



EDITORIAL

BREXIT REFERENDUM: BEGINNING OF THE END OR JUST A TURNING POINT?

The basic facts are well known by now. On 23 June 2016 the voters, by a slim majority, decided that the United Kingdom (UK) should leave the European Union. This has been a major earthquake with political and economic aftershocks going beyond the white cliffs of Dover. They are destined to continue for months, if not years. For the first time in history of the European Communities/the European Union a Member State has decided to ask for a divorce. This, in itself, is a serious blow to the European integration project and, as some may argue, it may be the beginning of the end. It may well be a major turning point, a wake-up call for the EU, its political elites and millions of EU citizens. It may lead to stagnation and slow demise of the EU, it may well lead to consolidation or even deeper integration. While predicting the future should be left to fortune-tellers, the academic community will use a lot of ink to analyze, among other things, the political, legal and economic implications of the Brexit vote. European Papers will hopefully serve as one of the platforms for this debate. This short editorial is by no means an attempt to analyze the Brexit referendum in great depth. It merely aims to give some food for thought.

Referenda are frequently perceived as epitomes of democracy. In a perfect world, well informed voters representing the entire society take key decisions affecting the future of their local communities or countries. Their decisions on what to vote for are based on a thorough consideration of real arguments and facts that are objectively presented and argued. Alas, such a perfect world does not exist and in many cases democratic credentials of such plebiscites are questionable. The Brexit referendum, rather sadly, belongs to that category. To begin with, the franchise was controversial from the start. While, with the exception of municipal and European Parliament elections, the franchise is a matter of domestic, not EU law, it should guarantee a proper representation. Allegedly this was not the case on 23 June 2016. Millions of EU citizens whose rights are at stake (and potentially in danger) have not been allowed to cast a ballot. Firstly, the UK citizens who have resided abroad, including those living in the EU Member States, for over 15 years were not allowed to vote. On the one hand, one could defend this decision by arguing that their links with the United Kingdom have been loosened, if not severed all together. On the other hand, they have been deprived of their voting rights because they have exercised their fundamental right as EU citizens, that is the right to move and reside freely in any other Member State than the country of origin. Secondly, the EU citizens residing in the United Kingdom have been divided into

two groups. The privileged group, that is nationals of Ireland, Malta and Cyprus were included in the franchise while nationals of other Member States did not have the right to vote. The franchise also included Commonwealth citizens. While such a distinction may be historically justified it does give a bitter aftertaste as dividing between the *better* and *lesser* EU citizens. Then comes the voting age. One could, of course, dispute whether it should have been lowered to 16 years of age, as it was with the Scottish independence referendum in 2014. This, however, is not as challengeable as the first two crucial points about the franchise. Finally, one could also debate the merits of the decision to leave the results of the referendum to simple majority without any additional requirements to comply with. There was neither minimum turnout threshold to meet, nor a double majority requiring all constituent parts of the United Kingdom to agree on EU exit. This, as explained below, may turn the United Kingdom into the Untied Kingdom with another Scottish referendum looming on the horizon.

The second important point is the quality of the pre-referendum debate as well as levels of awareness and understanding of EU matters among the voters. Unfortunately, the picture is depressingly bleak. The political elites on both sides of the battle line have shelved one of the most fundamental virtues of public debate, that is the duty of honesty. The Vote Leave campaign was built on fantasies, plain lies and misrepresentations. Above all, it gave an impression that EU membership was all about immigration, whether free movement of workers or immigration from third countries (which is largely UK's competence). The message was clear: the migrants were to blame for all misery the UK citizens encounter on daily basis. The Vote Remain focused on scaring the public and failed to demonstrate the benefits of European integration. The latter is hardly surprising, bearing in mind that many of the Conservatives supporting the EU membership, including the former Prime Minister David Cameron, spent years building a negative image of the European Union. A sudden affection for European integration would have looked anything but credible. Sadly, calls for a reasonable and merit-based discussion made by the academic community were largely ignored¹ and in some cases our fellow colleagues, who were engaged in the debate, were exposed to cyber bullying and open threats.² Last but not least, biased and manipulative media played their role, too. The question is if the voters themselves took a rational decision based on individual analysis of pros and cons, or, rather, they followed emotions based on prejudices and assumptions but not real facts. This we will never know and one might, rightly so, give the voters the benefit of the doubt. At the same time, some reactions to results of the referendum send worrying signals. Numerous voters opted for Brexit not believing it would actually materialize, some

¹ See *Over 250 senior academics criticise deliberate campaign misinformation in EU Referendum*, in *The Constitution Unit News*, 14 June 2016, www.ucl.ac.uk.

