-teu/)>, visited 1 October 2016.

<sup>40</sup>M. Elliott, ‘Brexit: On why, as a matter of law, triggering Article 50 does not require Parliament to legislate’, *Public Law for Everyone*, 30 June 2016, <[publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate/](http://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate/)>, visited 1 October 2016.

domestic constitutional law, appropriately enough in light of the disputed language of Article 50.

The Article 50 debate in the UK is already nearing saturation point, and there is a risk that anxiety about Brexit is being projected into this single issue, distracting from, perhaps even exhausting energy for, the greater subsequent challenges. It may also be the case that attempts to shift the ultimate decision to trigger EU withdrawal to the UK Parliament – whether that takes the form of the enactment of new legislation, or debate and scrutiny of the government's position followed by a formal vote – is motivated, for some, by an understandable normative desire for greater parliamentary involvement at a critical constitutional moment, or even a faint hope that Brexit may yet be obstructed.<sup>41</sup> Yet this threatens to distort what is, in my view, a relatively clear legal position at a time when there is already more than enough constitutional uncertainty.

Crucially, however, even if the prerogative is taken to provide a legal basis for a domestic withdrawal decision, as opposed to a new Act of Parliament or an existing statutory power, Parliament will still be centrally involved in the process of UK exit from the EU. That it could be the government which commences this process, under the royal prerogative and implementing the distinct result of a national referendum, does nothing to alter the fact that Parliament will be the appropriate forum, and possesses the necessary authority, to construct the UK's new relationship with the EU, whatever that may be, as a matter of domestic constitutional law. Though efforts will no doubt be needed to ensure that there is maximum parliamentary input into the process of reshaping the UK legal system post-Brexit – as will be discussed further below – if we approach the process holistically it becomes clear that parliamentary control over the decision to trigger Article 50 is neither legally necessary nor exclusively determinative of the extent to which Parliament will be centrally engaged in managing the change that accompanies UK exit from the EU. The legal position may be unsatisfactory, but should provide the mere starting point for the construction of the process of Brexit, which may be supplemented by the requirements of the political constitution, both principled and practical in nature.

Nonetheless, and most regrettably, we will now see the relocation of these arguments to the courts,<sup>42</sup> serving as final confirmation of the abrupt

<sup>41</sup> See e.g. G. Robertson, 'How to stop Brexit: get your MP to vote it down', *The Guardian*, 27 June 2016, <[www.theguardian.com/commentisfree/2016/jun/27/stop-brexit-mp-vote-referendum-members-parliament-act-europe](http://www.theguardian.com/commentisfree/2016/jun/27/stop-brexit-mp-vote-referendum-members-parliament-act-europe)>, visited 1 October 2016.

<sup>42</sup> A full judicial review hearing is now scheduled for October 2016, and many anticipate that the dispute will ultimately proceed to the UK Supreme Court; see 'Theresa May does not intend to trigger article 50 this year, court told', *The Guardian*, 19 July 2016, <[www.theguardian.com/politics/2016/jul/19/government-awaits-first-legal-opposition-to-brexit-in-high-court](http://www.theguardian.com/politics/2016/jul/19/government-awaits-first-legal-opposition-to-brexit-in-high-court)>, visited 1 October 2016.

legalisation of discussion of the commencement of Brexit.<sup>43</sup> This is in part problematic due to the inability of courts to provide real resolution to such fundamental constitutional questions as those concerning the UK's relationship with the EU. Attempts by a succession of eurosceptics to use the domestic courts to block further integration of the UK into the EU over a number of years have rightly been criticised as opportunistic and lacking in merit.<sup>44</sup> It is therefore unfortunate that it now appears that similar mechanisms are again being exploited, in what is likely to be an attention grabbing, but futile, endeavour to challenge the government's position, unless the domestic courts seriously overstep the limits of their constitutional role. This is also problematic if the effect of a legal victory is to bolster the government and legitimise an even more executive-centred process, while perhaps functioning to crowd out non-legal arguments for some parliamentary oversight of the decision to trigger Article 50, which could have been more effective if framed in political democratic terms.<sup>45</sup> The pursuit of legal challenge simply obscures this, and invites the courts into an arena where there is little chance that they can play a constructive role. Instead, the fundamental question concerning the commencement of Brexit is really 'when?' as opposed to 'how?', and this is likely to come down to an exercise of judgement by the Prime Minister and her government as to what is most advantageous for the UK's negotiating prospects, while accommodating the European partners in whose favour the deck is already stacked.

<sup>43</sup> An exception may be the report of the House of Lords Select Committee on the Constitution, *The invoking of Article 50* (HL Paper 44, 13 September 2016). The Lords' Constitution Committee argues it would be 'constitutionally inappropriate' for the government to act without seeking parliamentary approval, either in the form of a resolution or legislation, at [24]. With legal action pending, the committee does not offer a view on the merits of the competing legal arguments concerning the triggering of Art. 50, at [16]. But set explicitly against this backdrop of legal uncertainty, the arguments articulated from the perspective of constitutional propriety seem broad and even diluted in force: in particular, at [45], the committee does not offer a definitive view as to whether legislation or a resolution would be the preferable approval mechanism, leaving a lack of a clear standard against which the government can be (politically) challenged.

<sup>44</sup> See e.g. *R v Secretary of State for Foreign and Commonwealth Affairs, ex p. Lord Rees-Mogg* [1994] Q.B. 552; *McWhirter v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ 384; *R (on the application of Southall) v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWHC 1122 (Admin); *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin); *Wheeler v Office of the Prime Minister* [2014] EWHC 3815 (Admin).

<sup>45</sup> See e.g. C. O'Conneide, 'Why Parliamentary Approval for the Triggering of Article 50 TEU Should Be Required as a Matter of Constitutional Principle', *UK Constitutional Law Association*, 7 July 2016, <[ukconstitutionallaw.org/2016/07/07/colm-ocinneide-why-parliamentary-approval-for-the-triggering-of-article-50-teu-should-be-required-as-a-matter-of-constitutional-principle/](http://ukconstitutionallaw.org/2016/07/07/colm-ocinneide-why-parliamentary-approval-for-the-triggering-of-article-50-teu-should-be-required-as-a-matter-of-constitutional-principle/)>, visited 17 October 2016.

*Key challenges in execution*

EU law has, of necessity, deep constitutional roots. This means the scale of the challenge presented by the idea of withdrawal from the Union is immense: it will require a combination of diplomatic negotiation at the supranational level and legislative change at the domestic level. The kind of domestic legislative change required will, of course, be contingent on the nature of the termination of membership and future relationship agreed through diplomatic negotiation, but these will not necessarily be consecutive tasks – much may need to be done simultaneously, despite the fact that the Article 50 process formally attempts to separate negotiation of an exit agreement and the full framework for a future relationship with the EU. The process of executing Brexit is therefore likely to be iterative as it develops, with diplomatic and domestic action and possibilities informed by and informing one another. While there will clearly be a great deal of difference between a future in which the UK returns to become a member state of the European Free Trade Association,<sup>46</sup> or obtains some related access to the European Economic Area,<sup>47</sup> and a future in which the UK stands entirely apart from the EU, and trades with the remaining member states under World Trade Organisation rules, the following section begins to anticipate some of the key challenges that will likely be experienced in any eventuality. First, we discuss who will be involved in the process of executing Brexit. Second, we will explore what kind of domestic change might be necessary.

First, who will be involved in effecting Brexit? Which UK institutional actors will have responsibility for what, and how will they interact? These questions clearly overlap with the Article 50 debate considered above, but are arguably more important, and the position is more complex. The UK government has legal and constitutional responsibility for diplomatic negotiations and foreign affairs, but EU membership also has direct domestic implications. And in the domestic sphere, the UK Parliament has the ultimate responsibility for legislating, as will be necessary to alter arrangements establishing the availability and supremacy of EU norms within the UK legal system. Of course, in many areas Parliament can only legislate to provide the framework within which the government acts, and which must be supplemented by detailed secondary legislative provision. There are important debates about whether an appropriate balance is being obtained in contemporary constitutional practice in the UK, or whether too much law-making is being left for the executive to implement, subject to lower levels of parliamentary scrutiny, via subordinate legislation.<sup>48</sup> The scale of unravelling which Brexit will require will test

<sup>46</sup> See <[www.efra.int/](http://www.efra.int/)>, visited 1 October 2016.

<sup>47</sup> Agreement on the European Economic Area (OJ No. L 1, 3.1.1994, p. 3).

