

Durham Research Online

Deposited in DRO:

03 May 2019

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Brooks, Thom (2019) 'Brexit means anything but Brexit : why the Prime Minister is at a crossroads and in need of a second referendum.', *European human rights law review*. (3). pp. 229-234.

Further information on publisher's website:

<https://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?productid=6823recordid=388>

Publisher's copyright statement:

This is a pre-copyedited, author-produced version of an article accepted for publication in *European Human Rights Law Review* following peer review. The definitive published version Brooks, Thom (2019). *Brexit means anything but Brexit: Why the Prime Minister is at a crossroads and in need of a second referendum*. *European Human Rights Law Review* (3): 229-234 is available online on Westlaw UK or from Thomson Reuters DocDel service.

Additional information:

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

Opinion

Brexit means anything but Brexit:

Why the Prime Minister is at a crossroads and in need of a second referendum

Thom Brooks¹

This Opinion engages with the Prime Minister's claim that 'Brexit means Brexit' and that this is what she intended to deliver only to find both her party and the public abandon her once a plan for Brexit was published. It is argued that, if May wants Brexit in some form to happen, its likely content will enrage her party. Yet, if she plays to her party then her plans for Brexit are over. The recommended way out of this crossroads is to call a second referendum recognising it is the best of available options that should command support from Leavers and Remainers alike to bring finality and break Parliament's deadlock.

Key words: Brexit; Constitutional Law; European Union; Immigration

'Brexit means Brexit' is the mantra repeatedly uttered with disciplined conviction by Prime Minister Theresa May since July 2016.² This was shortly after the EU Referendum result, but months away from her triggering Article 50. While much has changed over the nearly three years since, the UK has yet to Brexit and the public are only confused further about what 'Brexit' means.

The following Opinion reflects on Brexit's troubled beginnings which can help explain both May's challenge in receiving support for her plans in Parliament and why she may have to choose between delivering some form of Brexit now or focus her attention on keeping her party united, but cannot have both. I conclude by providing a possible way out of the current parliamentary gridlock via a second referendum.

I. Brexit means stopping UKIP

Originally, Brexit did not mean leaving the European Union. Its political aim was not to take back control from Brussels, but from UKIP. In 2010, Prime Minister David Cameron took the helm of a Conservative-led coalition because it had failed to win a majority despite toppling Gordon Brown's government. As YouGov's Peter Kellner observed, a future Tory victory in

¹ Thom Brooks is Dean of Durham Law School, Professor of Law and Government at Durham University and an Academic Bencher of the Honourable Society of Inner Temple.

² The phrase was first used by May as a candidate to succeed David Cameron on 11 July 2016: 'Brexit means Brexit and we're going to make a success of it'.

2015 required squeezing UKIP support or risk not only losing the election, ‘but suffering lasting damage’.³ Of course, UKIP took votes from other parties, like Labour. However, for every one ex-Labour voter UKIP was winning over three ex-Tory voters so the threat they posed was decidedly targeting the Conservatives most.⁴ No party had a monopoly on support for leaving the EU. Euroscepticism could be found in different degrees within the Tories and Labour although much more so in the former than the latter. The issue was not that there was Eurosceptics in the Conservative Party wanting out of the EU, but that those with that view increasingly turned to supporting UKIP instead. The political writing was on the wall for Cameron if he wanted to boot the Liberal Democrats out of Downing Street and run a coalition-free Tory government and that was to give potential voters backing UKIP a new reason to support the Tories.

This new reason was the promise of an in-out EU referendum. It is worth remembering that, for Cameron, voting Remain was not support for the status quo. Instead, he secured a draft agreement on what was called an ‘emergency brake’ on EU migrants claiming in-work benefits for up to seven years, an opt out from the EU’s commitment to forge an ‘ever closer union’ and a ‘red card’ system to allow national parliaments to prevent unwanted EU laws from taking effect.⁵ This created a choice between a EU to be reformed subject to later confirmation versus a Brexit whose details were to be nailed down after the result. Neither option provided finality, only a direction of travel.

