

## Conclusion and Reflections

Brexit Seminar Series, 4 December 2015, All Souls College

Conveners: Sir Jeremy Lever and Dr. Jeremias Prassl

Speakers:

- Sir David Edward QC, former Judge of the European Court of Justice
- Professor Kalypso Nicolaïdis, Professor of International Relations, St Antony's College, Oxford
- Lord O'Donnell, former Cabinet Secretary; Chairman, Frontier Economics
- Dr. John Redwood MP

*Rapporteur*, Marius Ostrowski

The meeting was opened by Jeremias Prassl, who began the discussion by thanking all the contributors to the seminar series, and expressing his hope that the final session would produce both controversial arguments and discussion.

David Edward hoped it would not be held against him that he had both worked for the EU and holds an EU pension. He would be speaking from a Scottish unionist rather than Scottish nationalist perspective.

Following Robert Marjolin, the discussion about Brexit should avoid the expression 'United States of Europe', because it tends to create dangerous illusions in the minds of those who are ignorant of history. Likewise, as observed by Robert Schuman, it is clear that Europe will not be built at a single stroke or according to a master plan. It will be built through concrete achievements which first create a *de facto* solidarity between its members.

Stated simply, and as put by the Irish Institute of International and European Affairs, Britain has two sovereignty problems, one relating to the internal sovereignty of Westminster over the regions of the United Kingdom and the other, external, being the relationship between Westminster and the European Institutions. This translates into two clear questions: Brexit and the future of the UK, and Brexit as it affects individual rights.

Taking the perspective of Scottish politics, the 2014 independence referendum saw a result of 45% Yes and 55% No on a turnout of 85%. However, the aftermath of the referendum has seen SNP membership numbers soar to well above 100,000, and the SNP itself win 56 out of 59 Westminster seats and 50% of the vote on a turnout of 71%. In the Scottish Parliament, the SNP hold the majority of seats without any *effective* opposition, and it seems likely that they will increase (or at least hold) that majority in the next Scottish elections in May 2016.

In the referendum campaign, the Yes and No campaigns focused on the supposed economic 'advantages' without carrying conviction either way, but the Yes campaign had the better of the emotional argument. Meanwhile, the economic case for altering the *status quo* has been proved by events to have been based on an unsound hypothesis (the oil price).

Regarding relations between Scotland and the EU, the SNP is committed to EU membership, and opinion polls *tend* to show that a majority of Scots favour EU membership. UKIP won 1 out of 6 Scottish seats in the European Parliament, but only 1.6% of Scottish votes in the 2015 General Election. This implies that there is a probability that Scotland would vote Yes in the EU referendum. Taking as a working hypothesis that Scotland votes Yes, but the UK as a whole votes No, this would be construed by the UK Government as a mandate for Brexit, but could equally provide the basis for calling a second independence referendum in Scotland. In that event, some 2014 No voters would be likely to vote Yes, while few (if any) Yes voters would vote No.

Moreover, the Scottish referendum teaches us that a referendum does not settle matters for a generation, still less does it settle matters ‘once and for all’. It is productive of deep divisions (and unhappiness) amongst friends and families, and is just as likely to create, and prolong, uncertainty as to dispel it.

Any Brexit referendum would create potential issues for Northern Ireland as well as Scotland, and would be deeply disruptive of past UK/Irish agreements. In particular, Brexit would directly affect policies regarding agriculture, business, free movement of goods and potential tariff barriers, free movement of persons, social policy, financial services, energy, justice, and terrorism and organised crime.

On the subject of individual rights, Brexit would have implications for both principles of EU law and the practicalities of leaving.

Hersch Lauterpacht prefigured the most basic principle of EU law in his book published at the end of the Second World War, *An International Bill of the Rights of Man*. Speaking of conventional public international law, he said:

The rights of man were given a foundation no more solid or secure than the law of the sovereign State. ... The sovereign State, in an exclusive and unprecedented ascendancy of power, became the unsurpassable barrier between man and the law of mankind. The human being became, in the offensive, but widely current terminology of the experts, a mere *object* of international law.