<sup>48</sup> See e.g. Lord Judge, 'Ceding Power to the Executive; the Resurrection of Henry VIII', Lecture at King's College London, 12 April 2016, <[www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive—Lord-Judge—130416.pdf](http://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive—Lord-Judge—130416.pdf)>, visited 1 October 2016.

current practice far beyond previous experience, given the range of diverse areas in which EU law will have to be replaced, from environmental, employment and consumer protection, to agricultural, fisheries and data regulation, to single market rules concerning movement of goods, services, persons, capital, and competition law. As discussed further below, such change may be carried out on an interim basis initially, but the government will inevitably lead this extensive process. There is plenty of domestic capacity which needs to be developed here: new central government departments for International Trade and Exiting the European Union have been established,<sup>49</sup> and there is a need to supplement the civil service with experienced negotiators,<sup>50</sup> with the operation coordinated at the highest level of government by a new Brexit Cabinet Committee chaired by the Prime Minister.<sup>51</sup> There are significant questions about how effectively these new teams and departments will interact, with the position of the well-established Foreign Office in Brexit less than clear, and bearing in mind the nature of some of the politicians selected by the Prime Minister to handle these sensitive, intersecting portfolios.<sup>52</sup>

There are also a range of difficult questions relating to how best the finite capacity of the UK Parliament can be exploited in this context – is the most valuable use of parliamentary time and resources to focus on deep and thorough scrutiny of the executive led review? In line with modern developments in constitutional accountability, parliamentary select committees will be key.<sup>53</sup> Yet effort will be required to ensure coordinated activity and avoid duplication, given that many committees will have a remit which is touched by Brexit, and not just the specialist House of Lords EU Committee (and sub-committees), the House of Commons European Scrutiny Committee, and the committee which will now need to be established to scrutinise the activities of the new department for Brexit. A period of

<sup>49</sup> See <[www.gov.uk/government/organisations/department-for-exiting-the-european-union](http://www.gov.uk/government/organisations/department-for-exiting-the-european-union)> and <[www.gov.uk/government/organisations/department-for-international-trade](http://www.gov.uk/government/organisations/department-for-international-trade)>, visited 1 October 2016.

<sup>50</sup> See 'Government acs worldwide hunt for trade negotiators, experts warn', *The Telegraph*, 3 July 2016, <[www.telegraph.co.uk/business/2016/07/03/government-faces-worldwide-hunt-for-trade-negotiators-experts-wa/](http://www.telegraph.co.uk/business/2016/07/03/government-faces-worldwide-hunt-for-trade-negotiators-experts-wa/)>, visited 1 October 2016.

<sup>51</sup> See 'Theresa May takes charge of Brexit, economy and social reform committees', *The Guardian*, 19 July 2016, <[www.theguardian.com/politics/2016/jul/19/theresa-may-takes-charge-of-brexiteconomy-and-social-reform-committees](http://www.theguardian.com/politics/2016/jul/19/theresa-may-takes-charge-of-brexiteconomy-and-social-reform-committees)>, visited 1 October 2016.

<sup>52</sup> See e.g. 'Boris Johnson is foreign secretary: the world reacts', *BBC website*, 14 July 2016, <[www.bbc.co.uk/news/world-36790977](http://www.bbc.co.uk/news/world-36790977)>; 'Boris Johnson, Liam Fox and David Davis meet to "clear the air"', *The Telegraph*, 25 August 2016, <[www.telegraph.co.uk/news/2016/08/25/boris-johnson-liam-fox-and-david-davis-meet-to-clear-the-air-aft/](http://www.telegraph.co.uk/news/2016/08/25/boris-johnson-liam-fox-and-david-davis-meet-to-clear-the-air-aft/)>, visited 1 October 2016.

<sup>53</sup> On the understated effectiveness of parliamentary scrutiny, see e.g. M. Flinders and A. Kelso, 'Mind the Gap: Political Analysis, Public Expectations and the Parliamentary Decline Thesis', 13 *British Journal of Politics and International Relations* (2011) p. 249; M. Russell and P. Cowley, 'The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence', 29 *Governance* (2016) p. 121.



self-reflection on the role of parliamentary committees in Brexit is now well underway,<sup>54</sup> but perhaps the magnitude of what is to come might be thought to justify the creation of a central Joint Committee of the Commons and Lords on UK departure from the EU, modelled on that which exists at present on human rights.

Further important questions of institutional involvement relate to the engagement of the devolved institutions with those of the UK, which has been promised by the Prime Minister.<sup>55</sup> Yet Brexit arrives in an already complex environment. The national votes in Scotland and Northern Ireland in favour of remain<sup>56</sup> complicate the position intensely, with discussion of a second independence referendum for Scotland in 2017 already beginning,<sup>57</sup> given that the national election earlier in 2016 led to the Scottish Nationalist Party government being returned.<sup>58</sup> Calls for a referendum on independence in Northern Ireland are also already occurring, though this is less easy to imagine in the immediate future,<sup>59</sup> despite the fact that the land border between Northern Ireland and the Republic of Ireland could present the most difficult (and in this context, politically contentious) problem of all to resolve if a 'hard border' between the UK and EU was to be there established.

In Scotland, however, while there is no standing provision authorising an independence referendum, this could be very difficult to resist, as it was for the then Prime Minister David Cameron in 2012.<sup>60</sup> The lack of an outright majority in the Scottish Parliament for the Scottish Nationalist Party could yet complicate things further, and there will presumably need to be a clear shift in public opinion for the First Minister Nicola Sturgeon to wish to take this on: the prospect of a second loss

<sup>54</sup> Inquiries into the process of parliamentary scrutiny accompanying Brexit have been announced by the House of Lords EU Select Committee and House of Commons European Scrutiny Committee: see House of Lords European Union Committee, *Scrutinising Brexit: the role of Parliament* (HL Paper 33, 22 July 2016); and 'Brexit: European Scrutiny Committee response and consultation', 8 July 2016, <[www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/news-parliament-2015/scrutiny-consultation-launch-16-17/](http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/news-parliament-2015/scrutiny-consultation-launch-16-17/)>, visited 1 October 2016.

<sup>55</sup> See e.g. 'May tells Sturgeon Holyrood will be 'fully engaged' in EU talks', *The Guardian*, 15 July 2016, <[www.theguardian.com/uk-news/2016/jul/15/theresa-may-nicola-sturgeon-holyrood-article-50-decision](http://www.theguardian.com/uk-news/2016/jul/15/theresa-may-nicola-sturgeon-holyrood-article-50-decision)>, visited 1 October 2016.

<sup>56</sup> See 'EU Referendum Results', *BBC website*, 24 June 2016, <[www.bbc.co.uk/news/politics/eu\\_referendum/results](http://www.bbc.co.uk/news/politics/eu_referendum/results)>, visited 1 October 2016.

<sup>57</sup> See e.g. 'Nicola Sturgeon says she would consider 2017 Scottish referendum', *The Guardian*, 15 July 2016, <[www.theguardian.com/politics/2016/jul/17/nicola-sturgeon-would-consider-2017-scottish-independence-referendum-brexit](http://www.theguardian.com/politics/2016/jul/17/nicola-sturgeon-would-consider-2017-scottish-independence-referendum-brexit)>, visited 1 October 2016.

<sup>58</sup> See e.g. 'Holyrood 2016: SNP claims 'historic' win but no majority', *BBC website*, 6 May 2016, <[www.bbc.co.uk/news/election-2016-scotland-36205187](http://www.bbc.co.uk/news/election-2016-scotland-36205187)>, visited 1 October 2016.

<sup>59</sup> See e.g. 'Northern Ireland secretary rejects Sinn Féin call for border poll', *The Guardian*, 24 June 2016, <[www.theguardian.com/uk-news/2016/jun/24/arlene-foster-northern-ireland-martin-mcguinness-border-poll-wont-happen](http://www.theguardian.com/uk-news/2016/jun/24/arlene-foster-northern-ireland-martin-mcguinness-border-poll-wont-happen)>, visited 1 October.

