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## **Brexit: An End to the End of History**

*Matej Avbelj*

*Graduate School of Government and European Studies – Kranj Slovenia*

*[[avbelj@gmail.com](mailto:avbelj@gmail.com)]*

Britain has voted to withdraw from the European Union. This is a victory. For European populists. For Putin's Russia. As well as for the new world system of governance, what Victor Orban has called "illiberal democracy." The era of the modern West, in the form that emerged out of the ashes of the WWII, is coming to an end. The West alone is to be blamed for that. As it has been hit by one crisis after the other, the West has continued to merely scratch the surface in looking for *ad hoc*, immediate, and almost exclusively economic solutions. The emphasis is always on the symptoms but never on the disease. In so doing, the West has turned a blind eye on a process of deep, internal transformation. The post-Brexit debate that will ensue in the following days and months will most likely stay faithful to this legacy. The discussion will remain superficial, preoccupied with economic and political questions, limited to the short-term quests of reorganizing the EU in pursuit of its long-term viability. But I want to insist that the challenge is much bigger than the future of the EU. It is about the preservation of the West, understood here as a synonym for liberal democracy and the commitment to the rule of law. We are confronted with the difficult—even terrifying question: How are we to build a new modernity on the debris of the modern post-war West in order to avoid repeating the bitter historical experiences of the pre-war Europe.

### **How Did We Drift Apart?**

What has actually happened to us in the West? An excellent answer to this question, admittedly using the USA as its case study, has been offered by Charles Murray. In his excellent book *Coming Apart* (2012) he

demonstrated how western societies have been witnessing the emergence of two different worlds that have been steadily coming apart since the 1960s. One world is populated by well-educated and more affluent individuals who typically live in exclusive neighbourhoods in big cities or in the suburbs. Their educational background and accumulated property enable them to lead a cosmopolitan life-style. They are well adapted to globalization and reap benefits from it. Being extremely socially mobile, the members of this new class pass their advantages on to their descendants, leading to a reproduction of the privileges, making this new cosmopolitan class increasingly elitist and detached from the other world.

The other world consists in people of average and below-average education. They are less rich, not infrequently also (very) poor. They live in the more run-down neighbourhoods or in the countryside. They and their kids frequent schools of lower quality and therefore end up as low-skilled workers, producing little added value. These people do not live in a cosmopolitan world. Their experience is limited, circumscribed, often parochial, as they simply lack the means for (social) mobility. These are the greatest losers of globalization, at least in the West. Their low-paid jobs are increasingly outsourced to the global East and the global South. To make things worse, even the limited number of jobs that have remained face significant competition from economic migrants streaming into the West from the underdeveloped regions in pursuit of a better life.

As a result, over the last thirty years, the members of the non-cosmopolitan class have witnessed a radical transformation of their world. For the worse. Foreign people have moved into their neighbourhoods, changing them beyond recognition. The rich have left and have been replaced by the migrants from all over the place, while the members of the non-cosmopolitan class are bound to stay. They are stuck with the little they have and with who they are. They can only passively observe how things are taking a downturn, not just for them but especially for their children who run a serious risk of being far worse off than their parents' generation.

These people are filled with fear. And these people are in the majority. The cosmopolitan class disregards their problems and is, to make things worse, mostly ignorant of them. The cosmopolitan class simply lives in a different world. But there is someone who speaks to these very real and serious concerns. The political populists. They know what language to use and which words to utter! America needs to be “made great again,” right? Great Britain must reclaim its independence! We must get rid of the EU bureaucratic yoke, which has caused all mess, from mass and seemingly uncontrolled migration to the economic downturn! Globalization shall be rolled back for three decades or so! These simple people, as Nigel Farage has called them, mostly voted in favour of Brexit. This is confirmed by a quick look at the results in the cosmopolitan cities and the rest of Britain. Seventy percent of voters in the big cities supported the remain side while elsewhere the score was tied, or, eventually, tilted in favour of Brexit.

### **Inexhaustible Source of Paradoxes**

I will not hide my disappointment with Brexit. It is three-fold. First, I am disappointed as a professor of European Law, whose scholarly well-spring have been the British universities. The single EU legal (scholarly) space has been sustained by UK academic institutions, professional associations, publishing houses, and the academic market. This space is the only one that is really open to the people with a supranational, rather than exclusively national focus. Besides, and not unimportantly, beyond its opt-outs, Britain’s ranking on the scale of compliance with EU law has been relatively good, and often better than that of France or Germany.

Second, I am disappointed because, as an individual, I sincerely believe in the project of European integration. I am convinced that in the widest possible inter-subjective terms, the EU is the only solution for preserving a lasting peace on the European continent; for keeping stability in the world; for upholding the liberal-democratic values and, last but not least, for preserving our European way of life and the achievements of the welfare state in the globalized world. All this means that the majority of the British

voters wrongly answered the question that was posed to them. This is my third source of a disappointment with Brexit. Why?

Nation states, as we used to know them, can only be, at least partly, preserved within the framework of a strong, united European Union. The British voters will sooner or later, but inevitably, come to terms with this bitter truth. They will realize that in the 21<sup>st</sup> Century speaking of regained independence and sovereignty, which can only come about through the repatriation of competences originally transferred to Brussels, is not just a myth, but straightforward stupidity. For almost 100 years now, since the landmark *Wimbledon Case* (PCIJ 1923), we have known that a state is sovereign to the extent it can execute its sovereign competences in international relations with other subjects of international law. Following Brexit, perhaps paradoxically, but certainly not unexpectedly, British sovereignty will see a real decline. For instance, as global free-trade agreements will be negotiated between regional super-powers, which the EU is and will remain, the British role will be relegated to that of a passive bystander. The British capacity to have an impact on the global ordering, to be *de facto* sovereign, will fall significantly. The same will happen to British economic power as capital will seek refuge in safer harbours of the continental European monetary union.

And this is not all. In a few years Britain might be gone. The geographic spread of the referendum results is more than revealing. Scotland has voted overwhelmingly in favour of Remain. In two years it might leave the UK in order to stay in Europe. If this occurs it is hard to foresee how something called England could still preserve its permanent seat in the Security Council. There will be simply no justification for that any more. In other words, Brexit can set in motion, admittedly a long overdue, reconstruction of the United Nations and, on that basis, indeed of the entire international world order. The Breton Woods institutions will face an ultimate decline. In the brave new international world order, the West will play a much smaller role, while the process of transition to a new international legal and political settlement will increase the risk for international peace.



### **Populism Poses a Real Threat**

It goes without saying, that one is tempted to put all the blame for Brexit on the shoulders of Prime Minister Cameron and his extremely irresponsible and myopic politics. It is a temptation that is hard to resist, but we should do so, because it will take us in the wrong direction. Cameron only let out the pressure that was boiling in the West over the last decades, but in particular in the last few years. The British referendum, and this is my central claim, did nothing more than reveal the real face of the West. The face that has emerged, once an idealistic, cosmopolitan veil has been removed from it. This truth must be accepted and the reality must be confronted, if we want, first to suspend, and then halt the political populists' rise to power by (ab)using the real fears of the common people.

Shall the opposite be true: Trump's victory in the USA; UKIP's continuous rise in the UK; the National Front prevailing in France; a strengthening of the Alternative for Germany; and even more Central European leaders following Orban's suit? In short, shall the West be hijacked by the populists *in toto*, then we must be ready to face the worst. We must beware of populism. It poses a real threat. It works and it is successful. It works because it takes advantages of the negative sentiments simmering among the people; because it draws on the emotions in ways that a liberal democracy, as a complex system of checks and balances, is unable to match.

### **After the End of the End of History – A New Beginning**

In such circumstances, and in particular after Brexit, the responsibility of the political elites, of the cosmopolitan class, public intellectuals and indeed everyone who can influence the public sphere is enormous. The world has been decentred and must be brought back into the traditional framework. This requires winning back the common people from the hands of the populists by trying to respond to their real-life problems. The two worlds:

the cosmopolitan and the parochial must meet again and become acquainted with one another. If this remains possible at all. The only way of finding this out, is by trying it – at home, in the nation states, as close to the people as possible. This requires abandoning the scapegoat strategy. Let us face it: it cannot be that all bad things, all crises, are attributable to Brussels and its allegedly monstrous bureaucracy. The latter is, in fact, as thin as it is toothless. Especially since 2009 all the decisions have been taken by the European Council, that is to say, by the Member States, which are simultaneously clearly unable to resolve any crisis alone and individually.

This is why the European states are, *volens nolens, de facto* forced to cohabitate in the European Union. The latter, however, will need to be deepened and federalized, to preserve its own viability and to successfully protect the interests of its Member States. The British will no longer take part in this difficult enterprise and other countries too might follow Britain's suit, even if in a less radical way. My prediction, indeed a normative desire, however, is to see the European Union developing into a non-statist federal union, composed of the Member States and EU citizens, structured around the core EU, standing for the monetary, fiscal and political union. To this core EU other concentric circles of less willing or less ready Member States could be attached, following the many models of differentiated integration. This transformation of Europe into a non-statist federal union must take place soon. Should this not occur, then we risk not just losing the Union, but the very idea of Europe and of the West as we have traditionally known them. I am convinced that the time has come for a new era of European integration, founded in the West's new modernity.

*[Originally published in Slovenian as: Matej Avbelj, Brexit: Konec konca zgodovine, NEWSPAPER FINANCE, June 24, 2016, available at <http://www.finance.si/8846569/Brexit-konec-konca-zgodovine>]*

## **What Does It All Mean?**

*Gareth Davies*  
*Vrije Universiteit Amsterdam*  
[\[g.t.davies@vu.nl\]](mailto:g.t.davies@vu.nl)

What does Brexit mean for the European Union? One can try to predict the consequences, but one can also ask what messages the vote reveals, what it tells us about the state of integration. Is Europe a market, a project of identity-building, or one of political integration? What does Brexit tell us about each of these?

### **Europe the market: Brexit as a challenge, not a disaster**

If the EU is really a market with frills, then Brexit is not such a big deal. There are certainly possibilities for a future UK-EU relationship in which most aspects of free movement remain, and the economic cost is limited or even absent – since decentralization does bring its benefits too. Most of the plausible future UK prime ministers seem to want this kind of relationship, and given that at least some of the Brexit voters probably do too, and pretty much all of the remain voters, it should not be unrealistic. Onwards to Switzerland-light, perhaps. That might suit the UK just fine.

And if Europe is really about the market, then this ought to be a good result for Europe too: its most important policy, the internal market, would be largely intact. Perhaps there will be some restrictions on free movement of workers, but there are many intermediate positions between complete freedom and complete abolition. Free movement is limited in many Member States today by factual considerations – language, culture, the lack of jobs, and cultures of nepotism. A few legal holes in the regime in the UK need not be any more cataclysmic for the continent or for its mobile youth than the existing *de facto* limitations elsewhere. Of course, the structure of the market will become a little messier and more ad-hoc, and there may be even more of this to come from other countries, but there seems no reason to be too distressed about this as such. Markets are inherently imperfect anyway, and a deep belief in either the reality or the possibility of market perfection speaks more of delusional tendencies than either idealism or serious policy commitment. It is not integrity of structure we should seek, but possibilities for Europeans.

The problem is whether politicians in Europe have the agility to achieve such a pragmatic compromise, particularly given the panicky reactions coming from Juncker and Schulz and others, where the speediness of the divorce seems to be the only thing that matters. On the contrary, there is plenty of time to let the dust settle, let the UK work out what it wants – probably through elections – and then talk about it calmly and unhurriedly. Markets can certainly be unsettled by uncertainty, but they will be calmed if they think that leaders are sufficiently in control to achieve reasonable results. That is more likely to be the case if everyone is prepared to take as long as it needs to achieve a good future relationship. For the EU institutions it may be desirable to get the UK out quickly - a class is easier to manage without the difficult child – but this is a situation where the interests of the continent and the interests of the Commission and Parliament are not clearly aligned. One must hope that the UK leaders are robust enough to resist the demands for a quick Article 50 procedure, and continental politicians calm and collected enough to cope with a little wait. In particular, the fact that a full Brexit would almost certainly lead to the loss of Scotland from the UK (with no doubt alarming implications for other states with difficult regions) provides a motivation for the UK to slowly come round to a nearly-member model. The EU should give them the time they need to work this out, rather than rushing them into a harder break which will be worse for everyone. Of course, there have been lots of voices saying ‘in is in and out is out’, but grown-ups know this is a nursery rhyme, not a description of the possibilities available, and we must hope that grown-ups finally control this process.

**Europe the identity-project: it works! the young are Europeans!**

But suppose the EU is about identity-building – a project aimed at changing states and Europeans into something less nationalistic and more open. This was part of how it began, and there must be some outside Brussels who would still like to see it in these terms. What does Brexit mean then? A terrible failure? A significant setback?

Or – may I suggest it – a sign of success? The passion and emotion shown by the remain voters after the result was unprecedented. Never in the UK has there been such an outburst of pro-Europeanism. Whatever else has happened, a new community of committed Europeans was born last week. Yet they existed as individuals already. It seems that for many of today’s youth, and even the early middle-aged, openness to the rest of Europe is so much a part of their life, so self-evident and important, that a threat to this is existential. The easyjet generation, one might conclude, are Europeans in a way that is remarkable, quite un-English even. For not only is that openness important to them, but the ideas voiced by Brexit of exclusion, of ‘taking our country back’, were truly repugnant and alien.

This bodes rather ill for social harmony in the UK, revealing a stark divide in perspectives and values. Yet it seems that decades of integration have in fact made Europeans out of Britain's youth. The European identity project is a success – or at least, we know it can work.

Of course, only half voted remain. That is the other part of the story. But the generational divide is truly striking. If it is really so that young people have been formed in a different world view, then in ten years this vote would have been impossible. Whatever the outcome of the negotiations, the battle has in fact been won by Europe, by the EU, by a sort of cosmopolitanism. For it is implausible to think that Britain might now go into the kind of isolation that would lead these UK-Europeans to forget their friendships and experiences and ambitions and turn back into little-Englanders. They have been made, and so they will remain, and as one generation is replaced by another, they will inevitably shape the UK.

The timing of the vote and its result are then striking: Brexit won, just. It could hardly have been closer. The vote was just in time: we are apparently at the tipping point. For those formed in another time or space, for whom foreign is strange and Englishness is home, this was their very last chance to reclaim the land that they know and love from slipping away and becoming a place in which they feel lost and abandoned. Now they have reclaimed it, but the victory is pyrrhic, for time is against them, and time is even mightier than the European Commission.

One might quite plausibly have doubted whether new identities could be made just by contact, by removing borders. It was a noble gamble of the early Europeans to think that they could. Yet after decades of integration national languages, parliaments and cultures seem at first glance to be as robust as ever, and nationalism seems to be enjoying more of a renaissance than a dwindling away. One might easily conclude that the technique does not work: communities must be made by other means. Brexit sends a message of hope: it does work, and Europeans have been made, and the very success of the project is why we now experience this great roar of desperation from those left behind, who see the world becoming a place in which they, the product and adherent of the nation state alone, are the anachronism. The nationalist-populist wave in Europe, like extremist Islamic fundamentalism, is the huge and drawn-out death throes of a way of being for whom the future holds no hope.

Death throes can be violent. The unanswered question is whether those who feel they suffer from European integration can be consoled and brought within, for if not they have the capacity to do immediate social harm that will make the optimistic long-term story sound like cold and distant comfort. Britain has abandoned its weaker members for decades, and other European states, while perhaps less materially unequal than the UK,

have still not truly engaged with the modern existential malaises which drive public anger. One does not need to accept all the policy prescriptions of the angry voter in order to feel empathy for them, to understand their perspective, and to seek to improve their lives. Indeed, very often the self-diagnosis of the populist supporter is wrong: the EU, immigration or capitalism are hooks on which to hang disaffection that is more nuanced and diffuse. If states can seriously engage with the social, technological and economic barriers to contentment in their societies, looking beyond the rhetoric to the human beings involved, there is very much to gain. Otherwise, the promise held out by the votes of the young in the UK could come to nothing.

**Europe as political union: Sometimes the centre has to give.**

And finally, let us suppose that the EU is a political project. Let us imagine for a moment that its purpose, at least in part, is to create a political community of nations and their peoples, committed to acting not in isolation from each other but together, in order to strengthen their actions and more profoundly translate their will into change.

The message from Brexit for this is more demanding. The essence of a political entity is not this or that policy. It is that we commit to keeping talking, and acting together as far as we will and can. We will only do this if there is the possibility that our conversation can lead to results: that changes of public will can lead to real changes in the EU. This means that integration cannot be unidirectional. There must be the possibility of the centre ceding ground, because it is by doing so that the EU has the possibility to keep itself whole. Otherwise steam builds up until somewhere, somehow, something explodes. It is not clear that its leaders, or the leaders of many of its Member States, have understood this at all.

It is probably too late to keep the UK within the EU, but will the lesson be learned, or is Brexit the first of many cracks? It is frighteningly short-term – not to say undemocratic – to think that a hard break with the UK will prevent other countries being tempted to follow it. On the contrary, it will confirm the view of the EU as autocratic, indifferent to justice, and primarily concerned to maintain the status quo. The anger of those who feel themselves systematically ignored is unlikely to be contained by either political messages or economic consequences. Then it is just a question of time before the next rupture occurs, in France, or the Netherlands, Denmark or Italy, or elsewhere. If Europe cannot bend, then it will break.

## **The EU Must Face the New Politics of Globalization**

*Mark Dawson*  
*Hertie School of Governance*  
[\[dawson@hertie-school.org\]](mailto:dawson@hertie-school.org)

The world of EU law woke-up on June 24<sup>th</sup> with a hangover. Every member of our academic community is or knows well friends and colleagues studying and teaching EU law in the UK whose futures are in question. Yet, the referendum raises a larger scientific question for EU law. As well as the technicalities of divorce and variable geometry that will deservedly receive renewed attention, there is the broader question about the kind of political re-shaping of EU constitutionalism that Brexit will bring about.

