

EAST ASIAN OBSERVER

A Long Road to Brexit: How Britain came to leave the EU

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In a referendum held in 2016, Britain voted to leave the EU. Britain's membership of the EU has been a difficult one. Unlike the other leading Member States of the EU, Britain did not seem to have a firm conviction that "ever-closer union" of the peoples of Europe is essential to the peace and liberty of Europe. In the wake of increased immigration and the recent refugee crisis, the British people chose to leave the EU in order to have their sovereignty and independence re-affirmed. It remains to be seen what will be the economic consequences of this largely political decision.

Keywords

Brexit, EU, Direct Effect, Supremacy of the Community Law, Parliamentary Sovereignty, Single Market.

1. The Beginning

On June 23, 2016, the UK held a referendum to determine whether to remain in or to leave the European Union ("EU"). A majority of 51.9 percent voted that the UK should leave the EU.¹ The government, currently under the leadership of Theresa May (Conservative), vows that it will take steps to leave the EU. The UK has been an 'awkward' member of the European Community and the European Union for over

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¹ Prime Minister's Office, EU Referendum (Archived), available at <https://www.gov.uk/government/topical-events/eu-referendum> (last visited on Oct. 7, 2016).

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40 years. Britain's decision to join the European Community was not easy in the first place.

Soon after the Second World War, France, West Germany, Italy, Belgium, Luxembourg and the Netherlands launched the European Coal and Steel Community ("ECSC") in 1951. The UK declined the invitation to join. It was a time when the British positioned themselves at the centre of the Commonwealth countries including, among others, Canada, India, Australia and New Zealand. Continental Europe was viewed merely as a neighbour who had lately been in trouble and who often caused troubles for the British.² The decision to decline the invitation to join the ECSC was taken when the British self-esteem was at its peak.³

Ten years later in 1961, however, the UK began applying for membership in the European Communities. The applications were rejected twice (in 1961 and 1967). It was not until 1973 that the UK was finally allowed to join the club under the leadership of Edward Heath (Conservative).⁴

When the six original Member States of the ECSC began the European Economic Community in 1957, the preamble of the Treaty of Rome set out that they were "determined to lay the foundations of an ever-closer union among the peoples of Europe." The preamble concludes with the founding members' invitation, "calling upon the other peoples of Europe *who share their ideal* to join in their efforts" [Emphasis added] Britain sought membership of the EC and signed the Treaty of Rome, among others. But, with the hindsight, some might suspect that perhaps Britain did not truly "share their ideal" about the desirability of an "ever-closer union of the peoples of Europe." In a speech in the House of Lords in 1971, Crowther Hunt, in support of the UK's application to join the EC, said: "You do not haggle over the subscription when you are invited to climb into a lifeboat. You scramble aboard while there is still a seat for you."⁵ It appears that the beginning of the UK's membership of the European Community was driven not so much by an ideal of the ever-closer union of the peoples of Europe as by a sense of an urgent need to protect

² Margaret Thatcher was to reiterate such a perception of Europe when she wrote, with the Second World War in mind, that: "Most of the problems the world has faced have come ... from mainland Europe, and the solutions from outside it." See M. THATCHER, *STATECRAFT: STRATEGIES FOR A CHANGING WORLD* 320 (2002).

³ Some authors suggest that the UK's refusal "resulted at least partly from delusions of grandeur of a homogeneous political élite" See W. Kaiser, *A book review of The Conservative Party and European Integration since 1945* (written by N. J. Crowson), 123:501 *ENGLISH HIST. REV.* 529 (2008).

⁴ The UK's applications to join the EC are succinctly explained by Professor Bogdanor in his lectures "The Decision to seek entry to the European Community" and "Entry into the European Community, 1971-1973," available at <http://www.gresham.ac.uk/lectures-and-events/the-decision-to-seek-entry-into-the-european-community>; <http://www.gresham.ac.uk/lectures-and-events/entry-into-the-european-community-1971-73> (all last visited on Oct. 7, 2016).

⁵ S. WALL, *THE OFFICIAL HISTORY OF BRITAIN AND THE EUROPEAN COMMUNITY* (VOL. 2) 425 (2013).

