Final workshop of the ERASMUS Academic Network on Parliamentary Democracy in Europe – PADEMIA

THE IMPACT OF REFERENDA ON PARLIAMENTARY DEMOCRACY

On September 19th and 20th 2016, under the lead of Dr Julie Smith TEPSA hosted and organised the final PADEMIA workshop on the role of referenda in parliamentary democracy.

The first day was devoted to a general discussion about the principles of direct and representative democracy and about the political and legal aspects of sovereignty in the EU. An introduction by Dr Julie Smith (Cambridge University and House of Lords) and Prof Michael Kaeding (TEPSA Chairman) was followed by presentations by Prof Ben Crum (Vrije Universiteit Amsterdam), Dr Julie Smith (Cambridge University and House of Lords) and Prof Catherine Barnard (Cambridge University), Bernard Jenkin (British MP), Andrew Duff (European Policy Centre, former MEP), and Prof Jaap de Zwaan (Erasmus University Rotterdam, TEPSA Secretary-General). The first day of the workshop was concluded by a keynote speech by Dara Murphy (TD), Irish Minister of State for European Affairs, Data Protection and the EU Single Digital Market.

The second day of the workshop was specifically aimed at addressing constitutional questions in the UK in light of the recent Brexit vote. The session looked at the constitutional rules around referenda the legal challenges to triggering article 50 and the impact of the vote on the nations of the UK and on its relations with Ireland. Addresses were given by Prof Philip Norton (University of Hull) and Graham Avery (Oxford University, European Policy Centre and TEPSA).

An overview of the referenda held on EU-related issues since 1972 (in EU member states and not only) was prepared for the occasion by TEPSA, with the collaboration of some of its member institutes, and handed out to all the participants of the workshop. Prof Michael Kaeding presented the overview to the panellists and participants.

DAY 1

Panel Session I: Direct versus representative democracy – principles of holding referenda

Speakers: Julie Elizabeth Smith, Ben Crum and Catherine Barnard

Moderator: Michael Kaeding

The panel was dedicated to the current controversy around direct and representative democracy, which is an especially crucial issue with regards to referenda held on EU matters and, particularly, the Brexit referendum.

According to Michael Kaeding there has been a shift in the focus of EU-related referenda from membership and treaty ratification towards more individual issues with non-binding nature.

Ben Crum highlighted that referenda are often seen as a symptom of popular discontent and, although there are fears that they are likely to give way to growing populism, referenda should become a more common practice in order to channel people's political demands. Many of the objections against referenda – in particular the lack of knowledge of the common people - were already reflected in Plato's parable of the "Ship of State". Ultimately, however, political questions are not so much about the skills necessary to get us to a certain end but rather about deciding collectively about the ends that we want to attain – and those are questions on which all have a legitimate say. As parties are often torn on European issues, referenda offer a useful complement to national and European elections. In the end, Crum endorsed the use of referenda on EU affairs, but with two caveats. First, referenda are more easily accommodated in some contexts than in others, and indeed having referenda is a practice in which voters, parties and the media have to build up a certain experience. Secondly, referenda rarely settle a question for good but rather need to be appreciated as part of a longer-term process of collective decision-making.

According to Julie Smith, the pro-European elites' reluctance to talk about the EU problems or to engage the societies by explaining them the ongoing processes were problems. The UK referendum had been less about persuading discontented voters than about securing the unity of the Conservative party. Although such a move had succeeded in guaranteeing the unity of the party so far, it had left the country in a difficult situation. As Catherine Barnard underlined, the UK's EU referendum was badly timed from the perspective of attracting potential Remain voters (younger people). The referendum itself was not subject to a minimum turnout threshold (nor constitutional majority threshold). Further, it did not grant voting rights to several groups of people likely to be particularly affected by the referendum, including EU nationals who were long-term residents in the UK. Furthermore, the Leave campaign provided no detail as to what 'Leave' might look like. As an outcome, the Brexit referendum has now become *de facto* binding although legally it was not set out to be such.

During the Q&A session some of the thoughts that arose regarded the central problem of referenda, i.e. they lack a framework and often have a peculiar nature. For example, in the Greek referendum people were essentially asked if they agree to lower their living standards, while Brexit was a way of decreasing the tension within society and reflected a conflict between society and the political elite.

Panel Session II: Legal versus political aspects of sovereignty and democracy in the EU

Speakers: Bernard Jenkin, Andrew Duff and Jaap de Zwaan

Moderator: Geoffrey Edwards

The 2016 UK European Union membership referendum raises several political, constitutional and procedural issues that question the transfer of sovereignty and the quality of democratic life. Among questions raised were who should trigger the

procedure set out by Article 50 TEU and when it should be triggered, as well as how and what to repeal within the legislative acts and regulations that the UK applies at present by virtue of its EU membership.

In the light of these questions, panel session II – chaired by Geoffrey Edwards – explored some of the main heated topics in the post-Brexit referendum debate.

Both the first two speakers emphasised that the UK would now certainly leave the EU, and focused on the crucial question of what kind of relationship the UK should develop with the European Union after its exit ("secession" in Andrew Duff's terminology). In particular, according to Duff, the UK has 3 main options: access to the single market via the European Economic Area; the negotiation of a customs union agreement, like Turkey; the negotiation of a free trade agreement. However, according to Bernard Jenkin, if the UK entered into an "intrusive" model of relationship with the EU, another referendum would be needed.