Many, including Floris de Witte and I,<sup>1</sup> have argued that the EU must do a better job of internalizing democratic and political conflict. The most obvious conflict is along the traditional left-right axis. But this campaign has shown us that this axis is increasingly meaningless in our world. The real cleavage in modern 21<sup>st</sup> century politics is not about the state *per se* but about globalization. It pits the forces of internationalism and the liberal exchange of values and peoples against the reified, protectionist nationalism of the Leave campaign (culminating in posters of desperate Syrian refugees forcing Britain to a supposed “breaking point”).

The Leave campaign tapped into this cleavage with terrifying but effective vigor. It did not try to win the Brexit debate on concrete issues. It won, instead, on a promise to shield Britons from the (both real and imaginary) winds of change that economic transformation has produced. The message we saw in the Leave campaign was the message we see in populist movements throughout Europe and in the rust-belt populism of Donald Trump. It was a message as appealing to the post-industrial working class of Sunderland as it was to shopkeepers in the East Midlands or retired army officers in the prosperous South. It is re-shaping the political landscape across Europe.

How should EU constitutionalism respond? It seems impossible to imagine an EU response that does not take into account this seismic political force. This requires a form of EU constitutionalism that is able to reassure and provide hope and opportunity for those who

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<sup>1</sup> See Mark Dawson & Floris de Witte, *From Balance to Conflict: A New Constitution for the EU*, 22 EUROPEAN LAW JOURNAL 2 (2016), available at <http://onlinelibrary.wiley.com/doi/10.1111/eulj.12158/abstract>.

see globalization as a threat (including the non-mobile). While the defence community is often identified as the EU's "road not taken," another plausible candidate would be the Coal and Steel community itself—it contained a notable social dimension that was designed to compensate those who would be left behind by its shift to a more integrated European industrial base. At some point along the road of integration the idea of linking the fate of integration's "winners" with the fate of its "losers" was decisively lost.<sup>2</sup>

It also surely requires an EU that allows the debate between these two forces to take place within, rather than in opposition to, its institutional structure. The EU's Treaty rules in this sense—rules which settle a host of questions over economic policy, market access, discrimination, and many other issues that speak directly to the political concerns of populist parties and voters—do not help. Just as the UK's historic permissive consensus over Europe (to criticize it without subjecting it to real democratic choice) boiled in a wave of populist anger, EU constitutionalism is also in danger of suppressing rather than channeling democratic discourse over Europe's political future.

Accommodating the cosmopolitan/nationalist cleavage in EU constitutionalism is a dangerous exercise: it will provide the Le Pens, Farages, and Trumps of this world with a new platform. But what is the alternative? Brexit should signal the end of EU politics by stealth.

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<sup>2</sup> See N. FLIGSTEIN, *EUROCLASH* (2008).



## **Brexit, Labour Rights and Migration: Why Wisbech Matters to Brussels**

*Simon Deakin*

*University of Cambridge Faculty of Law*

[\[sfd20@cam.ac.uk\]](mailto:sfd20@cam.ac.uk)

In the aftermath of the Brexit referendum of 23 June 2016, the question of migration has been at the forefront of attempts to understand what happened, and in particular why working class communities in many of the regions of England, and in parts of Wales, voted predominantly for the Leave side.<sup>1</sup> Polling data show a weak correlation between areas of the country that voted for Leave and high levels of inward migration from the rest of the EU. The link between immigration and Brexit is very clear in East Anglian agricultural towns like Boston and Wisbech,<sup>2</sup> but otherwise is weak. South Wales and the North East of England, which also saw clear majorities for Leave, are not areas of high EU migration. Instead, they are regions that have experienced successive waves of deindustrialisation since the 1980s.<sup>3</sup> The overriding issue raised by the Brexit vote, in my view, is not migration as such (although that is part of the story), but a wider phenomenon of deepening economic insecurity, and the dangerous political dynamic it has created.

Job losses and plant closures over many years, resulting in the casualisation of wages and working conditions, have led to disenchantment with the European project among sections of the UK population that might have been expected to support it, given the role of EU law in providing for a range of social rights that UK governments would almost certainly not

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<sup>1</sup> The large cities outside London, including Bristol, Manchester, Liverpool, Newcastle and Leeds voted for Remain, but Birmingham, Nottingham and Sheffield voted for Leave, as did many medium sized towns and traditionally working class regions in the north and midlands of England. See *EU Referendum: The Result in Maps and Charts*, BBC News (June 24, 2016), available at <http://www.bbc.com/news/uk-politics-36616028>.

<sup>2</sup> 75% voted for Leave in Boston and 71% in Fenland (of which Wisbech forms a part), among the highest votes for Brexit. See *EU Referendum: Full Results and Analysis*, THE GUARDIAN (June 24, 2016), available at <http://www.theguardian.com/politics/ng-interactive/2016/jun/23/eu-referendum-live-results-and-analysis>.

<sup>3</sup> Scotland has also undergone significant deindustrialisation in the same period, but protest against the policies of Westminster governments found an outlet in the rise of nationalism and the election to office of the predominantly social democratic Scottish National Party, which has held a controlling bloc of seats in the Scottish Parliament continuously since 2011. Every Scottish region voted by a majority for Remain and the overall vote in Scotland was over 60% for rejecting Brexit. See *EU Referendum: The Result in Maps and Charts*, BBC News (June 24, 2016), available at <http://www.bbc.com/news/uk-politics-36616028>.

have conceded of their own accord.<sup>4</sup> In what way exactly did the EU institutions contribute to this process and what if anything can they do about it now?

In areas of the country where EU migration is high, in particular East Anglia, there is evidence of worsening labour conditions in sectors such as agriculture, which, until recently, provided a living wage and regular employment to tens of thousands of workers. Labour trafficking of the kind that has led to some high profile (but still rare) prosecutions of employers for breaches of forced labour legislation is partly to blame for this.<sup>5</sup>

Is EU law responsible for these developments? It is tempting to say that it is not, and that these developments are the result of the neoliberal policies pursued by successive UK governments. This is only partly true. Disentangling the role of the EU, on the one hand, and domestic governments, on the other hand, is important as it throws light on what is really at stake in the Brexit debate.

First, take the deindustrialisation that has led to the loss of secure industrial jobs, most recently in Teesside (following the closure of the Redcar steel plant) and South Wales (where the steel industry will shrink in the near future even if it does not completely disappear<sup>6</sup>). The suggestion has been made that EU state aid rules prevented the rescue of the Redcar plant and are impeding the salvaging of Tata Steel's UK operations. This is implausible: the EU Treaties allow for government support for industries in times of crisis and explicitly do not prohibit state ownership of enterprises.<sup>7</sup> A more plausible interpretation is that EU law has been used over many years as an excuse for inaction by UK governments opposed to the idea of an industrial strategy (while nevertheless being prepared to rescue the financial sector in 2008<sup>8</sup>).

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<sup>4</sup> Deakin and Morris provide an overview of the evolution of EU social policy from the perspective of its relationship to UK labour law. See SIMON DEAKIN & GILLIAN S. MORRIS, *LABOUR LAW* (6<sup>th</sup> ed., 2012), pp. 103-13.

<sup>5</sup> Felicity Lawrence, *The Gangsters on England's Doorstep*, *THE GUARDIAN* (May 11, 2016), available at <https://www.theguardian.com/uk-news/2016/may/11/gangsters-on-our-doorstep>.

<sup>6</sup> The House of Commons Library prepared a brief about the closure of the Redcar steel plant and the more recent threat to those elsewhere in the country in particular in South Wales. See Chris Rhodes, *The UK Steel Industry: Statistics and Policy*, *House of Commons Library Briefing Paper Number 07371* (May 2016), available at <http://researchbriefings.files.parliament.uk/documents/CBP-7317/CBP-7317.pdf>.

<sup>7</sup> See, e.g., Article 345 TFEU.

<sup>8</sup> In 2008-9 the UK government had to provide financial support to several large banks, including the Royal Bank of Scotland (RBS) and HBOS, to avoid their insolvency. It continues to hold significant stakes in RBS and in Lloyds Bank, which bought HBOS at the height of the crisis.

Still, EU law is not blameless. The freedom EU law gives to enterprises to move across national borders (“freedom of establishment,” along with the ancillary freedoms that operate in relation to cross-border movements of services and capital) increasingly translates into a right of business to seek out the least “restrictive” (or “protective” depending on your point of view) fiscal and regulatory regimes. This is the result in part of decisions of the Court, most notably the *Viking* and *Laval* judgments,<sup>9</sup> but it is a process that the Commission has also been actively encouraging since the debate over the Bolkestein Directive in the mid- 2000s.<sup>10</sup> That proposal ended up being watered down, but the idea that the construction of the internal market required a free for all in the rules governing free movement of enterprise only grew stronger over time.

Faced with this competitive challenge, some member states responded by strengthening their efforts to invest in skills and to encourage capital investment for the long-term. In varying degrees this is how Germany, the Nordic systems, France, and the low countries have retained a manufacturing base. The very high labour productivity they have achieved does not always translate into sustained employment growth, and has not prevented persistent and serious inequalities from emerging.<sup>11</sup> But their approach is very different from the path followed in the UK, which has been to tolerate the shrinking of the industrial base, while actively encouraging the growth of a casualised labour market, characterised by growing self-employment (often a front for very insecure employment), agency work, and zero hours contracting.<sup>12</sup> The result is the low-wage, low-productivity economy that the UK is rapidly becoming, and increasingly so since the crisis of 2008 revealed the structural weaknesses of the British economy.

To sum up this part of the argument, deindustrialisation is largely something that the UK has brought upon itself, but which EU rules have done nothing to prevent, and have probably, on balance, exacerbated.

Now consider the relative contributions of EU free movement laws and domestic UK social policy to the degradation of stable work and wages in large parts of the UK labour market.

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<sup>9</sup> Case C-348/05, *ITF v. Viking Line* [2007] ECR-I 10779; Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet & others* [2007] ECR-I 11767.

<sup>10</sup> It eventually became Directive 2006/123/EC. See Catherine Barnard, *Unravelling the Services Directive*, 45 COMMON MARKET LAW REVIEW 323-394 (2008).

<sup>11</sup> See S. Deakin & F. Wilkinson, *Marchés du travail, crise financière et réforme : projet d'agenda pour une politique du travail*, 182 L'HOMME ET LA SOCIÉTÉ 25-52 (2011).

<sup>12</sup> Adams and Deakin have written about the various ways in which labour market policy in Britain, together with social security and fiscal law in particular but also employment law, has contributed to casualisation of work. See Zoe Adams & Simon Deakin, *REREGULATING ZERO HOURS CONTRACTS* (Liverpool: Institute of Employment Rights, 2015).

The experience of falling wages and casualisation of work that is being experienced in parts of agriculture (for example, farming and food production in towns like Wisbech and Boston) and in the retail sector (for example, Sports Direct's warehouse in the Derbyshire town of Shirebrook<sup>13</sup> or Amazon's many distribution centres<sup>14</sup>) is associated with inward migration from other EU member states, but that is not the only cause.

The movement of labour into the UK is not spontaneous; it is organised along a chain of supply that links UK-based employers (many of them multinationals and/or listed companies) to labour market intermediaries including those operating across EU borders and taking advantage of the rules on freedom to supply services free of regulations applying in the host state, subject only to the minimal controls put in place by the Posting of Workers Directive. In its extreme form this supply chain morphs into labour trafficking of the kind which until recently was thought to exist only in developing countries.

The Posting Directive, as interpreted in *Laval* and later cases, is of course meant to prevent this, since statutory minimum wages and certain other basic legislative standards applying in the host state must be observed.<sup>15</sup> But there is an air of unreality about the subtle distinctions drawn in the posting jurisprudence, and a gulf separating what the law says should happen, and what is happening in practice. Once labour market intermediaries operating on a cross-border basis were exempted from the principle of the automatic territorial effect of labour standards in the host state, the door was open to the worst kinds of abuse, reminiscent of third world conditions, ranging from repeated non-payment of wages, widespread health and safety infractions, and, a growing incidence of forced labour of the kind which has led to prosecutions of gangmasters who were trafficking migrants from eastern Europe to work in farms in rural Cambridgeshire.<sup>16</sup> These prosecutions, while welcome, are most likely catching only a tiny proportion of labour

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<sup>13</sup> Simon Goodley & Jonathan Ashby, *A "Day at the Gulag": What it's Like to Work at Sports Direct's Warehouse*, THE GUARDIAN (December 9, 2015), available at <https://www.theguardian.com/business/2015/dec/09/sports-direct-warehouse-work-conditions>; House of Commons Business, Skills and Innovation Committee, Oral Evidence: Working Practices at Sports Direct, HC 219 (June 7, 2016), available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/business-innovation-and-skills/inquiries/parliament-2015/working-practices-at-sports-direct-inquiry-16-17/>). Shirebrook is the site of a former colliery and is in a region known, until the mid-1980s, for worker militancy. Shirebrook Colliery, along with most of the rest of the British coal industry, was closed following the unsuccessful (for the unions) outcome of the miners' strike of 1984-85.

<sup>14</sup> Carole Cadwallader, *My Week as an Amazon Insider*, THE OBSERVER (December 1, 2013), available at <https://www.theguardian.com/technology/2013/dec/01/week-amazon-insider-feature-treatment-employees-work>.

<sup>15</sup> Directive 96/71/EC. See DEAKIN & MORRIS, *supra* note 4, pp. 123-28.

<sup>16</sup> Lawrence, *supra* note 5.

abuses, and are unlikely to have persuaded anyone in Wisbech who had been thinking of voting Leave from changing their mind.

How did UK domestic social policy respond to the downward pressure on wages and terms and conditions arising from the *Laval* judgment? Not, as might have been supposed, by strengthening the floor of workers' rights in UK labour law. On the contrary, critical protections for agricultural workers were removed with the abolition of the Agricultural Wages Board for England and Wales in 2013.<sup>17</sup> The UK government helped to water down the Temporary Agency Work Directive prior to its adoption in 2008 and took advantage of the resulting derogations and loopholes when transposing it into national law in 2012.<sup>18</sup> Zero hours contracts have been tolerated subject only to a cosmetic law passed for reasons of political symbolism in 2015.<sup>19</sup>

This is the same approach to EU social policy that UK governments have been pursuing since the 1980s. The UK first diluted, then tried to block the Working Time Directive of 1994. Once it had no choice but to adopt the Directive, the UK took full advantage of the many derogations it contained, including the right of an individual worker to waive their right to a maximum working week of 48 hours.<sup>20</sup>

It is true that EU law provides many social protections that the UK legislature would most likely not have adopted of its own accord and that are now at risk following the Brexit vote. But it is equally the case that EU law has not stopped successive UK governments from implementing policies based on an extreme conception of labour market flexibility that has few counterparts among developed industrial nations.<sup>21</sup> EU law was no barrier to deregulation in the UK as the EU's legal competences in the social policy field are limited. There is no comprehensive floor of rights in the European labour market, but instead a set of disjointed and fragmented protections.

Things are not getting better for EU social policy. The Court of Justice, building on its *Laval* jurisprudence, has recently started to treat the minimum standards set out in labour law

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<sup>17</sup> See DEAKIN & MORRIS, *supra* note 4, pp. 306-18 (on minimum wage regulation including the powers of the Agricultural Wages Board).

<sup>18</sup> See Directive 2008/104/EC and SI 2010/93; DEAKIN & MORRIS, *supra* note 4, pp. 209-11.

<sup>19</sup> Small Enterprise, Business and Employment Act 2015, s. 153, inserting ss. 27A and 27B, Employment Rights Act 1996.

<sup>20</sup> See Catherine Barnard, Simon Deakin & Richard Hobbs, *Opting Out of the 48-hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the United Kingdom*, 32 INDUSTRIAL LAW JOURNAL 223-252 (2003).

<sup>21</sup> Deakin & Wilkinson, *supra* note 11.

directives as maxima, thereby preventing member states from adopting more worker-protective rules. This has already resulted in a tangible weakening of the operation of the Acquired Rights Directive, designed to protect workers' terms and conditions of employment following outsourcing and other business transfers, across Europe but in the UK in particular. The effect of the Court's *Alemo-Herron* judgment<sup>22</sup> has been to remove the collectively negotiated floor of rights that operated across local government and the National Health Service, and to drive a race to the bottom in public procurement. Extraordinarily, a justification for the Court's approach is a newly-discovered right of business to operate without regulatory constraints under Article 16 of the Charter of Fundamental Rights of the European Union.<sup>23</sup> Thus human rights law is being used to entrench the rights of capital in what the Court's Advocate General recently described as the EU's "free market economy."<sup>24</sup>

To sum up the second point of this essay: the perception that EU rules on free movement of labour are driving casualisation of work and wages in the UK labour market is partially correct, but a much bigger causal factor is UK domestic social policy, together with the EU's rules on freedom for enterprises to move across borders in search of low-cost regulatory regimes.

Is there a way out of this bind? Brexit, whatever form it might take (and this is still not at all clear), would not help, since the formal restoration of British legal autonomy (or "sovereignty" as it is grandly but, given the high degree of interdependence in today's globalised world, misleadingly termed) would provide no guarantee of a switch of direction in domestic social policy. Depending on which kind of relationship the UK might have with the EU post-Brexit, many of the same single market rules that are the root cause of the problem would still apply, but possibly without the social protections currently guaranteed by EU law, depending on how post-Brexit negotiations go.

If the UK exited the single market altogether, as would be the case if it were outside the EEA, it would have complete freedom from internal market rules, and so would not be bound by *Laval*, but would also be able to disapply EU labour laws. If social policy

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<sup>22</sup> Case C-426/11 *Alemo-Herron v. Parkwood Leisure Ltd.* [2013] IRLR 744.

