UK and France: Friends or Foes?

Géraldine Gadbin-George, Elizabeth Gibson-Morgan

Edited by Geraldine Gadbin-George
& Elizabeth Gibson-Morgan

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(Trans)cultural and legal unions and disunions

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Auctoritas non veritas facit legem. Such is Thomas Hobbes' well-known definition of law in his Leviathan. What transpires here is a realistic conception of law in which law and politics share a common dimension and are two spheres that should not be dissociated.

Auctoritas is a collection that sets out to open up fields of reflection and research with regard to the major legal and political issues pertaining to our societies, issues that will need to be examined in the light of their history, philosophical foundation, and cultural and discursive tradition.

The collection aims to publish, in English and other languages, the works of researchers specialising in law, political science, history, philosophy and sociology. The editors will request contributors to attempt to further our understanding of issues specific to contemporary democracies in the light of the profound transformations which have affected law and politics as well as the sciences that include them within their field of research.

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Introduction

On 24 March 1998, Tony Blair the Leader of New Labour and British prime minister was invited for the first time ever in French history to deliver a speech before the French National Assembly by its Speaker – now President of the Constitutional Council – Laurent Fabius. It was also unprecedented in the sense that never had such a pro-Europe speech been heard from a British Prime minister. He had won the May 1997 General Election on a platform of ambitious reforms for the United Kingdom and for Europe including the British, much delayed adoption of the Social Chapter of the Maastricht Treaty. Blair's 1998 Paris speech was both a warming against isolationism and a call for change. He held that Great Britain's future lay in being a "full-fledged partner of Europe" and pleaded for pragmatic "closer cooperation", "convergence", "rapprochement" between the United Kingdom and France while mentioning British people's anxieties in terms of national identity and national interest. Thus, his speech reflected the traditional ambiguity in the relationship between the United Kingdom and Europe. This

ambivalence is also to be found in the relations between the United Kingdom and France which were then – and still are – characterized by union and disunion, convergence and divergence aggravated by the prospect of Brexit.

EU member states today, partners in Europe tomorrow, the two nation-states both strongly attached to their national identity will have to think of the kind of relationship they want to establish post-Brexit, building on existing links but also developing new bilateral forms of cooperation. While the United Kingdom is engaged in a process of leaving the European Union, France, under the leadership of President Macron tries to promote a type of federal Europe based on ever more economic and political integration.

This book pursues these themes in an interdisciplinary fashion. It is the result of an international and pluridisciplinary symposium held at the University Pantheon-Assas (Paris 2) in partnership with the University of Tours on 24 and 25 May 2019 which gathered experts from different fields – historians, practising lawyers, law academics, political scientists, members of the military and defence specialists from both sides of the Channel. The symposium provided a unique opportunity to exchange well-informed diverse views on the current and future relationship between the United Kingdom and France, at a time of many uncertainties. The aim of this book is to give readers a better understanding of complex economic, political, social, cultural and strategic issues raised by Brexit involving the two countries and their future. Each author in his or her own speciality offers a better idea of what the relationship between the United Kingdom and France might look like in a post-Brexit world.

Lord Kenneth Morgan, member of the House of Lords, Fellow of Queen's College (Oxford), former vice-President of the University of Wales and Fellow of the British Academy, looks at the "*Ententes*" - not always "*Cordiales*" - between

France and the United Kingdom since 1904. He refers to the "partnership of winners" which was set up by David Lloyd George and George Clemenceau, which turned into a "partnership of enemies" straight after the Armistice, the two men having different goals in mind. The Munich crisis of September 1938 gave rise to a "partnership of losers" – if one may use the word partnership in that context – between Neville Chamberlain and Edouard Daladier. With the second world war emerged a "partnership of *prima donnas*" in the form of Winston Churchill and General Charles de Gaulle, who both had strong personalities. In the mid-1960s, there was an unexpected partnership between the then British prime minister, Anthony Eden, and Guy Mollet, former Socialist "*Président du Conseil*", who seemed to agree to interfere with the affairs of Egypt. A few years later and after de Gaulle was forced to abandon office under popular pressure, there was a "partnership of bureaucrats" between British prime minister Edward Heath and French President Georges Pompidou. According to Lord Morgan, the last – and fairly odd - partnership of interest was that between Margaret Thatcher and François Mitterrand. It was a "partnership of ideologues" who did not necessarily agree on a political front but respected each other highly.

Antoine Capet, *Emeritus* Professor at the Institute of British studies of Rouen University, Fellow of the Royal Historical Society, who sits on the International Board of *Twentieth Century British History* (Oxford University Press), focuses on the Winston Churchill's legacy to the United Kingdom which may explain – at least in part – the United Kingdom's current attitude to "Europe". He explains that many of the contradictions which the British population has shown in relation to the question of Europe since the 2nd world war may be explained by Churchill who openly fought for a federal model of Europe whilst refusing that the United Kingdom be part of it.

Aurélien Antoine, a Public law Professor at the Faculty of Law of Saint-Étienne, vice-dean for International Affairs and Communication and director of the Brexit Observatory, and Andrew Blick, Senior Lecturer in Politics and Contemporary History and Director of the Centre for British Politics and Government at King's College London, both look at constitutional issues. The former compares the concepts of Rule of Law and "*État de droit*" through the opposition between historicity and contemporaneity, practice and theory, societal issues and statism, whilst pointing to a convergence of the two legal systems under the influence of European laws. The latter focuses on the destabilisation of the United Kingdom constitution through the proposed Brexit.

The issue of defence – of the United Kingdom and of Europe – is then discussed by various authors. Patrick Chevallereau, Vice Admiral (retired), Former French Defence *Attaché* to the United Kingdom, Distinguished Fellow at the Royal United Services Institute, writes about the impact of a future Brexit on defence and security in Europe. Elizabeth Sheppard-Sellam, Associate Professor and the director of the program in International Relations and Politics at the University of Tours, examines the ways in which a future Brexit, amongst other possible factors, may impact on intelligence sharing between countries and may thus have consequences over the way counterterrorism operates in the context of Brexit.

Thibaud Harrois, Lecturer in British studies at the University Sorbonne Nouvelle (Paris 3), refers to the likely re-definition of the Franco-British relationship in terms of security and defence in the context of a possible future Brexit. He analyses the *rationale* behind the deepening of bilateral cooperation with France and shows that it remains crucial if Britain wants to maintain its role as one of the main actors in European defence and security policy.

The book then moves on to consider a number of economic, legal and social issues. Matthias Kelly, Queen's Counsel, former Chairman of the Bar of England and Wales and a Barrister in practice at 39 Essex Chambers (London) and Merchants Quay Chambers (Dublin) looks at existing European-wide (and global) legal standards to combat human trafficking, in particular in the field of labour. He wonders how, post-Brexit, countries will continue to co-operate across borders with a view to fighting against this form of modern slavery.

Hywel Ceri Jones, Honorary Fellow at the University of Swansea, an adviser to the Welsh government on European affairs on many occasions, former Head of the Directorate General for Employment, Social Policy and Industrial Relations at the European Commission, former Director of the Commission's Task Force for human resources, education, training and youth at the European Commission and former director of the European Policy Centre think tank in Brussels, traces the beginnings of European educational cooperation and look at the perspectives for expanding Erasmus through to 2027 in the latest EU policy and financial perspectives.

Anémone Kober-Smith, Professor of British Studies at the University of Paris 13-Nord, examines the place given to the National Health Service during the Brexit campaign before considering what will happen post-Brexit about access to healthcare for European Union citizens in the United Kingdom and British citizens living in one of the other European Union countries.

The last part of the book relates to the relationship between France and the nations (Wales, Northern Ireland and Scotland) which have had devolved powers since the reforms carried out by former prime minister Tony Blair in 1998.

Stéphanie Bory, Assistant Professor in British Civilisation at Jean Moulin-Lyon 3 University, looks at the long-lasting

alliance between France and Wales, the only Celtic country that voted for Brexit, which continues to show its willingness to preserve existing partnerships and strike new ones with European countries. Philippe Cauvet focuses on the use of referenda, over the last few decades, in France and the United Kingdom to identify points of convergence or divergence.

Juliette Ringeisen-Biardeaud, former *avocat* at the Paris bar and a Senior Lecturer in Legal English at Paris 2 University, discusses how, whilst the United Kingdom is planning to leave the European Union, the Scottish government has started opening governmental offices in foreign capitals with a view to establishing a Scottish diplomatic presence abroad in case Scotland ever becomes independent.

This book thus offers new insights and new perspectives on the inter-relationship between two great nations, each poised between profound historic changes and challenges. It provides succinct guides to past and present transformations. It may also, we profoundly hope, possibly offer a prospect for more positive and stable outcomes for the historic Entente Cordiale in the complex years to come.

We want to thank warmly all those who, by contributing to this book, made their experience and expertise available to all.

We also wish to thank the Franco-British Lawyers Society, the CERSA Law & Humanities (Paris 2 University), the *Interactions culturelles et discursives* (ICD) (University of Tours), the *Institut de sciences criminelles et de la justice* (ISCJ) (University of Bordeaux), the *Laboratoire Cultures – Éducation – Sociétés* (LACES) (University of Bordeaux), the *Pôle langues* (Paris 2 University) and the *UFR Lettres-Langues* (University of Tours) who one way or another, gave us their support and helped us set up this project.

June 2019

Géraldine Gadbin-George
& Elizabeth Gibson-Morgan

Part 1.
Historical aspects of the relationship between France and The United Kingdom

Chapter 1.
Partnerships and Perfidy; the Entente in War and Peace 1904 - 2020

Kenneth O. Morgan

The Entente Cordiale between the United Kingdom and France, like that other cliché of British foreign policy, the 'special relationship' between Britain and the United States, is an elusive idea, part reality, part legend. It is not obviously an entente nor has it been especially 'cordiale'. It emerged unexpectedly at the start of the 20th century after a century of quarrels from the Napoleonic war to the Boer War[1]. Both countries felt themselves to be diplomatically isolated with no stable European ally. The British increasingly felt that Splendid Isolation was no longer splendid or desirable. The French foreign minister, Theophile Delcasse, felt the need for a remedy for France's continental insecurity, after the debacle of the Franco-Prussian war of 1870 – 1 which had

[1] George MONGER, *The End of Isolation. British Foreign Policy, 1900 – 1907*, London, Nelson, 1963.

seen the German annexation of Alsace and Lorraine. France's recent ally, Czarist Russia, could offer relatively little help in Western Europe and was shortly to be heavily defeated by the Japanese navy in 1905. Britain and France had had a series of imperial confrontations, most recently at Fashoda in the Sudan in 1898. The Entente negotiated in 1904 was at best an understanding not an alliance. It was a clearing-up across the globe. Its most important features were that Britain was given a free hand to promote its interests in Egypt, while France in return received the same privilege in Morocco. There was the tidying up of boundary disputes in Siam (Thailand) in south-east Asia while, across the Atlantic the needs of French fishermen fishing in the waters of Newfoundland were covered in a rough and ready fashion. It was a *pot-pourri* not a partnership, although private talks between British and French chiefs of staff after a crisis in Morocco and the subsequent Treaty of Algeciras in 1906 began to give it more practical substance.

When war began in August 1914, it came as an unpleasant and unexpected shock to the majority of Asquith's Cabinet, who were anti-war, to discover what the implications were for joint defence. After all, the British government and the foreign Secretary, Sir Edward Grey had insisted that 'there should be 'no war for the sake of the Entente' and no steps were taken to mobilize the British Expeditionary Force so that it could fight in a continental war. The dispute of far-away Serbia with the Austrians after the assassination at Sarajevo in late June seemed unlikely to trigger off hostilities. The note of Asquith for his Cabinet on 1 August 1914 looked both ways to placate both wings of his Cabinet, the pacific majority including Lloyd George, and the more militant pro-French minority including Grey and Churchill (and in fact Asquith himself). But on Sunday 2 August came a most unwelcome

surprise[2]. With looming threats of a German invasion into Belgium, just across the channel, the Cabinet after a long debate agreed that the British navy, still all-powerful, would if necessary give a defence guarantee to France. And on 4 August, after a remarkably disingenuous explanation by Grey, the Commons voted by a large majority to declare war in the interests of national self-defence, coloured by an argument that it was to be waged on the moral basis of defending 'gallant little Belgium' against German aggression. So the Entente with France, greeted with much enthusiasm from King Edward VII downwards led to the bloody horrors of the First World War. The next four years, scarred for ever by tragic bloodbaths such as Verdun and the Somme were spent in trying to work out what the international implications were. The next hundred years were spent by historians in trying to explain it more fundamentally.

The Entente was embodied in a series of partnerships in which British and French leaders tied to forge a meaningful relationship. The first was a partnership of winners – David Lloyd George and George Clemenceau, the Goat and the Tiger. They were both independent politicians, with limited affection for the ties of party[3]. Lloyd George became prime minister in December 1916 after a political coup with the Unionists and a minority of Liberals which ousted Asquith from No. 10 Downing Street. Clemenceau became prime minister the following year after being an independent non-party politician in the early part of the war. They should have got on well, since each had a deep-rooted regard for the other's nation. Lloyd George was perhaps the most pro-French prime minister ever. He admired France intensely for its democratic, revolutionary and republican traditions since

[2] Douglas NEWTON, *The Darkest Days* London, Verso, 2014, pp. 156ff.

[3] Kenneth O. MORGAN, 'The Goat and the Tiger; Lloyd George and Clemenceau', in *Ages of Reform?*, London, I.B. Tauris, 2010, pp. 93–103.

1789. He expressed this in eloquent terms in a passionate speech at Verdun in 1916. A romantic realist, an early hero of his was Napoleon. His favourite author was Victor Hugo and his favourite. book *Les Miserables.* He enjoyed holidays in Nice where he could enjoy looking at beautiful French women walking along the Promenade des Anglais. Two recent episodes had increased his enthusiasm for the French republic – the eventual acquittal of Dreyfus, a target for anti-Semitism and nationalist mendacity (he was a man whom Clemenceau also strongly supported), and the disestablishment of the French Church in 1905, a huge source of gratification to a Welsh Baptist nonconformist who campaigned for a similar act of liberation in his country Wales.

Clemenceau, a more intellectual figure and a close friend of Monet, was inspired by English Liberalism, especially Gladstone and John Stuart Mill. He went to the United States in the latter stages of the Civil War (admiration for Abraham Lincoln was a strong link with Lloyd George and helped to unite them against the Southerner Woodrow Wilson at the Paris peace conference in 1919)[4], (4) married an American woman (briefly) and learnt to speak English well. In French elections his supposed anglophile views led to his being pursued by cries of 'Aoh, yes!'. As time went on, like Lloyd George he became increasingly wedded to more social versions of Liberalism like the New Liberalism current in Britain. In 1917 – 18 the great crisis of the war, Lloyd George and Clemenceau worked together intimately and successfully – it was perhaps the high point of the Entente Cordiale in his hundred years of history. They agreed totally on military measures necessary to rebuff the great German offensive around Amiens in April 1918, and on unity of command on the western front with the leadership of the Frenchman Field

[4] David LLOYD GEORGE, *The Truth about the Peace Treaties*, II, Gollancz, 1938, p. 232.

Marshal Foch. After all, for Lloyd George, Foch's becoming overall commander was a serious blow to one of his major wartime enemies, the British commander, Field Marshal Haig. Lloyd George later declared that in Foch he at last found the ideal leader on the front just as his hero Abraham Lincoln in the period after Gettysburg alighted on General Ulysses Grant. The Entente under their leadership made both men world famous. Clemenceau was hailed as *Pere la Victoire* and a statue placed in the Champs Elysees in 1938. Lloyd George for a time was 'the man who won the war' though significantly, he did not have his statue placed in Parliament Square until seventy years later. The commemoration of the war in the centenary years of 2014-18 astonishingly ignored him, perhaps because he was not an Englishman.

But immediately after the Armistice, the partnership soured, no longer a close relationship of allies but a partnership of enemies. Their personal relations in the Paris conference were good and positive – Lloyd George commented that they got on better with each other than with President Wilson, a baffling mixture of elements, 'badly mixed'. But the priorities of the two allied leaders proved to be very different. Clemenceau was determined to prevent another 1870 or 1914. His priority was the national security, of France, which had now regained Alsace and Lorraine, notably through the long-term military occupation of the west bank of the Rhine, as indeed happened temporarily later on in 1923. Lloyd George wanted reconciliation with the defeated enemy to rebuild Europe economically and politically. He strongly opposed occupation of the west bank of the Rhine or any British participation in it, although he did offer a guarantee of British support if France was invaded from the east. He set out these views in February 1919, very early in the Fontainebleau memorandum, drafted with close aides like Sir Maurice Hankey, Philip Kerr and General Sir Henry Wilson, along with background advice from

General Smuts of South Africa. It called for moderation in the imposition of reparations on Germany and also much caution in placing German-speaking populations under foreign rule such as the Sudetendeutsch in Czechoslovakia and the artificial Polish Corridor on Germany's eastern frontier[5]. These infuriated Clemenceau who saw these proposals as a betrayal of his country, while there were also quarrels over the Middle East (where oil in Mesopotamia (Iraq) was a new objective of great-power rivalry), and in policy towards Turkey where Clemenceau saw Lloyd George, with some reason, as infatuated by claims made by Greece to Asia Minor. Lloyd George was by no means insensitive to French concerns over national security, and floated the idea of a 'continental guarantee' by Britain which might commit. British forces to a long-term engagement on the European continent for the first time since the Peninsular War in Spain against Napoleon. There was for a brief period a more amiable phase of the Entente between the Welshman Lloyd George and Clemenceau's successor the 'Breton' (actually from Nantes), Aristide Briand[6]. In a conference at Cannes in January 1922 when both prime ministers made a determined effort to pursue Lloyd George's long-term aspiration of the revision of the peace treaties (for which he received new acclaim from his former stern critic, Maynard Keynes). Lloyd George also produced a more substantial plan for a British "continental guarantee". But this proposal was destroyed (or perhaps stymied) in the unlikely location of the Cannes golf course. Briand was a complete beginner at the game and French photographers then fatally showed the prime ministers apparently having a hilarious error-strewn game of errors, hacking away in bunkers. The Paris press felt their prime minister was being bamboozled or even

[5] *Ibid*., pp. 403ff. for the Memorandum and the French response.

[6] Alfred AUBERT, Briand, *Paris*, E. Chiron, pp. 145 ff.

ridiculed by the wily Welshman. Briand had to rush back to the National Assembly where his government was defeated on a confidence vote and had to resign.

Lloyd George's grand design to combine reconciliation for Germany with security guarantees for France vanished in the sand of the bunkers of Cannes golf course. The Continental Guarantee also fell when the isolationist United States refused to commit itself to Europe in any form (as, indeed, Lloyd George may very well have foreseen). As for the former great allies, Lloyd George and Clemenceau, relations rapidly deteriorated. In 1921, Clemenceau, in Britain to receive an honorary degree from Oxford University, called on Lloyd George in the House of Commons. It was a bad-tempered meeting[7]. Clemenceau declared Lloyd George to be an enemy of France. Lloyd George light-heartedly responded. 'Oh, is it not our traditional policy'. It was not a good moment to crack a joke at the expense of a Frenchman recently defeated in his country's presidential election by Duhamel, an old political opponent with whom he had once fought a duel. He later took a walking holiday in his native Vendee. He commented bitterly that there were no Lloyd Georges there, only squirrels. He pursued the theme in vengeful memoirs. A revealing incident took place later in 1922 when the new French prime minister, the Lorrainer Raymond Poincare roundly abused the British foreign secretary, Curzon, during the Chanak crisis in the Dardanelles. Curzon retaliated by bursting into tears.

A later, important partnership (though it scarcely deserves the name) occurred during the Munich crisis in September 1938. This can only be described as partnership of losers, Neville Chamberlain and Edouard Daladier[8].

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[7] David Robin WATSON, *Georges Clemenceau: a Political Biography*, London, Eyre Methuen, 1974, p. 388.

[8] See especially R.A.C. PARKER, *Chamberlain and Appeasement*, London,

The latter seemed the more belligerent of the two (he was known publicly as 'the Bull of Vaucluse' and had won some admiration for trying to stand up to violent demonstrations by French right-wing groups when prime minister in 1934. He had also made strong verbal commitments on behalf of Czechoslovakia if that country was attacked by Hitler on behalf of the Sudetenland Germans. Neither he nor his foreign minister, Bonnet spoke any English. Chamberlain had limited respect for this 'taciturn peasant of the South' as Keith Feiling, one of Chamberlain's biographers, called him. At a tense meeting with British Cabinet ministers in London on 25 September, Daladier was severely critical of Chamberlain's timid proposals at Bad Godesberg, a view shared by Duff Cooper and other British ministers. Daladier frightened several of the British Cabinet with strong words in support of Czechoslovakia should it be attacked. 'He would not return to France having agreed to the strangulation of a people. However Chamberlain was a profoundly stubborn man convinced of his own unique ability to resolve the Sudetenland crisis and force a territorial solution with Hitler. He responded with weak proposals for an Anglo-German understanding which would find ways for an orderly transfer of territory from the Czechs to Germany, insisted on dominating the discussions and proceeded on his own. When the discussions at the summit in Munich took place, what is striking about these supposed Entente partners was that they kept away from each other and indeed did not meet privately at all to formulate a common diplomatic strategy. When Chamberlain had private discussions with Hitler in his private apartment on 30 September, he told Daladier nothing about it. It emerged later that Daladier's bold words lacked substance since he had little confidence in the French army's ability to repel Hitler, and indeed had been so advised by

Macmillan, 1993, esp. pp. 172ff.; Keith FEILING, *The Life of Neville Chamberlain*, London, Macmillan, 1946, pp. 352 – 3.

General Gamelin and his chiefs of staff. He had also lost all trust in the British. He called Chamberlain 'desiccated' and George VI a 'moron'. He had made his lack of confidence in Britain as an ally very explicit, and expected to be betrayed.

The French prime minister left Munich in deeply despondent mood in contrast to Chamberlain's euphoric return to Heston airport to enjoy an ecstatic reception from large crowds. Whoever had brought peace in our time back from Munich it had certainly not been poor Daladier. He limped on as premier until March 1940, a humiliated and haunted man. When he sought to negotiate with Mussolini in the summer of 1939, Chamberlain almost contemptuously brushed him aside. On 3 September the French foreign minister, Bonnet, who had consistently argued against giving military support to the Czechs, also turned against Daladier and argued against going to war. Led by men such as these, democratic resistance to Hitler collapsed. Czechoslovakia was betrayed utterly, Hitler soon occupied the country, Slovaks as well as Czechs, and Poland soon followed. Appeasement in both its British and French forms had led to the Entente collapsing in the face of a totalitarian challenge.

The Second World War brought into being a very different kind of partnership between two far stronger personalities, a partnership of prima donnas in the form of Winston Churchill and General Charles de Gaulle. Churchill personally was always strongly Francophile from his earliest years and felt that France, with its unique literature and culture was central to European civilization[9]. He acquired a quirky grasp of the French language which he liked to deploy in international conferences. He made many friends with French politicians and officials. In the thirties he was insistent that British policy

[9] Douglas JOHNSON, 'Churchill and France', in Robert Blake and Wm. Roger Louis (eds.). *Churchill*, New York, Oxford University Press,1993, pp. 41 – 6.

should be to defend France against aggressive threats from Germany. In 1940 he famously proposed to Reynaud the then French prime minister that there should be a political union between the United Kingdom and France. De Gaulle was not the kind of Frenchman that appealed to him – aloof and arrogant, but he admired his strength of character and recognised him as a committed patriot who was totally resistant to German threats and wanted no kind of liaison with Vichy collaborators. He gave strong support to de Gaulle's leadership of the Free French and supported and welcomed his famous radio broadcast on 'a certain idea of France' in London in June 1940. Despite his constant bitter quarrels with de Gaulle Churchill felt it important to respond where possible to French susceptibilities, as over giving France (and de Gaulle himself) a prominent symbolic role in the liberation of France in 1944 and endorsing the view that there should be a French zone in occupied Germany in discussions at Potsdam, a conference where de Gaulle was not present.

De Gaulle however, was not easily reconciled. He showed little appreciation of his domicile in Britain during the war, which he saw as a kind of genteel, controlled captivity, and he quarrelled fiercely with most British representatives that he met, from Churchill downwards[10]. Apart from being imperious personalities, each aware of his own role in history, there was between the two men a conflict of visions and ambitions. De Gaulle saw the Entente mainly as a vehicle for restoring France as a great power, both in the leadership of Europe and in sustaining its overseas empire. He battled fiercely to preserve the French colonial domain, notably in Algeria and French Indo-China, in each case with appalling long-term effect and leaving bitter wars of liberation in each,

[10] Julian JACKSON, *A Certain Idea of France. The Life of Charles de Gaulle*, London, Allen Lane, passim.

in the Maghreb and Vietnam. His passionate nationalism was central to his world vision. Usually it was linked to his own personal authority and he deeply resented major slights such as the allies' reluctance to regard de Gaulle's as the legitimate government of France before October 1944. 'Churchill, for all his genuine affection for France, saw this nationalism as an obstacle to winning the war and often viewed him as 'our mortal foe'. His supreme vision, in total contrast to de Gaulle (who hated Roosevelt, Cordell Hulll and other US leaders) was to preserve the alliance with the United States, and to avoid at all costs anything resembling the US isolationism which had paralysed the League of Nations after 1919. To this, Churchill, in a discussion just before D Day in 1944, exploded in angry terms. 'You must know that when we have to choose between Europe and the open seas, we will always be with the open seas. Each time I have to choose between you and Roosevelt, I will choose Roosevelt'[11]. The words rankled with De Gaulle for the rest of his life: when he was president of France in the sixties, Harold Macmillan and Harold Wilson felt the impact of them when they sought membership of the European Union. It is worth noting that it is de Gaulle's memoirs to which we owe this account of Churchill's words. De Gaulle's recollection would not have veered on the side of warm partnership.

Among the long record of Anglo-French conflict during the Churchill-de Gaulle relationship, three might be mentioned. One was the expedition to Dakar in West Africa in September 1944, intended to secure French forces, ships and support for the Free French rather than for Vichy. It was a disastrous failure, with much confusion between the British and French commands. Some French warships were sunk and de Gaulle had to witness the heart-rending spectacle of Frenchmen fighting against Frenchmen and his morale collapsed to the

[11] JACKSON, *op. cit.*, p. 311, citing de Gaulle's memoirs, pp. 487 - 8.

extent that he was supposed to have contemplated suicide. The notion of Anglo-French partnership was massively devalued. Secondly at the time of the Casablanca conference in late 1942, Churchill joined Roosevelt in strongly resisting de Gaulle's claims to be given command over French forces in North Africa. De Gaulle was at Casablanca – but so was his implacable enemy in contending for the leadership, General Giraud, a far less resolute figure, far more willing to collaborate with Vichy figures such as Admiral Darlan (shortly to be assassinated). De Gaulle shook Giraud's hand with the greatest reluctance – the other man, after all, had greeted him with the words 'Bonjour, Gaulle'. Roosevelt regarded de Gaulle and Giraud as being of equal stature and gave both similar attention; Churchill was not a Giraud supporter but he went along with Roosevelt's view. De Gaulle was kept out of the Torch invasion. Third, and most wounding, de Gaulle was excluded from all the strategic discussions prior to the invasion of Normandy and the subsequent advance across France[12]. He seemed marginal to Allied decision-making. Churchill and Roosevelt were well aware that de Gaulle was under challenge, both from Algerian nationalists in the empire and with Communists in the resistance at home who paid no heed to de Gaulle's claims of leaderships. At least Churchill did manage to give de Gaulle a symbolic role, and the famous walk down the Champs Elysees in the face of some German sniper fire in the liberation of Paris. But de Gaulle resented deeply his feeling of subservience to the 'Anglo-Saxons'. When he wished to speak at the city of Bayeux, home of the tapestry hailing the Norman Conquest, soon after its liberation, he had in effect to ask for Churchill's permission. When the two men met for private talks in Paris to mark Armistice day in November 1944, their discussions were neither cordial nor conclusive. For the remainder of his

[12] *Ibid.*, pp. 310ff.

life, de Gaulle remained unforgiving towards 'les Anglais' of whose perfidy he was in no doubt.

There were no close partnerships between Anglo-French leaders in the two post-war decades. Under the Labour government, there was the Anglo-French treaty in 1947, signed symbolically by the British Foreign Secretary and the French Foreign Minister, Bidault on the beach at Dunkirk (a poor choice from the French viewpoint since they regarded it as the scene of a notorious British betrayal). But there was little closeness of partnership under the Attlee government which made the creation of a "special relationship" with the United States in foreign policy its main priority and achievement. The British sent troops to fight with the Americans in the Korean War; the French, bogged down in Indo-China, sent none. When the French in 1950 proposed the so-called Schuman Plan for an international community to integrate the coal, iron and steel industries in France, West Germany, and Britain, the Labour government brusquely dismissed this precursor of an European economic Union. It was protectionist, it originated in Catholic countries and, crucial to the Labour deputy leader, Herbert Morrison, "the Durham miners won't wear it."[13]

Six years later, there was to be an extraordinary new twist between two lesser figures, Anthony Eden the British prime minister and Guy Mollet the Socialist premier of a leftish French government. They were in secret planning a dubious intervention in Egypt, after President Nasser nationalized the Suez Canal, a fabricated military attack in the Suez area which was illegal under international law. On 10 September 1966 Mollet, now very pessimistic over the French economy, the enemy within in communist pressure in the trade unions

[13] Kenneth O. MORGAN, *Labour in Power, 1945 – 1951*, Oxford University Press, 1984, pp. 417 – 22. Hugh Dalton referred to the dangers likely to come from the Vatican.

at home and above all an unending, bloody war in Algeria felt France needed a significant ally. He astounded the political class by making a secret proposal for a formal union (though not a federation) between the two countries[14]. It helped perhaps their somewhat distant relationship that Eden spoke excellent French, the first leading British politician to do so since Austen Chamberlain, while Mollet, a schoolmaster by profession, was fluent in English. But the proposal did not find much sympathy, not least because the Foreign office view of France at this time was very negative, especially in its economy, and it was thought the British and French would not get on very well as fellow-citizens. An alternative was then suggested, even more extraordinary, namely that France should become part of the British Commonwealth: it was said that the Queen would not mind though whether she was actually asked is doubtful. This plan soon collapsed while the next month the secret Anglo-French invasion of Suez collapsed in humiliating fashion in the face of international diplomatic and financial pressure. The Entente reached a new low point. Soon after, a portent of troubles to come, de Gaulle became president of his country.

From the early sixties onwards, the course of the Entente was dominated by the issue of European Union, destined to plague British political life for the next half-century. In 2019 no resolution was yet in sight and British people were deeply divided. De Gaulle had his posthumous revenge by vetoing British applications to enter the European Common Market in the premierships of Macmillan and Wilson. It was now British economic weakness, not French, that inspired their unavailing quests. Then there was a dramatic transformation. This came from the partnership of bureaucrats in the early seventies, Edward Heath, the Conservative prime minister,

[14] Discussed in P. M.H. BELL, *France and Britain 1940 – 1994*, London, Longman, 1997.

and de Gaulle's successor as president Georges Pompidou[15]. The departure of de Gaulle, forced to leave office after internal movements of social protest amongst trade unions and students, meant an enormous lightening of the atmosphere in Anglo-French relations. This was seen in the role of Pompidou, prime minister under de Gaulle, who much admired his business-like, managerial style in building up the Gaullist party and running the somewhat diverse government in the sixties. Despite his Gaullist background, Pompidou had a high regard for the British, spoke the language and was keen on British entry into Europe to counter the growing power of Germany. Heath, a man of Kent brought up near the Channel, was ardently pro-European throughout his life – despite his execrable attempts to speak the French language. He had fought in the war, taking part in the invasion of Normandy, and, like other young men, regarded the coming of peace as a central feature of his life. His absolute belief in joining the EEC was reinforced by his being the most anti-American of British post-wartime prime ministers. His coinciding with Richard Nixon as a head of government reinforced his views. When I once asked Dr Henry Kissinger about this he described Heath's views as 'horrible' and welcomed the advent of Labour with the pro-American Jim Callaghan as foreign secretary.[16]

Heath and Pompidou had long one-to-one discussions which were business-like and constructive. Heath even agreed that French should be the working language of the union, which led Labour politicians to splutter patriotically about 'the language of Shakespeare'. And so the deal went through after a tight vote in the Commons, diehard 'Brexit' sentiment being limited at that period. Much credit goes to

[15] Edward HEATH, *The Autobiography of Edward Heath*, London, Hodder and Stoughton, pp. 361 – 78; John CAMPBELL, *Edward Heath*, London, Jonathan Cape, 1993, pp. 562 ff.

[16] Interview with Dr Henry KISSINGER, October 1992.

Heath for the outcome – and should also to his successor, Harold Wilson who redressed a remaining British concern, exports from the Commonwealth such as Australian beef and New Zealand dairy products. Callaghan's renegotiation of the terms of entering the common market dealt adequately with these matters.

One abiding matter, however, was the entry of Britain into Europe in 1973 was almost wholly economic, reflecting Britain's financial difficulties in the early seventies after the oil price hike. Both Heath and Pompidou were politicians who believed in the corporate approach and there was little discussion about matters of national sovereignty. There was little said either then or in the 1975 referendum about the notion of an 'ever closer Europe with much sovereignty vested in unelected EU bureaucrats. It was a corporate not a democratic Europe that emerged. However, in a period when the future of the Anglo-French relationship would be fundamentally shaped by Europe for the next four decades, it did create the basis for a positive partnership. This was, symbolized in business terms by the building of the joint Anglo-French air liner the Concorde (much debate about the final 'e'), which Harold Wilson had persuaded de Gaulle to support. For years afterwards British politicians thought in far more European terms. Callaghan as prime minister contemplated joining the Euro monetary zone to avoid future sterling crises, while even the critical Margaret Thatcher worked to create the single market.

The final partnership was a strange but often effective one – Francois Mitterrand and Margaret Thatcher[17]. They were apparently a partnership of ideologues, as socialist and a neo-liberal Conservative, but in fact they got on surprisingly well. Mitterrand prided himself on his skill in handling women

[17] Philip SHORT*, Mitterrand: a Study in Ambiguity*, London, Bodley Head, 2013, pp. 378 ff.

and Mrs. Thatcher liked him. He took her seriously and gave her full respect even if he considered her stubborn. He also commented famously that she had the eyes of Caligula and the lips of Marilyn Monroe, which casts a different light on their relationship. They got on well because Mitterrand was a remarkably flexible and subtle politician although on linguistic grounds. Mitterrand's English was weak while Mrs. Thatcher's French was a little stronger. They worked together with some effect on defence and economic issues. Both followed a common line on defence, and each accepted the basing of Cruise missiles in their countries. An early sign of rapport came in the 1982 Falklands war. France had plied Argentina with missiles – the sinking of HMS Sheffield was by a French-made Exocet missile. Nevertheless, Mitterrand held back during the brief Falklands War and instead gave Britain much technical support which Margaret Thatcher much appreciated. On the supreme issue of Europe, despite Mrs. Thatcher often Eurosceptic tone, especially towards the end of her term in office, they worked well together with the British prime minister far more sympathetic towards the Europe Union than was often credited. Mitterrand was helpful in settling the contentious issue of British contributions to the community budget, a difficult matter partly because of payments levied on trade with countries outside Europe. After often angry debate with their stubborn colleague, Mitterrand and the German Chancellor, Helmut Kohl agreed on a rebate of 1 billion euros over the next two years. This settlement made the British prime minister a far more amenable member of the European Community in future, for all her strong relationship for President Reagan of the United States. She also showed herself to be a warm enthusiast for the almost two-centuries-old project of a tunnel beneath the Channel. This was agreed and begun in 1986 to much bi-national acclaim as a physical symbol of the Entente in operation. Eight years later, Eurostar trains

began operations, ferrying immense numbers of passengers, businessmen, professionals and many tourists beneath the channel. Britain's 'island story' was effectively over. In another important area, the Erasmus scheme for student exchange and research collaboration between British and European universities, devised by an important Welsh aide to Jacques Delors in Brussels, Hywel Ceri Jones was another invaluable intellectual and scholarly breakthrough.

Politically, Mrs. Thatcher's main difficulties were not in fact with Mitterrand but with his fellow socialist, Jacques Delors, president of the European Commission. His enthusiasm for a growing, highly bureaucratic central state which would erode British state sovereignty allied with centralizing policies like the Social Chapter caused her much anger. She protested that she had fought tirelessly to prevent this kind of socialist collectivism at home, only to see it introduced from a French unelected bureaucrat who was manifestly not 'one of us'. Her complaints grew stronger and reached a climax with her Bruges speech in 1988 when she brusquely reminded her European audience, representing countries which had been conquered or collaborationist during the war that it was Britain who had kept the fight going and had liberated them. 'Big Ben had chimed out for liberty'. Margaret Thatcher was not a 'leaver' like the Brexiteers of 2017 and worked constructively in many aspects of the European Union. But the rising tide of scepticism added to growing concerns over national sovereignty in Britain and in the longer term served to make the Anglo-French entente the more difficult and complicated. One amusing historical by-product came with the celebrating of the bi-centenary of the French Revolution in 1989. Mrs. Thatcher was a distinct sceptic here, and favourably compared British tradition of civil liberty and parliamentary rule with French revolutionary traditions of 'rights', an abstract philosophy which she claimed had led directly to the Terror and populist dictatorship. In rebuttal

Francois Mitterrand summoned up the aged figure of Michael Foot, the celebrated literary leftist who told the French of the enthusiasm of his heroes Charles James Fox and William Hazlitt, along with sundry poets from Byron downwards for the inspiration and the libertarianism of 1789. Fox had spoken of his delight at the news of the revolutionaries victory at the battle of Valmy in 1792. Hazlitt, indeed, had been distraught and fell ill when he heard the sad news of the result of the battle of Waterloo. The responses of the French to all this historical propaganda are not known.

What is the status of the Entente Cordiale in the second decade of the twenty-first century? Its significance now is surely limited. The centenary in 2004 attracted little attention – indeed this was a time of Anglo-French ill-feeling after the invasion of Iraq and the severe rebukes by President Chirac, Dominque de Villepin and others at the ill-conceived and harmful action of the Blair government in that unlawful venture. President Macron today has real links with the United Kingdom. He has worked in banking in the City of London, he has studied in the London school of Economics and he has even been said to have an English ancestor, He speaks English excellently as did French leaders like Pompidou and Giscard d'Estaing. But he has not shown himself to be an Anglophile. He advocates a form of extreme European collectivism, including building up the Eurozone, and a European 'super-state' supported by almost no-one in Britain, and indeed by only a minority in his own country[18]. His interventions during the Brexit negotiations (if such they can be called) have been consistently unhelpful and he has been a hard-liner among the European nations, in marked contrast to Angela Merkel, for example. But the weakness of the Entente today does not lie mainly with him. It is a reflection that at the present time, with public

[18] Emanuel MACRON, *Revolution* (2017).

life on hold during abortive Brexit negotiations, Britain has really no foreign policy any more. Its main foundations have eroded away, with the complete marginalisation of the Commonwealth and the impossibility of having any kind of relationships, special or otherwise, with the erratic President Trump. With the loss of these traditional landmarks, relations with the EU or indeed any other overseas bodies have largely eroded. Jonathan Faull, a key civil servant, has spoken sadly of how 'This stable rational country seems unrecognisable to many watching us and there is no going back'[19]. Claims that the now feckless, irrational United Kingdom is a major player on the world scene, following 'a rules-based international system' are absurd.

The Foreign Office-has lost its authority as was shown by the astonishing appointment of an irresponsible, egocentric figure like Boris Johnson to the position occupied by Lord Palmerston or Ernest Bevin in former days. The department has been stripped of major competences, trade and international development, and its occupant no longer holds a position of weight. In 1960 Dean Rusk, former US Secretary of State, famously declared that Britain had lost an empire but had not found a role. This damning verdict is far more valid today. It is the end of an old song. Britain's main international links, political, economic and military, are gravely, perhaps fatally, diminished. The important external bonds of the country now lie in the precious realm of soft power, the cultural, intellectual, artistic and educational fields. Britain's abiding prestige here is shown by the pre-eminence of its universities, six in the world's top twenty and Oxford ranked as first. The preservation of a precious bond such as the Erasmus scheme for young students is thus a priority. This admirable conference and its organizers (to one of

[19] Cited in Martin KETTLE, *The Guardian*, 9 May 2019.

whom, to declare an interest, I am married) have never been more necessary and I am honoured to take part.

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Chapter 2.
"We are with Europe but not of it": Churchill's legacy in Britain's attitude to "Europe".

Antoine CAPET

"If I were ten years younger, I might be the first President of the United States of Europe".
Churchill in the winter of 1945[1]

The temptation is great to consider that in England (the rest of the United Kingdom being a different case) the will to adopt what the Germans call a *Sonderweg* – a special or peculiar approach – in Europe started with Henry VIII and his break with Rome, a clear assertion of national independence, or as we now say in the language of Brussels diplomats, a refusal

[1] Lord Moran, Churchill's physician, reports an undated conversation with Clementine [Clemmie], Churchill's wife some time after Yalta:
"Clemmie went on: 'Winston is non-party; he makes up his mind on questions as they strike him. He said to me yesterday: 'If I were ten years younger I might be the first President of the United States of Europe'". Charles WILSON (Lord Moran). *Winston Churchill: The Struggle for Survival*, p. 247.

of "supranational institutions". The implication already was *Let's Take Back Control*, the Vote Leave slogan before the letter.[2]

Today, however, we will not go back in history as far as that, being content with examining the role of another great figure of British political history, nearer to us, Winston Churchill (1874-1965). The fact that he always thought of "England" and only used "Britain" and hardly ever "the United Kingdom" in public is of course highly relevant in view of the geographical results of the 2016 Referendum.

Most of us today have forgotten that there was a time, in the late 1940s and early 1950s, when he was revered on the Continent as a Father of Europe by those in favour of European Integration. Today, his role in those years is rarely alluded to on the Continent, but his one-time support for "Europe" (the word in inverted commas meaning some degree of European Integration in British political vocabulary) was eagerly put forward by the Remainers during the Referendum campaign of 2016. Likewise, the Brexiters or Brexiteers – the vocabulary does not seem to be settled

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[2] See BBC video, 6 March 2016: "UK 'should take back control' (Boris Johnson says)":
https://www.bbc.com/news/av/uk-35739955/boris-johnson-uk-should-take-back-control
(accessed on 27 May 2019.)
Also, official Vote Leave site:
http://www.voteleavetakecontrol.org/briefing_control.html (accessed on 9 May 2019.)
One can also note the analogy with the 1982 Canadian "Patriation of the Constitution":
"In 1982 Canada 'patriated' its Constitution, transferring the country's highest law, the British North America Act, from the authority of the British Parliament – a connection from the colonial past – to Canada's federal and provincial legislatures". *The Canadian Encyclopedia*
https://www.thecanadianencyclopedia.ca/en/article/patriation-of-the-constitution
(accessed on 27 May 2019.)

– argued that the Greatest Briton ever (according to a BBC poll in 2002[3]) showed by his actual policy during his 1951-1955 premiership that he never was seriously interested in "Europe".[4] It is arguable that Churchill is like the Bible: in his long list of pronouncements on various subjects, you can find arguments for and against the same point. He himself claimed that it was not he who changed, it was the national or international context. And only fools did not adapt to changing circumstances. He put it in a nutshell in a famous Churchillism: "My views are a harmonious process which keeps them in relation to the current movement of events".[5] This makes fascinating material for academic discussion, of course – and this is what I would like to try to examine today.

Churchill was always in need of money for his extravagant lifestyle, and in the inter-war years, his main source of income came from his writings. He was the highest-paid journalist in Britain and he also wrote lucrative articles for the American press. He often wrote witty pot-boilers, but sometimes he combined politics with business, making his sometimes controversial views known in his syndicated articles. A case

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[3] "Victory for Churchill as he wins the battle of the Britons":
http://www.bbc.co.uk/pressoffice/pressreleases/stories/2002/11_november/25/greatbritons_final.shtml
(accessed on 27 May 2019.)

[4] Some "Brexiters" went as far as to combine several passages from different speeches to make Churchill even more "Eurosceptic" than he really was, *e.g.* "We have our own dream and our own task. We are with Europe, but not of it. We are linked but not combined. We are interested and associated but not absorbed. If Britain must choose between Europe and the open sea, she must always choose the open sea". See Jon DANZIG, "A revealing deception about Winston Churchill?" New Europeans. net site (25 January 2015):
https://neweuropeans.net/article/604/revealing-deception-about-winston-churchill
(accessed on 27 May 2019.)

[5] *House of Commons Debates*, 5 May 1952, vol. 500, col. 33.

in point is a remarkable article entitled "The United States of Europe" for the American weekly *Saturday Evening Post*, which appeared on 15 February 1930. Interestingly, it was reprinted as "Why Not 'The United States of Europe'?" in *the News of the World* on 29 May 1938, at the height of the new crisis with Nazi Germany, this time over Czechoslovakia. Churchill's most recent biographer, Andrew Roberts, argues that he was "hoping to breathe fresh life into an idea that might help collective security".[6] In other words, if we are to follow Roberts, there was an opportunistic dimension to it, which may remind the French of his approval of the abortive plan for Anglo-French union in June 1940.

The title itself was of course intended to be provocative. The expression "The United States of Europe" was not new: it had been used in the 19th century by prominent Continentals, among them Mazzini, Victor Hugo, Garibaldi and Bakunin, but nobody expected Churchill the champion of the British Empire to support the notion. In fact, after his glowing description of Europe in Roman times – a theme which he was often to take up again in his post-1945 speeches – the actual text at last comes to the crux: the magnificent "United States of Europe" which he adumbrates means the "United States of Continental Europe". Towards the end of his long disquisition, he at last refers to "The peculiar structure and distribution of the British Empire or Commonwealth of Nations". The peculiarity is made clear a few lines later:

> We belong to no single continent, but to all. Not to one hemisphere, but to both; as well to the New World as to the Old. The British Empire is a leading European power. It is a great and growing American power. It is the Australasian power. It is one of the greatest Asiatic powers. It is the leading African power.

[6] Andrew ROBERTS, *Churchill: Walking with Destiny*, p. 428.

So when he says: "The conception of a United States of Europe is right", he means right for the Continentals – but not for us, as made clear by his plea:

> We see nothing but good and hope in a richer, freer, more contented European commonalty. But we have our own dream and our own task. We are with Europe, but not of it. We are linked, but not comprised. We are interested and associated, but not absorbed.

And he continued with a Biblical allusion[7] which would be lost to most readers today, though it made even clearer that "Europe" was not for the British:

> And should European statesmen address us in the words which were used of old, "Wouldest thou be spoken for to the king, or the captain of host?," we should reply, with the Shunammite woman: "I dwell among mine own people".[8]

All through the 1930s, of course, he saw his vision of a united Continental Europe recede further and further. But apparently in his early weeks as wartime Prime Minister he did not give up his idea of a United States of Europe. If we are to believe Jock Colville, as early as August 1940, he envisaged how the world would be shaped after victory, one feature being that "there would be a United States of Europe, and this Island would be the link connecting this Federation with the New World and able to hold the balance between

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[7] "And he said to Gehazi his servant, Call this Shunammite. And when he had called her, she stood before him. And he said unto him, Say now unto her, Behold, thou hast been careful for us with all this care; what *is* to be done for thee? wouldest thou be spoken for to the king, or to the captain of the host? And she answered, I dwell among mine own people". 2 *Kings* 4:13.

[8] The easiest access to Churchill's full text in on the International Churchill Society site:
https://winstonchurchill.org/publications/finest-hour/finest-hour-130/the-united-states-of-europe/
(accessed on 27 May 2019.)

the two".9 Colville then recorded another conversation, on 12 December when "Talking of the future he sketched the European Federation that would have to be formed ('with their Diets of Worms'10) and shuddered at the thought of the intricate currency problems, etc."11 The following day, Churchill was more explicit:

> The P. M. reverted, in some detail, to his ideas for the future. We had got to admit that Germany was going to remain in the European family. "Germany existed before the Gestapo". When we had won he visualised five great European nations: England, France, Italy, Spain and Prussia. In addition there would be four confederations: the Northern, with its capital at The Hague; the Mitteleuropa, with its capital at Warsaw or Prague; the Danubian, consisting of Bavaria, Württemberg, Austria, Hungary, etc., with its capital at Vienna; and the Balkan with Turkey at its head and Constantinople[12] as its capital. These nine powers would meet in a Council of Europe, which would have a supreme judiciary and a Supreme Economic Council to settle currency questions, etc.

Remarkably the Council would have unchallenged supranational authority, since "The Council would be unrestricted in its methods of dealing with a Power condemned by the remainder in Council". "England" being among these Powers this meant that it, too, would be giving up national sovereignty. When he added "The English-speaking world would be apart from this, but closely connected with it, and it alone would control the seas, as the reward for victory",13 it is not

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[9] John COLVILLE, *The Fringes of Power*, vol. I, p. 253.

[10] An obvious schoolboy's pun à la Churchill on the Imperial Diet of Worms which passed judgement on Luther in 1521.

[11] John COLVILLE, *The Fringes of Power*, vol. I, p. 253.

[12] It is well known that in private, Churchill refused to use the "new-fangled" names of countries and capitals. He continued to speak of Persia rather than Iran, Constantinople rather than Istanbul, and Angora rather than Ankara, arguing that people would no longer see the connection with the beautiful Angora cat and the city of Ankara.

[13] John COLVILLE, *The Fringes of Power*, vol. I, p. 371.

clear what he had in mind. In his four popular volumes, A History of the English-Speaking Peoples, published in the mid-1950s, he included the United States – but in December 1940 he could not count the Americans as deserving to share in "the reward for victory".

One month later, in January 1941, Colville was present during the conversations between Churchill and Harry Hopkins, President Roosevelt's personal representative, and he recorded that the Prime Minister told the American emissary that "there must be a United States of Europe and he believed it should be built by the British" because "if the Russians built it there would be communism and squalor" and "if the Germans built it there would be tyranny and brute force".14 Retrospectively, of course, one may wonder what he meant by "it should be built by the British": the word by is open to all interpretations. Forced upon reluctant Continentals by a British Government remaining outside? Or coordinated by Britain as the leading member economically?

Churchill's next important reflections on "Europe" were made in a "Most Secret" minute to Anthony Eden, his Foreign Secretary on 21 October 1942:

> I must admit that my thoughts rest primarily in Europe – the revival of the glory of Europe, the parent continent of the modern nations and of civilisation. It would be a measureless disaster if Russian barbarism overlaid the culture and independence of the ancients states of Europe. Hard as it is to say now, I trust that the European family may act unitedly as one under a Council of Europe. I look forward to a United States of Europe, in which the barriers between nations will be greatly minimised and unrestricted travel will be possible.[15]

After the war, he lost no time in reviving the idea, even though, as in 1930, he was away from the seats of power.

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[14] John COLVILLE, *The Fringes of Power*, vol. I, p. 396.

[15] Martin GILBERT (ed.), *The Churchill Documents*, vol. 17, p. 1297.

His detractors would in fact say because he was no longer in power. With "Europe", as Leader of His Majesty's Opposition, he held a sure lever against the Labour Government now in office. The Labour Foreign Secretary was Ernest Bevin, a former Trade Union leader, who as such had two major objections to European Integration. Any commercial rapprochement with the Continentals would mean at least a partial opening of the British food market to their highly-priced products compared with the very low world prices which the British housewife was used to paying. It would also imply opening the British market for industrial goods to their low-wage producers. Thus the standard of living of the average British working-class family would lose on both accounts: an upward pressure on food prices and a downward pressure on industrial wages. Bevin remained the staunchest opponent of any participation in the European Movement until he had to retire on grounds of ill health in March 1951 (he died in April and Churchill came back as Prime Minister in October). So, whether Churchill was sincere or not, he had a marvellous tactical opening here, and he used "Europe" to the full to score points against the Labour Government.

He knew all about the prewar Pan-European Movement, as it was called in the 1920s, led notably by Aristide Briand (1862-1932) and Count Coudenhove-Kalergi (1894-1972) until it was engulfed in the Nazi tragedy. Here was a way of avoiding oblivion on the world scene: he would be the leading post-war British advocate of a United States of Europe. There is a tendency to present his Fulton Speech of 5 March 1946 as his first foray into post-war world politics, but in view of future developments, with "Brussels" now the centre of hatred for the rabidly anti-Europe Murdoch press, it is ironical that his first move was precisely in that capital, in a speech to a joint assembly of the Senate and the Chamber of

Belgium, on 16 November 1945.16 After arguing that "the tragedy of Europe shocks mankind" and that "European civilisation must rise again from the chaos and carnage into which it has been plunged", he placed his hope in the new United Nations, finally arguing that this was not incompatible with regional associations:

> I see no reason why, under the guardianship of a world organisation, there should not arise the United States of Europe, which will unify the Continent in a manner never known since the fall of the Roman Empire, and within which all its peoples may dwell together in prosperity, in justice, and in peace.[17]

With this, the United States of Europe appeared for the first time in a public speech by Churchill. But what did he mean by "unify the Continent"? The geographical European continent, of which the British Isles are only an appendage? Or the political continent, separate from the British Isles in British mentalities? Churchill was careful to cultivate this ambiguity in the next six years, until he came back in office.

When Churchill used practically the same vocabulary at the States-General of the Netherlands in The Hague six months later,18 on 9 May 1946, he was now a world figure again thanks to the stir created by his Fulton Speech on the Iron Curtain. In their chapter on "Winston Churchill" in the recent book, Prime Ministers on Europe: Half In, Half Out, Andrew Adonis and Nicholas Soames make much of the impact of the Fulton Speech on the emergence of European Integration:

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[16] Later that day, he gave the same speech, but in French, when receiving the Freedom of the City.

[17] Winston S. CHURCHILL, "A Speech to the Joint Meeting of the Senate and Chamber, Brussels, 16 November 1945", in *The Sinews of Peace*, p. 42, p. 44.

[18] Churchill had been invited by Queen Wilhelmina in person. Martin GILBERT, *Never Despair,* p. 232.

> The Fulton speech had two seminal effects. It gave an impetus to Churchill's plan to unite the Continent's Western democracies behind British leadership; and, as Truman came to share Churchill's analysis, it led the US to back the European union with a US defence commitment to its constituent members through what became NATO.[19]

This seems to extrapolate a lot – at least on the first point – since there is in fact only one sentence in the long speech which remotely alludes to "Churchill's plan to unite the Continent's Western democracies" (as opposed to the many paragraphs devoted to the "special relationship between the British Commonwealth and Empire and the United States "and "the fraternal association of the English-speaking peoples"20): "The safety of the world requires a new unity in Europe, from which no nation should be permanently outcast". And, interestingly in the context of the current debate on the Continent with the recurring argument of the pro-Europeans that the primary achievement of European Integration, worth all others combined and overriding any reservations or misgivings one may have, has been that it has brought peace since 1945, Churchill continued: "It is from the quarrels of the strong parent races in Europe that the world wars we have witnessed, or which occurred in former times, have sprung".21

Unfortunately for Soames and Adonis, however, Churchill's central argument when discussing "fraternal associations" of peoples, is not placed when talking of "Europe", but when pleading for closer cooperation, including in the military field, with the United States:

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[19] Nicholas SOAMES and Andrew ADONIS, "Winston Churchill", p. 3.