British interests.⁶

2. The Referendum of 1975

Europe, as Professor Bogdanor pointed out, has been the poisoned chalice for the ruling party in Britain, whether it is the Conservative Party or the Labour Party.⁷ Soon after gaining membership in the European Communities, the Conservative Party lost the 1974 election. The Labour Party won the election denouncing “the Tory terms of entry” to the European Communities. Once in power, the Labour Party was divided on the issue of the EC membership. Although a majority of Labour Cabinet members were in favour of the UK’s membership of the EC, a strong majority of Labour MPs were against Europe and an overwhelming majority of the Labour Party members were hostile to Europe. They viewed the European Communities and the Single Market as part of a right-wing agenda. The divide was between the ‘elitist’ and the ‘populist’ elements of the Party, the latter being hostile to the entry to the EC. Already in 1971, the Labour leader Harold Wilson described it as “a classic confrontation – the Establishment against the common sense of the British people.” After winning the general election in 1974, he resorted to a referendum in order to avoid the split of the Labour Party.⁸

After some cosmetic re-negotiations introducing special arrangements for dairy products imported from New Zealand and a corrective mechanism for member States’ budgetary contributions reflecting the country’s GNP (which did not necessarily mean a clear advantage for Britain), the referendum asked whether the UK should stay in or leave the EC.⁹ The Labour government, as well as the Conservative Party in opposition, officially supported the UK’s continued membership of the EC. On June 5, 1975, with a respectable turnout of 65 percent, the British people voted to stay in the EC with a decisive majority of 67 percent. The question of Europe was briefly

⁶ For details on the UK’s entry to the EC and why it was soon perceived as a disappointment, see C. LORD, *BRITISH ENTRY INTO THE EUROPEAN COMMUNITY UNDER THE HEATH GOVERNMENT OF 1970-4* (1993).

⁷ V. Bogdanor, *The referendum on Europe, 1975*: Transcript of a lecture delivered on April 15, 2014, at 38, available at <http://www.gresham.ac.uk/lectures-and-events/the-referendum-on-europe-1975> (last visited on Oct. 7, 2016).

⁸ H. Lazer, *British Populism: The Labour Party and the Common Market Parliamentary Debate*, 91:2 *POLITICAL SCI. Q.* 268-70 (1976).

⁹ For details on the renegotiations of 1974, see J. Pinder, *Renegotiation: Britain’s Costly Lesson?*, 51:2 *INT’L AFF.* 153-65 (Royal Institute of International Affairs, 1975). According to him, the Labour Party’s renegotiation goals (formulated in the context of the general election strategy while the Labour Party was in opposition) were largely due to its lack of understanding of what the membership of the EC meant. See *id.* at 165.

settled only to re-emerge in the 1980s.¹⁰

In the run up to the 1974 general election, the Labour Party made use of the promise of a referendum to attract those who were unhappy about the Conservative government's 'elitist' decision to take Britain into the EC. Once in power, the referendum was used as a strategy to appease the Euro-sceptic, anti-Establishment elements of the Labour Party in the 1970s. The press, which was then operating under a very different media technology environment compared to the 2010s, was largely favourable to the UK's membership of the EC. The outcome of the 1975 referendum coincided with the position of the Establishment endorsed by the media.¹¹ These 'strategic' uses of the referendum of 1975 were to be revisited in 2016 by the Conservative government, which led to an unintended result.

3. Parliamentary Sovereignty and the European Union

The economic advantages and disadvantages of the UK's membership of the EU are likely to be balanced. The Common Agricultural Policy and the Common Fisheries Policy are often regarded as damaging to the UK in view of its relatively small agricultural sector and abundant fishing fields. But there is an equally convincing argument that these are a small price to pay to have access to the Single Market. The debate is bound to be inconclusive.¹²

From at least 1964 onwards, however, it was not open to doubt that a membership of the European Community would inevitably require a permanent curtailment of the Member State's legislative power. The European Court of Justice ("ECJ") made this clear in two landmark decisions. In *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (1963), the ECJ held:¹³

the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields,

¹⁰ *Supra* note 7.

¹¹ C. Seymour-Ure, *Press and Referenda: The Case of the British Referendum of 1975*, 11 CANADIAN J. POLITICAL SCI. (Revue Canadienne De Science Politique) 601-15 (1978).

¹² See, e.g., M. Ridley, *The business case for Brexit*, available at <http://www.wsj.com/articles/the-business-case-for-brexit-1466549249> (June 21, 2016); *The EU single market: how it works and the benefits it offers*, available at <http://www.ft.com/cms/s/2/1688d0e4-15ef-11e6-b197-a4af20d5575e.html> (July 1, 2016) (all last visited on Oct. 7, 2016).

¹³ ECJ Case 26/62, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0026> (last visited on Oct. 7, 2016).

and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

In other words, the Community law has ‘direct effect’ imposing obligations or conferring rights on individuals “independently of the legislation of Member States.” Individuals need not rely on or wait for their national legislature to implement the Community law.