<sup>23</sup> See Stephen Weatherill, *Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract,"* 10 EUROPEAN REVIEW OF CONTRACT LAW 157 (2014); Jeremias Prassl, *Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law,* 42 INDUSTRIAL LAW JOURNAL 434 (2013).

<sup>24</sup> Case C-201/15, *AGET Iraklis*, Opinion of AG Wahl, at [1]; Nicola Countouris & Aristeia Koukiadaki, *The Purpose of European Labour Law: Floor of Rights or Ceiling?*, SOCIAL EUROPE (June 6, 2016), available at <https://www.socialeurope.eu/2016/06/purpose-european-labour-law-floor-rights-ceiling/>.

directives were no longer binding and British governments reverted to the deregulatory position that they have mostly followed (in areas beyond EU law) since the 1980s, British workers would be significantly worse off, although given the current failure of EU law to provide a break on the UK's lax labour regulation regime, this would be a difference of degrees, not kind.

Should a social democratic response be to reopen the issue of free movement for labour, as recommended by UK Labour Party politicians as the Brexit debate entered its final week and as some are now suggesting in the wake of the vote? Free movement has never been an unqualified right, and it should be possible to have a debate about the social security and labour law regimes governing migrant and posted workers, within the framework of the existing EU Treaties.

But it follows from the analysis set out above that making minor adjustments to the rules governing migrants' social security and labour law rights would only address part of the problem. It is the rules governing free movement for capital, not just labour, that must be reconsidered. The principle of freedom of establishment, together with the ancillary right to provide services across borders, has been twisted out of shape by a combination of legally dubious judgments and ill-considered legislative initiatives over the last decade.<sup>25</sup> To put this right does not require abandoning the 'four freedoms' but it does mean having a serious debate about the emerging federal structure of the Union and the relationship between EU law and the laws of the member states, of the kind that has been taking place in American jurisprudence for over a century.<sup>26</sup>

Addressing the problem of economic insecurity will be critical not just for the fate of Britain in Europe, but for the future of the EU. This is because the Brexit debate has thrown into sharp relief the cost of market integration in the absence of social protection: insecurity and marginalisation for growing numbers of European citizens. Social Democratic and Christian Democratic parties will cede the issue to the authoritarian Right if they do not address this question head on. They need to grasp the nettle: regulate capital, not just labour, or the European project will fail.

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<sup>25</sup> Deakin has argued that the decisions in *Viking* and *Laval* were juridically questionable. See Simon Deakin, *Regulatory Competition After Laval*, 8 *CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES* 581 (2008).

<sup>26</sup> *Id.* (on the relevance of the US model to EU law in this context).

*[This is an extended and updated version of a blog that originally appeared on the Social Europe website and is reproduced here with permission. It may be worth adding that the blog was written on 15 June 2016, the day before the politically motivated killing of the Labour MP, migrants' rights activist and Remain supporter, Jo Cox, and published by Social Europe on 20 June, three days before the Brexit Referendum.]*



## **On the Continent Alone**

*Udo Di Fabio*

*University of Bonn Faculty of Law*

[\[sekretariat.difabio@jura.uni-bonn.de\]](mailto:sekretariat.difabio@jura.uni-bonn.de)

The (still) United Kingdom has voted against remaining in the EU. The divide between London City and the countryside, between young and old, between Scotland and Wales – all of this will keep this nation occupied for a long time, if it does not tear the nation apart. At the very least it will be a nation under significant tension. But what about the Continent? Recently a truculent suggestion has been making the rounds in Brussels, Paris and Berlin. In principle it would be a good thing if the English leave. This would clear the way for “more Europe.” Maybe, with a divorce, Europe will at last be free to take step toward a federal state. Some, a bit more tactfully, wonder if Brexit should not have consequences for the EU as well. Should the EU become more “social” with decidedly more transfers? Or, should competences now be returned to the Member States? Others, to the contrary, have floated the idea of a new subsidiary balance: they want to transfer additional sovereign authority and reduce the veto-opportunities for the Member States.

The German Federal Government (*Bundesregierung*), in its first reaction, warned against rash conclusions that might further divide Europe. This was the correct response. After all, it seems that the populist-movement has reached a fervor in nearly all the Member States that has not been seen for decades. The anti-European sentiment runs the range from a not-totally-irrelevant marginal phenomenon as in Germany, to a hidden veto-power in France, to a movement that is already on the way to a majority in Italy. The doubts regarding the democratic system of governance continue to grow. Emotionally actionable moments of disruption, campaign posturing, blind and stubborn moralizing or resentment – all too often and altogether unmitigated, all of this has seeped into the regular script of our political theater. The opaque control of the centrist parties no longer prevails as had been the case for the last decades. There is a growing danger of a rapid loss of order and surprising, radical changes. The European project is no longer that which the elites would make of it.

Every government must reckon with sharp, hard-to-assess protests if anything institutional is to be undertaken within the power structures of the EU. Right-wing populists cannot exactly say—and certainly not with border-transcending unity—what kind of re-nationalization it wants. Billions in expenditures for economic support, with a healthy dose of price protectionism and social regulation could take some of the wind out of the sails of

left-wing populism. But these ambitions, depending on the respective interest groups and national sensibilities, are severely in conflict with one another. Should trade pacts, such as the TTIP, now be negotiated through discrete national channels without the involvement of the European Commission? Should immigration and asylum policy be returned to the States, even while Brussels retains authority to enforce free-movement in the common market? What is to be done with the anxiety that surfaces—not only palpable in England, but perhaps decisive in the English referendum—when some States open their borders and thereby pave the way for unjustified migrants to seek legal status and national residency permission, which then leave open the door to all of Europe? Or perhaps the reverse approach would be the solution: to completely Europeanize immigration issues. But which populist movement will have to be confronted if Brussels holds open the external borders and those arriving are authoritatively allocated or distributed?

Migration is one confounding problem. The economic conditions in the Eurozone represent other problems. Growth is weak on the old continent and the ability to compete internationally varies significantly. Explicit fiscal specifications and the imminent pressure to improve competitiveness in the Monetary Union combine to form a kind of tightly-laced corset that both makes it hard to take a political breath but is also held responsible for maintaining an attractive figure. But it is the Member States that must do the hard work to keep in fiscal shape. The State and regional democracies are responsible for what really matters: value-enhancing innovation, quality education and training, cultural grit, the openness of younger generations to the world, academic and technical infrastructure, a trim and efficient state administration, and an economic framework that mobilizes capabilities. An incentives-based system in a fair framework of competition—this can and must be European. But it is the States that must lay the foundations and deliver the results. The core of the economic-relevant decisions cannot be communitarized. No one should underestimate how important regional and national socio-cultural conditions are. Solutions are bound up with decentralized consensus- and conflict-faculties. In this sense there is an enormous difference between, on the one hand, labor law, tariff policies or social welfare systems, and on the other hand, technical standards for USB-communications protocols or vehicle emissions.

The European impulse and orientation for shared economic and labor-market policies are surely realistic and necessary. But the treaties only anticipate closely-coordinated economic policy occurring within a framework that is preordained in treaties. But this can only work when a consensus regarding that framework exists. The treaties have insisted on this ideal foundation for the common market since the founding-era of the European Communities. It is not clear, however, whether the fundamental principle of an “open market economy with free competition” (which is fixed in two places in the European Economic Constitution, including Art. 119(1) and Art. 120(2) TFEU) still reflects a political

consensus. Or is that commitment just another legal aim that can be swept-aside or overtaken by political developments?

The United Kingdom's domestic politics have always been headstrong and have always featured an evident desire to maintain some distance from the Continent. Yet, it may be that the fatal stimulus fuelling the "leave" campaign's victory was not only a product of domestic political tensions. It might also have been a consequence of the contradictions of European integration. The forces that led to the referendum were not just "made in England" and they do not only implicate the United Kingdom. Those who now favor rushing into an accelerated withdrawal process (without carefully considering the terms of Art. 50), or those who advocate opening the path for Scotland's secession, would be well-served to first cast a critical glance on the current conditions of the EU. Europe is and was an idea of the elites. And it was a good idea, which had been developed by responsible and self-conscious elites. But it is not only the voters who have become more volatile and decidedly more emotional. Along the way the elites have declined in quality, which is evident from their inability to admit to their mistakes. They sense that the ground is starting to buckle and have built a temporary fort in an effort to weather the populist hordes from the right and the left. More public education is their answer. That and more centralization in Brussels. More power for the Commission. Now all Member States should be compelled to join the Monetary Union (even Denmark and Sweden?). At least that is what it is hoped a new round of treaties will achieve. At the same time many are urging an end to Europe's "*Sparpolitik*" (austerity policies). Should the persistent legal violations at last be addressed with an effort to return to the stability criteria, or should the dilemma be papered-over with the ECB again accepting Greek bonds as securities?

Any serious reflection on the EU will expose two planes: the mechanism of integration that usually goes unnoticed and the evidence of the EU's performance on behalf of its citizens. The process of integration is the product of a political and economic-constitutional framework that cannot be opened for consideration or debate without the risk of setting-off destructive forces. Yet, the political frame should allow negotiations and compromises among competing interests. The dream of those in Brussels who intend, instead, to manage through governance, is a chimera. The Commission is no government, at least not in the classical sense. And it cannot become such a government. The Commission is an important instrument of shared governance, but it lacks the essential profile necessary to pursue and achieve the rational resolution of divergent interests. The EU's service on behalf of its citizens is most clearly visible when the Union pursues practical projects, such as: the effective expansion of coordinated efforts to secure borders; taking-up responsibility for humanitarian and foreign affairs policy in the regional neighborhood; and serious signals that it will combat over-regulation. The "*Acquis communautaire*" is not the Holy Grail. Long-knotted intersecting competences should be unbundled and the Union should renounce its well-worn paternalism. In some cases responsibilities can be

simply restored to the Member States, without doing any harm to the European ideal. The identity of the States as responsible spheres must be more clearly accepted and inscribed in law. A formal catalogue or inventory of competences—also extending to the Union’s judicial power—is necessary. Only then can a svelte new Europe convincingly join the struggle against the populisms of the left and the right. It would truly do so, but as a practical project promoting peace and prosperity.

Neither the dilemma that has erupted in England nor the problems that have long been smoldering in the Union can be resolved with confrontation. Tolerance and ever-more imagination are called for. If we can manage to de-escalate the emerging constitutional crisis in the United Kingdom with a thoughtful, conscientious and respectful Art. 50 process—rather than pouring fuel on the fire—then something new, something constructive might result. As they say: “It’s not over until it’s over.”

## **Confusion Now Hath Made His Masterpiece: Brexit and the Bard**

*Matthias Goldmann*  
*Goethe University Frankfurt*  
[\[goldmann@jur.uni-frankfurt.de\]](mailto:goldmann@jur.uni-frankfurt.de)

400 years after Shakespeare's death, a tragedy of Shakespearian dimensions has unfolded in the United Kingdom: Brexit. One Friday morning in June 2016, staring in disbelief at the incoming news, we were asking ourselves: "Are you sure/That we are awake? It seems to me/That yet we sleep, we dream." A look at Shakespeare's work in the context of Brexit is no lofty, purpose-free exercise. For one, Shakespeare's work is instructive for explaining British national pride, its indulgence in splendid isolation that obviously provided one of the intellectual undercurrents of the Leave campaign (though the causes for voting Leave are, of course, a lot more multifaceted). The English nation formed itself in the Elizabethan age against the background of a century of quarrels with France in what was then the recent past. The pride that the British took from their victories is nowhere better reflected than in Henry V's Crispin's day speech. A small number of English soldiers heroically resisted the French forces. "We few, we happy few, we band of brothers." Shakespeare infused the play with a feeling of togetherness based on England's victorious fight against continental powers. It was this idea of nationhood that carried England and the whole of the United Kingdom successfully through the turmoil of the 20th century. Small wonder that some demanded compelling (economic) reasons to continue bonding with the continent.

But this is not my main point here. It is my view that the cultural legacy of Shakespeare lays open certain aspects about the dynamics of direct democracy that should assuage our concerns about referenda. Contrary to what some constitutional theorists might suggest, Brexit, if seen from the perspective of Shakespeare's dramas, provides some hints that vindicate direct democracy.

Of course, constitutional theory might raise legitimate concerns against the referendum. The preceding debate provides a sobering anti-venom to overly idealistic perceptions of public discourse. The breathtaking amount of misinformation left "the commoner," who may have been interested in taking an informed choice, bereft. One could not but forgive them for doubting the truth to be a liar. They did not find sufficient hold and orientation in civil society – whose traditional structures and institutions (including parties, unions, and

churches) are in a dramatic process of overall decline, and not only in the United Kingdom. To make matters worse, a new cleavage separating those who benefit from globalization and European integration from those who do not seems to have crept into the political parties, dividing both the Conservative Party and Labour. It created the perverse situation where moderate Tory and Labour leaders stood side-by-side against the more skeptical segments in each party. One might question whether a different Labour leader would have been any more successful in making the case for Remain among Labour voters than Jeremy Corbyn. Under the prevailing conditions, sceptics of direct democracy might feel vindicated. What would be the point of having referenda if they are not preceded by, and embedded in, a process of public reasoning?

Yet, a look at Shakespeare's drama might vindicate direct democracy. The dangers implicit in a lack of public reasoning might, in the long run, protect referenda against abuse. To develop this thought, we need to turn our attention to the persons involved in the process. Their fate is regularly the focus of Shakespeare's plays, and the blind spot of many constitutional theories. The latter tend to focus on structures and processes, paying relatively little attention to the acting persons, their motives, and to what happens to a constitution when they forsake the common good for their own benefit. But there is a personal dimension to political processes.

One of the dramas revealing this point most clearly must be *Macbeth*. Macbeth is a successful nobleman, promoted by the king for his allegiance. For personal gain, however, he crosses the line and kills the king. The hags' predictions were not heard or understood in their full significance. Thus, at the moment of triumph, when killing Duncan in his sleep, things take a bad turn for Macbeth. He stares at his dagger in disbelief and guilt. To his horror, all the hags' other predictions come true—one after the other. As much as Macbeth tries to avoid the unavoidable, it only makes him lose first his friend, then his wife, and in the end—his life. One cannot but remember the dagger scene when watching Johnson's and Gove's press conference on the day after the referendum. They had just committed a political murder against their leader and were watching with horror as the predictions of "organizations with acronyms" about the disruptive consequences of a Leave vote quickly came true.

How does this vindicate direct democracy? In Shakespeare's drama, the driving force is fate. It turns the viciousness of the *dramatis personae* against themselves, entangling them ever-more deeply in the consequences of their acts. Today, we do not believe in fate, but in public discourse. Leaders who tamper with it might quickly lose control of the process. What's done cannot be undone. If public discourse is led astray, it will turn against those believing to be in control, producing results that they did not desire, that ultimately kill their ambitious plans. It is this uncontrollable aspect of public discourse, this risk of public reason to become unreasonable, that sends a big warning to anyone intending to

manipulate it. Though this be madness, yet there is method in't. One should therefore always take the people seriously. Shakespeare did—his plays were immensely popular not only among the educated echelons of Elizabethan society, but also among the masses. The play at stage needs to appeal to them, too, not just to the senses of a detached (not to say: rotten) elite.

Ironically, the historical Macbeth ultimately exposed Scotland to English domination lasting until today. While Johnson and his followers might reverse that, England is now not at all less likely to be dominated by Europe than before.





## **Is Europe in a Crisis of Faith?**

*Hans Michael Heinig*

*Georg August University Göttingen, Law Faculty*

[\[s.heiniq@jura.uni-goettingen.de\]](mailto:[s.heiniq@jura.uni-goettingen.de])

The British want to leave the EU and the rest of Europe is shocked. The Europeans may have lost their faith in their common destiny. The large number of strong arguments for a membership in the Union did not convince the majority of the British voters, although those arguments have been clearly demonstrated again and again. Many political fields cannot be ploughed unilaterally. Environmental protection is a global challenge. The tough competition prevalent in the global economy will not be suspended by referendums of ageing, wealth-saturated European societies. The single European market is more resilient against global competitive pressure than an array of small domestic economies on their own. All these reasons do not seem to pervade. EU- opponents see the membership of their country as an act of self-enslavement and the Brexit as a new biblical Exodus incident. Boris Johnson – a modern Moses? The construction of Europe in this perspective is no longer a rational calculation but turns into a question of faith and it congeals into political theology.

Considering the elemental force of populist emotions, not only a few supporters of the European agreement bet on strong feelings on their part. They see apocalyptic horsemen come up everywhere. The Union would be facing an imminent collapse – and therefore the question of war and peace appears on the European agenda again. There should be made an example of the British – in the hope that nobody emulates them. European integration should reach the hearts of the people instead of placing too much emphasis on mutual interest and rationality. Some quickly resorted to the idea that Europe should be given a soul – allowing certain intellectuals to proclaim themselves as high priests of a European civil religion.

Whoever keeps these overheated actions and reactions at distance will realize that neo-nationalists as well as integrationists are losing sight of the measures. Brexit is neither a procession to the Promised Land nor is it a signal for World War Three and for certain not the beginning of the end of the political union of European states. And it will neither bring back the British Empire nor lead into a decline of the United Kingdom.

The history of European integration can be told as well (or, exclusively) as a story of crises: From the failure of the European Defence Community, over de Gaulle's empty chair policy

to the eurosclerosis in the 1970s. The new momentum acquired under the commission presidency of Delors in the late 1980s and early 1990s, the completion of the European single market, and the foundation of a Union which goes far beyond economic issues by the Maastricht Treaty mark the beginning of a series of crises occurring with comparatively high frequency: The failure of the Constitutional Treaty, bank and euro bailouts after the crisis, the prevention of the Grexit, the refugee crisis. From this point of view, crises are now the permanent state of affairs, the basic mode of European integration – and the Union came through all of them. Actually, one more crisis is no reason for exaggerated concern.