With regard to the timetable to complete the withdrawal process, Jenkin pointed out that the UK should leave the EU as swiftly as possible. Duff agreed that Article 50 should be triggered as soon as practicable, but stressed that this would be only the first of a three-stage, longer and more complex process.

Lastly, Jaap de Zwaan examined the text and the context of the "withdrawal clause", which regulates the mechanism for the voluntary and unilateral withdrawal of a Member State from the EU. In particular, he focused on several problems linked to the interpretation of Article 50 TEU and drew attention to the possibility of coordinating the formal moment of the withdrawal with the entry in force of the future relationship between the UK and the EU.

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The first day was concluded by a keynote speech by Dara Murphy (TD), Ireland's Minister of State for European Affairs, Data Protection and the EU Single Digital Market, addressing the question: "Is strengthening direct democracy at the national level the right way of strengthening the democratic character of the European Union?"

The minister talked about the importance of accountability when referring to democracy, and subsequently of the necessity of engaging national parliaments in EU affairs. Mr Murphy discussed the topic from an Irish perspective, and referred to the Irish referenda held on issues related to the EU. In particular, he suggested that information campaigns are fundamental in order to raise awareness among citizens of the issues at stake during referenda, and that the political class plays an important role in communicating this to the voters.

DAY 2

Panel Session III: Constitutional questions in the UK in light of Brexit

Speakers: Philip Norton, Graham Avery

Moderator: Julie Smith

The session aimed to look at the constitutional implications of the Brexit vote, including the rules of the referendum, the legal challenges to triggering Article 50, the impact of the vote on different parts of the UK and on relations with Ireland. Dr Julie Smith (Baroness Smith of Newnham) of the University of Cambridge chaired the session.

The first speaker, Prof. Philip Norton (Lord Norton of Louth; Professor at the University of Hull and a member of the House of Lords) noted that since the 1970s in the UK referenda have been mainly used on issues connected with devolution and the EU, that there was no generic act on referenda and that each referendum has been based on a bespoke Act of Parliament. The Parliament, in the act initiating the Brexit referendum, has not established a threshold for participation or in the vote. The referendum on Brexit is not legally binding, but is politically binding on the Government, which is committed to implementing its outcome. Three stages may be perceived after the outcome: triggering Article 50, negotiating the withdrawal and giving effect to the withdrawal within the UK legislation. The consent of the Parliament may not be required for triggering Article 50, but its approval would be the wise course, and could be done through a motion in the House of Commons rather than primary legislation. It should be assumed that triggering Article 50 would be final, as the possibility of a state revoking a withdrawal notification is a grey area. Negotiations would be conducted by the government and scrutinized by the Parliament. The third stage would be the "heavy lifting" during which it would be the role of the Parliament to give effect in UK law to the consequences of withdrawal. The process could be completed by the time of the next scheduled parliamentary elections in 2020.

The second speaker, Graham Avery (University of Oxford, TEPSA and EPC), noted the considerable differences in the referendum outcome in the different regions of the UK, with 52% in favour of leaving in the UK as a whole, 53% and 52% in favour of leaving in England and Wales respectively, while in Scotland 62% voted in favour of remaining, as did 56% in Northern Ireland. In Scotland the First Minister Nicola Sturgeon campaigned in favour of remain and argued that Brexit should only be given effect if all four nations composing the United Kingdom were in favour. She also took the view that Scotland had four interests: the democratic interest (not leaving the EU in view of the fact that the majority had voted in favour of remain); the economic interest (maintaining membership of the single market); avoiding erosion of social rights in Scotland; and retaining its influence in the EU institutions. However she is likely to be cautious, not wishing a second defeat for the Scottish National Party (SNP) in an independence referendum. From the EU point of view, caution is also to be expected. Although Scotland as a member would be expected to be a net contributor, the EU member

countries do not wish to encourage separatism within EU member countries. In Northern Ireland, Brexit poses a complex question related to the frontier with the Republic of Ireland, but the British Government's position is that there will not be problems. In Wales the majority voted to leave, and the region has a much less successful separatist movement than Scotland.

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During the following discussion a number of issues related to the regions were raised:

It was emphasized that another independence referendum in Scotland would require a Westminster decision, although there might be a unilateral organization of a referendum. One participant expressed doubt as to whether the SNP aimed at a new independence referendum or merely to maintain a "grievance narrative".
The third stage of the exit process, that of sifting through EU originating laws and deciding whether to maintain or repeal them might take many years.
It was also concluded that, though legally there could be a change of mind after triggering article 50, it may not be possible politically, so that its triggering should be regarded as irrevocable.
The issue was also raised as to whether there should be generic rules developed for the conduct of referenda.
The view was expressed that if Scotland left the Union after the British exit from the EU, it would have to apply as a new candidate for membership, though this might not apply if the exit from the UK occurred before UK exit from the EU.
The was a discussion about how London would organize coordination mechanisms for the four nations that might have different requirements, and the question was posed as to whether it would be possible to end up with a different status for each component nation.
During the concluding discussion a high degree of consensus was evident on the need for study and dialogue on the question of referenda, including the question of whether it was necessary and possible to develop some ground rules that should apply to the conduct of referenda.

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