<sup>60</sup> See generally A. Tomkins, 'Scotland's Choice, Britain's Future' 130 *LQR* (2014) p. 215.

in an independence referendum within five years could truly serve to put independence off the political agenda for a generation.<sup>61</sup> Standing provision for a referendum on leaving the UK does, in contrast, exist in the Northern Ireland Act 1998,<sup>62</sup> but this power is exercisable by the UK Secretary of State, and only when ‘it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland’.<sup>63</sup> Well established divisions in the political class and communities of Northern Ireland would make calling such a referendum a major undertaking, even at a time when the UK did not face the all-consuming challenge of exiting from the EU. In the meantime, perhaps the crucial question is how effective engagement across the UK can be assured on an ongoing basis, even though Theresa May’s decision to deliver on the Brexit referendum vote seems to guarantee from the outset that two out of the four nations will be unhappy with the outcome, which adds to long-standing concerns about the adequacy of the existing intergovernmental machinery which is intended to smooth the operation of the devolved system.<sup>64</sup> It seems probable that informal and incremental management of the internal dynamics of the UK’s devolved governance will be of great importance if anything like a ‘national consensus’ is to be achieved,<sup>65</sup> and thus the manifestly political aspect of the UK’s political constitution will here be at its most evident.

Second, what kind of domestic legislative change might be necessary? The crucial domestic task necessary as a result of departure from the EU will be the repeal, and potential replacement, of the European Communities Act 1972 (along with associated primary legislation, such as the European Union Act 2011). This will remove both the direct legal effect of EU law within the UK legal system, and the domestic primacy of EU norms. Two key issues are the timing of the repeal, and whether, or with what, the European Communities Act 1972 will be replaced.

<sup>61</sup> See e.g. J. Curtice, ‘Could Brexit Lead to IndyRef2?’, *What Scotland Thinks*, 13 June 2016, <[blog.whatscotlandthinks.org/2016/06/could-brexit-lead-to-indyref2/](http://blog.whatscotlandthinks.org/2016/06/could-brexit-lead-to-indyref2/)>, visited 1 October 2016; J. Curtice, ‘Has Brexit Changed Voters’ Minds About Indyref2?’, *What Scotland Thinks*, 8 July 2016, <[blog.whatscotlandthinks.org/2016/07/has-brexit-changed-voters-minds-about-indyref2/](http://blog.whatscotlandthinks.org/2016/07/has-brexit-changed-voters-minds-about-indyref2/)>, visited 1 October 2016.

<sup>62</sup> Northern Ireland Act 1998, s. 1.

<sup>63</sup> Northern Ireland Act 1998, Sch. 1, para. 2. That this condition is not fulfilled has been directly referred to by both the previous and the new Secretary of State for Northern Ireland in rejecting calls for such a referendum; see *supra* n. 59, and *Hansard*, HC Deb Vol. 613, col. 809 (20 July 2016).

<sup>64</sup> See generally House of Lords Select Committee on the Constitution, *Inter-governmental relations in the United Kingdom* (HL Paper 146, 27 March 2015).

<sup>65</sup> The desire to obtain a national consensus is one of four principles intended to guide the Brexit negotiations, set out by the Secretary of State for Exiting the EU, David Davis MP, in a statement to the House of Commons; see *Hansard*, HC Deb Vol. 614, cols. 38–41 (5 September 2016). The three other principles are to put the national interest first, while acting in good faith to European partners; to minimise uncertainty; and to put the sovereignty of Parliament beyond doubt.

As concerns timing: the repeal will need to coincide with the formal termination of the UK's EU membership, although there may be calls – if Brexit is to be a drawn-out process – for the domestic supremacy of EU law to be suspended in the interim.<sup>66</sup> Primary legislation would be required to effect this, although given the complexity which could result, to call for such change as a matter of general principle would seem to be best understood as rhetorical posturing, rather than a worthwhile endeavour. Alternatively, where it is considered to be of particular and expedient significance, legislation on specific topics might be enacted making specific provision so as to take effect notwithstanding any contradictory EU norms – the current government may, for example, view attempts to undermine domestic guarantees flowing from the Working Time Directive as such a matter.<sup>67</sup> As a matter of domestic constitutional principle, it has always been the case that in such circumstances the UK courts would be obliged to give effect to such an instruction from the sovereign UK Parliament, expressed in the appropriate statutory manner and form.<sup>68</sup> With Brexit impending there can be absolutely no doubt that such a 'notwithstanding clause' would be legally effective. Whether the courts will respond more generally to the prevailing political atmosphere by taking a less purposive approach to the interpretation of domestic legislation to avoid inconsistency with EU law remains to be seen. It seems unlikely that we will see a clear departure from established case law like *Litster v Forth Dry Dock*,<sup>69</sup> in which the House of Lords held that a purposive construction of domestic law would be applied (even if that involved some departure from the literal text of national legislation) where necessary to give effect to obligations under EU law. But much will depend on the stage of the Brexit process at which a case arises<sup>70</sup> – until Brexit seems an imminent certainty, and in the absence of clear legislative instructions, a formal and overt change in judicial attitudes would be surprising, although informal and implicit shifts in the courts' approach to EU law may be inevitable.

<sup>66</sup> A number of leading eurosceptic MPs believe that a quick Brexit is possible, and it is not difficult to imagine that impatience will eventually lead to such calls; see e.g. the reported comments of John Redwood MP in 'Britain should deliver "full Brexit" soon, MP says', *Reuters*, 27 July 2016, <[uk.reuters.com/article/uk-britain-eu-redwood-idUKKCN1061Z3](http://uk.reuters.com/article/uk-britain-eu-redwood-idUKKCN1061Z3)>, visited 1 October 2016.

<sup>67</sup> The Working Time Regulations 1998, implementing Directive 93/104/EC and Directive 94/33/EC.

<sup>68</sup> See Gordon, *supra* n. 22, p. 177-183.

<sup>69</sup> *Litster v Forth Dry Dock* [1990] 1 A.C. 546.

<sup>70</sup> There are also particular questions concerning the (non-)implementation of Directives as the process of Brexit unfolds; see C. Lienen, 'Brexit and the Domestic Judiciary: Some Preliminary Thoughts on the Aftermath of Triggering Article 50', *UK Constitutional Law Association*, 21 July 2016, <[ukconstitutionallaw.org/2016/07/21/christina-lienen-brexit-and-the-domestic-judiciary-some-preliminary-thoughts-on-the-aftermath-of-triggering-article-50/](http://ukconstitutionallaw.org/2016/07/21/christina-lienen-brexit-and-the-domestic-judiciary-some-preliminary-thoughts-on-the-aftermath-of-triggering-article-50/)>, visited 17 October 2016.

As concerns what, if anything, will replace the European Communities Act 1972: much here depends on the nature of the UK's future relationship with the EU. If continued access to the single market is negotiated, then domestic legislation to ensure regulatory compatibility between EU law and UK law will no doubt be required, most probably modelled on the European Communities Act 1972, if more limited in its substantive scope. This might also present an opportunity to make more explicit the mechanisms in place to remedy any inconsistency between EU and domestic law, given the almost wilful lack of clarity in the European Communities Act 1972, despite its fundamental constitutional importance.<sup>71</sup> In particular, the rules concerning the disapplication of incompatible UK law were developed in a haphazard judicial fashion, if inevitably so given the commitments accepted by the UK's political institutions as part of EU membership,<sup>72</sup> and the failure (or unwillingness) of the government and Parliament clearly to articulate these consequences in statutory form.<sup>73</sup> If such obligations are again to be accepted as part, for example, of UK membership of the European Free Trade Association,<sup>74</sup> or some comparable agreement to access the European Economic Area, clearer implementing legislation must be a priority (although enduring debates about how exactly domestic ideas of legislative sovereignty can and should be preserved will surely reignite in the process).

If a looser future relationship is agreed, there may be no need to re-establish an austere imitation of the European Communities Act 1972, yet difficult legislative decisions will still be required. If the UK becomes free to legislate in a range of substantive fields previously governed by EU norms, how exactly this regained power will be exercised is a matter of real concern. It would surely be difficult to implement substantive legislative and policy change across an array of areas of domestic activity in the short term, especially when so much government time will be occupied by the formal negotiation of Brexit. It may then be that legislative frameworks modelled on EU legal norms will necessarily be preserved in the post-Brexit era, until such time that a more thorough evaluation of future possibilities can be conducted and effected. In such circumstances, provisional legislation affording domestic authority to directly effective EU rules in some areas may be required even after the UK's membership of

<sup>71</sup> See Gordon, *supra* n. 22, p. 151-154.

<sup>72</sup> See especially the speech of Lord Bridge in *R v Secretary of State for Transport, ex p. Factortame (No 2)* [1991] 1 A.C. 603, 658-659, emphasising that 'whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary'.

<sup>73</sup> See generally D. Nicol, *EC Membership and the Judicialization of British Politics* (Oxford University Press 2001) p. 114-116.

