The Red Cell

B + 1
Policy Priorities and Prep for Brexit

Report by
The Forward Policy Working Group
August 2017

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Introduction

The UK's departure from the EU is unique event in the UK's history; the first time that a Government has introduced far-reaching changes in response to an explicit instruction from the public (the 1975 referendum, remember, resulted in an affirmation of the *status quo*). Brexit, it could be argued, is the single most democratic process that the UK has ever embarked upon. The Government, therefore, has a singular duty to make sure that it is a success, and to ensure that potential problems are mitigated. A failure to do so will lead many to assume that the Government was not committed to implementing the will of the people, something which would be catastrophic for the reputation of British democracy.

The authors of this piece were enthusiastic supporters of Brexit, and remain convinced that the decision the British people made last year will turn out to be a prudent one, yielding both short and long term benefits for our economy, democracy and society.

However, to pretend that there will not be challenges along the way would be churlish. Likewise; to exaggerate, distort and paraphrase admissions of difficulty - as is the want of some bitter 'remain' supporters - is fundamentally dishonest.

Taking advantage of the opportunities of Brexit - and guarding against the possible problems - will require a number of laws to be passed immediately. Because EU law is so nebulous, affecting every part of British public life, passing laws in the normal way will be a far-too-time-consuming process. There are already reports that Parliament's legislative timetable will not be able to cope with the number of tasks it will have to deal with. The Government needs the power to make the necessary changes quickly and effectively, though not at the expense of by-passing the Parliamentary process entirely.

This is not just driven by an eagerness for the benefits of Brexit, but also an appreciation of how EU law makes us less safe. Immediate changes are needed so that urgently-needed improvements can be made to the law that govern, among other things, the NHS and the Intelligence Services.

Fortunately such a system already exists within the British political process, via delegated powers (where Parliament delegates some of its authority to make law to the Government or Government bodies) or via Henry VIII powers (which enable primary legislation to be amended by secondary legislation with or without further parliamentary scrutiny).

Henry VIII powers are so called because of the Proclamation by the Crown Act 1539 - a law passed during the reign of Henry VIII, which effectively circumvented the need for the Crown to gain Parliamentary approval when making legislative changes.

An Act that proclamations made by the King shall be obeyed (1539)

'FORASMUCH as the king's most royal majesty for divers considerations, by the advice of his council, hath heretofore set forth divers and sundry his grace's proclamations, as well for and concerning divers and sundry articles of Christ's religion, as for an unity and concord to be had amongst the loving and obedient subjects of this his realm and other his dominions, and also concerning the advancement of his commonwealth and good quiet of his people, which nevertheless divers and many froward, wilful and obstinate persons have wilfully contemned and broken, not considering what a king by his royal power may do, and for lack of a direct statute and law to coarct offenders to obey the said proclamations for the time being with the advice of his honourable council… may set forth at all times by proclamations, under such penalties and pains and of such sort as to his highness and his said honourable council shill seem necessary and requisite; and that those same shall be obeyed, observed and kept as though they were made by act of parliament for the time in them limited'

In the UK body politic there is a commendable - and wholly necessary - scepticism over concentrating powers in the hand of the Government without democratic checks and balances. However it is important that this tendency is not blown out of reasonable proportion. There are times where, in national crisis, powers are passed to the executive in order to ensure the effective conduct of Government during these rare period. For example, in preparation for World War II, Parliament passed the *Emergency Powers (Defence) Act 1939* which gave the Government significant powers in order to manage the impending war effectively.

It is clear that Parliament must have a strong voice throughout the Brexit process, but it is equally clear that the Government must have the power to get the needed changes through quickly. Henry VIII powers should be seen as instruments for exceptional circumstances, and should be subject to severe limitations. This document sets out some suggestions for how such powers could be of use - and how they can be restricted.

This is, of course, an incomplete and imperfect series of proposals. There are a range of difficulties with implementing legislation for even the most basic changes - let alone one as multifaceted and complex as Brexit. The devolution process alone makes the issues involved in legislating for EU withdrawal infinitely more complicated. It is to the Government's great credit that it has assembled a distinct Department to manage these issues and assemble an entire Civil Service task force to deal with the challenge.