The government’s official view was to remain in a reformed EU with ministers free to take opposing sides.⁶ This plan worked well as a political strategy to stem the tide of defecting Tory voters to UKIP. Cameron won a modest 12-seat majority. However, Cameron’s strategy was only to use a Brexit referendum to win back voters and not to leave the EU. To that end, his plan backfired in putting the Tories back in government but led by his successor to enjoy his election victory after he stepped down the day after the 2016 referendum.

This strategy focused more on what was disliked about the EU than any benefits of continuing membership. Cameron’s Euroscepticism. In 2014, he claimed ‘the EU is not working and we will change it’.⁷ The EU was a problem where the UK’s membership would be premised on it changing to the UK’s liking. This problem extended to the aim of seeking the right for his government to veto European Court of Human Right judgements notwithstanding criticisms that leaving the EU did not strictly commit the UK to exiting the Court’s jurisdiction.⁸

³ Peter Kellner, ‘Do angry Ukip voters threaten Tory future?’ YouGov.co.uk (13 October 2014), <https://yougov.co.uk/topics/politics/articles-reports/2014/10/13/do-angry-ukip-voters-threaten-tory-future> [Accessed 1 May 2019].

⁴ Ibid.

⁵ European Council, ‘European Council meeting (18 and 19 February 2016) – conclusions’, EUCO 1/16 (19 February 2016), <http://docs.dpaq.de/10395-0216-euco-conclusions.pdf> [Accessed 1 May 2019],

⁶ David Cameron, ‘Personal Minute: To all Ministerial colleagues – EU referendum’, (11 January 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/491181/EU_R_eferendum_PM_Minute.pdf [Accessed 1 May 2019].

⁷ David Cameron, ‘The EU is not working and we will change it’, (15 March 2014) *The Daily Telegraph*, <https://www.telegraph.co.uk/news/newstoppers/eureferendum/10700644/David-Cameron-the-EU-is-not-working-and-we-will-change-it.html> [Accessed 1 May 2019].

⁸ Nicholas Watt, ‘David Cameron prepared to break th Europe on human rights’, (2 June 2015) *The Guardian*, <https://www.telegraph.co.uk/news/newstoppers/eureferendum/10700644/David-Cameron-the-EU-is-not-working-and-we-will-change-it.html> [Accessed 1 May 2019].

Nevertheless, Brexit was never the goal for the government. The Foreign Affairs Select Committee went so far as to claim it committed an act of ‘gross negligence’ in instructing Whitehall to make no contingency plans for leaving the EU.⁹ It is as if leaving the EU was not the real point of the referendum after all. Sadly, this failure to plan for unwanted possibilities is a mistake that will be repeated again soon.

II. Brexit means consolidating support to become Prime Minister

Brexit soon transformed itself from a means to an end to prevent lost votes to UKIP to a means to an end to gain backbench votes to become Prime Minister. During the EU referendum, then Home Secretary Theresa May said ‘it is clearly in our national interest to remain a member of the European Union’.¹⁰ She feared ‘a loss of investors and businesses’ to the EU and ‘going backwards when it comes to international trade’.¹¹

Since Leave won and Cameron left office, May has said many things since. But it is fair to say that she has not changed her views about what she campaigned for, but about what is best since that campaign was lost. May’s support for Brexit is genuine in its reluctance. It is worth remembering too that her aforementioned speech concluding with her stating her wish the UK would remain in the EU, May had more to say of what she did not support than what she did. This Euroscepticism has likely contributed to May’s attempt to deliver a harder Brexit, including her own desire to see the UK out of the jurisdiction of the European Court of Human Rights appealing directly to the Eurosceptic wing of her party.¹²

This can be seen in one of May’s first acts over Brexit: to fight a court battle about whether her government could unilaterally trigger Article 50 and start the countdown to Brexit without Parliament’s explicit consent. The *Miller* case exercises many legal minds afterwards, but was a battle May could have easily avoided by conceding a vote and proceeding to a swift start to Brexit talks as she clearly wanted.¹³ At the time, I saw this as the first sign that the Prime Minister was trying to pin blame on others – perhaps the judiciary – for frustrating a Brexit that I predicted could not be implemented by 29 March 2019.¹⁴

The post-*Miller* rush to trigger Brexit talks before confirming Cabinet agreement for how they would be negotiated and a plan for achieving specific outcomes can be explained either as a previously undisclosed enthusiasm for Brexit generally or, more likely in my view, achieving the aim of further consolidating her party’s support for her leadership – which has

⁹ Foreign Affairs Select Committee, *Equipping the Government for Brexit*. London: HMSO, 20 July 2016, <https://publications.parliament.uk/pa/cm201617/cmselect/cmfaaff/431/43102.htm> [Accessed 1 May 2019].

