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Taking back control? The EU referendum, Parliament and the 'May Doctrine'

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Introduction

On 2 October 2016 Theresa May addressed her first Conservative Party Conference as Leader and Prime Minister. Focusing on her intention to remove the United Kingdom (UK) from the European Union (EU) in the wake of the 23 June referendum, she asserted a series of constitutional principles. For the purposes of this pamphlet I collectively label them the 'May Doctrine'. The position she advanced encapsulates a startling development in the discourse regarding the working of the democratic system in the UK that has accompanied the 'leave' vote. Her approach matters both in its own right, because of its implications for the way in which the UK is governed, and because of its deployment to justify a policy platform of exceptional historic importance. Though May presented her claims as self-evident, it is possible to contest them – in particular in their implications for Parliament.

The first constitutionally contentious claim from May – herself a supporter of 'remain' during the campaign, though one of minimal enthusiasm – was that 'Brexit' was an outcome 'the country voted for.' Obliquely confirming that some contest this view, she complained that 'politicians – democratically-elected politicians' were claiming that the referendum was invalid and that a further vote was required. She also referred to those who 'don't like the result' who were seeking to prevent departure through the legal system. May was dismissive of such opposition, insisting that the 'result was clear' and 'legitimate'; and 'was the biggest vote for change this country

has ever known.' Repeating her famous slogan, she said: 'Brexit means Brexit – and we're going to make a success of it.' May went on to note, correctly, that the holding of the referendum was only possible because of the Conservative Party and David Cameron. Though it was not her intention, this observation drew attention to the fact that the referendum was driven primarily by the internal dynamics of a particular political party, rather than a desire meaningfully to consult the public on continued EU membership.

A further constitutionally significant claim came with May's insistence that the government would 'not be able to give a running commentary or a blow-by-blow account of the negotiations.' While few in Parliament and beyond would dispute a need for some degree of discretion, her words seemed to imply a higher than normal level of confidentiality would apply. However, May was able to offer some information on this occasion. First, the UK government would invoke Article 50 of the Treaty on European Union, activating the process whereby member states can leave the EU, by the close of March 2017. On the process involved, May was firm that 'it is not up to the House of Commons to invoke Article Fifty, and it is not up to the House of Lords.' This task fell solely to the government, she asserted. The basis for her rejection of a parliamentary role was that in providing the legal basis for the referendum, Parliament had provided the public with the ability to choose between staying within or exiting the EU. Voters, May held, had given their verdict 'with emphatic clarity.' It now fell to the government 'not to question, quibble

or backslide on what we have been instructed to do, but to get on with the job.’ Those who contested her view were ‘not standing up for democracy’, May insisted. Rather they were ‘trying to subvert it. They’re not trying to get Brexit right, they’re trying to kill it by delaying it.’

Similarly, she went on, ‘the negotiations between the United Kingdom and the European Union are the responsibility of the Government and nobody else.’ Her government would ‘consult and work with the devolved administrations for Scotland, Wales and Northern Ireland’, to help ensure that ‘Brexit’ would ‘work in the interests of the whole country.’ It would also work with business and leaders of municipalities throughout the UK. But the negotiations were the work of the UK government. The UK, she insisted, had voted as single entity and would exit the EU in the same form.

After outlining plans for a ‘Great Repeal Bill’ which would ‘remove from the statute book...the European Communities Act’, May then presented the ‘Government’s vision of Britain after Brexit’. She explained that there would not be ‘a relationship anything like the one we have had for the last forty years or more.’ The UK would not seek arrangements along the lines of Norway or Switzerland in their dealings with the EU. Rather it would obtain ‘an agreement between an independent, sovereign United Kingdom and the European Union.’ She rejected the idea of a “trade-off” between controlling immigration and trading with Europe’. The UK had, May said, ‘voted to leave the European Union and become a fully-independent, sovereign country.’ It would therefore behave as such. ‘We will decide for ourselves how we control immigration. And we will be free to pass our own laws.’ The use of the term ‘we’ might have been intended to convey the impression that the entire UK was engaged in the enterprise she described. Yet May’s determination that putting exit into effect was formally the business only of the government might suggest that a far more select ‘we’ would be taking many crucial decisions.

For May, then, the referendum had delivered a mandate of such force that Parliament, the devolved legislatures and the courts had no proper role in implementing, let alone questioning, it. The only entity that was now relevant was the UK executive; and it had placed a very specific interpretation upon the outcome of the vote, particularly with respect to immigration.

The May Doctrine represents a challenge to an important established tradition of constitutional principles. Indeed, a member of her own Cabinet, David Davis, now Secretary of State for Exiting the European Union, once provided a powerful exposition of what is in many ways a more orthodox position, that can be labelled the ‘Davis Doctrine.’ It came on 26 November 2002 in a House of Commons debate (see cols 201-4). Davis was speaking for the Opposition at the Second Reading of the Regional Assemblies (Preparations) Bill 2002-3. The purpose of the legislation was to provide for popular votes on the proposed introduction of devolved regional assemblies in England. Davis raised a number of concerns about the use of referendums and their implications for the UK system of government. He emphasised, first, that ‘in a democracy, voters have to know what they are voting for. They need to know what the choice is...For that to happen, the proposition has to come before the vote...The Bill proposes that referendums should be held without voters knowing the structure or powers of the assemblies for which they are asked to vote.’