<sup>74</sup> Although it is not clear that the EFTA states want the UK as a member; see 'Norway may block UK return to European Free Trade Association', *The Guardian*, 9 August 2016, <[www.theguardian.com/world/2016/aug/09/norway-may-block-uk-return-to-european-free-trade-association](http://www.theguardian.com/world/2016/aug/09/norway-may-block-uk-return-to-european-free-trade-association)>, visited 1 October 2016.

the EU has been terminated. This may be an unsatisfactory outcome for many on the leave side, who might wish to sever UK ties with EU law in a more definitive fashion. Yet the alternatives are also constitutionally unappealing: we either risks gaps in regulation opening up, to be discovered only at some future point as part of legal disputes or proceedings (and potentially then requiring rushed, retrospective legislative action to provide a remedy), or an executive power grab. For only the executive could have the capacity to make change across such a range of substantive areas in a short space of time, and a government could perhaps on that basis persuade the UK Parliament to make wide ranging provision for the availability of secondary legislative powers to 'replace EU law'. Many will feel that a government intending to rewrite vast (and complex) swathes of the domestic legal system should first be required to submit such broad plans for approval by the electorate at a general election – that there is a democratic mandate for Brexit, by virtue of the referendum result, is clear, yet there is no such mandate for the government unilaterally to fill the policy vacuums potentially created by the withdrawal of EU law. That any policy choices made during this period would be reversible in future does not diminish the fact that it would be difficult for Parliament to provide adequate political oversight of so much so quickly, and in any event, interim solutions can readily acquire a degree of durability once in place.

A further complication is that withdrawal from the EU will almost certainly necessitate the amendment of the UK's devolution legislation, and this is a very sensitive constitutional task. In particular, EU law provides a crucial statutory limit to the legislative competence of the devolved legislatures: the Scottish Parliament,<sup>75</sup> the Northern Ireland Assembly,<sup>76</sup> and the National Assembly for Wales.<sup>77</sup> These statutory limits will presumably need to be removed or altered (depending on the precise nature of the UK's future relationship with the EU), and while there is no legal barrier to the UK Parliament amending the terms of legislative devolution, a constitutional convention – known as the 'Sewel convention' – exists which provides that this will usually be done with the consent of the devolved institutions.<sup>78</sup> If this is deemed to be necessary,<sup>79</sup> whether

<sup>75</sup> Scotland Act 1998, s. 29(2)(d).

<sup>76</sup> Northern Ireland Act 1998, s. 6(2)(d).

<sup>77</sup> Government of Wales Act 2006, s. 108(6)(c).

<sup>78</sup> *Devolution: Memorandum of Understanding and Supplementary Agreements* (October 2013) para. [14].

<sup>79</sup> There is likely to be debate about the precise applicability of the convention here: on the one hand, it is arguable that the convention has in practice expanded in scope to cover change to the devolution Acts which alters the scope of devolved legislative or executive competence; see S. Douglas-Scott, 'Removing references to EU law from the devolution legislation would require the consent of the devolved assemblies', *The Constitution Unit*, 13 June 2016, <[constitution-unit.com/2016/06/13/removing-references-to-eu-law-from-the-devolution-legislation-would-involve-the-sewel-convention/](http://constitution-unit.com/2016/06/13/removing-references-to-eu-law-from-the-devolution-legislation-would-involve-the-sewel-convention/)>, visited 31 August 2016. On the other hand, by Sch. 5, para. 7(1) to the 1998 Act, 'international relations', explicitly including those with 'the European Union (and its

devolved legislative consent can be obtained, especially in relation to the remain voting Scotland and Northern Ireland, and even given the pro-remain Labour government of Wales, will likely depend on the degree to which the UK is to separate itself from the EU. The convention has also been bolstered in relation to Scotland through its articulation as a principle which will 'normally' be respected in the most recent (pre-Brexit) statutory amendments to the devolution system.<sup>80</sup> The framing of this statutory provision does not have the effect of making a failure to comply with the Sewel convention unlawful, but does seem to enhance the formal authority of what was already a very significant and well-respected political precept underpinning the UK's system of devolved governance.<sup>81</sup> Of course, if Brexit produces an independence referendum in Scotland (or even Northern Ireland) then the UK government will have much bigger problems than recrafting the devolution Acts. Yet even in the absence of this most radical of challenges to the very existence of the UK as currently constituted, it is clear that devolution will complicate the UK's withdrawal from the EU in ways that offer no obvious resolution capable of reconciling the competing interests at stake.

### *Concluding and legitimising the process*

Once a deal is in place to effect the exit of the UK from the EU, the terms are known and domestic legislative changes have been agreed (at least provisionally) to come into force upon the termination of membership, how will the process be concluded? A crucial issue in this sense is whether some further legitimisation of the terms of Brexit is required as a matter of domestic constitutional law or principle. The Brexit referendum delivered a narrow, yet clear and decisive, mandate for the UK to leave the EU. But the nature of that exit (to put the point in the most charitable way) could not be known in the early months of 2016, and in any event (to put the point less charitably) there was a manifest failure by the major leave campaigners to articulate any kind of clear, coherent or consistent vision of the UK's future outside the EU. Is, then, some further resort to the electorate necessary to give a decision as momentous as departure from the EU the kind of

institutions) are matters reserved to the UK, and therefore change to devolved governance in this area may potentially fall outside the scope of the convention, if it is viewed as merely consequential to the UK's withdrawal from the EU.

<sup>80</sup> Scotland Act 2016, s. 2, amending the Scotland Act 1998, s. 28. It is notable that this new statutory recognition of the convention does not make reference to the expanded scope discussed above – which includes alterations of devolved competence within the ambit of the convention – but instead only to the normal requirement of devolved consent where the UK Parliament legislates 'with regard to devolved matters'.

<sup>81</sup> See generally M. Gordon, 'The UK's Fundamental Constitutional Principle: Why the UK Parliament Is Still Sovereign and Why It Still Matters', 26 *King's Law Journal* (2015) p. 229, at p. 242-247.

legitimacy that the UK's democratic political constitution ought to be understood to require?

There have already been calls for a second national referendum to confirm the outcome of the Brexit negotiations.<sup>82</sup> The UK's uncodified constitution contains no legally binding rules which prescribe when it will be necessary for a referendum to be held; instead, arguments for a referendum must be framed and justified in political constitutionalist terms.<sup>83</sup> Whether a persuasive argument can be so constructed is likely to remain a matter of serious debate in the coming years. From one perspective, the UK's relationship with the EU is clearly of sufficient constitutional significance to justify direct democratic decision-making. And if the decision to leave was taken by the electorate, it is similarly arguable that the terms of departure are also a matter for 'the people' of the UK. Yet there are also a range of problems with this position. First, at the conclusion of negotiating Brexit, the point may well be moot – there may be no way back with our European partners after potentially punishing exit discussions, and the satisfaction or otherwise of the UK population with the terms of the final deal on offer may be utterly irrelevant.<sup>84</sup> If a superior deal is unlikely to be obtainable, could the UK simply withdraw the Article 50 notification and retain EU membership? The legal possibility of this is open to question,<sup>85</sup> but to seek to remain at that point would bring accusations of frustration of the original Brexit mandate, and could further inflame UK political debate, potentially ensuring even greater anti-European sentiment in perpetuity. This in itself indicates a second difficulty: a further referendum risks becoming a vehicle for the perpetuation and aggravation of a range of existing resentments focused at both domestic and European political actors, and triggering accusations (whether justified or opportunistic) of elite rejection of popular decision-making, which is of course not an unknown phenomenon when it comes to direct

<sup>82</sup> See e.g. 'Owen Smith to offer referendum on Brexit deal if elected Labour leader', *The Guardian*, 13 July 2016, <[www.theguardian.com/politics/2016/jul/13/owen-smith-to-offer-referendum-on-brexit-deal-if-elected-labour-leader](http://www.theguardian.com/politics/2016/jul/13/owen-smith-to-offer-referendum-on-brexit-deal-if-elected-labour-leader)>, visited 1 October 2016.

<sup>83</sup> See generally House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom* (HL Paper 99, 7 April 2010).

<sup>84</sup> There is also a problem of timing, given the constraints imposed by Art. 50 TEU: would it even be possible to negotiate a withdrawal agreement, obtain the consent of the European Parliament, and hold a referendum on the terms in the UK within two years from the notification of intention to withdraw? If not, the UK would require the support of all members of the European Council to extend the two-year period, to hold a national referendum at which it is possible the entire agreement could be rejected. I am grateful to the editors for this point.

