# Faux Research in the Service of Ideological Deceit during the 2016 EU Referendum Campaign: The Legal Surreality of Leave's "Sovereignty" Statistics

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## Introduction

The Leave alliance of 2016 conducted one of the most dishonest political campaigns in modern British history.[4] In doing so, those responsible not only demeaned and debased our democracy. They also sought to inflict immeasurable damage upon some of the most important values which the academic profession is entrusted to represent and defend: the commitment to pragmatic, rational, evidence-based scientific investigation, which seeks to inform and better our society through the cultivation of expert skill, knowledge and experience, to be tested and refined through a process of objective and rigorous peer review. It is simply impossible to reconcile those values with a politics which is proudly ideological and, with it, indifferent to evidence, immune to persuasion, cynically selective and self-serving in its analysis, and ultimately anti-democratic in its

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[4] See further, eg https://www.youtube.com/watch?v=ic8A7KXFkKY; https://www.youtube.com/watch?v=eyMcesYSLk8; https://www.youtube.com/watch?v=oHm9QOffpyE.

intolerance of dissent.[5]

That irreconcilable conflict is well illustrated by examining, from the perspective of a legal researcher, the manner in which various Leave campaigners sought to use – or rather, succeeded in seriously abusing – "statistical evidence" about constitutional phenomena during the referendum campaign. One could chose any number of examples to work through in greater detail, but one of the most interesting involves the Leave campaign's statistics about the proportion of law imposed upon the UK by the tyrants in Brussels, aimed at proving their argument that UK sovereignty had been stolen away by the EU – interesting partly because the idea of "taking back control" played such a prominent role in the Leave campaign and has been interpreted (not least by the Government) as a leading consideration behind the majority vote to leave;[6] and partly also because it is such an excellent illustration of the rank incompetence and / or shameless dishonesty which fuelled so many of the Leave campaign's arguments.

## Leave's sovereignty analysis: why let the facts get in the way of a good lie?

One of the key planks in the Leave campaign was the argument about sovereignty: the UK had lost its sovereignty through EU membership and could only regain it by leaving again. That argument was summed up in populist slogans such as "take back control", "we want our country back" and making the UK "a free and sovereign country again".

The immediate problem for the Leave campaign was that (as pointed out by every credible international lawyer) there is no doubt

[5] See further: M Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia, Cambridge, 2017): Editor's Introduction.

[6] Eg HM Government, *The United Kingdom's exit from and new partnership with the European Union* (Cm 9417); Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (Cm 9446).

whatsoever that the UK has always remained a sovereign state under international law and (as confirmed by every credible public lawyer) there is no doubt whatsoever that the Westminster Parliament remains the sovereign legislative authority within the UK. Such completely orthodox constitutional principles have been reconfirmed yet again, even after the referendum, by the Supreme Court in its ruling in the famous *Miller* case;[7] and indeed by the Government itself in its White Paper on the UK's exit from and new partnership with the European Union.[8]

But why let the facts get in the way of a good lie, when one can simply come up with some alternative facts? And so Leave's strategy was to construct their own definition of sovereignty, then fabricate some statistics to prove it to be correct. In particular, Leave campaigners decided to define sovereignty in terms of the percentage of UK law which was being imposed by the EU – so as to demonstrate how marginal and disempowered our own Parliament had become, as the unelected Eurocrats in Brussels came increasingly to dominate every aspect of national life.

Leave's claims varied as regards both the alleged figure and its supposed source. For example, UKIP again and again asserted that Brussels makes 75% of UK law – a figure that appears based on nothing more than some unsubstantiated off the cuff press remarks from a former EU Commissioner.[9] Appearing before the House of Commons Treasury Committee in March 2016, Boris Johnson cited what he called "new evidence" that put the true number at 60%.[10] This turned out to be a gross misrepresentation of House of Commons Library research dating from 2014;[11] though that did not stop Boris

[7] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[8] HM Government, *The United Kingdom's exit from and new partnership with the European Union* (Cm 9417) especially Section 2.

[9] See http://www.ukip.org/75_of_our_laws_are_made_by_eu_institutions_says_senior_european_commissioner_viviane_reding.

[10] See http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/treasury-committee/the-economic-and-financial-costs-and-benefits-of-uks-eu-membership/oral/31014.html.

