

What does 'Brexit means Brexit' actually mean?

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*Theresa May has famously stated that 'Brexit means Brexit', but what does this actually mean (if anything)? **Sionaidh Douglas-Scott** examines the legal implications of triggering Art. 50. The position of referendums in UK constitutional law is very hazy, she notes, and previous UK-EU negotiations on crucial matters have often been shrouded in secrecy, with the key negotiators withholding information even from the Parliament. Paradoxically, Brexit may therefore not mean 'taking back control' by the Parliament, but rather a dominance by the executive for its political purposes.*



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What sort of Brexit?

On 28 July in Bratislava, Theresa May [told eastern European countries](#) that the British people sent a 'very clear message' on the need to reduce migration through their vote to leave the EU, and that the UK's deal with the EU would have to take into account voters' views on immigration control. But does this mean that free trade with the EU will have to be sacrificed in order to curb free movement of people? If so, then the possibility of the UK following the 'Norway option', by joining the EEA, would seem to be ruled out.

Yet in many ways, the EEA might be the best alternative to EU membership for the UK. It could provide legal security for trade with the EU in most goods and services and could be achieved quite quickly, reducing uncertainty. EEA membership would mean the UK was free to sign its own trade deals with other countries and would not bind the UK to some of the EU's more contentious policies such as fisheries, agriculture or VAT policy.

However, the EEA would also mean continuing free movement of persons with the EU, which many see as a key reason for the Leave vote. (Yet, notably, unlike EU membership, [Chapter 4 EEA](#) provides a safeguard, whereby EEA states can disapply part of the EEA, 'If serious economic, societal or environmental difficulties of sectorial or regional nature liable to persist are arising.')

But must Brexit mean 'hard Brexit'? Must resistance to the continued free movement of persons within the EU dictate the terms of any deal the UK negotiates with the EU? I argue not – there are no legal (or political) reasons

why Brexit negotiations must take any particular direction, let alone a hard one.

Referendums in UK law

The [EU Referendum Act 2015](#), upon which this year's 23 June ballot was based, did not provide for the referendum result to have formal effect. It was an advisory rather than a mandatory referendum. This is in contrast, for instance, to the 2011 Alternative Vote referendum, instigated by the [Parliamentary Voting System and Constituencies Act 2011](#), s. 8 of which provided that alternative vote provisions would come into force if there were a majority of 'Yes' votes cast in the referendum. In the event, there was a No vote and so this did not happen.

The position of referendums in UK constitutional law is rather hazy. UK-wide referendums were not used until the late 20th century, and notably, many hugely important issues such as declaring war, decolonization, abolition of capital punishment, legalization of homosexuality, the welfare state, royal abdications, measures limiting powers of the Crown and House of Lords, were not subject to referendums.

UK constitutional law (though Scotland is a different matter) does not acknowledge a principal of popular sovereignty. Instead, sovereignty is seen as resting with the Crown in Parliament, and UK politics is based on representative democracy. Although there may be democratic arguments for referendums, their use would appear to undermine parliamentary sovereignty, if the popular vote goes against the preferences of the majority of MPs (as in the case of June's EU Referendum).

Since the 1970s, however, referendums have become more common in the UK, most notably in the case of devolution to Scotland, Wales and Northern Ireland, and membership of the EU. However, their use has not always been due to a desire for direct democracy, of reconnecting the electorate with the political system. Rather, in some cases their employment illustrates an instrumental use by governments. In 2010, the House of Lords Constitution Committee, in its [report on referendums in the UK](#), declared that 'we regret the ad hoc manner in which referendums have been used, often as a tactical device, by the government of the day.'

Referendums have been held to overcome government divisions, as in 1975, when Harold Wilson held an In-out referendum over EEC membership to deal with divisions in the Labour party, or as a concession to hostile backbenchers, as in the devolution referendums of 1979. The 2011 AV referendum sprung from promises and deals made within Coalition government. The 2016 EU Referendum was a response to fractious dissent within the Conservative party, and also a reaction to external pressure posed by Ukip.

However, my purpose here is not to criticize the use of referendums, which may or may not be forming part of our constitutional toolbox. It is to note that sometimes referendums are used for particular political purposes. Where referendums are used in such instrumental ways, it is all the more important that specific constitutional constraints are set on their use, such as voting thresholds, requirements for supermajorities, protection of devolved nations, and so on, in order that the UK Constitution not be subject to tactical political purposes. The EU Referendum Act contained no such constraints. It is important that its follow-up should not be skewed by political bias.