Brexit would only appear as a dramatic event if one follows a historico-philosophical teleology of European integration. A lot of people who are enthusiastic about Europe believe that the course of the world follows a defined, almost physical law. For the dominant tendency in intellectual discourse on European integration, the aim of this Weltgeist-inspired process is not the extension and productive containment of nations, but their overcoming. Cosmopolitan visionaries only know cosmopolitans – and the prelude to this development is the EU citizen, replacing Spanish, Polish or British citizenship. National identities appear as a relic from the age of destructive nationalism that has to be defeated. To these visionaries, globalization formed random structures of free and equal individuals, replacing national collectives. Most of the political parties are not willing to go that far as it might not go down well with their voters. But even there, some believe that the Enlightenment and the modern age are perfected at the moment when the United States of Europe come true. On this basis, the Brexit does not seem as a democratic decision of a sovereign people, comparable to a change of government, but as an anticipated secession.

Nonetheless, the European Union is not a group of people thrown together by fate like a nation-state, but an alliance legitimated by convenience and common values. Its continued existence is subject to political availability in a totally different way. *Nota bene*: There are lots of good reasons for European integration, for a political union of European states and peoples. Germany has even committed itself in the Basic Law to a however constructed European co-operation. But whoever overrates the present achievements to an eschatological act of well-being provokes counter-reactions. Whoever pursues the objective of an ever closer Union without explaining its purpose and marking its limits will lose at some point the trust and the approval of the citizens, even of those who disapprove of excessive nationalism, who welcome a European expansion of their political consciousness, but whose democratic self-conception is first and foremost rooted in the national sphere.

Reflecting the Brexit, some people demand a deepening of the European integration, now, that the British troublemakers leave. These statements show an odd inability to listen and learn and reflect a certain immunity against the results of votes and elections. There are, of

course, valid arguments for “more Europe” in many political fields. However, as visions of political elites shape the European discourse, the backlash against elites, seen in the entire western World, will hit European integration unchecked. Political, economic and cultural elites lose trust within and beyond the EU. Large segments of the population feel that their functional elites have lost a sense of balancing interests fairly. Egregious executive salaries or the overblown language of politicians, which does not explain anything and is not understandable, inflame these emotions. Brussels with its glass palaces and thousands of lobby offices, intransparent negotiations and its focus on economic issues is considered as the embodiment of a caste of political apparatchiks out of touch with reality. This Brussels, seen as an economy not taking account of human fates, has become the prime target of populism. Anybody looking more deeply into the European Union, into the idealism of the actors involved and the practice of politics, knows how unfair current stereotypes are. But how does the elite react in this case, thinking that the majority gets it wrong? It responds with an elite strategy – and that is in European questions rather part of the problem than of a solution: The British people, they say, did not understand what they voted for. Half-seriously, half-jokingly, they mumble about denying the poorly educated, the elderly, the hayseeds from the Midlands and the Welsh rural areas the right to cast a vote in such issues.

In the political-philosophical debates during the Euro and Greek debt crisis, it has been constantly emphasized that the European Union can only gain public approval by developing a European welfare state, restricting the impact of national governments and enhancing the European Parliament based on the model of the German Parliament. Jürgen Habermas for instance relentlessly continued making certain claims. Brexit puts those views of the crisis into question. The British model of underlining individual freedom and market economy is comparatively liberal. The European Union does not appear as a neoliberal monster diminishing the welfare state (Margaret Thatcher did this repeatedly mandated by the people by herself). It is doubtful whether Brexit supporters would entrust their economic destiny to the directly elected members of European Parliament rather than to the united governments in the Council of the European Union or European Council.

Brexit thus cannot be explained with thought patterns popular amongst liberal intellectuals for explaining the recent crises in the European Union. They are also useless for paving the way for Europe’s future as the crisis in the European Union is too complex. It suffices to study the plans for economic policy, migration policy and social policy to grasp the complexity: Parts of Northern and Eastern Europe demand a rigorous restriction of immigration into the European Union and severe budgetary discipline for over-indebted States in the Euro Area. In contrast to this, Southern Europe demands a transfer union, including the mutualization of public debt and shared social security schemes. On top of that, they ask for European solidarity in the refugee crisis. The German position, which combines structural adjustments aspiring to austerity with a more generous refugee policy

without seeking the agreement of its European partners on the latter, alienates its European partners. This position has no chance of success.

What now? We can expect that Europe will experience some further integration crises within the next years. Those will possibly create a Europe of concentric spheres: the outermost sphere includes European states which only seek access to the internal market. Great Britain will belong to this sphere. This will subject Britain to regulation on which it has no say. Finally Europe would get the banking regulation that Britain always wanted to prevent. Ironically, Brexit would thus result not only in greater sovereignty but also in a loss of democratic influence. The British knew this before they voted. The result of the referendum may be confusing from a distant point of view, but in a democracy, seemingly unreasonable decisions need to be respected as long as they are legitimate.

In a second sphere there will be states wishing to maintain the European Union in its present status. It is their greatest challenge to decide on the further destiny of a badly designed economic and monetary union without there being any consensus as to where we should be heading. The gap between the monetary and economic philosophies of the North and the South of Europe is wide. Dilatory, superficial compromises will not last forever. But neither the Northern European economic model nor its Southern equivalent could be spanned across Europe without democratic consent. It seems preferable to admit the collapse of the Monetary Union. The European Union as such will not break up.

There might be a third sphere, a nucleus of a federal European community with deeper powers in internal and external security policy and social security. The question is whether a few nations of Europe want this. This may well be the case. Those who want a Europe with a deeper federal core have to learn to accept the opinion of those who do not want to accept this idea (yet). Otherwise this concept does not work and the idea does not have any chance. Even elites can be wrong. History or the philosophy of history do not confer rights upon them. They only have good reasons which they can feed into a democratic processes. The electorate do not owe them anything.

Perhaps today, the greatest risk for Europe originate not only from anti-European populists, but also from integrationists, who are so endowed with their issue that they want to push forward even when progress is not accepted democratically. These people consider a standstill as a step backwards; they feel betrayed of their historical right if their cosmopolitan Utopias are not totally embraced. With their arrogance they fuel the anti-European resentments, which they pretend to combat.

## **Legalism at a Dead End or the (Br)Exit of Politics**

*Florian Hoffmann*

*Pontifícia Universidade Católica do Rio de Janeiro (PUC-Rio), Faculty of Law*  
[\[f-hoffmann@puc-rio.br\]](mailto:f-hoffmann@puc-rio.br)

Back in 2007, the year during which, alongside others, Romania and Bulgaria joined the European Union (in January) and the world financial crisis began with the French global investment bank BNP Paribas terminating withdrawals from several sub-prime loaded hedge funds (in August), Perry Anderson concluded a *London Review of Books* essay entitled, “Depicting Europe,” with words that today must be seen as prophetic: “the long-run outcome of [European] integration remains unforeseeable to all parties. Even without shocks, many a zigzag has marked its path. With them, who knows what further mutations might occur.”<sup>1</sup> The narrow but decisive vote by the UK electorate on June 23 to “take their country back” represents just the latest, and arguably biggest, shock in what can only be described as a decade of seismic activity for the European project. Indeed, it is hard to believe in post-Brexit 2016 that only a little more than a decade ago, in 2004, Jeremy Rifkin could proclaim the “European Dream [...] a beacon of light in a troubled world,” beckoning, as it were, “a new age of inclusivity, diversity, quality of life, deep play, sustainability, universal human rights, the rights of nature, and peace on Earth.”<sup>2</sup> Such lofty words must sound no less than ludicrous to the sober and cynical minds of contemporary Europeans who see seemingly entrenched post-War realities, many having to do with European integration, assailed head on. What makes this (again seemingly) dramatic change yet harder to digest is, of course, the fact that much of the damage is self-inflicted. It is decidedly not the same as some external oil-price shock to which an otherwise well-governed and self-conscious incipient political community has suddenly been exposed. Instead, the Brexit vote symbolizes more starkly than anything else the deep crisis that has been building up within the European project for a much longer time than its proponents would wish to admit.

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<sup>1</sup> P Anderson, *Depicting Europe*, 29 LONDON REVIEW OF BOOKS 13 (2007).

<sup>2</sup> J RIFKIN, *THE EUROPEAN DREAM: HOW EUROPE’S VISION OF THE FUTURE IS QUIETLY ECLIPSING THE AMERICAN DREAM* (2004).

Indeed, the danger now is that in the ensuing barrage of self-reflection and soul-searching about the why and the what next, the forest is, again, going to be missed for all the individual trees to which disparate causal explanations can be nailed. Currently the most common of these, within and beyond the Brexit zone, is that this is the long-feared revenge of the EU's democratic deficit, which pits metropolitan Euro-elites across member states, represented in and through the Brussels institutions and especially the European Commission, against a diffuse mass of cognitive backcountry plebs who have been or at least feel economically threatened, culturally challenged, and politically disenfranchised. This is the (more or less enlightened) technocracy versus (more or less grassroots) democracy story that nicely resonates with similar conjunctures in other places, such as the contemporary United States. This thesis makes Brexit just one local manifestation of a global phenomenon from which Europe could not have really expected to be immune. The problem with this narrative is not its truth—it nails some crucial aspects of the truth head on—but its analytical middle-of-the-road position which avoids spelling out some of the wider implications of its point and, thus, runs the risk of going for the wrong sort of solution. In fact, as will be explored below, this middling-muddling-through attitude has been symptomatic for Europe's self-reflection (or lack thereof) for a long time, best characterized by a seeming inability or unwillingness to go beyond a schematic understanding of the underlying problems and to face up to their wider consequences with any kind of intellectual honesty. Some of the Leave voters certainly had this habit in mind. The democratic deficit hypothesis is a case in point. It has become an entrenched mantra in pre- and post-Brexit commentary but its wider implications are hardly discussed. It is neglected because, at least on the face of things, it is a counterfactual contention about the post-Lisbon EU. With a significantly strengthened Parliament, a new grassroots (European Citizens') initiative procedure, and, generally, a massive public consultation apparatus surrounding virtually all aspects of EU policy-making, there may be too many, rather than too few, means by which the EU's public can express its many voices. This is now an institutionalized cacophony deeply embedded in the EU's mode of governance of which hosts of interest group lobbyists (so called) in and around Brussels avail themselves. The overused image of besuited Eurocrats making backroom decisions to impose unpopular policies on defenceless national constituencies is simply a caricature. But this is why introducing yet more layers of participatory mechanisms, launching more information campaigns, and stuffing more citizens' rights into the existing governance mode is not a solution. The root cause of the deficit is democracy itself, or rather, its contemporary variant, which "people" around the world increasingly perceive as being no more than a smokescreen erected to generate popular legitimacy for outcomes determined by the global political economy of finance capitalism. In this sense, some of the more exasperated commentary by narrowly-defeated Remainers, namely that the Leavers voted less against

the EU than against globalization or, indeed, “the modern world” itself, articulates a deeper truth (even if it is not a conscious or deeply-reflected motive), given that the Leave camp illogically oscillated between fantasies of Britain outpacing the EU in (neo-)liberal commitment and of re-creating a cognitive British Empire.

So the real issue is the prevailing sense that politics, and with it democracy, has been largely neutered by technocratic path dependencies dictated by market functionalities, with the EU providing a convenient scapegoat for being (slightly) less ephemeral than globalization or modernity. Yet, there is a deeper point about this scapegoating. After all the EU can actually be seen as a model for the type of governance that dominates our (neo-)liberal age. It is a form of governance that emerged from the collapse of the post-War economic consensus that had enabled social democratic welfarism and that was based, as Richard Seymour recently pointed out, on “unprecedented growth rates and a business class willing to cooperate in corporatist bargaining and state coordination,” conditions, he added, “that are unlikely to return.”<sup>3</sup> Hence, while the economic base of that consensus gradually evaporated, its political fabric has been much more resistant, thus creating a permanent disconnect between expectations about what states, governments, and politics, in general, could and should be able to do, and what they have actually been able to deliver. This process was arguably accelerated, but not exclusively produced, by openly (neo-)liberal governments, not least in the United Kingdom. The structural shifts in the global political economy have simply meant that all states were required to fundamentally re-define their relationship with global markets and their primary actors, even if merely to preserve the minimum fiscal space to domestically maintain basic welfare structures. The rest, one might say, is history. In the case of Europe it is the history of European integration, which, in its structural components, is one of a collective and highly sophisticated adaptation effort that has, arguably, succeeded in preserving at least the outer forms of traditional European (welfare) statehood.

Yet the price of that success has been the confinement of politics into a highly circumscribed (public) space and the parallel rise of law as the main *de facto* mode of governance. In fact, adapting Metternich’s well-known quip on (pre-unification) Italy (notably of it being a mere “geographical expression”), one might call the EU a quintessentially “legal expression” in which law does not merely provide the constitutional architecture within which politics takes place, but in which it actually takes over from

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<sup>3</sup> R Seymour, *They Want Their Party Back*, VERSO BLOG (June 27, 2016), available at <http://www.versobooks.com/blogs/2728-they-want-their-party-back>.

politics. Hence, in a sense, the EU is an embodiment of the liberal legalism that pervades late modernity's mode of (self-)governance, a mode that now seems to approach its hybris in such seemingly irrational gestures as the Brexit vote. The rise of law as governance (or "lawvernance")<sup>4</sup> in Europe and through the EU had, of course, already been diagnosed nearly twenty years ago by, amongst others, Giandomenico Majone as the shift from what he termed the positive to the regulatory state.<sup>5</sup> In a (simplified) nutshell, the latter is a state that is no longer directly involved in the running of the economy and other policy fields. Instead, the state merely provides and enforces the legal frameworks and instruments through which decentralised, largely (competitive) market-based distributional (policy) decisions can be made. The state, thus, retains an indispensable role in the maintenance of market functionality and in the cushioning of market failure (now recognized as at least occasionally unavoidable even by the neo-classical economic orthodoxy), though it is actually a very different state from the one "the people" tend to have in mind when they elect their representatives. It is a state that is ruled less *through* than *by* a law that is closely tied to functionalist premises and that, therefore, must be kept highly autonomous and immune from political meddling. It is, therefore, a state in which the old European corporatist entanglement of capital, labour, and government, is replaced by formalised legal relations and independent regulatory agencies and courts that are meant to safeguard the functional requirements of competitive markets. It is, finally, a state that is meant to embody what have come to be known as the principles of good governance: accountability, transparency, and participation through a hegemonic rule of law. It does not exist in any pure form in reality. But, as a sizeable literature on the American adversarial legalism and its purported role in the emergence of the European regulatory state argues, it may bear some likeness to the United States and the predominant role law is seen to have historically played in the American polity and in its specific variety of capitalism.<sup>6</sup> It has, in any case, never existed in a pure form in the old European states, although this may be one of the key reasons for European integration, as the EU represents just such a regulatory superstructure.

There is, of course, a Himalaya of literature on the intricacies of that process: what and who, precisely, caused it; and what and who are now behind its crisis. This is not the place

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<sup>4</sup> I thank my friend and colleague Russell Miller for suggesting the concept to me.

<sup>5</sup> G Majone, *From the Positive to the Regulatory State: Causes and Consequences in the Mode of Governance*, 17 JOURNAL OF PUBLIC POLICY 139 (1997).

<sup>6</sup> See, e.g., R Kagan, *Adversarial Legalism: Tamed or Still Wild*, 2 NYUJ LEGIS. & PUB. POL'Y 217 (1998); D KELEMEN, *EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION* (2011).



to review and assess that literature. But I would like to underline the fundamental point that EU governance is essentially governance by law, with that law operating like an ideology become (institutional) flesh, notably by projecting a normative utopia (see Rifkin above) while simultaneously obscuring the material asymmetries on which it is based. What is important to the post-Brexit debate is that, like all (liberal) legalisms, Eurolegalism, as Daniel Kelemen has called it, performs a double quarantining of politics.<sup>7</sup> First it reduces the meaning of politics to a realist caricature in which self-interested individuals and states maintain their identities through permanent antagonistic differentiation. Then it fragments the political agency of this *Volk von Teufeln* (“people of devils”)<sup>8</sup> into a large atomized private sphere in which political vocabularies are generated and a much smaller public sphere where these vocabularies are “mainstreamed to the lowest common denominator consistent with a (reasonably) peaceful coexistence (that is, collective self-preservation).”<sup>9</sup> Politics is, thus, made to appear as a dirty affair marred by particularism and eternal compromise, while law—and its lawyer-high priests—stand for universality and integrity, antidotes to (realist) politics, and, therefore, the better politics all together. That this ideological work of liberal legalism is deeply ingrained in the late modern mindset is evidenced by the global trend from the US to Brazil and onto the UK to disdain politics and politicians, and to, instead, believe in the redemptive work of law and lawyers, and especially judges. Indeed, the creeping judicialization of politics observable in virtually all mature and emerging democracies is the surest sign that liberal legalism has become dominant alongside the economic scheme that underlies it.

To be sure, the Brexit vote, as much as all the other neo-nationalist tantrums that have flared up across the continent, cannot simply be considered a straightforward attempt to resist legal technocracy by reclaiming the primacy of politics. There are several reasons why this is the case. First, for many of those who voted Leave, the grassroots politization for which they clamour is, in reality, either a mere desire to re-affirm national, cultural, ethnic (or whatever further essentialized category offers itself) identity clichés, or it is an all together un- or even anti-political craving for authenticity, immediacy, and clarity. Second, because, legalization and judicialization have been rather popular, not the least in those EU member states, like the UK, where Euroscepticism has been rife. Often it is judges who are seen as Camelot-like heroes when they go after the political class (so called) in the

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<sup>7</sup> KELEMEN, *supra* note 5.

<sup>8</sup> See I KANT, ZUM EWIGEN FRIEDEN (1795).