Davis went on to acknowledge that ‘[t]here is a proper role for referendums in constitutional change, but only if done properly. If it is not done properly, it can be a dangerous tool.’ Noting the famous remark by Clement Attlee that referendums are ‘the device of demagogues and dictators’, Davis went on: ‘We may not always go as far as [Attlee] did, but what is certain is that pre-legislative referendums... are the worst type of all.’ It could be noted that the present EU referendum was held in advance of any legislation providing for exit. Indeed, the present government holds that no legislation or parliamentary involvement of any kind is required for the first implementation of the ‘leave’ vote. Connected to this legislative vacuum in 2016, as we will see, was a broader lack of knowledge regarding what leaving might mean, coupled with an absence of meaningful debate and the circulation of dubious claims. For Davis, in 2002, an absence of reliable information and high quality discourse was a problem. As he put it, ‘[r]eferendums should be held when the electorate are in the best possible position to make a judgment. They should be held when people can view all the arguments for and against and when those arguments have been rigorously tested. In short, referendums should be held when people know exactly what they are getting. So legislation should be debated by Members of Parliament on

the Floor of the House, and then put to the electorate for the voters to judge.'

Davis was concerned that a referendum could be used to provide excessive discretion to the executive. 'We should not ask people to vote on a blank sheet of paper and tell them to trust us to fill in the details afterwards.' If a referendum was 'to be fair and compatible with our parliamentary process, we need the electors to be as well informed as possible and to know exactly what they are voting for.' Crucially from the point of view of current concerns regarding the EU vote, Davis held that '[r]eferendums need to be treated as an addition to the parliamentary process, not as a substitute for it.' Davis went on to suggest that the unwillingness to legislate for regional devolution fully in advance arose because of a reluctance to 'debate the details'.

He accepted that '[m]ajor constitutional changes justify the use of referendums because the constitutional rights of our citizens are owned by the people and not by politicians.' But it was undesirable to use such votes as 'a snapshot of volatile changes of opinion'. They should seek to reflect the 'settled will' of the public. In pursuit of this underlying principle, Davis argued in favour of the use of thresholds. In this instance he felt that the agreement of a quarter of the total electorate or more would be sufficient. But he suggested that the threshold should be 'appropriate to the level of constitutional change'. Were the assemblies being proposed to have the same degree of power as the Scottish Parliament 'I would set the threshold a little higher.' Davis did not discuss the possibility of a referendum on EU membership on this occasion. But both the potential substantive impact of such a vote and the difficulty of reversing a 'leave' result if implemented mean that its significance would dwarf even that of a proposal to create a body equivalent to the Scottish Parliament. The logic of the Davis Doctrine therefore points to a higher threshold still for an EU referendum.

We are faced, then, with two competing accounts of the proper place of referendums within the UK constitution. The May Doctrine stresses the finality of the result and the centrality of the executive to its implementation, to the exclusion of other institutions including Parliament. The Davis Doctrine emphasises the importance of Parliament, and suggests that simply winning a vote is not a sufficient basis for a legitimate decision. According to this latter school

of thought, thresholds are needed, rising in proportion to the significance of the matter being decided upon. The nature of the possible change, according to the Davis Doctrine, should be made clear in legislation in advance, and there should be an informed public debate about the options. Taking into account these differing perceptions of referendums, the following paper considers the implications of the vote of 23 June, in particular from the perspective of the UK Parliament.

The meaning of the referendum and its result

In the lead-up to the 2016 referendum on United Kingdom (UK) membership of the European Union (EU), a key slogan of the 'leave' campaign was 'take back control'. Like many such phrases, its precise meaning was ambiguous, no doubt deliberately so. An intellectual current underpinning it relates to a perceived desire to assert the supremacy or 'sovereignty' of the UK Parliament, supposedly threatened by incorporation into the EU. But more broadly the term 'take back control' was meant to convey to members of the public that a vote to depart from the EU would give them greater power over their own lives. This premise is itself contestable. Whether UK exit from the EU, if it takes place, will – or indeed can – restore some form of 'control' that was lost at some point in the past, is very much open to debate. It involves matters of controversy such as how 'control' should be defined, and the post-EU arrangements it is believed the UK might be able to obtain.

There is a further difficulty with the 'take back control' slogan. The connection between the referendum vote itself and the final outcome is far more complex and tenuous than this message might imply. It is not only the destination the UK might reach if it left the EU that could give cause to challenge the idea of an augmentation of domestic popular authority. It is the means by which it is arrived at.

Those who advocated a referendum on EU membership – who tended to be, though were not exclusively, opponents of membership – often presented the holding of such a vote as being the subject of overwhelming public demand – that the people were insisting that they be given the opportunity to 'take back control'. Advocates of a referendum, however, never demonstrated the existence of a popular appetite on a scale they claimed, and therefore never established definitively why there should be a ref-

erendum on this precise issue. Why, then, was the referendum needed? And if it was, were there not a wide variety of other matters on which such votes might be held?