[20] Winston S. CHURCHILL, "The Sinews of Peace: A Speech to Westminster College, Fulton, Missouri, 5 March 1946", in *The Sinews of Peace*, p. 98.

[21] "The Sinews of Peace", p. 101.

> Special associations between members of the United Nations which have no aggressive point against any other country, which harbour no design incompatible with the Charter of the United Nations, far from being harmful, are beneficial and, as I believe, indispensable.[22]

Churchill's speech in The Hague23 did not have the same impact, far from it, either in Britain or on the Continent, probably because "Europe" was not in the same league as the Soviet threat in the eyes of newspaper editors. And yet, even though Churchill concluded his speech with almost the same words as in Brussels in November 1945, he managed to create a link with his Fulton warning about the Iron Curtain by introducing "the East" in his reasoning:

> I say here as I said in Brussels last year that I see no reason why, under the guardianship of the world organisation, there should not ultimately arise the United States of Europe, both those of the East and those of the West which will unify the Continent in a manner never known since the fall of the Roman Empire, and within which all its peoples may dwell together in prosperity, in justice, and in peace.[24]

So far, all his public allusions to a United Europe had been made abroad, but he concluded his very long strongly anti-Soviet and anti-Communist25 tour d'horizon on foreign policy as Leader of the Opposition in the House of Commons on 5 June 1946 with both an appeal to a reconciliation with the former enemies and an encouragement to European

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[22] "The Sinews of Peace", p. 99.

[23] Winston S. CHURCHILL, "A Speech to the States-General of the Netherlands, The Hague, 9 May 1946",
in *The Sinews of Peace*, pp. 128-134.

[24] "A Speech to the States-General of the Netherlands", p. 134.

[25] The Communist Parties of France and Italy being described as simply a Fifth Column executing orders received from Moscow. Winston S. CHURCHILL, "Foreign Affairs: A Speech to the House of Commons, 5 June 1946", in *The Sinews of Peace*, pp. 151-170.

unity – once more without saying what role Britain should play in it: "Let Germany live. Let Austria and Hungary be freed. Let Italy resume her place in the European system. Let Europe arise again in glory, and by her strength and unity ensure the peace of the world".26

During the war, Churchill had promised General Giraud that after victory he would come to pay him a visit in Metz, which Churchill wrongly thought was his native city – but anyway, Giraud was the deputy of Metz in 1946 and Churchill was true to his word, going to Metz for the 14 July ceremonies. The speech naturally alluded to the Anglo-French alliance in both world wars – but it had a marked "European" dimension, though once again it seems that Churchill did not include the British among the Europeans:

> We victors have set up together the United Nations Organisation […] But without the aid of a united Europe the great new world organisation may easily be rent asunder or evaporate in futility because of explosions which originate in Europe and may once again bring all mankind into strife and misery. Therefore the first word I give you here today is "Europe". May she regain her happiness and may her small, as well as her great, nations dwell together in security and peace. May there be a decent life achieved and set up for Europeans […][27].

In contrast with his speech two months later in Zurich, in Metz Churchill only spoke of the role France had to play in this European rebirth:

> There can be no revival of Europe, with its culture, its charm, its traditions and its mighty power, without a strong France. […] Using my privilege as your old and faithful friend, I do not hesitate to urge upon all Frenchmen, worn or worried though they may be, to unite in the task of leading Europe back in peace and freedom

[26] "Foreign Affairs", p. 170.

[27] Winston S. CHURCHILL, "A Speech at Metz, 14 July 1946", in *The Sinews of Peace*, p. 174.

> to broader and better days. By saving yourselves you will save Europe and by saving Europe you will save yourselves.[28]

Possibly because there was nothing sensational about his appeal to France, his Metz speech did not make the headlines in spite of his plea for "a united Europe" as essential for the success of the new United Nations.

For his next public pronouncement on the subject, in Switzerland, he was careful this time to send advance notices to the world press, hinting that he was to use momentous words in the same vein as the "Iron Curtain" phrase in Fulton. He had been invited by a consortium of wealthy businessmen to give a speech in Zurich, with the perspective of a luxury holiday on Lake Geneva beforehand. He was delighted of course. The speech took place at the University, with all the pomp and medieval costumes which he liked so much, on 19 September 1946.

As in Brussels, he began by talking of "the tragedy of Europe", blaming it on "the Teutonic nations". Then came the now familiar words: "We must build a kind of United States of Europe", with the equally familiar argument that this would in no way weaken the United Nations: "There is already a natural grouping in the Western Hemisphere. We British have our own Commonwealth of Nations". So far, more than half-way through the speech, most of the journalists must have wondered why Churchill had made such a fuss about it. The answer came with the dramatic announcement: "I am now going to say something that will astonish you". The climax was at last coming: "The first step in the re-creation of the European family must be a partnership between France and Germany". He explained why:

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[28] "A Speech at Metz", p. 175.

> There can be no revival of Europe without a spiritually great France and a spiritually great Germany. The structure of the United States of Europe will be such as to make the material strength of a single State less important. Small nations will count as much as large ones and gain their honour by a contribution to the common cause. […]
>
> But I must give you a warning, time may be short. At present there is a breathing space. The cannons have ceased firing. The fighting has stopped. But the dangers have not stopped. If we are to form a United States of Europe, or whatever name it may take, we must begin now. […]
>
> If at first all the States of Europe are not willing or able to join a union we must nevertheless proceed to assemble and combine those who will and who can. […]
>
> In this urgent work France and Germany must take the lead together.[29]

Now, it is difficult for us today to recapture the atmosphere of 1946, the mental framework of the populations of Europe and their political leaders. In France, for instance, there was an immediate outcry, led by the Gaullists on the Right[30] and the Communists on the extreme Left, for totally different reasons which are outside our subject. And yet the moderates from Right and Left were seduced – men like Léon Blum (1872-1950) or Robert Schuman (1886-1963). In Belgium, Paul-Henri Spaak (1899-1972), who was to remain in the forefront of European politics for many years, applauded. Count

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[29] Winston S. CHURCHILL, "A Speech at Zurich University, 19 September 1946", in *The Sinews of Peace*, pp. 198-202, *passim*.

[30] The "Official Biography" contains a remarkable report from Duncan Sandys to Churchill on de Gaulle's attitude to a United Europe as proposed by Churchill. Churchill had sent Sandys with a letter containing his views as stated at Zurich. During the lunch at de Gaulle's private residence in Colombey-les-deux-Églises on 29 November 1946, the General had put forward a long list of objections to Churchill's scheme, especially Franco-German cooperation, which Sandys dutifully noted. Martin GILBERT, *Never Despair*, pp. 286-287.

Coudenhove-Kalergi sent a telegram of congratulations to Churchill. In fact, Churchill paid tribute to him in his speech, on a par with Aristide Briand: "Much work has been done upon this task by the exertions of the Pan-European Union which owes so much to Count Coudenhove-Kalergi and which commanded the services of the famous French patriot and statesman, Aristide Briand".[31]

Churchill had refused the chairmanship of the British Pan-European Group which Coudenhove-Kalergi had offered to him in February 1938, and Churchill had again declined the Presidency of the Pan-European Movement in January 1946, but this did not discourage the Count, who argued that now that Churchill had so forcefully put the European question on the agenda, other political leaders would no longer be able to sidetrack it. And indeed, Churchill's Zurich speech is still often considered today as the crucial factor in the launching of the movement which was to lead to the present European Union, one of the main supporters of this view being none less than Dr. Frank-Walter Steinmeier, President of the Federal Republic of Germany since March 2017, who wrote a short essay entitled Europa ist die Lösung: Churchills Vermächtnis in 2016,32 just after the Brexit Referendum, when he was Minister for Foreign Affairs. Steinmeier concedes that Churchill did not envisage Britain as a member of the European Union which he proposed in his speech,33 but he berates British politicians like Boris Johnson who dismiss the ideal propounded by Churchill.34 Adonis and Soames

[31] "A Speech at Zurich University", p. 199.

[32] "Europe is the Solution: Churchill's Legacy". The booklet includes Churchill's speech in German translation.

[33] "Ein Staatsmann, der selbst, das muss hinzufügt sein, die Briten nie als Teil dieses vereinigten Europas sah". *Europa ist die Lösung*, p. 8.

[34] "Dass zu solchen Kräften [the forces at work against the European Union] auch so manche aus Churchills Heimatland zählen, mit angeführt von einem Churchill-Biografen [Boris Johnson, no doubt] als Wortführer

also see the speech as a historic watershed: "Zurich was Europe's equivalent of Lincoln's Gettysburg Address, just a bit longer".35 And Felix Klos describes it as "a kind of Magna Carta of European unity".36

Yet, of course, if Churchill's role in galvanising the energies of all the European politicians who believed in a United Europe is undeniable, the problem of his own participation remains a difficult one. Klos quotes from a capital document in the Swiss archives which might explain why Churchill remained vague – to say the least – about British membership of the union which he proposed. On the eve of the speech, Churchill had been invited to dine with a number of Swiss diplomats. One of them, Albert Cuttat, "asked the most sensitive question of the evening", as Klos puts it – whether Britain would ever become a member of the United States of Europe. Cuttat reported Churchill's reply to his government:

> I have preferred not to stress this point so as to leave to others the task of inviting us. One must not give the impression that we wish to control Europe, even though it is clear that only Great Britain is capable today of guiding her properly. […] Perhaps you invite Russia first, which will refuse, and in that case Britain will be able to join.[37]

The so-called "Official Biography" also gives us an exchange of letters with Viscount Cecil of Chelmswood[38]

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des Brexit, ist eine besondere bittere Volte der Geschichte". *Europa ist die Lösung*, p. 10

35 Nicholas SOAMES and Andrew ADONIS, "Winston Churchill", p. 3.

36 Felix KLOS, *Churchill on Europe*, p. 23.

37 Felix KLOS, *Churchill on Europe*, p. 22.

38 Edgar Algernon Robert Gascoyne-Cecil, 1st Viscount Cecil of Chelwood (1864-1958) [known as Lord Robert Cecil, 1868-1923], sixth child and third son of Robert Gascoyne-Cecil, 3rd Marquess of Salisbury, Prime Minister, 1885-1892 and 1895-1902. Viscount Cecil of Chelwood had been a prominent advocate of the League of Nations and he remained a supporter of the Pan-European Movement.

and Duncan Sandys which suggests that in 1946 his primary consideration was how to insert the movement for a United Europe in the wider context of the incipient Cold War. On 9 June wrote to the Viscount:

> I have a feeling that an immense amount of pro-British sentiment, in Western Europe at any rate, could be evoked by my working in this association, and also that I personally could save it from rivalry with the United States of America, and might prevent its having at the outset an anti-Soviet bias.
>
> […The movement] might become very big indeed, and a potent factor for world peace. After all, Europe is the foundation of almost all the glories and tragedies of mankind.[39]

Cecil having replied that for Coudenhove-Kalergi, the main objective of the Pan-European Union was "to restrain Russia, or to protect the rest of Europe from her", Churchill then wrote to his son-in-law, Duncan Sandys, who was a convinced "European" and an active participant in all the talks which were then taking place: "I think it would be a pity for me to join an organisation which had such a markedly anti-Russian bent, but I was not aware that this was Count C.K.'s conception".[40]

In the end, therefore, Churchill did not join Count Coudenhove-Kalergi's Pan-European Union, but he actively encouraged men like Léon Blum, Robert Schuman, Paul-Henri Spaak, Konrad Adenauer (1876-1967) and Alcide De Gasperi (1881-1954). All through 1947, these European politicians were busy organising the foundation conference of the movement, which finally took place at The Hague from 7 to 10 May 1948. In Britain, a pro-European pressure group was founded in January 1947 under the complicated name, *British United Europe Movement*, with Duncan Sandys playing a prominent role in it. Whether it was deliberate or not, the

[39] Martin GILBERT, *Never Despair*, p. 242.

[40] Martin GILBERT, *Never Despair*, p. 243.

words were once more ambiguous and confusing. *British United Europe Movement* did not in fact mean a movement in favour of Britain being part of a United Europe, but in favour of Britain supporting the creation of a United Europe of which it would not be a member. This was made clear by Churchill at the end of his Zurich speech, in which "Great Britain and the British Commonwealth of Nations" would only be "the friends and sponsors of the United Europe".[41]

That there was a form of wishful thinking among pro-Europeans in those years – we are talking about 1946, 1947, 1948 – is in no doubt. As the senior British diplomat Gladwyn Jebb put it in his 1972 Memoirs:

> Churchill was himself clearly not a "European" at all. If he had had his way, Britain would have been "associated" with a Europe that would extend from Lisbon to Brest-Litovsk... but would never have formed part of it herself. Why the European federalists should have apparently thought at one time that he was thinking of British membership of a federal Europe I have never understood. He always made it quite clear that Britain, if he had anything to do with it, would stand aloof.[42]

Paul-Henri Spaak was later to write in his memoirs that the ambivalence of Churchill's discourse arranged everyone and nobody dared to ask him what exactly he had in mind. The ambiguity was reinforced when Churchill accepted to chair the Congress of Europe, as it was solemnly called, at The Hague on 7 May 1948. Why? Because in his opening speech he no longer used the phrase "United States of Europe" – and even worse, whereas at Zurich in 1946 he had stressed the urgency of acting, he now warned against "undue precipitancy". He also reminded his audience that "We in Britain must move in harmony with our great partners in the Commonwealth"[43]

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[41] "A Speech at Zurich University", p. 202.

[42] Quoted in Andrew ROBERTS, *Walking with Destiny*, p. 900.

[43] Winston S. CHURCHILL, "The Congress of Europe: A Speech at

– and of course everybody knew that they wanted to keep their special access to the British market, still called Imperial Preference by Churchill in 1948, which they would lose if Britain joined a United Europe.

Six months later, at the annual Conservative Party Conference which took place at Llandudno, in Wales, from 7 to 10 October 1948, Churchill delivered what is still often considered as the foundation speech of post-war British foreign policy, explaining all the hesitations of successive governments since the mid 20th century. In that 'Llandudno Speech' as it is now known, Churchill gave an unambiguous definition of the role and position of Great Britain in the world as he saw them. These are very touchy subjects, and one must be careful to cite his exact words:

> As I look out upon the future of our country in the changing scene of human destiny I feel the existence of three great circles among the free nations and democracies. […]
>
> The first circle for us is naturally the British Commonwealth and Empire, with all that that comprises. Then there is also the English-speaking world in which we, Canada, and the other British Dominions and the United States play so important a part. And finally there is United Europe. These three majestic circles are co-existent and if they are linked together there is no force or combination which could overthrow them or even challenge them. Now if you think of the three interlinked circles you will see that we are the only country which has a great part in every one of them. We stand, in fact, at the very point of junction, and here in this Island at the centre of the seaways and perhaps of the airways also, we have the opportunity of joining them all together.[44]

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the Hague, 7 May 1948", in *Europe Unite: Speeches 1947 and 1948*, p. 316.

[44] Winston S. CHURCHILL, "Conservative Mass Meeting: A Speech at Llandudno, 9 October 1948", in *Europe Unite: Speeches 1947 and 1948*, pp. 417-418.

Now, one may notice, United Europe is only one of these three circles which meet in London – and the last on his list. And even though we only have General de Gaulle's word for it, Churchill told him on the eve of the Normandy landings in June 1944 – only four years before Llandudno and its three circles – that if he had to choose between Europe and the open sea, that is Britain's overseas Imperial interests and American contacts (his idealised "Special Relationship"), he would always choose the open sea.[45] So, the three circles were obviously of unequal importance "for the future of his country" in his eyes in the late 1940s, with Europe a poor third.

Yet, two months later, during a particularly acrimonious debate in the Commons in which he accused "the Government and their party organisation" of having "tried to wreck The Hague conference in May", he also made a plea for what General de Gaulle was to call "l'Europe des nations":

> We are not seeking in the European movement – and I speak as one of the Presidents; I share this honour with M. Blum and with the Prime Minister of Italy [Alcide De Gasperi] and the Prime Minister of Belgium, M. Spaak – to usurp the functions of Government. I have tried to make this plain again and again to the heads of the Government. We ask for a European assembly without executive power. We hope that sentiment and culture, the forgetting of old feuds, the lowering and melting down of barriers of all kinds between countries, the growing sense of being "a good European" – we hope that all these will be the final, eventual and irresistible solvents of the difficulties which now condemn Europe to misery. The structure of constitutions, the settlement of economic problems, the military aspects – these belong to governments. We do not trespass upon their sphere.[46]

[45] « Sachez-le ! Chaque fois qu'il nous faudra choisir entre l'Europe et le grand large, nous choisirons le grand large ! Chaque fois qu'il me faudra choisir entre Roosevelt et vous, je choisirai Roosevelt ! » Charles de GAULLE, *Mémoires de guerre*, vol. II, p. 224.

[46] Winston S. CHURCHILL, "Foreign Affairs: A Speech to the House of Commons, 10 December 1948", in *Europe Unite: Speeches 1947 and*

But among the Continental "Europeans" the illusion that Churchill was their best ally continued. Following the great success among the Continental delegates of the Congress in The Hague, the treaty founding the Council of Europe was signed in London, on 5 May 1949, Ernest Bevin being in the Chair. The seat of the Council was to be in Strasbourg, and the first assembly met there in August. Great Britain sent two delegations: one led by a member of the Labour Government, one by Churchill in the name of the Opposition. We have the testimony of Harold Macmillan (1894-1986), the future Conservative Prime Minister, who accompanied Churchill – and he says in his Diaries that Churchill was more interested in cultivating his image as a world statesman during lavish evening receptions than in the proceedings of the assembly, making sure that he did not make imprudent commitments while appearing as a friend of European integration.[47]

Churchill's last statement on the subject in the 1940s came in November 1949, on the occasion of a meeting of the *British United Europe Movement* in London. Again, every word counts, and it is necessary to give his exact phrasing:

> The French Foreign Minister, M. Schuman, declared in the French Parliament this week that "Without Britain there can be no Europe". This is entirely true. But our friends on the Continent need have no misgivings. Britain is an integral part of Europe, and we mean to play our part in the revival of her prosperity and greatness.

So far, so good, from the point of view of "our friends on the Continent". Yet the next sentence poured cold water on their hopes: "But Britain cannot be thought of as a single State in isolation. She is the founder and centre of a world-wide Empire and Commonwealth". And later:

1948, p. 495.

[47] Harold MACMILLAN, *Tides of Fortune*, p. 174.

> The British Government [that is the Labour Government in power in 1949] have rightly stated that they cannot commit this country to entering any European Union without the agreement of the other members of the British Commonwealth. We all agree with that statement.[48]

Now, all sorts of words and phrases spring to mind before what must in fact be called the Leader of the Opposition's bad faith regarding European Integration in the final months of the 1940s: equivocation, syllogism, delaying tactics, catch-22 situation, and most damning, perhaps, contempt for the people's intelligence. This was not to last.

The years 1950 and 1951 were dominated by electioneering. The General Election of 1950 was narrowly won by Labour and that of 1951 narrowly won by the Conservative Party led by Churchill, who became Prime Minister again. During the two election campaigns, Churchill had based his support for "Europe" on the return of the Eastern nations – again of course an unrealistic condition. But when he was once more in Downing Street he made it immediately and emphatically clear that a) Britain would not join the proposed European Coal and Steel Community; b) Britain would not join the proposed European Defence Community; and c) Britain would not join any form of European Union or Federation – by then the preferred word.

In a remarkable memorandum to the Cabinet issued one month after his election victory, on 29 November 1951, entitled "United Europe", which of course remained secret, he wrote: "I have never thought that Britain […] should become an integral part of a European Federation and have never given the slightest support to the idea".

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[48] Winston S. CHURCHILL, "European Movement: A Speech at Kingsway Hall, London, 28 November 1949", in *In the Balance: Speeches 1947 and 194*, p. 152.

This seems in fact to lift for good all the ambiguity which surrounded his public pronouncements on "Europe" in the late 1940s – and the sentences which followed indeed put paid to any hopes that Churchill the new Prime Minister would be an enthusiastic "European":

> Our attitude towards further economic developments on the Schuman lines resembles that which we adopt about the European Army. We help, we dedicate, we play a part, but we are not merged with and do not forfeit our insular or Commonwealth character. Our first object is the unity and consolidation of the British Commonwealth. […] Our second, "the fraternal association" of the English-speaking world; and third, United Europe, to which we are a separate closely- and specially-related ally and friend. […]
>
> It is only when plans for uniting Europe take a federal form that we ourselves cannot take part, because we cannot subordinate ourselves or the control of British policy to federal authorities.[49]

In fact, the last point had been excellently made on 27 June 1950 when he justified his refusal to join the European Coal and Steel Community during a debate in the House of Commons in which he hypothetically answered Sir Stafford Cripps (1889-1952), the Labour Chancellor of the Exchequer:

> If he asked me: "Would you agree to a supranational authority which has the power to tell Great Britain not to cut any more coal or make any more steel, but to grow tomatoes instead?" I should, say, without hesitation, the answer is No. But why not be there to give the answer?
>
> Nothing is said about the method of voting. We know nothing about the method by which voting power will be allotted to the different members of any supra-national authority which may be set up. But it is quite certain we should not agree to become members of it – and that we should have every right to disagree – if our great preponderance in coal and steel production did not receive full recognition.[50]

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[49] Public Record Office, London. CAB 121/38, C(51)32.

[50] *House of Commons Debates*, 27 June 1950, vol. 476, col. 2147.

This special pleading for Britain as the largest producer of coal and steel in Europe in 1950 was of course only the first of a long list of "opt-out clauses" demanded all through Britain's relations with its Continental partners, first during the negotations for entry in the course of its three applications for membership of the EEC, and later during its actual membership. It is interesting to see that Churchill himself adhered to this policy as early as 1950.

We saw that when Leader of the Opposition in the late 1940s, Churchill denounced the Labour Government for its lukewarm approach to European Union – but now Attlee (1883-1967), the former Labour Prime Minister and new Leader of the Opposition to Churchill's Government got his own back on the occasion of the traditional Commons debates which follow the Speech from the Throne in November 1952 spelling out the coming Government action and proposed legislation. Attlee was quick to point out Churchill's U-turn and his inconsistency, which made him rally Labour's constant refusal of any form of European integration:

> I note the passage on the unity of Europe. I am glad to see that the Government have very largely come down to taking the same line as that which the Labour Government took. There was a time when it looked as though the Prime Minister was going to be, so to speak, stroke [skipper, captain] of the European boat, but he is now only offering a few helpful suggestions from the towpath. In this matter we used to be accused of dragging our feet, but the proposal which has been put forward by the Foreign Secretary is very much in tune with the view which we have always taken on the question of European unity; that is, that we are willing to give it all the assistance we can, but we cannot be solely a European power.[51]

As if to confirm Attlee's observation, he made a statement to the House of Commons on 11 May 1953 which took up

[51] *House of Commons Debates*, 4 November 1952, vol. 507, col. 15.

his phrase in the *Saturday Evening Post* article of 1930, "We are with Europe, but not of it", with a slight modification:

> Where do we stand? We are not members of the European Defence Community, nor do we intend to be merged in a Federal European system. We feel we have a special relation to both. This can be expressed by prepositions, by the preposition "with" but not "of" – we are with them, but not of them. We have our own Commonwealth and Empire.[52]

As is well known, Churchill devoted all his time and remaining energy to trying to recapture the atmosphere of the war, arranging a summit of the Big Three as in the good old days of 1941-1945, this time to preserve the earth from nuclear war. Of course, European leaders had no part in this grand scheme. The other Big Two were not interested and he finally resigned in April 1955. Andrew Roberts neatly sums up his choice of priorities and the result for his position on "Europe":

> In the four years that Churchill was prime minister, between 1951 and 1955, he personally, regularly and decisively blocked all movement towards Britain joining any of the European federal institutions that existed.[53]

The minutes of his last Cabinet contain the advice which he gave to his assembled ministers in conclusion (in the regulation indirect style):

> The Prime Minister said that it remained for him to wish his colleagues all good fortune in the difficult, but hopeful situation

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[52] *House of Commons Debates*, 11 May 1953, vol. 515, col. 891.

[53] Andrew ROBERTS, "Churchill was all in favour of a united Europe – as long as it didn't include Britain" (Review of Klos's 2018 book, *Churchill's Last Stand: The Struggle to Unite Europe*). *The Spectator*, 17 February 2018.
https://www.spectator.co.uk/2018/02/churchill-was-all-in-favour-of-a-united-europe-as-long-as-it-didnt-include-britain/ (accessed on 27 May 2019.)

> which they had to face. He trusted that they would be enabled to further the progress already made in rebuilding the domestic stability and economic strength of the United Kingdom and in weaving still more closely the threads which bound together the countries of the Commonwealth or, as he still preferred to call it, the Empire.[54]

Here was the unrepentant Imperialist once more – the champion of the First Circle. The Second Circle was not forgotten, because when he met two non-Cabinet ministers after the meeting he told them: "Never be separated from the Americans".[55] But he said nothing of the Third Circle on that capital day when he left office forever.

Obviously, it was not an oversight. Yet in the last ten years of his life – he died in 1965 – he was always ill at ease when the question of "Europe" was broached. We know that thanks notably to Anthony Montague Browne (1923-2013), a high-ranking civil servant who was seconded from the civil service as his permanent aide after his retirement. They had long conversations in which Churchill reminisced about the past and gave him his opinion on a wide variety of subjects. For Montague Browne, Churchill lied to himself when he argued that he had been for European Integration in 1951-1955 but was frustrated in his action because he knew that the Conservative Party and the Foreign Secretary, Anthony Eden, were opposed. "My party was too strong for me", he is reported to have said to Sir Stephen King-Hall by John Ramsden, who comments: "Churchill's claim would be more convincing if there was any evidence that he had actually tried to achieve something different from what actually happened".[56] Montague Browne knew Churchill better than

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[54] Public Record Office, London. CAB 128/28 (Cabinet Conclusions, 'Secret', 5 April 1955).

[55] Recollections obtained in 1987 by Martin GILBERT, *Never Despair*, p. 1123.

[56] John RAMSDEN, *Man of the Century*, p. 319.

anyone else outside the family, and he was fully aware that Churchill was always able to impose his will in the end when he was determined about something. He knew that "Where there is a will, there is a way" applied to Churchill more than anyone else.

So Montague Browne was extremely embarrassed in July 1962 when it fell to him to issue a communiqué signed Churchill – because Churchill's senility now prevented him from expressing clear thoughts – to put an end to a serious incident connected with European Integration. Churchill was in hospital after breaking his hip, and his old friend Field-Marshal Montgomery (1887-1976) came to see him. The British Prime Minister, Macmillan, was then submitting Britain's application to join the Common Market, to use the conventional phrase of the time, and Montgomery told the journalists waiting for news of Churchill that he was very well and had told him how much he disapproved of that application. Montague Browne tells us how he used an unpublished (and rather contorted, we may add) older statement by Churchill, which he reproduces in his book, to try to reduce the damage done by Montgomery's words:

> I think that the Government are right to apply to join the European Economic Community, not because I am yet convinced that we shall be able to join, but because there appears to be no other way by which we can find out exactly whether the conditions of membership are acceptable.[57]

But he also tells us that Montgomery was partly right: "I think that in some almost incoherent but deeply felt way, Churchill's last thoughts returned nostalgically to our great days, and his own Anglo-American origin".[58] As another faithful aide and friend, Jock Colville, also wrote many

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[57] Anthony MONTAGUE BROWNE, *Long Sunset*, p. 274.

[58] *Long Sunset*, p. 276.

years after Churchill's death, "There was a contradiction in Churchill's vision" [of European Integration].[59]

In other words, Imperial glory and the "Special Relationship" – not "Europe" – remained his primary preoccupations to the last. "Keeping aloof" is a phrase often used in connection with Britain's attitude to European Integration – and indeed it excellently describes Churchill's position after his apparent enthusiasm in the 1940s.

The paradox here is that his final evolution in the 1950s and 1960s was away from European Integration for Britain at a time when in fact the reduced world position of the country made joining the European Movement increasingly sensible. But, as the Brexit vote demonstrated, the dictates of reason are often overcome by the feelings of the heart in this matter.

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Author's biography

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Part 2.
Constitutional aspects of the relationship between France and The United Kingdom

Chapter 3.
Rule of Law and "*État de Droit*": comparing British and French concepts of Law

Aurélien Antoine

Despite their common destiny and major contribution to building the model of liberal democracies, the United Kingdom and France do not share a common concept of the rule of law. There are several reasons for the divergence, even though the interplay of influence between the two countries was significant in the Middle Ages when the foundations of the modern European state were being laid.

In the United Kingdom, the Norman conquest resulted in William introducing feudalism into England. However, the change did not completely oust the organisation of monarchical power that existed under the rule of the Anglo-Saxon and Viking kings. This first hybridisation favouring the emergence of parliamentary sovereignty in England contrasts with France, which knew only a relationship of suzerainty. Nevertheless, it is true that the Kingdom of France and the

Kingdom of England are linked, both by the fact that William and his successors were vassals of the King of France for the lands they held in France, and by the establishment of dynastic ties that would lead the two countries into a state of war enduring for more than a century, from 1337 until 1453.

During this conflict, the two royal administrations organised themselves. Gradually, the competences that would soon be classified as sovereign powers were consolidated with a view to the constitution of a territorial unit and the recognition of a form of sovereignty over subjects. Superficially, the same developments were occurring on both sides of the Channel, but historical events and a separate State administration led the two countries to follow opposite directions, particularly in the approach adopted by their lawyers to the rule of law.

While France was moving towards the unification of its territory and the absolutism of monarchs ruling with divine rights from the 16th century, the entity that would become known as the United Kingdom did not emerge until 1800-1801 at the price of maintaining a strong legal identity of the four nations (England, Wales, Scotland and Ireland). But England enjoyed relative continuity from the constitutional standpoint with the historic tradition of formulation of legal rules by the judges. Marked by the authority of written law, which is necessarily more rigid and, consequently, more exposed to sudden changes, the conception of the rule of law in France contrasts with the "autorité du passé"[1] emanating from the English approach. Comparing the concept of the rule of law in the United Kingdom and that of the *État de droit* in France - which at this stage of the discussion will simply be defined as the obligation for institutions to comply with rules of a customary nature or enacted under penalty of legal or political sanction - must be set in the context of this centuries-old opposition. The following point must also be

[1] Louis ASSIER-ANDRIEU, *L'autorité du passé*, Dalloz, 2011, 272 p.

emphasised: the rule of law is indeed a notion in the sense that it derives from an empirical experience of the law tested by the judge; conversely, the *État de droit* is a concept in so far as it is initially abstract and theoretical; its identification in case law remains rare.

On the basis of this fundamental distinction between notion and concept, there are three major contrasts between the rule of law and the *État de droit* that contribute to a better understanding of how British and French lawyers view the law: the rule of law is historical, practical and societal, while the *État de droit* is contemporary, theoretical and Statist. These antagonisms have, however, been mitigated in the present era by European law. They have fostered the continentalisation of the rule of law, contrary to the English legal tradition. Indeed, the continentalisation of the principle has led to the progressive recognition of fundamental written regulations that call into question that form of flexible and pragmatic approach to law that has ancient roots. On the French side, European human rights law and European Union law have strengthened the role of the judge, who gradually is becoming as essential in society as the British judge.

Section 1. Historicity v. Contemporaneity

Establishing the history of the rule of law is an impossible task, as is claiming to identify the date of birth of the common law. Dicey, the first true rule of law theorist, wrote in his *Introduction to the Study of the Law of the Constitution* first published in 1885: "Two features have at all times since the Norman Conquest characterised the political institutions of England. The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government (...).The second of these features, which is closely connected with the first, is the rule or supremacy

of law."[2] Dicey bases his thesis on a judgement dating back to the reign of Henry VI which held essentially that the supremacy of the law is a condition for the exercise of the monarch›s authority and the relationship with his subjects[3]. It is also commonplace to assert that its spirit resides in the *Magna Carta* and Bracton's writings[4], although the term is not used. On the other hand, in the Middle Ages as today, it is the judges who shape and apply the principle to justify their legal reasoning. Legal historians agree that the principle "gradually emerged from real cases" heard by judges[5]. Under Elizabeth I, the submission of all to the law, including the Queen, became an identifying feature of the mixed nature of the form of government operative in England. William Lambarde explicitly uses the expression "rule of law" in his *Acheon of* 1591. More officially, the *Petition of Grievance* addressed by the Municipalities to James I, contrasts the rule of law with the arbitrary actions of the king.

Disputes questioning royal authority expedited clarification of the principle of the rule of law. Due to the absolutist tendencies of the Stuarts, several legal advisers, foremost among them Lord Coke, relied on the common law to limit the royal prerogative, or even challenge the law of Parliament (*Case of Prohibitions del Roy* in 1607: the use of the royal prerogative to render justice is excluded; *Calvin's Case of* 1608: a Scot may benefit from English law even though he was born in Scotland after the union of the two monarchies; *Dr Bonham's Case of* 1610; *Case of Proclamations* of 1611: Coke

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[2] Albert Venn DICEY, *Introduction to the Study of the Law of the Constitution*, *in* John W.F. Allison (ed.), *The Oxford Edition of Dicey*, vol. 1 , *The Law of the Constitution*, Oxford University Press, 2013, 576 p. , Chp. IV, p. 107.

[3] Quoted by Dicey, *Ibid.*

[4] *De Legibus et Consuetudinibus Angliae* written between 1272 and 1277.

[5] Robert GOFF, "The Future of the Common Law", *I.C.L.Q.* 1997/46, p. 753.

holds that the royal prerogative cannot be extended by the simple will of the monarch).

The recurrence of the term in English legal literature from the 16th century onwards without it becoming a theory in the true sense indicates its self-evident nature. It serves as a reminder that the monarch cannot govern without Parliament and its courts under his or her control[6]. The political community is united by respect for the law that guarantees the common good *(the Commonwealth*). Although Lord Coke, Sir Hale, Blackstone, Locke or Hobbes do not refer to the rule of law in their works, the observance of the rules by the monarch and his or her subjects is essential to political harmony. The famous *Entick v Carrington* case law of 1765 was to establish the possibility of challenging Government decisions in order to protect the life, freedom and property of individuals[7].

English and then British history confirms the close relationship between the form of government (mixed monarchy), the political system (parliamentarianism) and the rule of law. All the famous texts of English constitutional law adopted since the first third of the 17th century recall the obligation to preserve the rule of law in relations between institutions on the one hand, and relations between the monarch and his/her subjects on the other.

In France, the concept of the *État de droit* has no historical roots in the sense that it is not a condition for the exercise of power. It is customary in doctrine to trace the formalisation of the concept back to the 1971 decision of the *Conseil*

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[6] The close link between the rule of law and its protection by the Parliament was identified by FORTESCUE in the XVth century (*De Laudibus Legum Angliae*, written between 1461 and 1471).

[7] 19 St Tr 1030, 1067, 1073. See Adam TOMKINS, Paul SCOTT, *Entick v Carrington: 250 years of the Rule of Law*, Hart Publishing, 2015, 288 p.

constitutionnel, Freedom of Association (*Liberté d'association)*[8]. The justices acknowledge the legally binding value of the Preamble to the 1958 Constitution which incorporates the French declaration of human rights (*Déclaration des Droits de l'Homme et du Citoyen -DDHC*) and the Preamble of the 1946 Constitution. It encompasses principles of constitutional value, in particular the Fundamental Principles recognised by the laws of the Republic such as the freedom of association. Since that time, and through the method of incorporation in what is referred to as the "body of constitutional rules", the *Conseil constitutionnel* has identified the many ensuing principles and freedoms. The body of constitutional rules was also enriched by the revisions of the Constitution that have over the years incorporated the Environmental Charter, the provisions of European Union law (article 88-1 *et seq.*), the law of the European Convention on Human Rights (prohibition of the death penalty) or public international law (jurisdiction of the International Criminal Court, article 66-1).

From a simple authority responsible for ruling between powers in 1958, the *Conseil constitutionnel* has evolved into a true court whose primary purpose is to ensure that the law protects fundamental rights and freedoms. This development was achieved by the introduction of a preliminary ruling on constitutionality in 2008, which allows litigants to refer laws they deem unconstitutional to the *Conseil constitutionnel* - albeit indirectly and subject to conditions.

While the judicial authority is explicitly recognised as the body responsible for protecting individual freedoms, the *Conseil constitutionnel* and also the *Conseil d'État*, actively

[8] Cons. const., déc. n° 71-44 DC du 16 juillet 1971, *Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association*. See Guillaume BOUDOU, "Autopsie de la décision du Conseil constitutionnel du 16 juillet 1971 sur la liberté d'association", *RFDC* 2014, n° 2014/1, p. 5.

participate in a form of cooperation by French supreme courts in seeking to preserve the *État de droit*. The latter is generally defined in France as the obligation for public authorities to comply with the rules they enact, at the risk of being sanctioned by the courts, either by invalidate of their acts, by an obligation to act or abstain from acting or even by the award of financial damages.

However, despite the recurrent use of the expression *État de droit* in French legal literature, it is particularly difficult to identify any trace of it in the case law of the *Conseil constitutionnel* or of the *Conseil d'État*. Largely theoretical, it is not the product of practice as is the case on the opposite side of the Channel.

Section 2. Practice v. theory

In referring to the long history of the notion of the rule of law, it was seen that the expression was first used in tangible situations, whether by parliamentarians in the context of texts seeking to protect freedoms and property from royal arbitrariness or by judges for the same ends. In other words, the rule of law is a product of the common law. It is therefore not surprising to note that its occurrence is very frequent in judicial decisions which form case law. In the French context, the *État de droit* must be seen as the product of doctrinal works strongly influenced by Germanic *Rechtsstaat*. While there can be no complete synonymy between the terms, it seems quite clear that the idea of subjecting the State to the rules it lays down and drawing all the consequences for its relations with its subjects is common to the *État de droit*, the *Rechtsstaat* and the rule of law.

In France, the use of the expression *État de droit* first appeared during the Third Republic in order to challenge a legislative-led culture that contributed to the excessive domination of Parliament. Advocates of State Reform

sought increased control of the legislature through a form of higher control of the law, for example, Raymond Carré de Malberg[9]. The latter states that "the *État de droit* regime is a system for placing limitations not only on administrative authorities but also upon the legislator"[10]. The *État de droit* counters the *État légal*, because the former is "a state which, in its relations with its subjects and to guarantee their individual status, is itself bound by the system of laws, and this insofar as it fetters its actions by rules, some of which determine the rights reserved to citizens and others which determine in advance, the ways and means which may be used in order to achieve the objectives of the State"[11]. For Carré de Malberg, respect for the *État de droit* necessarily implies the existence of judicial control of public actions. The other author who merits a mention is Léon Duguit, who makes an explicit reference to the *État de droit* in his 1907 *Manuel de Droit constitutionnel*. His approach is as follows: "If political power is never legitimated by its origin, if it is in itself an act outside the law, it can become legitimate by its exercise; it can become an *État de droit*. »[12]

This relative intellectual success at the beginning of the 20th century was then eclipsed until the 1970s and 1980s[13]. In France, the *État de droit* is therefore inseparable from the review of constitutionality. Here one must admit the decisive influence of German constitutional principles on the French concept of the *État de droit*. However, the advent of this

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[9] Voy. Eric MAULIN, *La Théorie de l'État de Carré de Malberg*, PUF, 2003, 352 p.

[10] Raymond CARRÉ DE MALBERG, *Contribution à la Théorie Générale de l'État*, Recueil Sirey, 1920, p. 492.

[11] *Op. cit.*, pp. 488-489.

[12] *Op. cit.*, p. 256.

[13] Kaarlo TUORI, "L'État de droit", *in* Michel TROPER, Dominique CHAGNOLLAUD DE SABOURET (ed.), *Traité de Droit constitutionnel*, Dalloz, 2012, t. 1, p. 661.

(late) control in France does not include any reference to the expression "*État de droit*" in the Constitution, or case law. The substantive nature of the concept is therefore difficult to perceive in the enactment of regulations. Frequently, it is restricted to the value of a mantra[14]. To assess its true substantive nature, recourse must be made first to organic doctrine and then to academic legal doctrine. Jean Foyer considered, for example, that the opening up of the possibility of seizing the *Conseil constitutionnel* to 60 deputies or 60 senators following the 1974 reform "represented a new step forward in the construction of the *État de droit*"[15]. Today, the concept is central to the discourse of Presidents of the supreme courts, as well as that of politicians. Among academics, since the 1980s, it is of course to Louis Favoreu that the prospering of the connection between the *État de droit* and constitutional control must be attributed[16]. Since the work of the famous dean of the Faculty of Aix-en-Provence, the doctrine of public law has dedicated many works to the subject, often by adopting a comparative approach. Despite its recurrence in the discourse of the elites, the theoretical value of the *État de droit* nevertheless renders its dissemination to society at large and its adoption as a cardinal value of community life somewhat challenging.

Section 3. Societal v. Statism

The concept of the *État de droit* is intrinsically linked to the State. Although a tautology, it acquires special significance when compared with the principle of the *rule of law* which refers rather to the performance aspect (translated in French as "*règne du droit*"). The State-related and hierarchical

[14] See Jacques CHEVALLIER, *L'État de Droit*, LGDJ, 6e éd., 2017, 158 p.

[15] Quoted *in* Pierre AVRIL, "Hégémonie culturelle de l'État droit", *in* Mélanges en l'honneur d'Hugues, Dalloz, 2018, pp. 7-8.

[16] See Luc HEUSCHLING, État de droit, Rechtsstaat, et Rule of Law, Dalloz, 2002, pp. 380 et s.

dimensions emanating from the expression "*État de droit*" are, on the contrary, striking.

The absence of an explicit or implicit reference to the State in the British context should not be considered surprising for two reasons. First, the rule of law is above all an emanation of the spirit of the common law whose specificity precludes an institutionalised approach. As early as 1612 Sir John Davies explained the importance of the empiricism of the common law, which confers on it a form of superiority over State law. "This customary Law is the most perfect and most excellent, and without comparison the best, to make and preserve a Commonwealth. For the written laws which are made either by Edicts of Princes, or by councils of Estates, are imposed upon the Subject before any Trial or Probation made, whether the same be fit and agreeable to the nature and disposition of the people, or whether they will breed any inconvenience or not." [17] As briefly mentioned in the introduction, if there is indeed affirmation of the State in England defined as a sovereign authority exercised over a given population and territory, the State as a legal reality does not really emerge until the contemporary age. The term «State» is therefore uncommon in English and then British legal literature. On opening a work on British constitutional and administrative law, the reader will undoubtedly be confused by the fact that scant is made of the concepts of State and sovereignty[18]. The best way to understand is to cite the definition of the rule of law adopted by A. V. Dicey, who was the first author

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[17] *Irish Reports*, *in* John G. A. POCOCK, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century*, CUP, 1957, p. 33.

[18] See, in the contrary, Nick BARBER, *The Constitutional State*, OUP, 2010, chp. 5; Geoffrey MARSHALL, *Constitutional Theory*, OUP, 1971, Chp. 2. Difficulties to conceptualise the State explain why UK can't define precisely the outlines of the Administration. See Carol HARLOW, Richard RAWLINGS (ed.), *Law and Administration*, CUP, 3rd ed., 2009, pp. 19-20.

to theorise[19]. He identifies three characteristics in which no reference is made to the State.

- Legality: no individual may be troubled by a judge without the existence of a legal basis. This obligation to comply with the law implies that no public authority can infringe the rights of individuals without relying on a law. The ultimate consequence of legality according to Dicey is that any form of conviction or punishment must be brought before ordinary and impartial courts.

- Equality: no one is above the law, regardless of their condition. The law of the Kingdom applies to all, without distinction. The principle of equality implies that there are no special courts.

- "Informality": the principle of rule of law, like all constitutional rules, is defined by the intervention of the judge in accordance with the common law tradition. No written constitution formalised in a single document is necessary for its recognition and respect. The tangible and jurisprudential nature of the law favours protection of the rights of the individual against those of the Executive since disputes are resolved within the framework of the common law.

The "Diceyian" concept was widely criticised or updated[20] - a few years following its enunciation[21]. Even today, doctrinal debates are so lively that some authors seek to refute the juridical status of the definition[22]. Despite the outcome of

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[19] Albert Venn DICEY, *op. cit.*

[20] See, for example, works of Frederich von HAYEK, Lon FULLER, William A. ROBSON, Ronald DWORKIN, and more recently Joseph RAZ, Tom BINGHAM, John LAWS, Trevor ALLAN, or Paul CRAIG.

[21] Particularly by Ivor Jennings in 1933 (*The Law and the Constitution*, University of London Press, 5th ed., 1959, 354 p.).

[22] For a presentation of these debates, see Luc HEUSCHLING, *État de droit, Rechtsstaat, Rule of Law*, Dalloz, 2002; Duncan FAIRGRIEVE, "État

the doctrinal debate, Dicey's definition demonstrates that the rule of law is expressed in the relationship between powers and in its application - that transcends the hierarchical distinction between the State and its citizens. Because both institutions and individuals are subject to the same rules, the identification of the State as a legal person replacing other legal entities is no longer really necessary. Consequently, "Dicey's description of the rule of law is expressed in explicit opposition to continental systems (...) implying a "deductive" constitutional method contrary to the English "inductive" method."[23]

Finally, the principle of rule of law resides in practice rather than theory. It becomes one of the vital links between the entities of a collective body. In a way, it forms the bond of trust that unites institutions and citizens. According to opinion surveys, the rule of law is considered by 59% of the population as the most essential factor in "living together"[24]. Lord Neuberger, former President of the Supreme Court of the United Kingdom, recalled in this regard that "justice and security, the rule of law and the defence of the realm, together form the bedrock on which our society is built"[25]. According to the House of Lords report "This is why the rule of law, together with a commitment to democracy, individual liberty and respect for the inherent worth and autonomy of

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de Droit and Rule of Law: Comparing Concepts. A Tribute to Roger Errera", *Public Law* 2015/1, p. 40).

[23] Kaarlo TUORI, *op. cit.*

[24] 2008 Ipsos-Mori 2008 poll. In a speech on extremism in 2015, David CAMERON made a strong reference to the rule of law: « We are all British. We respect democracy and the rule of law. We believe in freedom of speech, freedom of the press, freedom of worship, equal rights regardless of race, sex, sexuality or faith. » (20 juillet 2015, Ninestiles School, Birmingham).

[25] *Justice and Security*, "Discours au Northern Ireland Judicial Studies Board", February 27th, 2014.

all people, are the shared values of British citizenship from which everything else proceeds."[26] The construction of a kind of mythology around a principle that dates back to the 13th century with the *Magna Carta* is also revealing of this social attachment.

A standard of behaviour that extends beyond the relationships between institutions and legal subjects, the rule of law cannot be properly apprehended from a Statist standpoint. That is why there is no worse linguistic solution than to translate "rule of law" by "*État de droit*".

On the other hand, and as Duncan Fairgrieve points out, "one obvious and immediate point of divergence is that the European concepts of *Rechtsstaat, l'État de droit, Stato di diritto et al* all have in common the fact that they are structured around the central concept of the State." [27] In France, the historical tradition of absolutism, then the shifting of parliamentary regimes towards the dictatorship of assemblies, and finally the advent of the excessive primacy of the Executive led to an understanding of the constant threats that State institutions pose to those subject to the law. To contain them while respecting the hierarchical and Statist culture of law creation, the State and its actors have gradually submitted themselves to the rules they have enacted. In addition to this first aspect, which is strictly constitutional, is the fact that the law in France is not cultural as in Anglo-Saxon countries. As an expression of the exercise of public power over citizens, the rule of law in France is "endured" by its recipients. Experienced as a form of "submission" and necessarily developed by a technocratic central authority, the law is perceived as a technical tool (or even a threat) much

[26] House of Lords, Select Committee on Citizenship and Civic Engagement, *The Ties that Bind: Citizenship and Civic Engagement in the 21st Century*, Report of Session 2017-19, HL Paper 118.

[27] *Op. cit.*

more than as a means of peacefully regulating relations between those subject to the law.

The *État de droit*, like the rule of law, is the subject of criticism and debates on its definition. The main dispute concerns the binding scope of the *État de droit*. The sovereign State has every opportunity to challenge its own compliance with the regulations adopted by its institutions. As the *État de droit* in France does not have a centuries-old and cultural foundation as in the United Kingdom, undoubtedly society is more likely to challenge it easily. However, it must be admitted that the concept becomes inseparable from that of democracy. Essential in political and legal discourse, it is not so far removed from exercise of a form of "cultural hegemony"[28]. In concrete terms this is manifested by the increasing power of the judge whose role in France is no longer so far removed from that of a common law judge regarding the protection of fundamental rights and freedoms. Indeed, the need to compel the State to comply with substantive law requires that the judge is vested with the power to confirm, reform, quash or suspend decisions, to prohibit action, or to hold the State, its institutions or agents liable. The *État de droit* therefore actively contributes to the affirmation of the figure of the judge as a real power, but also to the phenomenon of constitutionalism and the retreat of discretionary power. European legal systems by subjecting States to rules emanating from supra-national authorities, are now at the core of this evolution.

Section 4. Convergence under the influence of European laws

In its *Report on the Rule of Law*, the Venice Commission acknowledges the lack of total alignment of the concept of the *État de droit* with the rule of law[29]. However, it identifies

[28] Pierre AVRIL, *op. cit.*

[29] *Report on the Rule of Law*, CDL-AD (2011) 003, Adopted by the Venice

common points and it is sufficient to refer to the texts of international organisations to see, through the translations, an almost constant assimilation of the rule of law and the *État de droit*. This trend is imprecise and lacking in rigour, but nonetheless to some extent it reflects the reality. Indeed, both France and the United Kingdom belong to supranational entities whose normative production subjects the two countries to similar constraints that contribute to their rapprochement. Included among the liberal democracies of Western Europe, the British and French are bound to share a set of legal values.

The confusion between the substantive operation of the rule of law and the *État de droit* appears significant on reading Lord Bingham's analyses. The enumeration of the content of the rule of law he presents is entirely in line with the realities concealed behind the *État de droit*. In his work *The Rule of Law*[30], the famous judge constructs contemporary reasoning with regard to the principle of the rule of law shared by France and the United Kingdom. For him, this principle seeks eight objectives:

- the accessibility of the law;

- law not discretion;

- equality before law;

- exercise of public powers in good faith and without exceeding the limits of such powers and not unreasonably;

- to promote and respect Human Rights;

- the access to a Tribunal;

- a fair trial;

- compliance by the State with its obligations in international law[31].

Commission at its 86th plenary session (Venice, 25-26 March 2011).

[30] Tom BINGHAM, *The Rule of Law*, Penguin, 2011, 224 p.

[31] See. Judith N. SHKLAR, "Political Theory and the Rule of Law", *in*

None of these aspects are in contradiction with the *État de droit*. On the other hand, the objectives are much more precise than those set out by Dicey. The contemporary definition of the rule of law necessarily introduces developments that the Oxford *Vinerian Professor* could not or did not wish to retain, such as the affirmation of administrative law or the increasing influence of supranational rights.

The conjunction we are witnessing derives mainly from the fact that the United Kingdom and France belong to the Council of Europe and the European Union, which subject States to legal obligations that are unprecedented in terms of content and volume. On the British side, European rights have given a continental nuance to the rule of law, while on the French side they have helped to create an institutional role of the judge more aligned with the common law tradition.

By transposing the provisions of the European Convention on Human Rights into national law through the *Human Rights Act* 1998, the United Kingdom has accepted that public authorities must guarantee universal rights and freedoms in a completely new way. First of all, the universal concept of the Convention is not that historically constructed in England. Secondly, the acceptance of the jurisdiction of the European Court of Human Rights is likely to challenge the monopoly of the British Parliament and judges in determining the regime of freedoms. Last but not least, the possibility for national courts to challenge the validity of domestic legislation on the grounds of its incompatibility with European human rights law is an innovation. Here again, the sovereignty of Parliament and the traditional methods of complying with the rule of law are partially called into question.

Allan HUTCHINSON, Patrick MONAHAN (eds.), *The Rule of Law: Ideal or Ideology*, Carswell, 1987, p. 1; Thomas CAROTHERS, "Promoting the Rule of Law Abroad", *Carnegie Endowment for International Peace, Rule of Law Series*, n° 34, 2003, p. 3.

European Union law had the same effect many years ago. Until Brexit becomes effective under the EU (Withdrawal) Act of 2018, the European Communities Act of 1972 recognises the direct applicability of treaties in domestic law. It provides that the courts have an obligation to give full effect to Community law. It also requires all British institutions to comply with the decisions of the Court of Justice. The *Appellate Committee of* the House of Lords will draw all the consequences from this in the *Factortame No. 2* judgement by considering that Parliament had accepted pursuant to said law to refrain from infringing Community law and by setting aside the theory of implied repeal[32]. This famous decision ensures that British law complies with the principle of the primacy of European Union law set out in the *Costa v. Enel* judgement in 1964[33]. On reading these few data, it is easy to appreciate the new constraints to which Parliament and the Government have agreed to submit.

> In France, it took the *Conseil d'Etat* more than 20 years between the so-called "*Semoules*" case of 1968[34] and the *Nicolo* judgement of 1989[35] to agree to allow EU law to prevail over subsequent contrary laws. Since then, the French administrative judge has become a true "ordinary Community judge" by ensuring that the Administration complies with Community regulations. A few years later, it was the turn of the *Conseil Constitutionnel* (Constitutional Council) to recognise the specific nature of the European Union's legal order in the Constitution. In its decision of 10 June 2004, it allowed that "the transposition into domestic law of a EU directive derives from a constitutional requirement"[36] notably pursuant to article 88-1 of the Constitution. A few months later, the judges in

[32] *R v Secretary of State for Transport, ex parte Factortame Ltd n°1* [1990] 2 A.C. 85; *R v Secretary of State for Transport, ex parte Factortame Ltd n°2* [1991] 1 A.C. 603.

[33] *Flaminio Costa v E.N.E.L.*, case 6/64.

[34] CE, Sect., 1er mars 1968, *Syndicat général des fabricants de semoules de France*.

[35] CE, Ass., 20 octobre 1989, *Nicolo*.

[36] Cons. const., déc. n° 2004-496 DC, June 10th, 2004.

rue Montpensier declared that "the claimant has thus established the existence of a Community legal order integral to the domestic legal order but distinct from the international legal order"[37]. Since these case law decisions, the *Conseil constitutionnel* has regularly compared the work of the legislator with the constitutional requirement of loyalty owed to the legal order of the European Union[38]. As for European human rights law, it has led France to review its legislation in order to improve the organisation of its system of justice, which is sometimes considered biased[39] or too slow[40], to better prevent the suicides of prisoners[41], to ensure the condemnation of police violence[42] or to effectively preserve the rights of migrants[43].

Finally, the strengthening of the *État de droit* has been achieved at the cost of better regulation of the law and relativisation of the supremacy of the Constitution in France, while modernisation of the rule of law in the United Kingdom implied recognition (at least in part) of a specific status for several legislative bodies. Beyond EU law, several British judges have thus recognised the value and specific scope of well-identified texts classified as constitutional or "quasi-constitutional" instruments[44]. The first to do so was the Lord Justice Laws in the *Thoburn* decision[45], but other decisions confirm it. The House of Lords, in a devolution

[37] Cons. const., déc. n° 2004-505 DC, November 19th, 2004.