<sup>9</sup> F Hoffmann, *International Legalism and International Politics*, in THE OXFORD HANDBOOK ON THE THEORY OF INTERNATIONAL LAW 982 (A Orford & F Hoffmann eds., 2016).

wake of corruption allegations. Likewise, during the Euro crisis, British public opinion joined Germany's in favouring a strict rule-based system of fiscal governance over more flexible political bargaining; and constitutionally entrenched public spending limits are as popular as independent central banks, even though they clearly restrict the political space of manoeuvre well beyond any reasonable foresight.

So if the Brexit vote can be seen as an expression of opposition to the hegemony of liberal legalist technocracy, then it is much less clear what politics it really wants to substitute the latter with. Two overarching issues are, however, crucial to any further reflection. The first is the growing frustration, felt by many across Brexit lines and elsewhere, about the aura of inevitability and hermeticism with which the liberal project, and with it the EU, surrounds itself. It entails the mentioned impoverishment of politics, now increasingly a kabuki-style theatre production that seems only to be about lowest common denominators and middling-muddling through, and which always paints over the real issues and the real divisions. This was well illustrated during the global financial crisis when, despite the extreme fiscal fallout and stark rhetoric on the part of governments, states could not agree to fundamentally reign in the current paradigm of finance capitalism; they clipped the banking sector's wings, but clearly had no interest in interrupting the cash flow to their economies and consumer-citizens. Of course, this position was never openly stated or justified, nor was it properly opened up for public debate. The second issue concerns the role of law, or rather, the degree of autonomy it is accorded. As I have argued here, the EU stands for the highly autonomous legalism that inheres in the paradigm of the regulatory state that serves the functional interests of (neo-)liberalism. To divest the law from this colonization—to resurrect the language of the early Habermas<sup>10</sup>—and to reassert the primacy of politics over law, and of the rule *with* law rather than *by* law, the concept of politics has to be divested of both its realist distortion and its liberal impoverishment.<sup>11</sup> In fact, the spell will only be broken if law and politics begin (again) to be thought together, with law serving as both a *nomos*, a de-limitation of political action, and a *lex*, an instrument for creating linkages amongst political actors.<sup>12</sup> It is, in any case, a project that, as far as that geographical expression called Europe is concerned, can only take place within a political European Union which, given Europe's genocidal legacy, continues to be the only way any of its current member states can legitimately continue to exist.

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<sup>10</sup> J HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (T McCarthy trans., 1989).

<sup>11</sup> Anne Orford offered a critical review of Daniel Kelemen's book *Eurolegalism*. See A Orford, *Europe Reconstructed*, 75 *MODERN LAW REVIEW* 275 (2012)

<sup>12</sup> H ARENDT, *ON REVOLUTION* (1963); Hoffmann, *supra* note 8, at 984.

## **Post-Brexit Global Trade Relations: The Death of TTIP?**

*Amanda Lyons-Archambault*

*Student at Washington & Lee University School of Law*

[\[lyonsarchambault.a@law.wlu.edu\]](mailto:lyonsarchambault.a@law.wlu.edu)

### **TTIP Negotiations Mired in Controversy**

Prior to Britain's popular referendum on whether to remain a member of the European Union, parts of the public in Britain and other European states had already expressed a great range of emotions concerning on-going negotiations between the European Union and the United States regarding the bi-lateral Transatlantic Trade and Investment Partnership, more commonly referred to as "TTIP." In February 2013, the European Commission optimistically projected that TTIP "would be the biggest bilateral trade-deal ever negotiated," with the potential to "add 0.5% to the EU's annual economic output."<sup>1</sup> Most notably, TTIP seeks to streamline administrative rules and technical product standards in order to remove trade barriers, and aims to "achieve ambitious outcomes" across three broader areas—(a) market access, (b) regulatory issues and non-tariff barriers, and (c) rules, principles, and new modes of cooperation to address shared global trade challenges and opportunities.<sup>2</sup>

In March 2013, the European Commission announced from Brussels: "The aim is to build a more integrated transatlantic marketplace, while respecting each side's right to regulate in a way that ensures the protection of health, safety and the environment at a level it considers appropriate."<sup>3</sup> Since July 2013, TTIP negotiations have progressed through thirteen rounds.<sup>4</sup> Upon the conclusion of the most recent round of negotiations in April 2016, EU Chief Negotiator for TTIP Ignacio García Bercero anticipated a conclusion of these

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<sup>1</sup> *European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership*, MEMO 13/95, European Commission (Feb. 13, 2013) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=869>.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *European Commission Fires Starting Gun for EU-US Trade Talks*, European Commission (Mar. 12, 2013) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=877>.

<sup>4</sup> [http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index\\_en.htm#negotiation-rounds](http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#negotiation-rounds)

negotiations later this year.<sup>5</sup> However, just as Bercero announced his willingness to achieve the ambitious aims so eagerly anticipated by both governments in 2013, several voices within the British press lambasted the trade agreement as a bald power grab by big business. Journalist Nick Dearden of the UK's *Guardian* wrote:

It's true that TTIP is a symbol of all that's wrong with Europe: dreamed up by corporate lobbyists, TTIP is less about trade and more about giving big business sweeping new powers over our society. It is a blueprint for deregulation and privatization [sic]. As such it makes a good case for Brexit.<sup>6</sup>

Specifically, some UK citizens grew worried about the viability of public services, especially Britain's National Health Service, the protection of food and environmental safety, privacy, and financial security under TTIP.<sup>7</sup> These concerns were none-too-assuaged when media outlets revealed the heavy influence of Big Oil, including BP and ExxonMobil, by which the companies gained unprecedented access to "confidential negotiating strategies considered too sensitive to be released to the European [and American] public...."<sup>8</sup>

Roughly a year before Britain's referendum, Greenpeace Netherlands leaked draft text from the thirteenth round of TTIP negotiations that occurred in New York on April 25–26, 2016.<sup>9</sup> The consolidated documents, totaling 248 pages, compared the positions of the EU and US side-by-side—the first exposé of America's official positions on various topics.<sup>10</sup>

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<sup>5</sup> Ignacio García Bercero, EU Chief Negotiator for TTIP, Remarks at the Conclusion of the 13th TTIP Negotiation Round (Apr. 29, 2016) (transcript available at [http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc\\_154480.pdf](http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154480.pdf)).

<sup>6</sup> Nick Dearden, *TTIP is a Very Bad Excuse to Vote for Brexit*, THE GUARDIAN (Apr. 25, 2016) <https://www.theguardian.com/commentisfree/2016/apr/25/ttip-vote-brexit-barack-obama-leave-eu-trade-deal>.

<sup>7</sup> Lee Williams, *What is TTIP? and Six Reasons Why the Answer Should Scare You*, THE INDEPENDENT (Oct. 6, 2015) <http://www.independent.co.uk/voices/comment/what-is-ttip-and-six-reasons-why-the-answer-should-scare-you-9779688.html>.

<sup>8</sup> Arthur Neslen, *TTIP Talks: EU Alleged to Have Given ExxonMobil Access to Confidential Strategies*, THE GUARDIAN (Nov. 26, 2015) <https://www.theguardian.com/environment/2015/nov/26/ttip-talks-eu-alleged-to-have-given-exxonmobil-access-to-confidential-papers>.

<sup>9</sup> See generally Greenpeace Netherlands, *TTIP Leaks*, <https://www.ttip-leaks.org/>.

<sup>10</sup> *Id.*

The leaked text largely substantiated the concerns regarding environmental safety, representing a move away from the Paris Climate Agreement.<sup>11</sup>

After the Greenpeace leak, the European Commission intensified the air of secrecy surrounding TTIP negotiations by introducing a new rule limiting physical access to the actual text of the trade agreement to a secure reading room in Brussels.<sup>12</sup> The decision to restrict access was seen by many as an attempt by the European Commission to block smaller EU member states like Cyprus from sitting at the negotiating table, as these countries lack the abundance of resources to facilitate the journey necessary to view the actual documents.<sup>13</sup> The reading room in Brussels represented yet another means by which the EU could force “third countries”—those countries on the periphery of the trade agreement—to accept its terms.<sup>14</sup> The European Commission’s message to third countries seemed crystal clear: Third countries are to obey the rules or “they do not export [into Europe], just like Switzerland.”<sup>15</sup>

#### **TTIP and Brexit: Three Scenarios**

It might have been more than mere coincidence that the calls for the UK’s departure from the European Union reached fever-pitch mere weeks before the latest round of TTIP negotiations were slated to begin. Prior to the referendum, some viewed a vote for Brexit as a vote against TTIP. Certainly a vote to leave the EU would seamlessly equate to a vote to abandon participation in TTIP, as the UK would no longer be an automatic party to the trade agreement. However, European opponents of TTIP should be hesitant before celebrating the referendum results: TTIP may be ‘down,’ but it is by no means ‘out.’ Three possible scenarios come to mind:

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<sup>11</sup> *Id.*

<sup>12</sup> Zachary Davies Boren, *TTIP Controversy: Secret Trade Deal Can Only be Read in Secure ‘Reading Room’ in Brussels*, THE INDEPENDENT (Aug. 14, 2015) <http://www.independent.co.uk/news/world/europe/ttip-controversy-secret-trade-deal-can-only-be-read-secure-in-reading-room-in-brussels-10456206.html>.

<sup>13</sup> *Id.*

<sup>14</sup> Mark Dearn, *What Now for TTIP, CETA, and UK Trade?*, THE HUFFINGTON POST (June 24, 2016) [http://www.huffingtonpost.com/mark-dearn/what-now-for-ttip-ceta-an\\_b\\_10658470.html](http://www.huffingtonpost.com/mark-dearn/what-now-for-ttip-ceta-an_b_10658470.html).

<sup>15</sup> *Id.*

1. A severely weakened United Kingdom, fighting for a smaller seat at the TTIP negotiating table.

“While voting to leave the EU would immediately remove you from TTIP,” seasoned anti-TTIP campaigner Mark Dearn explained, “it doesn’t mean that five years from now you remain outside those powers.”<sup>16</sup> If TTIP is accepted and enforced, it will function as “a template for all world trade.”<sup>17</sup> A post-Brexit UK may still have to eventually accept the terms of TTIP, even despite walking away from present negotiations, if it wants to engage in future trade with EU countries and the US. Without the backing of the EU, the UK will have substantially weakened negotiating power due to its smaller market size if it does decide—or rather, is allowed—to continue participating in TTIP negotiations.<sup>18</sup>

2. A wholly independent United Kingdom, with completely severed ties from the EU and TTIP; or
3. A ‘wild card’ United Kingdom, who enjoys the potentially frightening power to negotiate a new multi-lateral trade agreement with the US and the EU.

While the latter two scenarios appear to be semantically identical to each other, they actually represent vastly different roles. The second scenario sees the UK as an emancipated, insular entity with both a diminished global market share and virtually no negotiating power in any future global trade agreement. This position represents an outright rejection of both the EU and the controversial TTIP. Indeed, the UK would face almost certain economic ruin if it completely severed the existing trading ties with the US and the EU. For that reason, this scenario seems unlikely to happen. By contrast, the third scenario casts the EU as an extroverted and eager trading power, armed with the existing

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<sup>16</sup> Harry Cockburn, *TTIP: UK Will be Powerless Against Trade Deal Outside EU, Say Campaigners*, THE INDEPENDENT (June 23, 2016), <http://www.independent.co.uk/news/business/news/ttip-eu-referendum-brexit-leave-uk-powerless-trade-a7095846.html>.

<sup>17</sup> *Id.*

<sup>18</sup> Ian Johnston, *‘TTIP on Steroids’: Campaigners Warn Post-Brexit UK Faces ‘Disastrous’ Trade Deal with the US*, THE INDEPENDENT (June 24, 2016), <http://www.independent.co.uk/news/uk/politics/ttip-brexit-uk-steroids-disastrous-global-justice-now-war-on-want-a7099986.html>.

TTIP negotiations to strike a new deal with both the EU and the US. This scenario has been labeled “TTIP on steroids” by many in the British media.<sup>19</sup>

In many regards, the UK’s membership in and association with the EU provided a backstop against the possibility of a truly mercurial form of the TTIP becoming enforceable international law. While occasionally dominant within the EU-side of TTIP negotiations, the British government’s political interests in the trade agreement were at least nominally tempered by the presence of other EU members. Hesitancy on the part of some European politicians, including French President François Hollande, have prevented TTIP from becoming a runaway train of American and British interest in deregulation and so-called ‘barrier-free’ trade.<sup>20</sup> Now, with the removal of the EU-backstop, Britain has more freedom and power to start anew and legitimately disregard the concerns of their EU-member neighbors in the negotiation of a new trade agreement.

#### **Conclusion: A Forecast for Post-Brexit Britain**

The aura reinvigoration and anticipation that currently envelops almost all discussion of the Brexit could represent a dangerous potential for Britain to inject political instability into the country’s global trade relations. Britain’s interest in streamlined, barrier-free trade certainly will not evaporate with its exit from the European Union. While secretive TTIP negotiations may have been an integral motivating factor behind the British public’s endorsement of the Leave vote, it would be a short-sighted mistake to describe the Brexit as “the last straw that broke the TTIP camel’s back.”<sup>21</sup>

The empowered and reinvigorated UK government may very well resume TTIP negotiations in its new form; the Brexit may be little more than an additional hurdle to the implementation of the trade agreement as the template for global trade. Today’s newly emancipated British government may promise a TTIP-free future, while the post-Brexit government of tomorrow may nonetheless adopt the agreement’s provisions.

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<sup>19</sup> See, e.g., Johnston, *supra* note 18 and Dearden, *supra* note 6; see also Tim Helm & Andrew Rawnsley, *David Cameron Says State Pensions Could Be at Risk if Brexit becomes Reality*, THE GUARDIAN (June 11, 2016), <http://www.theguardian.com/politics/2016/jun/11/brexit-axe-state-pensions-david-cameron-nhs-cold-reality>; Asa Bennett, *The EU Referendum Has Plunged Britain into a Topsy-Turvy World of Alice and Wonderland Politics*, The Telegraph (June 20, 2016), <http://www.telegraph.co.uk/news/2016/06/20/the-eu-referendum-has-plunged-britain-into-a-topsy-turvy-world-o/>.

<sup>20</sup> For more information about President Hollande’s critique of TTIP’s embodiment of “unregulated trade,” see Dan Cancian, *Brexit: TTIP Post-Leave Vote Could be Disastrous for Britain*, INTERNATIONAL BUSINESS TIMES (June 24, 2016) <http://www.ibtimes.co.uk/brexit-ttip-post-leave-vote-could-be-disastrous-britain-1567318>.

<sup>21</sup> *Id.* (“Brexit may well be the last straw that broke the TTIP camel’s back.”)

It appears highly unlikely that the British public will be able to reverse course on international trade agreements with the Leave vote alone. Rather, British citizens may soon find themselves in even choppier and more uncertain waters. Uninhibited by the reservations of their neighbors, the post-Brexit UK government may speed full-throttle towards a radical, new trade agreement that eclipses the current controversial terms of TTIP—truly becoming a wild card within global trade relations.



## **Is Free Movement of Workers a Fundamental Right or Merely the Price for Full Access to the Internal Market of the E.U.?**

*Catherine M. A. McCauliff*  
*Seton Hall University School of Law*  
[\[Catherine.McCauliff@shu.edu\]](mailto:Catherine.McCauliff@shu.edu)

*Factortame* (Case C-213/89 [1990] ECR I-2433, starting in 1988, ff.) was the case that Eurosceptics felt doomed UK parliamentary sovereignty. *Factortame* said that, having committed itself to the treaty, a Member State could not then contradict the treaty with contrary domestic action. Specifically, no discrimination against nationality (now TFEU Art. 18) has been permitted since the beginning. Nevertheless, parliament amended the Merchant Shipping Act in 1988 to prevent Spanish fishermen from catching fish in UK waters by requiring, for example, that 75% of the shares in a fishing enterprise must be owned by people domiciled and residing in UK. The diehards never accepted that parliament had to exercise its authority within the framework established by the treaty.

With strong support of the Eurosceptic former Prime Minister Thatcher, Bill Cash, a Conservative MP for Stone (Staffordshire), led the "Maastricht Rebellion" and has not let up since. Cash wrote several popular books, including *Against a Federal Europe: The Battle for Britain* (1993) and *Associated, not Absorbed* (2000). He triumphantly said that his constituents backed Leave so that they could recover their own sovereignty. Interviews of the actual voters show that many of those who voted Leave said that now they are now "free." The "potteries" (think Wedgwood) area is doing well in employment. Barnsley, in S. Yorkshire, however, lost its mines in 1994. When told that Barnsley received aid from the EU, voters said good, now we have the £ and our sovereignty. They did not seem to understand that the EU would not continue to send money once UK left and that the Leave campaign did not intend to make up the lost revenue.

Did reactionaries mislead unsophisticated people into voting for something that went against the interest of those voters but benefited the leaders of the campaign? When voters in Cornwall discovered that they too would lose their EU aid, they asked to vote again. Others had voted because the Leave campaign had said hundreds (£ 350 or 500 million, depending on who was speaking) of millions of pounds a week (!) would go into the NHS (National Health Service, which like American Social Security and Veterans Hospitals, is deliberately underfunded by the legislature responsible [or should I say irresponsible?] for its budget).

After the vote Nigel Farage admitted that whoever said money would be available for the NHS was speaking illustratively only. The leaders of the Leave campaign have no plans to ask the now supremely sovereign parliament to allocate any money to the badly underfunded NHS. Waiting-times for health care, both serious and routine, will increase and services delivered will decrease. Some who actually admitted to voting for Leave to decrease immigration were surprised (they did not know business needs immigrants) that Leave had no plans to decrease immigration, which comes perhaps more from third countries than from other EU Member States, including Polish immigrants who arrived in UK before Poland became a Member State in 2004. Did Remain utterly fail to explain what the EU does in its agricultural, fishing, and other policies? Hilary Benn suggests that tepid enthusiasm for Remain may have lost some Labour votes that could have been harvested by more robust campaigning.