The lack of clearly demonstrated tangible mass demand on the scale implied by advocates of a referendum was incidental. David Cameron saw committing his party to a renegotiation and a vote early in 2013 as the only means of managing his Eurosceptic wing. At the time he made it, it was no more than a pledge for the future. The coalition partners of the Conservatives, the Liberal Democrats, were opposed (though curiously their 2010 manifesto had included this very commitment). A promise to negotiate a reformed EU, or else new terms of membership for the UK, and then hold and abide by the result of a referendum was included in the Conservative manifesto for the May 2015 General Election. It was just one policy among others in the document, though it did attain substantial attention. Unexpectedly to many – perhaps including Cameron himself – the Conservatives then won an outright Commons majority. A vote became inevitable – or perhaps from Cameron’s point of view, unavoidable. The main basis for its taking place, then, was the internal dynamics of a party that had commanded 36.9 per cent of votes cast, on a turnout of 66.1 per cent – in other words, slightly under a quarter of eligible voters – at a General Election.

Whether its democratic basis was sound or not, the referendum took place on 23 June 2016. The ‘leave’ side won, with 51.9 per cent of votes cast, on a turnout of 72.2 per cent. If the scale of the victory speaks to the legitimacy of the result, how are we to interpret it? There was a gap of more than a million votes between ‘leave’ and ‘remain’ – about 17.4 million to 16.1. This figure cannot be dismissed, but in percentage terms, the difference was less than four per cent. By way of comparison, in 1975, support for ‘yes’ led ‘no’ by 67.23 to 32.77. We should also be cautious about the application of the term ‘majority’. Only slightly over 37 per cent of the total electorate voted ‘leave.’ In other words, whatever ‘Brexit’ means, nearly 63 per cent of those who could have done did not vote for it. Is this a sufficient democratic basis for what could be such a major change? For those who value the idea of a ‘settled will’ as a precondition for constitutional change, this level of support might well seem inadequate.

A common practice in referendums internationally is to apply some kind of threshold so that the side of the vote that seeks radical change – in this instance, ‘leave’ – must attain a higher level of consent than a simple majority of those voting if it is to be considered as having won. We have seen how, earlier in his career, David Davis (and the Conservative Party generally) was an advocate of thresholds, and felt that the more important the decision, the more rigorous they should be. As he would surely agree (though presumably rejecting the need for a threshold on this occasion), no choice could be more important than that which faced voters in the EU referendum. Had a threshold of some kind been applied in June 2016, depending on its terms, it might not have been met. For instance, had there been a 66 per cent or even 55 per cent supermajority stipulation, the level of ‘leave’ support would not have been sufficient. Similarly, a territorial supermajority, if it required ‘leave’ votes in England, Wales, Scotland and Northern Ireland, would have been too rigorous a requirement to yield an overall ‘leave’ verdict. So too would have been a stipulation that over half of registered voters support ‘leave’ for this view to prevail.

Yet there was no threshold in place, and the bare majority support for ‘leave’ among those who voted has created a scenario in which a myriad of outcomes are entirely possible. They range from, at one end of the spectrum, the UK’s changing its mind and not leaving at all to, at the other end, its departing from the EU without striking any kind of specific new deal, and operating within the framework provided by the World Trade Organisation (WTO). Between these two poles there are many potential degrees and combinations of characteristics. But the electorate cannot be said to have communicated any instruction as to the specific outcome it favours. The question it was asked was simply: ‘Should the United Kingdom remain a member of the European Union or leave the European Union?’.

Some might claim to discern particular priorities, such as control over inward migration. In doing so, they may well reflect prominent strands of public opinion. But nonetheless, any such claims entail layering interpretations upon the referendum result that are not derived from the wording of the question put. This problem is one inherent in referendums as decision-taking devices, particularly those that offer only binary options. There are problems with the idea that it could be possible to perceive a general

will from millions of individuals whose views might be contradictory or so vague as to offer no clear guidance on implementation.

It might be held that, whatever else, a majority of those who took part supported 'leave' and they have therefore at least coalesced around this view. This perception may lie behind the Theresa May axiom 'Brexit means Brexit', a statement the opacity of which aptly matches that of the referendum result it purports to decode (though May is now beginning to attach policy content to her phrase). But even this understanding should be qualified. Those comprising the plurality of the electorate who endorsed the 'leave' option may simply have been making a statement of general disgruntlement, and have given little or no thought to the EU issue. If they were consciously voting to 'leave', they may have done so on a basis of false information. Moreover, they might not necessarily have meant that this course of action should be pursued at any cost. Because the varieties of post-EU scenarios for the UK are so numerous, it cannot be expected that all who voted for withdrawal would find each one palatable. Furthermore, other developments, for instance economic or political difficulties, might prompt some of those who voted 'leave' to reverse their opinion. It is possible, then, to project a range of circumstances in which some of those who endorsed departure in June change their opinion – and perhaps in which those who did not vote at all become positive advocates of remaining. The plurality that existed on 23 June – if its existence is held to create an irresistible imperative, another contestable assertion – could be lost. It may not represent a settled will.

Responding to the referendum

What might happen in response to the EU referendum, as well as what the public wanted at the time and will want subsequently to happen, are areas of doubt. Further uncertainty and dispute surrounds who in the UK will shape policy, how they will go about doing so – and ultimately what they will achieve. In part this ambiguity is derived from the basis on which the referendum was held.

Sometimes referendums are called by a government because it wishes to introduce an innovation that it deems to require approval from the people directly affected. It gives an account of its proposal, holds the vote, and if it wins (possibly subject to a threshold requirement) it then proceeds. An example of

this approach can be found in proposals for Scottish devolution in 1997. The Labour government issued a White Paper, then a referendum took place in which approval for the plans was obtained, and they were then implemented through the Scotland Act 1998.