[38] See Chloé CHARPY, "Droit constitutionnel et droit communautaire. Le statut constitutionnel du droit communautaire dans la jurisprudence (récente) du Conseil constitutionnel et du Conseil d'État) (Contribution à l'étude des rapports de systèmes constitutionnel et communautaire) ", *RFDC* 2009, n° 79/3, p. 621.

[39] See ECHR, *Vassis v. France*, n° 62736/09 (June 27th, 2013).

[40] See ECHR, *Goetschy v. France*, n° 63323/12 (February 8th, 2018).

[41] See ECHR, *Isenc v. France*, n° 58828/13 (May 4th, 2016).

[42] See ECHR, *Boukrourou v. France*, n° 30059/15 (November 16th, 2017).

[43] See ECHR, *Khan v. France*, n° 12267/16 (February 28th, 2019).

[44] Lord MANCE, "Préface, *in* Aurélien ANTOINE, *Droit constitutionnel britannique*, LGDJ, 2e éd., 2018, p. 9.

[45] *Thoburn v Sunderland City Council*, [2002] 3 WLR 247.

dispute, or the Supreme Court, in the *HS2* case[46], would appear to confirm that certain standards enjoy special protection. The Magna Carta 1215, the Petition of Right 1628, the Bill of Rights and the Claim of Right 1689, the *Act of Settlement* 1701, the Act of Union 1707, the Human Rights Act 1998, the Devolution Acts, or the Constitutional Reform Act 2005 would undoubtedly fall into this category.

As an essential factor of modernisation of the rule of law in the United Kingdom, EU law is threatened by the Brexit. Undoubtedly, this major event is likely to impoverish the rule of law by the drying up of a source of law that has greatly enriched it for more than 40 years[47]. In the immediate future, an illustration of the impact of Brexit on the principle of rule of law may be invoked. Due to the importance of the legislative work required to review all legislation of EU origin, Parliament has had no alternative but to resort to secondary legislation, i.e. a transfer of its normative competences. While this process is traditional and known to all parliamentary democracies, it is nevertheless dangerous for the balance of power when the delegation is without substantive limits. It considerably strengthens the already dominant powers of the Executive. It prevents debate in the chambers and detailed examination of texts that directly concern the rights of individuals. Several parliamentarians and lawyers have therefore legitimately expressed their concern regarding the importance of delegated legislation in the EU (Withdrawal) Act and its compatibility with the rule of law[48].

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[46] *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3.

[47] See Bingham Centre for the Rule of Law and Observatoire du Brexit, "Le Brexit, le Parlement et le principe de Rule of Law", https://brexit.hypotheses.org/2193, October 2018.

[48] John McELDOWNEY, "Brexit – The UK Withdrawal Bill: The Rule of Law and Delegated Legislation: Parliament under scrutiny", Observatoire du Brexit, https://brexit.hypotheses.org/1227, February 2018.

However, the EU law will continue to have an influence in the UK legal system. There are four reasons for a (slight) contextualisation of the consequences of Brexit on the principle of the rule of law:

- the at least partial maintenance of the *acquis communautaire* resulting from the EU (Withdrawal) Act of 2018. Until the United Kingdom's exit from the European Union becomes effective, European Union rules will continue to prevail over domestic law. After withdrawal, the *acquis communautaire* will also have a special status. Primacy will remain after the day of withdrawal if necessary to interpret, not apply or cancel any act or rule adopted or enacted prior to withdrawal.
- the central role of the judge in the process of leaving the EU of which the law, given its constitutional nature, leads to stipulation of procedures for the exercise of government prerogatives. This was the consequence of the *Miller* judgement requiring the Cabinet to obtain Parliament's agreement to notify the European Council of the United Kingdom's intention to withdraw from the European Union[49];
- the judges' will to preserve case law founded on European Union legislation, in particular the possibility of partially binding the legislator by recognising the specific status of certain regulations;
- the future relationship between the United Kingdom and the EU, which could, through bilateral agreements, maintain many normative constraints despite Brexit, particularly with regard to the environment, health, economy and social aspects.

[49] *R (Miller) v. Secretary of State for Exiting the EU* [2017] UKSC 5.

Just like democracy, the rule of law and the *État de droit* are not protected from attacks by institutions and the sometimes unreasonable convictions of the population. Before Brexit, the United Kingdom had already committed itself to a marked contextualising of the rule of law with regard to preserving public order in the context of the fight against terrorism. With the proliferation of anti-terrorist laws, widely supported by public opinion, the procedural guarantees normally owed to persons suspected of illegal activities have been reduced to an unprecedented extent[50]. In France, a completely identical trend can be observed. The number of so-called security laws is increasing. The Government supported bill to strengthen and guarantee the maintenance of public order during demonstrations, adopted by Parliament in February 2019, is the latest manifestation of this trend[51]. However, since the early 2000s, the strengthening of the legislative arsenal in both the United Kingdom and France that undermines freedoms and the rule of law has not reduced threats to public order. The electioneering argument of recourse to hastily adopted laws against a background of much demagogic rhetoric must be replaced by a more in-depth and global reflection on how to combat the unprecedented dangers that Western societies are now facing. The balance between order and the rule of law is too precarious to be satisfied with simplistic solutions. As the example of security legislation and Brexit proves, demagogy, which appeals so much to the population and which ancient Greek philosophers quickly identified as the

[50] See our paper "Les pouvoirs d'urgence et le terrorisme au Royaume-Uni" *in* Pascal MBONGO, *L'état d'urgence. La prérogative et l'État de droit*, LGDJ, Institut Universitaire Varenne, 2017, p. 37.

[51] The bill was passed by the French Parliament in March 2019 and was partially censored by the Conseil constitutionnel (Déc. n° 2019-780 DC du 4 avril 2019, Loi visant à renforcer et garantir le maintien de l'ordre public lors des manifestations).

cancer of democracy, is also a source of major violations of the rule of law and the *État de droit*.

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- *Droit constitutionnel britannique*, LGDJ, coll. Systèmes, 1st ed., 2016; 2e ed., 2018, 206 p. (foreword by Lord MANCE, vice-President of the UKSC & Anthony W. Bradley, *Emeritus* Professor).
- *Le droit public britannique: Enjeux et Perspectives*, Société de Législation Comparée, coll. Colloque, 2015, 320 p.

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Chapter 4.
Brexit and the destabilisation of the United Kingdom constitution

Andrew Blick

Section 1. Introduction

The amorphousness of the United Kingdom (UK) constitution is renowned. Foreign and domestic observers have long noted this quality. In 1835 Alexis de Tocqueville famously remarked that "[i]n England, Parliament is recognized to have the right to modify the constitution. In England, therefore, the constitution can change constantly, or rather it does not exist at all."[1] Nearly a century and-a-half later, in 1979, the UK constitutional commentator J. A. Griffith wrote that "[t]he constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that

[1] Alexis DE TOCQUEVILLE, *Democracy in America*, Vol. 1, Indianapolis: Liberty Fund, 2012, p. 171.

happens is constitutional. And if nothing happened that would be constitutional also."[2]

I do not fully accept such accounts of the UK system of government. There are important constitutional principles and practices that have been both long-established and widely accepted. They include the idea of a limited monarchy, the legal authority of which is subordinate to that of Parliament (of which the monarchy is a component alongside the House of Commons and the House of Lords); the rule of law and an independent judiciary; the collective responsibility of Cabinet; and the individual accountability of ministers to Parliament.[3] But, unlike in many other democracies, there is no single text expressly labelled 'the constitution' setting out the fundamental rules and values of the polity.[4] Consequently, the core features of the UK system do not have the special legal status recognisable by the courts that a so-called 'written'[5] constitution might provide.[6] Nor are alterations to the constitution subject to a defined heightened amendment procedure.[7] Indeed, arguments about what the constitution

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[2] John A. GRIFFITH, <The political constitution>, *The Modern Law Review* 42.1 (1979), pp. 1-21, p. 19.

[3] For various efforts to encapsulate these principles in written form, with mixed results, see: Andrew BLICK, *The Codes of the Constitution*, Oxford, Hart, 2016.

[4] For discussion of these matters, see: Andrew BLICK, *Beyond Magna Carta: a constitution for the United Kingdom*, Oxford, Hart, 2015.

[5] In literal terms, parts of the constitution are written, in various dispersed texts of diverse status. When the UK is describe as lacking a 'written' constitution, or having an 'unwritten' constitution, these labels denote the lack of a single, clearly defined text of 'higher law'.

[6] Andrew BLICK, David HOWARTH and Nat LE ROUX, *Distinguishing Constitutional Legislation: a modest proposal*, London, The Constitution Society, 2014.

[7] Andrew BLICK, *Entrenchment in the UK: a written constitution by default?* London, The Constitution Society, 2017.

is, whether a particular provision is constitutional, and what it means, are a common occurrence, and difficult to resolve.[8]

An argument in favour of this kind of arrangement is that it enables flexibility. The system, it is held, can change with the times. It can respond swiftly to the shifting requirements of society without the need for dangerous build-ups of demand leading to destructive episodes of political malfunction or even civil unrest. Authorising the courts to be the ultimate arbiters of the constitution, even to the point of being able to strike down Acts of the UK Parliament if they were in conflict with the text, so the argument runs, would be democratic illegitimate. Unelected judges, according to critics of such practices, should not be able to overrule democratically accountable politicians. On the other hand, it might be held, too much change at an excessive pace can create instability and confusion. Constitutional malleability might enable those in positions of authority to interpret, ignore, or change the rules in ways that suit them, to the detriment of democratic values. Continual, casual flux can make it difficult to know at a given time what the rules are and whether they are changing, compromising transparency and accountability. Public understanding of an 'unwritten' constitution, some hold, is difficult to attain, to the detriment of wider ownership of the political system.[9]

This debate is well-rehearsed.[10] The purpose of the present chapter is to move beyond it. Rather than specifically

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[8] For the confusion and controversy that can surround an aspect of the constitution, see eg: Graeme COWIE, *Brexit: devolution and legislative consent*, London, House of Commons Library, 2018.

[9] For a summary of key arguments on both sides, see: HOUSE OF COMMONS POLITICAL AND CONSTITUTIONAL REFORM COMMITTEE, *A New Magna Carta?* London, The Stationery Office, 2014, part 1, pp. 19-28.

[10] See eg: BLICK, *Beyond Magna Carta*, in which I advocate a 'written' constitution for the UK; and Bogdanor, *Beyond Brexit*, pp. 257-258, which

considering the desirability or feasibility of the 'unwritten' UK constitution, I consider how that constitution has responded during an ongoing episode in UK history in which constitutional controversy and change have come to the political forefront. The following chapter therefore discusses the impact that the European Union (EU) referendum of 23 June 2016 and its prolonged aftermath has had upon the UK constitution, and what it tells us about the nature of that constitution. The shorthand term for the experience arising from the June 2016 referendum is 'Brexit'. This label has come to refer to more than simply the act of UK departure from the EU (which, as I write, has not yet occurred, and is not inevitable). It now refers to the wider consequences and controversies connected to the prospect of Brexit, commencing before it has even taken place. (The term will presumably additionally come to describe the actual act of leaving and its impact, if the UK does leave). Brexit has also become – I argue – an ongoing episode in UK history, commencing roughly in mid-2016 and continuing for a time span that at present remains indeterminate. During this period, the EU question has become the preeminent dilemma in UK politics. No other issue has achieved such intense and sustained significance in peacetime for at least a century in this country.

Constitutional matters have been central to Brexit turbulence.[11] This chapter considers, first, the impact of

places the debate in a Brexit context. For a statement of opposition to a 'written' UK constitution, see: N. W. BARBER, "Against a written constitution". *Public Law*, *11*, 2008. For a classic defence of the traditional UK approach, see: A. V. DICEY, *The Law of the Constitution*, Oxford, Oxford University Press, 2013.

[11] Andrew BLICK, *Stretching the Constitution: the Brexit shock in historic perspective*, Oxford, Hart, 2019, especially chapters 1 and 2; and Vernon BOGDANOR, *Beyond Brexit: towards a British constitution*, London, I.B. Tauris, 2019.

Brexit upon those aspects of the constitution that developed in the period since the UK first joined the European Community in 1973, and which had to be managed as part of a projected departure. It then focuses on what this author argues lies at the core of the Brexit episode: the UK executive or government, the UK legislature or Parliament, and the relationship between them. That an examination of constitutional discontinuity should focus on such traditional aspects of the system is perhaps a counterintuitive premise. Yet even as these venerable qualities remained constant in their prominence, they morphed in their nature. The chapter discusses the long-term background to the disruption experienced by executive and legislature in response to Brexit. It assesses the role of referendums in general and that of 23 June 2016 in particular. The chapter considers the impact that the popular vote on EU membership of 2016 had upon representative democracy, creating strains for the government and Parliament both individually and collectively, and the role performed by political parties in the Brexit episode.

The chapter concludes that Brexit has proved highly disruptive and exposed important weaknesses in the UK constitution. It discusses if, when and how the present dysfunction might come to an end, and what could follow it. Our system has important strengths. No perfect alternative model exists, and there are many worse ones on offer. Any constitution, 'written' or 'unwritten' would be strained by the task of leaving – or preparing to leave – the EU.[12] But none of these observations are a great comfort when we consider the difficulties through which we have been passing since June 2016. Such is the dislocation that has occurred that it is now worth considering how much worse the position might become.

[12] Though, as I argue elsewhere, the 'unwritten' nature of the UK constitution may have helped facilitate the Brexit episode. BLICK, *Stretching the Constitution*.

Section 2. Brexit and constitutional change since 1973

The Brexit episode has engaged many features of the UK constitution. Some of them pertain to the aspects of the system that have developed in the period since the UK joined the European Community on 1 January 1973. Membership in itself entailed immense change. The UK acquired a new source of law, that is the organs of the European Community. This law, that takes priority over law of domestic origin, including even Acts of Parliament[13], has comprised a significant and expanding presence within the UK legal order over a period of nearly half a century. The status of European law has been a source of contention throughout UK membership of what is now the EU. Those doubtful about or opposed to participation in the integration project often objected to the idea that it threatened the 'sovereignty' of the UK Parliament. But the difficulties associated with European law became far greater once the UK government decided, in response to the 'leave' victory of June 2016, to extricate itself from it.

Simply ignoring or repealing all European law built up from 1973 onwards was neither desirable (to all but the most fundamentalist advocates of Brexit) nor practical.[14] Continuity measures were required. The hugely controversial *European Union (Withdrawal) Act 2018* was designed to provide them. They have entailed the creation of a new category of 'retained' EU law, intended to ensure legal stability post-Brexit. The complexity of this provision is such that, when the 2018 Act was passing through Parliament in Bill form, doubts were raised about its comprehensibility. Being able to understand the law is an important aspect of the concept of the rule of law, that is itself a key aspect of the UK

[13] In as far as they are incompatible with European law as itself incorporated by an Act of the UK Parliament, the *European Communities Act 1972*.

[14] For a discussion of these issues, see: Richard GORDON and Rowena MOFFATT, *Brexit: the immediate legal consequences*, London, The Constitution Society, 2016.

constitution (and that of any democracy). Furthermore, the 2018 Act vested in ministers substantial delegated powers, enabling them to amend the law without being subject to the fuller parliamentary procedures involved in passing an Act of Parliament. An expansion in executive discretion is a further concern from the point of view both of the rule of law and parliamentary accountability. We will return to other aspects of the European Union (Withdrawal) Act below. While the government did accept some changes to the Bill before it became law, they did not eradicate all of the concerns raised which, moreover, are likely to return in other forms as the Brexit process continues to unfold.[15]

Another significant constitutional development that has occurred since 1973 and UK accession to the European Community involves the Northern Ireland peace process, and undertakings and agreements connected to it.[16] Brexit has had serious and well-recorded implications for the 1998 Belfast or Good Friday peace agreement, reached between various parties in the territory and the UK and Republic of Ireland governments. While the text of this agreement does not expressly rule out one or other country leaving the EU, it is clearly founded in the assumption of continued membership on the part of both. Brexit has therefore raised concerns about the of the viability peace process. The need to avoid the appearance of a hard border between the north and the Republic of Ireland led in turn led to the 'backstop' arrangement included in the exit agreement negotiated

[15] See eg: HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION, *European Union (Withdrawal) Bill: interim report*, London, House of Lords, 2017.

[16] See eg: HOUSE OF COMMONS NORTHERN IRELAND AFFAIRS COMMITTEE, *The land border between Northern Ireland and Ireland*, London, House of Commons, 2018; HOUSE OF COMMONS NORTHERN IRELAND AFFAIRS COMMITTEE, *The Northern Ireland Backstop and the Border*, London, House of Commons, 2019.

between the UK and EU. This provision in turn proved a major (but not the only) obstacle to Theresa May in securing the consent of the House of Commons to the exit deal, leading eventually to her downfall.

One aspect of the Belfast/Good Friday agreement was to provide for the establishment of a Northern Ireland Assembly and Executive. This arrangement leads us to another area of constitutional tension associated with Brexit: devolution.[17] When the UK joined the European Community in 1973, the only system of devolution to have operated in the UK up to that point, in Northern Ireland, had been suspended the previous year. After various failed attempts to restore it, finally in 1999 devolution was re-established in Northern Ireland in a different form. At the same time systems of self-government were introduced for the first time (in the history of the UK) to Wales and Scotland. Much of the legal framework within which the devolved institutions in Wales, Scotland and Northern Ireland functioned was determined at EU level. European law was built into the legislation that constituted them. Brexit, if and when it happens, has considerable implications for the devolved legislatures and executives. How would patriated powers in areas such as agriculture be managed going forward: at UK or devolved level?

There were significant disputes and negotiations between the UK government and its devolved counterparts over the way in which the legislation that became the *European Union (Withdrawal) Act 2018* handled these matters (though for most of the Brexit episode, devolution in Northern Ireland has not been fully functional). Eventually, the Welsh executive agreed to changes that the UK government introduced to the legislation in response to concerns that it would centralise

[17] See: Aron CHEUNG, Akash PAUN and Lucy VALSAMIDIS, *Devolution at 20*, London, Institute for Government, 2019, pp. 66-72.

power in London. These alterations had the effect of reversing the presumption previously envisaged in the Bill that patriated powers would by default be held at the centre. Now, with specified and limited exemptions, powers obtained from the EU would be devolved. Yet Some unresolved disagreements, especially involving Scotland, remain. In 2018, the Scottish Parliament voted down a motion giving consent to the European Union (Withdrawal) Bill. The UK Parliament used its rarely deployed legal authority to pass legislation regardless of such objections – a dramatic political step. It was an example of UK-level authorities using their power to interpret (or set aside) constitutional understandings, in this case about the relationship between the UK and devolved legislatures. Similar disagreements have developed around other legislation intended to give effect to UK exit from the EU. The Brexit and devolution episode has demonstrated that the Scottish, Welsh and UK governments each have different views of the UK constitution and the way in which it should function. The UK administration tends towards a far more centralised model. The Welsh executive leans in a federal direction, in which the component parts have a defined share in central decision-making, and defined spheres of operation of their own. The Scottish Government – formed by the Scottish National Party, favourable to independence – seeks to maximise autonomy for Scotland, and engage with the rest of the UK and the centre only when strictly required. Brexit revealed radical differences of perspective on the UK constitution, and intensified them in the process.[18]

Another institution that did not exist in 1973 is the UK Supreme Court. It became operational in 2009, under the terms of the *Constitutional Reform Act 2005*. Before this point, in a manifestation of the fusion of constitutional branches under the UK system, the highest court in the UK comprised

[18] See: BLICK, *Stretching the Constitution*, chapter 2.

the Law Lords, sitting in the House of Lords. The transfer of the Law Lords away from the House of Lords and into a new building on the other side of Parliament Square did not involve a radical alteration of formal powers (though the UK Supreme Court did take on from the Judicial Committee of the Privy Council responsibility for adjudicating in devolution disputes). But we should not dismiss the importance of this change, including for its psychological and cultural implications. Judges sitting separately from Parliament in their own institution are likely to perceive themselves, and be perceived, differently, with behavioural consequences and ultimately changed outcomes. The Supreme Court was drawn dramatically into the Brexit process. In January 2017, it ruled in the *Miller* case that the UK government could not trigger Article 50 of the Treaty on European Union, commencing the 2-year exit process, without first obtaining express statutory authority from Parliament.[19] In non-binding asides that formed part of the same judgement, the Supreme Court indicated that it did not believe it should be involved in ruling on whether the UK Parliament should be able to pass an Act notwithstanding denial of consent to that measure by a devolved legislature (something, as we have seen, that would happen the following year with respect to the Scottish Parliament and the European Union (Withdrawal) Act.)

Section 3. Brexit and the core of the constitution

All of these considerations are fascinating and important to the observer of the UK constitution. But when the Brexit process reached its most crucial stages in the opening months of 2019, the focus returned to what remained, despite the various changes and reforms that had taken place, the core of the UK constitution. It proved to be still,

[19] See eg: Sebastian PAYNE, "The Supreme Court and the Miller Case: More Reasons Why the UK Needs a Written Constitution", *The Round Table*, 2018 Jul 4; 107(4): 441-50.

in many ways, a political, centralised constitution. At its core lie two institutions: Parliament – and in particular the House of Commons, the elected chamber – and the executive, and their relationship with each other. The sustained importance of this nexus was confirmed by the fact that the final responsibility for resolving the key difficulties associated with Brexit – the terms and timing of departure (in as far as they were in the gift of the UK) – had fallen upon it. In many ways, it was the Parliament/executive core that was the source of the disruption also. Here was a notable tension. Though a theme of this chapter is constitutional malleability, this transition was taking place around a conjoined entity that had long been, and continued to be, the focus for the system, even as it, and configurations around it, changed.

Both the executive and Parliament were internally destabilised, as was the way in which they interacted with one-another. Before considering the precise nature of this constitutional dislocation, I will consider how it came about. It began with a political issue: the relationship with the continent of which the UK is a part. Arguments about Europe and our place within it stretch back to a time before the UK came into being as a single state.[20] The constitutional turmoil of the seventeenth century, for instance, partly arose as a consequence of disagreements over how to engage with the religious and political conflicts taking place on the mainland, such as the 'Thirty Years War' and, later, the threat of Louis XIV. Certain questions are perennial. Should we engage directly and if so in what way? Was there a danger that, by not acting, we would allow Europe to come under the influence of a single hegemonic bloc? Might the costs of involvement be too high?

[20] Brendan SIMMS, *Britain's Europe: A thousand years of conflict and cooperation*, London, Penguin, 2016.

We have always argued about Europe and we always will. A particular variant on this debate developed during the twentieth century when the idea of European economic and political integration came onto the agenda, both through precursors such as the Briand Plan, and then, in the post-Second World War environment, the ongoing project that remains with us today. European integration has had a doubly divisive effect in the UK. Not only have there been severe disagreements, but they have cut across normal divisions. Both the Conservative and Labour parties have continually had internal differences.[21] For Labour they were most serious in the 1970s (and perhaps early 1980s). For the Conservatives, they became increasingly severe from the 1990s onwards.

Faced with these kinds of fault-lines in their own parties, leaders have twice reached for a solution outside the more common range of devices of representative democracy in the UK: the referendum. A decision the party could not make was passed to the electorate to resolve. The use of referendums had long been considered in the UK. Popular votes on specific issues were held at local level from the nineteenth century onwards. But the idea of initiating them across the whole UK met with substantial resistance on the grounds that it did not fit traditional constitutional approaches in the UK, with its 'unwritten' constitution, doctrine of parliamentary supremacy or 'sovereignty', and Burkean representative tradition.[22]

In 1975, less than two years after the UK had joined the European Community, Harold Wilson, as Labour leader and Prime Minister, held the first ever UK-wide referendum,

[21] Anthony FORSTER, *Euroscepticism in contemporary British politics: opposition to Europe in the Conservative and Labour parties since 1945*, London, Routledge, 2003.

[22] Lucy ATKINSON, Andrew BLICK and Matt QVORTRUP, *Referendums in the United Kingdom: historic and comparative perspectives*, Oxford, Oxford University Press, 2019 forthcoming.

on continued membership of the European Community. It yielded the 'yes' vote that he and his government (with some permitted dissenters) recommended following a renegotiation of UK terms of membership. [23] This outcome was less disruptive than a 'no' might have been. We did not find out how problematic the incorporation of the referendum into our system could really be until the 'leave' vote of June 2016. David Cameron, like Harold Wilson, held a referendum in an effort to resolve internal divisions in his party, the Conservatives, and head off the external threat from the UK Independence Party. However, unlike Wilson, Cameron did not attain the 'remain' vote he recommended on the basis of his renegotiation with the EU. The conflict he hoped to end through a referendum was in the event severely aggravated by it.

The 2016 referendum was problematic for multiple reasons. It offered the voters the possibility of what appeared to be a radical change, namely departure from the EU. But it was a transformation that could take many potential forms that were difficult to predict in advance. Moreover, it was a change that most of the government (including the Prime Minister, Chancellor of the Exchequer and Foreign Secretary of the day), and majorities in both Houses of Parliament, did not want. Though they had misgivings, nearly all of these politicians chose to interpret the referendum result as binding, despite its lack of legal force. It would therefore fall to them to interpret an exceptionally vague (supposed) democratic imperative that they would have preferred never to have come into existence. At the same time, determined minorities within Parliament and the government were determined that the supposed Brexit obligation should be implemented, and in a way that did not dilute its meaning. Given these

[23] Robert SAUNDERS, *Yes to Europe: The 1975 referendum and seventies Britain*, Cambridge, Cambridge University Press, 2018.

contradictions, divisions and flaws, taken in conjunction with the unsurpassed gravity of the substantive issues involved, it is not surprising that the exercise in direct democracy of June 2016 should administer such a debilitating shock to the representative system.[24] I will now discuss how Brexit has impacted upon the key aspects of the Parliamentary/executive core of the UK constitution.

§ 1. A unified Cabinet

A prominent casualty of Brexit has been the collective responsibility of Cabinet. According to UK custom, the supreme entity within the executive is not a single office-holder, but a committee: Cabinet. It is (in theory) required to reach major decisions as a group, discussing freely in private, but falling behind whatever decision is reached in public.[25] Those government ministers who are unable to share in responsibility for a particular policy and wish overtly to distance themselves from it are required, by convention, to resign from Cabinet. Collective responsibility developed as a means of facilitating coherent, effective government, and makes it possible to hold an administration to account for its delivery of a given programme of policies.

On rare occasions, the rule has been temporarily suspended in relation to particular issues (for instance for both European referendum campaigns in 1975 and 2016). But there is a difference between a specifically defined and limited 'agreement to differ' (problematic enough in itself) and unilateral evasions. Since June 2016 we have seen a number of ministers testing or departing from the spirit of the doctrine, or perhaps directly violating it. A notable operator in this regard was Boris Johnson – a prominent

[24] BLICK, *Stretching the Constitution*, chapter 3.

[25] See: CABINET OFFICE, *Ministerial Code*, London, Cabinet Office, 2018.

proponent of Brexit when the referendum was held – during his time as Foreign Secretary. An example of his stretching of collective responsibility came with public comments he made in September 2017, shortly before the Conservative Party conference, regarding the proposed post-Brexit implementation period.[26]

Another activity generally regarded as difficult to reconcile with collective responsibility is failing to vote in accordance with the government line. On 14 March 2019, 13 government ministers abstained when the whips instructed them to vote against an amended government motion to the effect that the UK should leave without a deal in no circumstances.[27] Behaviour of this type seems to have infuriated the person within government responsible for disciplining the parliamentary party. On 1 April 2019, the BBC broadcast an interview with the Conservative Chief Whip, Julian Smith, the Cabinet member responsible for discipline in the parliamentary party, criticising his own government for not making it clear to the public that a "softer" variety of Brexit would become necessary after the inconclusive General Election of June 2017. He also described members of his own Cabinet as "sitting around the cabinet table... trying to destabilise her [Theresa May]". Smith labelled their conduct the "worst example of ill-discipline in cabinet in British political history."[28] Through these comments, he both defended and violated the doctrine; breaking ground publicly while criticising others for doing the same. It arose in the context of a government that seemed unable to reach basic decisions to which all its members felt committed. This

[26] https://www.theguardian.com/politics/2017/oct/03/theresa-may-defends-decision-not-to-sack-boris-johnson , accessed on 28 May 2019.

[27] https://theconversation.com/mps-vote-against-no-deal-brexit-but-what-does-that-actually-mean-113492 , accessed on 28 May 2019.

[28] https://www.bbc.com/news/uk-politics-47768884 , accessed on 28 May 2019.

shortcoming was a serious difficulty in itself, given that in substantive terms it pertained to one of the most serious issues the UK has faced in its history as a state. It also created problems for holding the government to account, since it was often difficult to discern what was the position against which it could be assessed.

§ 2. The role of the Prime Minister

Whether any given action clearly violates the doctrine of collective responsibility is partly a matter of interpretation. Like other important features of the "unwritten" constitution, it lacks full, formal definition. But if collective responsibility is interpreted as broadly entailing the maintenance of public unity, then the instances cited above departed from this general principle. But who was to decide whether a minister had failed to live up to this requirement, and if so what should be done about it? Ultimately this task falls to the Prime Minister. There is a long running debate in the UK about the power of the premiership. It centres on the extent to which rule by the Prime Minister has come to supplant collective government, or the Prime Minister has perhaps even become a *de facto* president (albeit one who is not directly elected, unlike the French or US version). This discussion has been going on in some form since the early phases of the office, during the time of Robert Walpole, first minister to George I and then George II in the early eighteenth century.[29]

The best approach to this subject is to acknowledge that the prime ministers *can* be very powerful, but that the precise amount of authority they wield is variable. They have relatively few 'hard' powers and are mainly dependent on personal and political resources, which are by their nature changeable. We

[29] See: Andrew BLICK and George JONES, *Premiership: the development, nature and power of the office of the British Prime Minister*, Exeter, Imprint Academic, 2010.

can observe this phenomenon during the course of the May premiership. In the earlier phases of her tenure she seemed to be in a position of strength, with apparently high levels of public approval for her administration. She conducted government in a personalised fashion, and seems to have taken the decision to call an early election in June 2017 largely on her own initiative without consulting more widely within her government. But this decision, coupled with an election campaign that deliberately focused on May as a leader rather than the Conservative Party, proved disastrous. The loss of her parliamentary majority that followed made it very difficult for her to discipline her Cabinet or parliamentary party (although she was already experiencing some difficulties and may well have struggled even with a large majority). A factor in constitutional disruption for significant portions of the Brexit episode has been not an over-powerful Prime Minister, but a premier so weak as to be unable to enforce basic operational rules of government.

§ 3. Brexit, the executive and the confidence of the House of Commons

The UK has a parliamentary system, which means a government has to have what is called the 'confidence' of the House of Commons. Normally in the post-Second World War era, a single party has had a majority of seats in the Commons (delivered courtesy of the First-Past-the-Post electoral system, which tends to provide one of the larger two parties with more than half of the seats in the Commons, despite securing well under 50 per cent of votes cast). Whichever of the two main parties that was in this position was thereby able to form and maintain a government. On the rare occasions (at points between 1974 and 1979; from 2010-2015; and since 2017) when there has been no outright majority for a single party, one of the larger parties has had to reach an agreement of some kind with others in

the Commons (as the Conservative Party has had with the Democratic Unionist Party since June 2017). The principle of 'confidence' means that, by definition, the government has a majority in the Commons, either on its own or with assistance from elsewhere. It does not have to win every vote. But it does need to be able to function.[30]

Confidence is not clearly defined anywhere. There is now a statutory procedure under the *Fixed-term Parliaments Act 2011* involving no-confidence motions. This Act fixed the standard length of parliaments – that is, gaps between general elections. It included a mechanism for no-confidence motions that, if passed, could lead to an early General Election ahead of the usual five year interval, unless reversed by a confidence motion in a government within two weeks. The May administration never lost any such vote, or a vote on any other kind of motion that expressly referred to 'confidence.' Yet in its dying period of the first half of 2019 it could surely be said to have lacked the 'confidence' of the Commons, if a common-sense definition of this concept was applied. It failed on three occasions (15 January; 13 March; and 30 March), by large if diminishing majorities (respectively 230; 149; and 58 in a House of Commons with 650 members), to secure support for the most fundamental plank of its entire programme at a time of unsurpassed peacetime urgency for the UK as a state. It lost other important votes pertaining to its ability to control its policy priorities and the parliamentary agenda itself, crucial to our (normally) executive-loaded constitution.[31]

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[30] For a recent discussion of the confidence concept, see: HOUSE OF COMMON PUBLIC ADMINISTRATION AND CONSTITUTIONAL AFFAIRS COMMITTEE, *The Role of Parliament in the UK Constitution: Interim Report: The Status and Effect of Confidence Motions and the Fixed-term Parliaments Act 2011*, London, House of Commons, 2018.

[31] For loss of control of the parliamentary agenda, see eg: Graeme COWIE, *European Union (Withdrawal) (No.5) Bill 2017-19*, London, House

Yet the May government continued to exist for some time after its three successive defeats. By this point, it was reasonable to ask, what would it take for the present Prime Minister or government to leave? Curiously, in March 2019, under pressure from her parliamentary party, May offered to resign if her deal was agreed to.[32] Normally one would expect a Prime Minister to threaten to leave if their policy was not backed in the House, rather than promise to stand down if it was supported. One threat that May no longer had at her disposal in the same way that prime ministers did before the passing of the *Fixed-term Parliaments Act 2011* was that she would request a parliamentary dissolution from the monarch leading to a General Election if it failed to support her on a critical vote. Under the Act, if the Commons did not want a dissolution, it could block it (for instance, the June 2017 General Election took place only because the required number of MPs agreed to it). Eventually, May was ground down by parliamentary opposition and the expectation of a cataclysm in the European parliamentary elections. Her departure, however, was arguably not a matter of loss of confidence in the Commons, but pertained to her leadership of the Conservative Party. The maintenance of any minority government is likely to be a challenging task from a parliamentary perspective. But May had an exceptional disadvantage in that she could not control MPs in her own party. Whether her successor will prove more effective in this regard is not known at the time of writing, but will become apparent, and could reveal whether the breaking of the link between executive and Commons is a more lasting phenomenon.

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of Commons Library, 2019, pp. 12-14.

[32] https://www.theguardian.com/politics/2019/mar/27/theresa-may-to-resign-before-next-phase-of-brexit , accessed on 2 June 2019.

§ 4. Brexit and the division of roles between Parliament and the executive

Under the UK system, Parliament and the executive are fused (rather than separate, as they supposedly are in, for instance, the US). However, there are long-established practical divisions of labour between the two. The general understanding of our constitution is that government governs and is held to account by Parliament. By tradition, the executive is given a higher degree of discretion in the conduct of diplomacy and external affairs, where flexibility, confidentiality, and greater continuity of approach are at a premium.[33] However, the high level of controversy surrounding Brexit, and the various divisions and instability I have already discussed, saw this principle come under threat. The House of Commons has sought to usurp government control of the parliamentary agenda, and achieved a degree of success in doing so. It has used this newly acquired power to try and establish its own view on the approach to be taken with respect to Brexit, and to impose it on the government. This activity might seem admirable from a democratic perspective. But it has also served to draw attention to the rationale underpinning the division of responsibility between executive and legislature. A body of 650 people is not suited to formulating and implementing detailed policy, especially in the field of diplomacy. The EU could not negotiate with the UK Parliament. It was experiencing sufficient difficulties in trying to deal with a divided, unclear and vacillating UK government. The points at which Parliament might have more effectively asserted itself were earlier in the process: when passing the legislation that provided for the 2016 referendum; or in early 2017 when, after the *Miller* judgement, it chose to provide to the Prime Minister the power unconditionally

[33] See: MINISTRY OF JUSTICE, *Governance of Britain: War powers and treaties: Limiting Executive Powers*, London, Stationery Office, 2007.

to trigger Article 50 of the Treaty on European Union. At both points, had they wished to do so, parliamentarians between them could have imposed important requirements, such as thresholds or supermajorities in the first referendum, a second confirmatory popular vote to be held later in the process, or perhaps imposing a negotiating position upon the government in its dealings with the executive (though achieving this objective is not straightforward). It entered the self-assertion game late, by which time it was operating in a far more reactive fashion than it would have been earlier. While – in April 2019 – through the 'Cooper/Letwin bill' (which became the *European Union (Withdrawal) Act 2019*), it sought to force May to request a second extension to the Article 50 period, the actual difference this legislative initiative made to the material outcome is difficult to assess.[34]

§ 5. Parties in Parliament and beyond

Underpinning much of the delicate historic UK constitutional balance has been party. A primary motivation for the dislocation described above is that, at present, the main two parties (as measured by seats held in the UK Parliament), the Conservatives and Labour, have ceased to function effectively. This effect is felt in Cabinet, and in Parliament, with multiple rebellions among MPs both of the governing and opposition parties, and countless defeats for the government on a scale and frequency never before witnessed. There are also serious factional conflicts taking place involving the parties within and outside Parliament. In the Conservatives, there have been tensions within the parliamentary party, with an assertive minority exceptionally hostile to the EU, and a range of other opinions from softer Euroscepticism to more active support for membership. Another cleavage in

[34] For analysis, see: COWIE, *European Union (Withdrawal) (No.5) Bill 2017-19*.

the Conservatives involves the membership in the country, within which the balance of opinion is tilted firmly against the EU. For Labour, the main divide is between – on the one hand – Jeremy Corbyn, a leader of radical left inclination, and a small group of allied MPs, backed overwhelmingly by the mass membership, and – on the other hand – the bulk of the parliamentary party, which is broadly of more moderate inclination. Curiously, an issue on which Corbyn is out of alignment with the members who secured and maintained the leadership for him (along with most Labour parliamentarians and Labour voters) is that of the EU, regarding which Corbyn has never been an enthusiast (to put it mildly).

An argument offered in favour of our First-Past-the-Post parliamentary voting system and the two-party dominance it has facilitated is that they produce stable government and avoid the pursuit of political extremes. The result of this arrangement, it is held, is a centre-left and centre-right party tending to compete for the centre ground, with a shared support for moderate core values. This argument has become increasingly difficult to sustain.[35] For those who hold more extreme political views, the most viable route to power of some kind has been to seek to control the agenda of one of the two largest parties. This tendency has been encouraged partly by a shift towards greater power for members within parties, in particular in choosing the party leader. Jeremy Corbyn, for instance, was able to capture and retaining the Labour leadership with the support of members. Anyone running as Conservative leader, even if they do not share the outlook of more extreme eurosceptics who make up a majority of party members, has to take this outlook into account and seek not to offend it. Such a consideration could well be crucial in the Conservative leadership election about

[35] David KLEMPERER, *The Electoral System and British Politics*, London, The Constitution Society, 2019.

to begin at the time of writing (at the end of May 2019). But whoever is chosen, the new Conservative leader could have difficulty constructing an administration which functions effectively, for all the reasons I have discussed.

When might this constitutional dysfunctionality come to an end – and if and when that happens, will normal service be resumed? Will the system revert to its earlier form and functionality? Some will argue that the UK system has proved remarkably resilient and adaptable to date, and can be expected to show these qualities once more. However, the current conflicts involve seemingly irreconcilable differences that cannot be satisfactorily contained within a party, parliamentary grouping, or government. If the parties are breaking down, perhaps a solution might be a reorientation of the party system, to accommodate the radically different views. In early 2019, 11 MPs left the Conservatives (4 MPs) and Labour (7 MPs) to sit in Parliament as the Independent Group, opposed to the perceived extremism of their respective former homes. It adopted the title Change UK to contest the European parliamentary elections in May later in the year. Following its poor performance at this poll, it seems that the best hope of achieving the reorientation its MPs and voters seek is by working with the Liberal Democrats, which achieved significant gains at European election, while the Conservatives and Labour recorded losses. Another 'pop-up' party on the other side of the debate was the Brexit Party. Its sudden appearance suggested that the party system was not catering for the anti-EU outlook either. Unlike Change UK, the Brexit Party was remarkably successful at the European elections. It achieved a clear lead over all other UK parties in the European elections of May 2019.

However, there is powerful cultural resistance to a reconfiguration of the party political system, reinforced by the practical reality of the First-Past-the-Vote electoral. It is

hard to form a new party with any chance of electoral success in such single-member plurality elections, and there is not really room for more than two major parties. The last serious reconfiguration occurred about 100 years ago. It involved a newcomer party, Labour, replacing one of the previous big two, the Liberals. Parties outside the duopoly are often most notable for the impact they have upon one or both of the main two. For instance, the Brexit Party could encourage the Conservatives to adopt a firmer position on Europe (as UKIP did before it). If there is not a move to a more multi-party system allowing for the expression of greater diversity of outlook, the constitutional uncertainty and upheaval described in this chapter is likely to continue.

Section 4. Conclusion. Brexit and constitutional safeguards

This chapter has described constitutional tensions arising from material disagreements within parties. The EU referendum of 2016 – an exercise in direct popular consultation – has applied pressures to the representative system that, because of its internal divisions over the substantive policy issue, it struggled to resolve. The basic functionality of the system consequently came into doubt. Means of escape from this predicament were not easily apparent. While there were some signs of a reshaping of the party system, it would involve overcoming powerful obstacles inherent within the UK system. Another solution might be for struggles within the governing party (and perhaps opposition party also) to be fought to a conclusion, or at least to be tilted more clearly in a given direction. One outcome in this regard could be for a more moderate parliamentary contingent to gain ascendancy. But to do so would seem to involve triumphing over the mass membership – a difficult task to achieve in contemporary party politics. What if more radical views, associated with the membership and smaller groups within Parliament, prevailed? This scenario would be

likely to involve an individual being leader of a party and a Prime Minister who was clearly attached to this more extreme platform, to which the parliamentary cohort and Cabinet were committed, or were at least resigned. At this point the term 'populist' could well, for some, be applicable to the UK administration of the day.

As discussed above, a key defensive mechanism of the UK constitution – the disposition, connected to First-Past-the-Post, for two main parties with an incentive to gravitate towards the political centre – seems to have failed. Another safeguard of our 'unwritten' system has been the so-called 'good chap' theory. According to this school of thought, those who find themselves holding high office in the UK have an implicit understanding of how to behave, what are the limits of constitutionally proper behaviour, and a desire to remain within them. The 'populist' scenario suggested here could entail a Prime Minister whose approach entailed an express rejection of those norms. This premier might claim that these rules were the means by which established elites hoarded power, to the detriment of the wider public. An anti-system government of this type could be of the right, left or centre. Whatever the precise orientation, a likely feature of it would be the targeting of some of the key aspects of the UK democratic constitution: the rule of law; executive accountability to Parliament; the impartiality of public institutions; and so on.

To be clear, I do not claim that such a development is inevitable, nor do I seek to prescribe its exact nature were it to take place. But here are sufficient examples of such administrations from around the world over time to know that they are possible, and have certain common characteristics. Recent developments in the UK mean we should at least give some thought to the possibility of an equivalent occurrence here. I hope we are wasting our time. So far, our 'unwritten'

constitution has avoided fully-blown populism, while other states with 'written' arrangements have not. But the advent of a populist government in the UK would mean that two of the most important protective mechanisms within the context of the 'unwritten' system – two party moderation and 'good chaps' – had proved ineffective. In a constitution that lacked hard judicial enforceability and heightened amendment procedures, what protections might then remain?

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Part 3.
Political questions on the relationship between France and The United Kingdom: security and defence

Chapter 5.
What will be the impact of Brexit on the Defence and Security of Europe?

Patrick CHEVALLEREAU

In a time when threats to the European continent are particularly serious and complex, there is unfortunately a risk that Brexit will foster division. The irony is that what is needed in this international context is more cohesion, not less. However, Brexit will not fundamentally change the British security interests, which are rooted in its history and geography.

A non-EU United Kingdom will "land" on an international stage where the balance of power is dramatically evolving. To what extent Brexit will impact the UK's strategic influence and engagement in international security is an important question for France. Indeed, the UK is a close partner of comparable size and strength whose international credibility is often a force multiplier for France and vice versa.

It remains to be seen how the United Kingdom can navigate between remaining a strategic influencer faithful to its values and pursuing its vital objective of prosperity through new trade arrangements, especially with some of those countries which are challenging the international rule of law. It is also not excluded that Brexit-related economic constraints will impact UK's ability to maintain its defence effort. As importantly, Brexit constitutes a huge strategic distraction for the British government, preventing it to dedicate all the energy required to manage major international security issues.

As the United Kingdom wishes to rethink its role in the world, we may expect some confusion. Indeed, it could prove difficult for the UK to find the right balance between its special relationship with the United States on one hand, and its future strategic connection with the EU on the other hand. Viewed from Washington, some of the added value of the strong historical bond with the UK is likely to be diminished. For London, an America behaving like a rogue international actor could certainly hurt the British security interests. In this vein, since Trump's election, it is noticeable that the UK has aligned itself closer to France and Germany on most international security issues, in effect opposing positions taken by the President of the US.

Considering the future defence relationship between the United Kingdom and the EU, it seems clear that London wishes to maintain the closest possible connection with the European Common Security and Defence Policy (CSDP). But important and concrete questions will have to be addressed, such as the access of the British defence industries to the new European Defence Fund, the possibility for the UK to participate in the European Defence capability development projects through the Permanent Structured Cooperation (PESCO), and how London would participate in CSDP

operations and missions - especially in the decision-making process.

In the near term, if the EU's aim is simply to reinforce the effectiveness of its current low-intensity military operations, then UK's absence will not be so detrimental to this endeavour. If in the longer term, the EU intends to become a more credible and autonomous military power, it might face more difficulties without UK's capabilities and know-how.

From a bilateral perspective, the importance of the French-British defence relationship is based on a shared vision on threats and on unique strategic and military similarities: both countries are nuclear military powers and permanent members of the United Nations Security Council, both have an expeditionary culture, and both maintain a full set of military capabilities. This put the two countries in a very small international club of "capable and willing" nations. In the foreseeable future, no other European country will be able to offer France a partnership matching these characteristics. The Lancaster House bilateral treaties on defence signed in 2010 are the logical and ambitious consequence of this paradigm. But with Brexit, there is a risk that this strategic partnership will be impacted, if a weakened United Kingdom becomes less capable or less willing to play its historically active role in international security issues. The daily practitioners of the French-British defence cooperation must continue their concerted effort to maintain it vibrant and ambitious, whereas the politicians on both sides of the Channel must keep in mind the strategic importance of the partnership that extends far beyond the unavoidable mutual frustrations to come.

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Chapter 6.
"Counterterrorism and intelligence sharing in a post Brexit world?"

Elizabeth Sheppard Sellam

"The threats we face do not recognise the borders of individual nations or discriminate between them."
Prime Minister Theresa May's speech
at the 2018 Munich Security Conference.

The Prime Minister's quote belies the undercurrent of unknowns and concerns that have emerged in the intelligence and law enforcement communities since Brexit has become a looming reality on both sides of the Channel. After being defeated three times by Parliament on the Brexit agreement negotiated with the European Union, British Prime Minister Theresa May planned to resubmit her bill to the House of Commons for a vote the week of June 3. The ongoing chaos has culminated in her announcing her resignation as of June 7th, 2019.

This forest of "what ifs" given how little was prepared, has crushed the high hopes in security and defense policy brought about by the progress in the wake of the Franco British Saint Malo Summit in the late 90s and the uptake in security since 2015. These hopes touted the possibilities that European defense would prosper with the integration of the UK into the fold albeit in a very intergovernmental format. Coalition warfare and operations through to recent years, and in particular the cooperation on counterterrorism efforts, reinforced the idea that security and defense cooperation and intelligence sharing within Europe was, if a rocky issue, nonetheless one motivated by pragmatism and common threats. Behind these hopes and advances, the bilateral relationship between France and the United Kingdom remained the driving force since its inception: "Extent to which the Franco-British relationship shapes things? [...] the relationship is in the driver's seat".[1]

This relationship, which predates Saint Malo, has been marked by strong bilateral agreements such as the Lancaster House Treaties in 2010 and become stronger with or parallel to the creation of the cooperation at the EU level in security and defense.[2] This rapprochement is illustrated on a daily basis by the exchange of permanent liaison officers (at the DGA but also in military officer training schools) as well as by the almost daily relations between senior officials.

Furthermore, 9/11 had far-reaching consequences for the security and intelligence communities both in Europe and in the NATO zone. One area particularly affected was the intelligence sharing and counter terrorist efforts. Much like Bosnia and the Yugoslav wars for coalition fighting, after

[1] Interview MOD, British Chancery, 2006.

[2] For a more in depth look at the Lancaster House treaties see SHEPPARD Elizabeth with Sophie ENOS ATTALI, « La coopération sécuritaire au secours de bEurope » in Carine BERBERI and Alexis CHOMMELOUX (eds.), *L'Europe en pièces,* Paris, Le Manuscrit, 2017, pp. 311-337.

these attacks, allies strengthened shared interests in fighting terrorism, especially after these seemingly isolated attacks have spread to countries such as the United Kingdom, Spain and France. With the attacks continuing in an unrelenting manner, whatever their form may take (organized massive terrorist attacks or "lone wolves"); intelligence agencies around the world redoubled their efforts to share intelligence on terrorist threats. In the UK, the House of Lords itself admits, "The UK has been a leading protagonist in driving and shaping the nature and direction of cooperation on police and security matters under the auspices of the European Union".[3] The creation and reinforcement of Europol and INTCEN as we will point out are key to this progress. In addition, these procedures, tools and relationships will not lose their pertinence the moment Britain exits.

In recent years, the rise of populist Presidents like Trump and candidates as well as the Brexit vote, have pushed many to question whether intelligence sharing efforts and thus counter terrorism will be impacted by these events. In Europe, this is of particular worry where the populist "couple" Brexit and Trump could weaken both NATO, the EU and bilateral relationships in this area and thus put European countries and populations at risk.

Our research seeks to analyze this question looking at in the first part in what ways Brexit specifically and this rise in populism in general might indeed be considered an operational risk in counter terrorism and intelligence policies (I). Our analysis looks in a second part at the governments (UK and EU) possible actions to respond (or not) to the inquiries posed by the allies and the security community at large (II).

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[3] https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/7704.htm (N°28)

Section 1. Operational risks

Before delving into the details of our case study, it is important to note that this phenomenon and the questions that gravitate around it (populism and the effects on the counterterrorist efforts), are not limited to Great Britain. As Professor James Igo Walsh points out, the United States has itself - following the election of Donald Trump - been subject to numerous interrogations on this very topic. Trump is, amongst other things, accused of passing on to Russian officials intelligence shared by Israel.4 In another case, the United States shared leaked information on the Manchester terror attack drawing great anger from the UK and reportedly causing the police to stop passing on information to the US on the Manchester attack.5 The concern here as with the case of Brexit is that of the possibility of irrevocably broken relationships both politically and legally. In addition, from a strategic perspective, states exchange intelligence they possess for concessions or influence, which may be affected by these phenomena. Intelligence sharing is a tricky political business, done with those whom countries most trust and with whom, perhaps most of all, their share interests and goals.6

In the framework of Brexit and the chaos surrounding it, as well as its impact on relations with other EU players this notion of trust and sharing is essential, as we will see. Nevertheless, it is, an essential tool in the counterterrorism fight, as the Barcelona attacks in August 2018 point out, the terrorists that used a vehicle to massacre pedestrians on Las Ramblas

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[4] https://www.oxfordresearchgroup. org.uk/blog/intelligence-sharing-an-interview-with-james-igoe-walsh

[5] https://www.brugesgroup. com/blog/eu-control-over-british-security-and-counter-terrorism-after-brexit, https://www.bbc.com/news/uk-politics-40040210

[6] Antonia WARD, "Maintaining Europol Security Ties after Brexit", *The Rand Blog*, 15 June 2018, https://www.rand.org/blog/2018/06/maintaining-europol-security-ties-after-brexit.html.

had planned to target the Eiffel Tower in Paris as videos discovered later showed their surveillance of the site. The group also had links to eventual cells in France, and at the very least, a number of arrests have been made in connection with the Barcelona attacks.

As such we are going to focus on the risk in terms of political relationships, and trust before moving on to the more pragmatic question of the legal and physical tools that could be impacted severely by the UK's withdrawal.

§ 1. Political concerns, trust and relationships

It can be for many, very odd to consider the importance of trust and relationships in what is a pragmatic area. Moreover, one hopes in reality that law enforcement officials prioritize safety over politics…However, if we take the current situation in Sri Lanka, and the lack of proper communication and trust between political entities even within one country, we can see why the concerns are present7. Political infighting, clashes in personalities or power plays can very clearly cause death and destruction if they get in the way of counterterrorism intelligence sharing efforts. As one of our interviewees pointed out, in order to work together, to be interoperable, trust is primordial: "There is a BASIC LEVEL OF TRUST to overcome ... It is not a technical problem nor even really a financial problem (i.e. paying for the high technology) but TRUST.8" This very basic human aspect is important to take

[7] Sri Lankan officials were warned at least 12 days before the attack by Indian authorities including the name of the group, the ringleader Zaharan Hashim, whom they had been tracking for a while, and the intended targets (churches). A memo destined to the Sri Lankan authorities on April 9th even included addresses and names of suspected terrorists. And yet, the attacks on Easter Sunday were not prevented, as the information did not get shared within the government and appropriate law enforcement circles in the country.

[8] Elizabeth SHEPPARD*, Les Politiques de défense face à l'Europe*, Brussels,

into account, as the situation is causing many tensions within Europe and not just within the EU.

The Franco British relationship as we pointed out has been key to Security and Defense policy in the EU and outside of it. These are two countries whose diplomatic relations have been quite tense in the past, resulting, with difficulty, in a so-called "cordial" agreement in 1904, and which, some 100 years after this "thaw", concluded two defense cooperation agreements, considered as a reflection of a "historical rapprochement". "From around 1989 onwards, there was very close collaboration between the teams at the Ministry of Defense and the Foreign and Commonwealth Office, where policy was formulated and reformulated in the light of current events," as William Hopkinson points out.9 Indeed, through the so-called Lancaster House Treaties, concluded at the end of the London Summit on 2 November 2010, France and the United Kingdom committed themselves to "empowering [their] forces to act together, optimizing [their] capabilities and making [their] defense investment more profitable". As well as committing to "increase the areas and ambitions of[their] common defense equipment programmes and stimulate close industrial cooperation", with the aim of "contributing to the security of the Atlantic Alliance, the European Union and[their] friends throughout the world". In view of the turbulent history of relations between France and the United Kingdom, it is tempting to see these agreements as a major turning point in Franco-British security relations and, with them, in the national security and defense policies of the two Member States of the European Union. However, this relative honeymoon may not last given the current state of things with the Brexit and the veiled threats of Theresa

Dictus Publishing, 2011. The emphases were expressed by the interviewee.

[9] William HOPKINSON, *The Making of British Defence Policy*, The Stationery Office Books, 2000, p. 93.

May for example to reduce cooperation in counterterrorism and information sharing if access for English goods to the continent was restricted, "a failure to reach agreement would mean our cooperation in the fight against crime and terror would be weakened".10

Because of increasing collaboration with regard to shared security concerns, Europol has noted an uptake in leads for investigations and target identification, linked to increased trust and awareness between agencies in member states. Trust is center for progress in the domain, but as Dimitri Avramapoulous, Commissioner for Internal affairs has pointed out, if Member States do not improve their cooperation immediately, the dangers will persist, "The tools exist. The EU can work miracles if [Member States] trust Europol."11 However, as Anders Ygeman, the Swedish Minister of the Interior, has highlighted said the lack of trust between the various European intelligence services was the most important obstacle in the counterterrorism efforts. Brexit reinforces an already difficult situation more specifically because of the central role played by the UK in this domain.