This paper can never hope to compete with the combined intellectual might of a Department. Nor is it intended to cover the immense range of transitional processes currently being mapped out as relate to trade rules (and which are covered by other Red Cell papers). It is simply a brief attempt to offer a handful of proposals for the collective to consider that may assist in realising the promises of Brexit effectively and quickly.

Changes to VAT

VAT should really be known as the European Tax. While the money does not go to the EU - or any of the Brussels institutions - EU member states are required, by law, to adopt a value added tax system that complies with the EU's rules. This means that, no matter how unpopular a particular form of VAT is, if it is required under the EU's law then there is nothing that can be done to change it.

The 2006 VAT directive establishes the current common system of Value Added Tax and states that the UK has had to charge VAT on a range of products that are politically controversial. This was highlighted during the referendum, with products that were marked as particularly egregious including:

- Sanitary products and contraception
- Work to repair flood damage
- Domestic supplies of fuel and power
- Energy saving materials

It is obvious how the obligation to charge VAT on many products is not only morally repugnant, but also disproportionately hurts the poor. What's less obvious, but no less important, is that the Government accepts that VAT rules for cross-border trade "can be complex and confusing" and has also said that "UK businesses also experience delays in the processing of cross-border VAT refunds in some EU Member States," encouraging tax evasion.[1]

The referendum saw a number of promises being made to the British people that, in the event of a vote to leave, there would be changes to VAT - not least to get rid of the hated 'tampon tax'. There is a pressing need to deliver this as soon as possible, lest it is seen as a betrayal of the promises that were made last year. Outside the EU's common system of VAT, the UK could exempt exports to the EU from VAT entirely, eliminating the burden on exporters of having to apply for a refund, as well as reducing the complexity of the existing system in the UK.

These changes will need to be encapsulated in a budget and passed in the typical way: via changes to the Value Added Tax Act 1994. This is typically done via a Finance Act, which is passed after a budget. The Government should commit – at the very latest – to pass a number of far-reaching changes to the

[1] https://www.gov.uk/government/publications/cut-eu-red-tape-report-from-the-business-taskforce/cut-eu-red-tape-report-from-the-business-taskforce

VAT system in the first budget after the UK formally departs the EU in 2019. A good way of generating good will at an earlier stage would be to start a very public consultation now, so people can say exactly which items they would like to see an end to VAT, and at the same time, give the Treasury the time that it needs to work out the consequences of ending, or at least reducing, VAT in these areas.

Establishing a new British trade policy

One of the big fears that led many people, though thankfully not the majority, to vote to 'remain' in the EU last year was the concern that the UK was risking ready access to some of its main markets; consumers who lived in other EU states. To put some context to this element of Project Fear, it is certainly clearly desirable, immediately after the UK leaves the EU, to have free trade deals with as many markets as possible, mitigating the potential impact of any possible emerging trade barriers with our European neighbours. The ultimate objective is that the UK will be left in a more advantageous position at the end of this process than it was when it was an EU member.

While there are obvious problems with agreeing trade deals (there is, after all, more than one party that has to be satisfied in any trade negotiation; or in many cases more accurately, more than one party that may elect to introduce fresh obstacles) there are additional problems that the UK needs to consider when it comes to introducing these trade deals. This is the problem of *passage*.

Seven years ago, this problem would not have existed, but today there is a serious risk that any new Treaty/Treaties might be blocked by the House of Commons. Parliament gained new powers under the Constitutional Reform and Governance Act 2010. This Act removed key powers from the Crown when it came to foreign affairs. Now, the Government must lay most treaties subject to ratification before Parliament for 21 sitting days before it can ratify them. If either House objects, the Government must give reasons why it wants to ratify before it can proceed.

While the Government can force through a treaty if the Lords rejects it, it cannot do so if the Commons rejects it. If the House of Commons rejects a treaty then the Government will have to explain to the House why it feels that the Treaty is in the UK's favour and lay the treaty before Parliament for another 21 sitting days. If the Commons rejects it again, the process repeats indefinitely. This means it is now possible - in theory - for the House to indefinitely delay a treaty.