<sup>85</sup> See e.g. 'There's a loophole in Article 50 that lets Britain back into the EU whenever we want', *The Independent*, 25 July 2016, <[www.independent.co.uk/news/business/theres-a-loophole-in-article-50-that-lets-britain-back-into-the-eu-a7155166.html](http://www.independent.co.uk/news/business/theres-a-loophole-in-article-50-that-lets-britain-back-into-the-eu-a7155166.html)>, visited 1 October 2016; J-C Pirié, 'Article 50 is not forever and the UK could change its mind', *Financial Times*, 1 September 2016, <[www.ft.com/content/b9fc30c8-6edb-11e6-a0c9-1365ce54b926](http://www.ft.com/content/b9fc30c8-6edb-11e6-a0c9-1365ce54b926)>, visited 13 September 2016.

democracy and the EU.<sup>86</sup> There is emerging evidence that the result of this referendum can be understood as part of a broader ‘anti-politics’ narrative, and that suspicion of domestic, European and international elites drove many who rejected the status quo.<sup>87</sup> The disjunction between political elites and the broader electorate is a profound constitutional problem – not just in the UK or the EU, but across democratic states – and in responding to this challenge, action which has the potential to exacerbate the situation should be avoided.

Third, even if judged to be worth the potential risks, a second referendum to approve the terms of Brexit creates serious potential for clashing direct democratic mandates. Could popular rejection of the proposed future EU relationship be interpreted as a vote to remain? Even if a referendum question could be framed to avoid this possibility, that may miss the point – for many advocating a second referendum, the reversal of the decision to leave is exactly the goal of going back to the electorate. Yet this path takes us into very difficult constitutional territory; indeed, it almost invites a conflict which is irresolvable on its own terms, and it is not as if the UK is lacking for such conflicts already. Finally, would a failure to exit now on the basis of some alternative direct democratic mandate simply condemn the UK (and indeed the other member states) to experience ‘neverendums’ on continuing EU membership? Not only might this obstruct EU plans for reform and redevelopment,<sup>88</sup> but also inhibit future UK governments from attempting to articulate and establish a more positive relationship with Europe. That the latter could even be attempted might seem difficult to imagine in the present environment, but the reductive defence of EU membership and its national benefits which dominated mainstream debate during the Brexit referendum suggests that fresh thinking may be required as to the UK’s aspirations regarding its relationship with Europe as a continent, as well as a political entity.

If the idea of a second referendum would pose difficulties which are, in my view, insurmountable, could there be an alternative way of legitimising the Brexit negotiations? We may consider whether a domestic general election could have some role to play in the process of exiting the EU. To require a UK government making such momentous decisions to seek a specific mandate for its actions could have great democratic value and importance. Yet the crucial question is when this could be done. Given the lack of clarity about what Brexit might amount to

<sup>86</sup> See G. de Búrca, ‘If At First You Don’t Succeed: Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change’, 33 *Fordham International Law Journal* (2011) p. 1472.

<sup>87</sup> See e.g. W. Jennings, ‘North v South, Young v Old – the New Political Faultlines’, *The Guardian*, 4 June 2016, <[www.theguardian.com/politics/2016/jun/04/eu-referendum-campaign-polls-fault-lines-politics](http://www.theguardian.com/politics/2016/jun/04/eu-referendum-campaign-polls-fault-lines-politics)>, visited 1 October 2016.

<sup>88</sup> See C. Mac Amhlaigh, ‘10 (pro-EU) reasons to be cheerful after Brexit’, *Verfassungsblog*, 22 July 2016, <[verfassungsblog.de/10-pro-eu-reasons-to-be-cheerful-after-brexit/](http://verfassungsblog.de/10-pro-eu-reasons-to-be-cheerful-after-brexit/)>, visited 1 October 2016.



exhibited during the referendum campaign, and the spectrum of potential outcomes, I would argue that it is constitutionally necessary for a government to obtain a specific mandate approving the kind of relationship with the EU that it wishes to negotiate before attempting to make that vision a reality.<sup>89</sup> Yet the possibility of this seems diminished at present – although far from an absolute barrier, recent changes to the rules concerning ‘early general elections’ which accompanied translation of the power to dissolve Parliament from the royal prerogative into primary legislation, make such a prospect more complicated,<sup>90</sup> and the current Prime Minister appears to have no desire to test the new statutory process.<sup>91</sup> More crucially, however, the utility of a general election may be clear at the start of the process – in providing a test of the agenda for negotiation set by the government – but it would be limited at the end, if intended to provide an opportunity to approve a Brexit deal. Introducing a new UK government at this point, with some potentially alternative indirect (as opposed to direct) democratic mandate, if even plausible at all, would generate unparalleled uncertainty, and revisiting commitments made in good faith would surely be unpalatable to the remaining member states.<sup>92</sup> Instead, the *realpolitik* would surely be that such a new government would have at best only limited room for manoeuvre, and Brexit would have pushed past the point of no return.

The questions of legitimacy which revolve around Brexit are, of course, fluid and (rightly) contested. Further debate may reveal new options, or the difficulties I have traced here may be overcome by events, making either a second referendum

<sup>89</sup> M. Gordon, ‘Brexit: The Constitutional Necessity of an Early General Election’, *UK Constitutional Law Association*, 6 July 2016, <[ukconstitutionallaw.org/2016/07/06/mike-gordon-brexit-the-constitutional-necessity-of-an-early-general-election/](http://ukconstitutionallaw.org/2016/07/06/mike-gordon-brexit-the-constitutional-necessity-of-an-early-general-election/)>, visited 1 October 2016.

<sup>90</sup> Fixed-term Parliaments Act 2011, s. 2. In accordance with these new statutory rules, an early general election can only be triggered in two ways: first, an early election can be held immediately if approved by a two-thirds majority in a vote of the House of Commons (by s. 2(1)(b)); second, if a government loses a vote by a simple majority on confidence motion in the House of Commons, an early election will be held unless a government (re)gains the confidence of the Commons within 14 days (by s. 2(3)). Prior to the 2011 Act, the Prime Minister could request the dissolution of Parliament and a general election from the monarch at any moment, subject to a statutory rule that the maximum duration of a Parliament was five years.

<sup>91</sup> See e.g. ‘Theresa May rules out second EU referendum or vote on terms of Brexit’, *The Independent*, 30 August 2016, <[www.independent.co.uk/news/uk/politics/brexit-eu-second-referendum-theresa-may-rules-out-general-election-a7216406.html](http://www.independent.co.uk/news/uk/politics/brexit-eu-second-referendum-theresa-may-rules-out-general-election-a7216406.html)>, visited 1 October 2016.

<sup>92</sup> Considerations of timing due to Art. 50 TEU again present a challenge here: could a UK general election be held following the negotiation of a withdrawal agreement with EU partners, but within the two-year time period running from notification of intention to withdraw? This seems unlikely, and as such, the UK would be faced with the unenviable task of persuading all members of the European Council to extend the initial withdrawal negotiation period to allow an election to be held at which the agreement could be rejected (among other consequences which are difficult to anticipate). I am grateful to the editors for this point.

or general election at some point a more foreseeable possibility. Yet perhaps we should also hesitate before linking questions of legitimisation exclusively to the conclusion of negotiations on exit from the EU. The very contestability of the legitimacy issues associated with Brexit means that they may also pervade other stages or elements of the process in as yet unpredictable ways. If we were being hyper-optimistic (and probably unduly so) we might consider whether the execution of Brexit could be approached in innovative ways which enhance the legitimacy (and potentially quality) of some of the many decisions to be taken concerning the replacement of substantive bodies of EU law with domestic rules. It could be possible to go beyond thinking about a review by a Royal Commission composed of the great and the good<sup>93</sup> – reinforced parliamentary mechanisms would be preferable in any event, in order to avoid the poor political optics associated with such elite level panels – and instead try to frame such processes around a more democratic impulse. For example, further evidence of the utility of direct citizen involvement in deliberative decision making<sup>94</sup> might suggest that there could be real value in some form of citizen-led convention – one recent version of which was employed to examine proposals for constitutional change in Ireland from 2012 to 2014<sup>95</sup> – to establish a direction for UK legal reform in the areas potentially left vacant by the withdrawal of EU norms. That Brexit is of sufficient constitutional significance and scale to justify such a complex understanding – supported and structured by expert input – seems obvious, and this could be a constructive way of exploiting existing popular engagement with the idea of the UK's post-EU future. However, it seems most unlikely that the government would be willing to risk limiting its unique opportunity to lead a reshaping of UK law after the responsibility for so doing has been prised back from the supranational level. As the idea of direct citizen involvement in executing Brexit verges on the utopian in a potentially dystopian period of uncertainty, it is hard, as a result, to see it gaining any traction regardless of its potential merits.