Beyond internal question of trust between European allies, the question of transatlantic relations should be mentioned. Up to now, the UK has acted as a sort of bridge between Five Eyes12 and the EU. With the UK out of the EU, not only will the EU no longer benefit from the information brought by the UK through Five Eyes, and vice ver-

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[10] Letter from Prime Minister Theresa May to Donald Tusk, 29 March 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf.

[11] Henriette JACOBSEN, "Les 28 proposent de renforcer Europol dans la lutte anti-terrorisme, » *Euractiv*, 25 March 2016.

[12] The "Five Eyes" intelligence alliance comprises the United Kingdom, the United States, Canada, Australia, and New Zealand.

sa, but it also means the UK may no longer be as much of interest to the Five Eyes alliance from a political standpoint.

§ 2. Arrest Warrant, databases and fundamentals

The British voted by referendum at 52% for exit from the EU in June 2016. The Withdrawal Agreement Bill (WAB) endorses the Brexit agreement negotiated with the EU. In particular, it provided for a transition period until December 2020. We will focus on the operational issues posed to policy makers, law enforcement officials and inevitably the problems posed to the security of the general population. It is important to understand here the breadth of the tools Europol offers its member countries. For example, in 2015, after the terror attacks in France, Europol was able to offer 800 intelligence leads, as well as over 1,600 leads on suspicious financial transactions. We should keep in mind that the possibilities are not of course limited to jihadists, but also to Right wing extremists who are increasingly on the rise in Europe, not to mention Transnational organized criminal groups.13

The sequence of events described above means that when the UK leaves the European Union, it will, in principle, leave these police and criminal justice measures that the then Home Security ironically deemed "vital" to aid British law enforcement in identifying foreign criminals in the UK, avoiding foreign fighters entering Britain etc. As recent debates in Parliament remind us, in November 2014 she warned the House of Commons that failure to re-join 35 pre-Lisbon measures on home security "would risk harmful individuals walking free and escaping justice, and would seriously harm

[13] While our specialty is Salafi jihadist terrorism, it should be noted that the UK law enforcement has repeatedly called out the rising occurrences of right-wing extremist terrorism, including, four foiled plots in 2017 (out of 18). See Daniel SANFORD, "Far-right terror threat 'growing' in UK as four plots foiled", *BBC News*, 26 February 2018.

the capability of our law enforcement agencies to keep the public safe".14

It is perhaps useful here to remind our readers of what the tools of the EU can do when it comes to foreign fighters or the Extreme Right. Europol, the EU's law enforcement agency, plays a critical role in facilitating and utilizing intelligence-sharing structures among EU member states. For example, according to EU texts:

> a) Member States will ensure that national authorities enter systematically data on suspected foreign terrorist fighters into the SIS II[15], in particular under Article 36.3, carry out awareness raising and training on the use of the SIS and define a common approach to the use of the SIS II data relating to foreign fighters, b) Member States will speed up full implementation and effective use of the Prüm acquis (interconnection and consultation of national databases on DNA, fingerprints and vehicle registration).[16]

In addition to these tools of course is the important arrest warrant. Just last year, in a case involving Ireland, the question of surrendering prisoners and the viability of the UK involvement in European Arrest warrants, the European

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[14] Parliament, European Union Committee, Brexit: future UK–EU security and police cooperation, 7th Report of Session 2016-17 - published 16 December 2016 - HL Paper 77 Parliament.

[15] The Schengen Information System (SIS) is the information sharing system for security and border management in Europe. SIS enables national law enforcement to enter and consult alerts on persons or objects including what to do when the person or object has been found. Each country has a specialised national SIRENE office which serves as point of contact for the exchange of supplementary information and coordination of activities if need be. According to EU documentation, by the end of 2017, SIS contained approximately 76.5 million records, was accessed 5.2 billion times and secured 243 818 confirmed hits.

[16] Conclusions of the Council of the EU and of the Member States meeting within the Council on Counterterrorism, Press Release, 20 November2015. https://www.consilium.europa.eu/en/press/press-releases/2015/11/20/jha-conclusions-counter-terrorism/pdf

Court of Justice had to statute. The ECJ decided that Brexit - and triggering Article 50 - "does not have the effect of suspending the application of EU law in that Member State," and as a result "the principles of mutual trust and mutual recognition" would "continue in full force and effect in that State until the time of its actual withdrawal from the EU."

From a strategic and analytical perspective, with the launch of Europol's European Counter Terrorism Centre (ECTC) in January 2016, Europol's counter terrorism efforts doubled with this creation to coordinate the multiple aspects of the anti-terror effort such as the INTCEN (EU Intelligence and Information Center Created in 2012) which brings data based on intelligence gathered from EU member states' own intelligence and security services including long-term strategic papers, threat assessments for particular EU member states, and various intelligence reports. It provides these strategic analyses is to EU decision-makers, as well as leaders of all member states.

This however brings to light the after Brexit, 17as the House of Lords, debates point out: "The European Arrest Warrant is a critical component of the UK's law enforcement capabilities. We see no reason to revise our assessment—and that of the Government in 2014—that the 1957 Council of Europe Convention on Extradition cannot adequately substitute for the European Arrest Warrant. Accordingly, the most promising avenue for the Government to pursue may be to follow the precedent set by Norway and Iceland and seek a bilateral extradition agreement with the EU that mirrors the EAW's provisions as far as possible. The length of time it has taken to implement that agreement—which was signed a decade ago but is still not in force—is, however, a cause

[17] http://www.ceje.ch/fr/actualites/action-exterieure/2018/10/brexit-implications-european-arrest-warrant/, https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/7707.htm

for concern. An operational gap between the EAW ceasing to apply and a suitable replacement coming into force would pose an unacceptable risk."18

Section 2. Responses, scenarios…what options does the future hold.

The National Police Chiefs Council in the past year clearly expressed their opinions on the options outside of the EU tools "Existing EU tools allow us to respond quickly and intelligently to crime and terrorism in the UK and the EU - they make us better at protecting the public. The alternatives we are planning to use, where they exist, are without exception slower, more bureaucratic and ultimately less effective."[19]

§ 1. A refusal to cooperate and a "hard" solution?

The refusal of the current government to compromise in particular on issues directly linked to security is worrisome at best. The Labour Party has decried the refusal of the government to back for example the maintenance of the European Arrest Warrant and other security arrangements which were included in Jeremy Corbyn's letter in February in which he proposed Labour's support if five of his concerns were taken into account in a reworked political agreement. The fifth condition asked for unambiguous security agreements overall including the reference to the arrest warrant.

Concerning the UK position, in a speech early in 2017 Theresa May said: "We will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain…because we will not have truly left the European Union if we are not in control of our own laws."

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[18] https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/7707.htm(n°141).

[19] Michael HOLDEN, "No-deal Brexit will harm counter-terrorism efforts, say UK police", Reuters, 18 September 2018.

This fixation on sovereignty at all costs and a rupture with the "European Law" is symptomatic of a shortsightedness that focuses on law and principles at all costs. Moreover, those costs may indeed be quite high. As Swiss Justice Minister Karin Keller-Sutter has warned in recent interviews that a Hard Brexit would do irrevocable damage to the security of her country as she pointed out following the Commissions assertions that the UK will withdraw from the system following their exist. «The European Commission is acting in the strict respect of its principles and not as function of security interests. Switzerland will be obliged to find a bilateral solution with London". As the UK parliament has pointed out as well in its findings, when the country leaves the EU, it will in principle leave the police and criminal justice measures that it has chosen to opt into since the Lisbon Treaty. There are around 3024 of the measures including measures the 2016 Passenger Name Record Directive, the Prüm Decisions, and the European Investigation Order…

If the current agreement holds and we are faced with a "hard" un-negotiated Brexit meaning the cutting off and withdrawal of Britain from all of the databases and system aforementioned. (SISII etc.). It also means changing border security. In addition, as the National Audit office has pointed out, the new border arrangements are not yet operational due to the political uncertainty and the chaotic negotiations. They estimate that most of the major borer protection projects will not be up and running on time, which they believe, "organized criminals and others are likely to be quick to exploit any perceived weaknesses or gaps in the enforcement regime."[20]

[20] National Audit Office, "The UK border: preparedness for EU exit", October 2018. Updated February 2019.

These legal hurdles lead us to evoke the risks of prioritizing law before security and force us to take a closer look at the question of an adequacy decision in particular.

§ 2. Adequacy decisions, law and building a new model?

The Europol framework allows cooperation with non-EU partners. However, as Europol's Executive Director, Rob Wainwright, commented, these third-party countries such as Australia and the US concluded their arrangements before the newest Europol Regulation came into effect on 1 May 2017[21]. Specifically, Europol can today conclude a deal with a non-European Union member only in two cases: one, if the latter has previously signed an international agreement with the EU including a "Justice and Home Affairs" clause or alternatively, the Commission has issued adequacy decision on said country's level of data protection. An adequacy decision as defined by Article 45 of the GDPR stipulates:

> A transfer of personal data to a third country or an international organization may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organization in question ensures an adequate level of protection.[22]

The Commission would thus have to study UK law following Brexit to insure it meets the conditions outlined in the GDRP. Thus, in entering into a third-party agreement, the UK would be the guinea pig for a procedure that has never been undertaken.

The need for an adequacy decision has been discussed quite a bit on both sides of the crisis. The UK government has stated that it believed an adequacy decision would be

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[21] Europol, EUROPOL'S NEW REGULATION, press release, 1 May 2017, https://www.europol.europa.eu/newsroom/news/europols-new-regulation.

[22] General Data Regulation Protection, Article 45, Section 1.

necessary before 'Brexit Day' on 29 March 2019 (assuming there were no extensions to negotiations). The government categorically refused to be drawn into the processes while negotiations were ongoing. Moreover, when directly asked the question 'If you do not secure an adequacy decision what is the default position?' the Minister for Brexit responded rather blandly 'we are seeking unhindered data flows, and that we are confident we will achieve'."[23] Highlighting the lack of preparedness on the part of the British on such a sensitive issue.

This speaks to the importance of this decision in determining to relationship between the UK and the aforementioned aspects of Europol. In fact, there is this possibility to include and participate in SOME aspects of the Europol activities and institutions as a third party could nonetheless impair greatly security cooperation. It would deprive the UK of a central role in the management board despite their expertise and the key role they have had in contributing to the information in the systems and the format of the institutions etc. [24] As a parliamentary report points out "The infrastructure that exists in this area, from Europol to the Passenger Name Record Directive…in part reflects the UK's significant influence and agenda-setting."[25]

Some mention the Danish model who have a bespoke agreement but which, with their exit would hardly be applicable from a legal perspective and which still cuts off Denmark

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[23] Andrew D. MURRAY, Data transfers between the EU and UK post Brexit?
International Data Privacy Law, Volume 7, Issue 3, August 2017, Pages 149–164, https://doi.org/10.1093/idpl/ipx015.

[24] Chiara GRAZIANA, "UK-EU Intelligence Information Sharing After Brexit," *Brexit Institute News*, 15 May 2018.

[25] Parliament, European Union Committee, Brexit: future UK–EU security and police cooperation, 7th Report of Session 2016-17 - published 16 December 2016 - HL Paper 77 Parliament.

from the decision-making processes, which the UK still sees as a valuable role. On the European side, the "third country" model, would probably deprive the Europeans from the access to crucial information the UK currently contributes to the system and which has, as already mentioned, been critical in maintaining high levels of vigilance and security throughout Europe.

Conclusion

The window of opportunity that opened in Saint Malo represented an important turning point at national and European level. Without this British declaration, the creation of the ESDP would not have been possible. This agreement will also lay the foundations for the relationship that set the tone for the ESDP until now…With Brexit European partners are faced with one of the motors in security and defense pulling out its cards, its cooperation and its influence. At a political level, this is of course a shame, at the operational level this can be argued is dangerous. The operational risks of political dealings are potentially enormous, as the cries from professionals have "pulled the alarm on". As one house of Lord's report highlights, ".One of the challenges for the future, therefore, is whether, and if so how, the UK can retain that sort of influence among its European neighbors and allies when it is no longer a full member of the EU structures in which the strategic direction of travel is set. The National Crime Agency observed, "There are a number of countries within the EU that show real leadership in this area and the UK is one of them. We may lose some of that influence. Bill Hughes, former Director-General of the Serious Organized Crime Agency (2006–2010), also warned us "the UK is seen as a major and leading partner. That will change".[26]

[26] https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/7704.htm

The "special" relationship with the EU has always been marked by important difference, notably within the Franco British relationship such as the important differences that emerged at the beginning of the war in Iraq. The British call the summit in Brussels, where some EU members, including France and Germany, have declared their opposition to the invasion of Iraq - the chocolate summit - speaks volumes about the fundamental differences that remain within the ESDP family.)

The new differences however are perhaps beyond repair from both a political and legal perspective and this is happening at the worst strategic moment possible in matters of counterterrorism. Our threat environment today evolves rapidly and as it is authorities have a hard time staying ahead of the game. Brexit is an element of division from a political perspective that presents numerous hurdles. In addition, it could deprive all concerned of the expertise, cooperation, and precious exchange of information and tools that are necessary to keeping populations safe throughout the world. It is essential to determine as a result, and as quickly as possible the relationship between the UK and Europol, ironic for the country that was the first member of the community to sign in 1996 the convention that governs Europol.

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Chapter 7.
Defence and Security Cooperation after Brexit: Towards a Redefinition of Franco-British Relations?

Thibaud Harrois

When Foreign Secretary Jeremy Hunt visited France in November 2018 for the 100th anniversary of the end of the First World War, he made a speech in which he insisted the relations between France and the UK were "bigger than Brexit". Talking about the First World War, Hunt insisted that "it was a war in which our destinies as nations were yoked together", and stressed the solidarity between the two nations that has existed throughout the last centuries. The Franco-British relationship was described as a relationship of competition and cooperation, similarity and difference, the Foreign Secretary saying "that it is precisely that mix which gives it its strength – because we have made a choice – for nearly 200 years – to work together."[1]

[1] Jeremy HUNT, "Britain and France: past, present and future", speech,

France and the UK decided to foster their cooperation as early as in the 1850s when the very first "*Entente Cordiale*" was encouraged by Queen Victoria and Emperor Napoleon III, especially during the Crimean War (1853-1856) to fight Russia. A new step was taken in 1904 with the signing of bilateral treaties known as the "*Entente cordiale*" which dealt with the necessity to find an agreement on colonial disputes, a few years after the Fashoda Incident (1898) but also – and maybe more importantly – to join forces to face the increasing power of Wilhelmine Germany. These treaties were the cornerstone of the "*Triple Entente*" (that also included Russia) which played a crucial role during the First World War. Diplomatic cooperation between the two countries continued throughout the 1920s and 1930s and into World War Two when France and Britain fought alongside one another. The signing of the Treaty of Dunkirk in 1947 once more underlined the necessity both for France and the United Kingdom to find another European partner to rely on so as to protect themselves from a potential German aggression. Yet, it soon became clear that this bilateral alliance did not carry enough weight to face the threat posed by Soviet Russia and the Treaty of Brussels was signed in 1948 with Belgium, the Netherlands and Luxembourg, one year before the Atlantic Alliance was created in 1949. The two countries also fought alongside one another once more in 1956 against Nasser's Egypt, in what came to be known as the Suez Crisis.

This brief overview of the history of Franco-British relations shows that the two countries have quickly understood that cooperation was necessary if they wanted to protect their national interests, and promote shared values like parliamentary democracy or individual freedoms.[2]

Paris, 8 November 2018. https://www.gov.uk/government/speeches/britain-and-france-past-present-and-future, accessed 15 May 2019.

[2] Philip M. H. BELL, *France and Britain, 1900-1940: Entente and Estrangement*, London, Longman, 1996; *France and Britain, 1940-1994: The Long*

However, close diplomatic ties between the two countries and the prolonged debate on security issues in Europe did not prevent mistrust and rivalry between the two allies. This became all the clearer in the second half of the 20th century, during the first years of the European Community. The rupture was complete after De Gaulle vetoed Britain's application to the EEC and refused to join the nuclear cooperation project in which President Kennedy and Prime Minister Macmillan had offered him to take part. These decisions had long-lasting effects and Britain's membership of the EEC did not mend the strategic rift between the two countries. On the contrary, tensions between France and the UK can account for the absence of an actual European defence policy. Indeed, while neither of the two countries could hope to carry such a project alone, it was impossible for them to cooperate efficiently as they disagreed about the role of the USA in European defence. On the one hand, Britain chose a resolutely "Atlanticist" strategy, and wanted to avoid giving the USA any argument that might allow them to become isolationists again. On the other hand, France adopted a "Gaullist" strategy that was perceived (improperly) as being anti-Americanist as what France aimed at was to promote a European defence policy in order to convince the USA that Europeans were trustworthy allies.[3] This 'Euro-Atlantic Security Dilemma'[4] considerably slowed down the possibility of a bilateral security policy and also made cooperation in Europe very complex. Only after the Cold War ended did the "Suez paradigm" disappear and bilateral cooperation find new momentum. France progressively

Separation, London, Longman, 1997.

[3] Jolyon HOWORTH, "Britain, France and the European Defence Initiative", *Survival*, 42 (2), 2000, pp. 33-45.

[4] Jolyon HOWORTH, "The Euro-Atlantic Security Dilemma: France, Britain, and the ESDP", *Journal of Transatlantic Studies*, 3 (1), 2005, pp. 39-54.

adopted a more "Atlanticist" strategy and acknowledged that because the US was increasingly unwilling to intervene militarily in Europe, it was necessary to make the most of NATO's capabilities and infrastructures. As far as Franco-British cooperation is concerned, as President Jacques Chirac and Prime Minister John Major put it after a meeting at Chequers in 1995: "the vital interests of one could not be threatened without the vital interests of the other equally being at risk".[5] There were two sets of arguments in favour of a Franco-British rapprochement: first, there was a strong political will for cooperation both in Paris and in London. But this rapprochement was also built in the theatre of operation when the two countries fought alongside one another, especially in Balkans. Therefore, between 1995 and 1997, France and the UK signed a series of Letters of Intent in which the potential fields of cooperation between the different branches of their armed forces were identified. In 1995, the UK-France European Air Group was created. Navy cooperation was reinforced in 1996 and in 1997, cooperation between land forces was the focus of a new Letter of Intent. A milestone was reached in 1998 when cooperation between the two countries was formalised and expanded thanks to the joint UK-France Declaration signed in Saint-Malo, which became the foundation for further cooperation between the two countries and was a key moment in the history of the EU's Common Foreign and Security Policy (CFSP).

Current cooperation between France and the UK falls under the terms of the Lancaster House Treaties which were signed on 2 November 2010. The 2010 treaties must then be understood as a new step in the history of bilateral cooperation and the aim of this paper is to recall the strategic,

[5] John MAJOR, Joint Press Conference with President Chirac, London, 30 October 1995. http://www.johnmajorarchive.org.uk/1990-1997/mr-majors-joint-press-conference-with-president-chirac-30-october-1995/, accessed 15 May 2019.

political and economic reasons that led the two countries to take a new step as well as examine the current state of cooperation. But it is impossible to study Franco-British cooperation without studying the impact it has on European defence, in particular with the Common Security and Defence Policy (CSDP). Should the signing of the Lancaster House Treaties be interpreted as a desire from France and the UK to give up on CSDP?[6] Or can Lancaster House be considered as a step forward for future European defence?[7] In order to understand the rationale for cooperation and account for France and Britain's decision to sign the 2010 treaties, the concepts of "role" and "national role conceptions", as defined by K. J. Holsti, are particularly useful.

> The policymakers' own definitions of decisions, commitments, rules and actions suitable to their state, and of the functions, if any, their state should perform on a continuing basis in the international system or in subordinate regional systems.[8]

In other words, "national role conceptions" refer to the ideas that states hold about their proper place in international affairs. Another useful concept defined by Holsti is that of "role performances" which refers to the policy actions appropriate to given roles. What Holsti explained is that states' decision to act or respond through policy is mainly

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[6] Ben JONES, "Franco-British military cooperation: a new engine for European defence?", EUISS Occasional Paper 88, Paris, EUISS, 2011; Sven BISCOP and Jo COELMONT, "Pooling and Sharing: From Slow March to Quick March?", Egmont Security Brief (23), Brussels, Egmont Institute, 2011.

[7] Tomas VALASEK, *Surviving Austerity: The case for a new approach to EU military collaboration*, London, Centre for European Reform, 2011; Dick ZANDEE, "Bridging the Channel: British-French Defence Cooperation as the core of European Military Capabilities", Clingendael Policy Brief 10, The Hague, Clingendael Institute, 2012.

[8] Kal J. HOLSTI, "National Role Conceptions in the Study of Foreign Policy", *International Studies Quarterly*, 14 (3), 1970, pp. 245-246.

determined by policymakers' national role conception in the international system. Cristian Cantir and Juliet Kaarbo insist actions take precedent over ideas in the definition of a state's role in the world.[9] In other words, roles are about "what we should do" rather than "who we are."

The assumption of this paper is that France and Britain have similar, or at least very close role conceptions. Both states have seen their global power status challenged in the 20th century but both have proved willing to preserve their status as forefront players on the international stage and they expect their partner to do so, which made cooperation possible.

The Lancaster House Treaties are organised around three main axes regarding operations, capabilities, and nuclear cooperation. The first two pillars are covered by the first treaty: the Treaty on Defence and Security Co-operation. It aims at developing cooperation between British and French armed forces and allowing the two states to share and pool equipment, including through mutual interdependence, to access each other's defence markets, and reinforce their industrial and technological cooperation. One of the key programmes at the heart of the newly signed treaty is the creation of a Combined Joint Expeditionary Force (CJEF), a non-permanent force "suitable for a wide range of scenarios, up to and including high intensity operations".[10] Other key elements in the treaty include provisions on industrial and armaments cooperation. Article 8 (2) of the treaty states that "each Party undertakes not to hinder legitimate access to its markets and to its Government contacts in the field of defence and security". France and the UK thus

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[9] Cristian CANTIR and Juliet KAARBO (eds.), *Domestic Role Contestation, Foreign Policy, and International Relations*, New York, Routledge, 2016.

[10] UK-France Summit 2010 Declaration on Defence and Security Co-operation, 2 November 2010, par. 8.

clearly displayed their ambition to create dependencies in a sensitive area of cooperation, including the development and improvement of missile technology. The last pillar is covered by the second treaty: the Treaty relating to Joint Radiographic/Hydrodynamics Facilities. Precisely because nuclear cooperation is a particularly sensitive issue with potentially important strategic consequences, it was deemed necessary to formalise cooperation between the two states in the form of a treaty. The aim of the agreement is to allow scientific and technological cooperation through the building of joint facilities that would model performance of nuclear warheads and materials. This would allow the two countries to ensure the viability and safety of their national deterrents, even if, as suggested by the title of the treaty, there never was any ambition of sharing nuclear arsenals.

Looking at the reasons that drove France and the UK to sign these treaties, it is possible to identify three main sets of reasons. First, there were strong financial incentives on both sides of the Channel to further cooperation. Both states had to face dire budgetary constraints, especially after the 2008 financial crisis, but they also wanted to retain their military power. This is the "*entente frugale*" aspect of the Franco-British cooperation.[11] The second reason was strategic. France and the UK recognised they were closer to each other than to any other European partners, not only as far as the size of their armed forces are concerned, but also in terms of attitudes to military intervention. Both countries were ready to deploy troops, something they had proved in the past, and therefore were most likely to fight alongside each other. This accounts for the important strategic dimension to their cooperation. Finally, looking at the political context in which the treaties were signed, it appears that there was no other

[11] Nick ROBINSON, "The *entente frugale* – where will it all end?", *BBC News*, 2 November 2010. https://www.bbc.co.uk/blogs/nickrobinson/2010/11/the_entente_fru.html, accessed 15 May 2019.

choice but to further Franco-British cooperation. The only other alternative would have been CSDP. The UK was never really in favour of reinforcing EU defence policy, contrary to France, but even the latter started doubting CSDP could be an efficient initiative.

This paper thus seeks to show that bilateral cooperation was motivated by the will of both countries to keep playing a forefront role on the international stage but in a context in which it was increasingly difficult for them to do so given the financial constraints they had to face, but also due to the nature of the threats they faced in an increasingly unstable international context. After the 2016 referendum on British membership of the EU, the first reactions were that French and British cooperation would continue, not least because it is outside EU structures and therefore will not be affected by the UK's exit from the EU. But one may wonder what future Franco-British cooperation will look like if one state is in the EU and the other outside, and what this means for CSDP.

Section 1. An "entente frugale": the financial rationale for cooperation

In 2006, the NATO Member States set themselves the aim of spending at least 2% of their GDP on defence. This objective was not primarily intended to solve the Organisation's funding issue but was used to reveal how committed each state was to NATO's common defence and aimed at maintaining the status of the Atlantic Alliance as a major security actor in the world. Among NATO's European Member States, only Greece, Turkey, Bulgaria, France, the UK and Romania devoted at least 2% of their GDP to defence in 2006. But among those countries, France and Britain were definitely the most important contributors to the Alliance's budget in absolute terms. It was this share of France's budget devoted to defence that made it a 'serious' partner,

with whom the UK could legitimately reinforce its links and deepen its bilateral relation. This is what Liam Fox insisted upon during the debate on the November 2010 treaties: "I repeat – this is about two sovereign nations, which between them spend 50% of all the defence spending of the NATO members in Europe, and 65% of the research spending".[12] The rapprochement with France was unanimously presented by British defence ministers as an asset for Europe and the influence European members of NATO would get in the Alliance.[13] However, some senior officials went as far as to say that Britain did not actually have any other choice than to reinforce its relation with France if it wanted to avoid losing some of its defence capabilities.[14]

Indeed, the 2010 *Strategic Defence and Security Review* and the *Future Force 2020* programme announced a reorganisation of the armed forces through cuts in the total number of military personnel and a reduction in combat capabilities, together with ambitious modernisation plans. In a context of cuts in public spending, one of the main aims of the 2020 review was to reduce the £36 bullion deficit in the defence budget. In order to do so, it was announced that defence procurement projects would be either delayed (like the Trident replacement project), cut (like the number of new destroyers and frigates) or scrapped completely (like the Nimrod reconnaissance aircraft). HMS Ark Royal, the navy's sole operating aircraft carrier, was taken out of service along with its fleet of Harrier Jump Jets. The overall budget of the Ministry of Defence was cut by 8%, which resulted in the loss of 17,000 military and 25,000 civilian jobs, and inevitably led to a reduced role for British forces in major military interventions.

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[12] Liam FOX, HC Deb 2 Nov 2010, vol. 517, col. 787.

[13] Liam FOX, interview, Jan 2015; Gerald HOWARTH, interview, Jan 2015; Nick HARVEY, interview, Jan 2015.

[14] Senior civil servant, MoD, interview, Jan 2015.

France met comparable difficulties with a defence budget close to the UK's (the French defence budget was €32.1 billion in 2010[15], compared with approximately €39 billion for the UK[16]) and had to find solutions to face budgetary pressure. The 2008 economic crisis further aggravated an already dire budgetary situation with the 2008 *Livre blanc* announcing the government's intention to close 83 military bases and cut 54,000 defence jobs.[17] The *Livre blanc* also made it clear that maintaining France's strategic independence would henceforth be difficult because it lacked the necessary funding.[18] This was confirmed in 2010 when the 5-yearly law on military programming voted in 2009 had to be amended to include extra spending cuts of up to €3.5 billion over 3 years from 2011 to 2013. In that context, it was believed that cooperation with the UK could save substantial amounts of money, while allowing both states to keep their nuclear capabilities as well as to protect key armament companies and technologies.

Section 2. Nuclear Weapons

The history of Franco-British nuclear cooperation followed the same path as that of defence cooperation between the two countries until the end of the Cold War. Indeed, after the Nassau Agreement was concluded in 1962, the UK's main – and indeed sole partner – was the USA. The first step towards cooperation between the two European nuclear powers was made in 1992 with the establishment of a Joint Commission

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[15] International Institute for Strategic Studies, *The Military Balance 2010: The annual assessment of global military capabilities and defence economics*, London, International Institute for Strategic Studies, 2010, p. 129.

[16] HM Treasury, *Spending Review 2010*, Cm 7942, London, The Stationery Office, 2010, p. 57.

[17] Ministère de la Défense, *Défense et Sécurité nationale: le Livre blanc*, Paris, Odile Jacob et La Documentation française, 2008, pp. 317-318.

[18] *Ibid.*, p. 318.

on Nuclear Policies and Doctrines, which later became the Joint Nuclear Commission (JNC), to discuss nuclear policy and doctrine (but leaving out operational cooperation).[19] And as available budgetary resources became scarce, French and British leaders started to consider cooperation in the field of nuclear deterrence:

> We have talked about nuclear co-operation, and noted considerable convergence between the two countries on nuclear doctrine and policy. We do not see situations arising in which the vital interests of either France or the United Kingdom could be threatened without the vital interests of the other being also threatened. We have decided to pursue and deepen nuclear cooperation between our two countries. Our aim is mutually to strengthen deterrence, while retaining the independence of our nuclear forces. The deepening of co-operation between the two European members of the North Atlantic Alliance who are nuclear powers will therefore strengthen the European contribution to overall deterrence. We have instructed our Joint Nuclear Commission to take this forward.[20]

Without threatening the independence of their nuclear forces, the two countries declared themselves ready to cooperate and justified their cooperation on the existence of shared vital interests. Similar words were used in November 2010 by Prime Minister David Cameron and President Nicolas Sarkozy:

> […] a threat to our vital interests could […] emerge at any time. We do not see situations arising in which the vital interests of

[19] "The UK/French Joint Nuclear Commission normally meets at official level every six months, alternately in London and Paris. The Commission's discussions cover a wide range of issues, but they exclude, by joint agreement, the operational aspects of our respective deterrent forces". Keith VAZ, Minister of State for Europe, HC Deb 6 Mar 2000, vol. 345, col. 500W.

[20] UK-French Joint Statement on Nuclear Co-Operation, Chequers, 30 October 1995.

> either nation could be threatened without the vital interests of the other also being threatened.[21]

Partly thanks to the work of the Joint Nuclear Commission, the two countries have developed their cooperation in the field of nuclear deterrence. Civil and military officials involved in French and British nuclear programmes started to meet regularly. But before 2010, the two countries did not have a joint nuclear policy and America remained Britain's main partner in this area. The USA only lifted their opposition to reinforced Franco-British cooperation when, at the end of the Cold War, nuclear capabilities became less strategically crucial, and after France resumed its seat in the NATO military committee, even if all American objections did not completely disappear.[22] Besides, the Franco-British rapprochement happened at a time when, in the midst of an economic crisis, finding a new strategic partner was all the more crucial than the decision to maintain the nuclear deterrent had been questioned by the Labour government in 2006[23] and later challenged by the Liberal-Democrats, whom had formed a coalition government with the Conservatives in 2010.[24] In the 2010 SDSR, the government renewed its commitment to maintain a nuclear-armed missile submarine on patrol at all times (Continuous-At-Sea-Deterrence, CASD) but, as we saw earlier, the number of nuclear warheads was reduced and the decision to replace them was delayed.[25]

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[21] UK-France Summit 2010 Declaration on Defence and Security Co-operation, 2 November 2010.

[22] Matthew HARRIES, "Britain and France as Nuclear Partners", *Survival*, 54 (1), 2012, p. 8.

[23] HM Government, *The Future of the United Kingdom's Nuclear Deterrent*, Cm 6994, London: The Stationery Office, 2006.

[24] Liberal Democrats, *Policy Options for the Future of the United Kingdom's Nuclear Weapons*, London, Liberal Democrats, 2010.

[25] HM Government, *Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review*, Cm 7948, London, The Stationery Office, 2010,

The Lancaster House Treaty on nuclear weapons cooperation was thus a milestone in French and British military history, especially as France long saw the nuclear domain as too sensitive for cooperation. Among the decisions taken in 2010, the treaty planned to allow British scientists to access the French research centre in Valduc where the viability and safety of nuclear warheads are tested. A new joint technology and development centre was also to be built as part of the British atomic weapons establishment at Aldermaston in order to develop the radiographic and diagnostic technology needed to support the hydrodynamic testing of nuclear weapons.

Since 2010, progress seems to have been swift and steady. In 2015, then UK defence minister Michael Fallon wrote:

> In the nuclear field, which more than any other domain reflects the closeness of our bonds and of our mutual confidence, we have developed common tools and facilities to ensure the safety and reliability of the weapons that represent a last resort defence of our vital interests. This includes construction of the joint radiographic and hydrodynamic facility at Valduc in Burgundy, where the British installations will be inaugurated in 2016.[26]

The positive relationship in the field of nuclear weapons is unlikely to be affected by Brexit. The initial motive for cooperation was financial, as both states wished to save money by cutting duplicate costs. But their cooperation also highlighted the fact that they were the two only nuclear powers in Europe, which means they share different interests than other EU member states. Even after the UK leaves the EU, this is not likely to change. The UK is committed to maintain

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par. 3.8-3.10.

[26] Michael FALLON, "UK-French defence cooperation reaffirmed on fifth anniversary of Lancaster House Agreement", 3 November 2015. https://www.gov.uk/government/news/uk-french-defence-cooperation-reaffirmed-on-fifth-anniversary-of-lancaster-house-agreement, accessed 15 May 2019.

its deterrent and France has no other partner to turn to. Doubts about the future of NATO and the US commitment to European defence even make the French and British nuclear arsenals all the more crucial for European defence (even if they both need American support to maintain their deterrent).

Section 3. Armaments Cooperation

The 2010 Lancaster House Treaty created a High-Level Working Group that meets several times a year in order to coordinate Franco-British armaments cooperation. There has been some progress on armaments cooperation, in spite of some failures, such as the decision by the British to revert to the F-35 short take-off and vertical landing (STOVL) variant of the Joint Strike Fighter, making its future carriers incompatible with French aircraft technology. One of the most important successes in the field of armaments cooperation is the One Complex Weapons initiative which covers a large range of joint missile projects as well the development of centres of excellence by MBDA. The two countries have thus reached genuine interdependence in a highly strategic sector.

Many decisions were made before June 2016 (including the concept phase for the Future Cruise/Anti-Ship Weapon, or the SCALP/Storm Shadow cruise missile). But as soon as 12 July 2016, a group of French and British parliamentarians met in Paris as part of a twice yearly follow-up of the Lancaster House Treaties and published a joint statement reaffirming "that even though the UK had decided to leave the EU, the Lancaster House treaties [were] still essential to the security of both Nations."[27] On 26 March 2017, a couple of days

[27] House of Commons, House of Lords, *Assemblée nationale, Sénat*, Joint Statement, 12 July 2016. http://www2.assemblee-nationale.fr/14/commissions-permanentes/commission-de-la-defense/secretariat/a-la-une/la-cooperation-franco-britannique-de-defense-plus-necessaire-que-ja-

before Britain triggered Article 50, British Defence Minister Harriett Baldwin and Délégué Général pour l'Armement Laurent Collet-Billon signed an agreement that began a programme to develop future long range weapons. On that occasion, Baldwin declare:

> Our relationship with France is strong and enduring. We have a long history of cooperation in defence and security with our European Ally. As demonstrated by having Europe's largest defence budget, the UK is committed to European security and we will continue to collaborate on joint defence programmes across the continent.[28]

A series of agreements were signed after the Brexit vote, like those regarding the future CTA40 cannon, or on further sharing hydrodynamic testing facilities to increase naval cooperation and cooperation in those fields has not been threatened by Brexit. However, other projects, like the Future Combat Air System (FCAS) programme, the stealth supersonic cruise missile (FCASW/FMAN-FMC) programme, and the Maritime Mine Counter Measure (MMCM) programme are at different stages of development and could be threatened by either financial, technical or political difficulties.[29] The development of the FCAS has stalled and the British announced in 2018 they would develop their own Tempest programme while a new FCAS programme was launched by France and Germany.

It is therefore hard to say what to expect in the long run in terms of armaments cooperation. The EU has plans

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mais, accessed 20 May 2019.

[28] Harriet BALDWIN, quoted in "UK and France strengthen defence cooperation with new weapon system agreement", 28 March 2017. https://www.gov.uk/government/news/uk-and-france-strengthen-defence-cooperation-with-new-weapon-system-agreement, accessed 20 May 2019.

[29] Institut Montaigne and Policy Institute (King's College London) UK-France Taskforce, *The UK-France defence and security relationship: How to improve cooperartion*, London, Policy Institute at King's, 2018, pp. 21-23.

for enhanced post-Brexit defence research cooperation, something Jean-Yves Le Drian and Ursula van der Leyen also pushed for in their letter on revitalising CSDP in September 2016. In the joint proposition paper they sent to Federica Mogherini, the two then Defence ministers called for an EU operational headquarters, a common budget for military research and joint procurement capabilities, as well as the use of the "permanent structured cooperation" provisions of the EU treaties that allow for smaller groups of EU member states to further their cooperation even in cases when all states are not part of the programme.[30] The Franco-German proposal shares a lot of the ideas already introduced in the EU's *Global Strategy* document that High Representative Mogherini had presented in June 2016 and which also called for further cooperation between EU members. The UK is unlikely to be part of such reinforced EU cooperation. But France is the only EU member state that is willing to move forward on defence matters, apart from Germany and Italy, albeit sometimes reluctantly.

The main difficulty for future Franco-British armaments cooperation will be political as France might find it hard to express support for a stronger EU defence policy while reinforcing cooperation with a non-EU partner and might ending up choosing cooperation with other EU partners if it proves more advantageous. Another difficulty might arise from EU market regulation as the UK might have difficulties accessing the market after Brexit. This would inevitably make cross-border defence industry and cooperation in the field of procurement more difficult and therefore more expansive, depending on the terms of the deal signed by the UK and the EU. Finally, there is much uncertainty around the state of the

[30] Jean-Yves LE DRIAN and Ursula VAN DER LEYEN, "Revitalisation de la PSDC – Vers une défense au sein de l'UE globale, réaliste et crédible", 11 Septembre 2016. http://www.france-allemagne.fr/article9346.html, accessed 14 May 2019.

British economy and financial consequences of Brexit. The Pound Sterling has already declined sharply since June 2016 and this devaluation of the British currency puts high pressure on the UK defence budget. The UK may especially encounter difficulties paying for equipment bought from the US when the pound slides against the dollar. If, as some predict, Brexit is followed by an economic crisis involving a recession, this situation would get even worse. Therefore, from a financial perspective, there is still a good case for cooperation between France and the UK, but as far as conventional armament is concerned, British perspectives look quite dire and the country may encounter further difficulties after Brexit.

Section 4. The Strategic Rationale for Cooperation

The Franco-British defence relationship was largely built upon the idea that the two states had a broadly shared understanding of when and how it is appropriate to use military force. In 2011, Lt General Simon Mayall declared: "[The French] are another nation that is prepared to pull the trigger, as are the Americans".[31] In other words, France was regarded as one of various few serious partners for the UK precisely because of their readiness to intervene abroad. This view was widely shared by military officials and politicians who acknowledged that France and Britain had a broadly similar level of defence ambition.

It was this view that led the two countries to build a joint expeditionary force. The Combined Joint Expeditionary Force (CJEF) draws upon British and French Armed Forces (land, air and maritime components) together wish command and control and support functions. It is not a permanent standing force but it is meant to be available

[31] Lt General Simon MAYALL, in House of Lords Select Committee on the European Union Foreign Affairs, Defence and Development Policy (Sub-Committee C), *Inquiry on British-French Defence Relations*, Oral evidence, 3 Feb 2011, Q 12.

at notice for bilateral operations. The aim of the CJEF is to be able to carry out high-intensity military deployments which would rapidly launch operations that could then be taken over by other allies, including NATO or the EU. Since the creation of the CJEF was announced in 2010, progress has been made and the force was tested in April 2016 with Exercise "Griffin Strike" which saw the deployment of 5,500 military personnel, 20 aircraft and around a dozen shups. This allowed full-scale testing of the binational chain of command, the interoperability of Franco-British forces and the efficiency of the new joint force. The exercise was successful and the force was "validated", opening a new five-year bilateral training plan for the 2017-2022 period. Yet, however politically significant the CJEF may have been – as a sign that Franco-British cooperation had concrete results – many doubts remain as to the context in which this force would be deployed, as well as about the relationship it has with organisations like the EU or NATO.

This new Franco-British strategic ambition has also translated into cooperation in military interventions. The main joint operation that followed the signing of the Lancaster House Treaties was the intervention in Libya in 2011. French President Nicolas Sarkozy and British Prime Minister David Cameron were the main advocates for action. France and the UK were the first states to condemn the Gaddafi regime and they were quick to undertake to have the resolutions passed at the UN Security Council. French and British aircrafts dropped the first bombs alongside the US on 19 March 2011 and the operation was quickly deemed successful with the toppling of Muammar Gaddafi. However, there were also disagreements between the two states on the way this operation should be led. Sarkozy wished the two countries would command operations together, without requesting American or NATO support. But this plan was quickly abandoned when Cameron insisted American

involvement was needed – at least for operational planning. In the end, Franco-British operational cooperation was very limited during the intervention in Libya that had taken place only a few months after the signing of the Lancaster House Treaties but the operation was nonetheless presented as proof that the two states – and their armed forces – could fight effectively alongside each other.

A few months after the beginning of the upheaval in Libya, the Assad regime repressed the Syrian opposition, leading to civil war. Prime Minister Cameron agreed with US President Obama that the use of chemical weapons by the Assad regime would be a "red line" leading to a military intervention. Yet, British MPs voted against intervention in August 2013, which led the USA and France to suspend their move towards intervention. This event led France to worry about the UK's readiness to fight. And even if there has been some British support for other French interventions in Mali, the Central African Republic and for Barkhane, France's main partner remains the US, with whom the tradition of cooperation is older and feels more familiar to some senior officers.[32]

There have been some strains in the Franco-British military cooperation and both British and French officers are more accustomed to working with their US counterparts. But more effective cooperation between the two main European military forces still seems to be needed in spite of Brexit. On the British side, there is a recognition that the US might not the reliable partner that is used to be, and remaining close to other European partners is seen as a safe option. On the French part, in spite of concerns about British reliability, the UK remains a more convincing partner than any other European state, including Germany. One of the most recent signs of that was the creation of a European Intervention

[32] French Navy senior officer, interview, April 2019.

Initiative (E2I), following President Macron's proposal in his Sorbonne speech in September 2017. The aim of this new military project is to allow a shared strategic culture to emerge among participant states. The E2I was built outside the EU framework in order to allow the UK to act as an equal partner rather than a third state like in CSDP missions or PESCO (Permanent Structured Cooperation) projects. This has been widely interpreted as a way of allowing the UK not to be isolated after Brexit.[33] But the E2I also points out France's frustration with other EU partners and its will to find more efficient alternatives to CSDP.

Section 5. A bilateral alternative to CSDP?

In the preamble to the Treaty for Defence and Security Co-operation, France and the UK state that they commit to bilateral cooperation

> Mindful of their rights and obligations under the North Atlantic Treaty and, in the fields of security and defence, under the Treaty on European Union,
>
> Believing that greater defence and security co-operation strengthens the North Atlantic Treaty Organisation which remains the foundation of their collective defence and the forum for its implementation and reaffirming their commitment to supporting the role of the European Union's Common Security and Defence Policy in strengthening international security,
>
> Convinced that greater bilateral defence and security co-operation will reinforce those rights and obligations as well as the objectives contained in the treaties referred to above […].

Bilateral cooperation was thus presented as a way of reinforcing the two states' involvement in the international

[33] Florence PARLY, « L'Europe de la défense nécessite une culture stratégique commune », interview, *Le Figaro*, 24 June 2018. http://www.lefigaro.fr/international/2018/06/24/01003-20180624ARTFIG00161-florence-parly-l-europe-de-la-defense-necessite-une-culture-strategique-commune.php, accessed 16 May 2019.

organisations responsible for European defence, including CSDP. However, precisely because the treaty was signed outside the EU framework, it can be argued that it is the result of the Atlanticist and Eurosceptic orientations of the British government of the time.[34] Yet, as we saw, the treaty is also the result of a longstanding process of cooperation that started with the Saint-Malo Declaration in 1998 and that has resisted several changes in governing party both in France and in the UK. The Lancaster House Treaties were largely negotiated under Brown's Labour government and their signing by the Conservative-led coalition government can be a sign of cross-party support. But as Etienne de Durand argued:

> La relation franco-britannique n'est pas idyllique […]. Le traité se négocie difficilement dans un contexte de méfiance des deux appareils militaires. Le Franco-britannique n'est pas la panacée, mais il n'y a simplement rien d'autre.[35]

Traditionally, France has been attached to the idea of independence in national security and French foreign and defence policy decisions have been imbued with Gaullist

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[34] Alice PANNIER, "The Anglo-French defence partnership after the "Brexit" vote: new incentives and dilemmas, *Global Affairs*, 2 (5), 2016, pp. 481-490, and Alice PANNIER, "From one exceptionalism to another: France's strategic relations with the United States and the United Kingdom in the post-Cold War era", *Journal of Strategic Studies*, 40 (4), 2017, pp. 457-504. See also Falk OSTERMANN, "The end of ambivalence and the triumph of pragmatism? Franco-British defence cooperation and European and Atlantic defence policy traditions", *International Relations*, 29 (3), 2015, pp. 334-347.

[35] "The Franco-British relationship is not idyllic. The treaty was negotiated with difficulty in a context of mistrust between the two military teams. Franco-British is not a panacea, but there is simply nothing else". Etienne DE DURAND, "La cooperation européenne à la lumière des operation récentes", dans Fondation pour la recherche stratégique, "Londres, Berlin, Paris et la cooperation européenne en matière de défense", études & débats (02), Paris, Fondation pour la Recherche Stratégique, 2011, p. 11.

beliefs in the primacy and "grandeur" of the nation state. In this perspective, as Ronja Kempin argues, European security cooperation was seen originally as a French instrument to guarantee France could maintain its international role.[36] As it had lost its ability to play a forefront role on the international stage, for example by launching military interventions on its own, cooperation with other member states was seen as a workable alternative, on the condition that forces would not be integrated. According to another narrative, the EU was perceived as a prolongation of France and of French values and interests in the world.[37] The defence of France being tied to the defence of Europe, it seemed necessary to reinforce European capabilities for the continent to become strong in security. The two narratives share a common focus on autonomy in security affairs. In one narrative, this autonomy was for a France supported by a cooperative European framework, in the other, Europe itself was to be autonomous. But in any case, France was to inspire Europe's strategic choices. As a result, the failure of CSDP would mean France had few reasons to remain involved any more.

Lack of progress on military capabilities in CSDP, especially after the failure of the French 2008 EU Presidency, convinced the French that CSDP would remain a low-level crisis management vehicle.[38] There were few industrial breakthroughs and government and industry alike grew weary of the slow progress on collaborative projects. Moreover, France had had to realise that its traditional partner in the

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[36] Ronja KEMPIN, "France's Discourses on NATO Since the Kosovo-War", COPRI Working Paper 27, Copenhagen, COPRI, 2001.

[37] *Ibid.*

[38] Laura CHAPPELL, Jocelyn MAWDSLEY, Richard WHITMAN, "The National Priorities of Germany, France and the UK: Enabling or Constraining a Joined-Up EU Strategy", in Laura CHAPPELL, Jocelyn MAWDSLEY, Petar PETROV, (eds.), *The EU, Strategy and Security Policy: Regional and Strategic Challenges*, London, Routledge, 2016, pp. 169-85.

construction of the EU, was not ready to build and use defence capabilities in the way France had hoped. On the contrary, Germany had chosen to rely on NATO missile defence and had been reluctant partners on the issue of nuclear deterrence. They had abstained on Libya (and even almost voted against) at the UN Security Council. All this means that "there is no "triangle" of England France and Germany"[39] and that the UK remains France's only reliable partner in Europe.

As far as the UK is concerned, the development of a European defence has been met with caution for two main reasons. Firstly, even when Britain finally joined the EEC in 1973, it did not renounce its global ambitions and successive leaders insisted the UK had a role to play outside Europe which did not necessarily involve other European partners. Secondly, the role of outsider Britain adopted with regard to the EU was strongly associated with its ambition to become a "bridge" between the two sides of the Atlantic. British Atlanticism has aimed at keeping the US involved in European security, especially through its commitment to NATO, even if some governments have been keener to acknowledge the role CSDP could play, like Tony Blair's Labour government did after the signing of the 1998 Saint-Malo Declaration. But by 2010, at the time of the signing of the Lancaster House treaties, Britain did not actively participate in CSDP anymore. The more Eurosceptic Conservative members of the coalition, like then Defence secretary Liam Fox, strongly influenced the government's attitude to new EU initiatives in the field of defence which were repeatedly vetoed. On the other hand, war weariness was widespread, especially among Liberal Democrats and some Conservatives. The consequences of the 2003 war in Iraq meant Prime Minister Cameron and Foreign Secretary Hague's liberal interventionalism was not

[39] Etienne DE DURAND, *op. cit.*, p. 11.

fully embraced by members of the coalition, which also had consequences on the country's relationship with the USA. In this context, cooperation with France was seen as way for Britain to satisfy its ambition to retain its global power status while neither getting further involved in CSDP missions nor compromising its traditional Atlanticism.[40]

Therefore, albeit for different reasons, France and the UK were frustrated with CSDP. As Etienne de Durand put it:

> […] il faut être très clair: la PESD n'est pas l'Europe de la défense. La PESD (désormais rebaptisée "PCSD") n'a jamais été pensée comme telle par les Français et les Britanniques, les partenaires initiaux du projet. Il s'agissait avant tout d'un outil de gestion de crises de bas niveau (en Afrique essentiellement) où l'OTAN n'interviendrait pas. […] Quant aux outils institutionnels existants, prévus par le Traité de Lisbonne, ils ne sont pas utilisés et ne le seront très probablement pas. Il ne faut pas se faire d'illusions. Les dispositifs institutionnels mis en place vont au-delà de la volonté politique de les utiliser.[41]

In recent years, defence spending has slightly increased. In Western Europe, military spending in 2017 had increased for the third consecutive year, up by 1.7% in comparison with 2016 and by 12% in Central Europe.[42] The EU Defence Action

[40] Oliver DADDOW, "Interpreting the Outsider Tradition in British European Policy Speeches from Thatcher to Cameron", *Journal of Common Market Studies*, 53 (1), 2015, pp. 71-88.

[41] "[…] it must be very clear: the ESDP is not Europe's defence. ESDP (now renamed "CSDP") has neven been thought of as such by the French and the British, the original partners of the project. It was more of a tool for crisis management of a low level (in Africa mainly) where NATO would not intervene. […] As for the institutional tools under the Lisbon Treaty, there are not used and will most likely not be used. We should not kid ourselves. The institutional arrangements in place go beyond the political will to use them". Etienne DE DURAND, *op. cit.*

[42] Stockholm International Peace Research Institute, *SIPRI yearbook 2018: Armaments, Disarmament and International Security*, Stockholm, SIPRI, 2018, p. 6. https://www.sipri.org/sites/default/files/2018-11/yb_18_summary_en.pdf, accessed 15 May 2019.

Plan introduced a €500 million per year budget that would be devoted to research and €5 billion per year for procurement. However, even if these figures might be encouraging for the future of CSDP, there is no guarantee that the money will meet French strategic priorities or French industrial interests. Besides, although extra-spending and extra-ambitions by other European member states were welcomed by French officials, it remains unclear whether they could meet the strategic targets set by France. Germany's aims in particular seem to diverge from France's threat assessment. Even though the country agreed in 2011 to use the Bundeswehr for overseas deployment and has recently planned a rise in the number of its soldiers to 200,000 by 2025,[43] the number of its professional military personnel remains inferior to France's and – for historical reasons – Germany still remains a prudent actor as far as deployments are concerned. This explains why French Defence minister Le Drian was keen to ensure that Brexit would not affect the Lancaster House Treaties.

British Defence minister Michael Fallon's initial response to Brexit was to stress the UK's Atlanticism and reaffirm the role of NATO as the "cornerstone of our defence".[44] Yet Britain will continue to face the same threats as the continent. As far as security is concerned, MI5 director general Andrew Parker insisted that British and EU security depended on further collaboration between British and European security

[43] Tobias BUCK, "Germany plans to increase size of armed forces", *Financial Times*, 29 November 2018. https://www.ft.com/content/5d79501a-f3e5-11e8-ae55-df4bf40f9d0d, accessed 16 May 2019.

[44] Department for Exiting the European Union, *Foreign policy, defence and development: A Future Partnership Paper*, 12 September 2017, par. 3. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/643924/Foreign_policy__defence_and_development_paper.pdf, accessed 14 May 2019.

agencies.[45] High Representative Federica Mogherini similarly stressed that "the security of the United Kingdom is our own security. And the security of the European Union is the security of the United Kingdom. There are bonds that cannot be broken. Politics may change, but some realities do not change".[46] Future arrangements in the field of security are therefore crucial both for the EU and the UK, and Michel Barnier quickly announced that, given the issue's importance, the EU wanted to avoid "any trade-off between security and trade" even if Brexit inevitably would have consequences on future cooperation.[47]

Besides, the UK's commitment to NATO as the main defence actor in Europe may raise questions given the attitude of the USA which may threaten the future of the organisation. Even before Donald Trump was elected President, the US insisted European member states of NATO should contribute more to their own defence. President Obama's Asia-oriented foreign policy confirmed it was now urgent for Europeans to play a greater role in the defence of their own continent but also in military operations in their immediate neighbourhood. Trump's election did not change these broad strategic decisions. It even reinforced doubts about the USA's commitment to NATO, Trump having described the organisation as "obsolete" and suggested the US would

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[45] Andrew PARKER, MI5 Director General, speech, BfV Symposium, Berlin, 14 May 2018. https://www.mi5.gov.uk/news/director-general-andrew-parker-speech-to-bfv-symposium, accessed 17 May 2019.

[46] Federica MOGHERINI, quoted in European Union External Action, "Brexit: EU keen to ensure closest possible cooperation with UK for mutual security and defence", eeas.europa.eu, 15 May 2018. https://eeas.europa.eu/headquarters/headquarters-homepage_en/44590/Brexit:%20EU%20keen%20to%20ensure%20closest%20possible%20cooperation%20with%20UK%20for%20mutual%20security%20and%20defence, accessed 17 May 2019.

[47] *Ibid.*

withdraw from it unless its allies were ready to contribute more.[48]

But beyond NATO, it is the very UK-US "special relationship" that has been questioned. Theresa May was the first foreign head of government to meet Trump after his inauguration as President. The two leaders insisted on the "bonds of history, of family, kinship and common interests" between the two countries on which closer bonds, in commerce, business and foreign affairs could be built.[49] Yet recent developments like Trump's unilateral decision to withdraw from the Paris climate accord, to move the US embassy in Israel to Jerusalem or to scrap the Joint Comprehensive Plan of Action signed with Iran, or to withdraw the US from the Intermediate-range Nuclear Forces (INF) treaty show the UK's vision is closer to that of other EU countries than to America's[50] and that even if cooperation with Europe, and in particular with France, is not Britain's first choice, there is no other credible option, even after Brexit.