This creates potential problems for the UK. One of the biggest handicaps that the EU has faced in agreeing trade deals over the last few decades has been the number of different political bodies it has to appease: note how the 'CETA' free trade deal with Canada was very nearly derailed as a result of votes in regional parliaments. At best, this system wastes a lot of time – time that the UK does not have as a result of the two-year window prescribed in Article 50. Nor can it be guaranteed that continued UK participation in every current existing trade deal that the EU has negotiated will remain unchallenged by any party ahead of 1 April 2019. There is, therefore, a case for suspending certain clauses of the Constitutional Reform and Governance Act 2010 on a temporary basis.

Such a recommendation is likely to generate considerable concern; however it should be noted that while the aim of the proposals that led to the 2010 Act was 'to hold power more accountable', the Act does little to help Parliament actually scrutinise treaties effectively. There is nothing in the Act to help Parliament look at treaties in a systematic way or decide which clauses of treaties are significant or controversial. This hinders its ability to present its democratic opinions on them.

With the clauses temporarily suspended, the UK Government should seek to affirm the future status – as quickly as possible – of current trade deals with all the countries/blocs that the EU has agreed trade deals with. These countries are listed below;

Albania	Egypt	Liechtenstein	Seychelles
Algeria	El Salvador	Madagascar	South Africa
Andorra	Faroe Islands	Mauritius	South Korea
Antigua and Barbuda	Fiji	Mexico	St Kitts and Nevis
Bahamas	FYR Macedonia	Moldova	St Lucia
Barbados	Georgia	Montenegro	St Vincent and the Grenadines
Belize	Grenada	Morocco	Suriname
Bosnia Herzegovina	Guatemala	Namibia	Swaziland
Botswana	Guyana	Nicaragua	Switzerland
Cameroon	Honduras	Norway	Syria
Chile	Iceland	Palestine	Trinidad and Tobago
Colombia	Israel	Panama	Tunisia
Costa Rica	Jamaica	Papua New Guinea	Turkey
Cote d'Ivoire	Jordan	Peru	Ukraine
Dominica	Lebanon	San Marino	Zimbabwe
Dominican Republic	Lesotho	Serbia	

Source: House of Commons Library

From an external vantage point it is difficult to assess exactly where negotiations over extending these deals currently stand. It is worth underlining that in the majority of cases these are not actual free trade deals, but lesser cooperation and partnership agreements, and in many cases are associated in fact with international development support. We can consequently predict a majority will see the non-EU partner wishing to translate the text into a tri-partite agreement, or to establish a parallel bilateral, though in some instances there will be areas where share of quotas will be areas of discussion and negotiation (these issues are covered in other Red Cell papers, so we pass by the detail here).

Where the Secretary of State for International Trade has successfully negotiated a more comprehensive free trade agreement than currently exists, then Parliament might properly scrutinise the extended provisions and their effects more intensely. But the prospect of delay in ratification of what are existing arrangements is a potential and mitigable risk.

It is important to stress, this is not to say that the 2010 Act should be suspended indefinitely – or even that the trade deals negotiated via the clauses of the Bill should be permanent. They simply make sure that the UK's trading position with third countries on 1 April 2019 looks as similar as possible to what it looks like now. That will help maintain business certainty.[2]

In addition, Article 34 of TFEU has historically allowed the CJEU to determine what constitutes "a measure equivalent to a quantitative restriction on imports." In a deeply concerning display of judiocracy, the CJEU has used this clause to prevent elected politicians from taking major decisions of public policy. After Exit Day, the UK should take steps as a matter of urgency to address these democratic outrages and reverse the CJEU's legislation by proxy.

Ending EU red tape to save money and save lives

Scrapping EU red tape was one of the key promises of the Vote Leave campaign during last year's referendum. There was no end to the situations of mad, bad and dangerous regulations which have frustrated businesses and caused deep irritating. However, there is a more sinister undertone to EU laws which – like the cited example above of the CJEU's ban on imports of blood on the grounds of unimpeded trade – create real risks to people's lives. Some EU laws have even led to deaths.