[11] See https://secondreading.uk/vaughne-miller/how-much-legislation-comes-from-europe/.

Johnson from repeating it in writing and in speeches throughout the referendum campaign.[12]

However, perhaps the most important and influential backing for the Leave claims came from the Europhobic campaign group "Business for Britain". In a report published in March 2015 – entitled *The EU's influence over British Law: The Definitive Answer*, replete with methodological explanations, scientific formulae and lots of detailed numbers – Business for Britain decreed that, between 1993 and 2014, 64.7% of UK law was EU-influenced, while EU regulations accounted for 59.3% of all UK law.[13]

## Interrogating the Business for Britain methodology:

## a case of outright legal claptrap

Just how scientific and definitive were those Business for Britain findings? It is rarely a promising start when basic definitions (such as those of a regulation or a directive under EU law, and indeed, even of an Act of Parliament under UK law) are incorrect: that sort of infantile error would see a first year law undergraduate having to repeat the module.[14]

But far more serious are the basic methodological flaws which run throughout the Business for Britain report. To work out its numbers on the UK side, Business for Britain added together the total number of primary and secondary legislative measures adopted in the

[12] Eg https://www.thesun.co.uk/archives/politics/1139354/boris-johnson-uk-and-america-can-be-better-friends-than-ever-mr-obama-if-we-leave-the-eu/.

[13] Available, eg via http://tcpresearch.weebly.com/uploads/2/1/7/1/21715546/percentagelaws.pdf. The lead author is identified as Tim Philpott. It is unclear whether this individual holds any particular training, qualifications, skills, experience or external peer validation in the field of legal research. Research funding was provided by the "Politics and Economics Research Trust" – a charity resourced by private donations which has been accused of improper political bias towards Europhobic campaign groups: eg http://www.thirdsector.co.uk/charity-commission-investigates-claims-politics-economics-research-trust-broke-political-campaigning-rules/governance/article/1376805.

[14] See Business for Britain, *7% or 75%? The EU's influence over British Law: The Definitive Answer* (March 2015) p 7 (then continuing throughout).

UK during its reference period: Acts of Parliament and statutory instruments. On the EU side, Business for Britain added together the total number of regulations adopted by the EU during the same reference period.[15] Business for Britain then identified the total number of UK measures adopted in order to implement EU directives into national law.[16] Those measures were extracted from the UK tally and added instead to the EU figures. So: from the total legal acts counted, 59.3% were EU regulations; 5.4% were UK measures adopted to implement EU directives; and that left just 35.3% as "pure bred" British law.

Table 1: Business for Britain, *The EU's influence over British Law: The Definitive Answer* (March 2015): between 1993 and 2014, 64.7% of UK law was EU-influenced; in particular, EU regulations accounted for 59.3% of all UK law.

| | **Absolute Numbers** | **% of Total** |
|---|---|---|
| **All acts**<br>*of which:* | **83,804** | **100** |
| EU regulations | 49,699 | 59.3 |
| UK primary and secondary acts implementing EU directives | 4,532 | 5.4 |
| **Combined "EU influenced"** | **54,231** | **64.7** |
| **"Pure" UK primary and secondary acts** | **29,573** | **35.3** |

[15] Regulations are defined by Article 288 TFEU as measures having general application, binding in their entirety and directly applicable in all Member States.

[16] Directives are defined by Article 288 TFEU as measures binding as to the result to be achieved, upon each Member State to which they are addressed, but leaving the national authorities the choice of form and methods.

Scientific and definitive? Actually – complete rubbish.

The vast bulk of the "64.7%" figure calculated by Business for Britain refers to "EU regulations" without any apparent attempt to distinguish between legislative regulations and non-legislative ones.[17] Or – within the category of non-legislative regulations – between delegated acts and mere implementing acts.[18]

EU legislative regulations can rightly be compared to primary legislation in the UK. But they are relatively few in number. EU non-legislative but delegated regulations can (with some justification, though many would still dispute this) be compared to statutory instruments in the UK. But again, they are relatively few in number. The vast majority of EU non-legislative regulations are purely technical and administrative in character. In fact, they constitute one of the main legal instruments through which the EU institutions reach detailed decisions: for example, updating the scientific registers of chemicals and food additives; calculating the precise allocation of import licences under the common commercial policy; adjusting specific anti-dumping duties on cheap imports from third countries; confirming the regular continuance of UN sanctions on particular third countries or named individuals suspected of involvement in terrorism; entering or updating specific foodstuffs in the register of protected designations of origin etc.