² See P. YEUNG, *Brexit campaign was 'criminally irresponsible'*, in *Independent*, 2 July 2016, www.independent.co.uk.

openly admitted complete ignorance about the EU and consequences of Vote Leave, while others – in the midst of post-referendum chaos – had a recourse to a well established internet search engine to find out what the European Union actually was. Already on 24 June the discussion started whether the United Kingdom should have another referendum and a petition in this respect was signed by over four million people. Very importantly, this was more of a grassroots initiative than yet another political gamble. If all the above was not shocking enough, it has quickly turned out that neither Vote Leave, nor the Government had an actual plan for Brexit. Furthermore, the leading Brexiteers have had no desire to design one and decided to abandon the ship. All of this gives a picture of a failed attempt for a genuine democratic exercise and makes the Brexit referendum look like mere political chutzpah. It also shows the reality of contemporary politics where mediocre political elites are not only acting primarily in their own personal interest but also fail to see the big picture. The scene is full of visionaries of the worst sort, while genuine statesmen are in big demand but nowhere to be seen. One thing is certain, though. The voters who cast their votes have made their point clear and the United Kingdom, whether accidentally or not, is heading for a EU divorce. This was confirmed by the UK's new Prime Minister Theresa May.

What does it mean for the United Kingdom and for the European Union? As far as the first is concerned it is definitely in the period of self imposed uncertainty, which has already translated into an economic and political crisis. It may also lead to a disintegration of the country. The results of the referendum clearly demonstrate deep divisions in the society and dangers brought by poor civic education combined with irresponsible populism. As far as the first is concerned, the United Kingdom is not united anymore. Both, Scotland and Northern Ireland voted for staying in the European Union. This has already given impetus to a second independence referendum in the first, and, potentially a referendum on unification with Ireland, in the latter. One should also not forget about London, which overwhelmingly voted for remain. So far the idea that London itself could be an independent country is treated as a fantasy, however, one should not forget that with its population London could end up being one of the midsize Member States with a very high GDP. In the short term much more worrying signs are not such tectonic shifts on the British Isles but growing nationalism and xenophobia. Obviously, both have been rumbling for a long time but the dramatically increased levels of hate crime in the weeks following the referendum are alarming. In the coming years the United Kingdom will therefore have to face not only difficult negotiations of the terms of divorce, future relations with the EU and with the outside World but also a major existential challenge. The kindergarten politics that the Conservative and Labour Party have been engaged since 23 June 2016 demonstrate that the political elites seem to be in denial when it comes to severity of the predicament that the United Kingdom is in. All of these factors are likely to be a very fertile ground for academic analysis. No doubt, they will keep political scientists, economists and lawyers very busy in the coming years.

For the European Union the current situation is yet another crisis to handle. As Donald Tusk, the President of the European Council, metaphorically said quoting Nietzsche, what will not kill us will make us stronger. The early days after the referendum have shown that the European Union is getting itself ready to face this challenge, notwithstanding the usual doses of political bickering and differences between the Member States. Judging by some political pronouncements, the EU political elites are aware that Brexit may be the beginning of the end or, at best, a turning point. One should now hope for the political statements declaring unity to be turned into actions. Brexit will be, no doubt, a political exercise. However, when the time comes, it is going to be, as any other divorce, a game played by the lawyers. This game has already started as the Brexit vote forced many to take a serious first look at Art. 50 TEU and it became abundantly clear that it was not the finest hour of the Treaty drafters. Art. 50 TEU may not be a loose cannon but, without any doubt, adds to the post-referendum blues.