¹⁰ Theresa May, ‘Theresa May’s speech on Brexit: full text’, (25 April 2016) Conservative Home, <https://www.conservativehome.com/parliament/2016/04/theresa-mays-speech-on-brexit-full-text.html> [Accessed 1 May 2019].

¹¹ *Ibid.*

¹² Anushka Asthana and Rowena Mason, ‘UK must leave European convention on human rights, says Theresa May’, (25 April 2016) *The Guardian*, <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum> [Accessed 1 May 2019].

¹³ See *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5 (24 January 2017).

¹⁴ Rachael Pells, ‘UK will never leave EU because Brexit process ‘too complex’, says academic’, (29 August 2016) *The Independent*, <https://www.independent.co.uk/news/world/europe/brexit-article-50-eu-referendum-uk-will-never-leave-says-top-academic-a7214926.html> [Accessed 1 May 2019].

held steady until recently. Brexit is once more a means to an end rather than any particular destination.

III. Brexit means selective memory

Since September 2018, Brexit's meaning changed again – this time to something very specific in terms of a withdrawal agreement based on a selective memory of past campaign promises.

Of course, the best known promise of Vote Leave was to redirect £350m per week it claimed was sent to the EU and instead spend it mostly on the NHS. This reflected the UK's gross contribution that does not take into account Britain's rebate of about £75m per week nor the amount per week the EU pays to the UK in farming subsidies and regional aid.¹⁵

Nonetheless, this is a significant sum in the eyes of the public. What is more, the Prime Minister did promise that NHS spending would increase by more than £350m by 2023—24 although this spending neither covers all health spending in England nor likely to come from any so-called Brexit dividend.¹⁶

A second major promise of Boris Johnson and Michael Gove's official Brexit campaign group Vote Leave was that Brexit means a new points-based immigration system.¹⁷ Nigel Farage, who headed unofficial Brexit campaign group Leave.EU, claimed 'everybody who voted Brexit wants a points-based immigration system'.¹⁸ Both groups claimed that a points-based immigration system was exactly what was needed to take back control of the immigration system after EU free movement is ended. Critics said that countries, like Australia, that introduced points-based immigration systems did so in order to attract more immigrants rather than cut numbers.

As an immigrant to the UK and immigration expert, I found myself baffled by both sides. Why? Because the UK already has a points-based immigration system – and for about a decade.¹⁹ I should know – I received my visa through it. So, there is no points-based system to launch for the first time even if it is currently only used for non-EU migrants. It makes one wonder how little politicians making the loudest promises about immigration know about the system they are so eager to reform. Their points-based revolution already happened, and they were too busy complaining about the system to notice it.

Referenda are not general elections: there is no requirement to publish a manifesto and hold those who win accountable for making good on promises they made. We know that the main

¹⁵ See BBC News, 'Boris Johnson: Does his £350m a week Brexit claim add up?' (18 September 2017), BBC News, <https://www.bbc.co.uk/news/uk-politics-41306354> [Accessed 1 May 2019].

¹⁶ See FullFact, 'NHS England: £394 million more a week?' (26 November 2018) FullFact.org (26 November 2018), <https://fullfact.org/health/nhs-england-394-million-more/> [Accessed 1 May 2019].

¹⁷ Peter Dominiczak, 'EU Referendum: Boris and Gove pledge tough new immigration system after Brexit', (1 June 2016) *Daily Telegraph*, <https://www.telegraph.co.uk/news/2016/05/31/eu-referendum-boris-and-gove-pledge-tough-new-immigration-system/> [Accessed 1 May 2019].