As a result, the Business for Britain study was simply not comparing like with like. If one were to apply their understanding of "EU law" also to "UK law", then one would have to add into the calculation vast numbers of UK decisions taken by public officials in a wide range of public bodies across the entire country – which would surely render the EU component of any statistics on the total volume of "UK law" virtually negligible. Instead, the Business for Britain report is comparing apples with vast quantities of pears – which is why they produce such inflated statistics. Going further: insofar as Business for Britain explicitly claims to be comparing like with like – in particular, they repeatedly refer to all of those EU regulations in terms corresponding to legislative acts, not mere non-legislative

[17] See Article 289 TFEU.

[18] See Articles 290 and 291 TFEU.

measures – these statistics are not only wildly inaccurate but also positively misleading.

If one were to try and do a better job of comparing like with like, there is no doubt that one would end up with radically different numbers. By way of experiment, the present author checked all of the EU regulations published in the *Official Journal of the European Union* during several randomly selected months. October 2015 serves as a typical example. Using the methodology apparently employed by Business for Britain, one would count 115 EU regulations, i.e. 115 added into a Business for Britain-style tally of "EU law imposed on the UK by Brussels". But in fact, only 4 of those regulations were legislative measures – of which 3 were amending acts, adopted to change the provisions of pre-existing measures (note that the approach of Business for Britain towards counting amending measures is not entirely clear from their report). Of the remaining 111 non-legislative regulations, 8 were delegated acts. As said above, those are (arguably) comparable to statutory instruments as adopted in the UK – so being generous, one should add them into the figures for "EU law imposed on the UK by Brussels: 4 + 8 = 12. The remaining 103 non-legislative regulations consisted of detailed technical administrative decisions, adopted by the Council or the Commission, of the nature indicated above – in no way comparable to either UK primary or secondary legislation.[19] In other words: using the sort of approach adopted by Business for Britain, the figures for EU regulations that should be added into the calculations, together with UK measures, increased from 12 to 115 – an entirely artificial multiplication of nearly x10.

[19] The author's favourite example was Commission Implementing Regulation 2015/1746 [2015] OJ L256/5. Its sole substantive article reads, "[i]n the second paragraph of Article 2 of Implementing Regulation (EU) No 750/2014, the date '31 October 2015' is replaced by '31 October 2016' – thus extending the period during which the competent authorities should undertake precautionary checks against the possible introduction of a novel strain of pig diarrhoea from North America into Europe.

Table 2: EU regulations published in the Official Journal for October 2015.

| | **Absolute Numbers** | **% of Total** | **BfB style method?** | **Credible EU law method?** |
|---|---|---|---|---|
| **All regulations** *of which:* | 115 | 100 | 115 added to "EU" tally | 12 added to "EU" tally |
| Legislative | 4 | 3.5 | | |
| Delegated | 8 | 7 | | |
| **Combined "law"** | **12** | **10.5** | | |
| **Other non-legislative** | **103** | **89.5** | | |

The present author repeated the same experiment for all the EU regulations published in several other months of the *Official Journal of the European Union* during 2016. The basic story was the same, even if the exact multiplication effect varied from month to month: vast numbers of purely technical, administrative regulations were included in the statistics, seriously distorting the results by massively exaggerating the amount of "EU law" being including in the calculations.

## Yet further flaws in the Business for Britain analysis...

## or indeed, in any analysis?

The failure to distinguish between legislative, non-legislative, delegated and purely administrative EU measures is by far the most serious but

it is not the only significant methodological problem with the Business for Britain report.