In the landmark case *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963), the Court of Justice said that the European 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, 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.*

Thus, a clear distinction is drawn between natural persons as the *subjects*, as opposed to the *objects*, of EU law. Their rights derive directly from the Treaty.

Likewise, in the *Brasserie du Pêcheur and Factortame* case (1996), Advocate General Tesouro said:

It does not seem possible to me to ignore the specific, peculiar features of the Community legal order. *That system is based ... on a contractual foundation.* The Treaty ... contains a series of obligations on Member States with regard to the achievement of the aims set out therein, which have been freely subscribed to, and to the operation of an institutional structure whose powers are very largely, but not wholly, predefined. ... The obligations of the Member States and Community institutions are directed above all—in the system which the Community system has sought and sets out to be—to the creation of rights of individuals. This is the picture drawn by the authors of the Treaty and consolidated by the Community legislature.

Constitutionally, there is an interesting parallel to be drawn with the very recent comments of Justice Kennedy in the case *Obergefell v. Hodges* (2015):

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter.

The European parallel would be that the EU treaties create individual rights which do not wait for legislation to be capable of being asserted in courts.

As regards the practicalities of Brexit, Article 50 of the Lisbon Treaty requires a period of negotiation because:

(1) transitional and final provisions would be required to determine future participation (or non-participation) in the customs union, the internal market, justice and home affairs co-operation;

(2) withdrawal from the Union would involve the unraveling of a highly complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations; and

(3) these relationships, liabilities and obligations are multilateral and, in general, reciprocal and legally enforceable.

Brexit would affect: contracts for the supply of goods and services, businesses and professionals established in UK or other member states, investors in the corporate sector, Erasmus and other students, research co-operation, the status of migrant workers in UK and other member states, and access to fishing areas. All of these involve, directly or indirectly, individual rights, so Brexit negotiations would not be solely about relations between states, but also about withdrawal or modification of individual rights. Failure adequately to protect individual rights could give rise to court actions in UK and other member states, with the possibility of references to the Court of Justice, which would have an unpredictable outcome and timescale.

Patrick Minford's comments in a previous seminar that secession from the EU would be "the last shoe to drop for the UK to become a *nation* shaped by its own *advantages*", and would allow the UK to "become a normal self-governing nation" raise some clear questions. In what sense is the UK a "nation"? Is it a "normal" nation? To what extent is any "nation" nowadays self-governing? Are the economic advantages predicted by the Brexiteers any more reliable than those of the Scottish Yes campaign? In reality, the UK is a fissile rather than a normal nation, and in the words of Rudyard Kipling, the prognoses of the Brexiteers seem to be of "unimpeachable inaccuracy".

Finally, Brexit is not simply an issue of the UK's "advantages", at the cost of honouring the obligations of solidarity towards other member states and their citizens, especially those of Central and Eastern Europe. Rather, there is a clear moral case for Europe.

Kalypso Nicolaïdis started by observing that she was, in effect, taking off from where David Edward ended, in the sense of offering a perspective on Brexit from the rest of Europe—a view 'from the outside in'. This would go a small way to redress the excess of British nationals taking part in seminar, not to mention the majority of men doing so. Although she has taught at Oxford for many years, she is Franco-Greek and therefore ineligible to vote in the referendum.

There are three arguments in support of the UK remaining within the EU. First, the 'Groucho Marx argument in reverse'. Why should the UK leave a club in which it is a respected and influential member, since many studies quantify the UK as one of the most influential states in the EU? The EU would benefit from being made a (more) British Europe, even if the UK is not yet a European Britain. Second, the 'Monty Python argument'. Following a rescue narrative, the UK should think not what the EU can do for it, but what it can do for Europe. Third, the 'great divergence argument'. In light of the fact that the main competitors for the future EU will be major rising polities such as China, there is a risk that, if the UK leaves, that EU will become a more unified political bloc of the kind that the UK has worked to avoid, which would leave the UK forced to interact with a EU that is not to its liking.