Only one example will suffice, *the Clinical Trials Directive.* This was intended to harmonise regulation of clinical trials. Academic studies concluded within eighteen months that it 'resulted in a doubling of the cost of running non-commercial cancer clinical trials in the UK and a delay to the start of trials' and 'both increased the cost and caused delay to non-commercial cancer clinical trials run by major public sector Clinical Trials Units in the UK'.[3] Between 2007 and 2011, applications for clinical trials fell by 25%. The cost of insuring commercial trials increased by 800% and the cost of administering non-commercial trials increased by 98%.[4] According to the *Change Britain* pressure group, this directive could have led to 5,000 deaths.

There is no doubt that people died – and continue to die – as a result of this EU law. So long as it is on the statute books, it creates a clear and present threat to the wellbeing of the British public. Its repeal is not simply a desirable outcome; it should be seen as an absolute, immediate necessity.

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[2] Our hope is that the Labour Party would be pragmatic and constructive so there would be no obstructionism over existing treaties. Nor is this to invalidate having a full debate on those subjects as part of the broader and enriching process of political accountability and democratic ownership after Brexit, and over time; but it is to assist in making the transition work. Debates on the limits and opportunities arising from FTAs will naturally follow over time, and we can predict a hot debate within the Labour Party.

[3] http://www.ncbi.nlm.nih.gov/pubmed/17118647

[4] http://ec.europa.eu/health/files/clinicaltrials/2012_07/proposal/2012_07_proposal_en.pdf

Naturally, the UK implementing legislation cannot simply be scrapped. This would create chaos. Instead, a law can be passed which will allow a Minister of the Crown to - by regulations - make such provision as the Minister considers appropriate to remedy or mitigate;

(a) The cost of legislation introduced under Section 2(2) of the European Communities Act 1972.

(b) Any other deficiency in legislation introduced under Section 2(2) of the European Communities Act 1972.

Deficiencies in legislation introduced under Section 2(2) of the European Communities Act 1972 could be defined to include where the Minister considers that the legislation in question —

(a) Creates unreasonable risks to public safety

(b) Undermines the effective operation of the National Health Service

(c) Places unreasonable costs upon any public body

(d) Places unreasonable costs upon any private body

(e) makes provision for payments to any EU entity

Obviously this provides a lot of power to the executive, and caution is needed. Therefore a number of restrictions should be put in the Act that grants the minister these powers, including, but not necessarily limited to:

- No right to impose or increase taxation
- No right to make retrospective provision
- No right to create a criminal offence
- No right to amend or repeal the Northern Ireland Act 1998
- No right to breach the UK's obligations to international bodies
- No right to use such powers after two years following exit day

Regaining the power to deport dangerous criminals

One of the great misinterpretations of the 2016 referendum was that the 'leave campaign' was obsessed with either reducing immigration or 'kicking out' people who had moved to the UK from other countries. Aside from the views of a handful of cranks, this was self-evidently not the case for the main 'leave' campaigns, who stressed the need for *control* of borders. The one group of people that the campaign did say needed to be deported were criminals – those who came from other EU lands and who committed terrible crimes, and who were protected from deportation by EU law.

At present, the Home Secretary has the power to deport foreign nationals from the UK if she considers that it would 'be conducive to the public good'.[5] The law provides that a person who is convicted of a serious crime and sentenced to imprisonment is sentenced to more than twelve months' imprisonment will be subject to automatic deportation.[6] However – scandalously – this has no application where deportation 'would breach rights of the foreign criminal under the EU treaties'.[7]

The authorities, therefore, cannot remove EU citizens on the basis of their criminal convictions. This is explicitly stated in the 2004 Free Movement Directive. In other words, the right of violent killers to enjoy freedom of movement trumps the right of people in the UK to live without fear of murder. Take the example of Theresa Rafacz, who killed her husband, in an act the trial judge described as involving 'gratuitous violence', it was determine that – as an EU national – she could not be deported.