¹⁸ Amy Southall, "'Everybody who voted Brexit wants a points-based immigration system,'" says Nigel Farage', (5 September 2016) talkRADIO, <https://talkradio.co.uk/news/everybody-who-voted-brex-it-wants-points-based-immigration-system-says-nigel-farage-1609053654> [Accessed 1 May 2019].

¹⁹ See Home Office, *Tier 2 of the points-based system* (version 32.0). London: HMSO, 2019, <https://www.gov.uk/government/publications/points-based-system-tier-2> [Accessed 1 May 2019].

issues for those backing Brexit were sovereignty and immigration, but they do not by themselves dictate what Brexit means.²⁰

The Prime Minister took Brexit to mean specific things: an end to freedom of movement (and no points-based immigration system), an end to the ECJ's jurisdiction and no Customs Union membership. Yet, FullFact.Org confirmed a lack of consistency by the Vote Leave official campaign that Brexit would mean exiting the Customs Union.²¹ Michael Gove said during the campaign that: 'There is a free trade zone stretching from Iceland to Turkey that all European nations have access to, regardless of whether they are in or out of the euro or EU. After we vote to leave we will remain in the zone' – strongly suggesting Brexit does not mean leaving the Customs Union.²² Another prominent campaign, Daniel Hannan MEP, said in the run up to the campaign 'absolutely no one is suggesting we would give up our position in the free market in Europe' suggesting Brexit did not mean leaving the Single Market either.²³

My point is not to hold either side to every promise made in its name. The issue is that the Prime Minister took Brexit to mean only a specific set of red lines not clearly supported consistently by those who championed Brexit – and, in rejecting a points-based system, claimed Brexit did not mean one of the most popularly held policy views of those who campaigned and voted for Brexit. Brexit means a selective memory of picking and choosing red lines somewhat arbitrarily – which to some degree undermines the claim that to fail to give full support to the implementation of every policy picked is to betray some specific democratically chosen set of policies for Brexit.

IV. Brexit lite or Rule Brexitannia?

Now Brexit's meaning is in transition once more splintering off into opposing, hardened camps. One view of Brexit is what we might call *Brexit Lite*. It is where a majority seems most possible in seeing the UK leave the EU but remain within the Customs Union and possibly the Single Market. Like any lite brand, it is a less substantial substitute for the so-called 'real' thing of a complete, No Deal total break. The attractiveness of Brexit Lite for its proponents is that it honours Brexit in name with minimal disruption in its spirit. Much might continue to operate as before, but Britain would be out of the EU.

A second, opposing view is *Rule Brexitannia*. This represents both a firm breaking off from the EU and a desire to reclaim a cherished past. Both parts matter. Brexit is not merely a break or new beginning, but a return to greatness. Rule Brexitannians want a harder Brexit not to hide from the world, but to reengage like the global powerhouse we once were.

²⁰ See Noah Carl, 'People's stated reasons for voting leave or remain', The UK in a Changing Europe (2018), <https://ukandeu.ac.uk/research-papers/peoples-stated-reasons-for-voting-leave-or-remain/> [Accessed 1 May 2019].

²¹ See FullFact, 'What was promised about the customs union before the referendum?' (26 October 2018) FullFact.Org, <https://fullfact.org/europe/what-was-promised-about-customs-union-referendum/> [Accessed 1 May 2019].

²² See http://www.voteleavetakecontrol.org/michael_gove_the_facts_of_life_say_leave.html [Accessed 1 May 2019].

²³ See <https://youtu.be/zzykce4oxII?t=308> [Accessed 1 May 2019].

Neither view represents a consistently held position by either Vote Leave or Leave.EU during the referendum. This is not to dismiss their credibility, but to earmark them as post-Brexit claims about what Brexit means.

Each sees the other as a danger. Rule Brexitannians see support for Brexit Lite as a charade that hamstringing Brexit's potential paying mere lip service to the vote to leave the EU. Whereas Brexit Lite sees Rule Britannia as a reckless leap into an abyss from which it might take a generation or more to climb out and rebuild what was lost.

The problem for May is that this hardening represents a deep split in her party and Leavers across the country. To outsiders, they appear as two different conceptions of Brexit. But for them, each sees itself as the Brexit that the public mandated through the referendum – with the other lacking that justification. This deep difference makes reconciliation difficult to find and each vote by Parliament against May's plans for withdrawal saw each take different positions on whether to support her or not. Interestingly, May's plan is neither isolating her position on what Brexit means even more.