In 2016, the government provided for a popular vote in which there was a choice between two options, one of which implied radical change ('leave'), while the other was far closer to a preservation of existing arrangements ('remain'). By contrast with the Scottish referendum of 1997, in 2016 the government sought approval for its desire not to bring about a dramatic change. Consequently, it had put no clear set of plans before the electorate for leaving, and any internal preparations in Whitehall for the eventuality of a 'leave' result had to be conducted discreetly, and were disavowed publicly as they took place. In accordance with statutory obligations, the government issued materials providing information relating to the referendum. This output included an account setting out what the government believed would be the benefits of continued EU membership for the UK. Alongside it, the government published a description of different possible post-EU arrangements for the UK, should it leave. It discussed a number of potential models, only to conclude that none was as attractive as remaining, which was government policy. Consequently, no specific favoured outcome, were the voters to choose the option of ending UK membership, was advanced.

Those who supported 'leave' failed to fill this gap. Such proposals as were offered for the future of the UK outside the EU certainly did not amount to a detailed, coherent programme around which the exit movement was unified. Any attempt to construct such a platform might well have been to the detriment of the 'leave' campaign, bringing with it practical and political difficulties. But it is important to note the absence on either side of the debate of a properly formulated account of the policy implications of a vote to exit the EU.

A further source of post-referendum confusion derives from the nature of the legislation that provided for the vote to be held. Much is made of the question of whether or not the result of 23 June is or is not 'binding'. In a legal sense, it clearly is not. The legislation providing for the referendum – the European Union Referendum Act 2015 – made no mention of such an obligation. Even if it did, under UK constitutional

understandings, Parliament could, if it chose, repeal an Act that sought to compel a course of action in the same way that it passed it. This principle arises from the so-called doctrine of parliamentary sovereignty, a concept to which we shall return.

However, claims that the referendum is binding tend to rest not in legality, but in political undertakings made in advance of the vote. David Cameron, the Conservative Party and the UK government made various statements to the effect that they would abide by the outcome of the vote. But politicians, parties or the executive cannot commit Parliament to accepting any course of action. Moreover, a pledge to implement the result, even if it did have force, would not bypass the various problems of indeterminacy discussed above, as well as the fact that it rested on the assent only of a plurality of those able to vote. Furthermore, if prior statements are significant, it is worth noting that, in its March 2016 account of possible post-EU arrangements for the UK, the UK government stated the following:

If the UK voted to leave the EU...[w]e would seek the agreement of the remaining 27 EU Member States for the best access for UK companies and consumers to the Single Market...We would aim to keep those elements of non-economic cooperation that serve our national interest, enhance UK power in the world and increase our ability to get our way. (Alternatives to membership: possible models for the UK outside the EU, para. 4.1)

The approach to exit set out by Theresa May at the Conservative Party conference is radically different to that contained in this pre-referendum document. It is not clear why a commitment to leave is binding, while a specification as to the type of departure the government would seek – arguably an issue of equal importance to that of leaving itself – is not, particularly when the present Prime Minister was a member of the government in question.

The gap in the legislation with respect to the effect of the result is significant in another sense that has received less attention. It creates no constitutional framework for the response to a 'leave' vote. A comparison with the 2011 referendum on whether the UK should adopt the Alternative Vote in favour of the so-called 'First-Past-the-Post' system of elections to the House of Commons is useful in this regard. The pav-

ing legislation, the Parliamentary Voting System and Constituencies Act 2011, provided specifically for the next General Election to take place under AV in the event of a 'yes' vote. Public officials, acting under authority derived from Parliament, would implement the result of the referendum in the form prescribed in the same Act that provided for the AV referendum itself. When they passed this legislation, parliamentarians could be aware of what they were potentially setting in motion (and retained a theoretical power to revise the decision after the referendum).

The statutory position in 2016 is different. There is no definition of the process to be followed in the event of a 'leave' (or indeed 'remain') vote, of who or what will be responsible for any actions that might be taken, or of the powers under which they would act. Confusion about the outcomes of the referendum, therefore, has been compounded by bewilderment connected to the process. But given the wide range of possible scenarios that confront the UK (and the outside world), the questions of who takes decisions for the UK, how they do so, and what is the source of their power, are of especial importance.

The process of leaving

It is important to consider how the process of leaving might take place, not least because the nature of this process has implications for the prospects of departure actually occurring. What accounts have been offered of the proper means of exiting the EU? One proposal has come from the firmly committed wing of the 'leave' campaign. For many of this disposition, the doctrine of parliamentary sovereignty – the idea that the Westminster Parliament should be subject to no constraints on its law-making authority, either within or external to the UK, and should not even be bound by its own previous legislation – is crucial. A key basis for their opposition to EU membership was that it compromised this principle. It is a frequently noted irony that those of this disposition should seek legitimisation for exit through a referendum, a device that might be suggestive of a rival, popular source of authority to Parliament. Indeed, the vote they sought and the result they wanted now threaten seriously to compromise the institution they claim to prize.

Irrespective of this possible tension, those opponents of UK membership of the EU who place emphasis on parliamentary sovereignty have argued that, given the supremacy of Parliament, the proper means of freeing the UK from the EU is for Parliament to re-

peal the legislation it enacted to give domestic legal expression to its membership, the European Communities Act 1972. In this scenario, departure from the EU is viewed from a domestic legal perspective, with an unwanted external presence expelled. Any implications for the outside world would be treated as secondary consequences of this assertion of parliamentary sovereignty.