The ‘supremacy’ of the Community law was elucidated in the following year in *Costa v. ENEL* (1964). The ECJ held as follows:¹⁴

the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.

Britain sought the EC membership when these cases were well known.¹⁵ In fact, the ‘direct effect’ of the Community law was explicitly recognised by Westminster Parliament in s. 2(1) of the European Communities Act 1972.¹⁶ However, the ‘supremacy’ of the Community law was never explicitly stated in any of the enactments of Westminster Parliament. Politicians were wary of openly admitting that Westminster Parliament was no longer sovereign in the ever increasing areas covered by the Community law. The expression, “sharing of sovereignty” was perhaps the limit beyond which few British politicians were willing to tread.¹⁷

¹⁴ ECJ Case 6/64, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006> (last visited on Oct. 7, 2016).

¹⁵ F. Trindade, *Parliamentary Sovereignty and the Primacy of European Community Law*, 35 MODERN L. REV. 375-402 (1972), available at <http://www.jstor.org/oca.korea.ac.kr/stable/1094437> (last visited on Oct. 7, 2016).

¹⁶ S. 2(1) of the European Communities Act 1972 stipulates that those rights and obligations created by the Community law which have direct effect “shall be recognised and available in law, and be enforced, allowed and followed accordingly” without further enactment.

¹⁷ W. Wallace, *The Sharing of Sovereignty: the European Paradox*, XLVII POLITICAL STUD. 503-21 (1999). See also G. Howe, *Sovereignty and Interdependence: Britain’s Place in the World*, 66:4 INT’L AFF. 675-95 (Royal Institute of International Affairs, 1990).

Judges in the UK were also keen to maintain the revered narrative of parliamentary sovereignty (i.e., Westminster Parliament is ‘sovereign’ in the sense that no superior authority can limit its power of legislation). When the House of Lords faced in 1990 the prospect of having to deny the validity of an enactment of the ‘sovereign’ Parliament (Merchant Shipping Act 1988) and was asked to suspend its application as an interim measure, the House of Lords (*per* Lord Bridge) made an extra effort to insist that “the sovereignty of the United Kingdom Parliament” is nevertheless unimpaired even though the court is, in order to ensure full effectiveness of the applicant’s Community rights, required to suspend the application of an Act of Parliament and ultimately deny the legal effect of the Act to the extent it is incompatible with the Community law.¹⁸

To an outside observer, such an insistence on parliamentary sovereignty is rather strange. The ‘supremacy’ of the Community law would simply mean that the UK Parliament, just like any other Member States’ national legislature, does not have the power to introduce national legislation which is incompatible with the Community law. To this extent, the sovereignty of ‘every’ Member State’s national legislature is equally curtailed. To insist, as Lord Bridge did, that the UK Parliament’s sovereignty remains unimpaired because its acceptance of curtailment of sovereignty was ‘entirely voluntary’ is an unconvincing effort to deny the undeniable. None of the Member States involuntarily became members of the EC or the EU. They all accepted – entirely voluntarily – to have the sovereignty of their national legislature limited in areas covered by the Community law. But judges in the UK have persuaded themselves that their national legislature is still sovereign because it voluntarily accepted the supremacy of the Community law. Twenty years later, in 2010, Lord Bingham was still staunchly defending the orthodoxy of the parliamentary sovereignty. He wrote:

To substitute the sovereignty of a codified and entrenched Constitution for the sovereignty of Parliament is ... a major constitutional change. It is one which should be made only if the British people, properly informed, choose to make it.¹⁹

It is simply impossible for him to accept that such a constitutional change was already made in 1973 – in areas covered by the Community law – when the UK joined the EC and accepted the direct effect and the supremacy of the Community law. It may not be entirely accurate to say that the Community law is ‘codified.’ But it certainly is an

¹⁸ Regina v. Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2) [1991] 1 A.C. 603, at 658.

¹⁹ T. BINGHAM, THE RULE OF LAW 170 (2010).

‘entrenched’ part of the Member State’s legal system which cannot be overridden by national legislation. As far as the curtailment of the national legislative sovereignty is concerned, it seems that politicians and jurists of the UK have been in a state of denial.