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[48] "Transcript: Donald Trump on NATO, Turkey's Coup Attempt and the World", *New York Times*, 21 July 2016. https://www.nytimes.com/2016/07/22/us/politics/donald-trump-foreign-policy-interview.html?_r=1, accessed 14 May 2019.

[49] Theresa MAY, PM press conference with US President Trump, Washington DC, 27 January 2017. https://www.gov.uk/government/speeches/pm-press-conference-with-us-president-donald-trump-27-january-2017, accessed 14 May 2019.

[50] Simon MCDONALD, Permanent Under Secretary and Head of the Diplomatic Service, Foreign and Commonwealth Office, speech, Royal United Services Institute, London, 11 May 2018. https://rusi.org/event/sir-simon-mcdonald-delivering-uk-foreign-policy, accessed 17 May 2019.

Conclusion

French and British diplomats, senior civil servants and senior military officers have all very quickly signalled that bilateral cooperation would move forward after Brexit, just as it survived political changes in both countries in the last few years. As far as military cooperation is concerned, ties between the two countries' armed forces are now much stronger than they were 9 years ago when the treaties were signed, with French and British chiefs of staff and senior officers meeting regularly. As far as industrial cooperation is concerned, the latest agreements signed by French and British Defence ministers have confirmed the forefront role MBDA is expected to play in the future of bilateral, and even European integration. Politically however, as Brexit negotiations unfolded, the relation between French and British leaders has got tenser. Even if bilateral cooperation is unlikely to be jeopardised by Brexit, further political tensions could considerably slow it down.

As far as European defence is concerned, CSDP is unlikely to make serious progress. Brexit has led EU member states, to launch (or relaunch) a number of initiatives that were previously vetoed by the UK. But there were few concrete decisions about the future of CSDP at the 2016 Bratislava and later summits, which has served to underline the fact that the UK was far from being sole responsible for the lack of progress on European defence. The CSDP is therefore likely to remain an instrument with limited use and ambitions.

It is however possible to think of European defence as being in fact composed of several over-lapping institutions led by two or more states. In this perspective, Franco-British cooperation is a major contribution to the defence of the continent. Keeping the UK engaged in European security issues is essential at a time when the US commitment

to European defence has become unpredictable and the continent is faced with an increasing number of threats.

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His PhD dissertation studied the foreign and defence policy decision-making process in the UK through the development of Franco-British cooperation and the 2011 war in Libya. His most recent article ('Towards 'Global Britain'? Theresa May and the UK's Role in the World after Brexit') was published in the *Observatoire de la société britannique* in 2018. Other articles include: 'Little Britain? The Debate on Britain's Foreign and Defence Policy', *Revue française de civilisation britannique*, 20 (3), 2015 and 'British Foreign and Defence Policy since the End of the Cold War: the State and Security Governance', *Observatoire de la société britannique*, 16, 2014.

Part 4.
Economic and social issues of the relationship between France and The United Kingdom

Chapter 8.
Is the effective enforcement of European-wide social and economic values possible after Brexit?

Matthias Kelly Q.C.

This paper addresses the third issue of this symposium, namely the divergences and convergences between France and the United Kingdom as European Union Member States at present and European partners in the future[1].

It looks at existing European-wide (and global) legal standards to combat human trafficking, particularly in the field of labour trafficking, and ask how, post-Brexit, we can continue to co-operate across borders, especially as human trafficking is a global phenomenon. It will examine the relevant

[1] "The divergences and convergences between France and the United Kingdom as European Union member states today and European partners tomorrow in social issues, migration, judicial co-operation, defence co-operation, cultural and academic exchange and emerging modes of post-Brexit governance."

European jurisprudence and the national performance of the UK and Ireland.

In Ireland, the National Parliament, (the Oireachtas) enacted the Criminal Law (Human Trafficking) Act 2008 (as Amended), which is concerned with, according to the view, expressed by the Irish judiciary, criminal offences relating to human trafficking, as opposed to conferring rights on its victims. Mr Justice Hogan (currently an Advocate General at the Court of Justice of the European Union) in the case of *Lin v Governor of Cloverhill Prison* [2014] IEHC 214, [2014] 1 IR 134, noted at paragraph 21:

> The main effect of the Act of 2008 is to create specific criminal offences, penalising persons who engage in the trafficking of adults and children. It does not, as such, confer any rights or entitlements on any trafficked person.

The same is true in the UK with the Modern Slavery Act 2015. It, likewise, creates offences[2], but does not, of itself confer a right not to be enslaved. However the wider legal architecture does.

The European Convention on Human Rights and Fundamental Freedoms spans all the nations of the continent of Europe and beyond. In that sense, it is a good starting point because its operation does not depend upon any individual member being or remaining a member of the European Union.

All states currently members of the European Union are parties to the protocol to the United Nations Convention Against Transnational Organised Crime (the "*Palermo Protocol*"), which aims to prevent, suppress and punish trafficking in persons, especially women and children. The European Union signed that protocol on the 12th December

[2] Section 1: *Slavery, servitude and forced or compulsory labour.*, section 2: *Human trafficking.*

2000 and most other Member States signed around the same time. Article 216(2) of the Treaty on the Functioning of the European Union provides:

> Agreements concluded by the Union are binding upon the institutions of the Union and its Member States.

Thus, as an international agreement signed by the EU, it forms part of EU law binding on all member states. The UK having signed on 14/12/00 (ratified on 9/2/16), Ireland signed on 13/12/00, ratified on 17/10/10, France signed on 12/12/00 and ratified on 29/10/02.

In case 181/73, *Haegeman* [1974] ECR 449, the Court of Justice confirmed that international agreements binding the EU, form an integral part of European Union law. Recital 1 in the Preamble to Directive 2011/36/EU on Preventing and Combatting Trafficking in Human Beings and Protecting its Victims recognises such trafficking as "a serious crime" and "a gross violation of human rights".

Article 2 of the Directive, in practical terms, defines "trafficking". Article 2(1) provides that the following intentional acts must be punishable:

> The recruitment, transportation, transfer, harbouring or reception of persons including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Article 2(3) states:

> Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices

> similar to slavery, servitude or the exploitation of criminal activities, or the removal of organs.

Article 18(1) of the Directive[3] requires Member States:

> To take appropriate measures such as education and training, to discourage and reduce the demand that fosters all forms of exploitation relating to trafficking and human beings.

The right not to be subjected to forced or compulsory labour or trafficked as a human being is among the most fundamental of all human rights. That right gives rise to positive (as opposed to negative) obligations upon the State under international law which are independent of European Union law. These international law obligations do form a useful reference point for the identification of prevailing ideas, concepts and values for both the United Kingdom and the European Union to interpret, understand and operate effective systems. We should remind ourselves that Article 4 of the Universal Declaration of Human Rights recognises as a universal right:

> No one shall be held in slavery or servitude: slavery and the slave trade shall be prohibited in all their forms.

That concept of human dignity forms a fundamental bedrock of the Universal Declaration of Human Rights. For example, the Supreme Court of New Zealand in *New Health NZ v South Tarankai DC* [2018] NZSC 59; [2018] 4 LRC 592 at paragraph 231 underlines that point. There the Court was of the view that the concept of human dignity underlay both the International Convention on Economic, Social and Cultural Rights as well as the Universal Declaration of Human Rights.

Article 8(1) to (3)(a) of the International Covenant on Civil & Political Rights provides:

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[3] Directive 2011/36/EU.

(i) No one shall be held in slavery and the slave trade in all their forms shall be prohibited;

(ii) No one shall be held in servitude;

(iii) no one shall be required to perform forced or compulsory labour…

Ireland, France, the United Kingdom and virtually every other European nation is a party to a number of international agreements that expressly protect the rights of victims of human trafficking and affirm the entitlement of victims to full respect for their human rights. There is, for example, the Council of Europe Convention on Action Against Trafficking in Human Beings *("The Warsaw Convention")*. That convention establishes a monitoring mechanism in the form of the Group of Experts on Action Against Trafficking in Human Beings, known as "GRETA", which carries out an evaluation of the party's implementation of the Convention. It does that regularly for all nations. This is quite independent of membership of the EU and the UK will remain subject to its scrutiny.

That is an example of how, independently of membership of the European Union, the United Kingdom and the European Union (Ireland and France included) can work together to prohibit trafficking. The "Delphi Indicators" so called because they are based upon the Delphi methodology. That is the methodology used to reach consensus, in this case, on the indicators of human trafficking. This method was developed in the 1950s and has been widely used in the social, medical and political sciences ever since. The Delphi methodology produced a result based on a consensus from a wide group of experts. Those experts were drawn from the then 27 EU Member States[4], from Police, government, academic and research institutes, as well as

[4] That being the number of members in 2006. Croatia joined 2013, bringing the membership to 28.

non-governmental organisations, international organisations, labour inspectorates, trade unions and judiciary. They are widely respected.

The Delphi Indicators consist of four sets of operational indicators for adult and child victims of trafficking for labour or sexual exploitation. Each set is a structured list of indicators relevant to the trafficking definition. There are six dimensions:

(i) Deceptive recruitment;

(ii) Coercive recruitment;

(iii) Recruitment by abuse of vulnerability;

(iv) Exploitative conditions of work;

(v) Coercion at destination;

(vi) Abuse of vulnerability at destination.

Given that the EU and the global community are all agreed that trafficking in human beings should not be permitted, it is surely possible for the United Kingdom and the EU to work together in super-national organisations to help eradicate this scourge of the 21st century.

Detecting the true level of modern slavery is difficult. It is difficult because of its very nature. Those who are trafficking human beings do not proclaim what they are doing from the rooftops. Those who are trafficked remain silent and fearful. It is often said that those who are trafficked are hidden "in plain sight" in our modern societies – car washes, garages, factories, nail bars, fishing fleets, the sex industry, etc. – all are likely venues for slave labour.

There are many examples of how slavery is facilitated by visas, for example, visas that tie the employee to a particular employer. In the Middle East these are known as "Kafla" or "sponsorship". In the construction of the infrastructure

for the 2022 World Cup in Qatar, many commentators have identified the enslavement of foreign migrant construction workers preparing venues and infrastructure as operating under that system. Under this system, migrant workers require "sponsorship" of an employer to obtain work. On arrival, it is said, typically, their passports are confiscated and they are prohibited from changing employers, irrespective of how abusive the employer becomes.

In the United Kingdom, a system operates called the "Overseas Domestic Worker Visa". That has been described, by Anti-slavery International as the United Kingdom's British Kafla system.

These Visas, known colloquially as "Tied Visas", were introduced by the United Kingdom Government in 2012. Their effect has been that employees, typically from poorer countries, such as, for example, the Philippines or Indonesia, cannot legally remain in the United Kingdom if they change employers and most often their employers are, in fact, wealthy families who have brought them over from the Gulf. That system previously permitted Domestic Worker Visas since 1998 to help eradicate slavery and abuse reported by NGO's. However, that system had problems and were reformed in 2002 then abolished in the United Kingdom in 2007. However the Coalition Government of former Prime Minister David Cameron reintroduced it in 2012, despite much opposition.

In 2002, the rules had changed to break the linkage between the employee and employer in the Tied Visa system in the United Kingdom. As already pointed out, it was changed in 2012. However, despite this, the United Kingdom government's policy is summarised as follows:

> An overseas domestic worker's entry to the UK is permitted because their employer is entering the UK and needs / wants to bring their domestic employee with them.

That is the rationale of the policy as explained in an employment tribunal case "*ET/3400174/2013 of 17/9/15*".

There is strong evidence that workers from Africa and Southeast Asia are trafficked into the European Union in order to work in slave-like conditions in fishing fleets. A case[5] alleging precisely that is in the process of being concluded[6] in Dublin. Until this case was brought and argued in Court the workers were "tied" to one employer with no effective enforcement of workplace rights. The tied visa bound the worker to the employed and the worker was not free to seek another employer. The case challenged the legality of that system[7].

The relevant European Union Directive is 2011/36/EU. It expresses, in its preamble, the clear view that "trafficking in human beings is a serious crime, often committed within the framework of organised crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union preventing and combatting trafficking in human beings is a priority for the Union and the Member States" – and no one would disagree with that. I do not think that anyone in the United Kingdom could disagree with it either. The question then becomes one of how the United Kingdom can continue to play its role in combatting trafficking in human beings when/if it leaves the EU. Measures which are purely national are, in my view, wholly inadequate to deal with this and bound to fail. It is a global phenomenon. People are trafficked from around the world to Europe. Unless everyone acts together the problem

[5] *ITF v Minister for Justice & Equality, Ireland and Others.*

[6] It has now been resolved through mediation between the Plaintiff, the ITF and the Irish Government who were the Defendant.

[7] https://uk.reuters.com/article/ireland-labor-fishing/migrant-fishing-workers-in-ireland-to-get-protections-against-slavery-idUKL5N2252ER https://www.theguardian.com/world/2019/apr/22/non-eea-migrants-on-irish-trawlers-gain-new-immigration-rights

will continue to be hidden, and if it is hidden it will continue to flourish and human misery will be perpetuated.

It seems to me that post-Brexit it is going to be important to establish transnational agencies, by which I mean agencies which span Europe (whether it be the European Union or the Council of Europe) to which the United Kingdom and others can subscribe in order to take effective enforcement action. Effective enforcement action will involve the sharing of intelligence, joint operations and joint enforcement. For example, money which is generated in a Member State as a result of trafficking will have to be pursued[8] through other countries and cities, perhaps through London, and probably other global centres in order to find out where it has gone and thus provide valuable evidence. The United Kingdom cannot, in conscience, if it is committed to freedom and democratic values, sit back and ignore that[9]. Nor can the European Union. Such effective enforcement and suppression mechanisms are going to have to be put in place[10]. If we all are to operate separately, we will have the absurd position where a ship, for example, can pull into Rotterdam, be registered elsewhere and no one in Rotterdam will have the remotest idea whether or not those who crew the ship are in fact enslaved. Likewise, woman and / or

[8] "Chasing the money and paper trail".

[9] In the withdrawal agreement it is recorded at Article 8 that after withdrawal the UK will not have access to EU networks, information systems or other data bases in the EU. However, Article 50 contains a derogation from Article 8 which relates mainly to the movement of goods, customs duties, VAT and medicine licencing.

[10] In so far as the European arrest warrant system is concerned that will end with Brexit, as there is no provision for its continuation. That leaves the UK unable to extradite criminals and those wanted in another EU state. Likewise, the UK will be unable to easily obtain the extradition of those it wishes to pursue for criminal matters in the UK. This is a profound weakness and isolationist approach which, no doubt will be availed of by those seeking to avoid a criminal trial.

children being trafficked for sexual exploitation. These issues are too important to be left to the squabbling of politicians.

The preamble to the Directive of 2011, which itself was a replacement for a Framework Decision (2002/629/JHA), at paragraph 2 records:

> This Directive is part of global action against trafficking in human beings, which includes action involving third countries as stated in the "Action paper on strengthening the Union's External Dimension on Action Against Trafficking in Human beings"; towards global EU action against trafficking in human beings, approved by the Council on the 30th November 2009.

It goes on to record:

> In this context, action should be pursued in third countries of origin and transfer of victims, with a view to raising awareness, reducing vulnerability, supporting and assisting victims, fighting the root causes of trafficking and supporting those third countries in developing appropriate anti-trafficking legislation.

In the light of that, on the face of it, there can be little doubting the commitment of the European Union to take action against trafficking in human beings. One might lament that there has not been as much success as there possibly could have been, but the legal framework is clearly there. In the United Kingdom, a document was published, sponsored jointly by the Home Office and the Scottish Executive, entitled "UK Action Plan on Tackling Human Trafficking". It was published in March 2007.

In 2016, in the United Kingdom, the Police and other relevant enforcement authorities identified 3,804 people who were thought to have been the victims of modern slavery[11], which represented a 16% increase on 2015, representing an unacceptable and massive rise. Those figures came from the National Referral Mechanism which is a government

[11] Source: UK Annual Report on Modern Slavery 2017.

safeguarding framework that aims to help potential victims of trafficking.

In England, Wales and Northern Ireland, human trafficking offences are contained in two separate acts: the Sexual Offences Act 2003, which criminalises trafficking for the purposes of sexual exploitation; and the Asylum & Immigration (Treatment of Claimants etc.) Act 2004, which criminalises trafficking for forms of non-sexual exploitation. There is further provision in the Coroner's & Justice Act of 2009, which criminalises holding another person in slavery or servitude, or requiring them to perform forced or compulsory labour without the need to prove trafficking.

The Serious and Organised Crime Agency ("SOCA"), in the United Kingdom, also uses a wide range of criminal justice and non-criminal justice tools in an attempt to bring perpetrators of serious and organised crime to justice. There is, thus, a shared value between the United Kingdom and the European Union.

Article 2(4) of the Directive deals with one of the most common responses to trafficking: "But they consented" is a common response. It deals with that reaction in this way:

> The consent of a victim of trafficking in human beings to the exploitation, whether intentional or actual, shall be irrelevant where any of the means set forth in paragraph 1 have been used. Paragraph 1 relates to 'the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'.

It is thus clear from the European perspective, as it is in the United Kingdom, that consent is utterly irrelevant.

The most important international treaty, in the context of Europe, is the European Convention on Human Rights 1950. Article 4 of that Convention provides that no one shall be held in slavery or servitude and that "subject to very limited exceptions", no one shall be required to perform forced or compulsory labour. The European Court of Human Rights has held that trafficking in human beings falls within the scope of Article 4 of the Convention, referring to two further relevant international treaties – the Palermo Protocol to the UN Convention on Transnational Organised Crime and the Council of Europe Convention on Action Against Trafficking in Human Beings in 2005 (see *Rantsev v Cyprus and Russia*, No. 25965/04, 2010/1 at paragraphs 282 to 286). Both of those treaties expressly require the States who are parties to prevent trafficking, punish traffickers and protect victims. There is a positive duty upon the State. It is not simply a case of condemning the activity. The treaties, as does the Directive, imposes positive proactive duties upon the State. The United Kingdom is currently bound by those, and, I hope will continue to be. Each and every member of the European Union has likewise got a specific positive duty.

By virtue of Article 82(2) and Article 83(1) of the Treaty on the Functioning of the European Union, trafficking in human beings falls within the competence of the European Union. It is specifically prohibited by Article 5 of the Charter of Fundamental Rights of the EU and those provisions of the Charter of Fundamental Rights of the European Union bind Member States when they are implementing Union law. Directive 2011/36/EU imposes positive obligations on participating Member States with the aim of preventing and combatting trafficking in human beings and protecting its victims. Article 18 of the Directive, for example, requires Member States "to take appropriate measures - to discourage and reduce the demand that fosters all forms of exploitation relating to trafficking in human beings".

Article 6 and 7 of the International Covenant on Economic, Social and Cultural Rights of 1966 guarantees, amongst other things, the right to work, which includes the right of everyone to the opportunity to gain his living by working which he freely chooses or accepts and the right of everyone to the enjoyment of just and favourable conditions of work, which conditions must include, as a minimum, fair wages, safe and healthy working conditions and reasonable limitation of working hours. The European Social Charter (Revised) of 1996 recognises, in Articles 1 to 4, the right to work, the right to just conditions of work, the right to safe and healthy working conditions and the right to a fair remuneration. Those are all, surely, things that the United Kingdom can and will subscribe to, and thus participate in transnational organisations to enforce those.

The International Labour Organisation has long been focussed on the issue of vulnerability of international migrants to forced labour. In its report "Global Estimates of Modern Slavery – Forced Labour and Forced Marriage 2017", the ILO concluded that 40 million people were victims of modern slavery. That figure included 25 million people in forced labour and 15 million people in forced marriage. In short, there were 5.4 victims of modern slavery for every thousand people in the world in 2016. It is often forgotten that women and girls account for 71% of modern slavery victims, debt bondage affects 50% of all victims of forced labour, and children constitute 25% of victims of modern slavery. The ILO recorded that in the past five years 89 million people have experienced some form of modern slavery for periods of time ranging from a few days to the whole of five years. The problem is endemic and must be tackled.

Slavery has been with us for many hundreds, if not thousands, of years and yet we don't seem to have eliminated it. Do we have the will to do so? Recently in a highly unusual

move four UN Special Rapporteurs wrote a joint submission to the Government of Ireland asking a series of pertinent questions related to Ireland's handling of issues and its enforcement of labour protection laws concerning migrant labour, particularly in its fishing fleet. The four were the Special Rapporteurs on:

(1) The human rights of migrants,

(2) Contemporary forms of racism, racial discrimination, xenophobia and related intolerance.

(3) Trafficking in persons, especially women and children and

(4) Contemporary forms of slavery including its causes and consequences.

This followed upon the commencement in Dublin of the legal action brought by the ITF against the Irish Government which alleged the Irish Governments' "Atypical Workers Permit Scheme", under which non-EEA workers are permitted to work in Ireland, embeds slavery by tying labour permits in its fishing Industry to a specified employer or fishing boat. That case, in the High Court in Dublin, is coming to a conclusion following a 3-day hearing and a two-day mediation, so I don't wish to comment further on it, at present. The facts behind the case do, however, show that we as citizens and Lawyers, do have to be pro-active in our attempts to eradicate slavery and trafficking in human beings in Europe, particularly in enforcing existing laws and International standards rather than merely enacting such laws and failing to enforce them, something which can be described as no more than window dressing.

Let me end with the case of Cartwright.[12] in 1569 which together with the case of *Somerset v Stewart in 1772*[13] the English Courts held that "England was too pure an air for a slave to breathe in." I often wonder if those ringing words find an echo in our 21st century world, and if they do how real they are for those entrapped in modern slavery in a car wash, a brothel, a fishing trawler, a nail bar, not to mention a domestic home. This is an area where post-Brexit, we in Europe, whether in or out of the EU need to engage is real and meaningful co-operation, in the name of the values that we as Europeans hold dear.

Author's biography

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[12] The case is reported by John Rushworth in his 1721 summary of John Lilburne's case of 1649.

[13] Somerset v Stewart (1772) 98 ER 499.

Chapter 9.
Origins, Development and Future of the ERASMUS programme

Hywel Ceri Jones

The word "education" did not feature as such in the original Founding Treaty of Rome. Despite the Messina meeting in 1955 signalling that the new Europe needed close links with universities, and despite several unsuccessful attempts in the 1960s, education had been more or less taboo on the European political agenda. France, most especially, was concerned that action in education might impinge on its concept of national sovereignty. It argued that cooperation should be restricted to an inter-governmental approach, excluding the European institutions from playing a catalytic and organising role. Germany too was sensitive about the implications for its Federal system in which education was a devolved Lander responsibility. It is difficult now to realise that in the early 1970s, 0.5% only of the EEC student population came from another Member State. Other than

the foreign language teaching assistantship scheme which operated only between France, Germany and UK on a bi-lateral basis[1], there was very little interchange involving other European countries, and certainly not involving areas of the curriculum other than foreign language teaching.

By 2020 the ERASMUS+ programme will have involved over 9 million in all - students, apprentices, young people, volunteers and staff. It has engaged virtually all European Higher Education and, through its ERASMUS Mundus dimension connects universities across the globe. Its quality ERASMUS brand is widely recognised throughout the world. "Doing an ERASMUS" has become a tried and trusted way for students to enhance their knowledge and skills, thereby improving significantly their employability and career prospects[2].

What a different picture today after 40 years of European collaboration, especially as a result of the impact of ERASMUS. Stories abound from successive ERASMUS generations[3] of alumni all over the world to confirm the

[1] The bilateral scheme for the exchange of language assistants between the UK and France dates back to 1904, whilst Germany established its bilateral scheme with France and the UK a little later. Some spent their time in universities; others led English conversation classes as assistants in schools. These were valuable experiences in helping British students to improve their foreign language skills, exposing them to other cultures. But they touched a tiny percentage of the student population. The other European countries had virtually no incoming or outgoing students from Europe. In practice, many regions of the world remained inaccessible to British students.

[2] Research indicates that mobile university students are twice as likely to have found a job one year after graduation compared to their non-mobile counterparts, one in three higher education trainees are offered a position in the company with which they trained abroad and one in 10 trainees go on to create their own company, 92% of European employers are looking for candidates with transversal skills when recruiting, and evidence shows that mobile students acquire these skills better having studied abroad.

[3] Generazione ERASMUS: *L'italia dalle nuove idée A cura di Francesco Cap-*

extent to which their ERASMUS experience provided a transformative, life enhancing dimension to them and for their careers[4]. One happy unintended consequence of the programme is that there are now more than 1 million ERASMUS babies in the world!

Let me trace the early history and the difficult political journey to secure the adoption of the ERASMUS programme. The Paris European Summit held in November 1972 marked a decisive shift of political attitude by the founding six Member States towards the future development of the then European Economic Community (EEC) to emphasise "its human face". In the words of the Paris *communiqué* they agreed "to pay attention to no-material values as befits the genius of Europe." The Paris Summit gave rise to the opening of European Environmental Policy, a new thrust in favour of cooperation with the third world and the launch of the first Social Action programme, and (particularly important to Wales), creation of a European Regional Development Policy and Fund (ERDF).

This was the political context when, together with Ireland and Denmark, the UK entered the EEC in 1973, making then a total of 9 Member States, a third of what we now know after successive enlargements. They were in effect joining the much larger and more ambitious idea of Europe as a community, not simply a Common Market and its associated commercial arrangements, as some Brexiteers have repeatedly argued, re-writing history to fit their ideology.

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pé, Milano, Franco Angeli, 2011; Benjamin FEYEN and Ewa KRZAK-LEWSKA (eds.), *The ERASMUS Phenomenon - Symbol of a new European generation?* Frankfurt, Peter Lang edition, 2013.

[4] Anne CORBETT, *Universities and the Europe of Knowledge*, Palgrave Macmillan, 2005; Commission Européenne, *Histoire de la coopération Européenne dans le domaine de l'éducation et de la formation*, *Comment l'Europe se construit: un exemple,* 2006; Muriel BOURDON, *L'Europe des universitaires*, Presses universitaires de Grenoble, Collection EUROPA, mars 2012.

Inspired by the retiring Commissioner Altiero Spinelli, the incoming Commission decided in 1973 to establish a Department for Education and Youth Policy for the first time. Spinelli had the vision to argue that a strong educational and cultural dimension was necessary to build an open, democratic Europe, dedicated to promoting peace and reconciliation across the European continent. I was privileged to be appointed as its first Head with the challenge of preparing proposals for a European Action Programme.[5]

The crucial challenge then was to give Member States the political assurance that engaging in education at European level would not lead to harmonisation of the educational systems, and that the European Commission would not seek to promote binding legislation on the Member States, the method of operation which typified its approach in fields such as agricultural policy and the Customs Union, requiring common European rules for their effective operation.

[5] Hywel CERI JONES was appointed to head the first education and youth policy department of the European Commission set up in 1973 and was responsible for developing the first educational cooperation programme at European level launched in 1976. He was promoted to director for education and training in 1978 and then in the 1980s led the Commission team which initiated, negotiated and managed the different EU flagship programmes, including ERASMUS, Comett, Lingua, Petra, Force and Youth for Europe. With the successful launch of these programmes, the Commission decided to establish a separate Task Force for human resources, education, training and youth policy with Hywel CERI JONES as its Director, reporting directly to Commissioner Vasso Papandreou. The Task Force successfully launched the TEMPUS scheme for Central and Eastern Europe and prepared the proposals which led to anchoring education in the Treaty, thus also providing the legal basis for the financing of educational cooperation by the EU budget. The Task Force prefigured the creation of a Directorate General for Education. At that point, Hywel CERI JONES was promoted to act as Director-General for employment, social policy and industrial relations in the Commission.

The charismatic presence and internationally acclaimed academic credibility of Professor Ralf Dahrendorf[6] was an important factor in securing the initial breakthrough in the Commission's negotiations with European Ministers of Education. This led in February 1976 to the agreement to the first programme establishing close cooperation between the educational systems in the EEC. Ministers also agreed that the European Commission could act as the facilitator and broker of the 22-point action programme and that an Education Committee be set up consisting of the Member States and the European Commission to oversee the cooperation.[7]

The original concept of the ERASMUS programme, dates back directly to this first programme, when it was agreed to promote joint courses of study between universities and higher education institutions". This was the first formulation of what was to develop as the core idea of the ERASMUS programme. I had proposed this formula to the Commission and to the Education Committee as a result of my previous experience when working at Sussex University.[8] The Sussex School of European Studies had broken new ground in the

[6] Professor Ralf DAHRENDORF was attributed the portfolio for Education, Science and Research in 1973. He left the European Commission in 1974 to take up his appointment as Director of the London School of Economics, the first foreigner to hold this important post. He was also responsible for the major breakthrough in the Council in negotiating the mutual recognition of qualifications for doctors.

[7] This first education action programme was adopted on the basis of a mixed Resolution of the Council and Ministers meeting within the Council. This double formulation was negotiated as a special political formula to recognise that there was some (deliberately unspecified) justification provided by the Treaty of Rome (most evidently in relation to the education of migrant workers), whereas other educational actions fell exclusively under the competence of Member States - a mixture of inter-governmental and *communautaire* competence. It was a unique formula in the conduct of the Council of Ministers.

[8] The first of the 7 new UK universities set up in the 1960s, following the recommendations contained in the Robbins report.

UK providing organised opportunities for all its students, whatever their major discipline - not only linguists – to pursue a year abroad as an integral and recognised part of their degree programme. I was convinced that such an idea could be developed on a European-wide basis. My personal experience of spending the year abroad as part of my Aberystwyth degree had a lasting impact on me as a committed Welsh European.[9]

Despite the diversity of systems for academic recognition and student financing, it took what turned into a 10-year development phase from 1976-1986 to demonstrate that the scheme could work well in practice[10]." The pioneering experimentation initiated during this period with credit transfer and modular units of study (the ECTS) proved to be full of promise for larger scale development. The scheme received the enthusiastic backing of universities and students across Europe."[11]

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[9] In 1957 I had arrived from the University of Wales College, Aberystwyth to teach as an Assistant for one year at the Lycée Dupuy de Lomé in Lorient to find that 95% of the Breton town had been shattered by devastating bomb attacks during the war, though they had all missed their primary target of the naval arsenal.

[10] Karen FOGG and Hywel CERI JONES, "Educational Cooperation 1973 to 1985", *European Journal on Education*, Volume 20 2/3, 1985; Wiley Speech by Hywel CERI JONES at the North of England Conference held in Liverpool in January 1983 on Education in the European Community.

[11] "In this initial period, it is interesting to note that the British Polytechnics especially played an important role in demonstrating the value of joint programming of studies and the mutual recognition of the period spent abroad. Several partnerships between French and British institutions were initiated at this time in the first generation of European joint study programmes. The three-way joint programme set up by Middlesex Polytechnic, the Ecole de Commerce at Reims and the Fachhochschule at Reitingen in the Federal Republic was an inspiring example at that time.

Two important political impulses contributed to creating a favourable context for presentation of the ERASMUS initiative. Firstly, the People's Europe report submitted by the Adonnino Committee to the Milan Council was well received by it in June 1985.[12] Adonnino called for a "comprehensive programme of EU inter-university exchanges and studies open to a significant section of the community's student population". In approving the Adonnino report, the Milan Summit echoed the political commitment made earlier at the Hague Summit of 1969 to engage young people much more actively in building Europe and developing a mentality of cooperation.

The second crucial factor was the parallel decision of the EU Summit to set the political target of 1992 for completion of the Internal Market. This gave added momentum to the ERASMUS and Comett initiatives, attracting wide public and private sector support for them as well as from universities. The idea of free circulation of students and researchers was increasingly linked to the central importance attached by the EU to the internal market and its four principles of free movement of services, goods, capital and persons. It was argued that future professionals in all fields should be able to act as multipliers of further European cooperation, developing a new kind of professionalism which would know best how to exploit the opportunities of the European Single Market, gained through experience of working and studying in another country and by acquisition of at least one foreign language.

The thorny question of mutual recognition of both academic and professional qualifications became a matter

[12] Luce PEPIN (ed.), *Histoire de la Coopération Européenne dans le domaine de l'éducation et de la formation Comment l'Europe se construit - un exemple*, Commission européenne, 2006; Luce PEPIN is a former Director of Eurydice, this volume provides an authoritative and official account of the history of European educational cooperation.

of growing policy concern.[13] This was especially important for young people and notably for teachers and trainers. The rapidly increasing number of business mergers and joint ventures of all kinds across the EU brought in their train of new patterns of voluntary mobility, especially for the highly skilled and qualified. Many firms gave a new European profile to their recruitment policies which in turn influenced the content of *curricula* at all levels, as the education systems sought to provide for these new needs.

Many signals followed of young people wishing to make their careers and plan their education and training in a European context. This coincided with the growing Europe-wide concern and consistent backing of the European Parliament to invest in people, their skills, their creativity and versatility as powerful forces for economic development.

During this period, the Gravier judgement in 1985 issued by the European Court of Justice had a profound influence on the legal debates on the place of education and training in the Treaty. A case had been brought by Françoise Gravier, a French national who wished to pursue a course in cartoon design at a Belgian art school in Liège. She took the Belgian authority to court on the grounds that, as an EC national,

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[13] Qualifications were but the tip of the iceberg. Concern grew about the barriers to movement which the educational systems were being called upon to help remove stereotyped conceptions and prejudices about other countries and other peoples. Jack Smith, General Motors international boss, summed up the problem on a global scale in an apocryphal tale he told at a Stockholm motor show.

Students at an international school were studying the automobile business. The Americans wrote a paper on the world's biggest and best cars. The English concentrated on the motor and the glory of the British Empire. The French topic was love and the automobile and the Italians never quite agreed on what their subject should be. The German devoted 12 volumes to the theory of the automobile, and the Swedes did a thesis on how to make cars for joy and fulfilment. Finally, the Japanese students came up with a strategic plan for 100% market share.

she should have been given a place on the same terms as Belgian students and not charged the higher foreign student fee called the minerval. The European Court accepted that there should be no discrimination between EC (now EU) nationals in terms of access to training and that the word "training"[14] should be deemed to cover university education.

Encouraged by the enthusiastic reactions and the rulings of the European Court of Justice, the Commission seized the opportunity to propose the full ERASMUS programme, building on its now well tested foundations. The difficult experience encountered by the Commission in its successful negotiation with the Council of the Comett programme (university-industry collaboration) led it to argue that the legal basis for ERASMUS should be justified by reference to both Article 235 (a catch-all article) and the vocational training Article 128 of the Treaty of Rome. On this combined legal basis, the Commission proposed to promote its objective "to secure a pool of manpower to provide a broader basis for intensified economic and social cooperation in the Community."[15]

The negotiations which led to the adoption of both the ERASMUS and Comett programmes owed a great deal to the determination and dynamic leadership of Commissioners Peter Sutherland and Manuel Marin, both of whom were passionately attached to winning what turned into a difficult period of confrontation in negotiation of these proposals within the Council, notably with the three largest Member States - France, Germany and the UK - which challenged the legality of the Treaty basis to approve and finance these programmes.[16]

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[14] 294/83 Gravier (1985) ECR 593.

[15] Luce PEPIN, *op. cit.*

[16] Hywel CERI JONES, "Tribute to two Founding Fathers of the EU's ERASMUS programme", *Federal Trust*, December 2017.

With the explosion of enthusiastic support from universities and students and effective lobbying of Prime Ministers at the London European Summit, the programme was finally agreed and officially launched in 1987.[17] A crucial role was played by a group of European Rectors led by Roger Dillemans following a seminar at Leuven University where the 30 rectors present agreed to directly lobby their respective Prime Ministers in the European capitals prior to the London summit. There is no doubt that the outstanding leadership qualities of Jacques Delors, President of the European Commission, strongly supported in particular by President Mitterrand[18], played an important role in finally persuading the reluctant Mrs Thatcher, thereby securing the political breakthrough at this tense Summit, much to the delight of universities and students across Europe.

With its historic symbolism and immediate appeal, the official title ERASMUS worked perfectly as an acronym - European Community Action Scheme for the Mobility of University Students. The programme was to make a quantum leap at this point in the size of EU budget allocated to ERASMUS and in the numbers involved. This would simply not have happened without the political legal breakthrough.

We can now see that the ERASMUS programme and its European credit transfer scheme (ECTS) have contributed in a significant way to the reform process in the EU higher education scene. Since 1987 the trio of programmes - ERASMUS, Comett (University - Industry Collaboration) and Lingua placed inter university and higher education cooperation in Europe on a much larger scale than any

[17] Council Decision of 15 June 1987 adopting the European Action Scheme for the Mobility of University Students (ERASMUS) (Doc 87/*327*/EEC), Official Journal of the European Communities.

[18] President Mitterrand had addressed an audience of students in Paris on Europe as the way forward, committing fully to support the ERASMUS programme.

previous international venture.[19] Following the fall of the Berlin wall, this pattern of education cooperation was given further impetus by the dramatic pace of political changes in Central and Eastern Europe after years under the Communist yoke. This led to the EU decision to launch from 1990-1991 the Tempus scheme, modelled on ERASMUS and Comett, tailored to respond to the reform needs to the countries of Central and Eastern Europe, adapting and opening up their higher education systems through cooperation with Western institutions.

Looking back, I recognise that the initial 10-year period of development and try-out provided a necessary phase of experimentation and confidence building. The basic architecture of the ERASMUS programme has remained fundamentally the same to this day in respect of its focus on universities and higher education, although the + in its present title now indicates the greater breadth and depth of its coverage.

Whilst the organised mobility of students within Europe continues to be the idea that caught the wider popular imagination, the keys to its continuing long-term success lie in its basic architecture. It is often still described incorrectly as an exchange programme. This misses the central point of the programme's importance to strengthening the long-term mission of universities seeking to embed a strategy of internationalisation through partnerships in their teaching and study programmes. Let me highlight three features which have contributed to the sustainable impact and quality of the ERASMUS programme.

Firstly, the decision to open up ERASMUS to students of all disciplines was perhaps the most significant innovation.

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[19] Hywel CERI JONES, "Promoting Higher Education's contribution to the developing European Community - the European Community Higher Education Programmes", *Prospects*, v21 n3, 1991, pp. 443-54.

Present and future labour market opportunities required graduates in all fields, not only law, economics and business studies, the capacity to work across the cultures through the medium of at least two and preferably three languages. ERASMUS students have come from all disciplines, not just from modern languages: from humanities and the arts through business and law, social and natural sciences, mathematics and computing, engineering, manufacturing, agriculture and veterinary science to medicine and nursing. The idea of a jointly awarded qualification represented a huge plus on the student's CV for his or her future career. In some cases, more than 3 or 4 universities have been involved in this multinational cooperation.

Secondly, the programme was conceived from the outset to promote initiatives on a voluntary and decentralised basis, not via the national authorities. The power of initiative was placed firmly in the hands of universities themselves to seek and develop partnerships abroad. With their own degree-awarding powers in most European countries, universities were to be the initiators and drivers of the process. The institutional engagement of the university authorities was seen as the *sine qua non* for a lasting, long-term effort to embed the capacity to mount such joint degrees or joint ventures. University authorities in particular were expected to give the assurance that the period of study spent abroad would be fully recognised as a necessary and integral part of the students' final qualification, and that it would be explicitly presented as such in the final degree or certificate. This precondition is now a key component of the ERASMUS Charter which participating universities must sign when committing to participation in the programme.

The decentralised approach adopted by the Commission led many universities to set up their own ERASMUS or European offices to assist in institutionalising their partnership

agreements, committing themselves institutionally more than ever before to a process of internationalisation of their teaching and study programmes. This commitment provided crucial backup to the vital decision which we also negotiated to underpin the ERASMUS programme by forging reciprocal cross-national arrangements regarding the financing of such exchanges, including the waiving of tuition fees and the provision of Commission top-up (complementary) grants to participating students towards their travel and subsistence which would complement the different national systems of student financing.

The third decision which has continued to make all the difference in the development of ERASMUS was to offer grants to academic and administrative staffs to help them to identify possible partners abroad and to plan jointly with their partners to prepare the necessary quality conditions governing the teaching and assessment of the joint courses. Over the years, this has helped build up mutual trust and professional friendships and enhanced mutual understanding of the different national systems and structures of *curricula* and degrees, as well as generating widespread confidence in the overall ERASMUS scheme. Thousands of grants have been awarded for both teaching and staff training assignments – so crucial to changing the European educational landscape, and later seeding the Bologna process.[20]

Education and training moved up the European political agenda. Fuelled by the dynamic of the ERASMUS and Comett programmes, mutual confidence grew between the different educational authorities. This certainly contributed to the successful negotiations leading to the introduction of a new chapter on education and vocational training policy in the Maastricht Treaty in 1993. This provided a clear legal basis for the future and made it possible subsequently for

[20] ERASMUS+ 2017, European Commission 2018.

the EU budget to be drawn on to finance the ERASMUS programme. The wording of the two articles in the Treaty make it totally clear that the idea of harmonisation of the education and training systems is ruled out. The explicit formulation of the primary responsibility of Member States on education policy and the complementary role of the EU are perfect examples of subsidiarity written into the Treaty.

The progressive expansion and appeal of ERASMUS were given further momentum when the Commission launched its first ERASMUS Mundus programmes at Masters level. Hundreds of Masters programmes have been supported as well as scholarships for thousands of students, involving over 80 countries from all over the world, including partners in India, China, Brazil, Russia and the USA. This world-wide scope of ERASMUS was further enhanced by the success of the special effort opened up by its International Credit Mobility Initiative involving non-EU partners around the world, funding short-term mobility of students, researchers and staff to and from Europe.[21]

The ERASMUS+ and Horizon 2020 (research) programmes were adopted as centrepieces of the EU's strategy of development for 2016-2020. Since 2014, ERASMUS+ has been developed as a programmatic framework, building from its original inter-university base and drawing inspiration from the previous EU initiatives in these fields.[22]

The + sign indicates that it now also provides ERASMUS opportunities to those working and studying in the fields of initial vocational and further education, previously much less involved in international collaboration. This greater breadth

[21] ERASMUS+, *Annual Report 2017,* European Commission, 2018.

[22] *Histoire de la Coopération Européenne dans le domaine de l'éducation et la formation, op. cit.*; See other Community programmes which progressively had an impact on the design of ERASMUS+: Communautés Européennes, Petra p. 121; Lingua pp. 122-3; Force and Eurotecnet, pp. 124-5; Tempus pp. 125-128; Youth Exchanges, pp. 129-130.

of the programme fits well into the EU wide concern to raise the status and quality of vocational education and training throughout Europe as a vital component of the EU strategy to promote lifelong learning. The + in the programme also signalled the opening of ERASMUS cooperation to help build schools fit for the 21st century, promoting a sense of global citizenship, and now also includes the European Solidarity Corps (launched in December 2016) incorporating the successful European Youth Voluntary Service.[23]

Future of the ERASMUS programme

I found it depressing that during this latest period of my daily BREXIT nightmare, the persisting uncertainties around the UK's strategy for its post-Brexit future should coincide with the release of the European Commission's exciting proposals for the next phase of EU development, particularly for the ERASMUS and Horizon Europe programmes (the research framework programme re-titled) for the period 2021-2027. Together, they have enriched and strengthened the long-term missions and performance of universities and other higher education institutions throughout Europe.

In view of the great popularity and success of the programme and its iconic world brand, the European Commission has proposed the doubling of its budget to 30 billion Euros for the period 2021-2027. This will make it possible to support up to 12 million persons and to reach with targeted support to engage more people from disadvantaged backgrounds or with special needs.

At the same time, the European Commission has proposed the budget for Horizon Europe should be increased to 100 billion Euros, the highest absolute increase ever to the well- known EU research framework programme. Horizon Europe will underpin the EU's collective effort to address

[23] ERASMUS+, *Annual Report 2017*, *op. cit.*

global challenges with a clear focus on the UN's Sustainable Development Goals through effective joint action. Over half the total budget will be devoted to tackling global challenges, with the target of 25% of this expenditure to support climate objectives and eco-innovation to support implementation of the Paris Agreement on climate change. The Commission has proposed that the special focus of Horizon Europe in respect of sustainable development and climate change be complemented by the ERASMUS programme which fund strategic and cross-disciplinary collaboration between universities on this theme.[24]

Setting this new level of ambition for Europe's global leadership in higher education development, science and innovation, both ERASMUS+ and Horizon Europe, working in synergy, will scale up international cooperation on an unprecedented scale, together they will also underpin the EU commitment in its forthcoming strategy 2021/2027 to continue to promote citizenship and its common values of freedom, tolerance and non-discrimination through education.[25] We can, I believe, look forward to substantial expansion of these EU engines of investment in research and education in support of what I hope will be a reformed EU anti-austerity economic strategy for the future of Europe.

Sadly, the dark shadow of Brexit has been cast on future UK participation. The turmoil and political impasse in the House of Commons and the exhausting Brexit psycho drama emphasise sharp continuing divisions across the UK and great public perplexity about the future of our economic, social, cultural and constitutional policies as well as the question of the future of the UK in Europe and the world.

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[24] Hywel CERI JONES, *Education & Research: The Future at risk*, IWA-Click on Wales, 9 July 2018, https://www.iwa.wales/click/2018/07/education-research-future-risk/

[25] http://ec.europa.eu/dgseducationculture/repository/education/news/2015/documens/citizenship-education-declaration

Whilst the political focus of the last months in Parliament has been to find agreement on the terms of the Draft Withdrawal Agreement, there has been little discussion of the scope and substance of the linked Political Declaration which sets out proposals for "a new, deep, special and comprehensive partnership between the UK and the EU". This draft text is an open-ended wish list, including maintaining engagement in the ERASMUS and Horizon, but its contents remain uncosted and we still have no idea of how long its negotiation would take between the UK and the EU. This blindfold text has done little to allay the increasingly voiced fears of the CBI and Trade Unions and most especially of universities and students about the future.

Participation of any third country in these EU programmes requires the signature of a new association agreement, subject to very specific conditions set by the EU.

Unless as I hope we succeed in stopping Brexit, and if the UK is to continue to be involved in Horizon Europe and ERASMUS "as a partner", it will fall into this category as a third country. The three conditions set by the Commission include:

- a fair balance regarding the contributions and benefits of participating in these programmes,

- financing of participation and the associated administrative costs;

- and exclusion from involvement in decision making about the programme.[26]

Third country status will in no way match the advantages of the present situation as a Member State. The UK has clearly influenced the priorities of the Horizon programme,

[26] The EU reserves the right to exclude third countries from parts of the programme where its economic or security interests might be threatened. Look at the row over future UK participation in the Galileo satellite project to see what this might mean.

often providing a leading and coordinating partner in the funded projects, and, in respect of the current Horizon 2020, has paid in 20% less than it has received[27] in funding.[28]

The call for a "people's vote" on Brexit intensifies. This is the moment for the university and higher and further education sector throughout the UK, particularly students and young people of all ages, to stand up once again to voice their opposition to the negative dynamics and impact of Brexit. Students and young people in the UK can make all the difference this time if they come out to vote.

The public mood remains volatile and unpredictable, and as we know, some of the British media have a long track record of distortions and prejudice against anything European. I remain optimistic that the 2016 vote can and will be reversed by a further democratic vote now based on almost three years of greater public discussions in the UK about European questions than during the whole of the previous 40 years of membership.

I am encouraged by the example of how the mood of the public and media shifted in France when *Le Moniteur* the Parisian newspaper covered the journey of Napoleon when he fled from the Isle of Elba in 1815 and marched on Paris. The journey was covered in a series of headlines and I will read them to you together with the dates on which they were published:

- March 9: The beast has left its lair

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[27] Hywel VERI JONES, "Forward or Backward Steps for the UK?", IWA-Click on Wales, 11 February 2019, https://www.iwa.wales/click/2019/02/forward-or-backward-steps-for-the-uk/

[28] The House of Lords EU Home Affairs Sub-Committee published its report on 12 February 2019. The Government has sent its formal response to this report, is available on the Committee's website: https://www.parliament.uk/business/committees/committees-a-zlords-select/eu-home-affairs subcommittee/inquiries parliament-2017/student-exchanges-funding-universities-research/publications/

-March 11: The Corsican monster has set foot on French soil

-March 19: Bonaparte wants to conquer Paris, but he will not succeed

-March 20: The Emperor has already reached Fontainebleau

- March 21: The liberator is pounding at the gates of the capital

-March 22: His Imperial Majesty marched into Paris today, *Vive l'Empereur*

Acknowledgement

The Commission broke new ground in its handling of European higher education cooperation, delegating day-to-day animation and technical assistance to a team of specialists, familiar with European higher education, capable of advising universities on opportunities for and conditions of partnership building across national frontiers. The policy oversight and direction given to the development of the ERASMUS programme by the Commission was underpinned by the dedicated and highly professional support of the external team and proved to be a critically important factor in building the credibility and quality of this European cooperation.

With this article, I wish to pay a very special tribute to the cooperation and support of Raymond Georis and Lada Cerych, respectively Secretary-General of the European Cultural Foundation and Director of the European Institute of Education and Social Policy, which was based at the University of Paris-Dauphine. Their commitment was crucial to enabling the Commission to set up the team of experts which later became the ERASMUS Bureau with Alan Smith as its talented Director. The close cooperation with these colleagues, as well as with colleagues developing the Comett, Tempus, Lingua, Petra and Youth Exchange programmes

has contributed in building the success of ERASMUS+. It has been a triumph of teamwork over the years which the Commission continues to promote actively with especially significant contributions from Adam Tyson and Vanessa Debiais-Sainton.

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Author's biography

Hywel was born in Neath and brought up in Port Talbot and then Clydach in the Swansea Valley. He was educated at Pontardawe Grammar School and UCW Aberystwyth (1955-1962) where he graduated with an Honours Degree in French. He gained a Diploma of Education and pursued post-graduate research into the life and work of Henri Barbusse. In 1961-62 Hywel was President of the Aberystwyth Students Union and received a John and Elizabeth Williams Scholarship to study in Europe.

From 1962-1973 Hywel held posts at the then new University of Sussex: Assistant Registrar, Deputy Director of the Centre for Educational Technology and Curriculum Development, and then he served as Special Assistant to the Vice Chancellor (Lord Asa Briggs) for research and academic development of the University.

In 1973 Hywel moved to Brussels when he was appointed as Head of the Commission's first ever department for

education and youth policies and later promoted as the Commission's Director for education, training and youth. Following the launch of several EU flagship programmes, notably Erasmus, Comett, Tempus and Petra, for which he played the leading role as the senior Commission official for their design, negotiation and management, he was designated as Director of the Commission's Task Force for human resources, education, training and youth. With responsibility for the oversight of all the EU education programmes he chaired the EU committees involving representatives of the Member States and was responsible for liaison with the European Committee of Rectors and Vice Chancellors.

Early in 1993 Hywel was appointed to act as Director General of the Directorate General for Employment, Social Policy and Industrial Relations (1993-1998). During this period, he had responsibility for the European Social Fund, chaired the Social Dialogue Committee involving European employers and trade unions, and co-directed the EU's Peace and Reconciliation Programme in Northern Ireland. He also played a special role in relation to the promotion of equal opportunities and social inclusion and for the development of the EU's policy on behalf of disabled persons. During this period too, he was responsible for the design and launch of several Community Initiatives, in the framework of the EU's structural funds, namely EQUAL, NOW, ADAPT, and YOUTH START. He served as a member of the group of senior officials which prepared EU Agenda 2000 which set the EU's first multi-annual programmatic and financial framework for the period until 2006.

On his early retirement from the Commission in 1998, Hywel acted as Special Adviser to George Soros on the philanthropist's strategy for his Open Society Network of Foundations in Central and Eastern Europe. He then returned to Wales and was appointed as European Adviser

to the Secretary of State for Wales (Ron Davies and later Alun Michael). He chaired the All Wales Taskforce set up to prepare the incoming National Assembly of Wales to take on its European responsibilities and was closely involved with the Secretary of State in the negotiation of the EU's decision to accord Objective 1 status to Wales.

During the period 2000-2010, Hywel served successively as Chair of the European Policy Centre, (EPC) a leading policy think tank in Brussels, and Director of the European Network of Foundations, which promotes cooperation between European foundations across Europe on several issues of international concern. He was also co-chair of the European Consortium of Foundations for Disability Rights, Governor of the European Culture Foundation (Amsterdam), Trustee of Ecorys (Rotterdam), and of the Federal Trust for Education and Research in London and the Franco British Council.

Since his return to live in Wales, Hywel was a member of the Board of Cymru Yfory (Tomorrow's Wales) advocating the reforms necessary to take forward Welsh devolution and to secure the 'Yes' vote in the Welsh Referendum. He served as Chair of the Wales Governance Centre of the University of Cardiff (2012-2015) and for the period of 2015-17 was appointed by the Welsh Government to serve as one of 3 EU Funding Ambassadors to Wales, reporting to the Government just before the start of the 2016 EU Referendum. Following the result of this Referendum, Hywel was appointed by the Welsh Government to serve on its European Advisory Group, to advise on the implications of the Brexit vote for Wales.

Hywel has been awarded Doctorates by the Universities of Sussex, Leuven, Brussels, Wales, Ireland and the Open University and holds Fellowships from the Universities of Aberystwyth, Swansea, Trinity, Glyndwr, Glamorgan,

Westminster and the Education Institute of Scotland. He received the award of the Gold Medal from the Republic of Italy for services to education and culture, and the award for the Outstanding Contribution for International Educational Exchange from the Council of Educational Exchange, Berlin, and was a recipient of the Winston Churchill and Eisenhower Fellowships. He was awarded the CMG by the Queen for services to UK and Europe. In 2017 Hywel received the International Award for Vision and Leadership from the European Association for International Education (EAIE). Most recently in July 2018 he was awarded a Doctor Honoris Causa by the University of Edinburgh for "leadership and services to Higher Education and Student Mobility across Europe".

He has published a wide range of articles on education, training, employment and Europe and has delivered a number of named lectures, including the Guardian Education Lecture in 1989, the IBM Lecture at the Foundation of Science and Technology in 1990, the BBC Wales Annual Lecture in 1999 and the Annual Lecture of the Institute of Politics of Aberystwyth University in 2016. His publications include planning the development of universities: a case study of the University of Sussex (UNESCO: International Institute for Educational Planning, Parish 1971) Co-author Teaching and Learning: an introduction to new methods and resources in higher education (UNESCO and the International Association of Universities, Paris 1979.) Co-author. Soon Hywel's website well over 100 of his lectures and presentations in Wales and Europe will be presented.

He is a member of the Gorsedd of the National Eisteddfod of Wales, a Vice President of the International Eisteddfod at Llangollen and a Trustee of the National Museum of Wales.

He lives with his wife Morwenna in Penarth and has two children, Hannah and Gwilym and three grandchildren, Zac, Leah and Etienne.

Chapter 10.
The healthcare issue during and after the In/ Out EU referendum campaign of 2016

Anémone Kober-Smith

During the campaign leading to the In/Out referendum of June 2016, and in the years that have passed since then, the issue of the NHS - and of access to the NHS for EU citizens living in the UK and for British citizens living in another EU country - has at times made front-page news. It is certainly an important issue for those citizens who are directly concerned – the 3,5 million EU citizens[1] who live in the UK and the 1,3 million British citizens who live in another EU country and whose access to healthcare after Brexit is at stake. Yet the issue of the future of the NHS after Brexit is wider than this and concerns the whole of the country.