V. Brexit's future in a second vote

So how to move forward? Consider three options. The first is that the Conservatives change their leader and so the Prime Minister. However welcome this may be it does not solve Parliament's gridlock because it does not change its arithmetic. A different personality whether more charismatic or Churchillian makes no difference to resuscitating the same deal struck dead more than once.

A second option is that there is a new general election called. This is now a possibility with the delay of Brexit until at least Halloween. Yet, without changing or reducing May's red lines, it is clear that no majority in Parliament will spook the EU into a different deal especially with the latter calling the shots on the Brexit timetable. Any attempt to try, try and try again will fail each time as May's plan did across three votes in the House of Commons. The only greater folly might be for a proponent of Rule Britannia to claim additional red lines yet expect a more generous concession in return.

A third option might prove to be May's best hope in an unlikely place: calling a second referendum. This outcome is tainted by association: namely, it has become synonymous with those who want to cancel Brexit as some Remainers were quick to call for another vote shortly after the first was counted. A second referendum has a large number of MPs behind it although still short of a majority.

But now reconsider May's position. If a new leader or election might not push her deal past the parliamentary line to win a meaningful vote, a second referendum could give her withdrawal agreement a second life. A choice between her deal or no Brexit would command a majority in Parliament who, for different motivations, each have something gain from holding such a contest. Pro-Remain MPs would have a last attempt at blocking Brexit for good while pro-Leave MPs would have a final push for public support before the October deadline.

The strategy carries big risks for May. If she lost, then her deal is gone and so too her time as Prime Minister. Yet should she win, May could achieve two aims. First, she could 'own'

Brexit by leaving out No Deal and forcing pro-Leave critics to either publicly support her or be shown to fail to back Brexit when it was needed most. Secondly, a win would put all MPs under sufficiently strong political pressure to vote for her deal no matter how reluctantly – just as we saw MPs from all parties come out in support of triggering Article 50 notwithstanding any concerns they held personally. A second referendum is May’s only viable chance at passing her deal at this time – and it would bring much needed finality to the Brexit debate.²⁴

VI. Conclusions

This Opinion has taken no view about how the public should vote on Brexit or any other matter. It has not commented on claims the winning side told falsehoods to mislead the public to victory or about the impact, if any, that unlawful campaign spending might have played. My intention is not to suggest these issues are unimportant, but instead to draw out a narrative in as non-partisan a way possible – notwithstanding my serving as an advisor to Labour for many years (which will overshadow my analysis enough for some readers).

Those who put Brexit on the table – Cameron in promising a referendum and May for triggering the Brexit talks – are not those who wanted it to happen. It is hardly surprising to suggest that Brexit has been used by them for goals other than leaving the European Union, but without doubting their sincerity in seeing through their promises. May’s claim that ‘Brexit means Brexit’ seemed apt at the time when its meaning was still being pinned down. Now it seems Brexit means something different.

Britain is now at a crossroads that perhaps only a second referendum might help us pass. This does not mean another vote will happen or that problems arising during the last campaigns will not return. I remain of the view that Brexit is so complex politically and legally it is highly unlikely to happen, at least in any of its purer forms.²⁵ We may know by November whether this pessimistic, realist prediction comes true. Either way, the debate over what Brexit means will not end even if Brexit’s implementation does.

²⁴ Thom Brooks, ‘I advised the Electoral Commission on Brexit – this is why Theresa May needs a new referendum to pass her deal’, (22 January 2019) *The Independent*, <https://www.independent.co.uk/voices/brexit-second-referendum-theresa-may-deal-parliament-commons-peoples-vote-final-say-a8740091.html> [Accessed 1 May 2019].

²⁵ Thom Brooks, ‘I’m known as the Brexit expert who said it would never actually happen – after Article 50, my opinion hasn’t changed’, (9 April 2017) *The Independent*, <https://www.independent.co.uk/voices/brexit-will-never-happen-article-50-theresa-may-remoaners-expert-leave-eu-a7674596.html> [Accessed 1 May 2019].