<sup>93</sup> See e.g. 'Parliament should have final decision on whether to leave EU, barristers say', *The Guardian*, 11 July 2016, <[www.theguardian.com/politics/2016/jul/11/brexit-parliament-should-make-ultimate-decision-on-whether-to-leave-eu-barristers-say](http://www.theguardian.com/politics/2016/jul/11/brexit-parliament-should-make-ultimate-decision-on-whether-to-leave-eu-barristers-say)>, visited 1 October 2016.

<sup>94</sup> See e.g. the evidence gathered from the Citizens' Assembly pilot projects in Sheffield and Southampton in 2015: M. Flinders et al., *Democracy Matters: Lessons from the 2015 Citizens' Assemblies on English Devolution*, <[citizensassembly.co.uk/wp-content/uploads/2016/04/Democracy-Matters-2015-Citizens-Assemblies-Report.pdf](http://citizensassembly.co.uk/wp-content/uploads/2016/04/Democracy-Matters-2015-Citizens-Assemblies-Report.pdf)>, visited 1 October 2016. See also G. Smith, *Democratic Innovations: Designing Institutions for Citizen Participation* (Cambridge University Press, 2009) ch. 3.

<sup>95</sup> See <[www.constitution.ie/](http://www.constitution.ie/)>, visited 13 September 2016. For discussion of the alternative citizens' assembly model used to evaluate and propose change to the voting system in British Columbia in 2004, see M.E. Warren and H. Pearse (eds.), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, 2008).

*Conclusion*

It is understandable that, at present, when we are still in the early stages of charting a path to Brexit, major attention has been given to the question of commencing this process. Yet we should not become distracted by this issue for too long – far greater challenges relate to the execution, conclusion and legitimisation of Brexit. Given the pace at which the process is likely to be conducted once Brexit negotiations formally begin, advanced planning and detailed thinking is now required to ensure that these challenges are understood and can, at least in principle, be confronted. There will be some hard constitutional choices ahead, and few easy answers – instead, the process by which UK exit from the EU will be achieved is likely to be beset by a range of competing aims and clashing principles, many of which will be difficult to reconcile, if indeed they are not simply incommensurable.

It is against this backdrop, then, that we should turn to consider Brexit as a constitutional challenge in the second sense identified at the outset of this article: not simply as a challenge *for* the UK constitution, in the ways mapped above, but also as a challenge *of* the UK constitution. With the sheer scale of the practical challenge for the constitution now starting to become clear, whether Brexit reveals limitations of the UK's existing constitutional arrangements, and whether the nature of these arrangements can be understood as having made some contribution to the decision to depart from the EU, will now be explored.

## BREXIT AS A CHALLENGE OF THE UK CONSTITUTION

The UK constitution is giving every impression of being a constitution in crisis. It is traditionally and distinctively a 'political constitution',<sup>96</sup> but is it now a constitution which has been overwhelmed by its politics? The forces which have led to Brexit may be understood as amounting to a challenge of the UK constitution in two ways. First, limitations or flaws in the structures and fabric of the constitution may have been both revealed and heightened. Second, the very dynamics of the UK's constitutional arrangements may be implicated in the decision to depart from the EU – and if there is such a 'constitutional element' to the result of the 2016 referendum, we must also consider whether such underlying issues can truly be addressed as the UK charts its post-EU political future.

*Exposing limitations of the UK's constitutional arrangements?*

The range and extent of the challenges that Brexit potentially creates for the UK constitution have been examined above (although inevitably incompletely, at this

<sup>96</sup> See J.A.G. Griffith, 'The Political Constitution', 42 *Modern Law Review* (1979) p. 1.

early stage of the process). Across the range of potential problems – which include those concerning the requirements to trigger Article 50, the respective roles of the UK Parliament and government, the position of the devolved institutions and the future of the territorial state, and the domestic legislative changes necessary – a number of patterns might appear to emerge. In different ways, we see a lack of clarity about what should happen, an array of competing actors to engage and satisfy, a multiplicity of principles to aspire to respect, and uncertainty about what the consequences of Brexit might ultimately be.

In such circumstances of pervasive difficulty, we might be led to ask whether Brexit is here serving to expose limitations in the UK's constitutional arrangements or constitutional model. If we look beyond the throwaway normativity of claims that the UK has no constitution at all,<sup>97</sup> there is a distinctive form of constitutionalism classically understood to be in operation. In the absence of a definitive constitutional text or instrument, the UK's uncodified constitution affords significant space for political action. This vision of the political constitution is defined by a sovereign UK Parliament with the flexibility to reshape the constitution by primary legislation, a fusion of executive and legislative power underpinned by ideas of 'responsible government' procured through electoral and parliamentary accountability, and relatively peripheral judicial oversight operating principally where the boundaries of allocated power have been exceeded by public authorities. Against the backdrop of Brexit, it is not unreasonable to question whether the UK constitution's very openness to politics is also its fundamental systemic flaw, hindering the ability of the various institutional actors to organise a coherent response to the challenges presented. Indeed, that it will be left for these various actors to organise the response to Brexit, due to a distinct lack of pre-existing constitutional prescription as to the domestic path by which to depart from the EU, may in itself be taken to be the ultimate failing of the UK's political constitution.

There is clearly something to be said in support of this line of argument. It is certainly the case that Brexit has potential both to illuminate and exacerbate a range of existing ongoing difficulties concerning the UK's contemporary constitutional arrangements.<sup>98</sup> The challenges for the UK constitution which have been explored above do not arise in a vacuum; instead, to a significant extent they reflect pre-existing difficulties in a constitutional system which is already very much in flux.<sup>99</sup> Concerns about the division of power between the legislature and

<sup>97</sup> Contrary, for example, to the famous argument developed in F.F. Ridley, 'There is No British Constitution: A Dangerous Case of the Emperor's Clothes', 41 *Parliamentary Affairs* (1988) p. 340.

<sup>98</sup> See e.g. R. Masterman and C. Murray, 'A House of Cards?', *UK Constitutional Law Association*, 4 July 2016, <[ukconstitutionallaw.org/2016/07/04/roger-masterman-and-colin-murray-a-house-of-cards/](http://ukconstitutionallaw.org/2016/07/04/roger-masterman-and-colin-murray-a-house-of-cards/)>, visited 1 October 2016.

<sup>99</sup> See e.g. N. Walker, 'Our Constitutional Unsettlement', *Public Law* (2014) p. 529.

the executive, the extent of constructive engagement between the institutions of UK central government and the devolved governments, the place of direct democratic decision-making, the effectiveness of mechanisms of parliamentary accountability, the appropriate balance between primary and delegated law-making, and the future direction of the United Kingdom itself, are not new – rather they are given fresh impetus by Brexit. It is, moreover, unlikely that additional attention or aggravation will increase the prospect of broader domestic constitutional reform. If the process of departing from the EU becomes politically and constitutionally all-consuming, it may be enough to hope that these difficulties can simply be managed, rather than expecting solutions to emerge. In that sense, Brexit may provide a case study which demonstrates acutely our existing constitutional inadequacies.

Equally, however, there is room to be sceptical of the assumptions which appear to underpin claims that Brexit has exposed the limitations of the UK's present constitutional model. First, the UK constitution has changed, is still changing, and this is in no small part a direct result of membership of the EU. It is a matter for debate how far the political constitutionalist paradigm still accurately represents the modern position in the UK.<sup>100</sup> We must also be careful not to present a vision of the UK constitution which ossifies certain principles, arrangements or philosophies. Nevertheless, in my view, the political constitutionalist paradigm does still have clear salience in the UK context – both descriptively and normatively – despite the changes which have occurred. Indeed, that this constitution is continually open to reformation is (at least ostensibly) one of its defining characteristics, and the extent of change in recent history can be understood as a vindication of the continuing force of the idea of a political constitution. But this does not mean that the openness and flexibility of the UK constitution should be overstated, nor that it is chronically uncertain, or even descends into 'incoherence'.<sup>101</sup> There are actually areas where the required position is as clearly established as might be expected in a more formal constitutional order – the debate as to whether the UK government has the power to trigger notification of intention to withdraw from the EU for the purposes of Article 50 under the royal prerogative is a good example of this. As discussed above, here we see a relatively settled position being unsettled by some (though certainly not all participants in the academic debate) who may wish to cultivate constitutional arguments which can be wielded (particularly through

<sup>100</sup> See e.g. C. O'Conneide, 'The Human Rights Act and the Slow Transformation of the UK's Political Constitution', *UCL Institute for Human Rights Working Paper Series*, No. 1 (2012), <[www.ucl.ac.uk/human-rights/research/working-papers/docs/colm-o\\_cinneide](http://www.ucl.ac.uk/human-rights/research/working-papers/docs/colm-o_cinneide)>, visited 1 October 2016.