The consequences of the EU referendum

The EU Referendum result has been momentous, not just in terms of the UK's relationship with the EU, but also for our understanding of the British Constitution. It is astonishing that there could be so little clarity about such matters as whether an Act of Parliament is necessary to trigger Article 50 TEU, whether there should be another referendum to approve any withdrawal agreement, and whether the devolved nations should have any considerable role in all of this. Can the British Constitution really be fit for purpose if there can be so little certainty over these matters?

However, my focus is on just one aspect of the referendum result: the question of what the referendum itself requires by way of follow up. We have heard that Brexit means Brexit – but what does this mean? What, as a matter of law, does a vote to leave the EU in the referendum require?

It has already been stated that the referendum is advisory only. Legally, both the government and parliament could choose to ignore it. They could choose never to trigger Art 50 TEU, never repeal the European Communities Act 1972, nor ever take any other step inimical with the UK's EU membership. That would be both lawful and constitutional. However, it has become a truism to add that politically the situation is quite different, and that it would be highly inexpedient to ignore the referendum result.

Yet there are many examples where governments have believed it politically possible to do just that. So for example, in July 2015 the Greek people voted by a roughly 20% majority to reject austerity conditions that would be imposed by EU and other international institutions in return for a large bailout. Notwithstanding, the Greek government [agreed soon after](#) to perhaps even tougher measures. In 2008, Irish voters rejected the Lisbon Treaty, but in 2009 a [second referendum](#) was held in Ireland, with 67 % of voters instead now backing the treaty.

Leaving EU treaties aside, we may turn to Sweden, which in 1955 [held a referendum](#) concerning which side of the road cars should drive on. Although 83 % Swedes voted to remain driving on the left, the government ignored this vote and later legislated to introduce driving on the right, believing this to be in the interests of the Swedish people. So even politics need not dictate action on referendum results.

However, the government does not seem minded to ignore the referendum result and stated in the policy paper, [‘The Process for Withdrawing from the European Union’](#), published February 2016, that it is under a ‘democratic duty to give effect to the electorate’s decision.’ This view was presented to Parliament and was not challenged.

But what does ‘giving effect’ to the electorate’s decision mean? Neither the referendum legislation, nor the vote itself, provide any mandate or guidance as to what the UK’s future relationship may be with the EU, or with other states (which will not be dealt with in any detail in the Art 50 negotiations). The electorate voted only to leave the EU. They did not agree to any particular exit agreement.

Some of those who voted Leave may desire a Norwegian style arrangement, which would mean EEA membership involving access to the Single Market, and associated freedom of movement. For other Leave voters, however, terminating freedom of movement for EU citizens is the reason why they voted to Leave. No doubt the Leave campaign’s shift to a focus on immigration in May 2016 did, in the words of [Sir Lynton Crosby](#), ‘pay off’.

[A post-referendum poll](#) conducted by Tory Deputy Chairman Lord Ashcroft shows, however, that immigration was only a secondary motivator for leaving the EU. Of the Leavers polled, most voted out because they believed that ‘key decisions about the UK should be taken in the UK.’ 20% of Leave voters did not agree immigration was a force for ill. Such polls are rough tools, and it is very hard indeed to know why voters voted in the way they did. Nonetheless, however important immigration was as a factor for those voting Leave, it is unlikely that of all those who voted in the EU Referendum, a majority were in favour of reducing immigration from the EU.

If the referendum result is merely advisory in law, and the vote to leave the EU does not provide a mandate for any specific future UK relationship with the EU, what follows from that? Where does that leave the UK government, and statements such as Theresa May’s proclamation that British people have sent a ‘very clear message’ on the need to reduce migration through their vote to leave the EU?

Is there any legal authority for the making of such statements? The argument to this point would suggest not, and that these reflect the political choices of the politicians concerned. However, notably, the Conservative party, in its election manifesto for the May 2015 general election, made no commitments as to the UK’s future relationship with the EU in the event of a No vote in any EU referendum. So the government (even less so, given the change of Prime Minister and most other members of the Cabinet) has no electoral mandate for any specific policy on future relations with EU. At the very least there would appear to be a political need for the government to legitimize any agreements it makes with the EU, by way of a general election or further referendum.

Renegotiating a new UK-EU relationship with regard to immigration: what (if any) are the legal constraints?

While the UK remains a member of the EU it may not perform any acts in violation of its EU obligations. This probably includes negotiating trade deals with 3rd countries, which, while the UK is a member of the EU, fall within EU competence and not that of the UK government. The UK may, however, presumably hold talks that fall short of formal negotiations.