The normative and analytic basis of these questions is an attack on the tyranny of dichotomies, such as the spurious distinction between a federalist *or* a sovereigntist Europe. It is a mimetic fallacy that there needs to be a democratic state of Europe or that we can hang on to the beautiful fallacious myth of a self-governing UK. Instead, Europe needs to be a third way, a *demoicracy*, with the EU conceived as a union of *peoples*. In fact, it has been developing into this over time, and was not doing so too badly before the advent of monetary union. In this context, Britain is needed within the EU to keep Europe sane, and prevent the excessive centralisation of competences—which would be the image of a French Europe.

Monetary union came to mess up the growing demoicracy in Europe, as the EU became captive to the messianic tendency of a certain technocratic elite once monetary union began. The UK itself is in a good place as a member of the EU without monetary union, and David Cameron has some good instincts on Europe. However, the UK's future relationship with the EU cannot be all about British optouts, which is equivalent to staying married but in separate bedrooms—rather, the UK needs to renegotiate a more British Europe, which would mean refurbishing the house and staying together in a nicer bedroom.

The 4 areas in Cameron's letter to Europe are not trivial if he gets them in a real, and not in a perfunctory way, so he should be wished well for the good of Europe. With regard to the opt-out from 'ever-closer union', 'ever-closer' does not mean 'becoming the same', since everyone does integration

in different ways, so the same logic should be applied to everyone. Second, democracy also means that national parliaments must be wary of excessive executive capture, since it is purely a delusion of federalists to put all their hopes in the EU parliament.

Third, on the relationship between EMU-ins and EMU-outs, in future, it will continue to be normal for different aspects of the EU to have ‘ins’ and ‘outs’, in particular because it will remain a multi-currency union, which everyone recognises. As lawyers will confirm, the rights of ‘outs’ are, as yet, not spelt out properly. In particular, the fiscal compact and the overriding of the British veto has not been thought through properly. It is messy and needs to be revisited, as its current form was driven by the assumption that all members would join the monetary union eventually. However, the ‘outs’ are out in the cold to stay, since (speaking as a Greek) out in the cold is often warmer than inside in the warmth.

Last but not least, migration is the inevitable result of free movement, which means both access to labour markets across borders and the potential for benefit tourism. However, lawyers are paid to be creative with the law, and should consequently find creative ways for dealing with access to the welfare state. This should be more or less managed, but not in discriminatory way, relying perhaps on a residency requirement, or a national insurance requirement. Overall, peoples want to be in control, but the EU must protect free movement, and find a way to balance this with the need to recognise the fears and hopes of all people within the EU.

John Redwood began by observing that he was normally always asked to balance his remarks, but had an easier task on this occasion as he was the only person advocating leaving the EU on a panel of Europhiles. Echoing David Edward’s erudite remarks, the UK’s membership of the EU is linked to the Scots staying in the UK, since the Scottish nationalists will simply disagree with anything a Conservative government does, so the future of the Union is determined by the extent to which Scots buy into the SNP vision. Following on from Kalypso Nicolaïdis’s comments, it is clear that no-one would wish to stop the engagement and movement of peoples within Europe, since All Souls as a house of learning also welcomes people from outside EU. He commented that he is speaking as a member of Vote Leave, a well-run and well-financed campaign that is providing a daily challenge to the Europhile side.

There is nothing at risk from leaving EU—indeed, the UK will be more prosperous, more democratic, and more influential by leaving the EU. The first reason to leave the EU is that such an arrangement would be better for business in the UK, since EU membership has contributed to a massive balance of payment deficit, producing a commercial and economic arrangement that is not in the UK’s interest. After 43 years, the EU has failed to produce free trade deals agreements with the USA, China, India and other leading countries, so the UK should negotiate its own deals on its own. The UK can decide which rules and regulations to impose on all UK internal business and all exports to non EU countries. It will continue to trade with the rest of the EU, and in turn EU member states will not impose additional tariff barriers on their trade with us. The UK will also avoid new and higher taxes on business, including the Financial Transaction Tax, VAT, and Corporation Tax. Currently, the UK can only get things through vetos, most of which it has given up, and there is an urgent need to stop the folly of EU-led legislation. There is absolutely no bridgeable gap with the German high contracting party, since UK Eurosceptics do not accept the Treaties of Maastricht, Nice, &c.