4. Opt-outs and the Narrative of Sovereignty

While remaining a member of the EU, the UK negotiated opt-outs in a number of areas. Schengen Treaty (1985) and Schengen Convention (1990) aimed at abolishing internal border checks within the Schengen Area and introduced a single external border check where member States agreed to carry out passport and visa inspection in accordance with an identical procedure. The Schengen Area took effect in 1995. By the Treaty of Amsterdam (1997), Schengen cooperation became part of the EU legal framework.²⁰ The UK (and Republic of Ireland, which has a free movement arrangement with the UK) opted out. The UK maintains its border checks. But it does not mean that the UK can refuse entry to the peoples of the EU. The EU and the EEA Member State passport holders (and their non-EU spouse and children) are entitled to enter and reside in the UK. They simply have to show their passport at the UK border.²¹

The Maastricht Treaty of 1992 set out the details of the Economic and Monetary Union (“EMU”) with the aim of adopting Euro as the single currency. The UK opted out from EMU and chose to remain outside the Eurozone.²² The Conservative government led by John Major opted out also from the Social Chapter of the Maastricht Treaty. But the Labour government led by Tony Blair abolished the opt-out and accepted the Social Policy Chapter (which reproduces the Social Chapter) in the Treaty of Amsterdam (1997).²³

In the field of police and judicial cooperation in criminal matters, the UK opted-out in 2014 – pursuant to Protocol 36 of the Treaty of Lisbon (2007) – from the entirety

²⁰ See The Schengen Area and Cooperation, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A133020> (last visited on Oct. 7, 2016).

²¹ See European Parliament and Council Directive 2004/38/EC, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004L0038> (last visited on Oct. 7, 2016).

²² See United Kingdom: EMU opt-out clause, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A125060> (last visited on Oct. 7, 2016).

²³ J. Lourie, *The Social Chapter*, House of Commons Library Research Paper 97/102, available at <http://researchbriefings.files.parliament.uk/documents/RP97-102/RP97-102.pdf> (last visited on Oct. 7, 2016).

of about 130 police and criminal justice measures which would be brought under the EU's competence. After this 'block' opt-out, the UK sought partial 're-opt-in' in 35 individual measures in the area of freedom, security and justice.²⁴

These repeated opt-outs would obviously mean diminishing influence of the UK in the decision-making processes of the EU. But the opt-outs are used to prop up the narrative of the sovereignty of the UK Parliament and the independence of the UK government. In the British political discourse, it seems that the narrative of 'Europe' never managed to overcome the narrative of 'sovereignty' or 'independence'. If Britain had the genuine conviction of being among the leading members of the EU, the supremacy of the Community law and the curtailment of Member States' national legislative sovereignty would have been a cause for celebration rather than protest. Leading members of the EU should feel that, thanks to the supremacy of the Community law and the increasing areas of the EU's competence, their decisions reach well beyond their national boundaries and shape the lives of peoples of Europe. What loss of sovereignty?

As far as the narrative of sovereignty is concerned, Britain has been in the defensive. Rather than realizing that the British can, through the EU mechanism, reach out to the rest of the EU, they have instead dug their heels in the British Isles and resorted to opt-outs to fend off the onslaught of the EU and the Community law. After a series of opt-outs, Britain was to find itself cornered, running out of opt-outs.

5. The Referendum of 2016

There is an interesting parallel between the referendum of 1975 and the referendum of 2016 although the outcomes are dramatically different. In both cases, the ruling party was using the referendum as a means of consolidating and unifying its support base. Just like the Labour Party in the 1970s, the Conservative Party in the 2010s was deeply divided on the issue of Europe. Moreover, in recent years, the success of the UK Independence Party ("UKIP") as "the party of choice for the anti-government vote and anti-politics vote" was felt as a threat to the Conservative Party's success in

²⁴ See UK's block opt-out and partial re-opt-in to the ex-third pillar *acquis*, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/145981.pdf. See also UK's 2014 opt-out decision (Protocol 36), available at <http://www.parliament.uk/2014opt-out> (all last visited on Oct. 7, 2016).

2015 general election.²⁵ The UKIP has attracted popular support using the narrative of sovereignty and blaming the EU for most of the UK's problems. Under these circumstances, in 2013, the Conservative government led by David Cameron made an election pledge of In/Out referendum as a means of securing Euro-sceptics' votes in the 2015 general election.²⁶

Treading in the footsteps of the Labour government's 1975 referendum, the Conservative government proposed that the referendum of 2016 would be held after re-negotiations of the terms of the UK's membership of the EU. The Labour government in 1975 claimed that re-negotiations were successful and that was enough to give an assurance to the overwhelming majority of voters who voted to stay in the EC. It did not, however, work in the referendum of 2016.

The re-negotiations ahead of 1975 referendum were mainly about fine-tuning of budgetary contributions of Member States. They were not aimed at questioning the fundamental premises of the EC. The re-negotiations of 2016, however, were entirely different. They were no longer about money.²⁷ Britain purported to opt out, among others, from the principle of "ever-closer union" which has inspired the development of the entire edifice of the EU. In February 2016, David Cameron described the result of the re-negotiations in the following terms:²⁸

Britain will be permanently out of ever-closer union, never part of a European superstate...
Britain will never join the euro and we've secured vital protections for our economy.