The first question that emerged, almost as soon as the results of the referendum were announced, was whether Art. 50 TUE is the only way to depart the European Union. A prevalent opinion, confirmed by the EU itself, was that it is the only way out from the European Union. Then came the question of who exactly triggers the withdrawal procedure. Art. 50, para. 1, TEU provides that any Member State may decide to withdraw "in accordance with its constitutional requirements". It was quickly settled that from the point of view of EU law, it is the departing country that has the initiative. *Au contraire*, the divorce proceedings may not be formally triggered by the European Union itself. With that settled the discussion moves to the actual act itself. Is the referendum a notification *per se*, or perhaps a statement of the UK's Prime Minister to the European Council would do? In fact, one can draw here from the accession process which is triggered by a diplomatic letter. There is no reason why this should not be the case with the EU withdrawal. This very issue seems to be far more problematic from the UK's constitutional perspective. The legal community is clearly divided if the power to trigger Art. 50 TEU belongs solely to the government or whether it requires a parliamentary approval. The latter in itself is likely to be a challenge as a majority of Members of Parliament do not support the idea of EU withdrawal, furthermore, the referendum from a purely legal point of view was merely a consultative exercise.³

Another key question is how much time does the United Kingdom have to actually commence the withdrawal proceedings. With a rapid replacement of the Prime Minister, both leading political parties in disarray, no credible alternative to EU membership or a negotiation position developed the UK seems to be playing for time. David Cameron in his resignation speech left to the problem to be handled by his successor, which Theresa May had no choice but to inherit on her first day at 10 Downing Street. The European Union, though not exactly in unison, has asked the United Kingdom to proceed

³ See a number of interesting posts currently available at ukconstitutionallaw.org.

with the notification at the earliest convenience. There is no doubt that at this stage of withdrawal procedure it all hangs on the decision of the United Kingdom (whether involving its Parliament or not). However, as soon as the divorce notice is filed the centre of gravity will largely move to the EU's side. This game will change the dynamics into one against 27. Political and legal fireworks are guaranteed. A bulletproof plan as to substance and timing of Brexit negotiations is badly needed. Art. 50 TEU provides only that the withdrawal agreement is concluded between the EU and a departing country. It shall cover the terms of exit, taking account of the framework for future relations. In the aftermath of the referendum three options are being discussed: one comprehensive agreement covering the divorce and future relations, two separate agreements negotiated together or in sequence. The best option, that is an agreement covering the divorce and post-Brexit relations, would be a guarantor of legal certainty. At the other end of the spectrum is the last option, which provides for the least amount of certainty but it is clearly a preferred solution for the European Union.⁴ If it were to be implemented there would be a potentially long period of disintegration between the EU and the UK that would only at a later stage lead back to some, for now uncertain, levels of integration. For the UK the Brexit exercise will be much more than this. Unless it opts for the European Economic Area as an alternative to EU membership, it will also have to leave the EEA. Even if it opts for the EEA the jump over the fence from the EU to European Free Trade Association (EFTA) side would not be easy and could involve a formal pullout from the EEA first, followed by accession to EFTA and re-accession to the EEA. Furthermore, whether it opts for EEA or not, it will also lose all trade agreements with third countries it is currently bound by as an EU Member State. If this were not enough, the Whitehall, together with the devolved authorities, will also have to engage in the screening of the UK legal orders with the view of replacing directly applicable EU regulations with domestic law. All of this will keep politicians and lawyers busy but one thing is certain. The European Union and particularly the United Kingdom are heading for a very turbulent period. The early signs are, however, that the ups and downs of Brexit may wake up the European *Demos*, even in the United Kingdom. In the weeks following the referendum something unthinkable before 23 June happened: thousands of people wrapped in EU flags took to the streets of London to protest against Brexit. This was not an episode of blind love. Many of us share the view that the EU is not perfect, that it needs to reform to become closer to EU citizens to win over their minds and hearts. Let's hope these voices will be heard and echoed in political actions. Perhaps, it is not the beginning of the end, but just a turning point in the history of European integration.

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⁴ European Council, *Informal meeting at 27 - Brussels, 29 June 2016 - Statement*, www.consilium.europa.eu.