A second approach to leaving is that it should take place within the terms laid down by the EU itself, and in particular in accordance with Article 50 of the Treaty on European Union, which sets out the basis on which a member state may depart. To ignore this process and unilaterally to exit on a basis of domestic legislation may seem attractive from the perspective of a fundamentalist commitment to parliamentary sovereignty. But it might not be a wise move for a state about to enter a prolonged period of multiple international negotiations, and that presumably wishes to seem committed to acting in good faith and in accordance with agreements it has made and procedures to which it has assented. In advance of the referendum, the UK government stated that the Article 50 route was the only appropriate way forward, and it has maintained this position under Theresa May. For the remainder of this paper, it is assumed that – if exit does take place – it will be via this route.

Article 50, then, is a mechanism of profound importance to the future of the UK – yet one of which there were low levels of awareness in advance of the vote of 23 June. Some important observations are required. First, since the Lisbon Treaty that created it came into force in 2009, Article 50 has never been used. Previous examples of countries extricating from European integration – offered in some senses by Greenland and Algeria – are not useful guides. We have no past indicators of how Article 50 might play out in practice for the UK. Second, the chief motive for the design and agreement of the Article seems to have been the desire to create the impression that the EU was an open, voluntary project. The creators of Article 50 did not anticipate that it would be used, and they did not want it to be. They did not, therefore, design to it be a practical, user-friendly device.

Third, in as far as thought was given to the way that Article 50 would operate, it was – as might be expected – loaded against the state seeking to depart and in favour of remaining member states and the EU as a whole. Upon triggering the Article, a two-year

time period commences during which the departing member state negotiates with the EU ‘arrangements for its withdrawal, taking account of the framework for its future relationship with the Union’. At the end of the two years, the member state concerned can be automatically ejected from the EU, regardless of whether or not it has reached an agreement. A former member state that has left under Article 50 that may wish to rejoin is – according to that same Article – then subject to the accession rules that apply to other states, as set out in Article 49.

Fourth, whatever outcomes do arise from Article 50 are dependent upon forces beyond the full control of the departing member state. The process is a negotiation. The policy that the UK forms in advance of entering discussions under Article 50 is only an opening position. The EU negotiates on the basis of a mandate from the European Council; and any deal it may agree with the UK is dependent upon approval from both the European Parliament and the Council using qualified majority voting. Moreover, even an extension to the two-year period requires unanimity from member states. Article 50 does not deal expressly with the issue of whether a state can choose within the two years (or any extension to them) to abandon withdrawal and remain a member of the EU. Any dispute over the interpretation of the silence of Article 50 on this point might ultimately be resolved by the European Court of Justice (ECJ). Yet to submit to the ECJ, whatever decision it reached, would be to accept the authority of another external force. As a final irony, the UK may find itself in a position where it is seeking the help of the ECJ to end a withdrawal procedure that it chose to commence.

Fifth, it is not entirely clear what can be discussed as part of the Article 50 process. The text states that the agreement will deal with the ‘withdrawal’ of the member state concerned, only ‘taking account of the framework for its future relationship with the Union’. In other words, depending on the interpretation placed upon it, Article 50 might be narrowly focused on exit arrangements, and not on what comes next; potentially prolonging the period of uncertainty for the UK.

The instigation of Article 50, therefore, may lead the UK into a realm of considerable uncertainty. But there are some observable facts involved. In particular, the act of triggering Article 50 is sufficient in itself to bring about departure from the EU. No further intervention is required for UK removal from the EU;

and the ability to stop the exit process may not be within the direct control of the UK.

We cannot know the precise framework for a post-EU UK, should exit come about. But the consequences of leaving would undoubtedly be immense. It would affect the way in which a variety of policies are formulated, and the content of those policies. There would also be changes in the internal configuration of the UK constitution. More dramatically, the chances of Scottish independence would probably be heightened; and the Northern Ireland peace process may become less stable. Furthermore, exit from the EU – especially given current government policy on this issue – would probably entail depriving people from the UK and those who are present within it of important rights, such as freedom of movement within the EU and the right to vote in elections to the European Parliament. Some of these entitlements may already be realised through domestic legal enactment. Exit from the EU will not in itself repeal this internal legislation; and the proposed Great Repeal Bill, if it manifests itself, may be intended to provide continuity. But UK exit from the EU will render certain key rights meaningless, even if they remain temporarily part of UK law. Moreover, the special legal protection that EU-based rights enacted in UK law enjoyed from parliamentary interference will be removed, unless some other form of entrenchment is introduced. Leaving would also represent a major change in the external orientation of the UK on a scale unsurpassed in UK history. Moreover, it is important to perceive the implications not only from the perspective of the UK. The consequences for the geo-political balance of forces will be substantial. It could have a destabilising impact upon the EU. While some in the UK might relish this scenario, others – perhaps even among advocates of leaving – will realise it is likely to be detrimental to the UK.