[1] There were approximately 3,7 million EU citizens living in the UK in 2018, and 1,3 million British citizens living in another EU country in 2017. Office for National Statistics figures quoted by https://fullfact.org/immigration/eu-migration-and-uk/
(consulted 16 May 2019)

Before focusing on the issue of the NHS after Brexit – and that of access to healthcare for EU citizens in the UK and British citizens living in one of the other 27 EU countries - it makes sense to examine the place given to the NHS during the campaign. Was the NHS mentioned during the Remain campaign and in what terms? Conversely, how was the question of the impact of Brexit on the NHS dealt with by Vote Leave?

In a second part, the paper will outline key economic and social factors that are likely to have an impact on the NHS post-Brexit though it is impossible to assess this with any precision as the country has not yet left the EU. However, most experts agree that if the country leaves the EU without a negotiated agreement, the impact of withdrawal on the NHS (and on many other institutions) is likely to be more severe.

Finally, we will explore the impact that the decision to leave the EU has already had on the present and future healthcare rights of EU citizens living in the UK and of British citizens living in another EU country. What decisions have the UK and the EU reached on this issue during the Withdrawal Agreement negotiations? How do things stand at present should the Withdrawal Agreement continue to be rejected by the British Parliament?

Section 1. The health issue during the referendum campaign of 2016

The campaign was dominated by economic arguments on the Remain side and by the immigration issue on the Leave side. However, Vote Leave seized the issue of funding the NHS with great success whereas the Remain campaign more or less ignored the question of healthcare altogether. So how precisely was the issue of the NHS – and of the healthcare

rights of EU citizens living in the UK – framed in the official campaign leaflets, if at all?

§1. The healthcare issue in the Remain campaign leaflet

In April 2016, the government sent a 14-page document to every household in the country (27 million) outlining the benefits of staying in the EU for the UK.[2] The leaflet focused mainly on the economy and there was only one direct and positive mention of healthcare in relation to the EU – the fact that membership gives "UK citizens travelling in other European countries the right to access free or cheaper public healthcare".[3] This was a reference to the EHIC card system which is widely used by UK citizens who visit or reside temporarily in another EU country. However, there was no mention of the many examples of cross-border cooperation in the field of medical research and innovation which have a direct impact on the quality of care in the UK, nor of cross-border sharing of health services between Northern Ireland and Eire.

Beyond the issue of healthcare, the social rights of EU citizens were only mentioned in a negative manner – thus the leaflet states that "tough new restrictions on access to our

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[2] The mail drop was bitterly criticized by Vote Leave because the total cost of the production and postage of the leaflet, estimated at about £9 million, was paid for by the government and was on top of the official sum of £7 million of authorized spending by each of the two official campaigns, "Britain Stronger in Europe" and "Vote Leave".
James LANDALE, "EU referendum: Government to spend £9 million on leaflets to every home", BBC News, 7 April 2016. https://www.bbc.co.uk/news/uk-politics-eu-referendum-35980571

[3] HM Government, *Why the Government believes that voting to remain in the European Union is the best decision for the UK,* 2016, p. 6.
https://assets.publishing.service.gov.uk/…/why-the-government-believes-that voting-to-stay-in-the-european-union-is-the-best-decision-for-the-uk.pdf

welfare system" would be applied for new EU citizens after the referendum should the UK remain in the EU.[4]

Although access to the NHS was not to be included in the list of "restricted" benefits,[5] this was an explicit reference to the four-year delay that was to be imposed on newly-arrived EU migrants who wanted to claim tax credits and some other benefits following tough negotiations between David Cameron and the EU in early 2016.[6]

This shows that even for Remain, the question of the social rights of EU migrants was framed in a negative way. Implicitly the leaflet reinforced the popular belief that EU migrants place an extra burden on the welfare state. This had been a common theme in the right-wing media – particularly in the Daily Mail[7], the Daily Telegraph and the Daily Express - in the years preceding the referendum despite studies showing that EU migrants were – and still are – positive contributors to the country's finances rather than "takers".[8] This theme became even more frequent from January 2014

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[4] *Ibid*., p. 2.
https://assets.publishing.service.gov.uk/…/why-the-government-believes-that voting-to-stay-in-the-european-union-is-the-best-decision-for-the-uk.pdf

[5] https://www.bbc.co.uk/news/uk-politics-eu-referendum-35622105

[6] There were already measures in place to limit the right of these migrants to claim out-of-work benefits, in particular the job seeking allowance.

[7] For instance, "How do I claim benefits when I get to Britain? Romanians demand help from job agencies in the UK", *The Daily Mail*, 3 November 13.
https://www.dailymail.co.uk/news/article-2486853/How-I-claim-benefits-I-Britain-Romanians-demand-help-job-agencies-UK.html

[8] Rob MERRICK, "EU migrant workers contribute £2,300 more per year to UK than average British citizen, study reveals", *The Independent*, 18 September 2018.
https://www.independent.co.uk/news/uk/politics/eu-workers-uk-tax-treasury-brexit-migrants-british-citizens-a8542506.html

when Romanian and Bulgarian citizens gained the right to work in the UK without restrictions.[9]

§2. The NHS in the Vote Leave campaign

The Vote Leave leaflet was much shorter than the Government's one but the issue of healthcare featured prominently alongside other points related to immigration and free trade. Unsurprisingly, EU immigration was the dominant theme and was viewed as problematic:

> More than a quarter of a million people came to the UK from the EU in the 12 months to September 2015 – the equivalent of the size of Plymouth or Newcastle in just one year.[10]

The leaflet also claimed that net immigration was set to increase even further since "five more countries are being considered for membership" including Turkey and their citizens will have the "same rights" as other EU migrants. [11] So leaving the EU would help the country to "take back control" on EU immigration and would also be very good for NHS finances:

> The EU costs us at least £350 million a week – that's enough to build a new NHS hospital every week. We get less than half of this money back, and we have no control over how it's spent. That's decided by politicians and officials in Brussels, not by the people we elect.[12]

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[9] Between 2007 and 2014, the UK government applied transitional restrictions so that only Romanian and Bulgarian skilled workers or workers in shortage areas could work in the UK without a permit. https://www.gov.uk/government/speeches/migration-bulgarian-and-romanian-workers

[10] Vote Leave, *The UK and the European Union: the facts.* https://digital.library.lse.ac.uk/objects/lse:xiz923doh

[11] *Ibid.*

[12] *Ibid.*

Even during the campaign, the UK Statistics Authority pointed out that the claim was wrong.[15] The then Conservative MP Sarah Wollaston,[16] chair of the Health Select Committee of the House of Commons, even switched sides from Vote Leave to Remain over the issue.

Firstly, the slogan was wrong because the £350 million a week figure did not include the rebate negotiated by Margaret Thatcher in the 1980s. Once the rebate was deducted, Britain actually contributed £252 million a week to the EU budget in 2016. Secondly, at least £100 million a week came back to

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[13] "We send the EU £350 million a week – lets fund our NHS instead. Vote leave. Lets take back control".

[14] BBC news website, "Reality check: Have Leave campaigners changed their tune?", 28 June 2016.
https://www.bbc.com/news/uk-politics-eu-referendum-36641390

[15] "Final say: the misinformation that was told about Brexit during and after the referendum", *The Independent*, 28 July 2018.
https://www.independent.co.uk/news/uk/politics/final-say-brexit-referendum-lies-boris-johnson-leave-campaign-remain-a8466751.html

[16] She resigned from the Conservative party in February 2019 and is now a member of the Independent Group in Parliament.

the UK in the form of grants to support agriculture, regional aid and research and development. Once these deductions were taken into account, the net contribution to the EU budget was about £160 million a week[17] in 2016, or £8.3 billion a year.[18] Treasury statistics[19] indicate that total public health spending was close to £144 billion in the UK[20] in 2016/17 so that the UK's contribution to the EU budget amounted to about 5.5 per cent of health spending that year – not a very large percentage. Thirdly the Vote Leave slogan implied that all the money saved would be spent on the NHS whereas there would be many claims on that money from other sectors such as research and agriculture and from deprived regions such as West Wales or Cornwall that would lose their EU subsidies as a result of Brexit.

Yet even though the Vote Leave claim was showed to be false even at the time, it struck a chord with the public. This is in part because the NHS holds a special place in the British psyche - it is the institution that Britons are second most proud of, after the fire brigade.[21] It is also a service that has been visibly underfunded[22] since 2010 as a result of the Government's austerity politics - even though its budget was

[17] Matt WITHERS, "Gross dishonesty: why Boris latest £350 million claim is an admission of guilt", *The New European*, 16 January 2018.

[18] https://fullfact.org/europe/our-eu-membership-fee-55-million/

[19] HM Treasury, *Country and Regional Analysis*, November 2017. https://www.gov.uk/government/statistics/country-and-regional-analysis-2017

[20] Out of this total figure, £120 billion were spent in England, £12.6 in Scotland, £6.9 in Wales and £4.2 in Northern Ireland in 2016/17. *Ibid.*

[21] Matthew SMITH, "the NHS is the British institution that Brits are second most proud of after the fire brigade", You Gov, 4 July 2018. https://yougov.co.uk/topics/politics/articles-reports/2018/07/04/nhs-british-institution-brits-are-second-most-prou

[22] In particular, during NHS winter crises characterised by a shortage of hospital beds and long A&E waiting times. See for instance: https://www.independent.co.uk/news/health/nhs-crisis-hospital-waiting-times-winter-patients-england-flu-weather-a8778886.html

protected from real cuts unlike that of many other public services. What is clear is that the British public was receptive to the promise made by Vote Leave, and nearly half of them believed the claim at the time. And more than two years after the referendum, in October 2018, nearly half of the British public that had heard of the claim still believed it to be true, despite all the efforts deployed to debunk this myth.[23] It is difficult to overstate the importance of this false claim in the referendum result. Indeed, Dominic Cummings, the campaign director of Vote Leave, declared that it was the "most effective argument" of the campaign "with almost every demographic".[24]

Yet the day after the referendum, key personalities of Vote Leave – such as Iain Duncan Smith[25] - went back on it or at any rate qualified it. Meanwhile Nigel Farage – who was leading an alternative Leave campaign called Leave.EU – said the claim should never have been made.[26]

While the £350 million claim largely contributed to the victory of Leave, other Brexit-related healthcare issues barely got a mention except in specific forums such as that of the British Medical Association. Yet it emerged in the months that followed the referendum that the NHS would probably be negatively affected by leaving the EU.

[23] Jon STONE, "British public still believe Vote Leave "£350 million a week to EU myth from Brexit referendum"", *The Independent*, 28 October 2018.
www.independent.co.uk/news/uk/politics/vote-leave-brexit-lies-eu-pay-money-remain-poll-boris-johnson-a8603646.html

[24] "[…] It was clearly the most effective argument not only with the crucial swing fifth but with almost every demographic". "Dominic Cummings: how the Brexit referendum was won", by D. Cummings, *The Spectator*, 9 January 2017.
https://blogs.spectator.co.uk/2017/01/dominic-cummings-brexit-referendum-won/

[25] During the BBC Andrew Marr show, 25 June 2016.

[26] During Good morning Britain, ITV, 24 June 2016.

Section 2. Post-referendum: the likely impact of leaving the EU on the NHS

After the referendum, it gradually dawned on the country that Brexit would have consequences for the NHS. Estimates of their degree of severity vary depending on whether there is an orderly departure from the EU, according to the terms of a withdrawal agreement, or whether the country leaves without a deal on 31 October 2019.[27] In case of no deal, most specialists consider that the consequences on the economy, on public services in general and on the NHS in particular will be more severe than if the withdrawal deal is voted.

§1. The funding issue

Considering that the NHS funding issue held pole position during the referendum campaign, we need to briefly analyse what is the likely impact of Brexit on NHS finances.

Since the NHS is largely funded out of general taxation, the level of funding granted to the NHS by politicians tends to be influenced by the state of the economy. Most economists – including civil servants - expect that the British economy will suffer after Brexit, at least in the short to medium term. In its 2016 Autumn Statement, the Office for Budget Responsibilty (OBR) forecast that investment, productivity growth and immigration would all be negatively affected by leaving the EU, and that inflation would rise. The expected fall in revenue was estimated to be about £15 billion per year by 2020. This would add up to nearly double the amount that would be saved by leaving the EU according to the Vote

[27] Following the House of Commons' votes against the Withdrawal Agreement, the EU granted the UK an extension of Article 50 on 21 March 2019 – with a departure date fixed at 12 April if MPs did not approve the Withdrawal Agreement and 22 May if they did. This was then further extended to 31 October 2019 with the condition that the UK would have to participate in the May EU elections if it had not left by then.

Leave campaign. In reality Brexit – and especially a no deal Brexit – is likely to result in a smaller economy and less money for public services in general and for the NHS in particular.[28]

This is likely to be a particular problem for the NHS because the service is already under strain as a result of several interrelated factors – such as a growing and ageing population, the impact on NHS hospital services of an underfunded social care sector and the cost of new treatments and technologies. In order to meet increasing demand for healthcare services in the future, the budget of the NHS would have to increase quite substantially. The OBR suggested that NHS spending would need to increase by 5.3% of national income over the next fifty years to meet demand whereas its budget has only grown by 1.1% a year in real terms since 2009/10.[29] Whether Brexit happens or not, the NHS will need a substantial and prolonged real term budget increase simply to meet its present and future population needs.

Conscious of the sensitivity and urgency of the issue, the Prime minister Theresa May announced in June 2018 that the government would increase the budget of the NHS by £20 billion by 2023 which would amount to more than the £350 million a week promised by Vote Leave. She said that this would be paid for by the "Brexit dividend" although the need for tax rises was also hinted at. This promise would amount to an NHS budget increase of 3.4 per cent a year until 2023 - but commentators have pointed out that this is less than what the NHS needs and it is also less than the average NHS funding increase since 1948.[30]

[28] Peter LEVELL and George STOYE, "Brexit, the public finances and the NHS", in *Brexit and the NHS*, The UK in a Changing Europe, March 2018, p. 7.

[29] *Ibid.*, p. 6.

[30] Average increase since 1948 has been 3.7% a year. Nick TRIGGLE, "NHS funding: Theresa May unveils £20bn boost", 17 June 2018, BBC.

§2. Other healthcare issues that emerged after the referendum

Apart from the funding issue, it quickly emerged that there was a whole series of healthcare-related issues that would probably occur after Brexit. Moreover, it is very difficult to prepare for them as long as nobody knows whether the UK will leave with a deal or not. Among the main issues to emerge were:

- the future of EU-funded medical research projects between the UK and EU
- the health and safety of food products and medicines. At the moment, Britain benefits from EU rules and regulations in this field but this would cease to be the case after Brexit. For instance, the UK will lose automatic access to the EU market for its medicines, and it will no longer benefit from shared EU monitoring of their safety.[31]
- NHS staffing: about 5.5% of NHS staff are EU citizens, and the figure is closer to 9% for doctors and 7% for nurses.[32] The proportion of EU staff working in the social care sector is even higher. The NHS already experiences serious shortages of some staff, particularly GPs and nurses, and needs these EU workers who are able to work in the NHS thanks to freedom of movement and the mutual recognition

co.uk. https://www.bbc.com/news/health-44495598

[31] Jean McHALE and Matthew BEVINGTON, "Drugs and medical devices", in *Brexit and the NHS*, The UK in a Changing Europe, March 2018, p. 12.

[32] Anan MENON, "Could Brexit harm the NHS?", BMJ 2018-362: K4014 and Mark Exworthy, *The NHS and Brexit,* University of Birmingham. https://www.birmingham.ac.uk/research/perspective/nhs-and-brexit.aspx

of common qualifications. All this could change after Brexit.

As part of its post-Brexit immigration plans, the British government presented a White Paper in December 2018 in which it detailed its plan to require skilled workers – including skilled EU workers - to earn at least £30,000 a year in order to qualify for a work visa,[33] a policy which was based on the recommendation of the Migration Advisory Committee.[34] The Royal College of Nursing,[35] the Confederation of British Industry,[36] the hospitality sector and many other employers' organisations[37] protested that this would exclude many key EU workers who earn less than that. While Theresa May was in favour of the proposal, and wanted its immediate implementation after Brexit day, the Chancellor of the Exchequer, Philip Hammond, led a Cabinet rebellion against it arguing that it would lead to skills' shortages in key sectors.[38] In a sign that the government was changing its mind

[33] UK Government, *The UK's future skills-based immigration system*, White Paper, 19 December 2018.
https://www.gov.uk/government/publications/the-uks-future-skills-based-immigration-system

[34] The Migration Advisory Committee is an independent, non-statutory, non-departmental public body that advises the government on migration issues and that is sponsored by the Home Office. https://www.gov.uk/government/organisations/migration-advisory-committee

[35] https://www.rcn.org.uk/news-and-events/news/rcn-responds-to-immigration-white-paper

[36] "Brexit: EU migrants won't get special treatment, May says", BBC News, 2 October 2018. https://www.bbc.co.uk/news/uk-politics-45714413

[37] Lisa O'CARROLL, "Business leaders warn against plan to slash EU immigration to UK", The Guardian, 17 December 2018. https://www.theguardian.com/politics/2018/dec/17/business-leaders-warn-against-plan-slash-eu-immigration-uk-sajid-javid

[38] "Dan SABBAGH, Rajeev SYAL, "May's Cabinet split over £30,000 immigrant salary threshold", The Guardian, 19 December 2018. https://www.theguardian.com/uk-news/2018/dec/19/may-cabinet-split-over-30000-immigrant-salary-threshold

on the issue, the Home Secretary, Sajid Javid, stated in a letter to the Migration Advisory Committee in May 2019 that it needed to bring fresh evidence to justify its proposal for the introduction of the salary threshold.[39] Yet as with many other Brexit-related issues, nothing has been settled as yet.

Another crucial issue is that of the healthcare rights of EU citizens living in the UK and of British citizens living in the EU after Brexit. Some progress has been achieved on this issue since 2016 though it is far from being resolved.

Section 3. EU citizens' access to healthcare in the UK and British citizens' access to healthcare in the EU after Brexit

§1. Present access to healthcare for EU citizens living in the UK

Reciprocal access to healthcare has been an important part of EU policy for decades principally in order to allow EU citizens to exercise their Treaty right of freedom of movement. Indeed, EU citizens would be less keen to settle and work in other EU countries if their social rights – of which access to healthcare is arguably the most important – were not guaranteed in their host country.

In the UK, the application of this right has meant that EU citizens have been able to use the NHS like other ordinary residents,[40] and conversely British expats in Europe have

[39] This information was revealed to the press via a letter that was leaked to the Sun newspaper in May 2019. https://www.civilserviceworld.com/articles/news/home-office-considering-ditching-%C2%A330000-earnings-threshold-eu-migrants-after-brexit

[40] Being an ordinary resident in UK law means living in the country on a lawful and properly settled basis and being able to prove this NHS. *Moving to England from the European Economic Area (EEA) or Switzerland* https://www.nhs.uk/using-the-nhs/nhs-services/visiting-or-moving-to-england/moving-to-england-from-the-european-economic-area-eea-or-switzerland/

been able to use the public healthcare system of the country in which they have chosen to reside. The NHS is free at the point of use for all ordinary residents, and there are no special steps to be taken by an EU citizen in order to register with a GP or access hospital services other than those that apply to all ordinary residents.

It must be noted that free access to non-urgent hospital care is not granted to all migrants – non-EU/EEA citizens who wish to stay longer than six months in the country and who do not have indefinite leave to remain are required to pay a health surcharge for hospital treatment and are also advised to have private health insurance.[41]

This requirement hints at the fact that the question of *future* entitlement of EU citizens to the NHS once the UK has left the EU (and after any transition period) is not straightforward. After the 2016 In/Out referendum, it soon became the focus of attention of concerned citizens, the EU and the British government. Moreover, the issue of access to healthcare quickly became tangled up with another key issue – that of the right to permanent residence for settled EU citizens.

§2. The issue of Comprehensive Sickness Insurance

Under the terms of a little-known EU rule passed in 2011, EU citizens living in another EU country and deemed to be "self-sufficient" – essentially non-working citizens such as

[41] "In April 2015 changes were made to the way the NHS charges overseas visitors for NHS Hospital Care. (…) People who live outside the EEA – including former UK residents – should now make sure they are covered by personal health insurance (…). An immigration health charge (…) is now payable by non-EEA nationals who apply for a visa to enter or remain in the UK". Department of Health and Social Care, *Guidance: How the NHS charges overseas visitors for NHS hospital care*, 1 August 2018. https://www.gov.uk/government/publications/how-the-nhs-charges-overseas-visitors-for-nhs-hospital-care/how-the-nhs-charges-overseas-visitors-for-nhs-hospital-care

stay-at-home parents – have been legally required to purchase private insurance – called Comprehensive Sickness Insurance (CIS) – to cover their healthcare needs.[42]

Although this requirement is derived from EU law, the strict manner in which the UK has interpreted it led the EU commission to start proceedings against the country in 2012. For the EU, the UK does not need to apply this rule since EU citizens already have access to the comprehensive health cover provided by the NHS. However, the UK government's position is that NHS care does not amount to full health cover and that the rule therefore applies for EU students and non-working citizens.[43] However, it has not publicized this position so that few people know about it. As a result, some non-working EU citizens living in the UK only found out about the CSI rule when they applied for permanent residence (PR) in the months that followed the referendum and when their application was refused because they had not held CSI for the previous five years. In the words of one such citizen:

> (…) I do not qualify for permanent residency. This came as a shock to me as I initially thought that application would be a formality. That was until I learned of the infamous CSI (Comprehensive Sickness Insurance) when I wanted to apply for PR. In all my years as a student or self-sufficient person, no one has ever mentioned this requirement to me.[44]

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[42] "Comprehensive sickness insurance: What is it and who needs it?", Freemovement.org, by Colin YEO, 13 Dec 18.
https://www.freemovement.org.uk/comprehensive-sickness-insurance-what-is-it-and-who-needs-it/

[43] *Ibid.*
https://www.freemovement.org.uk/comprehensive-sickness-insurance-what-is-it-and-who-needs-it/

[44] See Elena REMIGI, Véronique MARTIN, Tim SYKES (eds.), *In Limbo: Brexit testimonies from EU citizens in the UK*, 2017, p. ix.

The CSI rule meant that potentially thousands of EU citizens could be denied permanent residence and would be left in limbo after Brexit – not knowing what would happen to them and their family. Moreover, even those who tried to purchase CSI insurance found out that very few insurers were prepared to sell it to them.

This situation led to complaints and articles in the UK press[45] and a campaign by "the3million"[46] citizens' group, a group actively campaigning for the rights of EU citizens in the UK post-referendum. They pointed out that the length of the application form to apply for PR, the amount of complementary documentation required and the necessity for some applicants to have CSI amounted to a "hostile environment"[47] policy from the Home Office aiming at making it difficult for EU citizens to get permanent residence. While all this did not lead to EU citizens being refused healthcare, or worse, being deported, there was always the worry that this could happen in a post-Brexit future. Moreover, the Windrush Affair[48] that came to light in 2018 has set a credible

[45] Ross HAWKINS, "EU citizens "denied residency documents", *BBC.co.uk*, 18 February 2017.
https://www.bbc.co.uk/news/uk-39014191

[46] https://www.the3million.org.uk

[47] The "hostile environment" was a set of measures designed and applied by the Home Office under Home Secretary Theresa May from 2012. It aimed at discouraging migrants from staying in the UK by making it difficult for them to get settled status and to access public services and jobs. See for instance Jamie GRIERSON, "Hostile environment: anatomy of a political disaster", *The Guardian*, 27 August 2018. https://www.theguardian.com/uk-news/2018/aug/27/hostile-environment-anatomy-of-a-policy-disaster

[48] The Windrush affair that came to light in 2018 concerns some British citizens of Caribbean origin who had arrived in the UK before 1971 and who were sometimes denied their right to benefits and healthcare, and even lost their jobs or were deported back to Jamaica, under the "hostile environment" policy of the Home Office because they lacked documentation to prove that they were British.

precedent for such a possible outcome.[49] What is clear is that after the referendum, many EU citizens who were legally living and working in the UK suddenly felt that they had become migrants whose status and future in the UK had become uncertain.

§3. Partial resolution: the citizens' rights part of the Withdrawal Agreement

Following the first round of negotiations on withdrawal between the EU and the UK government in December 2017, the two parties reached an agreement on the replacement in UK law of the status of permanent resident with two new statuses – that of "pre-settled" and "settled" resident. Those who have resided in the UK for five years can now apply for settled status, and those who have been there for less than five years can apply for pre-settled status and will normally qualify for settled status after five years. The deadline to apply was set at the end of the transition period – possibly December 2020.

Furthermore, the EU Parliament rapporteur, Mr Verhofstadt, made it clear that administrative procedures to get either of these new statuses needed to be "light touch". Importantly CSI would not be required in order to obtain them. This was confirmed a few days later by the immigration minister Brandon Lewis in front of the House of Lords Select Committee on EU citizens' rights.[50]

Gracie BRADLEY, "The brutal truth of Windrush is that one year on, the 'hostile environment' is more entrenched than ever", *The Independent*, 16 April 2019. https://www.independent.co.uk/voices/windrush-scandal-immigration-deportation-david-lammy-home-office-a8872126.html

[49] Jessica ELGOT, "Theresa May's 'hostile environment' at heart of Windrush scandal", *The Guardian*, 17 April 2018. https://www.theguardian.com/uk-news/2018/apr/17/theresa-mays-hostile-environment-policy-at-heart-of-windrush-scandal

[50] House of Lords. Select committee on the European Union, EU Justice

Although the issue appeared settled by the end of 2017, it was once more thrown into doubt following the three rejections of the Withdrawal Agreement by the House of Commons between January and March 2019.[51] Although Parliament also voted against the possibility of a no deal outcome in March 2019, the vote is not legally binding and the departure of the UK from the EU with no deal is still a very real possibility.

This means that if the country leaves the EU without a deal, the draft agreement between the EU and the UK on citizens' rights will no longer be valid and the citizens rights' part of the deal will also cease to apply. This could mean that EU citizens living in the UK, and UK citizens living in another EU country, would automatically become third country citizens and lose their rights to healthcare and other social benefits.

In a pre-emptive move, and to avoid continuing anxiety and uncertainty for EU citizens living in the UK, the Parliament voted unanimously in favour of the Costa amendment in February 2019. This amendment states that Britain will keep the part of the Withdrawal Agreement that deals with citizens' rights even if the country exits the EU without a deal.[52]

Sub-Committee, *Brexit: Citizens' Rights*, Tuesday 12 Dec 2017. Witness: Rt Hon Brandon Lewis, Immigration minister at Home Office. Chair: Baroness Shackleton of Belgravia.
https://parliamentlive.tv/Event/Index/a15e84d0-1fcc-45c3-be5b-173adec2d674

[51] On 15 January, the result was 432 against, 202 for the deal. On 12 March, 391 against and 242 for it. On 29 March, 344 MPs against and 286 for the deal.

[52] Lisa O'CARROLL, Heather STEWART, "Government relents on rights of EU citizens after MP quits", *The Guardian,* 27 February 2019. https://www.theguardian.com/politics/2019/feb/27/confusion-reigns-over-brexit-amendment-as-tory-mp-alberto-costa-sacked

So far, hundreds of thousands of EU citizens living in the UK have already applied for pre-settled and settled status.[53] Citizens whose application is successful – and figures indicate that nearly all applications are – will in principle continue to have the same rights as they currently have, including full use of the NHS.

However, the Costa Amendment and the legislation that was passed afterwards to protect the rights of these EU citizens in UK law do not guarantee these rights in the long term as there is nothing to stop a future government (and future Parliament) from changing these arrangements. Nor does it help the British citizens residing in another EU country.

§4. British citizens' right to healthcare in EU countries

Under the terms of the draft Withdrawal Agreement, British citizens will also continue to have access to healthcare in their EU country of residence under the same conditions as at present. This will apply to British citizens who are working in another EU country as well as to the 190,000 or so retired British citizens in receipt of a UK state pension who have settled in an EU/EEA country. At present, they have access to free healthcare in their country of residence thanks to reciprocal arrangements.[54]

However, the continuation of these rights is conditional on the Withdrawal Agreement being voted in the UK, which

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[53] The deadline to apply has been set at 30 June 2021 if the Withdrawal Agreement is signed and 31 December 2020 otherwise.
Lisa O'CARROLL, "More than 600,000 EU citizens apply for UK settled status", *The Guardian*, 2 May 2019.
https://www.theguardian.com/uk-news/2019/may/02/more-than-600000-eu-citizens-apply-uk-settled-status

[54] The so-called S1 arrangements. Lisa O'CARROLL, "UK retirees in EU will lose free healthcare under no deal Brexit", *The Guardian*, 29 January 2019. https://www.theguardian.com/politics/2019/jan/29/british-pensioners-in-eu-will-lose-nhs-covered-health-care-under-no-deal-brexit

has not happened so far. As the no deal scenario has become more and more plausible, groups representing British expats – in particular "BritishinEurope"[55] – have urged the British government to protect their existing healthcare rights by offering unilaterally to continue paying for their healthcare.

This situation has partly come about because the EU has so far refused to reciprocate the UK's decision to keep the citizens' part of the withdrawal deal no matter what, arguing that the only way to guarantee citizens' rights after Brexit is to pass the Withdrawal Agreement.[56] Although the Commission has called on all individual member states to act generously towards those British citizens, not all countries have yet formally declared that they will fully protect their existing rights.[57] According to Robin Walker, the Parliamentary Under-Secretary of State for Exiting the EU, speaking on 4 April 2019:

> […] all members states have given some public assurance the protect the rights of UK nationals. We will continue to call on member states to fully reciprocate our unilateral offer […] The Government have sought the EU's views on ring-fencing the citizens' rights part of the Withdrawal Agreement […].[58]

Yet these declarations have not reassured groups like "BritishinEurope" who continue to campaign for the UK government to do more to guarantee their continuing rights to healthcare and other social rights.

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[55] https://britishineurope.org/

[56] "EU rejects no deal citizens rights call", 1 March 2019, BBC.co. uk. https://www.bbc.co.uk/news/uk-politics-47408789

[57] Some countries - Spain, Germany, Italy, the Czech Republic among them – have declared they will protect British citizens' rights but not all have done so yet.

[58] https://www.parliament.uk/written-questions-answers-statements/written-statement/Commons/2019-04-04/HCWS1483

The UK government introduced a Bill in 2018 in order to do so - the Healthcare (International Arrangements) Bill - which was passed in 2019.[59] It formalized the UK's willingness to pay for the healthcare costs of British retirees living in an EU country in order to maintain or replicate existing reciprocal deals after Brexit.[60] The Act will enable the UK government to pass any number of healthcare deals with the EU as a whole (or with each EU country), even in case of no deal. The principal aim of the Government is to ensure continuity of access to comprehensive healthcare for British citizens living in an EU country – especially for retired British citizens who have contributed all their lives to National Insurance in the UK. The Act will also enable the Government to pass deals to replace the EHIC card system that covers British holiday visitors and second homeowners in the EU at present, but that will probably cease to exist in the UK in case of no deal.[61]

However, unless the UK gets cooperation and reciprocation from all EU countries, these arrangements may not help all UK citizens visiting or living in an EU country.

Conclusion

During the referendum campaign, the issue of healthcare after Brexit was more or less ignored by the Remain side and exploited in a manipulative way by Vote Leave. Yet the issue

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[59] The Healthcare (EEA and Switzerland) Act, 2019.

[60] Oliver ROWLAND, "Lords debate Bill on healthcare of Britons in EU", Connexion France, 5 February 2019.
www.connexionfrance.com

[61] The EHIC card covers emergencies as well as existing medical conditions and is literally a lifeline for many UK citizens visiting the EU. There are 27 million EHIC cards in the UK at present. Reality check team, "Will the EHIC be valid after Brexit?", *BBC news*, 8 February 2019.
https://www.bbc.com/news/world-europe-44850972

of the NHS and of healthcare access for EU citizens in the UK and for British citizens in Europe soon rose to prominence after the vote.

Even the one issue that looked more or less settled by December 2017 – the right of EU citizens in the UK to get settled status and therefore continued access to NHS care in the future – and vice versa for British citizens residing in Europe - is now far from resolved as the possibility of no deal has become more real since the beginning of 2019 and the rejection by Parliament of the Withdrawal Agreement.

Even though the Costa amendment has given some reassurance to EU citizens as to their right to apply for settled status and preserve their existing healthcare rights, there is nothing to stop a future government – perhaps led by an ardent Brexiteer – to change these rights. Before 2018, the requirement that non-working EU citizens wishing to apply for permanent residence needed to have Comprehensive Sickness Insurance is an example of how easy it can be for the government to change healthcare rules for migrants, and even permanent residence rules.

Moreover, since the EU has so far refused to guarantee the existing social rights of British citizens in Europe in case of no deal, those citizens– especially retired citizens with low incomes – are rightly concerned about their future access to healthcare in their country of residence. Despite the Healthcare Act 2019, which allows the UK to pass deals to pay for the healthcare costs of their retired citizens living in the EU, nothing has been formalized as yet, no healthcare deal has been signed with an EU country, so the future healthcare rights of these citizens are still not guaranteed.

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Anémone KOBER-SMITH, « Le gouvernement de coalition et le secteur de la santé: une politique contestée », *Revue de l'Observatoire de la Société Britannique*, n° 15, mars 2014, pp. 115-128.

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Anémone KOBER-SMITH, « '*We will save the NHS':* la réforme du système de santé anglais sous le New Labour », *Revue de l'Observatoire de la Société Britannique*, n° 8, janvier 2010, pp. 69-86.

Part 5.
Relationship between France and Nations with devolved powers

Chapter 11.
Wales v France: Sports foes but political and economic friends

Stéphanie Bory

Relationships between Wales and France have over the last decades been marked by competition and rivalry, the two countries being traditional foes in rugby and, in 2018, cycling, even if, obviously the real enemy is England! And yet, France was one of the first countries to consider Wales as an independent nation when Charles VI of France signed a formal treaty of alliance on 14 July 1404 with Owain Glyndŵr, who had been rebelling since September 1400 against the usurping English king Henry IV, thus recognising his status as Prince of Wales.

France remains today one of Wales' key partners since Wales exported £2.7 billion worth of goods to France in the year to June 2018, making France its second exporting country. European Union (EU) countries overall account for 60.6% of Welsh exports, with businesses exporting £16.6

billion to them over the same period.[1] Wales is also one of the EU regions receiving the most funds, more than £1.9 billion between 2007 and 2013, up to 2.7 billion for 2014-2020.[2] It nevertheless decided to vote for Brexit in June 2016, making Professor Richard Wyn Jones, director of the Wales Governance Centre, based in Cardiff University, write an article entitled "Why Did Wales Shoot itself in the Foot in this Referendum?"[3] Indeed, Brexit is going to have economic consequences for Wales.

Besides, devolution and European membership are inevitably linked since, in both cases, the UK had accepted to give up some of its prerogatives, especially its sovereignty, to another institutional level, as underlined in the *Irish Times* by Paul Gillespie, associate professor at the School of Politics and International Relations in Dublin University: "The twin processes of devolving power downwards within the UK and sharing it with other states in the European Union radically challenge British unitary conceptions of sovereignty constructed in empire, and now made more necessary and difficult for the central British state after it. It is a crisis of political identity for all concerned, in which resolution of the EU issue depends on finding a solution to that of the UK itself"[4]. Both Carwyn Jones, then Wales' First Minister, and Nicola Sturgeon, Scotland's one, were quick to denounce the

[1] Regional Trade Statistics, https://www.uktradeinfo.com/Statistics/RTS/Pages/default.aspx, accessed in November 2018.

[2] See Lisa O'CARROLL, "Wales urged to do deal with Ireland to secure EU funds post-Brexit", *The Guardian*, 28-11-2016, https://www.theguardian.com/uk-news/2016/nov/28/wales-urged-to-do-deal-with-ireland-to-secure-eu-funds-post-brexit, accessed in January 2017.

[3] Richard Wyn JONES, "Why Did Wales Shoot itself in the Foot in this Referendum?", 27-06-2016, http://www.centreconstitutionalchange.ac.uk, accessed in January 2017.

[4] Paul GILLESPIE, "Consequences of fragmentation within the British Isles", *Agenda 50*, summer 2013, Cardiff: *IWA*., p. 28.

"power grab" by the British government on the repatriation of European prerogatives to the UK. Brexit is thus also going to have political and legal consequences for Wales.

As a result, Wales, the only Celtic country voting for Brexit, is willing to preserve existing partnerships and strike new ones with European countries, especially France, as illustrated by the hosting in November 2017 of a conference in Cardiff with more than 20 local and national representatives from all over Europe.

This article thus aims to study the economic, as well as legal and political, consequences of Brexit for Wales, before considering the new relationships the country wants to build with France, one of its oldest friends.

Section 1. The economic impact of Brexit for Wales

Several polls carried out by ICM have revealed that Welsh people feel more and more concerned by Wales' economic perspectives after Brexit: a poll on 1 March 2018 showed that 49% of respondents considered that Brexit was going to have a negative impact on the Welsh economy, and 24% a positive one, compared to respectively 44% and 33% a year before.[5]

In March 2017, Demos, an independent think tank, published a report in which it stated that Wales could be the worst affected region by Brexit in the UK.[6] Demos looked at which nations and English regions could be most vulnerable based on how much they exported to the EU, whether they received large amounts of EU funding and how many migrants were employed. First, nearly 2/3 of Wales'

[5] See BBC News, "Poll for BBC Wales on Brexit attitude and voting", 01-03-2018, https://www.bbc.com/news/uk-wales-politics-43230062, accessed in March 2018.

[6] See BBC News, "Wales most at risk from hard Brexit, says a think tank", BBC, 27-03-2017, https://www.bbc.com/news/uk-wales-politics-39405561, accessed in March 2019.

exports (60.9% in 2018) go to the EU compared to 40% for London and the south west, 44% for UK exports as a whole,[7] Germany and France being Wales' first two export destinations. Besides, Wales was also pegged to receive more than £1.8 bn in the current EU structural funds programme, ending in 2020, which amounts to nearly 1% of Gross Value Added (GVA) annually. However, the risk of loss of EU workers for Wales was deemed to be low, with under 4% of workers in Wales coming from the Union, compared to more than 16% from London. Wales will also be affected more seriously due to unique circumstances, like the way its economy is structured, the type and concentration of jobs Wales has, the importance of Welsh ports, and, as already mentioned, the amount of EU aid the country gets and the places Welsh companies export to.

Two major studies were commissioned by the National Assembly for Wales: the first by Nicholas Perdikis, Professor of International Business at Aberystwyth University, awarded a fellowship with the Assembly between August 2017 and January 2018 to examine the economic impact of Brexit on Wales, and the second by Cardiff University Business School, *EU Transition and Economic Prospects for Large and Medium Sized Firms in Wales*, presented by the Welsh Government in its document *Trade Policy: the Issues for Wales*[8] published in 2018.

Professor Nicholas Perdikis considered how a range of scenarios could impact on trade in Wales, including no deal or trade on World Trade Organisation (WTO) terms as well as membership of the European Economic Area (EEA) as a transitional arrangement, ie three scenarios compatible

[7] See Steffan RHYS, "The impact of Brexit on Wales: 14 serious ways the country loses if we crash out of EU", 08-02-2019, WalesOnline, https://www.walesonline.co.uk/news/politics/impact-brexit-wales-14-serious-15781495, accessed in April 2019.

[8] Welsh Government, *Trade Policy: the issues for Wales*, *Securing Wales' Future*, Cardiff: Welsh Government, 2018, 40 p.

with the UK Government's stated "red lines" – control of immigration, ability of the UK to make its own Free Trade Agreements (FTAs), independence from the European court of justice (ECJ) and an end to substantial contributions to the EU budget. As indicated by Professor Nicholas Perdikis at the beginning of his fellowship: "Nobody yet knows how leaving the EU will affect trade in Wales or the UK as a whole and Brexit remains the focus of political debate and discussion. This fellowship is a fantastic opportunity to work in an advisory capacity to the National Assembly of Wales at a time of significant change to Wales' international economic environment".[9] In 2018, he released his report, *Modelling the Economic Impact of Brexit on the Welsh Economy*,[10] written along with Professor Sangeeta Khorana, of Bournemouth University. Using a "dynamic Computable General Equilibrium model" to study the macroeconomic, sectoral, trade, employment and investment impacts of Brexit, they concluded: "In sum, Wales loses under all scenarios, but with smaller losses under the status quo scenario. Continuation of an extended status quo for a limited period of time is the best policy option".[11] Below are the main findings of the report, with the three options:

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[9] Professor Nicholas PERDIKIS, in Aberystwyth University, "Aberystwyth academic to advise National Assembly on Brexit trade challenges", 18-08-2017, https://www.aber.ac.uk/en/news/archive/2017/08/title-205804-en.html, accessed in March 2019.

[10] Professors Sangeeta KHORANA & Nicholas PERDIKIS, *Modelling the Economic Impact of Brexit on the Welsh Economy*, Cardiff: NAW, 2018, 40 p, https://pure.aber.ac.uk/portal/files/25732755/ModellingImpact_06032018_FINAL_003_.pdf, accessed in Février 2019.

[11] *Ibid*., p. 2.

	Status Quo				No-Deal Scenario	CE-TA[1]-Style (FTA)
	2-year	3-year	5-year	10-year		
Real GDP	-0.57	-0.56	-0.54	-0.50	-0.60	-0.06
Exports	-19.62	-19.57	-19.46	-19.24	-19.70	-0.91
Imports	-4.89	-4.90	-4.92	-4.98	-4.90	-0.10
Unskilled	-2.47	-2.46	-2.46	-2.45	-2.50	-0.13
Skilled	-2.75	-2.75	-2.74	-2.71	-2.9	-0.12
Total Investment	-0.06	-0.059	-0.056	-0.055	-0.061	-0.0066

Table 1: Impact of alternative scenarios until 2030
(% change from baseline)

The authors added that the Welsh sectors most reliant on the EU, hence most vulnerable to Brexit, were food and live animals, machinery and transport equipment, manufactured goods, and chemicals and related products. Professors Perdikis and Khorana mentioned in conclusion the second study, by Cardiff University Business School, presented in *Trade Policy: the issues for Wales*, by the Welsh Government, as part of *Securing Wales' Future*, a white paper jointly written with Plaid Cymru, the nationalist party, in early 2017.

In this report, Carwyn Jones, then Labour First Minister of Wales, acknowledged the major impact Brexit would have on Wales' trade and the country's will to keep strong European links: "Leaving the European Union represents the greatest change in our international trade status for generations. Whatever the challenges, we are clear that leaving the EU does not mean turning our backs on our trading partners in Europe".[12] It was first pointed out that Wales mostly relied

[12] Carwyn JONES, in Welsh Government, *op. cit.*, p. 1.

on two markets: the UK internal market and the EU Single Market, due to Trade gravity, meaning that countries trade more with near neighbours thanks to geographical proximity, ease of entry and no time consuming border checks: "The economy of Wales is deeply embedded within that of the wider UK. Trade gravity helps explain why Wales trades more with Europe than the rest of the world. It is very unlikely that, in the short term, free trade deals with other countries – even the USA – could compensate for the loss of full and unfettered access to the Single Market."[13] The high-risk sectors most vulnerable to the imposition of tariff and non-tariff barriers on their output and/or inputs were aerospace systems and services, the automotive sector, electrical engineering components and semiconductors, chemicals and steel. Besides, the report highlighted the impact of Brexit on Welsh ports, which "play a significant role in the commercial life of Wales, servicing a wide range of specialised and general markets, […] acting as a gateway to economic hubs in the Republic of Ireland, the UK, the rest of Europe and the wider world".[14] Wales has 7 major ports, including Holyhead – the UK's second largest 'roll-on roll-off' ferry port after Dover – which directly supported 18,400 jobs according to a 2011 study commissioned by the Welsh Government. An Associated British Ports report revealed that the South Wales ports alone contributed £1bn to the Welsh economy and 80% of goods carried in Irish registered HGVs (Heavy Goods Vehicles) between the Republic of Ireland and Europe are passing through Welsh ports.[15]

The economic impact of Brexit can already be felt in Wales, as illustrated by the following two examples: Airbus and Ford. Airbus first, which employs 6,500 people at its Flintshire

[13] Welsh Government, *op. cit.*, p. 5.

[14] *Ibid.*, p. 17.

[15] See Steffan RHYS, *op. cit.*

site in Broughton, 400 in Newport and many Welsh people crossing the border to go to Filton, threatened in January 2019 to pull the firm out of the UK over Brexit, as stated by Airbus CEO Tom Enders on a video: "If there is a Brexit without agreements, we may have to make very damaging decisions for Great Britain at Airbus. It is not possible to move the big British factories immediately to other parts of the world. But aerospace is a long-term business. There are countries in the world who would like to build wings for Airbus."[16] It is estimated that Airbus supports 11,600 jobs in Wales in the supply chain, mostly in wing construction. Most jobs are well paying and high-skilled, so that such a decision would have severe consequences in Wales. Similarly, Ford, the carmaker, has warned that a no-deal Brexit would be catastrophic for the firm's manufacturing operations in the UK and that it would do "whatever is necessary" to protect its business. The company, with 13,000 employees in the UK at sites in Bridgend, Dagenham, Halewood and Dunton, is thus making preparation to move its production out of the UK. According to the Unite union, Ford aims to cut almost 1,000 jobs at its Bridgend plant by 2021 because of challenging market conditions.[17]

Therefore, Brexit will undoubtedly have serious economic consequences in Wales. As indicated in the Assembly's document, *Trade Policy*, economics and politics are sharply linked, so that it will also have political consequences: "After we have left, the UK's trade policy will be the principal responsibility of the UK Government but with a

[16] Tom ENDERS, in "Plant closures possible: Airbus threatens the UK with plant closures", 24-01-2019, http://www.tellerreport.com/news/--plant-closures-possible--airbus-threatens-the-uk-with-plant-closures-.B12fT8D74.html, accessed in March 2019.

[17] See BBC News, "Ford warns no-deal Brexit would be 'catastrophic'", BBC, 13-02-2019, https://www.bbc.com/news/business-47225787, accessed in March 2019.

significant intersection with devolved powers in areas such as environmental standards, economic development, agriculture and skills and qualifications."[18]

Section 2. The legal and political consequences of Brexit for Wales

Brexit questions the British post-devolution constitutional settlement since it will change the balance of powers and prerogatives between the central government and the devolved administrations, as stressed in December 2016 by Mick Antoniw, AM for Pontypridd:

"Leaving the EU will lead to significant changes to the devolution settlement in Wales – only the UK Parliament can make those changes, which should be with the agreement of the National Assembly for Wales. The UK Government does not have the power to short circuit the important mechanism for dialogue between the democratically elected National Assembly for Wales and the UK Parliament, by using the [Crown] prerogative in this way."[19] He then mentions the arguments presented by the Welsh Government before the Supreme Court of the UK after Theresa May's decision to trigger Article 50 of the Lisbon Treaty without a vote in Parliament. Very quickly after the process was launched in March 2017, the Welsh Government raised the issue of the repatriation of prerogatives held by Brussels until Brexit. Indeed, the UK being the member state, and not Wales, they will theoretically be given back to the British Government

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[18] Welsh Government, *op. cit.*, p. 2.

[19] Mick ANTONIW, in Welsh Government, "If Brexit is about 'taking back control' then trying to override the British constitution is a bad start' – Counsel General for Wales", 05-12-2016, https://www.wired-gov.net/wg/news.nsf/articles/If+Brexit+is+about+taking+back+-control+then+trying+to+override+the+British+constitution+is+a+bad+start+%E2%80%93+Counsel+General+for+Wales+051220-16110500?open, accessed in May 2018.

which may devolve them to the devolved administrations if they fall under the devolved matters, especially, as stated in the previous quote, in economic development or the environment. They must thus cooperate, as indicated by Professor Richard Rawlings: "The tendency to sequencing – the temptation to treat the devolutionary aspects as if they were some kind of second front best frozen while supranational negotiations proceed, rather than to take them forward in tandem, in a spirit of cooperation – must be firmly resisted."[20] The tensions between the central government and the devolved administrations since the Brexit referendum illustrate the lack of dialogue and the weak relationships within the Union. Such tensions are also highlighted by the failings of the Joint Ministerial Committee (JMC) (EU negotiations) chaired by the Secretary of State for Exiting the European Union and set up after Brexit as "a forum to continue the UK Government's work with the devolved administrations in Scotland, Northern Ireland and Wales to secure the best Brexit deal for the whole of the United Kingdom."[21] In a conference entitled "Brexit and Devolution" presented on 14 May 2018 at the Wales Governance Centre, Mark Drakeford reminded Wales should have a strong voice in the JMC and explained there were calls for a reform of the committee, including a regular calendar, the setting of meetings outside London and the quick publication of minutes. According to him, these proposals were not going far enough, and he demanded the creation of a council of ministers with

[20] Professor Richard RAWLINGS, "Brexit and Territorial Constitutions", *Constitution Society*, October 2017, in Glyndwr Cennydd JONES, "A Union for the 21st century?", 27-03-2018, *ClickonWales*, http://www.iwa.wales/click/2018/03/union-21st-century/, accessed in April 2018.

[21] See British Government, https://www.gov.uk/government/publications/joint-ministerial-committee-eu-negotiations-communique-9-november-2016, accessed in March 2019.

Qualified Majority Voting[22] (QMV) and in charge with the resolution of disputes.[23]

On 13 July 2017, the EU (Withdrawal) Bill was introduced in Westminster by David Davis, the Brexit Secretary of State since 13 July 2016.[24] For Carwyn Jones and Nicola Sturgeon, it did not respect the key devolution principles whereas David Lidington, a Conservative member of the Cabinet since January 2018, had promised in a speech delivered on 26 February 2018 to make "a considerable offer" to the devolved administrations with a deep change in the government's approach of the repatriation of prerogatives under the EU (Withdrawal) Bill.[25] The two First Ministers denounced the "power grab" exercised by the British Government, since article 11 of the bill stated that matters theoretically devolved but practically managed by European directives and law would first be transferred to London, and not to Cardiff or Edinburgh, to enable Westminster to legislate for these matters in replacement of European texts. David Lidington justified this move in the speech mentioned previously in the following way: "Some powers are clearly related to the UK

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[22] A qualified majority (QM) is the number of votes required in the Council for a decision to be adopted when issues are being debated on the basis of Article 16 of the Treaty on European Union and Article 238 of the Treaty on the Functioning of the European Union

[23] Mark DRAKEFORD, "Brexit and Devolution", Wales Governance Centre, 14-05-2018, available on https://www.youtube.com/watch?v=U-JgIiPKVuHg, accessed in May 2018.

[24] *DExEU* ou *Department for Exiting the EU*, a new department, was set up by Theresa May in July 2016 to negotiate Britain's Brexit terms with the EU and define their future relationships. David Davis, disagreeing with Theresa May's decisions, resigned on 8 July 2018 and was replaced by Dominic Raab, also replaced on 16 November 2018 by Stephen Barclay.

[25] David LIDINGTON, in Jo HUNT, "Devolution: The Withdrawal Bill and the concept of the UK Common Market", 15-03-2018, *ClickonWales*, http://www.iwa.wales/click/2018/03/devolution-withdrawal-bill-concept-uk-common-market/, accessed in 2018.

as a whole and will need to continue to apply in the same way across all four nations in order to protect consumers and businesses who buy and sell across the UK, in all parts of what we might call the United Kingdom's common market."[26] Carwyn Jones et Nicola Sturgeon called for the simple and immediate devolution of all the prerogatives. In late February 2018, adopting a common strategy, they asked their devolved assemblies to discuss a bill to ensure that all repatriated powers were not kept by the British Government but immediately handed back to the devolved administrations and both First Ministers threatened not to approve an unamended EU (Withdrawal) Bill.

The Welsh Assembly and the Scottish Parliament hastened to draft a bill stating that European law in the devolved matters would be directly incorporated into Welsh and Scottish laws, while committing not to use these new prerogatives until an agreement was found with Westminster: "Leaders in Wales and Scotland have outlined plans to unilaterally protect their own powers after Brexit, setting the scene for a potential clash with the Westminster Government."[27] Ken Macintosh, the Scottish *Presiding Officer*, considered the Scottish Parliament was not entitled to adopt such a bill. Elin Jones, the Welsh one, however stated that the Welsh Assembly could do so, and a bill was introduced on 7 March 2018. On 21 March 2018, the Assembly voted the Wales EU Continuity Act, with 39 out of 60 AMs in favour, to safeguard, according to Carwyn Jones,

[26] David LIDINGTON, in Andrew SPARROW, "Minister seeks to scotch claims of Brexit power grab", *The Guardian*, 25-02-2018, https://www.theguardian.com/politics/2018/feb/25/minister-seeks-to-scotch-claims-of-brexit-power-grab, accessed in 2018.

[27] Benjamin KENTISH, "Welsh and Scottish leaders to introduce new laws to protect devolution after Brexit", *The Independent*, 27-02-2018, https://www.independent.co.uk/news/uk/politics/brexit-latest-scotland-wales-devolution-law-eu-withdrawal-bill-nicola-sturgeon-carwyn-jones-a8231711.html, accessed in March 2018.

the devolution settlement: "It's not about stopping Brexit, what it is about is making sure that the powers that the people of Wales voted to give to themselves in 2011 are preserved, and that is what it is about."[28] He added the act was only a safety net and that he preferred keeping discussions opened: "I'd rather we moved forward on the basis of agreement between ourselves, between the UK Government and the Scottish Government. We're almost there. There is a gap but it's not unbridgeable, and that will be my preferred way forward."[29] One hour later, a similar text was adopted by the Scottish Parliament.

On 12 March 2018, during parliamentary debates, the British Government, faced with the opposition of the Welsh Assembly and the Scottish Parliament to its bill, introduced a series of amendments, including a compromise on article 11: the control of matters at the intersection of European and devolved prerogatives – 153 matters were listed and released by the Government, among which 64 for Wales – would be given to the devolved administrations by default. The amendment raised another issue: the British ministers' power to legislate in the devolved matters for a specified and transitionary period, which went against the Sewel Convention. This convention, named after Lord Sewel, a former Labour Secretary of State and included in the Scotland Act 2016, also applies to Wales and Northern Ireland. It allows the British Government to ask Members of the Scottish Parliament (MSPs) the right to modify an act related to a devolved matter. The amendments were debated in the House of Lords on 21 March 2018, but eventually removed by the Government without a vote.

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[28] Carwyn JONES, in BBC News, "Brexit: Wales EU Continuity Bill passed by AMs", 21-03-2018, https://www.bbc.com/news/uk-wales-politics-43477470, accessed in April 2018.

[29] *Loc. cit.*

On 17 April 2018, the British Government decided to challenge these two acts before the Supreme Court of the UK, which was to state whether they were constitutional or not. Steffan Lewis, Plaid Cymru's AM and Brexit spokesman, regretted the Government's move: "The National Assembly for Wales legislated to protect our democratic powers from a power grab by the Government in Westminster. It demonstrates the contempt that the Conservatives have for the democratic wishes of the people of Wales that they are choosing to challenge the Bill in the Supreme Court."[30] Along with Simon Thomas AM, Plaid Cymru's spokesman for rural affairs, Lewis had introduced a Welsh European Union Continuity Bill late in 2016, to incorporate into Welsh law all existing European directives and acts. Such a decision fuelled tensions between the British Government and devolved administrations and Akash Paun, a member of the Institute for Government, a British thinktank on governing, warned London on the potential consequences of this strategy, even in case of a favourable decision in the Supreme Court: "[Even] if the continuity bills are struck down in their entirety, this will not help get the EU Withdrawal Bill through. Scotland and Wales are likely to withhold consent in any case, and while legally possible, proceeding without consent would be a risky strategy for Westminster to follow."[31] And yet the British Government decided to proceed with its claim. The Supreme Court of the UK released its decision on the Scottish bill on 13 December 2018 and stated, first, that the Scotland Continuity Bill did not relate to international relations, ie a reserved matter, *per*

[30] Steffan LEWIS, in David WILLIAMSON, "Welsh Government's battle to stop the UK Government Brexit 'power grab' goes to the Supreme Court", *WalesOnline*, 17-04-2018, https://www.walesonline.co.uk/news/politics/supreme-court-brexit-continuity-bill-14540048, accessed in May 2018.