<sup>101</sup> See e.g. I. McLean, *What's Wrong with the British Constitution?* (Oxford University Press 2010) p. 6.

legal action) to inhibit, obstruct or delay the Brexit process. There may be a danger in accepting the argument that Brexit has revealed the UK constitution to be fundamentally flawed, if it allows the superficial openness of the constitution to be exploited to establish an environment in which everything can be presented as remaining up for grabs. This misrepresents the true position, according to which the parameters of a domestic constitutional response to Brexit can at least be mapped and understood, even though many details await definition.

Second, we must bear in mind the unprecedented nature of Brexit. Any constitution would face challenges in dealing with such a major, unanticipated recalibration of its political architecture. And any constitution would struggle to meet those challenges, as seems likely for the UK constitution (and indeed, the 'written' constitution of the EU) as the process progresses. Yet it is nevertheless arguable that the political nature of the UK constitution, in addition to ensuring that the difficulties experienced will be brutally evident, will also make apparent what is surely the only way in which they can be confronted – through coordinated political action. In this sense, the UK will not be unduly constrained by law in responding to this momentous national challenge. Indeed, where we currently see legal means of problem-solving being emphasised – as regarding the domestic legal basis for giving notification of departure in accordance with Article 50 – this is likely to introduce additional, and unnecessary, complexity. For not only does this legal challenge have the potential to delay the process of Brexit, but in framing the commencement debate as one which concerns what is required as a matter of law, rather than what is desirable as a matter of political principle, the parameters of what might be conceivable have been regrettably narrowed. In contrast with what is likely to result from this legal parody, the real decisions to be made at this point are political. Moreover, it will be political pressure, incorporating both practical and principled concerns, and utilised by all manner of interested stakeholders, which is likely to be the most effective way of shaping the Brexit process.

We should not, therefore, reject the political constitutionalist model in reaction to Brexit – indeed, while existing difficulties with the UK's specific constitutional arrangements are likely to be magnified through the process of departing from the EU, the political constitution may offer the best hope (or indeed the only hope?) for an effective response to the challenges we can expect to experience. Such a response will be one that recognises that political compromise must be at the heart of organising the process of Brexit – both at the supranational level, between the UK, the EU institutions and remaining member states, and at the domestic level, between the various institutional actors operating at the centre of government and across the UK, and the broader electorate who have set us on this path. While success cannot be guaranteed – indeed, it is hard at this point to know what

‘success’ would even look like<sup>102</sup> – that the UK constitution does not conceal the essential nature of what lies ahead suggests that there is virtue to be found in the honesty of a constitutionalism which embraces, rather than simply tolerates, its fundamental politics.

However, in the political constitutionalism which is likely to dominate the UK’s response to Brexit, can we also see some of the root causes of the dissatisfaction motivating the decision to depart from the EU? Should Brexit also be understood as a challenge of the UK constitution because the result of the referendum was – in part – a function of constitutional considerations?

*UK constitutionalism as a contributory factor in generating Brexit?*

To explain in detail the causes of the UK’s decision to exit the EU is clearly a task which extends well beyond constitutional analysis. It is also a task which will take time, although there has already been much debate as to the initial indications. Clearly significant was the fact that the commitment to freedom of movement required by EU membership clashed with concern about immigration levels which were cynically, even viciously, exploited by some prominent leave campaigners.<sup>103</sup> Electoral demographics obviously had an important impact, particularly the enhanced engagement of older votes,<sup>104</sup> as did the failure of the then Prime Minister David Cameron to bring his party with him on a remain vote.<sup>105</sup> Yet in addition to these diverse contributing factors we have reason to question whether there was a constitutional element to the result of the Brexit referendum.

Was the nature of UK constitutionalism itself a factor? As the campaign developed, it was notable that constitutional themes and ideas seemed to resonate in the political and public discourse to a greater extent than might have been expected, notwithstanding the fact that whether the UK should have retained its membership of the EU is obviously a ‘constitutional’ question with ‘constitutional’ implications. This does not, of course, mean that constitutional

<sup>102</sup> The Prime Minister has, however, asked her government ministers to identify specific ways in which their departments can make Brexit a success; see ‘Theresa May calls Brexit meeting amid reports of single market split’, *The Guardian*, 28 August 2016, <[www.theguardian.com/politics/2016/aug/28/theresa-may-brexit-meeting-single-market](http://www.theguardian.com/politics/2016/aug/28/theresa-may-brexit-meeting-single-market)>, visited 1 October 2016. Whether this attempt to exploit the benefits of positive thinking will itself succeed remains to be seen.

<sup>103</sup> See e.g. ‘Nigel Farage’s anti-migrant poster reported to police’, *The Guardian*, 16 June 2016, <[www.theguardian.com/politics/2016/jun/16/nigel-farage-defends-ukip-breaking-point-poster-queue-of-migrants](http://www.theguardian.com/politics/2016/jun/16/nigel-farage-defends-ukip-breaking-point-poster-queue-of-migrants)>, visited 1 October 2016.

<sup>104</sup> For data and analysis, see <[lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/](http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/)>, visited 1 October 2016.

<sup>105</sup> See e.g. ‘Where’s the evidence that Jeremy Corbyn is to blame for Brexit?’, *The Guardian*, 4 July 2016, <[www.theguardian.com/commentisfree/2016/jul/04/evidence-blame-jeremy-corbyn-brexit-remain-labour-conservative](http://www.theguardian.com/commentisfree/2016/jul/04/evidence-blame-jeremy-corbyn-brexit-remain-labour-conservative)>, visited 1 October 2016.

considerations dominated the debate. Yet as seemingly well-established strategies for electoral success – most notably the ‘it’s the economy, stupid’ approach<sup>106</sup> – failed ultimately to persuade a majority of the electorate to maintain the status quo, the leave campaign’s pseudo-constitutionalist call to ‘take back control’ was effective in capturing and combining a range of issues. If we look beyond the superficiality of this message, we may discern a number of constitutional dynamics potentially at work in the Brexit vote.

The constitutional underpinnings of the referendum result – or of the long-cultivated eurosceptic environment in which the decision to exit the EU was reached – may include, among others, a discomfort with the ‘eurolegalism’ which has arguably come to define the European project,<sup>107</sup> and the resulting changes in domestic law and practice which such a supranational philosophy prompts. A related concern may be that the UK’s domestic constitutional reliance upon mechanisms of governmental accountability and responsibility (imperfectly though they may operate in practice) does not readily translate to the supranational level of governance.<sup>108</sup> Such discontinuities between organising principles of EU and UK constitutionalism can of course be overstated, and some degree of divergence has been inevitable by virtue of being a member state. Yet an underlying tension between these different visions of political organisation – ‘national’ and ‘European’ – may still remain, or even merely influence UK perceptions of the EU. Indeed, a general scepticism towards the power concentrated within remote international or supranational governance networks, of which the EU is the most advanced kind, may be a constitutional attitude which – whether justified in these particular circumstances or not – could have contributed to a rejection of UK participation in this architecture of European cooperation.

Perhaps the most significant constitutional idea to feature in Brexit debates, however, was the notion of sovereignty. Exactly what was meant by this seemed to vary from speaker to speaker, and from day to day.<sup>109</sup> In some ways it may be an umbrella term capturing some or all of the potential concerns identified above: a preference for national level decision making through domestic processes, over pooled power and European influence. The vagueness of the idea of sovereignty deployed during the Brexit referendum differs markedly from the

<sup>106</sup> See e.g. ‘It’s Not the Economy, Stupid’, *Bloomberg Markets*, 5 August 2016, <[www.bloomberg.com/news/articles/2016-08-05/it-s-not-the-economy-stupid](http://www.bloomberg.com/news/articles/2016-08-05/it-s-not-the-economy-stupid)>, visited 1 October 2016.

<sup>107</sup> See generally R.D. Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2011).

<sup>108</sup> See e.g. A. Tomkins, *Our Republican Constitution* (Hart 2005) p. 5-6.