The constitutional basis for activating Article 50

Since all of the outcomes described above can be reached simply by instigating the Article 50 procedure, it is important to scrutinise how this triggering occurs. Of further significance, too, is how the process that follows this activation is managed. Article 50 informs us that a member state can choose to remove itself from the EU ‘in accordance with its own constitutional requirements’. What, then, are the ‘constitutional requirements’ for such a decision in the UK? To ask this question is to enter into yet

another area of indeterminacy and controversy that has emerged in the wake of the EU referendum. We know the position of the government, as set out by Theresa May: that the executive has sole responsibility for activating Article 50, and handling the negotiations that then commence. But is this position legally correct; and is it constitutionally correct?

One difficulty which emerges in this discussion is the lack of a ‘written’ constitution in the UK. Such a text could provide a clear account, in a single document, of a range of core, legally enforceable principles of the UK system. If it existed, it might make more clear than is presently the case where the authority lies for the triggering of Article 50 and the conduct of policy thereafter. At present, the government claims that it has sole authority using an ancient authority known as the Royal Prerogative. Once this power was exercised in fact as well as in form directly by the monarchy. Now it has in practice largely devolved to ministers. By definition, a Royal Prerogative power has not been provided by Parliament; and unless it makes specific provision to this effect, Parliament has no firm right to a role in its exercise.

The government assertion that it has the power to trigger Article 50 under the Royal Prerogative is currently the subject of a legal challenge. But whatever the outcome of this process, a further point arises. One of the features of the ‘unwritten’ UK constitution is a divergence between that which is legal and that which is proper. Even if the UK government does possess the legal right to trigger Article 50 without reference to Parliament, is it appropriate for it to do so? Here the May Doctrine comes into conflict with the views expressed by the House of Lords Select Committee on the Constitution, that recently argued that there should be prior parliamentary consultation.

Furthermore, even for those who accept that the referendum result has some democratic force, it does not necessarily follow that Parliament has no further significant role to play. The existence of a mandate is compatible with parliamentary processes. A party that takes office alone after a General Election is generally accepted as possessing a mandate for the proposals included in its manifesto. Yet this concept is compatible with the processing of its legislative programme by Parliament. Both Houses scrutinise, amend and potentially seek to block measures emanating from the government, subject to convention and political calculation in which the mandate con-

cept figures. In a representative democracy, voting by the public provides the basis not for the exclusion of Parliament, but for it to begin its work. Mandates play out through elected institutions. They can in the process be subject to refinement and modification. Moreover, potentially, under scrutiny, parliamentarians could come to the view that a proposed course of action lacks a mandate, even if one is claimed for it.

It may transpire that the UK government is legally able to bypass Parliament over exiting the EU. Yet if acting in accordance with strict legal rights is deemed to be a measure for acceptable conduct, the UK government could then in theory equally choose to proceed as though the EU referendum had not occurred, or not produced a 'leave' result, and simply to continue as a member of the EU. Similarly, a UK government could, by the application of its supposed prerogative power, presumably have triggered Article 50 at any point since it came into force, on its own initiative, without there having been any referendum or parliamentary action. Such behaviour would be regarded by many as a constitutional affront. So too might entering into and managing the Article 50 procedure post-referendum without allowing any specific role for Parliament.

The May 'Brexit means Brexit' mantra has now been revealed as entailing that, since the vote on 23 June yielded a 'leave' result, there is no further role for Parliament to play in the instigation (or otherwise) and handling of exit proceedings. But to exclude Parliament from such a momentous decision is difficult to reconcile with a key objective of many who advocated departure: the assertion of parliamentary sovereignty. The idea of parliamentary sovereignty connects in turn to the 'take back control' slogan. If Parliament is to be denied a meaningful part in the process of leaving, who, it might be asked, is regaining this 'control'? The answer would seem to be an executive, able, moreover, to exercise it in an arbitrary fashion.

If Parliament is denied a formal role in the decision to activate the Article and in the conduct of the consequent negotiations, its role in relation to Brexit will be minimal. Its being asked to pass a 'Great Repeal Act' would amount only to dealing with the consequences of Brexit, not the prospect of Brexit itself. It is true that, under the Constitutional Reform and Governance Act 2010, the House of Commons is able to veto treaty ratification. Potentially, then, it

could block an agreement reached with the EU under Article 50 (and other treaties arising from the UK leaving the EU) – but to do so would be to intervene very late on, rather than to be engaged in the initial decision or to shape the deal arrived at. It would, moreover, be a drastic action, potentially leaving the UK outside the EU with no exit deal at all. Furthermore, aside from any formal powers to intervene, the stipulation by May that a 'running commentary' will not be provided could mean – depending on how it is realised in practice – that Parliament struggles in performing its fundamental duty of holding the executive to account. How, for instance, could parliamentary select committees formed to monitor departments and policy areas relevant to Brexit, fulfil their functions properly if they are denied basic information about negotiations?

The realisation that the executive might possess such strength relative to Parliament encourages reflection on the nature of the UK constitution. Many of the uncertainties and difficulties discussed above derive primarily from internal features of the UK political system. They pre-date membership of the EU. Moreover, if the UK leaves, they will become more significant in a post-EU UK. A common theme of anti-EU campaigning in the UK has been that it was an undemocratic, centralised entity governing through fiat and undermining the ancient liberties of England or the UK. But recent developments suggest a different perception is possible. A comparison of the respective approaches of the EU as a whole and the UK to the Article 50 process is revealing. On the EU side, each of the member states – in turn accountable to their own parliaments and publics – and the European Parliament, elected by the people of the EU, will play a part in shaping and approving – or vetoing – any exit deal. By contrast, the UK government believes it can undertake this process on behalf of the entire UK exclusively on its own account, with no formal rights for the Westminster Parliament, or the devolved institutions. In this scenario, it is not the EU that appears a monolithic polity suffering from democratic deficit, but the UK.