[31] Akash PAUN, in David WILLIAMSON, *op. cit.*

se, but was concerned with the domestic implications of the UK's conduct of international relations, then that a number of provisions made in particular aspects of the bill were outside the Scottish Parliament's competences, and were thus, as Section 29 of the Scotland Act 1998 puts it, "not law". The judgement meant the Scottish Parliament had to introduce amendments to the bill to remove the sections identified by the Supreme Court as incompetent, before sending it back before the MSPs. The Supreme Court considered the fact the EU (Withdrawal) Bill had been adopted by Westminster since March 2018.[32]

Following new discussions between London and Cardiff, the Welsh Government agreed with the EU (Withdrawal) Bill on 24 April 2018. In a statement, Mark Drakeford, then Finance Minister,[33] insisted on the fact that all devolved powers held by the Assembly would remain devolved.[34] As for Leanne Wood, Plaid Cymru's leader, she accused the Welsh Labour Party of selling Wales and surrendering to Westminster.[35] On 15 May 2018, during a plenary debate, the Assembly adopted a Legislative Consent Motion to approve the EU (Withdrawal) Bill. The Scottish Parliament, however, massively refused – 93 votes against 30 – which did not stop Westminster from studying the EU (Withdrawal) Bill. It was

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[32] See The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland (Scotland) [2018] UKSC 64, https://www.supreme-court.uk/cases/docs/uksc-2018-0080-press-summary.pdf, accessed in January 2019.

[33] He became Wales' First Minister in December 2018 after Carwyn Jones's resignation.

[34] Mark DRAKEFORD, in James WILLIAMS, "Welsh and UK Governments agree Brexit bill deal", BBC News, 24-04-2018, https://www.bbc.com/news/uk-wales-politics-43880270, accessed in May 2018.

[35] Leanne WOOD, in James WILLIAMS, *op. cit.*

sent back to the House of Commons on 13 June 2018 and received the Royal Assent on 26 June 2018.

During the conference on Brexit for the Wales Governance Centre on 14 May 2018 previously mentioned, Mark Drakeford considered Plaid Cymru was not concerned by the future of the UK, just as the Scottish Government, leading them to neglect discussions between London and Cardiff on the impact of Brexit on devolution and the British Union and to criticise the Welsh Government's stance. And yet Adam Price, Plaid Cymru's AM and now leader of the party, insisted on the necessary cooperation between Welsh parties to defend Wales' interests in the Brexit negotiations and, late in 2016, called for the creation of a government of national unity: "Wales finds itself at a unique historic crossroads that requires those of us who believe in a national future for Wales to work together to secure it."[36] Following the May 2016 Welsh elections, Carwyn Jones set up a liaison committee on Brexit made up of members of the Labour Party and Plaid Cymru. During the summer 2016, he announced the creation of the European Advisory Group, chaired by Mark Drakeford and composed of Neil Kinnock, former Vice-President of the European Commission, Dr Hywel Ceri Jones, former EU Funding Ambassador, Welsh MEPs, academics, trade unionists and industrialists. The Group, advising the Welsh Government on the challenges and opportunities of Brexit, met for the first time on 28 September 2016.[37] In January 2017, Plaid Cymru and the Welsh Government jointly published a white paper previously mentioned, *Securing Wales' Future, Transition from the European*

[36] Adam PRICE, "Wales united?", *Hope for the Future?*, *Agenda 57*, Cardiff: IWA, Autumn/Winter 2016, p. 25-26.

[37] For the membership of the *European Advisory Group*, see Welsh Government, "Written statement – First meeting of the European Advisory Group", 28-09-2016, https://gov.wales/about/cabinet/cabinetstatements/2016-new/euadvisory/?lang=en, accessed in January 2017.

Union to a new relationship with Europe, presenting the Welsh administration's priorities in the forthcoming negotiations: the single market and international trade, migrants, financing and investments, the devolution settlement, the social and environmental protection in Wales and a transition phase.[38] Wales' two main political parties are willing to collaborate, despite their disagreements.

In the same conference, Mark Drakeford defined three audiences the Welsh Government should aim at and collaborate with: Welsh people, the British Government, and EU members. It is indeed important for Wales to preserve its links with Europe and its traditional partners, as underlined by the former Finance Minister: "to sustain those many bilateral and multilateral relationships that we've spent so many years creating and developing with other nations and regions."[39]

Section 3. Building new relationships with European partners

The Welsh profile in the EU is now based on three elements: its outpost in Brussels, or Wales House, comprising the Welsh Government, Welsh Higher Education Brussels and the National Assembly for Wales,[40] its participation in European networks, and bi-lateral partnerships. The three dimensions will have to be developed post-Brexit. Wales, just as Scotland,[41] has chosen to develop what Panayotis Soldas

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[38] Welsh Government & Plaid Cymru, *Securing Wales' Future, Transition from the European Union to a new relationship with Europe*, Cardiff: Welsh Government, January 2017, https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future_ENGLISH_WEB.pdf, accessed in March 2017.

[39] Mark DRAKEFORD, 14-05-2018, *op. cit.*

[40] Until March 2018, it also included the Welsh Local Government Association (WLGA).

[41] See the article by Juliette RINGEISEN-BIARDEAUD on Scotland's paradiplomacy in this work: "A new alliance against an auld foe? Scottish paradiplomacy in France and Europe".

coined "paradiplomacy", and defined as "[…] direct and, in various instances, autonomous involvement in external-relations activities" of federated states, a term first used to describe the Canadian provinces' diplomacy. According to Stéphane Paquin and Christian Lequesne, "[W]e can talk about paradiplomacy when a subnational or non-central government, like the government of Quebec, mandates an actor, often a minister, to negotiate or enter into relations and defend the interest of this actor directly with other actors abroad. These actors may be sovereign states, federated states, NGO's or private sector actors. Paradiplomacy is thus similar to normal diplomacy with the major difference that non-central governments are not recognized actors in international law. They cannot become full members of international organizations or be part of an international treaty."[42] Wales in a not a state, but part of a wider state, and yet the Welsh Government acts, in terms of the diplomacy of the country, as if it were, developing all three elements of its profile abroad.

First, according to Dr Rachel Minto, a Research Fellow from Cardiff University's Wales Governance Centre, and Kevin Morgan, Professor of Governance and Development at Cardiff University, Wales House should adopt the Wales European Centre model. The WEC, created in 1992, embodied a more co-operative partnership approach: "Now is the ideal time to rehabilitate the partnership model so that WEC 2.0 can represent a wider array of stakeholders in Wales."[43]

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[42] Christian LEQUESNE and Stéphane PAQUIN, "Federalism, Paradiplomacy and Foreign Policy: A Case of Mutual Neglect", *International Journal*, 22 (2), 2016, p. 188.

[43] Rachel MINTO & Kevin MORGAN, "Wales in Europe post-Brexit", *ClickonWales*, IWA, 02-05-2019, https://www.iwa.wales/click/2019/05/wales-in-europe-post-brexit/, accessed in May 2019.

Besides, Wales should reinforce its participation in European networks, seen as "gateways into Europe."[44] On 16 November 2017, Cardiff hosted a conference with more than 20 local and national representatives from all over Europe – Scotland, France, Ireland, Spain, Germany and the Netherlands among others – along with the Conference of Peripheral Maritime Regions (CPMR), grouping 160 regions from 25 states – with only Cornwall for England. Representatives signed the Cardiff Declaration, approved by CPMR on 19 October in Helsinki, in which they committed to keep many partnerships between the UK and nations or regions all over Europe post-Brexit.[45] Carwyn Jones welcomed the signing: "Bringing together representatives from across the regions of Europe and signing the 'Cardiff Declaration' demonstrates our intention to collaborate with our European partners. Wales remains open, outward-facing and international in outlook and Brexit will not change that."[46] Wales hence displayed a strong will to preserve and further develop existing partnerships with European partners, as indicated by Carwyn Jones in a speech he delivered at Cardiff Metropolitan University on 27 November 2017: "Increasing our presence in these key markets has never been more important as we face a future outside the EU. […] That is why we are expanding our presence in Europe and across the globe, so we are able to meet with, and attract, new investors

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[44] *Loc. cit.*

[45] CPMR, *Cardiff Declaration*, 19-10-2017, https://cpmr.org/fr/wpdm-package/declaration-de-cardiff-sur-le-brexit/?wpdm-dl=14548&ind=CdzesLQUBN0LGnL2qmJRadedbbYdlhDfGIayiT-WNPM3l-j_0bia9TgO1Eyq_5ooO, accessed in November 2017.

[46] Carwyn JONES, "European politicians in Wales to talk Brexit", 16-11-2017, https://gov.wales/newsroom/firstminister/2017/1071116-european-politicians-in-wales-to-talk-brexit/?lang=en, accessed in November 2017.

and sell Welsh goods to overseas customers."[47] Cardiff is also a member of EUROCITIES, the network of major European cities founded in 1986 by the mayors of Barcelona, Birmingham, Frankfurt, Lyon, Milan and Rotterdam and bringing together today the local governments of over 140 of Europe's largest cities.[48]

Finally, the Welsh Government should consolidate bilateral alliances with regions with which it feels a sense of strong common identity and mutual interest. French regions are particularly targeted by the Welsh Government. Indeed, in the year ending June 2018, France was the second largest export market for Welsh products, with £2.7bn worth of Welsh products reaching the French market. Equally, France exported £0.8bn worth of French products to Wales that year. The nature of trade between the two countries is varied and includes transport, medical and pharmaceutical, automotive, iron and steel, electronics, food and drink, and a wide range of services. The extent of the importance of the relationship between the two countries was perhaps best demonstrated in May 2018, when the biggest contract ever awarded in Wales, worth £5bn, to run the rail franchise and deliver the next phase of the South Wales Metro, was awarded to a joint venture of French transport giant Keolis and leading infrastructure management consultancy Amey. As the trading relationship between the UK and Europe changes in a post-Brexit world, developing the mutual understanding and collaboration between Wales and France becomes ever more critical.

As a result, the Welsh government decided to open an overseas office in Paris – as well as in Germany, Canada and

[47] Carwyn JONES, in James WILLIAMS, "Five overseas Welsh Government offices to open in 2018", BBC, 27-11-2017, https://www.bbc.com/news/uk-wales-politics-42109029, accessed in March 2019.

[48] See http://www.eurocities.eu/eurocities/home, accessed in May 2019.

Qatar, but the opening in Paris received a much wider media coverage – in a bid to increase trade post-Brexit, meaning the Government now has a presence in 20 countries. This move was yet criticised by the Federation of Small Business which claimed that overseas offices had "no tangible effects" on exports, since, for instance, exports to the US fell from £1,871m in 2013 to £1,631m in 2016, down 13%, whereas exports to Germany and France rose over that period – 40% up in Germany to £2,909m and 33% up in France to £2,047m despite no Welsh Government presence in those countries.[49] Wales Week à Paris was also organised from 22 February to 10 March 2019, with several events, including the Welsh Government Saint David's Day Reception on 27 February, to mark Saint David's Day and the opening of the Welsh Government office in France. It was a networking event co-hosted by the British Ambassador to France, Lord Edward Llewellyn OBE – Ambassador since November 2016 – and Mark Drakeford, the First Minister of Wales. Saint David's Day Festival was also displayed at Disneyland, in Disney Village, with a Welsh crafts market and British and Celtic pop concerts. Wales Week à Paris also aimed to officially launch the Wales France Business Forum, colloquially known as Le Club. This is a Franco-Welsh networking business forum, meant to stimulate networking, partnership development and trading opportunities between organisations with both Welsh and French links, whether these links are through their business operations or through their people. It is a not-for-profit business club open to anyone with existing or ambitions to grow Franco-Wales business relations. Founders of Le Club are its Chair, Céline Jones, Solicitor, Head of the French Desk at Geldards LLP and advising lawyer for the Consulate and the French Embassy in London, and Dan

[49] See BBC News, "'No effects on exports' from Welsh Government overseas offices", BBC, 24-09-2017, https://www.bbc.com/news/uk-wales-politics-41332331, accessed in March 2019.

Langford, Group Marketing Director at leading recruitment firm Acorn. Le Club has received invaluable support from its Founding Partners Geldards LLP, Acorn Recruitment, and both the UK and Welsh Governments – along with generous sponsorship from leading French companies Keolis and Bouygues.

With the EU favouring collaboration between regions, Wales and Brittany, more specifically, have recently been strengthening their links. Wales was for instance the guest country for the 2018 Festival Interceltique de Lorient. Wales and Brittany share Celtic roots and there are very ancient and special links – historic and cultural – between the two territories. They share the same national anthem, composed by James James of Pontypridd, and meanings, even if they are in different languages, *Bro gozh va Zadoù* in Breton and *Hen Wlad Fy Nhadau* in Welsh. Welsh, Breton – as well as Cornic – are the outputs of a language dating from the beginning of the Middle Ages, a time when the Celtic Sea was a link between the coastal regions. They also share several Celtic saints, including Saint Padarn, born c. 490, who founded a monastery near Aberystwyth, or Saint Cadfan in the 6th century. In 1968 already, the Breton nationalist and European federalist Yann Fouéré[50] published his famous work, *L'Europe aux cent drapeaux*,[51] in which he popularised the idea of a "Europe of 100 Flags". He stated that a federal Europe should not be based on the then existing nation states but instead on regional polities, the "100 Flags". His book was translated into English 12 years later and edited

[50] FOUERE was alleged to have been a collaborator to the Vichy Government during the second World War and was sentenced to life in 1946, after he had fled first to Wales, then to Ireland. He was finally found not guilty in 1955. In 2011, just before he died at 101, he launched his autobiography entitled *La Maison in Connemara* at events in Galway and Aberystwyth.

[51] Yann FOUERE, *L'Europe aux cent drapeaux*, Presses d'Europe, 1968.

by a Welsh editor.[52] The necessity to establish strong links between European territories is essential in the current Brexit context, as underlined by Brittany's vice-president in charge of international affairs, Forough Salami-Dadkhak, who told Oliver Rowland, journalist for *The Connexion* on 24 October 2018 that the region hoped to reinforce links between Brittany and Wales by forming a "Euro-region" between the two, and also with Ireland. This is a geographical area common to several regions of different EU member states, or between parts of a member state and non-member states, sharing cultural and historical links, enabling them to devise a common development strategy. On a visit to Brittany earlier in 2018, Carwyn Jones had expressed his support for the plan, as well his wish for close cooperation due to Brexit. Already in January 2004, Rhodri Morgan, the Welsh Labour First Minister, and Jean-Yves Le Drian, President of Brittany's regional council, signed a Memorandum of Understanding, ie a partnership agreement, and identified areas of collaboration such as culture, education, school exchanges or the environment. It led to the common publication of *Brittany, a Partner for Wales*.[53] Ever since then, new projects have been added every few years, as renewable marine energies. A new Memorandum was signed on 11 January 2018 by Carwyn Jones and Loig Chesnais-Girard, the new President of the regional council. It committed the two parties to strengthen economic cooperation between the two regions, particularly by acquiring a better knowledge of the economic characteristics of the two regions, to develop co-operation in the field of education and training, to create relationships and share experience between the various cultural networks, to share and promote best practices

[52] Yann FOUERE, *Towards a Federal Europe, Nations or States*, Swansea, Christopher Harvie, 1980.

[53] Conseil Régional de Bretagne & Wales Cymru, *Brittany, a Partner for Wales*, January 2004.

regarding language planning and to develop exchanges of experience and information in all fields of mutual interest. Finally, both Wales and Brittany are involved in international networks, notably the Network of Regional Governments for Sustainable development (Nrg4sd), which encourages partnerships and cooperation in this domain, for better international recognition of regions' contributions in this area. Wales is thus willing to reinforce its links with France.

Conclusion

In an article published on 30 June 2016 on the website of the Institute of Welsh Affairs, "Wales sleepwalking to independence revisited", Dylan Moore listed the year's main events and finally selected Brexit as the major one: "2016 was all set to be remembered as the year we mourned David Bowie and Muhammad Ali, Prince and Harper Lee; George Martin, Alan Rickman and Terry Wogan; Ronnie Corbett, Paul Daniels and Victoria Wood; Merle Haggard and Howard Marks. It might yet be the year we witness the end of the United Kingdom, leaving little old Wales at the behest of forces way beyond our jurisdiction. We might end up with the bleakest choice imaginable: not so much winning independence but having it thrust all-but-unwanted upon us, or admitting we have become – as the electoral maps are suggesting – a region of England after all."[54] He feared the impact of the vote on the future of Wales and there are, and will undoubtedly be, serious economic, as well as legal and political consequences for the country. The Welsh Government, to limit the impact of Brexit, is trying to reinforce the country's links with European partners, especially France, an old ally and friend.

For the moment, Wales, as the rest of the UK, had to organise the European elections, held on 23 May 2019.

[54] Dylan MOORE, "Wales sleepwalking to independence revisited", *ClickonWales*, 30-06-2016, http://www.iwa.wales/click/2016/06/wales-sleepwalking-independence-revisited/, accessed in July 2017.

Wales's governing party, the Welsh Labour Party, had taken an unclear stance on the second referendum issue since Labour's candidates in Wales declared they were in favour even though the leadership of the party were lukewarm about the idea. During the special edition of the Sunday Politics Wales programme on 12 May, the 8 main party representatives clashed over the issue, and some parties were clearer in calling for a new referendum, especially Plaid Cymru which, in its manifesto *Make Wales Matter*, stated: "A vote for Plaid Cymru in the European elections on 23 May will be a vote for Wales to stay inside the European Union."[55] Plaid Cymru was thus presenting itself as "Wales' leading pro-European party,"[56] along with the Greens, the LibDems and the newly formed Change UK party. The Brexit Party eventually came first in 19 out of Wales' 22 council areas. Nigel Farage's new party won two seats with one each for Plaid Cymru and Labour while the Conservative Party only came 5th with 6.5% of vote. The clearly Remain parties did beat the clearly Brexit parties, but by a small margin with a low turnout. Post-Brexit, Wales's membership to a dual union – the UK and the EU – is creating new divisions.

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[55] Plaid Cymru, *Make Wales Matter*, Cardiff: Plaid Cymru, 2019, p. 2, https://d3n8a8pro7vhmx.cloudfront.net/plaid2016/pages/7962/attachments/original/1557734498/Plaid_Cymru_-_European_Manifesto_2019.pdf?1557734498, accessed in May 2019.

[56] Plaid Cymru, https://www.partyof.wales/europe_candidates, accessed in May 2019.

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Chapter 12.
A Democratic Critique of Referendums in France and in the United Kingdom: Convergence or Divergence?

Philippe Cauvet

The first words of this chapter aim at warning the readers that it was drafted by someone who does not claim to be a specialist of comparative constitutional law, even less of the question of referendums. As a preamble, I must humbly confess here, that I don't know much about the British constitution and perhaps even less about the French Constitution. Yet, the author of these lines happens to be a French academic, specialising in British and Irish studies, and in the last three or four decades, the referendum question has become a central question both in my life as a French citizen, living and voting in France, as well as in British and Irish politics which is my object of academic study. Many referendums have taken place in France, in Britain and in Ireland/ Northern Ireland. The question of the democratic value of

referendums has even taken more dramatic salience with the 2005 French referendum on the European constitution and with the June 2016 Brexit referendum, with its resulting political and constitutional chaos in the UK and the question of the Irish border question. That is why, even if many aspects of the British and the French constitutions have already been brilliantly compared by other academics,[1] it is hoped that the reflection below, focussing on the place and functions of referendums in the two constitutional traditions, can bring a fruitful contribution to existing scientific knowledge.

For a very short while after the election of Emmanuel Macron in 2017, it seemed that, as Britain was sinking into the post-Brexit referendum depression, France was slowly overcoming its 2005 crisis and was returning to a quasi-normalised political process: there had been no France-wide referendum since 2005, Macron had been elected President and the following legislative elections had returned a very large pro-Macron majority to the *Assemblée Nationale*. But then the *Gilets Jaunes* came, contesting the legitimacy of the French government's and *Assemblée Nationale*'s decisions, returning to the traditional claim for a referendum, more precisely asking for the establishment of a People's Initiative Referendum. So funnily enough, as this piece is being written, both the French and British democracies, however different their constitutional roots are, seem to be suffering from the very same referendum trauma. Does it mean that they in fact are more similar than different? To what extent is the pressure for more referendums, and the multiplication of them, an

[1] E. GIBSON-MORGAN, *Constitutional Reform in Britain and France, From Human Rights to Brexit*, Cardiff, University of Wales Press, 2017.
J. HAYWARD, "Parliament and the French government's domination of the legislative process", *The Journal of Legislative Studies*, (2004) 10:2-3, pp. 79-97.
Frank WRIGHT, "Is Northern Ireland Britain's Algeria?", *Études irlandaises*, n°16-2, 1991, pp. 119-131.

attack against or a complement to representative democracy in both countries? To what extent are the constitutional definition and the practice of referendums converging in France and in the UK? Can the French example help us understand the main democratic risks that exist in today's UK? To what extent does the French constitutional definition and practice of referendums help us make sense of the crisis which has been taking place in the UK since the Brexit referendum of June 2016?

At first sight, such questions can seem odd to any specialist of the British and French constitutional traditions. The Gaullist philosophy, which led to the establishment of the Fifth Republic in France in 1958, certainly has nothing to do with the Diceyan interpretation of the British Constitution of which Parliamentary Supremacy is the corner-stone. Yet, the aim of this chapter is actually to show that the ways France and the UK have conceived, constitutionalised and used referendums surprisingly raise the same questions on their democratic value.

The first section aims at identifying two major democratic problems raised by referendums in France, namely the weakening powers of Parliament to the advantage of the executive and an increased capacity for the executive to shape the electoral majorities it needs. The other sections, demonstrate that democratic problems related to referendums in the UK are of the same nature. Referendums have entailed, first, a dramatic weakening of Parliamentary Sovereignty (Section 2). Second, and more fundamentally perhaps, they have allowed the executive to do, but also to undo majorities, which largely contributed to destabilising the Northern Irish democracy established in 1998 (Section 3).

Section 1. Referendums in France since 1958: Theory, practice and democratic limits

The aim the first section of this chapter is to focus on the main characteristics of referendums in France, notably since 1958. Two main problems stand out and are successively addressed. The first is that referendums were conceived as one of the main constitutional tools given to the Executive to short circuit the power parliament. The second problematic aspect that stands out, notably when one studies the various referendums called on the Algerian question, is that referendums are about manufacturing democratic majorities as they allow the executive to shape the demos, that is to define and decide who votes, on what and when.

Following Laurence Morel's analysis, it can be argued that de Gaulle used the referendum as an instrument to introduce what Weber called a « plebiscitarian democracy », the main point of which was to give the executive, embodied by a charismatic leader, the constitutional means to short circuit any parliamentary power.[2] Although the Fifth Republic conceived by Charles de Gaulle and established by referendum in 1958 can, technically speaking, be defined as a parliamentary regime, it simultanously gave extensive powers to the President of the Republic, in order for it to avoid the political instability of the « *régime des partis* » that had prevailed under the Third

[2] Laurence MOREL, La Ve République, le référendum, et la démocratie plébiscitaire de Max Weber, *Jus Politicum*, n° 4, http://juspoliticum.com/article/La-Ve-Republique-le-referendum-et-la-democratie-plebiscitaire-de-Max-Weber-226.html: ‹*Il [le référendum] peut être vu comme le mécanisme central par lequel la Ve République naissante a parachevé une similarité frappante avec le modèle de « démocratie plébiscitaire » esquissé pour l'Allemagne par Max Weber dans ses écrits politiques de 1917-1919* ; Max WEBER, *Max Weber et la politique allemande, 1890-1920*, Paris, PUF, 1985 ; Voir aussi Martial FOUCAULT, *La Constitution de la Ve République va dans le sens du Président*, Titre VII, septembre 2018, n° 1 [https://www.conseil-constitutionnel.fr/publications/titre-vii/la-constitution-de-la-ve-republique-va-dans-le-sens-du-president]

and Fourth Republic. The very referendum which established the Fifth Republic was itself aimed at legitimizing De Gaulle as the President of the new republic and the creation of the *Conseil Constitutionnel* was a guarantee that the Gaullian conception of the Constitution could prevail against any potential attack, including from Parliament. The idea of De Gaulle and Debré was to rationalise parliamentarian democracy by giving the executive the means and powers to influence, or even to avoid, parliamentary intervention in the legislative process. Not only has the President been elected by direct universal suffrage after 1962, like the *Députés*, but the President also enjoys very large powers defined by Articles 12, 15, 20, 49.3. An essential element of these powers, is the right to initiate referendums: according to Article 11, the President has the power to launch a national referendum on any piece of legislation. These powers are justified by a dual definition of popular sovereignty. According to Article 3 of the Fifth Republic, the sovereignty of the French people exercised through the means of Referendums is of equal value and legitimacy to that exercised through their *Députés* and *Sénateurs*: "*La Souveraineté nationale appartient au peuple qui l'exerce par ses représentants et par la voie du référendum*" .

In France therefore, the point of the referendum is not so much to introduce more popular participation or deliberation into the democratic system. It is part of a wider constitutional framework whose function is to weaken Parliament. Its aim is to create an alleged direct link between the person of the President and the sovereign people, to legitimize Presidential decisions as directly inspired by and for the sovereign people. Following Charles De Gaulle 's quasi organic and fusional conception of his relationship with the French people, both the presidential election by universal suffrage and the referendum were the constitutional keys by which his charismatic leadership was made democratic and legitimate. Hence his resignation after the failure of his 1969 refe-

rendum: he could not remain in office since he had lost the confidence of the people he led.

After de Gaulle, the referendum lost its plebiscitary function and was much less the expression of this symbolic organic link between the French People and a charismatic President. This was visible in 1992 when Mitterrand declared in advance he would not resign even in the case of a no majority on the Maastricht Treaty referendum. As for Jacques Chirac, he did not resign after his defeat on the 2005 referendum. However, as could be seen both in 1992 and in 2005, and since both these referendums were a deliberate choice by the respective presidents rather than a constitutional obligation,[3] the referendum had remained a constitutional tool in the hands of the President in order to avoid pluralistic parliamentary debate and contradiction within their majorities or to divide the opposition. Both Mitterrand in 1992 and Chirac in 2005 knew that a referendum on Europe would be very divisive within the ranks of their respective oppositions. In 1992, a large part of the French right, including within the main political party, rejected the Maastricht treaty. In 2005, Jacques Chirac knew very well that it was the same for the left regarding the European Constitutional Treaty.[4]

The second feature of Referendums in France I would like to insist on is linked to the plurinational nature of the French State, notably at the time of the Algerian question which General De Gaulle chose to settle by several referen-

[3] In 1986, F. Mitterrand chose to have the Single European Act ratified by Parliament, not by a referendum.

[4] If the 2005 referendum can be seen as an obligation which Jacques Chirac could not do without, it can also be argued that it was more of a tactical move. See Pierre MARTIN, Le choix de Chirac ou Pourquoi Jacques Chirac a-t-il choisi la voie référendaire pour la ratification du Traité constitutionnel?, in A. Laurent & N. Sauger, *Le référendum de ratification du Traité constitutionnel européen du 29 mai 2005: comprendre le « Non » français,* Les Cahiers du CEVIPOF, N° 42, Juillet 2005, pp. 26-41.

dums. Not only did he consider the 1958 majority in favour of the Fifth Republic as an unquestionable sign of massive popular support for *l'Algérie Française*, but once he announced he had changed his mind about the status of Algeria, he again used referendums: one in January 1961, one in April 1962 and one in July 1962. These referendums can be seen as typical examples of what theoreticians of democracy have identified as the Democratic Boundary Problem.[5] The democratic boundary problem can be briefly summarized as the impossibility to have a normative definition the *Demos*. Democracy, by giving power to the *Demos,* presupposes that the *Demos* exists, yet there is no such thing as a normative definition of the *Demos*. Nor is there any normative framework on when and how often to initiate referendums. That is why, as some constitutionalists and political scientists have argued, any referendum is by nature constitutive, especially when it is used in plurinational States:[6] as the normative definition of the *Demos* does not precede the referendum, it is the referendum itself which constitutes and defines the *Demos*.

In France, the succession of referendums on the Algerian question and the different definitions of the *Corps électoral*

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[5] The boundary problem has emerged as one of the major questions in the field of democratic theory. See for instance: David MILLER, *On Nationality,* Oxford: Oxford Univ. Press, 2004; Sarah SONG (2012), "The boundary problem in democratic theory: Why the demos should be bounded by the state." *International Theory*, 4(1), 2004, pp. 39-68; Margaret MOORE, "Justice et théories contestées du territoire", *Philosophiques*, 39 (2), Automne 2012, pp. 339-351; D. LEYDET, "Démocratie et frontières: le problème de la constitution du demos et le recours à l'histoire", *Philosophiques*, 39 (2), Automne 2012, pp. 405-419; F. WHELAN, "Prologue: Democratic Theory and the Boundary Problem," in *Nomos XXV: Liberal Democracy*, ed. J. Rolan Pennock, John W. Chapman, New York & London, New York University Press, 1983.

[6] Stephen TIERNEY, "Should the people decide? Referendums in a post-sovereign age, the Scottish and Catalonian Cases", *Netherlands Journal of Legal Philosophy*, 2016 (45)2, pp. 99-118.

who voted on each of these referendums are typical examples of this democratic boundary problem generated by referendums. Instead of having a predefined sovereign people decide, they actually constituted the sovereign people and the relevant majorities. By using this multiple referendum process to settle the Algerian question, the aim of the French executive was certainly not to have the sovereign people express its majority opinion. Rather it was actually to create the sovereign people and to manufacture the majority that it needed. If the 1958 referendum was, according to De Gaulle's own interpretation, an unquestionable sign of the people's will to keep Algeria French, why then should a referendum, only two years later mean that the same sovereign people chose Algeria to become independent? Since both referendums were constitutional, which of the two referendums was democratically legitimate and why? What democratic normative principle could justify that the Evian Agreements should be submitted to a referendum in *La Métropole* only and not in Algeria? In the absence of any binding pre-existing constitutional and democratic norm on the frequency of referendums, and in the absence of a normative and binding definition of the *Corps électoral*, de Gaulle was actually free to determine these parameters as he wished. His choice of a multiple referendum process to settle the Algerian question shows that referendums are not about letting the French sovereign people express its majority opinion. The referendum in France considerably facilitates the effort made by the executive, when it needs it, to shape and determine the people and the majority it requires.

From these two features, one can see then, that in the Fifth Republic, referendums are certainly not part of a more deliberative component of French democracy: they are just a tool in the hands of the executive to reinforce its power and prerogatives. Not only do they give the executive more power against Parliamentary control but they also give the

executive an instrument to create and shape the majorities it seeks when it needs to legitimize its own political decisions.

Section 2. Referendums in the UK and parliamentary democracy

Of course, at first sight the portrait of the French model of referendum democracy just drawn above seems to stand as the perfect counter-model to the Diceyan interpretation of the British constitution whose corner stone is Parliamentary Supremacy. And, if Dicey himself was not against the principle of referendums,[7] it is simply because he conceived them as a potential addendum to Parliamentary sovereignty rather than as a limitation to it. Vernon Bogdanor has summarized this Diceyan theory of referendums, showing in crystal clear language that it is the polar opposite of French referendums in the Fifth Republic:

> The referendum serves not to replace the machinery of representative government but only to supplement it. The machinery of representative government remains but certain issues, either before or after they are scrutinized by the legislature, are put to the people for their approval. A measure still requires scrutiny before it can become law. But where there is provision for the referendum, the measure undergoes an extra measure of scrutiny before it reaches the Statute book. The dichotomy between representative and direct democracy is therefore a highly misleading one. Use of instruments of direct democracy is intended not as an alternative to the mechanisms of the representative system but as a complement to them.[8]

However, if one looks at the way UK-wide referendums were actually decided and the circumstances in which they were used, one can clearly detect a distinct convergence with the French Fifth Republic model rather than a strict adhe-

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[7] Mads QVORTRUP, A.V. DICEY, "The Referendum as the People's Veto", *History of Political Thought*, vol. 20, no. 3, 1999, pp. 531–546.

[8] Vernon BOGDANOR, *The New British Constitution*, Oxford, Hart Publishing, 2009, p. 174.

rence to Diceyan theory. Wilson's 1975 referendum on European Membership, Cameron's 2011 Alternative Vote referendum and the 2016 Brexit referendum were all decided by the executive in attempts to silence, at least temporarily, opponents in their own majority. In 1975, Harold Wilson decided to launch a referendum on EEC membership not because he was convinced that British people should have a say on an exceptionally important constitutional question, but only to pull the rug out from under Tony Benn and his friends who, although they were in the Labour party, wanted to leave the EU. The decision to have UK-wide referendum on EEC membership was the result of a deal between the two camps in the Labour majority. The Alternative Vote referendum launched by David Cameron was aimed at weakening the Lib-Dem component within the majority coalition by getting rid of one of their major demands. As a change in the electoral system was demanded by the Liberal-Democrats, the referendum had been agreed on as part of a coalition-programme agreement with the Conservatives. As for the 2016 Brexit referendum, it was aimed at suppressing the internal opposition of eurosceptic conservatives led by Boris Johnson, who used the European question to try and become the Conservative Party leader. Cameron had promised such a referendum, should the Conservatives be re-elected in 2015. On these three occasions, there was no fundamental conviction that the nature of the question raised was of such constitutional importance it required a referendum rather than the usual parliamentary procedure. Donald Tusk actually confessed that Cameron told him he had promised the anti-EU Conservatives to hold a referendum because he was convinced he would still be in a coalition with the Lib-Dems who, he thought, would never accept the principle of holding such a referendum.[9] In these three cases, the Prime minister

[9] *The Guardian*, 21 January 2019.

was under no constitutional obligation to call a referendum. These three referendums were simply part of a majority management tactics in the hands of the executive.

In practice therefore, the UK-wide referendum has proved to be very different from its Diceyan theoretical conception. It does not supplement Parliamentary sovereignty. It does not give sovereignty to the people either rather than to Parliament.[10] It merely gives the executive more power against Parliament. The executive decides what question and what circumstances are the best to make sure the referendum is an efficient tool to short-circuit oppositions and obstacles that any pluralistic parliamentary system naturally generates.[11] As was most visible after the Brexit referendum, in Britain, and even if the Leave campaign was centred on a pro-parliamentary supremacy rhetoric, referendums are not part of an attempt to reinforce parliamentary supremacy. Nor are they aimed at creating a more direct and deliberative democratic system. It is an essentially anti-parliament instrument in the exclusive hands of the executive. Whereas basic democratic theory was premised on the need for Parliament to check Executive power,[12] UK-wide referendums have proved to be an instrument for the executive to check Parliamentary sovereignty. The most explicit confirmation of this was brought

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[10] Vernon BOGDANOR, "After the referendum, the people, not Parliament, are sovereign", in *Financial Times*, December 9, 2016.

[11] Even if there is an Electoral Commission, its function is limited to controlling the practical aspects of the organisation of referendums (wording of the referendum question, distribution of information, campaign organisation and funding, publication of results...). It does not intervene in the decision to hold the referendum. See https://www.electoralcommission.org.uk/our-work/roles-and-responsibilities/our-role-in-elections-and-referendums.
See also *Report of the independent commission on referendums, The Constitution Unit*, UCL, July 2018.

[12] Jeremy WALDRON, Separation of Powers in Thought and Practice, *Boston College Law Review*, 2013, 54-2, pp. 433-68.

by Theresa May who, once she had become Prime Minister, invoked royal prerogative to exclude Parliament from the process of triggering Article 50. It took the Miller case and the decision of the Supreme Court to reintroduce Parliament in that process. Without the Miller decision, Parliament would have been completely excluded from the Article 50 procedure[13]. That is why most Brexiteers, including Mrs May herself, felt seriously frustrated after the Supreme Court's decision on the Miller case since it forced them to compose with Parliamentary counterpower when they had thought the referendum results had given freer reins to the executive to monitor the UK's exit from the EU alone[14].

This is why it can be argued that the way and the circumstances in which those three UK-wide referendums were decided and held show a striking similarity with the French conception and practice of referendums. The following words, written by Nat Le Roux on the history of British referendums, might perfectly be used to describe French referendums:

> There are no coherent constitutional rules which tell us when a referendum is required, or indeed when it might be inappropriate. This is in contrast to many other democracies, where the circumstances in which a referendum should be held are more clearly defined, often in written constitutions[...]. Because of this flexibility, the history of referendums in the UK is characterised by political opportunism. They have commonly been used, or promised, to resolve intractable internal disputes within political parties [...]. The fact that each referendum requires its own separate legislation

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[13] Dominic GRIEVE, *Brexit and the sovereignty of Parliament, a backbencher's view*, February 8, 2018, https://constitution-unit.com/2018/02/08/brexit-and-the-sovereignty-of-parliament-a-backbenchers-view/
See also, Mabbet, D., "Brexit and Parliamentary sovereignty", *The Political Quaterly*, 88(2), 2017, pp. 167-169.

[14] Andrew BLICK, *Brexit and Parliamentary 'Sovereignty'*, 10 April 2019 [https://fedtrust.co.uk/brexit-and-parliamentary-sovereignty/]

> also allows the government to vary the franchise and the campaign rules opportunistically.[15]

In the UK, Referendums, and more especially the Brexit referendum, have introduced a form of competition between direct popular sovereignty and representative parliamentary sovereignty, turning the executive into the sole arbiter between the two procedures. The fundamental motivation for the executive to choose the referendum option rather than the parliamentary procedure is not to complement representative democracy. It is to get out of the problems imposed by parliamentary pluralism and oppositions. Hence, like their French counterparts, the three UK-wide referendums held in Britain in 1975, 2011 and 2016 smell very much of *parlementarisme rationnalisé*.[16] Just as French referendums are part and parcel of a regime in which parliament, rather than being sovereign, is rationalised by and for the executive, referendums have largely helped transform the UK into a parliamentary democracy with less parliamentary sovereignty. To the sole advantage of the executive.

Section 3. Referendums in the UK and the democratic boundary problem: the case of Northern Irish democracy

The aim of this last section is to assess the function(s) of referendums in the democratic settlement of sub-state national questions in the UK, more particularly of the Northern

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[15] Nat LE ROUX, *Is there a tension between Parliamentary Democracy and referendums?*, 18 November 2016, The Constitution Society, available at https://consoc.org.uk/publications/tension-parliamentary-democracy-referendums/

[16] Of course, this "parlementarisme rationnalisé in the UK is not something new, nor is it exclusively linked to the fairly recent introduction of referendums." See E. GIBSON-MORGAN, *op. cit.* See also Peter L. LINDSETH, "The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France", 1920s-1950s, *The Yale Law Journal*, vol. 113, no. 7, 2004, pp. 1341–1415.

Irish question. Just like France did with Algeria, London resorted to different referendums to try and settle questions related to sub-state nationalist demands in Wales, in Scotland and in Northern Ireland. Devolution referendums and the ensuing establishment of devolved institutions in the three Celtic peripheries were a major constitutional change in British democracy. However, as has been demonstrated by the yet unsolved Irish Border conundrum, the Brexit referendum has proved to be a factor of serious destabilisation for Irish/Northern Irish democracy, which itself had been established by two referendums in 1998 (one Northern Ireland and one in the Republic of Ireland). Hence the democratic value of the Brexit referendum can, and must, be assessed against the democratic value of the previous referendums which were used to settle the Northern Irish question.

The Northern Irish question can be defined as a democratic boundary problem due to clashing definitions of democratic popular sovereignty. The Irish nationalist definition of the Demos (the majority in the isle of Ireland) is in conflict with the unionist definition of the Demos which is defined as the majority in the UK. After failed attempts in the 1970s and 1980s, which involved one referendum in 1973,[17] it is only in 1998 that an agreement between these two definitions emerged, enshrined in the Good Friday Agreement and ratified by two simultaneous referendums in Northern Ireland and in the Republic of Ireland. That settlement, and the creation of agreed devolved power-sharing institutions in Nor-

[17] The first referendum ever called in the UK was the 1973 Northern Ireland Border Poll. Organised only in Northern Ireland, it was boycotted by the Nationalist minority who considered it was a mockery of democracy. Since unionists have a demographic majority in Northern Ireland, the 1973 referendum only aimed at reassuring them that London respected their rejection of a reunified Ireland. See Philippe CAUVET, « L'Etat britannique et la crise en Irlande du Nord: de Wilson à Thatcher », *Revue Française de Civilisation Britannique*, XXII-Hors série, 2017, consulté le 29 mai 2019. URL: http://journals.openedition.org/rfcb/1704

thern Ireland were the end result of a long peace process during which London had slowly accepted to alter its Northern Irish policy. First, in 1985, with the Anglo-Irish Agreement, Margaret Thatcher officially broke the alliance between London and the Northern Irish Unionist block.[18] From then on, London consistently stuck to that line, declaring that it had no particular and selfish interest in Northern Ireland. As early as 1990, the Secretary for Northern Ireland, Peter Brooke, used that phrase in a public speech and very shortly after, it became one of the fundamental points of the 1993 Downing Street Declaration by John Major and Albert Reynolds, the starting point of the official peace process which aimed at recreating democratic institutions in Northern Ireland:

> The Prime Minister, on behalf of the British Government, reaffirms that they will uphold the democratic wish of the greater number of the people of Northern Ireland on the issue of whether they prefer to support the Union or a sovereign united Ireland. On this basis, he reiterates, on the behalf of the British Government, that they have no selfish strategic or economic interest in Northern Ireland. Their primary interest is to see peace, stability and reconciliation established by agreement among all the people inhabit the island, and they will work together with the Irish Government to achieve such an agreement, which will embrace the totality of relationships.[19]

Hence the basic premise on which London's participation in the Irish peace process was based was that a democratic solution to the Northern Irish problem was to be found in Ireland but not in Britain as the London government now refused to be the spokesparty for the Northern Irish Unionists. The two referendums that took place to ratify the Good Friday Agreement were nothing less than the implementation

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[18] Philippe CAUVET, *Ibid.*

[19] Downing Street Declaration, 15 December 1993. Available at [https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/peace-process--joint-declaration-1993-1.pdf]

of this democratic redefinition. London, as a neutral party in the question, accepted that Northern Irish democracy could be defined exclusively by two concurrent democratic majorities in Ireland: a majority in Northern Ireland and a majority in the Republic of Ireland. It accepted to build an Irish/Northern Irish democracy in which the British people were not the part of the demos.

In this context, it can be argued that the Brexit referendum in 2016 reshuffled the democratic cards in Northern Ireland, as it put into question the long and hard-gained redefinition of Northern Ireland's democracy which had started in 1985. The 2016 upheaval was all more violent as a majority of Northern Irish voters, 56%, voted to remain in the EU. By launching a UK-wide referendum on the UK's European membership in 2016, David Cameron deliberately short-circuited not only the sovereignty of the Parliament of Westminster but also that of the democratically expressed wish of the majority in Northern Ireland.[20] A UK referendum was, by nature, a unilateral reassertion of democratic popular sovereignty over the entire territory of the UK. By constituting the Demos as the totality of voters in the UK as a whole, the choice of David Cameron's government meant that the devolved regions would have no say in the decision, even if, locally, majorities were likely to be different. Opting for a UK wide referendum, David Cameron made the choice of unilaterally reasserting UK popular sovereignty as an integral and undivided popular sovereignty: only a UK-wide monolithic majority could decide the status of all the constituent parts of the UK, regardless of their pre-existing differentiated constitutional status and regardless of the results of the referendum itself in the devolved regions. This referendum,

[20] On the case of the Scottish referendum, David Cameron had chosen to have only Scottish voters decide rather than the whole of the UK, following the pattern established by the Blair government's Devolution referendums.

was, in its very essence, repugnant to the definition of the Demos contained in the Good Friday Agreement ratified by London in 1998. Just as the peace process had constituted a new cross-border Irish and Northern Irish Demos, validated by the 1998 referendums, David Cameron's referendum was premised on the alternative idea that, as Dicey, the staunch unionist, had argued when defending the introduction of a referendum to oppose Irish Home Rule, the UK democracy is constituted on one single solid people. The UK-wide referendum being a fundamentally unionist instrument, it was bound to sap the very foundations of Northern Irish democracy established in 1998.[21]

It is certainly not by chance, therefore, that the Northern Irish devolved Assembly and Executive collapsed just a few months after. Even if the proximate cause for the end of the power-sharing institutions in Northern Ireland was Martin McGuinness' resignation from his post as Deputy First Minister, the Brexit referendum proved to be an opportunity, for Northern Irish parties on both sides, to reject the very logic of power-sharing and to return to their traditional conflicting definitions of democracy. Regardless of the pro-remain majority in Northern Ireland, Northern Irish Unionists were only too happy to seize this unexpected opportunity: it was the first time since 1985 that London had given them a clear sign that they are, once again, an integral part of a UK-wide indivisible Demos. The results of the 2017 snap General elections gave them a second opportunity allowing them to sign a confidence-supply deal with

[21] Cameron's conception of an undifferentiated UK-wide majority was confirmed by the Supreme Court's Miller decision. See C. McCRUDDEN, & D. HALBERSTAM, *Miller and Northern Ireland: A Critical Constitutional Response* (October 31, 2017). The UK Supreme Court Yearbook, Volume 8, December 2017; U of Michigan Public Law Research Paper No. 575; Queen's University Belfast Law Research Paper No. 2018-3. Available at SSRN: https://ssrn.com/abstract=3062964

Mrs May's pro-Brexit Conservatives. As for the Nationalist/Republican side, the 2016 referendum was conceived as the demonstration that Britain had never really meant to create an exclusively Irish/Northern Irish democracy. Sinn Fein immediately called for a reunification referendum, soon to be followed by the SDLP.[22] Instead of working together and passing complex deals in the Northern Irish Assembly for the general good of the majority in Northern Ireland, parties on both sides of the divide in Northern Ireland, including, to a certain extent, moderates like the SDLP and the UUP, chose to return to their respective age-old sectarian rhetoric in which one definition of popular sovereignty (the right of the majority on the isle of Ireland) excludes the right of the other majority (the majority in the UK). As both communities, and their respective spokesparties, officially want to keep the Irish Border as open as possible, the Brexit referendum has renewed the Irish Border question, which is now exclusively and fundamentally democratic rather than socio-economic. Even though referendums had been instrumental in providing for the constitution of a cross-border Irish/Northern Irish Demos since 1998, the Brexit referendum came as a deconstruction of that Demos, recreating the conditions by which the democratic and constitutional status of the Irish border is, once again, contested by the two Northern Irish communities and their respective political parties. Just like De Gaulle used referendums to do and undo the majorities he needed to give democratic legitimacy to his Algerian policy, referendums have proved to be both constitutive and destructive for Northern Irish democracy. After a long and painful effort to peacefully reconcile nationalist and unionist conceptions of democracy, which culminated with the 1998 Good Friday Agreement ratified by parallel referendums in Ireland and in Northern Ireland, the Brexit referendum

[22] Martin McGuinness (Sinn Fein), in *The Guardian*, March 11, 2016. Colum Eastwood (SDLP), in *The Irish Times*, March 30, 2017.

of 2016 has seriously, perhaps irreversibly, undermined the foundations of democracy in Ireland/Northern Ireland.

Conclusion

From all this it appears quite clearly that the French and British examples can be used as some of strongest arguments to build a democratic critique of referendums. Both in France and in the UK, in spite of their differing constitutional traditions, referendums have had similar effects, significantly reinforcing the executives against parliamentary counter-powers while giving them the means to, opportunistically, do and undo majorities according to their needs and to circumstances. In their own specific ways, both France and the UK have become executive-led regimes, largely shaped by referendum democracy. That is why, the democratic value of refendums should certainly be questioned rather than assumed. If, in De Gaulle's mind, referendums were the most democratic means to use sovereignty, the type of plebiscitarian direct democracy that he had in mind is perhaps questionable, both for France and for the UK, especially at a time when populist movements, always keen on defending referendums, have found regained momentum.

This raises multiple, far-reaching and, to a certain extent, contradictory questions on the UK: How can the UK rebuild its parliamentary and pluri-national democracy in the wake of the devastating effects of the Brexit referendum? Is a second Brexit referendum the most democratic and efficient way to get out of the constitutional crisis in which the UK has been plunged since 2016? In the particular case of Northern Ireland, can democracy be restored in the Province? How can the 56% majority in favour of remaining in the EU obtain satisfaction? Who, in Northern Ireland, is willing and able to bring the representatives of both communities back into a parliamentary assembly to find a democratic solution

to the Irish Border question for the interest of the majority? Can the two communities, through their respective parties, find an agreement on the re-establishment of devolved institutions within the framework of the Good Friday Agreement? Or has the democratic system, agreed on and established in 1998, been damaged beyond repair by the Brexit referendum?

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Chapter 13.
A new alliance against an auld foe? Scottish paradiplomacy in France and in Europe

Juliette Ringeisen-Biardeaud

Introduction

In a move that no-one would have expected five years ago, former Labour First Minister H. McLeish, traditionally a political opponent to the First Minister's party, the Scottish National Party (SNP), hailed N. Sturgeon's trips abroad to promote Scotland in the following terms:

> She is doing absolutely the right thing. Scotland has much to offer the outside world. It is important we have a more ambitious and more assertive international policy. The UK Government is doing very little for Scotland amid this Brexit crisis and I think it is vital that we move forward and we build up our already good international reputation". He added: "Regardless of what our final constitutional destination may be, Scotland has got to be more aggressive in terms of selling the country to the world. I am always

> trying to be an ambassador for Scotland and I believe what Nicola Sturgeon is doing is absolutely critical.[1]

N. Sturgeon has indeed launched a series of trips abroad, coupled with the opening of offices of the Scottish government (dubbed 'Innovation and Investment Hubs') since 2018. These endeavours culminated in her visit to France on 17-19 February 2019 to open the Paris hub during which she met the then European affairs Secretary N. Loiseau and gave an interview to the French newspaper *Le Monde*.[2]

In the particular context of Brexit, there has been an unprecedented head-on opposition between the Scottish and British governments. Therefore, even more so than before, opening governmental offices in foreign capitals and meeting foreign officials can easily appear as attempting to establish a Scottish diplomatic presence abroad should Scotland become independent. Such undertakings by regions or sub-State entities are usually referred to as paradiplomacy.

According to E. Hepburn, paradiplomacy refers to the "international activities and external engagement of sub-State actors".[3] For A. Lecours, the issue of regions as "[…] international actors is very sensitive for States because it involves another challenge to their sovereignty and it is viewed as troublesome for the articulation of a coherent foreign policy".[4]

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[1] K. NUTT, Sturgeon's trips to promote Scotland are 'vital' say former senior ministers, *The National*, 20 February 2019.

[2] Sturgeon uses French trip to make business case for post-Brexit Auld Alliance, *Scottish Financial News*, 19 February 2019.

[3] E. HEPBURN, Written evidence given to the Scottish Parliament European and External Relations Committee in its Inquiry into "Connecting Scotland – How the Scottish Government and its Agencies engage internationally", 5 February 2015.

[4] A. LECOURS, 'Paradiplomacy: Reflections on the Foreign Policy and International Relations of Regions', *International Negotiations*, vol 7, no. 1, 2002, p. 95.

Indeed, diplomacy is one of the areas, along with defence, monetary and fiscal policy which is always excluded from devolution to sub-State entities.[5] In the case of Scotland, the Scotland Act 1998 (as amended by the Scotland Act 2012) provides for a number of matters, listed in its Schedule 5, which are reserved to the UK Parliament. In Schedule 5, the topic of Foreign affairs is listed third after the Constitution and political parties. It reads as follows: "Foreign affairs: International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters".[6]

Scotland is geographically located on the outskirts of the European Union, the so-called Celtic fringe. However, during her speech delivered for the opening of the Scottish Government hub in Berlin, N. Sturgeon insisted that Scotland should have a central position within Europe. She asserted that Scotland could not trust the likes of B. Johnson and L. Fox to represent them. She stated: "They are retreating to the fringes of Europe; we intend to stay at its very heart where Scotland belongs."[7]

Indeed, in terms of diplomatic projection, a long time before Brexit came into play, Scotland has already moved from the confines of a peripheral position. Although there is a bit of exaggeration from the Scots when it comes to quoting Voltaire who supposedly declared: "I look to Scotland for all its ideas of civilisation""[8], Scotland has had

[5] S. WOLFF, 'Paradiplomacy: Scope, Opportunities and Challenges', *Bologna Center Journal of International Affairs*, no. 12, spring 2007.

[6] Scotland Act 1998 as amended in 2012, Schedule 5, see https://www.legislation.gov.uk/ukpga/1998/46/contents.

[7] K. BUSSEY, Nicola Sturgeon plans to open German 'trade hub' to protect Scotland from effects of Brexit, *The Independen*t, 15 October 2016.

[8] M. RUSSELL, speech before the French business organisation

a philosophical, economic and political reach way beyond its somewhat secluded geographical position. The relationship between Scotland and France is often referred to, both by recalling the famed Auld Alliance and by quoting the words of praise expressed by General de Gaulle after World War Two. In a speech delivered in Edinburgh in June 1942, Ch. de Gaulle described the alliance between Scotland and France as "the oldest alliance in the world". He also declared: "In every combat where for five centuries the destiny of France was at stake, there were always men of Scotland to fight side by side with men of France, and what Frenchmen feel is that no people has ever been more generous than yours with its friendship. "[9]

The famed Auld Alliance referred to by de Gaulle is indeed hailed as the oldest diplomatic and military alliance in the world as it was concluded between John Balliol of Scotland and Philip IV of France in 1295. In terms of military undertakings, the treaty favoured France. However, Scotland, as remote and impoverished as it then was, became aligned to a major European power. Although the concrete repercussions were mainly symbolic, Scotland greatly benefited from such an alliance. The prestige of being bound to one or more major European country or countries is still as crucial today, in particular in the turmoil of Brexit, as it was back in 1295.

At the time of the Auld Alliance, Scotland and France, being both sovereign States, could reach such an agreement though the channel of what was already, at the time, called diplomacy. However, times have changed and Scotland being now part of the United Kingdom, which is in itself a nation State, cannot conclude a diplomatic agreement on its own.

MEDEF, *The Scotsman*, 28 August 2018.

[9] Ch. DE GAULLE, *Mémoires de guerre: L'appel, 1940-1942* (tome I), Plon, Paris, 1954, p. 44.

Indeed, diplomacy is considered the preserve of nation States and any encroachment calls for a harsh response.

Despite the fact that diplomacy appears to be off limit for stateless nations such as Scotland, the Scottish government has been relentlessly focused on developing a paradiplomacy, since devolution, and even more so since the results of Brexit (i.e. the British Exit of the European Union) showed that, despite the fact that every single Scottish constituency had voted to remain in the European Union, it was going to be severed from the EU and the Single Market against its will.