Probably no one wished to reveal that average UK voters, whose salaries fell about 7% since the Great Recession, are in fact against the lobbying that manages to channel the trickle of revenue coming in from the slow growing economy toward the largest multinationals and largest investors but they think they are against the EU. The same is true in other Member States, to say nothing of the United States.

Closing loopholes that allow the privileged to take advantage of the democratic system might provide money to develop infrastructure, develop new industries, and provide job training. It may be that the average voter in the USA or the UK may not wish to hear such technicalities about deductions. Could the UK voters have understood better if Remain gave its warnings in terms of the messiness involved when two human beings divorce? Certainly, the voters did not like hearing President Obama say we have spent seven years developing a trade treaty with the EU (the completion of that treaty itself may arguably be in jeopardy) and you will, at least in terms of time, be waiting at the end of the line for negotiating a trade treaty with USA if you leave. No wonder Remain did not give warnings, prudent though they may have been.

Thomas Piketty, in his book *Capital in the 21st Century* (2014), explained that democracy has been changed by the current political economy: left vs. right is irrelevant compared to vertical interests in the global economy such as multinational companies vs. the retail service worker in a chain store. What does democracy mean when the voter has a vote but neither the time nor the training to understand what is at stake in the vote? Donald Trump apparently charged his own campaign to rent his golf resort at Turnberry for his press conference as candidate. Maybe, as the Don said, facts don't matter ("I could shoot someone on 5th Avenue and they'd still vote for me"; and in another context, "I am for 2d amendment rights"); luckily enough for Trump, with a post-factual electorate, he does not have to learn the facts). There he was, in Scotland where people largely voted to Remain,

and gave his congratulations to the UK for taking the "country" back by leaving. The Don also brashly said that the decline in sterling is good for him because more people who use other currencies can afford to come to his resorts here (close to his wording) since they will get more for their money on conversion into lower valued pounds. Who else congratulated UK besides the Don? The Don's friend Vlad, who has a union of his own to promote to Ukraine, Georgia and, he hopes, Eastern and Baltic Europe, such as Belarus, as well as Central Asia), Iran, and jihadi tweets that indicated their terrorism will be easier to carry out now that security channels are more difficult with UK on the outs.

Jeffrey Sachs says it is not so likely that anyone will pay attention to his (and others') suggestions to provide meaningful aid to the areas where refugees are coming from in order to give people a real choice to stay where they are. That may be the real failure of the EU. An EU-wide policy that both admits and supports refugees and strengthens safe-havens in their home countries is vital, as are strengthened security policies, work on infrastructure, deposit insurance, and greater monitoring and support for weak banking systems—yes, more EU-wide institutions—if problems are to be fully addressed rather than only endured.

The triumphant Leave campaigners say they feel sorry for the EU, which is no longer going to have Great Britain to grace it. What does Lisbon Art. 50(2) state? The first sentence provides: "A Member State which decides to withdraw shall notify the European Council of its intention." It does not say when the Member State shall notify. The two years to full exit are triggered by the UK's notification. Secretary of State Kerry is in Brussels and has met with other foreign ministers. He has called for calm and seems to share some of Angela Merkel's positions on taking measured steps. Others want the fastest exit possible to prevent the "contagion" of several Member States seeking referenda.

Mark Carney, Governor of the Bank of England, is doing everything he can to prop up the currency and has provided liquidity for the banking system. Some hotheads have called for Carney to resign because they deem him a collaborator with the failed Conservative government, but it will be very difficult to replace such a seasoned hand at this critical time. The UK's debt has been down-graded because of the fear of a recession and interest rates nevertheless fell. Carney assured the public that he would make £250 billion available, if necessary, to provide credit and support the markets; the Bank might lower interest rates next month. The stability or volatility of the pound and other currencies in the coming days will tell much about the health of the world economy in the near future.

Businesses always prefer stability, not to say certainty, which is crucial for world markets, although markets often deliver more volatility than risk managers can absorb. Have volatility and the devaluation of stocks and currency reached crisis-levels similar to the situation of Lehman Bros. in 2008? Certainly not, though volatility abounds. Try saying

there is no crisis, just “unrecognized loss,” to a person with a § 401 (k) account that has not been robust lately anyway. We hope political distress will not cause extreme losses in valuation, especially if we think the underlying economy is basically sound and the blurry picture will soon begin to come into focus. The stock markets, but not all currencies have begun to stabilize, possibly with several false starts still to come. But growth will not be robust and may be at a standstill so that the fear of recession is real. Life will be more difficult for all at least for a time and the young people in England, who will not have Erasmus fellowships or a chance to work in other places and instead will have a harder time getting started, are not grateful for the unexpected hardships visited upon them by their grandparents who are happy to be free, sovereign and independent. Will 23 June 2016 look better to them than 9 May (Europe Day) (when Schuman made his declaration in 1950, setting forth a supranational community engaged in setting up a coal and steel community) as a day to celebrate on the calendar?

What about the border between Northern Ireland and the Republic? 300 miles of opportunity for smugglers? Armed border stations like Check-point Charlie? Will the UK give up the six counties and let them reunite with the Republic? They voted to remain but some die-hard Unionists (the Acts of Union of 1707 and the Scotland and Northern Ireland Acts of 1998 provide for devolution) do not wish to leave England. Could the Queen remain Head of State? Yes, in Canada or Australia, but she will not be head of state in a republic like Ireland. What about Scotland? Next weekend Elizabeth II is going to Scotland to speak to her Scottish people. If Scotland remains in the EU but leaves the UK, Elizabeth may remain head of state because she is in effect but not in title Queen Elizabeth I of Scotland (Mary was Queen of Scots and Elizabeth I was Queen of England only). The First Minister Nicola Sturgeon is pursuing all her options to remain in the EU, but is not necessarily interested in staying in the UK if she must give up Scotland's relationships with the other 27 Member States in the EU. Nevertheless, it is unlikely that the EU will be able to deal with Scotland unless and until it becomes independent of UK.

Unwinding long-standing relationships is hard to do but poking into the interstices of the relationship does unlock EU values in the process. How much should the Union mean to the future of the remaining 27 Member States and even to the new outsider, the UK? If the founders' values (peace, not war; brothers, not others; open borders, not barriers; prosperity, work and food for all) are rejected, then none of those expansive, irenic plans for all the partners will come to pass. For Robert Schuman's philosophical underpinnings in pursuing what became essential EU value, including new emphasis on democracy in response to totalitarianism, see Robert Schuman, *Pour L'Europe* (1963, translated by the Centre for European Studies as *For Europe* 41-59 (2010) (highlighting the work of Jacques Maritain as well as the Christian Democratic parties emerging after World War II.) These values were first translated into the treaties as the four freedoms, including the free movement of workers. The Brexit movement rejected free movement of workers and

subsumed it under the category of unwanted immigration leading to the desire to take the country, or sovereignty, back. It will be difficult for the UK to ask as a non-Member State for the benefits of the internal market while refusing to participate in the free movement of workers which makes the internal market work and invests the project of uniting Europe with the fundamental values of human respect and human rights. The irony of wanting access to the benefit of the internal market without honoring the free movement of workers integral to making the market work, that is, without accepting the price to be paid for cheaper goods and ease of trading, may be lost on the illusionists who gestured that millions of pounds a week would be available for the NHS and on those who willingly participated in the illusion by voting Leave. The interest politics of the aggressive, rather than cooperative, nation state, on display in Russia's invasions of Georgia and Ukraine, may become more common in a difficult, dangerous and heartbreaking time. Is this the dramatic setting for novels? Yes. But unfortunately it may be a setting for reality as well. Is there a way for the founders' values to flourish and grow in UK if it is outside the Union? This will depend on people in the younger generation, who will now have to go it alone. Barring some unforeseen political reversal of fortune, their generation will be foreclosed from being EU citizens.



## **Does Brexit Spell the Death of Transnational Law?**

*Ralf Michaels*  
*Duke University School of Law*  
[\[michaels@law.duke.edu\]](mailto:michaels@law.duke.edu)

### **Introduction**

Philip Jessup would not be pleased. Exactly sixty years after he published his groundbreaking book on *Transnational Law*,<sup>1</sup> a majority of voters in the United Kingdom decided they wanted none of that. By voting for the UK to leave the European Union, they rejected what may well be called the biggest and most promising project of transnational law. Indeed, the European Union (including its predecessor, the European Economic Community), is nearly as old as Jessup's book. Both are products of the same time. That invites speculation that goes beyond the immediate effects of Brexit: Is the time of transnational law over? Or can transnational law be renewed and revived?

It is worth remembering that Brexit is not an isolated event of anti-transnationalism. The most successful transnational movement today is, ironically, nationalism. Nationalists and populists in other EU Member States hope to ride the Brexit wave and inaugurate their own exits in the name of national sovereignty: Italexit, Nexit and Frexit are more than just idle word games. The EU might well collapse. And such nationalism, often with clear racist tendencies, goes beyond Europe, and beyond states within organizations. In India, Modi has instituted a new Hindu nationalism. In Russia, Putin is deploying a cynical form of nationalism. And in the United States, Donald Trump has already suggested that his campaign is about "the exact same thing" as Brexit, namely taking the country back from cosmocrats and elites. This transnational nationalism is thus about more than just membership in the EU. It is a movement for national strength, for closed borders, for controlled or restricted trade. It wants to reestablish a traditional idea of a sovereign nation state.

Leave voters have been called stupid, selfish, and xenophobic, among other things. Even if this were true (it clearly is for some, but not necessarily for all), this would not prove much. In a democracy everyone has the right to be stupid and also, up to a point, selfish and

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<sup>1</sup> PHILIP JESSUP, *TRANSNATIONAL LAW* (1956).

xenophobic. This is not petty: we leave to democratic votes precisely those questions of politics that we do not feel we can decide objectively on a scientific basis, and we trust people to determine for themselves what is best for them. Whether membership in the EU should be open to a referendum is quite contestable. But once a referendum is called, it is not easy to reject the result and simultaneously celebrate democracy. The arguments must be taken seriously, even if we refuse to accept them. And they must inform our thinking about transnational law, even if we refuse to adopt them.

### **Brexit as Rejection of Transnational Law**

Brexit must be understood as a rejection of transnational law because, in many ways, the European Union is the epitome of transnationalism. Jessup himself, although primarily interested in Asia, acknowledged as much. When *Transnational Law* was first published, Jessup could only mention the European Coal and Steel Community, but he already rejoiced that it had “blazed a trail for supranational authorities.”<sup>2</sup> In *Transnational Law*, Jessup famously defined transnational law “to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.”<sup>3</sup> This fit the new European Union quite well, as Jessup himself explained:

The basic treaties are pure international law, as is the rule which makes these treaties binding—*pacta sunt servanda*. But the jurisprudence of the Court of Justice of the European Communities shows that to a great extent the law of the Communities is something different—something which I would call “transnational,” which may be in part international law in the sense in which that term is used in Article 38 of the Statute of the International Court of Justice, and partly law which has certain other characteristics.<sup>4</sup>

The core for our understanding of both Transnational Law and European Law (and, incidentally, also Brexit) is to understand their relation to the state and to national

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<sup>2</sup> *Id.* at 113.

<sup>3</sup> JESSUP, *supra* note 1, at 2. Later in the book, in a less-often quoted passage, he clarified: “Transnational law then includes both civil and criminal aspects, it includes what we know as public and private international law, and it includes national law, both public and private.” *Id.* at 106

<sup>4</sup> Philip Jessup, *Diversity and Uniformity in the Law of Nations*, 58 AM. J. INT’L L. 341, 347-8 (1964).



sovereignty. For Jessup, states were, only one of many sets of actors, besides individuals, organizations and corporations, and also supranational organizations. Sovereignty, for him, did not disappear or become irrelevant, but it had become relative. Already, in a speech from 1942, Jessup said as much: "If we can remove the snobbery and the selfishness from our international thinking, really admitting that the principle of sovereignty is not a sacred and unlimited thing, we shall be well on our way toward true international democracy."<sup>5</sup> In *Transnational Law*, he argued that "in fact the sovereign's power is neither exclusive nor absolute within its own territory, and that this is true whether one is talking in terms of legal or extralegal power."<sup>6</sup> He could have been speaking of the EU. Member States still play a role, but they are one set of actors between individuals and regions, on the one hand, and the supranational organization of the EU, on the other hand. Sovereignty does not disappear but it is shared, as in Neil MacCormick's insightful analysis of constitutional pluralism that generated a whole field.<sup>7</sup>

The Brexit movement, in rejecting the EU, rejected quite precisely the transnational law character of the EU. Of course, this is not overt in every aspect. Sure, there was likely little desire among the Leavers to reestablish legal categories such as public and private law. It also seems unlikely that the Leave campaign was animated by the desire to reject the problem-based regulatory style of the EU. What the campaign rejected, however, was the transnational character of EU law. Leavers want laws to be national. At its heart, Brexit represented a fundamentally legal concern: rules for Great Britain should be made by Great Britain and its institutions. This links lawmaking and sovereignty with the idealized sovereign state of 19<sup>th</sup> century international law: a British population without foreigners, a firmly controlled territory controlled by closed borders, and a sovereign British government that need not share authority with Brussels. And, remarkably, they also emphasize the fourth element named as a requirement for a state in international law: the ability to enter into relations with other states on its own terms. In other words, what the Leave-voters wanted was sovereignty, both in its internal and its external aspects: a Westphalian model of the world, in which states are internally sovereign, and in which international relations are exclusively dealt with as matters between states.

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<sup>5</sup> *Jessup Calls International Democracy Post-War Ideal*, 65 COLUMBIA DAILY SPECTATOR No 131 (2 (June 1942), p. 1, available at <http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19420602-01.2.7&e=-----en-20--4934--txt-txIN-columbia---50-->.

<sup>6</sup> JESSUP, *supra* note 1, at 41.

<sup>7</sup> Neil MacCormick, *Beyond the Sovereign State*, 56 MODERN LAW REVIEW 1 (1993); Neil Walker, *Constitutional Pluralism Revisited*, 22 EUR. L.J. 333 (2016).

### The Nostalgia of the Nation State

Much of this desire is driven by nostalgia for a past that never was. There is the right-wing nostalgia for a Britain that was not only powerful and prosperous but also, by and large, white. Some of this is nostalgia for Empire, a nostalgia both unrealistic and abhorrent. More plausible is the nostalgia for the nation state. There is the left-wing nostalgia for a functioning welfare state, for a strong left that can actually improve workers conditions and can fight understandable fights with understandable enemies (workers against capitalists). This hope for a return to the nation state is misguided. There is no way back. The nation state in its 19<sup>th</sup> century idealized form is a mirage, and self-regulation in isolation can no longer work.

Start with the idea of sovereignty. We know it to be a construct and a highly problematic one. Krasner has called it, with some justification, organized hypocrisy. Jessup made the point earlier, from a realist perspective:

The very existence of a government of a state is a fiction, for a state is an intangible, and our international law picture of a sovereign state never had life. Sovereignty is essentially a concept of completeness. It is also a legal creation, and as such, is a paradox, if not an absolute impossibility, for if a state is a sovereign in the complete sense, it knows no law and therefore abolishes, at the moment of its creation, the jural creator which gave it being. All juristic persons, indeed, as Charles De Visscher has pointed out, are fictions created by a superannuated doctrine which should be discarded.<sup>8</sup>

But the idea of the state as the fundamental entity is problematic in other ways. Insofar as the dream of the Leavers is to go back to the nation state with a shared identity, the futility of the dream is showing, not least from the voting results. A country cannot be said to have a clear national identity if, in a referendum, it splits almost evenly on what that identity is. Indeed, the split is not random but tracks various societal differentiations: young versus old, urban versus rural, educated versus uneducated. The idea of one country with one identity and one national interest is refuted by the results of the very referendum that sought to reclaim the notion.

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<sup>8</sup> Philip C. Jessup, *International Law in the Post-War World*, 36 AM. SOC'Y INT'L L. PROC. 46, 49 (1942).

Indeed, the UK is one of the stranger models for a nation state, not least because it consists of several nations: besides England, there are Wales, Scotland, and Northern Ireland. Scotland and Northern Ireland voted with significant majorities to remain in the EU. Both are now considering an exit from the UK in order to make that happen. The Leavers run into the familiar conundrum from international law discussions on secession and self-determination: if the UK can split from the EU, why should not Scotland split from the UK? Why is it wrong for Brussels to make rules for London, but right for London to make rules for Glasgow? Who is the *self* in self-governance?

There is one answer, and it should not be dismissed out of hand.<sup>9</sup> One might say that sovereignty does not require homogeneity of a shared identity. Quite the contrary: the state is that very institution that provides robust procedures to create decisions that can be accepted amongst diverse views. Nation states (especially the UK with its parliamentary supremacy) provide the relevant institutions for democratic decision-making. They have functioning parliaments, a functioning court system, a functioning government. And they have elected officials who can be held accountable.

This seems plausible in theory but it has two shortcomings. First, it is not clear that voters actually accept decisions made under the procedures provided by the state; the referendum itself may be a test case. Second, and more importantly, it is not clear that the state's institutions are particularly well-versed for transnational problems. These institutions remain national in their setup and in their functioning. As they stand, these institutions are adequate for national, not transnational issues.

This is where the second mirage becomes evident, the mirage of self-governance. When Jessup suggested that "the sovereign's power is neither exclusive nor absolute within its own territory," he expressed an important fact. There are many issues that are effectively decided outside of the sovereign. There are issues on which states are almost bound to follow the demands from other states—not by law, but by necessity. Neighbors of the EU know of the need to enact EU legislation in order to be compatible. Even seemingly robust states strive to comply with EU data privacy standards in order to serve as "safe havens." Poorer countries have even less choice. They have to enact certain product and labor standards in order to be allowed to export. They may have to grant foreign investors specific privileges. Their sovereignty is formal, but in effect they are regulated from elsewhere through economic pressures, even without the formalities of a system like the EU. Jessup knew about this interdependence. British proponents of Brexit, if they did not, will soon learn it.