For example: if one really planned to include non-legislative EU regulations in an analysis, then why not also include other categories of EU legal instrument which are essentially comparable in nature – such as EU decisions of general application?[20] Business for Britain seemed entirely unaware even of the very existence of such instruments – reinforcing the sense that their analysis is not only blatantly incompetent but also essentially arbitrary. Or again: the Business for Britain analysis gives no indication that it has distinguished between those EU regulations (whether legislative or non-legislative in nature) that apply to all Member States; as opposed to those measures that only apply to certain Member States and, in particular, are not binding upon the UK – as with all measures adopted in the field of the single currency;[21] and many measures adopted under the Area of Freedom, Security and Justice.[22]

But even setting aside the serious flaws that riddle the Business for Britain report itself, the important question arises: would it ever have been possible to do a genuinely reliable job of this sort of calculation? The answer is: probably not. Any competent legal scholar would confirm that attempts to quantify the amount of "UK law", or the amount of "EU law", let alone the statistical relationship between the two, could never be anything more than an inaccurate guess. There are serious challenges even for a study that knows better what it is doing.[23]

[20] Ie without any specific or individual addressee: see Article 288 TFEU.

[21] Protocol No 15 on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland (annexed to the TEU and TFEU).

[22] Protocol No 19 on the Schengen *acquis* integrated into the framework of the European Union; Protocol No 20 on the application of certain aspects of Article 26 TFEU to the United Kingdom and to Ireland; Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice (all annexed to the TEU and TFEU).

[23] To be fair on Business for Britain, its report at least acknowledges that certain challenges in compiling accurate statistics have been identified in previous studies – but gives no indication that / how it takes those challenges into account in any credible way; overlooks the other key problems identified here; and in any case does not allow any such uncertainties to muddy its claim to "definitive" conclusions. See Business for Britain, *7% or 75%? The EU's influence over British Law: The Definitive Answer* (March 2015) pp 5-6.

For example: the distinction between EU legislative and non-legislative acts was only formalised under the Treaty of Lisbon 2007 and came into force in December 2009.[24] Before that, separating out what was to be considered an act of legislative status, from what was to be treated as an exercise of delegated legislative authority, or instead to be considered purely administrative in nature, often meant checking individual legal acts on a case-by-case basis and making a considered judgment about their likely character. Indeed, there were various disputes where a more definitive classification had to be decided upon by the courts – a body of caselaw that makes clear the often difficult judgments involved.[25] Such a task – which evidently covers the bulk of time during which European legal instruments have even been adopted – simply defies systematic and reliable statistical analysis.

Or again: what should we do with caselaw? In a common law system, the judges make "new law" through their interpretation of statutes as well as through their own jurisdiction to develop unwritten legal principles. The EU is no different: the European Court of Justice operates, from that perspective, in a manner akin to a common law court. But how should we count caselaw in our statistics? There is simply no reliable or credible method for doing so. Yet if we do not take caselaw into consideration, then no study is able to offer a really accurate "statistical" picture of the make-up of any given legal order.

Last but not least: claims or studies (such as Business for Britain) which have sought to calculate "how much UK law comes from the EU", invariably use a relatively short reference period (in that case, of around 20 years from 1993-2014) as the basis for identifying which range of legal instruments should be considered relevant within each legal order and thus for the purpose of describing in numerical terms the nature and extent of the EU's influence upon UK law. However, that overlooks the rather obvious yet still fundamental fact

[24] See further, eg M Dougan, "The Treaty of Lisbon 2007: Winning Minds, Not Hearts" (2008) 45 *Common Market Law Review* 617; J Bast, "Is There a Hierarchy of Legislative, Delegated and Implementing Acts?" in C F Bergström and D Ritleng (eds), *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP, Oxford, 2016).

[25] Eg for the purposes of individual standing to bring judicial review proceedings against Union measures under what is now Article 263 TFEU; or for determining the limits of the Council's power to delegate certain implementing powers to the Commission under what is now Article 291 TFEU.

that, whereas the EU legislature has been active for several decades, the UK parliament has been legislating continuously for several hundred years. Vast quantities of UK law therefore pre-date, but continue to be fully in force within, any artificially chosen reference period (such as that employed by Business for Britain). That in itself makes searching for a credible statistical calculation feel ever more preposterous. But in any case, one need only abstractly consider the challenge of properly locating the contribution of EU law within the overall context of the UK legal system, judged across the totality of the latter's fullness of time and completeness of volume, to reinforce just how selective and distorted the Leave analysis really was.

## The research questions a lawyer would really ask

If we accept that attempts accurately to quantify "law" in any jurisdiction are very difficult, let alone trying to do so across jurisdictions in order to draw meaningful comparisons, there are nevertheless much more important qualitative questions that we can ask about the relationship between UK law and EU law.