Second, leaving the EU will be better for people, since the UK could decide how to spend money it would save—either to enjoy a £300 per year per family tax cut, or to increase public spending on healthcare and other things that UK public wants—since the UK will save £10bn on its net contribution to the EU. The UK can also offer farmers and universities more if outside EU by guaranteeing all EU payments out of the savings from the UK’s gross contribution to the EU. It could also pursue a cheaper energy policy, taking people out of fuel poverty, and aiding the UK’s industrial recovery by making better use of the economic capacity lost otherwise.

Third, leaving the EU would make the UK a richer country, since on leaving it will be £10bn per year better off—a 0.6% boost to the UK economy—from the saved net contributions. The UK balance

of payments will also improve by £10bn in the first year from saving the net contribution. There will be further economic gains from negotiating free trade agreements elsewhere, which the EU has stopped the UK from doing, and there could be gains to output from simplifying and making regulation more proportionate and risk based.

Fourth, the UK would become a more influential country if it leaves the EU. Out of the EU, the UK will gain a separate seats on: (1) the World Trade Organisation, hence freeing it to follow its own approach to freer trade; (2) major standards bodies which set the world standard, which in turn inform EU standards; (3) world summits like the Climate Change summits. The UK will have a better presence and stronger say at the world rather than the EU level, not compromising on meeting UK interests. It will also be better treated and respected by France and Germany, as it is often in agreement with them, while they will still want UK support and help for some of their activities, without the current EU frustration that UK is always a ‘no say’ who refuses to participate.

Fifth, secession will make the UK a more democratic country, can do things that are currently ruled out by EU law, which will be better for getting representatives to do the will of their constituents. The UK will be able to make its own decisions through Parliament as guided and informed by UK voters, and will regain control of its own business, environmental, criminal justice and foreign policies, amongst others. Once again, the UK will become a country where Parliament can change any law it wishes, unlike within the EU, which is a ratchet system towards more law rather than less. Instead, the UK people will be sovereign again, able to elect people who do their bidding without the interference or prohibition of EU laws.

Finally, staying in the EU is not some comfortable *status quo* with a few clumsy compromises, but a wild ride to political union, as it is clear that the rest of the EU has a blueprint for trying to put in place the political, social, market, and further economic union that their currency union requires. Far from being a ticket to a prosperous market, it is a set of costs and laws that can impede freedom and prosperity, which are difficult for the UK to live alongside while being constantly unhappy with what it is doing. Ultimately, the biggest battle for the UK if it stays in is how to live alongside the Eurozone.

Gus O'Donnell started by insisting that he will wait until after the EU membership renegotiations before making up his mind about which choice the UK should make. From the view of economic interest, discussion of the UK's EU membership should be part of a bigger project of making the EU more competitive in the world, and the UK has a big part to play in making this effective, and pushing for a meaningful currency union. At Maastricht, ‘ever-closer union’ was part of the agreement, but there is no chance of countries being forced to join the euro if they do not want to. As a contributor to the formulation of Gordon Brown's 5 tests for the UK joining the euro, and as a representative at the discussions of what the euro should do, he was convinced that the UK should not be part of it, as it constituted an extremely flawed product. It was clear from the beginning that monetary union without more fiscal union would not work, and history has borne this out. In light of this, Eurozone countries have decided that they need desperately to bring about a single banking system, along with possibly fiscal transfers—in any event, certainly a closer union.

The EU and Eurozone need to decide whether ‘outs’ can live with ‘ins’, especially now that Poland has become a prominent ‘out’. The attempt to balance ever closer Eurozone union with a single financial market makes it important to get good deals. The case for expanding the single market is strong. Comparing labour productivity alone, and comparing the US and UK since joining the EU, the UK within the EU has had far better productivity growth.