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<sup>9</sup> See, e.g., Richard Tuck, *The Left Case for Brexit*, DISSENT (June 6, 2016), available at [https://www.dissentmagazine.org/online\\_articles/left-case-brexit](https://www.dissentmagazine.org/online_articles/left-case-brexit).

Jessup's focus, in positing transnational law, was especially on problems that transcend borders—which defines, at least traditionally, the limited competences of the EU. But Jessup already demonstrated that there is no clear boundary between domestic and transnational problems, and that traditional distinctions tend to be arbitrary.<sup>10</sup> Realistically, an increasing number of problems must be characterized as transnational, and it is not surprising therefore that the EU has claimed ever broader competences. Now, these transnational problems cannot be resolved through isolated self-regulation on the level of the nation state. By necessity, citizens in or from several countries are involved—the very justification for regulation at the EU level. Immigration concerns, which seem to have been the biggest driver of the referendum's outcome, show this nicely. Immigration control can be defined as a national problem, but that is artificial. Immigration is by definition a transnational problem: it concerns the immigration country, the emigration country, the refugees in transit between the two, and also other countries that will need to bear the costs of one country's permissive or restrictive immigration policies. Much was made of the claim that Angela Merkel, in accepting the European duty under international law to accept masses of refugees, was indirectly imposing on other countries as well. But the Brexit demand for self-regulation is, in itself, the demand that the UK should be allowed to regulate refugees and thereby, indirectly, impose on other countries, without giving them a say. That may be justifiable, but not as self-regulation.

Again, there is a more sophisticated version of this argument. It says that even when problems are transnational they need not be regulated on a supranational level. It would be better to resolve them through coordination among individual states, and such regulation requires sovereign states. The Leavers made much of the UK's enhanced ability to enter into agreements, both with third countries and with the EU. And indeed, in many ways, such decentralized regulation is often superior to supranational regulation. But it seems questionable, to say the least, that such coordination is easier from outside than from inside the EU. One can well speculate that a vote for Brexit is really largely a vote against coordination, not for better coordination.

This is not to say that the EU is the optimal mechanism for coordination. It is not a mere coordination institution, and one may well argue that its impulse for harmonization has gone too far. But the Leavers grossly overestimate the space for political freedom that Brexit creates. In view of existing networks, it will be very difficult for the UK to independently negotiate better conditions and, thus, essentially secure more regulatory space for itself than would have been possible from within the EU Switzerland and Norway are sometimes named as models. But one would think the UK's ambition goes beyond

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<sup>10</sup> *Id.* at 11.

these autonomy and authority of these countries. Leaving the EU means escaping from some outside influence, but it results in the UK losing even more influence.

### **The Nostalgia of Transnational Law**

If the desire to return to the nation state is a sign of nostalgia, then why is it that so many people prefer it over transnational law? One answer, I suggest, is perhaps surprising: transnational law itself is marred by its own nostalgia. Nostalgia for Jessup can be viewed, perhaps, in the frequency with which his book on *Transnational Law* is invoked as a book for our, not its, time. Nostalgia for the European Union can be viewed, for example, in a curious statement from 25 June 2016, in which the foreign ministers of the six original founding Member States invoked the Community's founding in 1957 and assure themselves of that project's continued importance.<sup>11</sup> Both stem from a time that is no longer ours. Just as we cannot go back to the 19<sup>th</sup> century sovereign state, so we cannot go back to the mid-century world.

In many ways, reading Jessup's *Transnational Law*, like reading statements around the founding of the European Communities, is a journey into another time, the era of the *Pax Americana*. That era was influenced by the recent experience of the catastrophe of two World Wars, and it was characterized by an emerging Cold War. The first of these experiences suggested the risk of nationalism, the second suggested the risk of collectivism. Transnationalism and individualism, in the form of free markets, were the apt responses. But this describes only what was to be rejected—in that time and in that place. Beyond that, both *Transnational Law* and the European Community were hopeful projects. Jessup's *Transnational Law* exudes the optimism of its time: problems exist, but they can be solved. There is some utopian quality to it, but it is a very finely chiseled and detailed utopia. It is a manifesto of a generation that sees big tasks ahead but feels up to resolving them, with the right instruments and the right attitude.

It is necessary, however, to consider carefully what these instruments and this attitude were. Jessup's approach to transnational law was influenced by legal realism: He suggested that one should start with concrete problems rather than the abstract categories. What was needed was expertise: not expertise in legal doctrine, but expertise in real world

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<sup>11</sup> See Common Statement by the Foreign Ministers of Belgium, France, Germany, Italy, Luxemburg and the Netherlands, 25/06/2016, available at

[http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Meldungen/2016/160625\\_Gemeinsam\\_Erklaerung\\_Gruenderstaatentreffen\\_ENG\\_VERSION.html](http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Meldungen/2016/160625_Gemeinsam_Erklaerung_Gruenderstaatentreffen_ENG_VERSION.html).

See also <https://euobserver.com/political/132204/>.

problems and their solutions. He trusted institutions and officials to display this kind of expertise. He praised Mixed Arbitral Tribunals for their creativity in developing new and attractive rules in the lack of established ones, and suggests that national judges should be able to do something similar. At least in principle this is still the approach that the EU takes in its lawmaking. Most secondary law is formulated as a response to a concrete problem that has surfaced. One may well criticize the EU for its narrow focus on the problems confronting a free market. One may also claim that the EU sometimes sees problems that are not really there. But that does not change the methodological point.

What could be wrong about all this? For one, Brexit demonstrates that governance by experts is unpopular. This should not just be irrational. David Kennedy demonstrates in his latest book some of the problems of expert-based governance and how it can lead to injustice.<sup>12</sup> There are many reasons for this, but the simplest may be this: it is undemocratic. Expert-based governance depoliticizes decisions and turns them into observable truths. Such depoliticization may have seemed appropriate in view of the experience with Nazi Germany and the Soviet Union. Today it has become problematic. In the light of such expert opinions it appears that Brexit supporters relied on the power they had: they may be wrong, their vote may not even be to their benefit, but at least they are able to stick it to what they perceive as the elite.

This leads to a broader problem for transnational law, the problem of democratic responsibility. Jessup speaks of the wealth of rules, he speaks of jurisdiction and he speaks of choice of law, but he does not speak of accountability. Admittedly, Jessup spoke forcefully for international democracy elsewhere.<sup>13</sup> But even there, this democracy often seemed more instrumental than intrinsically good. Democracy was important to fend off the Soviet Union (that did not support it, at least in the Western way). But it is not clear that it plays a role for the development of transnational law. And as for the EU, its democratic deficit has never been fully resolved, and it is not clear that there is enough political will to fix it. In many ways, the EU was set up precisely in order to overcome the narrow national interests that make their way into national legislation.

Indeed, arguably, this anti-democratic position was once a virtue. In the aftermath of the experience with Nazi Germany, the idea of populist control was deeply suspicious, at least for Europe. In the European postwar mind, the depoliticization of important questions

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<sup>12</sup> DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW & EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* (2016).

<sup>13</sup> See, e.g., Jessup, *supra* note 5; Philip C. Jessup, *Democracy Must Keep Constant Guard for Freedom*, 25 DEP'T ST. BULL. 220 (1951).

seemed a good thing: it made it possible to ensure that rational decisions would be taken. In this story, what made the postwar world prosper and what made transnational law successful was precisely that it held populist control in check. The international human rights movement spoke truth to power, even where that power rests in overwhelming popular majorities, and even where the “truth” was normative and contestable. The emerging transnational commercial law was successful because it was able to free itself from democratic state control. And the EU was able to hold national governments accountable not just *vis-à-vis* foreigners but also *vis-à-vis* their own citizens, an aspect that Christian Joerges has emphasized. The disdain for the leave voters is a successor to the disdain for Nazi populism. Discord may exist within, not about, the system. This somewhat restrained view of democracy is now seeing its limits: people revolt against decision-making process in which they do not feel represented.

This leads to a further aspect. For Jessup and for the European Union, the focus on the individual was closely linked to a preference for competition and capitalist markets. Party autonomy has been greatly expanded and private ordering has been celebrated. Not all individualism in transnational law has this focus on markets; the human rights movement is, in parts, anti-capitalist. Nonetheless, it appears that individualism itself is being rejected. In Brexit we see this with particular strength. The hope of many of the Leavers was to avoid the harsh individual competition of the common market, in favor of a national community, whether in the leftist view of solidarity and the welfare state or the rightist view of a racially homogeneous nation.

A final aspect follows from this, and it may be the most important one: Transnational law is potentially elitist. Transnational law, like increased Europe-wide competition benefits some and injures others—it benefits the British elites and the famous Polish plumber; it hurts the British worker. If, as we know, the educated were against Brexit and the uneducated were for it, then that may suggest that votes for Brexit were simply dumb. But it may also suggest that the EU benefits the educated more than it benefits the uneducated. Similarly, it is undoubtedly xenophobic and selfish to oppose human rights, including rights for refugees. But it is at least understandable in view of the fact that, of course, human rights for some individuals have spillover effects on others. This is a reason why we usually do not leave decisions on human rights to a majority vote; the fact that the Brexit referendum has such effects is one of the most unfortunate aspects.

The elitist potential of transnational law is no accident. It is a reflection of the new stratification of world society, creating a transnational upper class that travels and communicates freely across borders, and a national underclass that remains local and cannot participate in the benefits of the upper class. In this sense, the solidarity amongst nationalists worldwide is not paradoxical. Transnational law, insofar as it concerns transnational problems, threatens to be the law of that transnational elite. It may care for

the transnational underclass (especially migrants), but not the local underclass. As such, it is no surprise that the underclass opposes it.

### **What Is to be Done**

All of this does not suggest that transnational law is dead. The simple return to the nation state is not the answer, despite the nostalgia that surrounds it. Transnational problems are not solved by national laws in isolation. There is no alternative to transnational law. But we must realize that transnational law has a dark underbelly. That underbelly was not so visible in the 1950s, and maybe it was not so important. Today it is important and should not be underestimated. Transnational law, like any other area, benefits some and hurts others. It must be developed without nostalgia. That means that some aspects that are often underappreciated must be addressed.

One of these aspects is elitism. Transnational law, by and large, is a project made by a transnational elite, a transnational network of scholars and decision-makers. It is also, widely, a network made for a transnational elite, namely those who benefit from transnationalism, whether in its market liberal form or its human rights form. Transnational law likes to take on the fate of the poor elsewhere—exploited workers in Bangladesh, environmental victims in Ecuador. It does not always sufficiently endorse the issues of the have-nots at home, especially where these have-nots display unattractive characteristics such as racism and xenophobia. This is the problem of exclusion. Market liberal transnationalists let the weak collapse. Leftist transnationalists let the xenophobes collapse. It is no wonder, then that weak xenophobes most vociferously reject transnationalism. The Brexit voters are those who felt excluded, and the disdain that we pour on them suggests that they are not wrong in feeling that way. There is something charming in the current movement for London to separate from the UK. But we cannot go back to a Hanseatic League of transnational cosmopolitan, cities and leave only the countryside to the nation states.

The lack of democratic accountability is a second, related problem. It is not enough to try to extend the benefits from transnationalism to the have-nots because they may reject this as paternalism—the fact that so many in the UK who oppose the EU are the ones who benefit from it makes this clear. This is a particularly tricky challenge. We have come to develop our ideas of democratic accountability in the nation state. This is why proponents of democracy are among the opponents of transnational law and the EU. If that is not an option, then better concepts of actual democracy, self-determination and accountability are needed. Transnational law in Jessup's conception did not provide for this; today it must be found.



A third problem concerns, ironically, Jessup's favored approach to problem-solving. The realist idea of law as a solution for a problem seemed attractive in many ways. Today we realize that it underestimates the symbolic value of law. The Brexit nostalgia for the British state is also a nostalgia for the symbolism of nationally made law, which has more attraction than Brussels. There is no other explanation for the paradox that the leave campaign voted in favor of the supremacy of a Parliament which itself, by a large majority, is opposed to the Brexit. The European Union has always hoped to establish an identity and a positive image; but its image remains that of a cold regulator of bananas. As concerns marketing, transnational law may be able to learn from human rights law with its widely shared positive image. But the problem is not merely one of marketing. Transnational law must also take seriously that law itself has symbolic power. Law goes beyond regulation—it aspires and inspires and expresses a vision of our better selves.

Jessup was aware of the power the have-nots could yield if their problems remained unaddressed:

When such issues as we have been describing attain certain proportions or degrees of intensity, something is done about it. If it is not done by the haves, the have-nots may resort to domestic violence, or to international war, or to the General Assembly of the United Nations.<sup>14</sup>

Or to Brexit, one might add. For Jessup, transnational law was the answer to such issues. For today's have-nots today, transnational law is part of the problem. Transnational law will need to regroup in order to respond to their plea.

*[The author offers thanks for valuable comments to Jed Purdy]*

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<sup>14</sup> JESSUP, *supra* note 1, at 32.



## **Brexit. Or, Is the European Union Educable?**

Russell A. Miller

Washington & Lee University School of Law

[\[millerra@wlu.edu\]](mailto:millerra@wlu.edu)

In an essay from 1998 the comparative law scholar Pierre Legrand asked the question “are civilians educable?”<sup>1</sup> It was a theme that had preoccupied him for some years as he agonized over what he regarded as the intolerant, totalizing, and normalizing manner in which civilian legal systems and their acolytes encounter other legal traditions. He had documented, for example, the ways in which Quebec’s new 1994 Civil Code constructively sought to suppress and exclude the significant and historically relevant Anglophone community in Quebec.<sup>2</sup> Legrand argued that this domineering posture is a product of the civil law’s cosmological and autarkic mentality.<sup>3</sup> “The difficulty,” Legrand lamented, “is that the civil law mind ... is reflexively imperialistic ... because of its penchant for universalization.”<sup>4</sup> Far more than his disquiet over the precarious future of Quebec’s Anglophone community, Legrand came to be concerned about the fate of the English common law tradition in the face of the European Union’s convergence agenda. This was, to Legrand’s mind, an apocalyptic confrontation between England’s still-proud legal culture and Europe’s horsemen of convergence: the ECJ, the Commission, the Parliament. With increasing distress Legrand turned his attention to the way in which the European Community (and later the Union) “is liable to achieve ... the marginalization of one of the subcultures that have defined western Europe historically.”<sup>5</sup> He would go on to insist that “European legal systems are not converging” and to raise ever-more strident objections to the idea of a European civil code.<sup>6</sup> This would not cease until Legrand had written “Antivonbar,” an incendiary manifesto aimed at salvaging the English common law from

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<sup>1</sup> Pierre Legrand, *Are Civilians Educable?*, 18 *LEGAL STUDIES* 216 (1998).

<sup>2</sup> Pierre Legrand, *Civil Codes and the Case of Quebec: Semiotic Musings Around an Ancient Aigu*, in *CONSCIENCE, CONSENSUS, & CROSSROAD IN LAW* 195 (Roberta Kvelson ed., 1995).

<sup>3</sup> *Id.*

<sup>4</sup> Legrand, *supra* note 1, at 226.

<sup>5</sup> Pierre Legrand, *Codification and Politics of Exclusion: A Challenge for Comparativists*, 31 *U.C. DAVIS LAW REVIEW* 799, 803 (1998).

<sup>6</sup> Pierre Legrand, *Against a European Civil Code*, 60 *MODERN LAW REVIEW* 44 (1997).

what he viewed as the Union's closed-fisted and violent politics of supremacy, which had taken the form of the proposed European Civil Code.<sup>7</sup>

The answer to the original question—"are civilians educable?"—was that civilians could only be expected to grudgingly learn to "fail better."<sup>8</sup> Legrand explained that "any reversal or abjuration of a world-view is fantastically difficult, especially when it involves suppressing an overweening sense of superiority."<sup>9</sup> Drawing on Michael Oakeshott, Legrand concluded that civilians—as rationalists—are essentially "ineducable."<sup>10</sup>

For Legrand, this clash was about more than merely the relative strength (perhaps even survival) in Europe of what many comparatists consider to be the world's two grand legal traditions.<sup>11</sup> It was about much, much more. Legrand insisted that law—and legal traditions such as the common law and civil law—are expressions of the broader culture that they serve and out of which they emerge. In this sense, his defense of the English common law was also a defense of English culture more broadly conceived. "Ultimately," Legrand explained, "the reality of European legal convergence becomes problematic as the idea of convergence of European societies, at least from the moment one takes the issue beyond the superficial level of rules and precepts. This is because convergence of a group of legal cultures does not appear any more feasible than would convergence of the different world-views privileged by a wide range of societies."<sup>12</sup>

For Legrand, the fate of the English common law would be a measure of the ethics of the broader European project. Could Europe—in law and politics and society—bend towards "genuine intercultural dialogue, the kind of unceasing and unceasingly stimulating exchange which nurtures a reflective awareness of diversity and fosters an important measure of empathic understanding, if not (benign) admiration."<sup>13</sup> Legrand was skeptical, but he was not hopeless. Common law lawyers in Europe would have to embrace the distinctiveness of their life in the law as a good in itself. They would have to resist the

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<sup>7</sup> Pierre Legrand, *Antivonbar*, 1 JOURNAL OF COMPARATIVE LAW 13 (2006).

<sup>8</sup> *Id.* at 25.

<sup>9</sup> Legrand, *supra* note 1, at 228.

<sup>10</sup> *Id.* (quoting MICHAEL OAKESHOTT, RATIONALISM IN POLITICS 32 (1962)).

<sup>11</sup> See, e.g., JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION 1 (3<sup>rd</sup> ed. 2007).