This paper will look at the SNP's perception of the European Union over the past four decades and how, in turn, the EU perceived the SNP's and other minority nationalist movements' pro-European stance. It will define what paradiplomacy is about and how Scottish paradiplomacy has been unfolding since devolution. It will then focus on the strategy developed by the Scottish government to maintain its goodwill in Europe. It will also explore what the two major hurdles to the development of a full-fledged Scottish paradiplomacy are. It will finally argue that in terms of paradiplomacy, the resources of States in terms of personnel and clout outrank, for now, the best efforts of any devolved government.

Section 1. A historical context: the EU-Scottish relationship

The relationship between the SNP and the European Union has been full of surprises. It changed entirely between 1975 and the mid-80's. The adoption of the slogan "Independence in Europe" spearheaded the change of attitude of the SNP towards the EU. The shift from a hostile position to one relying on membership of the EU to promote independence of stateless nations has made the EU uncomfortable. With

the advent of the Brexit referendum results, the EU seems to have relaxed its position on the issue.

§ 1. Two foes and no friends? The SNP seeking a coherent stance on Europe

On 5 June 1975, the very first referendum in British history was held on whether or not to keep the United Kingdom in the EEC: 67.2% of voters voted in favour of accession, with a 65% turnout.[10] In Scotland (with the exception of the Shetland Islands and the Outer Hebrides, which voted against), membership was confirmed, but with almost 10 points less than in the rest of the United Kingdom (58.4%) and with a lower a participation rate of 61.70%.

At the time, the SNP (which held 11 seats, the highest number of SNP MPs until the 2015 General Election) campaigned for the "No" (to remaining within the EEC). Their position, namely that Scotland wanted to take orders neither from London nor from Brussels was summed up by the slogan "No, on no one else's terms".[11]

During this campaign, the SNP leader in Parliament made it clear that, for him, the EEC "represents everything that our party has fought against: centralisation, undemocratic procedures, power politics and a fetish for abolishing cultural differences".[12]

However, the SNP completely reversed its point of view a few years later, in the mid-1980s, under the leadership of former Labour party member J. Sillars (who nevertheless

[10] The question was drafted as such: "Do you think the UK should stay in the European Community (Common Market)?".

[11] Slogan of the SNP during the campaign on the EEC membership referendum in 1975

[12] P. LYNCH, "The Scottish National Party and European Integration: Independence, Intergovernmentalism and a confederal Europe", *Minority Nationalism and European Integration*, Cardiff, University of Wales Press, 1996, p. 68.

supported Brexit in the spring of 2016).[13] It was under his influence, and that of W. Ewing, Member of the European Parliament, and dubbed *Madame Europe* by French newspaper *Le Monde*,[14] that the SNP adopted the slogan "Independence in Europe".[15]

For the former Vice-President and longest serving Member of the European Parliament, Labour MEP D. Martin, the adoption of the slogan "Independence in Europe was "without a shadow of a doubt, a masterstroke."[16]

This slogan indeed cut short the main argument of the unionist parties who pointed out the isolationism of the SNP. It had a considerable impact in that it gave credibility to the SNP's independence project, in particular in terms of economic repercussions.[17] G. Wilson, deputy leader of the SNP parliamentary group at Westminster, said at a conference in 1983, that he considered the new SNP policy to be: "[…] a first class way of pushing the advantages of political independence without any threat of economic dislocation."

However, independence in Europe, is not, from a legal standpoint, as easy as the slogan seems to indicate.

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[13] J. SILLARS campaigned to leave the EEC in 1975, then coined the phrase "independence in Europe" when he joined the SNP. He eventually supported the Leave camp in the run-up to the Brexit referendum. K. ANDREWS, "No Downside to Brexit' Claims Former SNP Deputy Leader Jim Sillars", *The Courier*, 15 juin 2016.

[14] M. CHARREL and P. RICARD, "Nicola Sturgeon: « L'Ecosse deviendra un pays indépendant »", *Le Monde*, 20 February 2019, https://www.lemonde.fr/international/article/2019/02/20/nicola-sturgeon-l-ecosse-deviendra-un-pays-independant_5425596_3210.html.

[15] SNP Manifesto, *Scotland's Future - Independence in Europe*, 1989.

[16] J. RINGEISEN-BIARDEAUD, "D'une union à l'autre, intégration européenne et désintégration des États? Le cas de l'Écosse: 1973-2017", Paris 3 Sorbonne Nouvelle, 2017, unpublished, interview with D. Martin, p. 124.

[17] G. Wilson quoted by P. LYNCH, "Minority Nationalism and European Integration", *Nations and Nationalism*, 3.3 (1997), p. 38.

Indeed, during the run-up to the independence referendum, A. Salmon, then First Minster, pretended he had requested and obtained a legal opinion according to which an independent Scotland could stay "seamlessly" in the EU as a new member State. His assertion proved to be untrue and the Scottish and British governments later engaged in a battle of legal opinions on the matter. Unsurprisingly, the Scottish Government's legal experts considered that an independent Scotland could indeed be maintained in the EU "from within". It claimed that the article used for such process would be article 48 TEU which provides for a simplified revision of the treaties (and which has never been used so far) whereas the British government posited that Scotland could only join the Union via the regular membership process of article 49 TEU (which applies to pending applications such as Serbia's).[18]

Even in the context of Scotland being side-lined by the British government is Brexit talks, the current position of the SNP on the European Union is not as clear cut as one might expect. Indeed, some in the party still consider that being ruled from Brussels is the same as being ruled from Westminster. Others believe that the right framework for Scotland would be membership to EFTA, similar to that enjoyed by Norway, which would allow Scotland to escape the dire requirements of the Common Fishing Policy.

N. Duclos made a thorough analysis of the reasons why Brexit had not fuelled a demand for Scottish independence.[19] Academics agree that the Scottish government has failed to

[18] F-X. PRIOLLAUD and D. SIRITSKY (eds), *Les traités européens après le Traité de Lisbonne*, p. 53-54.

[19] N. DUCLOS, "The strategic dilemmas of the Scottish independence movement as a result of the Brexit vote", pp. 29-41, in G. GADBIN-GEORGE and J. RINGEISEN-BIARDEAUD (eds), *Partir en solitaire, Conséquences du Brexit aujourd'hui et demain*, Éditions Panthéon-Assas, October 2018.

capitalise on Brexit to promote a clear pro-EU stance. K. Hughes feels that the SNP's blurred message has undermined the Scottish government's bargaining power and clout in the negotiations with its British counterpart.[20] However, most academics whom we interviewed in March 2019 consider that the SNP now has a clear pro-European stance and that no more fault-lines can be found within the party's pro-European agenda.[21]

For the EU, which has had an almost knee-jerk reaction to the very notion of nationalism, having minority nationalist movements rely on Europe to steady their claims for independence has always been a highly sensitive subject.

§ 2. An independent country after a lawful referendum seeking automatic membership to the EU: confusion and embarrassment in the EU

Many reasons led the representatives of EU institutions and Member States to reject the claims of "Independence in Europe" of separatist movements. Amongst them was an instinctive dislike for such movements, blamed for being war mongers, but also the risk of fracturing the EU into a myriad of small member States, rendering the institutions unworkable. European member States and institutions have however tempered their position on Scottish independence since the 2014 referendum.

A. The embarrassment of the EU towards minority nationalism seeking "Independence in Europe"

On 26 October 2010, H. Van Rompuy, then President of the European Council, told Flemish television's Ter Zake program that he "did not know of any pro-European nation-

[20] K. Hughes is the Director of the Scottish Centre on European Relations. Interview of 4 March 2019.

[21] M. KEATING Director of the ESRC Centre on Constitutional Change. Interview of 5 March 2019.

alist parties." This position, which reflected either a total lack of knowledge of minority nationalist movements in Europe or complete bad faith, provoked an outcry from minority nationalist parties, in particular in the European parliamentary group European Free Alliance.[22]

A powerful narrative in the European Union is to assert that nationalism goes instead the spirit of European integration. A particularly adamant scholar, J. Weiler, described the attitude which the EU should adopt with regards to stateless nations seeking independence in Europe: "Europe should not seem like a Nirvana for that form of irredentist Eurotribalism which contradicts the deep values and needs of the Union. The assumption of automatic membership in the Union should be decisively squelched by the countries from whom secession is threatened […]."[23]

It is complex to compare Scottish nationalism to nationalist movements in other parts of Europe or elsewhere in Europe. N. Duclos posits that Scottish nationalism can be described as "a form of minority (or peripheral or counter-state) (or neo) nationalism, democratic, liberal in orientation, and claiming to be civic". She also refers to J. Breuilly who believes that "[t]here is no valid explanatory theory of nationalism, only a number of ways of describing and comparing various forms nationalist politics have taken."[24]

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[22] "MEPs Shocked by Van Rompuy's Ignorance EFA Press Release", <http://efa.greens-efa.eu/meps-shocked-by-van-rompuy-s-ignorance-2809.html> .

[23] J.H. WEILER, Scotland and the EU: a Comment, 8 September 2014 Verfassungsblog.

[24] N. DUCLOS, *Synthèse d'habilitation à diriger des recherches*, non publiée, 2015, p. 49 et 50. "There is no valid explanatory theory of nationalism, only a number of ways of describing and comparing various forms nationalist politics have taken." J. BREUILLY, *Nationalism and the State*, Manchester, Manchester University Press, 1994, p. 338.

In the case of the relationship between nationalism and the EU, researcher S. Joly has highlighted the fact that nationalist minority or regional parties are often among the most pro-European. According to him: "A supranational organization and subnational autonomy movements may seem odd bedfellows, but instrumentally their interests align."[25]

This is why minority nationalist parties began early on to establish close links with the European Union and reserved a large space for European issues on their political agendas. Although, theoretically, nationalism and the transfer of sovereignty involved in European integration seem to be contradictory, minority nationalist parties have indeed developed manifestos that place their independence within the framework of European Union membership.

According to M. Keating, "The EU undermines the traditional identity among sovereignty, territory, nationality, and function that is the essence of the traditional nation-state and opens the way to other conceptions of political authority and of public action."[26]

What makes the European Union so desirable for minority nationalists is that it does not represent a State "rival" in the traditional sense of the word. It is easier to make minority nationalism coexist with a large European group than with a unitary State that is sometimes hostile.

As F. Tétart points out, after the Second World War, "the objective of European integration was to make war impossible, not by hegemony or the balance of power, but by the creation of a normative space, which made the use of violence and force impossible." He also considers that "by providing European minority nationalisms with

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[25] S. JOLY, "The Europhile Fringe? Regionalist Party Support for European Integration", *European Union Politics*, section 8 (1), p. 109-130.

[26] M. KEATING, *Regions and Regionalism in Europe*, International Library of Comparative Public Policy, Cheltenham, Edward Elgar, 2004, p. 368.

an institutional structure of universal values, the European Union allows the recognition of identities and autonomies within a protective framework and can therefore contribute to curbing the excesses of nationalism."[27]

The suspicion of EU institutions and Member States towards Scotland's government's wish to achieve independence in Europe has been toned down by the failure of the independence referendum on the one hand, and by Scotland's remain vote on the other hand.

B. EU relationship to Scotland: A softer stance post Brexit but no dramatic change of attitude

"Please remember this: Scotland did not let you down. Please, 'chers collègues', I beg you, do not let Scotland down now."[28] With this moving plea delivered during the first plenary session of the European Parliament following the results of the Brexit referendum, the SNP MEP A. Smith challenged his European colleagues not to forget Scotland during the negotiations. In what he believed to be his last speech after serving as an MEP for 15 years, on 27 March 2019, he renewed his plea, this time asking his European colleagues to "[…] leave a light on (for Scotland) so we can find our way home."[29]

In the immediate aftermath of the Brexit results, the Scottish government and MPs seemed caught in a diplomatic

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[27] F. TETART, « Les nationalismes «régionaux» en Europe, facteur de fragmentation spatiale ? », L'Espace Politique. *Revue en ligne de géographie politique et de géopolitique*, 2010 https://doi.org/10.4000/espacepolitique.1647.

[28] "Scottish MEP Receives Standing Ovation in European Parliament after Passionate Speech Saying Scotland 'Voted to Remain'", *The Independent*, 28 juin 2016.

[29] SNP MEP Alyn Smith calls on EU to 'leave a light on for Scotland', *The Herald*, 27 March 2019. A. Smith was re-elected on 23 June 2019 as an MEP for Scotland.

frenzy. On 29 June 2016, a few days after the Brexit results, the press sarcastically noted that while Prime Minister D. Cameron was headed back to the UK, N. Sturgeon was flying to Brussels.[30] While her predecessor A. Salmond had never managed to meet a representative of EU institutions, N. Sturgeon managed to meet President of the Commission JJ. Juncker and the then President of the European Parliament M. Schultz. Only D. Tusk, Head of the European Council, turned down her offer to have a meeting.

A few days later, on 5 July 2016, N. Sturgeon hosted a reception at Bute House in Edinburgh for European Union diplomats to discuss the impact of Brexit. Eighteen honorary consuls and consuls attended this event. The Honorary Consul of Austria described the Scottish Government's approach as "refreshing", while the Czech Honorary Consul considered that Scotland had, as a nation, the right to make its decision by referendum. The journalist present at the event highlighted the change in attitude: "And they struck a different tone than in 2014 when SNP leaders were effectively shut out of European talks. During the independence referendum, senior EU officials either kept quiet or said Scotland would have to join the back of the queue."[31]

European institutions usually maintain a neutral stance when it comes to sub-State attempts at getting political backing from them. They have evolved from downright hostile in the run-up to the independence referendum in 2014 to sympathetic further to the vote on Brexit.

A number of European representatives have acknowledged that if Scotland was to become an independent country and sought to join the EU, this could be achieved

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[30] C. PHIPPS, "EU Referendum Morning Briefing: Cameron Waves Farewell to Brussels, as Sturgeon Flies in", *The Guardian*, 29 juin 2016.

[31] P. ANDY, "EU Diplomats Won over by Sturgeon as They Tell Her 'We Would Welcome Scotland back to Europe", *Daily Record*, 6 July 2016.

smoothly.[32] However, some Member States made a show of their displeasure at Scotland's paradiplomatic offensive. In particular, M. Rajoy, the then Spanish Prime Minister, made the following comments pursuant to N. Sturgeon's trip to Brussels: "I want to be very clear: Scotland does not have the competence to negotiate with the European Union. Spain opposes any negotiation by anyone other than the government of the United Kingdom. I am extremely against it, the treaties are extremely against it and I believe everyone is extremely against it. If the United Kingdom leaves … Scotland leaves."[33]

In the run up to the 2014 referendum on Scottish independence, Spain made clear it would resist an independent Scotland's application to join the EU for fear of fuelling the Catalonian separatist movement.

However on this front, Spain's stance seems less rigid than it used to be. Indeed, Spanish foreign minister J. Borrel said in an interview to Politico and before a live audience in Brussels in November 2018 that Spain would have no objection to Scotland rejoining the European Union as an independent nation, as long as the secession process from the United Kingdom was legally binding.[34]

A. Salmond declared in December 2016: "I think the efforts by the First Minister and her team are being well

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[32] For an extensive review of European Member State reactions to Scotland's place in Europe after the results of the Brexit referendum, see J. RINGEISEN-BIARDEAUD, « De fauteur de troubles à bienfaiteur de l'UE, l'évolution de l'Ecosse en Europe (2014-2016) », in M. MUNRO-LANDI and D. CONNIL (eds), *From Devolution to Brexit, Presses de l'Université de Pau et de l'Adour*, 2018, p. 75-92.

[33] J. RANKIN, S. CARRELL and P. OLTERMANN, "Nicola Sturgeon's Plea to EU Leaders Meets with Sympathy but Little Hope", *The Guardian*, 29 June 2016.

[34] R. EMMOTT, E. O'LEARY, S ADDISON, "Spain would not oppose future independent Scotland rejoining EU", *Reuters* 30 November 2018.

regarded. […] We have no intention of allowing our 1,000 year history as a European nation to be severed by the failures of the Westminster political establishment. When that clarion call is issued then other Europeans should rally to Scotland's cause.'[35]

As we will see later in this paper, major politicians from Member states and EU institutions have expressed their support to Scotland. However, there has been no official endorsement of an independent Scotland in Europe by any Member State or EU institution as such. No matter how sympathetic European Member States and EU institutions might feel toward Scotland, it is for Scotland to walk the proverbial extra (diplomatic) mile.

Section 2. Scottish paradiplomacy: Looking for allies outside of the UK

This section will explore the theoretical context of paradiplomacy and look into the first attempt of Scotland at playing the paradiplomatic game within the framework of the EU.

§ 1. A theoretical approach of paradiplomacy: having a say in foreign affairs

Before tackling the issue of paradiplomacy, it is worth defining diplomacy *per se*. For GR. Berridge, diplomacy is an important means by which States pursue their foreign policies and these policies are still framed in significant degree in many States by a ministry of foreign affairs.[36] According to J. Batora: "Diplomacy is located firmly in the organisational structures, procedures, routines and habits of foreign mi-

[35] K. NUTT, "Jean-Claude Juncker Tells Salmond: Scotland's Earned the Right to Be Listened to", *The National*, 15 December 2016.

[36] GR. BERRIDGE, *Diplomacy: Theory and Practice*, Palgrave, Basingstoke, 2005, p. 3.

nistries."[37] RG. Feltham also focuses on the role of Foreign Affairs by stating that: "The Ministry of Foreign Affairs has archetypically been the channel through which representations should be made to a government by another State, its diplomatic representative or an international organisation."[38]

To conclude, J. Kincaid believes that the authority to "conduct foreign relations is an intrinsic attribute of a national government. For purposes of international relations, the nation-state is held to be unitary […]."[39]

Definitions of diplomacy focus on the notion of State and its ability to lead a foreign affairs policy. J. Kincaid's definition restricts the framework of diplomacy to unitary States, which *de facto* excludes any devolution arrangement.

If the field of diplomacy *stricto sensu* is the preserve of a unitary nation-State, sub-State entities have to resort to a separate endeavour to put forward their interests on the diplomatic scene.

As stressed by L. Moreno, "sub-States increasingly tend to project themselves as international actors and regard paradiplomacy as an important element in the promotion of their interests."[40]

Indeed, I. Duchacek considers that "[…] not only nations but subnational territorial communities have to engage in

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[37] J. BATORA, "Does the European Union Transform the Institution of Diplomacy", Discussion Papers in Diplomacy, no. 87, July 2003, p. 2, Netherlands Institute of International Relations 'Clingendael', The Hague.

[38] RG. FELTHAM, *Diplomatic Handbook* (2nd ed), Longman, London, 1988, p. 12.

[39] J. KINCAID, "Constituent Diplomacy in Federal Politics and the Nation-State: Conflict and Cooperation", in HJ MICHELMANN & P SOLDATOS (eds), *Federalism and International Relations: the Role of Subnational Units*, Oxford University Press, Oxford, 1993, p. 57.

[40] L. MORENO, "Scotland, Catalonia, Europeanisation and the 'Moreno Question'", *Scottish Affairs*, no. 54, winter 2006, p. 11.

trans-sovereign activities that often catapult them politically and physically far beyond the national frontiers […].”[41]

There is a tight relationship between nationalism and paradiplomacy. As described by S. Paquin, “Nation-building policies are elemental to any nationalist project. To achieve this goal, many sub-States leaders will map out international strategies”. He also considers that such entities are “liable to venture onto the international chessboard to search for resources or support that are unavailable to them on their own soil”. S. Paquin finally asserts a fundamental point: “The underlying objective of any nation seeking its identity is recognition. This need for recognition and legitimisation would explain why the development of paradiplomacy by sub-State nationalist movements remains an indispensable priority.”[42]

For many sub-State nations, paradiplomacy is seen as core to their attempt at independence. For instance, before the attempt of Catalonia at organising a non-constitutionally approved referendum, the paradiplomatic reach of the *Generalitat* of Catalonia, the regional parliament of Catalonia, was seen, according to M. Keating, as a landmark of what ambitious and energetic paradiplomacy could be.[43]

From the early attempts at paradiplomacy made through their “regional” representation in Brussels, as well as the Committee of the Region and RegLeg, to the opening of hubs in several European countries, it seems that Scotland

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[41] I. DUCHZSEK, “Perforated Sovereignties: Towards a Typology of New Actors in International Relations” in HJ. MICHELMANN & P. SOLDATOS (eds), Federalism and International Relations: the Role of Subnational Units, Oxford University Press, Oxford, 1993, p. 6.

[42] S. PAQUIN and G. LACHAPELLE, “Why do sub-States and regions practice international relations?”, in G. LACHAPELLE and S. PAQUIN (eds), *Mastering Globalization, New sub-States' governance and strategies*, Routledge, London, 2005, p. 77.

[43] M. KEATING, meeting of 5 March 2019.

has lately pushed the paradiplomatic experiment to a whole new level.

§ 2. Early attempts at establishing a representation in Europe: Scotland House, the Committee of Regions and RegLeg

From 1986 and the Single European Act, structural funds (the concept of which was originally promoted by a Scotsman, British commissioner G. Thomson) started to make a noticeable difference in some Scottish regions such as the Highlands and Islands. In order to collect money in Brussels, a small representation was set; Scotland Europa. After devolution, the first attempt at establishing a standalone Scottish paradiplomacy started with the consolidation of Scotland's representation in Scotland House and participation to the Committee of the Regions and RegLeg.

A. Scotland House

In 1999, the existing representation of Scotland in Brussels, Scotland Europa, moved to new headquarters and the Scottish Executive (later to be named the Scottish government) joined in and opened "Scotland House" in Brussels. This marked an important development for the Scottish representation at European level. Indeed, Scotland Europa was only a commercial and cultural showcase. Once devolution took place, Scotland House also became a political emanation of Scotland, in conjunction with the British representation.

Members of the Scottish Government with offices in Scotland House are affiliated to the British representation (the UKRep) which grants them diplomatic status. Scotland House's headquarters is particularly prestigious as it is located on the Schuman roundabout, i.e. at the epicentre of European power, opposite the Commission and next to the Council. As we will see later, of all political emanations of the Scottish government, Scotland House is the only one not

to be housed in a distinct building from the British embassy. However, it must be borne in mind that every single agent from the Scottish government operates under the diplomatic affiliation to the British embassy. If such diplomatic status was to be withdrawn, the hubs and houses would become instantly of very little use to the Scottish government.

Scotland House accommodates Scotland Europa, the European representation of the Scottish Government, as well as a specific representation for the Highland and Islands European Partnership, which is the main beneficiary of European development funds. Scotland also participates in the Committee of the Regions and RegLeg.

B. The Committee of the Regions and RegLeg

The Committee of the Regions was established by the Maastricht Treaty and set up in March 1994. The recognition of its role was reinforced by the Lisbon Treaty in 2009. Its headquarters are in Brussels. It is an advisory body composed of elected representatives at local and regional level from the 28 Member States of the European Union. It allows its representatives to give their opinion on European legislation that has a direct impact on regions and cities. This institution was wished for by Germany at the request of the *Länder*, despite the reluctance of unitary States such as the United Kingdom and France (although the French President of the European Commission, J. Delors, gave impetus to its creation).

For Scotland, four representatives, all locally elected and representing a Scottish locality, are chosen to sit on the Committee. Scotland is the best-represented region in the United Kingdom, but London still has two representatives, out of a total of twenty-four members for the United Kingdom. Of course, the fact that countries such as Malta (less than 450,000 inhabitants) and Luxembourg (less than 550,000 inhabitants) have five and six representatives

respectively (more than Scotland, which has over 5 million inhabitants) caused some discontent in Scotland.

In order for sub-State entities with legislative powers to enjoy better representation for a few seats at the Committee of the Regions, another entity was created. The RegLeg was an attempt to differentiate between "simple" regions and municipalities and regions with legislative powers. To this end, groups were set up: Group A, which includes countries made up entirely of regions with legislative powers (Austria, Germany, Belgium, Spain and Italy), and Group B, composed of regions of countries in which there is an asymmetric devolution of powers (as in Finland - with the province of Åland -, Portugal - with the Azores and Madeira Islands - and, of course, the United Kingdom - with Wales, Scotland and Northern Ireland). RegLeg is a political network that allows mutual assistance between regions with legislative powers. It currently includes representatives from 73 regions in eight Member States and is working on issues common to these regions. Both institutions issuing merely advisory recommendations have no bearing on EU legislation.

Former SNP MEP I. Hudghton, a former member of the Committee, believes that the Committee of the Regions allows local authorities to have a direct point of contact with the European Union. However, like Labour MEP D. Martin, he believes that RegLeg, is an empty shell.[44]

Quasi-diplomatic initiatives from Scotland and other sub-State entities are monitored more or less tightly both by their nation-State and by the EU institutions. Indeed, Scotland in the particular context of Brexit, appears to be walking a fine line in diplomatic terms. In a straightforward way,

[44] See interviews with MEPs I. Hudghton and D. Martin in J. RINGE-SIEN-BIARDEAUD, « D'une union à l'autre, intégration européenne et désintégration des États? Le cas de l'Écosse: 1973-2017. » Paris 3 Sorbonne Nouvelle, 2017, unpublished, p. 257.

Deputy Director of the European Relations for the Scottish government, F. Strang, admits that the current paradiplomatic manoeuvres of the Scottish government amount to "walking on egg shells."[45]

Section 3. Current paradiplomatic endeavours: France, Germany and Ireland

The first "Innovation and Investment hub" of the Scottish government was launched in Dublin in February 2016. Another hub was then opened in London but has no diplomatic reach and aims at hosting Scottish businesses in London. The next hub was opened in Berlin in April 2918. The last of this series of hubs was the opening of the Paris hub, which is translated as "bureau" (office) on the director and deputy director's business cards. It is unclear what the remit of such hubs is compared to that of Scottish Development International (SDI) which offers advice to would-be investors in Scotland in over 30 offices all over the world.[46] SDI is a business only structure dedicated to attracting businesses and developing business links between Scotland and the rest of the world. However, the Scottish government's press releases concerning the "hubs" mention strengthening "government-to-government relation" (for the Dublin hub) and increasing the government's influence and engagement with France.[47]

There is always a fine line between paradiplomacy and protodiplomacy. Paradiplomacy refers to the international

[45] This expression was used by F. STRANG, Deputy Director of the European Relations of the Scottish government, during a meeting dated 4 March 2019.

[46] For a presentation of Scottish Development International (SDI) and its remit, see https://www.sdi.co.uk/about-sdi/about-sdi-and-how-we-can-help-you.

[47] The list of all hubs can be found on the Scottish government's website: https://www.gov.scot/policies/europe/innovation-and-investment-hubs/.

activities and external engagement of sub-State actors.[48] This covers the activities of a sub-State nation which revolve around areas usually devoted to diplomacy as such. Typically, areas tackled by paradiplomacy would be cultural activities, economic activities and political activities. Protodiplomacy refers to setting the ground work for a full-fledged diplomacy in view of becoming a State rather than a sub-State.

This chapter will explore how Scotland's paradiplomatic adventure plays out in three different (but equally influential in their own ways) countries in the European Union.

§ 1. France: Rekindling the auld alliance

The relationship between France and Scotland is articulated around the newly opened hub in Paris, as well as the long-standing presence of the French Consulate in Edinburgh.

A. The opening of the Paris hub, diplomatic meetings and Public Relations

There has been a long-lasting tale of the auld alliance between Scotland and France which did not translate into anything serious until recently. Over the past couple of years, Scotland has increased its network in France, mainly via cultural events, but also through meetings and press articles.

Francophone and Francophile MEP A. Smith has been mentioned before in this paper. As an MEP, he used to be sponsored by a very active French assistant, S. El Ghoneimi, who is now running for MEP for the ALDE/LREM party in France. A. Smith has been interviewed in a weekly magazine called *L'Express* in an article published on 19 July 2017.[49] He

[48] E. HEPBURN, Written evidence given to the Scottish Parliament European and External Relations Committee in its Inquiry into "Connecting Scotland – How the Scottish Government and its Agencies engage internationally", 5 February 2015, *Ibid.*

[49] A. SMITH, Brexit "Dear Macron, don't forget Scotland", *L'Express*,

was invited by the Young European association in Science Po Paris (alma mater to S. El Ghoneimi) in 2017. Furthermore, a French national, Ch. Allard, was elected on 23 June as an MEP on the SNP list (number two after A. Smith).[50]

In May 2017, F. Hyslop came to Paris to meet General Secretary of Foreign Affairs Ch. Masset. She also gave an interview to newspaper *Libération* in which she said that Scotland was happy that a fervently pro-European candidate had been elected as French President and was looking forward to working with him.[51] She later attended, along with former First Minister A. Salmond, a Celtic music festival in Lorient during which both made cultural and political declarations on devolution and Brexit.[52] Cultural affairs are traditionally, along with education, non-controversial areas where paradiplomacy is allowed to develop and thrive. But adding a touch of politics to a cultural event changes the rules.

M. Russell, the Scottish Government's Brexit Secretary actively represented Scotland during summer 2018 by delivering a speech in front of MEDEF, the French equivalent to CBI (Confederation of British Industry).[53]

Lately, N. Sturgeon went on a two day visit to France in February 2019 to officially open the Scottish Government's

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19 July 2019.

[50] S. DELESALLE-STOLPER, « Européennes, Christian Allard, un Français à la pêche aux voix en Ecosse », *Libération*, 14 May 2019, https://www.liberation.fr/planete/2019/05/14/europeennes-christian-allard-un-francais-a-la-peche-aux-voix-en-ecosse_1726986.

[51] S. DELESALLE-STOLPER, "Brexit, nous voulons faire entendre la voix de l'Ecosse", *Libération*, 22 May 2017.

[52] La politique écossaise s'invite au Festival interceltique de Lorient, *La Croix*, 8 August 2017.

[53] "Strengthening links between Scotland and France", *Eureporter*, 28 August 2018, https://www.eureporter.co/frontpage/2018/08/28/strengthening-scotland-links-with-france/.

France Hub. During her visit, she addressed the Foreign Affairs Committee of the *Assemblée Nationale*, the lower house of the French Parliament and met then Minister for European Affairs N. Loiseau. The latest figures show that France is Scotland's third largest international export market worth an estimated £2.4 billion to the Scottish economy. The recent opening of a Scottish government hub in Paris now somehow balances out the long lasting presence of a French consulate in Edinburgh.

B. The French consulate in Edinburgh: a tale of serendipity

The history of the French consulate in Scotland goes back to the roots of diplomacy itself. It is said to be the oldest diplomatic representation in Europe. It has waxed and waned over decades. At some point it consisted in three buildings located in an elegant but not very central part of Edinburgh, the New Town, where most consulates are located. Each of these interconnected buildings held an entity, one was the "*Institut français*" which, unlike the "*Alliance française*" entities is managed by the French State, an Economic mission and the consulate itself. Although dwarfed by its London counterpart, the consulate actually provides for 5000 French citizens. Gradually, the Economic mission was closed down, leaving the middle building empty and there were very serious threats that the consulate would be shut down altogether.

However, the French consulate made a miraculous recovery when, after losing most of its consulate work to the London consulate and under threat of closure, it was finally moved to a highly prominent building. In fact, it so happened that the Consul, E. Cocher, found a fine, available and above all cheaper piece of real estate in the very heart of Edinburgh. The location is about as strategic as it gets: next to the Assembly hall where the reconvened Scottish parliament met after devolution while the brand new building was being built in Holyrood. The new location of the French

consulate is so significant that the French consul recalls that he had to make sure the inhabitants of Edinburgh would not feel they had been robbed of a landmark building. Quite the opposite happened, the location of the building and the powerful meaning attached to it were perceived as a message of endorsement of Scotland. The new French Consulate General was inaugurated by Princess Anne on 29 November 2017.[54]

The significance of the move is illustrated by S. Carrell: "France has taken over one of the most prestigious buildings on the Royal Mile, the former chambers for Lothian regional council opposite St Giles Cathedral, as the new home for its consulate and its cultural institute."[55] Although the French diplomacy insisted that the new building was merely a convenient move and not a political statement, it was not perceived as such. For instance, S. Carrell described the denial of political implication before asserting: "Even so, France's decision to acquire such a prominent site will add to Scotland's confidence and reinforce its efforts to be seen as a European nation in its own right while the UK struggles with its divorce from the EU."[56]

The new consulate houses a language school, offices and rehearsal rooms for orchestras and arts organisations, a specialist library of French literature with 30,000 books, and a 100-seat concert venue.

According to E. Cocher, the current Consul, he did mean to market the move as a symbolic endorsement of France's links to Scotland (without promoting any particular political

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[54] https://www.thecrownchronicles.co.uk/royal-news/other-royals/princess-anne-edinburgh-st-giles-cathedral-mcewan-hall-french-consulate/.

[55] S. CARRELL, "France reinvigorates 'Auld Alliance' with new base in Scotland", *The Guardian*, 28 November 2017.

[56] S. CARRELL, *Ibid.*

affiliation or support to independence). He recalled a meeting with the City council of Edinburgh (which was in charge of the real estate operation) during which he stressed the fact that having the French consulate move to the building would imply having a European flag flying on top of this prime and symbolic location.[57]

So all in all, the move of the French consulate to a new and symbolically loaded place is mostly a matter of serendipity. However, the perception of this move in the hearts of the inhabitants of Edinburgh is just as strong as if it had been a carefully crafted political move.

The decision about whether to maintain a diplomatic presence in a nation, be it a stateless nation, has an undeniable political bearing. Whereas the original purpose of transferring the French consulate was to save money, the final combination of keeping the consulate open and moving it to a highly central and symbolic location was felt as a political statement and as a gesture of support or at least sympathy from France.

Along the same lines, the European Commission had a very small and mostly inactive office in Edinburgh which it has decided to shut down. However, the European Parliament has made public its decision to keep its Edinburgh Office. This office has always been more active and pro-active than its Commission counterpart. This decision to maintain a European Parliament presence in Edinburgh is perceived in Scotland as politically charged.[58]

France is a unitary and centralised State which has, albeit on a smaller scale than the UK or Spain, to face separatist claims from minority nationalist movements, mainly in

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[57] Interview with E. COCHER, French Consul in Edinburgh, 5 March 2019.

[58] G. CAMPBELL, "European parliament to keep Scotland office after Brexit", *BBC Scotland*, 7 March 2019.

Corsica. Germany is a federal State with local parliaments and powerful *Länder*. Despite these major political differences, the German government's reaction to the opening of a hub in Berlin was not very different from the French reaction: one of circumspection.

§ 2. Germany: an uncertain position towards Scotland

Just three days after the Brexit referendum, G. Krichbaum, then head of the EU Affairs committee in the German government stated: "The EU will still consist of 28 Member States, as I expect a new independence referendum in Scotland, which will then be successful... We should respond quickly to an application for admission from the EU-friendly country."[59]

While speaking on an unrelated topic, the then Economy Minister and Vice-Chancellor S. Gabriel (now Foreign Minister) declared that "The EU will certainly take in Scotland, it [it] wants to leave the UK and enter the EU."[60] However, as we shall see later, such personal endorsement have no bearing on the political stance of Germany as a State.

French Consul to Edinburgh E. Cocher declared that the opening of a German hub a year before opening a French counterpart was beginning to be considered as a little offensive by the French diplomacy.[61]

However, a Scottish government spokesperson stressed that the opening of a hub was triggered by "Germany being in Scotland's top five export destination with exports worth more than 2.02 billion in 2015 and being Scotland's

[59] "Scotland Welcome to Join EU, Merkel Ally Says", *Reuters*, 26 June 2016.

[60] J. DELCKER, "When Scotland met Germany", *Politico*, 24 March 2017.

[61] E. COCHER, interview of 5 March 2019.

third largest inward investor."[62] In addition, according to the Scottish Government, around 30,000 German citizens live in Scotland. Germany is the third largest source of foreign direct investment into Scotland, with 155 German-owned companies employing nearly 18,000 people. Furthermore, it is Scotland's biggest partner in Europe for academic research collaboration. Finally, in August 2018, Glasgow and Berlin co-hosted the first European Championships.[63]

The remit of this hub is to promote investment between German and Scottish businesses and organisations, increase Scottish Government influence and engagement with Germany, encourage collaboration between business, research, education and cultural institutions and build on Scotland's reputation as a destination of choice to work, study and visit. The hub jointly houses Scottish Government and Scottish Development International staff and, as always, is co-located within the British Embassy.[64]

The hub in Berlin was inaugurated by External Affairs Secretary F. Hyslop on 23 April 2018. She then proceeded to signing a Memorandum of Understanding between the Glasgow and Berlin Chambers of Commerce and meeting the organisers of the European Championships. As confirmed by the French consul in Edinburgh, despite the opening of the hub, F. Hyslop did not manage to meet with any leading political figure.

There seems to be a rift between individual declarations of support to Scotland, both from politicians and based on signs of popular support and a State approved endorsement of Scotland. There is indeed an unexpected popular support

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[62] J. DELCKER, *Ibid.*

[63] https://www.europeanchampionships.com/championships.

[64] Scottish government press release, Germany hub opens for business, 23 April 2018, https://news.gov.scot/news/germany-hub-opens-for-business.

for the notion of Scotland joining the EU as an independent country in Germany[65] and this support is also surprisingly present in the Netherlands.[66] A German businessman who runs a printing company, has decided to print European maps on which Scotland appears as an independent country and a Member State of the European Union.[67]

There is one card in the German-Scottish political game which is worth mentioning. D. McAllister, has dual British and German citizenship thanks to a Scottish father and German mother. He has been a Member of the European Parliament since 2014 and is the Deputy President of the European People's Party (EPP) which is the majority group in the European Parliament. He chairs the Committee on Foreign Affairs in the European Parliament. Although he has never been involved in British politics, he has he has become prominent on the Scottish scene, for example on 25 February 2019, when he gave a lecture on to the John P Mackintosh Memorial on the topic: "The European Union. What's next?"[68]

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[65] The German branch of Youpoll asked the following question to a panel of EU citizens: "Would you endorse or reject Scotland joining the EU if it became separate from Great Britain?", "*Is it "somewhat" or "very likely" that the Scots will vote for independence?*", "There is a possibility such a public view could affect how European governments approach the Scottish question." N. WILLIAMS, "Poll: Europeans Push EU Governments to Accept Independent Scotland", *CommonSpace*, 11 July 2016, <https://www.commonspace.scot/articles/8796/poll-europeans-push-eu-governments-accept-independent-scotland> .

[66] There is a very active pro Scottish independence movement in the Netherlands with rallies. For instance, C. McCALL, "Dutch campaign for Scottish independence prepares for rally", *The Scotsman*, 23 April 2018.

[67] J. WHITELAW, *The Scottish Sun*, 24 February 2017, "Eurovision of the future? Map shows Scotland as part of the European Union in 2019-with the UK left out".

[68] https://www.ed.ac.uk/special-events-protocol/john-p-mackintosh-memorial-lecture-series/lectures/2019-lecture.

Ireland was the first hub to be opened by the Scottish government and has become a crucial ally for the Scottish government.

§ 3. Ireland: becoming a strategic ally without crossing the line

As early as November 2015, when Brexit was still a distant source of mild concern, F. Hyslop, announced the appointment of J. Webster to the new Scottish innovation and investment hub in Dublin.[69]

J. Webster, who is well known in Ireland for his work in the British Embassy, was to take the lead of a dedicated Scottish team to form new and enhanced business relationships on both sides of the Irish Sea.

The Scottish Government's Dublin hub actually opened in January 2016. Speaking in Dublin for the inauguration, F. Hyslop, declared: "Investment from Ireland is vital to Scotland and supports around 6,000 jobs. Exports from Scotland to Ireland also support the Scottish economy to the tune of £920 million. The Dublin hub will provide firms with additional support to help them grow. Our dedicated staff will also have the expertise to give them an insight into what businesses are looking for."

She added: "John Webster is a well-known diplomat here in Ireland and I welcome his appointment. John brings a wealth of experience to the Dublin hub and I'm sure his team will work well under his leadership. I look forward to returning to Ireland next year to discuss their achievements."

Described as a major ally by all of the interviewees, the relationship with Dublin has developed into a pivotal diplomatic antenna for Scotland. It is acknowledged by N. McEwen

[69] http://www.industryandbusiness.ie/scottish-innovation-and-investment-hub-in-dublin-to-increase-trade-and-investment/.

for instance, that the Irish hub is a lot more political than the others.[70]

As aptly mentioned by F. Strang, in diplomacy, it is difficult to assess cause and effect. However, he is confident that the relationship between Dublin and Edinburgh has bloomed over the past years partly thanks to the action of J. Webster who is in charge of the Dublin hub.[71] J. Webster has been a career diplomat for 27 years and Political secretary in the British Embassy to Ireland since April 2012.

Scotland is trying to develop links with the Republic of Ireland for many reasons. Ireland is a European country of similar size and location to Scotland. Above all, according to F. Strang, the Scottish government is impressed by the fact that the EU is willing to stand firm against the UK when it comes to protecting peace in Ireland, although it is a small and peripheral European country.

The tangible reach of the Irish hub is so great that, according to M. Keating, such a thing would be inconceivable in Spain for instance. However, all this diplomatic effort is done under the banner of the UK embassy which gives Scottish diplomatic personnel diplomatic status, without which there is no power nor visibility.

Section 4. Constraints of paradiplomacy: facing the hard truths of diplomatic life

Two issues have been identified in the course of this research. The first one relates to the fact that, for all its deployment of paradiplomacy, the Scottish government

[70] Interview dated 4 March 2019 with N. McEWEN, Professor of Politics at the University of Edinburgh, and Associate Director of the ESRC Centre on Constitutional Change.

[71] "Diplomat to lead new innovation and investment hub in Dublin", *BBC News*, 9 November 2015, https://www.bbc.com/news/uk-scotland-scotland-business-34768606.

is constrained by diplomatic etiquette. The second source of concern is the lack of senior personnel and a coherent narrative to support the government's ambitions.

§ 1. Scotland is constrained by diplomatic etiquette

Member States will not interact with the Scottish government as if Scotland were a State in its own right. Every request for a meeting has to be made via the UK embassy or the FCO (Foreign and Commonwealth Office). According to F. Strang, any attempt at bypassing the FCO would result in a no-go from the approached State.

For instance, the meeting between N. Sturgeon and N. Loiseau was organised through a formal request of the UK embassy in Paris, supported by the Scottish French Consulate. Another key element is, as made clear by the press release, the range of topics discussed between the First Minister and the European affairs Secretary.[72]

Indeed, according to the release, N. Sturgeon "expressed our desire to continue the work already begun of identifying, among the powers devolved by the United Kingdom to the Scottish authorities, areas where we could initiate new, mutually-advantageous cooperation projects." The reference to devolved areas emphasizes the fact that, even from a Scottish perspective, only devolved areas can serve as a ground for diplomatic cooperation (and not reserved matters).

However, the Scottish First Minister did not meet France's Prime Minister E. Philippe despite a formal request made by the UK embassy. According to E. Cocher, such a meeting could have been made non-controversial by stressing the cooperation in cultural matters and in devolved areas. However, the meeting simply did not happen, perhaps to avoid

[72] https://www.diplomatie.gouv.fr/en/country-files/united-kingdom/events/article/united-kingdom-meeting-between-mme-nathalie-loiseau-and-the-scottish-first.

putting N Sturgeon and E Philippe on an equal footing, one being First Minister of a sub-State entity, and the other being Prime Minister of an actual State.

N. Sturgeon delivered a speech before the Foreign affairs committee of the French *Assemblée Nationale* and gave an interview to the newspaper *Le Monde*. Although the inauguration of the Paris hub of the Scottish government, with 350 guests, and the various meetings listed above were a success, they cannot amount to a high-profile diplomatic endeavour either.

Although the meeting with M. Loiseau was arranged through diplomatic channels, such was not the case with M. de Sarnez. M. de Sarnez belongs to the family of centrist political parties which favour a federal European Union and are supporters of granting EU membership to an independent Scotland. JC. Lagarde, Chairperson of UDI (one of the centrist parties, along with Modem to which M. de Sarnez belongs), has published an article in French in The Scotsman to encourage France and Europe to support Scotland.[73]

The French Consul in Edinburgh pointed out that France was loyal to the UK because it was so careful not to breach the diplomatic etiquette. In particular, the French diplomacy makes sure all its diplomatic relationship with Scotland is carried out and vetted through regular British diplomatic channels. E. Cocher considers that France purposefully refrains from any gesture which could give the impression that they are addressing Scotland as if it were a State. To him, the Scottish officials perceive the restraint exercised by France, but the UK does not. He says that in his view,

[73] J.C. LAGARDE, 19 May 2019, « La France et l'Europe ne doivent pas abandonner l'Ecosse ! », *The Scotsman*, https://www.scotsman.com/news/opinion/columnists/la-france-et-l-europe-ne-doivent-pas-abandonner-l-ecosse-jean-christophe-lagarde-1-4926097.

France's good manners are not necessarily reciprocated by the UK in terms of diplomatic *savoir vivre*.

However, according to E. Cocher, such a diplomatic cold shoulder is not a major issue because of the fact that Scotland has no real diplomatic standing anywhere. Therefore, France's prudent attitude should not be perceived as a major problem. In his view, France sees Scotland through the lenses of a centralised State as being merely a region with some autonomy but not a serious potential partner.

Of course, E. Cocher admits that if Scotland does become independent and re-joins the European Union, with the benefit of hindsight, France may come to regret not having been the first State to extend some courtesy to Scotland as a potential new European Member State. However, for now, in the midst of Brexit, he thinks that we are far from such consideration.

In fact, the State which has developed into Scotland's main ally, namely Ireland, is also very careful to toe the diplomatic line and not to treat Scotland like a State. This is because all diplomatic relations with Dublin must also be vetted by the UK embassy.

The second issue concerns the Scottish government's lack of senior diplomatic personnel and the fact that its paradiplomatic deployment appears to be hectic and piecemeal.

§ 2. Scotland's lack of competent manpower and of a coherent diplomatic narrative

The crucial constraint on Scottish paradiplomacy, according to E. Cocher, is not linked to legal boundaries or diplomatic etiquette, it is the lack of resources in terms of personnel and the lack of a clear-cut strategy as to what the government wants to achieve with their hubs. In terms of

diplomatic reach, Scotland is, according to him, to be ranked along the same standards as developing countries. However, he thinks there could be a shift in the near future as the last month's diplomatic frenzy have created an impetus.

According to former EUCJ UK judge D. Edward, Scotland lacks 'top notch' diplomats. He believes that it took a long time for Ireland to establish its diplomatic links within the EU and would take equally long for Scotland. For him, the Scottish paradiplomatic endeavour is less of an offensive than a ground standing mission.

Paradiplomacy is, according to P. Lynch "[…] not the same as conventional State diplomacy, which is about pursuing a defined State interest in the international arena. It is more functionally specific and targeted, often opportunistic and experimental".[74]

The lack of coherent narrative of the Scottish government regarding Brexit and Foreign affairs has been criticised by academics. The general feeling seems to be that the SNP has an "unclear overarching strategy" (K. Hughes) and "no vision of what they what for the European Union" (M. Keating). Here, time is of the essence and the loss of 21 seats during the snap election where the Brexit question could have been a dry-run for a second vote on independence froze the Scottish government. Indeed, the Scottish government fear the fate similar to that of Quebec where two successive unsuccessful referenda killed the independence project for good.

This absence of clear strategy was also perceived by the Scottish Parliament's Culture, Tourism, Europe and External Affairs Committee. The committee has launched a call for written evidence on "the Scottish Government's external affairs policy in the context of Brexit."[75] There are two strands

[74] P. LYNCH, *Scottish Government and Politics: an Introduction*, Edinburgh University Press, Edinburgh, 2001, p. 159.

[75] Scottish Parliament's Culture, Tourism, Europe and External Affairs

to the call for evidence. One concerns the engagement with the EU and the other with the "rest of the world". Regarding the engagement with the EU, the questions raised cover, *inter alia*, the principles which should inform the focus of the Scottish Government's external affairs policy with regard to the European Union as well as what should be the focus of the business plans for the Scottish Government Innovation and Investment Hub offices in Berlin, Brussels, Dublin, London and Paris. The committee also seeks evidence on examples of best practice for ways in which nations / regions from non-EU Member States engage with and influence the EU.

In a similar call for evidence dated 2015, E. Hepburn observed that sub-State entities which manage to build a successful paradiplomatic endeavour are the ones who are able to put forward a coherent, original and recognisable narrative.[76]

E. Hepburn identified the narrative developed by other sub-State nations and recommended that Scotland build its own narrative to the tune of its "enduring democratic engagement."[77]

Actually, from the speeches delivered by the Scottish government officials over the past six months, it appears that the narrative put forward is narrower than that of mere democratic engagement identified by E. Hepburn. The government addresses the issue of Scotland organising a new independence referendum and its will to be at the heart of

Committee is seeking written submissions on the Scottish Government's external affairs policy in the context of Brexit, https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/111569.aspx.

[76] E. HEPBURN, *op. cit.*

[77] E. HEPBURN, *op. cit.*, p. 6-7.

Europe and to pool its sovereignty with other like-minded European States within the EU.[78]

The Scottish government's paradiplomatic strategy seems to unravel in a rather disorganised, yet pragmatic manner. It now aims at reaching out to countries where their diplomatic status (or lack thereof) is not an insurmountable hurdle. For instance, F. Strang says that the Scottish government has an interest in International French Francophony and in particular in joining the Organization of *La Francophonie* (OIF). Here, he says, you do not have to be a State and merely have to display an interest in French culture and language. He also thinks that it provides for a platform to reach many African countries.

F. Strang says that a number of ideas are being floated such as having pop-up hubs set for a determinate period of time in a particular country. The government must also decide between deepening their presence with more manpower and broadening their presence by covering more countries. The next hub, if any, would probably be located in a Nordic country. Indeed, Scotland has an interest in joining entities such as the Nordic Council, which is an official body for formal inter-parliamentary co-operation. Formed in 1952, it has members from Denmark, Finland, Iceland, Norway, Sweden, the Faroe Islands, Greenland and Åland.[79] Nordic countries tend to treat Scotland as if they were on equal diplomatic footing. For instance, the meeting, on 30 April 2019, between N. Sturgeon and Icelandic Prime Minister, K. Jakobsdóttir, who hailed the good relationship between

[78] J. RINGEISEN-BIARDEAUD, "'Let's Take Back Control': Brexit and the Debate on Sovereignty", *Revue Française de Civilisation Britannique*: XXII-2-2017, 1-17.

[79] For more information on the Nordic Council, see https://www.norden.org/en/nordic-council

the two countries, did not seem to be as diplomatically constrained as it would have been with France or Germany.[80]

Conclusion

The EU is a union of member States, and as obvious as it may seem, in order to be a member State, one has to be a nation-State in the first place. This caveat was noticed early on by J. Sillars, when he declared: "A Community of member States is a network of power and shifting power relations. The apparatus for making decisions reflects the power-structure of the Community. […] When the real players gather around the top table of the Council of Ministers, it is only member States that count. They exercise power."[81]

From a different side of the board, former Permanent Representative of the United Kingdom to the European Union between 2003 and 2007, J. Grant remarked in a speech delivered in 2014, a few months before the independence referendum in Edinburgh that: "[…]In Brussels, a nation (and Scotland is indubitably a nation) is either a Member State or a region. If it is a Member State, it has a seat at the table not just in Ministerial meetings, but in all the preparatory work in the myriad working groups that deal with the mass of business that makes up the EU's regulatory role. It has an Ambassador, a seat at the European Council, and, crucially, a Commissioner, able to represent its interests within the Commission. As a region, it has none of these things."[82]

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[80] *Icelandic PM hails Scots links after Sturgeon meeting*, BBC News, 30 April 2019, https://www.bbc.com/news/uk-scotland-scotland-politics-48095676

[81] J. SILLARS, quoted in P. LYNCH, "Minority Nationalism and European Integration", *op. cit.*, p. 8.

[82] J. GRANT, speech at the David Hume Institute in March 2014, in J. RINGEISEN-BIARDEAUD, « D'une union à l'autre, intégration européenne et désintégration des États? Le cas de l'Écosse: 1973-2017. » Paris 3 Sorbonne Nouvelle, 2017, annex 6.

There are two ways of looking at Scotland's paradiplomatic adventure. One is to see it as trying to promote Scotland from a commercial perspective. This could be reflected by the use of the non-descript and somehow business-orientated word "hub". However, if it is nothing more than a business help to Scotland's commercial interests, then why establish a structure which seems to compete with the existing, highly regarded and functional Scottish Development International? On the other hand, these hubs could be a tentative diplomatic reach. In such an option, it is no wonder that the message appears blurred with the use of 'hub', that the implementation has been within the UK embassies and that there is the glaringly unclear remit of such entities. Indeed, such hubs would be crossing the line and engaging in an activity which is in breach of the Scotland Act.

The development of paradiplomacy is, according to S. Paquin and G. Lachapelle, "a power struggle between sub-State nationalist movements and players on centre stage". They further assert that "the attitude of central governments relative to the intrusion of sub-State nationalist movements into the private preserve of their foreign policy and the country's foreign representation is, from the offset, basically negative. Loss of monopoly gives central governments cause to perceive a great danger for the nation's foreign image."[83]

In this research, the issue of whether the hubs set up by the Scottish government first in Brussels, then Washington DC, Beijing, Ottawa, Toronto, later Dublin and then in Berlin and Paris are embryonic embassies has been frequently addressed and it is too early to give a definite answer to the question. Apart from Brussels (which is however located in the former UKRep), each of the hubs is located in the British embassy itself or in buildings belonging to the British embassy. Therefore, if these hubs were to become independent entities,

[83] S. PAQUIN and G. LACHAPELLE, *op. cit.* p. 85.

the Scottish government would have to find new quarters. In addition, as we have seen, the Scottish government suffers from a lack of senior diplomatic personnel. However, the network and the good will developed thanks to these hubs would probably provide for an appreciable footprint in key countries. Such key countries were decided either for geopolitical reasons such as Washington DC to network the US, Beijing to have a hub at the heart of Asia, or to tend to the large Scottish diaspora in Canada. Finally, the European locations were chosen to establish or consolidate links with friendly States and potential allies.

In an appeal to Europe's sense of solidarity, A. Salmond delivered a speech in Brussels in December 2016. Echoing the words of de Gaulle, he declared: "In peace and in war Scotland has been at the heart of Europe. Therefore to be told now that against the wishes of the Scottish people that these connections are to be severed, that we are to be reduced to the role of at best a bystander, is not just democratically unacceptable – it flies in the face of our history. It should not just be unacceptable to Scotland – it should be unacceptable to Europe."[84]

But in the course of the Brexit chaos, all the well-established diplomatic conventions and boundaries have collapsed so that neither Europe nor Member States are able to work out what is deemed acceptable or not anymore. Everything seems to be up in the air and the Scottish government's para-diplomatic expedition could well be, to quote D Edward, less of an offensive than a ground standing mission.

Finally, with tongue in cheek, and as a tribute to the title of this conference on "friends and foes", we will give the last word to historian J. Goodare. In an interview on the auld alliance, the reader in Scottish history at the University of

[84] A. SALMOND, "Brussels Speech in Full", *The National*, 15 December 2016.

Edinburgh declared that the Auld Alliance was "a political and military alliance. It wasn't about the Scots liking French orchestras or French wine. The reason the Scots and the French cooperated is they both hated the English, and the English hated them."[85]

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