But what, if any, constitutional constraints operate on the UK government once it has triggered Art 50 and is negotiating with the EU? May the government decide to rule out EEA membership? Must it include the devolved nations? Will these negotiations fall under the government's prerogative powers?

The royal prerogative has enjoyed a popular limelight, rather like Art 50 TEU, since the EU referendum. It comprises those powers once wielded by the monarch when directly involved in government. These powers include making treaties, declaring war, deploying the armed forces, granting pardons, and are now generally exercised by government ministers. Importantly, exercise of the prerogative does not usually require Parliament's approval.

Once Art 50 TEU is triggered it seems that the UK's withdrawal negotiations, and framework talks for future EU relations, will be conducted according to the usual practice under the prerogative. This is hardly a transparent process. Parliament has not traditionally had a major (or indeed any notable) role in such foreign and trade negotiations. Both government ministers and unelected and unaccountable officials conduct the negotiations behind closed doors.

The process is opaque and secretive. It has been exceptionally hard for Parliament to access information in advance of negotiations, and virtually impossible for it to play a part in shaping government's position. This is in contrast to the position in, e.g., Denmark and Finland. For example, in June 2007, at the time of government negotiations in advance of what would become the Lisbon treaty, it proved almost impossible for Parliament to gain information about the government's negotiating position. [Margaret Beckett, then Foreign Secretary stated](#),

'One of the conclusions that I have come to is that the less I say about what we might in principle accept and what we might not, the more I preserve the maximum amount of negotiating space to resist anything that I think is not in Britain's national interest. I appreciate that is unsatisfactory for the committee ... [T]he more I say ... the more I am giving away my negotiating room, which I am always deeply reluctant to do.'

There was a similar lack of information and consultation of both the UK Parliament and the devolved institutions during David Cameron's 2015/16 negotiations over a 'New Settlement' for the UK with Donald Tusk, a fact specifically noted by the House of Lords EU select committee in its [report on the EU Referendum and Reform](#). This does not bode well for communications to the UK Parliament and devolved institutions on any withdrawal agreement.

Of course, Parliament will have to ratify whatever withdrawal agreement is concluded under Art 50. So, for example, back in the early 1970s, the UK government negotiated its EEC accession (using prerogative powers). Parliament debated and assented to the Treaty of Accession under the former Ponsonby rules as well as passing the European Communities Act, and the UK joined the (then) EEC on 1st January 1973.

The Brexit agreement will probably be governed by the [Constitutional Reform and Governance Act](#) (CRAG) 2010 (which replaces the former Ponsonby rules), although it is possible that the EU Act 2011 might control the matter, in which case a referendum might also be required. Section 20 of CRAG states that if the House of Commons resolves within 21 days that the treaty should not be ratified, then subject to certain exceptions, it would be unlawful to do so. This rule prevents the executive from committing the UK at international level through ratification of a treaty of which Parliament disapproves.

The problem is that if Parliament refuses to ratify a withdrawal treaty with the EU, it will be too late for Parliament to insist on its own conditions. The EU might simply state that, in the event of no agreement being concluded, and Art 50's 2 year time period expiring, the UK should withdraw with no agreement, a situation hardly likely to favour the

UK. A withdrawal agreement is different to an accession treaty or a new treaty (such as the Lisbon treaty) expanding EU powers.

In these latter cases, if under domestic law ratification is not possible (as in the case of a Norwegian No vote to enter the EEC, or the Irish peoples' first No vote on the Lisbon Treaty) renegotiation often goes ahead (although requires unanimity) but in the meantime the status quo continues. In the case of withdrawal, Art 50 TEU also requires unanimous agreement of other EU states to continue negotiation beyond 2 years, but unlike in the other examples, the status quo does not continue, instead the treaties cease to apply.

This is why it is vital that Parliament maintains a handle on the process. There is no reason, for example, why EEA membership should be off the table. Neither domestic law nor politics dictates this. However, there is a danger that those negotiating the Brexit withdrawal from the UK will dictate its terms, and once Art 50 is triggered, they will have a great deal of discretion under the prerogative to do so.

If the [current lawsuit](#) brought against the UK government, requiring an Act of Parliament before Art 50 TEU is triggered, succeeds, then such an Act could set down conditions for negotiating the terms of Britain's exit. Otherwise, there is no guarantee that Parliament will be kept regularly informed of negotiation progress, nor of the terms sought. This will not mean 'taking back control' for Parliament. 'Brexit means Brexit' may well mean dominance by the executive of the day, and its political purposes.

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This post represents the views of the author and not the position of the Democratic Audit blog, or of the LSE.

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