However, there is a question of how all these arguments will be told. It is likely that lots of figures will be thrown at the public, and nobody has the time to argue it out over all of them. As a result, it is an important consideration how the public can come to an evidence-based conclusion, and what will influence how people actually vote—with the worry being that what is in the news 2 or 3 weeks before the vote will decide the outcome. In this light, HM Treasury needs to do its own analysis in the same way as before the Scottish referendum, which needs to look at the economics of Brexit,

and what are the terms of the UK not being in the EU. Once the UK notifies the EU under Article 50, that will start the clock on 2 years of negotiations, for which objective analyses need to be prepared.

There are lots of different models that the UK can learn from, including New Zealand and Japan, and each will have different implications for the UK's future relationship with the EU. To give just one example, leaving the EU does *not* mean not paying into EU budget. On this and other issues, the IFS is better than HM Treasury in terms of objectivity, and it is worth paying close attention to the Bank of England study on EU membership as well.

In terms of the consequences for UK political economy, there are two possible roads for PM, which represent a fundamental crossroads. If he manages a successful renegotiation, then leads the campaign to stay in and wins, he gets to choose when he stands down, and will be able to present himself as having won 3 referenda (AV, Scotland, and EU). Of course, however, the referendum will never be the last word, since it is not about renegotiation but about staying in or leaving the EU entity. If Brexit takes place, he will not be able to choose his moment of leaving if he has argued for staying in, which means that if he loses, he goes, and the Conservative party will sort out who is next. The next question then will be what happens in Scotland, and it is likely that the Scots will choose union with Europe over union with the UK, which would mean that Cameron's legacy would be one of failing to keep the UK in the EU, and ultimately failing to keep Scotland in the UK.

Overall, it is clear that there is a chronic need for objective evidence on these questions, since there are already too many models that build in assumptions that provide the conclusions one wants to see. For instance, both campaigns are offering large quantities of money for evidence that provides the answers that they want. Since confirmation bias is so significant, the public must be strongly urged to allow for that when they are confronted by objective evidence. It is to be hoped the voice of business in all its richness comes through in this debate, since they are not all in one camp, and play an important part of the discussion, alongside other groups, in order to generate a range of evidence.

Jeremy Lever noted that, as the seminar had conclusions in the title, it would be appropriate to dwell on the conclusions from the seminar series, which has striven not to propagandise for one side or another. The first seminar covered the question of 'Brexit to where', and the conclusion was that a Norwegian or Swiss type of settlement could be safely ruled out. New Zealand is an inappropriate parallel, since it is clear that someone who has never been married is not like someone who has been married and then divorced. For UK-EU relations, there would be many enduring questions of *ad hoc* agreements, suspicions of asymmetrically favourable business conditions, and state aid. The second seminar addressed the movement of persons, and found that benefit tourism is not a major question, and could be dealt with while remaining in EU, while overcrowding will stay a problem even if the UK leaves the EU. The third seminar covered services, and emphasised the importance of the City of London and financial services to the UK economy, which would be disadvantaged in the case of Brexit.

When Lord Willetts was asked why the UK was not represented in the talks with Vladimir Putin over Ukraine, his response was that this reflected the 'semi-detached' status of the UK vis-à-vis the EU. Since John Redwood says this status will get worse, it would make sense, if one does not like the EU's direction of travel, to get out now rather than in 10 years' time when the situation will be even worse. That said, it is vital to think of the effect of Brexit on other member states, above all its impact on their political health. There is lots of respect for the new Germany, which has turned around so well since its 'zero hour', but has since gone off the rails. Of course, good Germans will be sorry to see the UK go, since the UK, as the only country not occupied by other country in recent history, can act as a sheet anchor versus the German hegemony of the EU, which would not be good for the EU.

Noel Malcolm added a concluding comment, having sat through the whole term of seminars, that the UK becoming a self-governing country is perhaps the most important consequence of Brexit. That said, there remain questions about what a 'normal' nation is, if any country is truly self-governing, although it is clear that a country inside the EU is less self-governing than one outside the EU. It is

unusual to have this level of supranational government, and the rhetorical current of presenting Brexit in black and white terms often gets in the way of the facts at issue. That the difficulties of extricating the UK have been a major feature of the seminars shows how difficult and awkward this entanglement is, as well as any disentanglement. The complications will become greater the longer the UK stays in, and there are plenty of unknowns about the transitions as well as the UK's long term future within EU—which leads to the majority wanting to leave but feeling unable to and having to put up with it.