A role for Parliament

However, the possibility of fuller parliamentary engagement is not yet completely excluded. If the judiciary decides that the use of the Royal Prerogative with respect to Article 50 is not lawful, and if it overcomes a traditional disposition not to assert itself in matters of high politics, the executive may

be forced to take a different approach. Alternatively, the government may modify its position for other reasons, perhaps including pressure from Parliament itself. In either scenario, what would be the proper role for Parliament? Moreover, if and when Article 50 is activated, how should Parliament engage with the process that follows?

The two basic options for parliamentary involvement in the activation of Article 50, as the House of Lords Select Committee on the Constitution has recently identified, are that it should involve a parliamentary resolution or a statute. The latter seems in many ways the more constitutionally satisfactory option. It would be the best means of ensuring that the response to the EU referendum takes place firmly within the established norms of representative democracy in the UK. To this end, a statute could:

- Ensure that Parliament performed its established role as the body responsible for taking and overseeing the implementation of key decisions for the UK;
- Remove any legal doubts about where the ultimate authority lies, granting the executive certain powers but firmly subjecting it to whatever controls were deemed appropriate;
- Involve a legislative process whereby both the procedural and substantive issues arising in response to the EU referendum could fully be discussed by representatives in Parliament;
- Engage both Houses of Parliament directly in scrutinising and approving the principle and detail of the framework in which the UK government will respond to the referendum. A role for the Lords as well as the Commons is appropriate given the gravity of the circumstances;
- Make possible the creation of binding requirements upon the government prescribing the basis on which it should report to Parliament on the progress of negotiations, in the event that Article 50 is activated. Though some degree of confidentiality is required, protests about the difficulties of a 'running commentary' must be overcome. Clearly, parliamentary influence on the outcome is limited by the fact that, while it might shape the

negotiating position of the UK government, it cannot guarantee how it will be received by the EU and what agreement might ultimately be reached; and

- Further requirements, for instance for parliamentary votes on terms that were obtained and/or a second referendum. The effectiveness of these options would be subject in part to the willingness of the EU to countenance the UK suspending or reversing the Article 50 process.

While statute is ideal, a resolution – particularly if parliamentarians forced amendments to it – could be directed towards the ends described above.

But what might Parliament and the parliamentarians (that is to say, both MPs and Peers) comprising it seek to achieve by creating a more central role for themselves in the Brexit negotiation process? One approach that some in Parliament propose at present is that their responsibility is, in the words of May, to 'make a success' of Brexit, and help to ensure that the UK obtains the best possible deal. This outlook represents a challenge to the May Doctrine only in as far as it envisages a role for Parliament that amounts to more than that of a bystander. It does not contradict the underlying proposition of the Prime Minister that the democratic imperative to leave is irresistible. In this scenario, 100 per cent of parliamentarians – a majority of whom seemingly supported 'remain' – would still be required to take instruction from the slightly over 37 per cent of the registered referendum electorate who voted for 'leave'.

Within the constraints of the 'make a success' approach, what is the scope for meaningful parliamentary action? Among those who are supporters of leaving the EU, there may be agreement that they have a duty to ensure that the UK government holds fast to its commitment to exit. However, opinions among them will differ as to what constitutes the best possible deal. Moreover, whatever the UK tries to obtain from leaving, there is no guarantee that it will be able to obtain it in negotiations with the remainder of the EU. Indeed its objectives may prove to be irreconcilable with one-another.

The position is more problematic still for those parliamentarians – a majority of them, it is reasonable to assume – who do not personally support leaving the EU, if they have decided nonetheless to 'seek

the best deal' or 'make Brexit work'. Some of them may have concluded that they are obliged to abide by the referendum result and the supposed mandate it produces. They may have formed the opinion that such an outcome is now inevitable. They may be reluctant to oppose UK departure from the EU for fear of the political and personal consequences of their doing so. Or they may have judged for tactical reasons to appear to accept the outcome, in the hope that a more apt moment will present itself to mount concerted opposition. Those who fall into this general category of reluctant conceders may seek to present themselves as realists, striving to exploit the opportunities for the UK in circumstances that they did not seek.

But they can never be engaged in more than a damage limitation exercise. For those who want to remain within it, EU membership is the best deal. All other arrangements involve different varieties and degrees of inferiority. As the government (of which May was a member) put it in its March 2016 document on possible post-EU arrangements for the UK (paras 4.2-3), in the event of an exit forced by a 'leave' result:

It would...be hard even to come close to replicating the level of access and influence from which the UK currently benefits as a result of our special status in the EU. In addition to the pressure imposed on the UK by the Article 50 process to secure a deal quickly, reaching agreement on a wide range of issues with 27 Member States, each of which would seek to fight for their own interests, is likely to be challenging and involve difficult trade-offs. If we failed to reach agreement within two years under the Article 50 process, our membership of the EU – including our access to the Single Market and to Free Trade Agreements with 53 markets around the world – would lapse automatically, unless all 27 other Member States agreed to an extension...The UK would therefore have to make some difficult decisions about its priorities. Each possible approach would involve a balance between securing access to the EU's Single Market, accepting costs and obligations and maintaining the UK's influence.