Here, Cameron was essentially repeating Margaret Thatcher's conviction that "willing and active cooperation between independent sovereign states is the best way to build a successful European Community."²⁹ This conviction is not shared by the rest of the EU. It is wholly incompatible with the very foundation of the EC and the EU. Cameron's purported opt-out from "ever-closer union" was probably the last available opt-out before exiting the EU. As far as principles and visions are

²⁵ See UKIP: The story of the UK Independence Party's rise, available at <http://www.bbc.com/news/uk-politics-21614073> (last visited on Oct. 7, 2016).

²⁶ See *Cameron takes gamble with in/out EU referendum pledge*, EurActiv.com, Jan. 23, 2013, available at <https://www.euractiv.com/section/uk-europe/news/cameron-takes-gamble-with-in-out-eu-referendum-pledge> (last visited on Oct. 7, 2016).

²⁷ L. Cram, *Negotiation: What has been agreed? What difference will it make? What will change in a 'reformed' Europe?*, in *BRITAIN'S DECISION* 38ff (C. Jeffery & R. Perman eds., 2016).

²⁸ M. Karnitschnig, *Welcome to a two-speed Europe*, POLITICO, Feb. 23, 2016, available at <http://www.politico.eu/article/welcome-to-a-two-speed-europe-deal-british-voters-brussels-open-marriage> (last visited on Oct. 7, 2016).

²⁹ M. Thatcher, *Speech to the College of Europe (The Bruges Speech)*, Sept. 20, 1988, available at <http://www.margaretthatcher.org/document/107332> (last visited on Oct. 7, 2016).

concerned, Britain is already ‘out’ of the EU when it announced that it will be out of “ever-closer union.”

The influx of immigrants from countries who recently joined the EU as well as the refugee crisis of 2015 decisively influenced the outcome of the 2016 Referendum. They highlighted and dramatized the discrepancy between the reality and the narrative of sovereignty. The narrative of sovereignty has fuelled a popular expectation that the UK Parliament should have full control of the immigration. When such a false expectation is denied by the reality (free movement of peoples of the EU), the narrative of sovereignty became no longer tenable if the UK was to remain in the EU. A majority of the British people voted to leave the EU to preserve the narrative of sovereignty.

6. Conclusion: Britain after Brexit

The UK has several alternatives to the EU. Norway’s relationship with the EU or Switzerland’s relationship with the EU is mentioned, among others, as a possible model of the UK’s future relationship with the EU.³⁰ But it is obviously impossible to predict how the EU and the UK will negotiate the terms of the latter’s exit from the EU. What is clear now is that the EU will make every effort to avoid the impression that the UK is ‘better off’ leaving the EU.³¹ Another point to mention is that the UK does not in fact have a successful history of negotiations with the EC or the EU. From the beginning, the UK had to accept the entirety of the terms of the EC (including the Common Agricultural Policy and the Common Fisheries Policy, which are clearly unfavourable to the UK). The UK has negotiated a series of opt-outs along the way, but they all have the effect of diminishing the UK’s role or influence within the EU. The UK’s negotiation success with the EU has so far been mainly in preserving its own narrative of sovereignty in an increasingly insular fashion, culminating in the opt-out from “ever-closer union.”

³⁰ M. Keating, *What are the alternatives to EU membership?*, in *BRITAIN’S DECISION*, at 53-7. See also *Five models for post-Brexit UK Trade*, BBC.com, June 27, 2016, available at <http://www.bbc.com/news/uk-politics-eu-referendum-36639261> (last visited on Oct. 7, 2016).

³¹ Germany’s Vice-Chancellor Sigmar Gabriel was voicing such a concern in the following terms: “If we organise Brexit in the wrong way, then we’ll be in deep trouble, so now we need to make sure that we don’t allow Britain to keep the nice things, so to speak, related to Europe while taking no responsibility. See *Brexit may send EU ‘down the Drain’ - German vice chancellor*, BBC.com, Aug. 28, 2016, available at <http://www.bbc.com/news/world-europe-37210138> (last visited on Oct. 7, 2016).

After leaving the EU, the UK will have little leverage to influence the future of Europe. This will open up a new era where Britain looks out to the world. It may be possible that the UK will become one of free trade hubs such as Singapore or Hong Kong. The British talents may perhaps turn their eyes and mind from Europe to the rest of the world, including Asia. That will not be a bad scenario for Britain after Brexit.