John Redwood professed himself a great admirer of the modern democratic Germany. Confident that Gus O'Donnell's wisdom will come over to his side, he warned listeners not to confuse sovereignty with power, and reminded them that the argument was not about the single market, and all similar things that will be sorted out, given that modern reasonable Germans want to do trade and business, but that the real argument is about how to define a modern democratic country.

David Edward objected to being accused of rhetoric, and argued that it is not rhetorical to ask what nature the country will be if it leaves, since it cannot be guaranteed that it will be a single country that results from Brexit.

Jeremy Lever expressed worries that Brexit would be bad for Northern Ireland. Although it would be hoped that the Republic of Ireland would exit the EU with the UK, it is clear that there will be no chance of that, just as there is no chance of Ireland offering a federal structure to take on Northern Ireland, since the Republic cannot afford to do so.

Gus O'Donnell warned that the UK will not simply continue to trade with the same EU, since the EU minus the UK is a very different beast, a game-theoretic model leads to a different conclusion.

Kalypso Nicolaïdis wondered who is against self-government, but argued that it is necessary to define what this means in the 21<sup>st</sup> century. There are so many problems of mutual recognition, and the 'damn terrible regulations' are the infrastructure of mutual recognition and movement, although the number of regulations has dramatically decreased in recent years. By the major power reciprocity principle, since the UK is not among the big countries, it will become a rule taker not a rule maker, and since some rules of interactions are clearly needed, the UK must be part of a rule-making group. Of course, everyone shares some of the same concerns, and not all are 'Brexitin' rather than Brexit. Control is the most important thing, and this is exactly why the UK needs to stay in to avoid EU capture by elites, and in order to change it from within.

It was asked whether it is common internationally to be in a situation of not knowing whether it is better to be 'in' or 'out', and whether this is a good place to be in.

David Edward suggested that this was exactly the situation in Scotland, which was asked to vote without knowing clearly the costs and benefits of either option.

John Redwood argued that the sides in the UK do know but just disagree.

Gus O'Donnell suggested that EU membership may not even be an appropriate question for a referendum. Just on the economic case, there will be a large range of answers, and lots of things that nobody fully knows, which means that the public must look for trusted, respected bodies, and not just take information from anyone who puts a sign on it.

John Redwood objected that it is not about numbers, but about heart, namely where the UK public want to be governed from.

John Redwood was asked how he envisaged the impact of Brexit on other EU citizens, and whether the existence of multiple leave campaigns might lead to guilt by association.

John Redwood replied that Vote Leave should be the only campaign, and that it has no wish to talk about immigration, on which basis all those who came here legally under EU law should be free to stay. However, Brexit should be done by Act of Parliament in the traditional British way.

Kalypso Nicolaïdis wondered what makes John Redwood think that other EU members will want to negotiate in such a scenario. Naturally, everyone in the EU wants the UK to stay, but if the UK wants to leave, there will not be much goodwill to negotiate.

Gus O'Donnell insisted that the only possible process is under Article 50, and that if Redwood is saying that the Prime Minister will not abide by Article 50 and do something entirely different, this needs to be debated publicly.

Kalypso Nicolaïdis argued that the UK will only make its relationship with the EU worse if it does not respect the existing accepted leaving procedures.

John Redwood retorted that the UK is a customer and has a large deficit, which would make the EU partners inclined to avoid tariffs.

Jeremy Lever reminded those present that the current government's formal position is that it intends to use the machinery under Article 50 if there is a vote for Brexit, but observed that the UK position will be unhappy in this situation. It is rather like receiving a decree nisi but not a decree absolute, or like filing for divorce on reasonable grounds but continuing to live in the matrimonial house.

A final comment from the audience echoed Gus O'Donnell's mistrust of all economic predictions from either side, and echoed John Redwood's suggestion that it is not just about numbers, but noted that ultimately, the burden of proof lies on the 'leave' side.