In order to change this outrageous – and dangerous – situation, some immediate changes are needed to UK law:

- The powers conferred the Immigration Act 1971 and other laws to deport people should apply to *all* persons regardless of where they come from;

- The Home Secretary should have the power to refuse *any* person leave to enter the United Kingdom on the ground that their presence would not be conducive to the public good;

- Section 33(4) of the UK Borders Act 2007 and the Immigration (European Economic Area) Regulations 2006 should be repealed.

[5] www.legislation.gov.uk/ukpga/1971/77/section/3
[6] www.legislation.gov.uk:80/ukpga/2007/30/section/32
[7] www.legislation.gov.uk:80/ukpga/2007/30/section/33

Ending the EU role over the intelligence services

The UK's surveillance regime has been at great risk as a result of EU law. Key powers that MI5, SIS and GCHQ rely on to keep us safe have been struck down because of EU law. In July 2015, the Divisional Court in London annulled the Data Retention and Investigatory Powers Act 2014 on the ground it was inconsistent with the EU's Charter of Fundamental Rights.[8] In November 2015, the Court of Appeal referred the UK's surveillance regime to the CJEU for a decision as to whether it will be allowed, making clear in doing so that the CJEU's decisions 'will remain central to the validity of all future legislation enacted by the Member States in this field', articulating clearly the sheer extent of EU law over our intelligence services.[9]

The then-Home Secretary, Theresa May, described the UK's legislation as 'crucial to fighting crime, protecting children, and combating terrorism'. She argued that without the legislation, 'we run the risk that murderers will not be caught, terrorist plots will go undetected, drug traffickers will go unchallenged, child abusers will not be stopped, and slave drivers will continue their appalling trade in human beings'. Nonetheless, the CJEU judgement has ridden a horse and cart through the UK's intelligence services – with suggestions that wide-ranging changes will be need to be made to the UK's intelligence framework in the near future.[10]

In order to deal with these issues, the following changes will be needed as soon as possible – *these changes should be passed as quickly as possible - regardless of whether or not the UK is a member of the EU:*

- It needs to be clearly stated, in statute, that EU law shall not affect the validity, continuing operation or enforcement of laws which are deemed to be important to the intelligence services;

- The law must be changed so as to make it clear that EU law shall not apply to the intelligence services or to a designated body (as defined by a minister);

- Primary legislation must make it clear that no court or tribunal shall have any jurisdiction to disapply or fail to give effect to an Act of Parliament that gives powers to MI5, SIS or GCHQ on the ground that such an Act is contrary to EU law.

These powers should be seen as vital to national security. It would be an act of madness to implement extremely damaging EU law that will make us less safe when we plan to leave in a little over a year. We should risk CJEU judgements and the ire of the Commission – they are much less threatening prospects than our intelligence services not being able to protect us.

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[8] https://www.judiciary.gov.uk/wp-content/uploads/2015/07/davis_judgment.pdf
[9] www.judiciary.gov.uk/wp-content/uploads/2015/11/davis_final.pdf
[10] http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0203&lang1=en&type=TXT&ancre=

Conclusion

There is an irony, not lost on the authors, in calling for the immediate response to Britain's departure from the EU to be one of seemingly undermining Parliament's voice and role in the legislative process. It would seem contradictory to the aims and promises of a referendum campaign that pledged to let Parliament 'take back control' of the affairs of state.

It is *not* the intention of this paper to argue this. Parliament must be at the heart of all things in our body politic, the sovereign body which governs our laws. This paper is not a call in any way to mitigate these powers, but to ask Parliament – for a short time – conduct itself differently so that a few, important things can happen quickly after we leave the EU. This is not the same as calling for a Cincinnatus-like state of affairs: all of the powers recommended above will have to be passed by parliament and all regulations introduced under their power will be subject to review. This is not about transferring power, so much as it is as passing decisions *quickly.*

The things set out in this paper, if done in a prompt and effective manner, will make us safer and richer. Indecision and inaction will likely lead to problems and will undermine the safety of the realm. It will free up legislative time (likely to be in high demand for the coming years) and will not undermine the democratic process.

Nothing in this document is envisioned to be permanent. It is intended to be limited, controlled, and sober. It is hoped that it will offer some answers to the big questions of Brexit while delivering on the biggest promise of leaving the EU – to take Britain back to being a genuine democracy once again.