Moreover, the present posture of the UK government is that it will prioritise attaining control over migration policy over maintenance of access to the Sin-

gle Market. On this trajectory the post-EU outcome for the UK, if it leaves, would be one that would tend towards a maximisation of possible discontinuity. From this starting point, the prospects even for a damage limitation exercise are bleak. The hopes of retaining any of the key benefits that accompany EU membership – such as freedom of movement and membership of the Single Market – appear remote. The unfolding of this scenario might well cause those parliamentarians who have initially conceded defeat and simply seek to extract the best from leaving the EU to reconsider their position. Outright opposition to implementation of the 'leave' result should become relatively more attractive – or perhaps essential. Even those parliamentarians who have believed they are bound by a popular mandate might question whether it extends as far as the present interpretation the UK government is placing upon it.

Those parliamentarians who reach the view that there is no deal worth having outside the EU, and that they are not bound by an irresistible popular mandate, or who held these opinions all along, have a simple responsibility. Their role within our system of representative democracy requires them to seek to ensure that the UK remains within the EU, or at least that the electorate is given the chance to reverse the previous vote. Such individuals could well come to comprise a majority in both House of Parliament – indeed they may already do so. In such circumstances, if sufficiently determined, they could prevail. Fulfilling their responsibility might well entail their condemnation for acting in a supposedly anti-democratic spirit. In reality, they will be defending our system of representative democracy against populist majoritarianism – or perhaps that should be pluralitarianism. These parliamentarians are also likely to be exposed to the charge that they are creating alarm about the prospect of leaving the EU, within and beyond the UK. Yet it may well be that alarm is well-founded and necessary, and to seek to quell it is to endeavour to mislead.

Much of the discussion of parliamentary approval being sought for exit from the EU does not make the most crucial point explicit. If the permission of Parliament is being sought for a given course of action, Parliament can by implication refuse to provide it, or insist upon modifications to it. In such circumstances, whether or not it is legally required to do so, the government should at the very least reverse or alter its policy. The resignation of a num-

ber of senior ministers, perhaps including the Prime Minister, could also be a likely and appropriate outcome. What would follow next is beyond the immediate scope of this paper. What matters to the present discussion is that Parliament would successfully have asserted its will to prevent exit from the EU, if it decides it has such a will.

There are a number of points at which parliamentarians might seek to put an end to attempts to leave the EU, or at least prepare the ground for such a change of direction. Opportunities could arise if votes were held on resolutions either on the principle of leaving, or on activation of Article 50. If a bill is passing through Parliament intended to provide the executive with the authority to activate Article 50, it is possible for Parliament to block such legislation altogether, or ensure that it contains provision for parliamentary intervention into the process at a later stage, or a second referendum on the terms reached, perhaps including a threshold. If and when Article 50 is activated, Parliament may seek to halt the process while ongoing, before the two-year deadline – or any extension period that is secured – has expired. As we have seen, whether a state can extricate itself unilaterally from Article 50 once instigated is unclear. Much may depend on the politics of the negotiation. It would be better from the point of view of those opposed to leaving the EU that the Article is not invoked at all. However, it may be deemed necessary to seek to halt the proceedings, and hope that to do so proves acceptable to the EU.

While the Commons has primacy, both Houses of Parliament have a potential role to play in the reversal of present policy, if it takes place. The House of Lords may well feel less bound by party political considerations than the House of Commons. But at the same time, constitutional principles might be an obstacle for the Lords. Would it be appropriate for an unelected chamber to seek to frustrate a government that has the confidence of the elected chamber? The Conservative manifesto in 2015 pledged both to hold a referendum on EU membership, and to respect the result. In this sense, exit may be seen as covered by the so-called 'Salisbury convention'. However, Peers may decide that the various problems with the translation of the vote into an outcome discussed above release them from any mandate requirement. Furthermore, conventions can change, be reinterpreted, or be dispensed with altogether. Indeed flexibility is held to be a key strength of the UK

constitution. The origins of the Salisbury convention lie in 1945, a time before the European integration project had even commenced, and referendums were not the established part of UK politics they would later become. (Indeed, as we have seen, the then Prime Minister, Attlee, regarded them as a sinister, anti-democratic device.) Some might hold that it is inappropriate for the Lords to seek to make such an important impact. Others could claim that because the stakes are so high, peers have a responsibility to act, and that if the Lords cannot involve itself in this issue, there is little point in its existing. The government may claim a lack of democratic legitimacy on the part of the Lords, but it has no immediate plans to reform it to correct this defect.

There is one particular parliamentary lever that the Lords does not possess, and is uniquely the property of the Commons. If the UK government denies Parliament any express role in the response to the EU referendum – as it seemingly intends to do at present – or if it seeks to exclude it at a particular crucial moment, the Commons nonetheless possesses an important latent power. It can remove its support from the government as a whole, and force the formation of a new administration committed to remaining within the EU. The precise nature of votes of confidence has recently become confused by the Fixed-term Parliaments Act 2011. Nonetheless, a government faced by a Commons determined to unseat it cannot long survive. The deployment of this nuclear option would rest on a split in the governing Conservatives, and possibly other crosscutting divisions. But the drama of such cleavages would be dwarfed by the significance of the decision over the EU currently facing the UK. It would be an apt conclusion if the defeat of the movement to leave the EU were marked by Parliament genuinely taking back control.