For example: EU law tends to be concentrated in particular fields of activity (such as the single market, consumer rights or environmental protection); when it comes to other sectors, the EU's legislative activities are much more marginal (as with taxation, public health or education policy). Even within sectors which see greater EU regulation, the relationship between national and European law is often so complex and intertwined that it becomes difficult to tell where national law stops and where EU law takes over. That can be true for various reasons. Many EU measures set out general objectives / principles which the Member States have to translate into more concrete rules, rights and obligations. There may well be a European framework, but the key tools and instruments are national. Or again: in the process of translating EU law into national law, Member States often decide to "gold plate" the basic EU legislation, by extending its scope of application, or adding additional rights / obligations, or creating more detailed frameworks and processes. In many situations,

trying to separate the "national" from the "European" is more a task for the philosopher than the lawyer or statistician.

There is also the obvious point that not all "law" is of the same significance. Much EU legislation is very humdrum in nature and of little wider public salience or political controversy. But other EU acts are far more important in terms of what they set out to achieve and the instruments they use to achieve them – creating new legal frameworks of undoubted importance and contestation – though legal researchers take it almost for granted that the number of such measures adopted by the EU each year will be relatively low. And of course: much of this EU legislation concerns issues that would need to be regulated by the Member State in any case, and in most cases, the essential framework of any "alternative" domestic rules would undoubtedly look very similar: after all, we do not want to place unsafe toys on the market; we want to limit air pollution; we want to promote equal treatment between men and women in the workplace.[26]

Far from artificially seeking to translate the vast and rich complexity of the legal system into simplistic and misleading numbers, those are the questions that can stimulate a more fruitful and credible – though necessarily more qualitative – discussion of how EU law interacts with and influences the legal systems of its Member States. If a non-specialist wishes to garner a more accurate picture of the complex interrelationship between EU law and UK law – the scope and variegations, the key interventions and the mundanities, the benefits and the controversies, the unforeseen consequences and the indirect impacts – they would do far better to peruse the many volumes of detailed but nevertheless accessible explanation, evidence and analysis produced in respect of every sector of policymaking through the *Balance of Competences Review* undertaken by Whitehall under the Coalition Government between 2012 and 2014.[27]

[26] To say nothing of those EU measures that implement international obligations (in fields such as environmental protection and financial services regulation) which would be binding on the UK in any event.

[27] See https://www.gov.uk/guidance/review-of-the-balance-of-competences.

## Conclusions

This paper used the Leave campaign's statistical claims about the influence of EU law upon the UK in general, and the "definitive" Business for Britain report in particular, as an example of their incompetent and / or misleading abuse of legal concepts and legal material for ideological purposes. But even if those claims were especially prominent and apparently influential, they remain far from the only such example. On virtually every key issue, Leave's arguments were at best highly selective; in some cases seriously distorted; and in many situations, they consisted of outright fabrications. Those researchers who sought to challenge them were often subjected to a barrage of abuse.[28] And unfortunately, we still see the influence of that dishonesty at work today – only now, it is represented at the highest levels of Government – indeed, it has effectively dictated the contents of the White Paper of February 2017 setting out the UK Government's negotiating position in relation to our future relations with the EU. And nor should one forget that this is not just about the EU. There is a depressing correlation between some of the leading Europhobes and other anti-rational, anti-scientific bigotries (such as climate change denial) and indeed their support for various regressive socio-economic preferences (from the return of capital punishment to the dismissal of employment legislation as "red tape"). That should impress upon all academic and scientific colleagues an important lesson for the future: we should not stand idly by and watch our national future be so easily hijacked, in particular, by faux research which is deliberately manufactured so as to advance its own ideological predispositions.

[28] On the abuse of academics by Leave campaigners before and after the referendum campaign: M Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia, Cambridge, 2017): Editor's Introduction. Note that an earlier version of this paper was submitted as written evidence to the Treasury Committee: it is interesting to read the subsequent insinuations of bias against the present author made, without any sense of irony, by prominent Europhobe Rees-Mogg MP: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/treasury-committee/the-conomic-and-financial-costs-and-benefits-of-uks-eu-membership/oral/31014.html.