<sup>109</sup> See M. Gordon, ‘The UK’s Sovereignty Uncertainty’, *UK Constitutional Law Association*, 11 February 2016, <[ukconstitutionallaw.org/2016/02/11/mike-gordon-the-uks-sovereignty-uncertainty/](http://ukconstitutionallaw.org/2016/02/11/mike-gordon-the-uks-sovereignty-uncertainty/)>, visited 1 October 2016.



domestic idea of the sovereignty of the UK Parliament, which is a foundational, symbolic principle of UK constitutionalism.<sup>110</sup> Yet it might nonetheless be thought that the very primacy afforded to this notion of sovereignty in the domestic constitution invites, or at least facilitates, a preoccupation with questions as to the location of ultimate authority which was evidently exploited – in a rough and ready fashion – in arguments about Brexit. That there exists broad consensus that the UK conception of parliamentary sovereignty had been reconciled successfully with the core precepts of EU membership (and in particular, the domestic supremacy which must be afforded to EU law) did not seem to be significant during the course of the referendum campaign. Instead, the notion of sovereignty employed to justify Brexit was more emotive and less precise, leaving it open to debate exactly what those citizens who were persuaded by such arguments were voting to restore.

It is not my purpose to endorse these claims as to the (potential) constitutional underpinnings of Brexit, nor to condemn the domestic reliance on the idea of parliamentary sovereignty as a central organising concept of the UK constitution. Instead, I simply want to consider: if there were constitutional factors which contributed to the referendum decision to leave the EU, such as those sketched above, can they be responded to? Or are these really constitutional concerns which extend beyond the UK's relationship with the EU? This will be important in two ways: first, regarding the future development of the UK constitution, and second, regarding the future of the post-Brexit EU.

First, the uncertainty about any underlying constitutional causes – as about much else concerning Brexit – makes it far from straightforward to anticipate how the future development of the UK constitution could respond to this agenda. Again, much would depend on the future substantive relationship agreed with the EU – if the UK were to end up formally outside of the Union, but within related structures such as the single market, and consequently subject to fields of EU law, it would be open to question whether this could amount to a restoration of sovereignty in any sense. Indeed, many might suggest that in such circumstances the UK's power to control its own affairs would be diminished, given the loss of influence over EU law-making this would necessarily entail. Even if the UK were to negotiate a position entirely apart from the EU and its legal norms, there are other international institutions and power structures with which we would be required to engage. Will the accountability gap be any less apparent, for example, with respect to the World Trade Organisation, or the institutions which could be empowered under international trade agreements?<sup>111</sup>

<sup>110</sup> See Gordon, *supra* n. 22, p. 21-32.

<sup>111</sup> There is a parallel here with the investor-state dispute settlement mechanisms which have caused real concern as part of the public debate about the US-EU Transatlantic Trade and

It is difficult to avoid the conclusion that if Brexit is intended to herald a return to a romanticised constitutional past it will be a significant disappointment. A UK constitution founded on the principle of untrammelled national sovereignty is not just impossible under modern conditions, but the very notion is a myth – this much should be readily apparent in a tradition which is sceptical of the utility of formal limitations, while recognising that political constraint can provide the core of a constitutional framework. The unavailability of a constitution that is invulnerable to European influence does not mean abandoning all ideas of (parliamentary) sovereignty, appropriately understood, operating in a domestic context. It also does not mean that the broad constitutional concerns discussed here should be disregarded as the unalterable pillars on which a supranational legal order must rest. Rather, the UK (in common with others) will likely continue to grapple with the questions of what it means to be a nation state in a world of globalised authority and diffuse institutional arrangements, and how best to combine ideas of sovereignty and autonomy with the realities of power and influence. Perhaps engagement with these challenges might be advanced through reduced focus on how to reclaim ‘lost’ national power, and greater reflection on how states can use their positions to enhance the accountability and responsiveness of supranational systems of governance. Yet paradoxically, this constitutional soul searching may be a more difficult task for the UK outside the EU than it would have been on the inside.

Second, there are questions here of broader importance for the EU’s remaining member states too – should Brexit be treated as a function of UK constitutional exceptionalism, or does it give cause for more general reflection regarding the scope, ambition and framing of the European project? While integration of the power and responsibilities of national and European institutions continues, how can the fault line – which though perhaps blurred, certainly remains – between nation states and supranational structures best be navigated? Is the relocation of competence to the supranational level generating a sense of remoteness – both for those exercising power and those subject to it – which is pernicious, and serves to undermine the benefits which greater cooperation can offer? How can the accountability gap be bridged? Whether Brexit really does mark the ‘high watermark’ of Europeanisation, let alone of globalisation,<sup>112</sup> very much remains to be seen. But it may (re-)expose significant challenges for those interested in the operation of some of the most fundamental of constitutional principles at the

Investment Partnership. The UK government, of course, has not appeared distressed about a dilution of national sovereignty in this context.

<sup>112</sup> See P. Mason, ‘Corbyn delivered the Labour vote for remain – so let’s get behind him’, *The Guardian*, 26 June 2016, <[www.theguardian.com/commentisfree/2016/jun/26/corbyn-leader-brexit-labour-rebels-sabotage](http://www.theguardian.com/commentisfree/2016/jun/26/corbyn-leader-brexit-labour-rebels-sabotage)>, visited 1 October 2016.

supranational level – and it is not clear whether the EU is really any better placed to respond to these questions as to its functioning and legitimacy than is the UK in relation to its own many and varied difficulties.

Both in the UK and in the EU, therefore, we can choose to treat Brexit as a momentary challenge, presenting a set of particular problems which can be addressed (no doubt imperfectly), and then moved beyond. Or we can view it as raising more fundamental constitutional questions about government and governance, democracy and accountability, power and sovereignty, the national and the supranational. Whether Brexit does or does not ultimately represent a critical challenge to constitutional pluralism,<sup>113</sup> or constitutional cosmopolitanism,<sup>114</sup> or even (if the limits of what withdrawal from the EU can achieve become apparent) constitutional parochialism, is clearly a matter for the future. Yet, for now, it may be most appropriate to treat Brexit as both a general and a specific constitutional challenge – there is little room for complacency in such a response.

#### CONCLUDING REFLECTIONS

Having considered Brexit as a challenge *for* the UK constitution and *of* the UK constitution, we can be in little doubt that – in a range of ways – UK exit from the EU is going to be a difficult constitutional undertaking of immense importance, while posing a variety of formidable questions for the future. If Brexit is already ubiquitous, it is likely to continue to define the development of the UK constitution for years to come. This constitutional future is likely to be one of struggling with the practicalities of Brexit, and potentially its unintended consequences, which may even extend to include the disintegration of the UK as the territorial state we presently know. Yet Brexit may also be about more than this. If the concerns which provoked the majority decision in the 2016 referendum are about more than mere dissatisfaction with membership of the EU, and reflect deeper, thicker tensions concerning the location of power and the adequacy of accountability under modern constitutional conditions, the inability of even a national democratic decision of this magnitude to prompt change of a kind desired could be a cause of yet further frustration. In this sense, even when Brexit does become a process and event, it may also still be necessary to understand and engage with it as a state of mind, both within and beyond the UK, if we are to

<sup>113</sup> See e.g. K. Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014); C. Harvey, 'Complex Constitutionalism in a Pluralist UK', *UK Constitutional Law Association*, 2 July 2016 <[ukconstitutionallaw.org/2016/07/02/colin-harvey-complex-constitutionalism-in-a-pluralist-uk/](http://ukconstitutionallaw.org/2016/07/02/colin-harvey-complex-constitutionalism-in-a-pluralist-uk/)>, visited 1 October 2016.

<sup>114</sup> See M. Loughlin, 'The End of Avoidance', 38 *London Review of Books* (2016) p. 12-13.

attempt to respond to the constitutional challenges posed by alienated citizens and competing collective identities, the diffuse distribution of power and fragile processes of accountability.

In terms of how the UK constitution responds, it may seem paradoxical to argue – as I have done – that Brexit should not cause us to reject the UK's political constitutionalist model, even if it may have been a contributing factor in leading to a referendum vote to depart from the EU. Yet it will, in my view, be necessary for us to attempt to exploit the strengths of this approach to constitutionalism if we are to confront the challenges of Brexit. As we are in self-imposed arduous circumstances, we must look within the UK constitution for solutions – a repository of potential principles does exist, but they could provide the basis for very different visions of the UK's constitutional future. When drawing on these principles to provide a framework for Brexit, we must try to ensure that our constitutional response is informed by ideas of diversity, toleration, accountability, and pragmatic effectiveness, rather than those of exceptionalism, isolation, complacency and affected hubris. Whether we can genuinely expect such a framework to be the result of UK exit from the EU is far from clear. A period of profound change lies ahead of the UK, and also the EU. At the end, whether for 'remain' or 'leave', we may all be left wondering: was it worth it?