<sup>12</sup> Pierre Legrand, *Public Law, Europeanisation, and Convergence: Can Comparatists Contribute?*, in CONVERGENCE AND DIVERGENCE IN EUROPEAN PUBLIC LAW 225, 252 (2002).

<sup>13</sup> Legrand, *supra* note 1, at 228.

pervasive suggestion that their way of doing law is inferior.<sup>14</sup> Comparative lawyers more generally would have to commit themselves to an approach that both embraces the inescapable fact of cultural particularity and fosters an “enhanced understanding of alterity.”<sup>15</sup> This would be a comparative law “that values diversity as a good and ... is prepared to affirm it as a good.”<sup>16</sup> Finally, Europeans would have to renounce the project’s strident and inflexible propensity for harmonization. Europeans would have to accept that a “good European” could offer resistance to the project’s universalizing agenda—at least when that resistance is rooted in an ethical commitment to life’s irreducible and unavoidable diversity. “In fact,” Legrand concluded, “it must be appreciated that to master, absorb and finally reduce difference to sameness just cannot make for a ‘good Europe.’”<sup>17</sup> The Europeanisation of the continental law and politics and society, Legrand said, will only “prove persuasive if it will work *through* difference.”<sup>18</sup>

Brexit—whatever else it means—offers us a troubling opportunity to consider where things now stand in relation to Legrand’s appeal for a Europe that recognizes and respects “difference in all its complex ramifications.”<sup>19</sup> The difference that was always there—in law as well as life—has now been formally ratified and reified through the British referendum. There is Britain and there is the Union, sharper and harder now, but as it has always been. The Union has heard this before, in France and Holland and Ireland and Denmark and Greece, and it has not wanted to listen. It is hearing it more loudly now in Hungary and Poland. But, even while the Union sings sweetly about the respect owed to the national communities of which it is constituted,<sup>20</sup> no one believes that it wants

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<sup>14</sup> *Id.* at 229. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 10, at 3. But see Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Schleier & Robert Vishny, *Law and Finance*, 106 JOURNAL OF POLITICAL ECONOMY 1113 (1998); Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 JOURNAL OF ECONOMIC LITERATURE 285 (2008). *Contra* Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AMERICAN JOURNAL OF COMPARATIVE LAW 765 (2009).

<sup>15</sup> Legrand, *supra* note 1, at 228. Comparative lawyers may have an outsized role in the European project. See, e.g., Koen Lenaerts, *Interlocking Legal Orders in the European Union and Comparative Law*, 52 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 873 (2003).

<sup>16</sup> *Id.* at 229.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 230.

<sup>20</sup> See, e.g., Article 4(2), Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, October 26, 2012, O.J. (C 326/01) (“The Union shall respect the equality of Member States

anything other than a distinct European identity, drawing on a particular European society, for a discrete and cohesive European economy, law and politics. European unity is the teleology and “an ever closer union among the peoples of Europe” is its method.<sup>21</sup> The reasons for wanting *this kind* of Europe are so varied and fluid that it is hard to assess them. But they strike me as sadly reactive: European unity as a *reaction* to European bellicosity; European unity as a *reaction* to the newly globalized, borderless world-order; European unity as a *reaction* to the loss of geo-political standing relative to big powers such as the United States, but also China. I least like the offer of European unity as a *reaction* to the crises stirred by steps taken to fashion European unity. This is not an affirmative vision. But it might have been: Europe as a framework within which the continent’s rich—oh so very rich—multi-valence and plurality would be fostered and celebrated.<sup>22</sup> “Divided we stand,” perhaps. Or “*E pluribus unum*,” if that catchy motto had not already been taken. It is tempting to say that this “sum of the parts” approach would have precluded Europe’s many remarkable achievements. But if Brexit can happen—not to mention the roiling refugee crisis and the never-ending debt crisis and southern Europe’s lost generation—maybe those achievements were only ephemeral. Maybe they came at the price of cutting off Europe’s nose to spite its face. Sometimes less really is more, especially if it is confidently and securely rooted in a realizable and realistic consensus. No one really cares exactly how high Icarus was able to fly. It is his crashing into the sea that we all remember. Would a “lesser” Europe—albeit a Europe animated by the dream of validating and actualizing the diversity of the 28—have been able to turn the Leave’s 52 percent into the Remain’s 48 percent? Legrand pointed us to James Tully, who observed that “the suppression of cultural difference in the name of uniformity and unity is one of the leading causes of civil strife, disunity and dissolution today.”<sup>23</sup>

One troubling reason why Europe has taken another path, even if it led through “unity” to Brexit, is that Europe’s most vigorous and convinced advocates have a not-widely-shared disregard for nations and national cultures and national identities. These Europeans are the anti-patriots of a hoped-for supra-national new world order. Their distance from or disdain for any national identity frees them to aspire to and work for a unified supra-national Europe. Indeed, it may compel them to do so. What else do they have to call

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before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”).

<sup>21</sup> See, e.g., Article 1, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, October 26, 2012, O.J. (C 326/01).

<sup>22</sup> Remember Article 4(2) of the Consolidated Treaties?

<sup>23</sup> Legrand, *supra* note 1, at 229 (quoting JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 197 (1995)).

home? Particularly in Europe, there may be some convincing historical reasons for this stance, but I do not want to resolve the normative debate here. Instead, I want to remark on how unusual this perspective is. Identification with one's country is the global norm. Europe's European unifiers are a radical exception. The World Values Survey obtained results from 97 countries to the query: "How proud are you to be [*substitute your own nationality*]?" In 69 of the countries a majority of respondents said they were "very proud."<sup>24</sup> This result includes nearly 70 percent of Indians,<sup>25</sup> the world's second most populous country.<sup>26</sup> This should be emphasized: nearly twice as many Indians alone express a strong identification with their state than there are Europeans altogether.<sup>27</sup> Large majorities share this sentiment in the world's third and fourth largest countries as well.<sup>28</sup> And the world's most populous country? China is not covered by the survey, but research has repeatedly confirmed "a rising tide of nationalism" in China, especially "amongst China's young university students in urban areas."<sup>29</sup> In a result that eerily points to the outcome of the Brexit referendum, half of the British surveyed said they were "very proud to be British."<sup>30</sup> It is true that ten European Union Member States find themselves in the small minority of nations about which fewer than 50 percent of their citizens express this kind of patriotism.<sup>31</sup> But it is really only France and Germany—the Union's old engine—where this post-national impulse reaches anything like a firm social consensus. Lots of people, all across the Union, still strongly cling to their national identity. Spain stirs considerable patriotism in its citizens—despite all the tension between its regions.<sup>32</sup> Austria, in another (somewhat older) world survey of national pride, ranks fourth, closely

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<sup>24</sup> Karlyn Bowman *et al.*, *Polls on Patriotism*, AMERICAN ENTERPRISE INSTITUTE 22-23 (June 2015), available at [https://www.aei.org/wp-content/uploads/2015/06/Bowman\\_Public-Opinion-Study\\_Patriotism\\_2015.pdf](https://www.aei.org/wp-content/uploads/2015/06/Bowman_Public-Opinion-Study_Patriotism_2015.pdf).

<sup>25</sup> *Id.*

<sup>26</sup> See *Country Comparison – Population*, CIA WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html>

<sup>27</sup> *Id.*

<sup>28</sup> Fifty-six percent of Americans are "very proud" of their country (out of a population of 300 million). Fifty-six percent of Indonesians are "very proud" of their country (out of a population of 235 million).

<sup>29</sup> Liqing Li, *China's Rising Nationalism and Its Forefront: Politically Apathetic Youth*, 51 CHINA REPORT 311, 312 (2015) (citing a number of studies).

<sup>30</sup> Bowman, *supra* note 23.

<sup>31</sup> Slovenia (49%), Romania (43%), Hungary (43%), Italy (41%), Sweden (40%), Bulgaria (39%), France (28%), Germany (24%), Estonia (21%), and the Netherlands (21%). See Bowman, *supra* note 23.

<sup>32</sup> Spain (55%). See Bowman, *supra* note 23.

following Australia, Venezuela, and the United States.<sup>33</sup> This entrenched national identification was always going to be—and Brexit seems to say that it still is—a profound barrier to European unity. This also serves as a caution against ridiculing this part of the Remain voters' motivations. Britishness—and other forms of national identity—may be nostalgic and retrograde, but it is real and it belongs to the people. As Legrand put it: “these differences are not just superficial or technical distinctions, ... they are differences which play a constituting role in shaping national and cultural identity.”<sup>34</sup> These attachments, Legrand explained, “must be apprehended as a legitimate and often vital aspect of social existence which, as [they help] to define selfhood, deserve to be respected.”<sup>35</sup> Unionists demean and dispute this widely-held *Weltanschauung* at the risk of seeing their dreams dashed any time these “national people” are allowed to speak on the matter of Europe.

Another reason might be Legrand's insight that European universalization is a product of the same comprehensive rationality that conditions the civil law's “purposeful drive toward abstract universalism.”<sup>36</sup> The same impulse for systematization and generalization, Legrand argued, have infected the “convergence agenda that animates a significant academic, bureaucratic and political constituency within the European Community.”<sup>37</sup> Europe, on these terms, consists in an epistemology that, similar to the civil law mentality, seeks to “banish particularized perceptions by ordering them into an exhaustive and categorical ... framework.”<sup>38</sup> Europe is another expression of faith in transcendental universalism. It is the Enlightenment answer to tired Romanticism. This, however, is an ethos that does not have to ask itself why alterity should bow to a totalizing universalism, which is the ultimate good in itself. This approach to integration, Legrand concluded, is merely a “variation on the theme of cultural imperialism.”<sup>39</sup> Others have reflected on the

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<sup>33</sup> See Tom W. Smith & Seokho Kim, *National Pride in Comparative Perspective: 1995/96 and 2003/04*, 18 INTERNATIONAL JOURNAL OF PUBLIC OPINION RESEARCH 127, 129 (2006).

<sup>34</sup> Legrand, *supra* note 1, at 225.

<sup>35</sup> *Id.* Legrand argued that “it is a mistake to underestimate the constitutive links between individual welfare ... and implication in cultural forms, including law, which are recognizable by participants (and which are recognized by others) as being *theirs*.” *Id.* at 226.

<sup>36</sup> *Id.* at 222.

<sup>37</sup> *Id.* at 216.

<sup>38</sup> *Id.* at 217.

<sup>39</sup> *Id.* at 226 (citing I. MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 59 (1990)).



“darker legacies” that should hound Europe’s new, more benevolent imperialist turn.<sup>40</sup> Despite the ugly evidence of past universalisms, dangling around Europe’s neck like the albatross borne by the Ancient Mariner, Europe has preferred to rationally unify and put in order the continent’s cacophonous chaos. “One can perhaps sympathize with the desire for a more orderly, circumscribed world,” Legrand conceded.<sup>41</sup> “One can perhaps relate to [the] yearning for the suppression of discord and dissension.” But the problem with convergence, Merryman warned us, “is more accurately perceived as a problem of *sensitivity*.”<sup>42</sup> We are seeing just how big the problem of a sensitivity-deficit (yes, another crippling European deficit) is in some of the reactions to the Remain voters.

Between these imposing pillars of the European unity mentality there is very little scope for the European Union to “learn” the kind of sensitive, diversity-affirming answer that can be the only appropriate response to Brexit and those in other Member States who feel profoundly linked to their nations and who will continue to bristle at attempts to subsume them into a “unifying pattern not unlike the Platonic belief in a final rational harmony.”<sup>43</sup> But if it is to survive, the European Union must find a way to learn this. Legrand pointed us towards Samuel Beckett, who said that the task of the artist now “is to find a form that accommodates the mess.”<sup>44</sup>

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<sup>40</sup> See, e.g., *Special Issue – Confronting Memories: European “Bitter Experiences” and the Constitutionalization Process: Constructing Europe in the Shadow of its Pasts*, 6 GERMAN LAW JOURNAL 245-512 (2005); *Special Issue – European Integration in the Shadow of The “Darker Legacies of Law in Europe” Europe’s Darker Pasts Revisited*, 7 GERMAN LAW JOURNAL 71-256 (2006).

<sup>41</sup> Legrand, *supra* note 7, at 25.

<sup>42</sup> Legrand, *supra* note 1, at 227 (citing J.H. Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, in *NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE* 232 (M. Cappelletti ed., 1978)).

<sup>43</sup> *Id.* at 230.

<sup>44</sup> Legrand, *supra* note 7, at 35 (quoting T.F. Driver, *Beckett by the Madeleine*, 4 COLUMBIA UNIVERSITY FORUM 23 (1961)).



## **They Do What They Want, But Do They Also Know What They Want?**

*Christoph Möllers*  
*Humboldt University Berlin, Law Faculty*  
[\[moellers@rewi.hu-berlin.de\]](mailto:moellers@rewi.hu-berlin.de)

Eurosceptics of all kind feel vindicated by the Brexit. However, their reasons do not only differ, they are actually inconsistent: For leftists like the Greek Prime Minister Alexis Tsipras the vote expresses the failure of a socially unjust political order devoted to austerity and market liberalism. Considering the anti-regulatory bias of the Leave campaign and the strict austerity policy of the newly re-elected conservative majority, this seems like a rather paternalistic interpretation. Many on the left-wingers refuse to accept that there are democratic majorities for inequality. They prefer to treat the voters as the victims of a wrong consciousness instilled by politics or the media.

For right-wing nationalists it seems to be more plausible that the Leave campaign has won. However, this alone does not necessarily make their point of view coherent. It is an irony of the growing right-wing nationalism that it is - contrary to Herders' assertion of the nation as an individual - so well coordinated on the European level. All European nations should be united in their equal rejection of Europe. Nigel Farage gloated after the referendum that it will be the beginning of the end of the European Union (EU). But why does he care after the British have decided to leave? His reaction shows that what the right-wing EU-opponents are really against is not the EU. They want to establish anti-minoritarian xenophobic regimes all over Europe. In a dark sense the extreme right is deeply European, perhaps more European than left and centre.

The fact that the EU is being criticised by politically opposite camps, is both good and bad news. The good news being that the EU actually is the centrist organization that its advocates praise. As such it cares for the legitimate need for compromises between its members. Yet, this is exactly why – and here comes the bad news – what happened to the EU in Britain could happen to it in whole Europe: it can be grounded down easily between the opponent political camps. It is important to see that the result of last week's vote should less be ascribed to the already EU-sceptical conservatives, but rather to a paralysed Labour party. The European left-wing will soon have to decide whether it wants to further distance itself from the EU as an agent of neoliberalism, or to take seriously its

achievements in various fields ranging from the protection of the environment to anti-discrimination. This ties in with a crucial current debate in the social sciences, a discipline traditionally dominated by the left, which could become unusually relevant for an academic debate. If the European left-wing decides against the EU, this could lead to the Union's end without having much of a positive effect on the left political project.

A third interpretation of referenda on the European Union traditionally reflects the point of view of the EU-technocracy. As after the referenda on the European constitution held in France and the Netherlands in 2005, the technocracy might adopt the view that the vote was really not about Europe, but about domestic politics. That this time nobody dares to say this in public is a testimony to how careful and defensive the European technocracy has become – which is not a bad thing either.

In any case, all three explanations share one flaw. They suggest that if the British want to leave the EU, there must be more to it than just their legitimate opinion that from a British point of view, the EU does not fit to Britain. Be this as it may (the country is obviously split about their relationship to the EU), while the vote indeed made a statement about the EU, it does not allow any necessary conclusion about the state of the EU. Unlike many – EU-advocates included – assume, the British rejection of the EU is not only the expression of Britain's strong political identity. Great Britain, in this respect most similar to the Ukraine and Turkey, is a nation on the European periphery that cannot agree on the question whether to be part of Europe or not. Unlike Scotland, England may be regionally homeless, and this is certainly not a sign of strength. Regional integration becomes more and more a necessary condition for conducting foreign policy, even though it can have the price of reducing control in domestic politics. Without a regional framework, a middle-size power soon becomes the object of the power politics of true great powers. Or, how Mary Beard, publicist and ancient historian, put it: "The issue is not "winning back control" as spun; but what "control" means in joined up world and how we ensure it."<sup>1</sup> How much this question was missed out in the British debate will become obvious should the British aspire, as Boris Johnson now carelessly states, a status comparable to that of Norway or Switzerland. Both countries accept most parts of EU law without being able to participate in the decision-making process. And both pay relatively more money for it than the United Kingdom did. The project of regaining sovereignty would be turned upside down.

This does not change the fact that the British people have come to a decision and that it would be presumptuous to question its obligatory effect. Second-guessing of the decision could be even more devastating for the British democracy than the decision itself.

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<sup>1</sup> Mary Beard on Twitter (June 25, 2016, 0:41 AM), <https://twitter.com/wmarybeard/status/746609323380449280>.

Nevertheless, one does not have to like the referendum just because one respects it. The vote can hardly serve as a model for democratic procedures. Too many aspects seem dubious. Besides the remarkably high impact of factually wrong allegations, its feudal style has been striking, in which upper class-boys carry on personal rivalries in national politics. Is this really more functional than the good old continental European party system? Especially irritating is the fact that a simple majority sufficed for such an important decision. Decisions made by a simple majority obtain their legitimacy from the fact that they can be modified by a simple majority. This does not seem possible in the case at hand. Nevertheless, the true enemies of the EU can now be recognized by their hurry to use the political momentum for their case, while someone like Boris Johnson, who does not have any deep political aversion against the EU that could drive him, has to get things sorted out first. The quest for an informed decision about the value of the EU could learn a lot from the observation of the consequences of Britain's exit. In the aftermath of the vote, the British seem to be far less enviable than before – even for Euro-sceptics. To stylize them into being part of a new avant-garde of sovereign democracies on the level of Canada and Australia, as has been done, seems rather absurd and can be easily refuted by studying European geopolitics and history.

Does this mean – so we read – that the EU can go on like before? Well, there is no right answer to a wrong question. In the last years, the EU has changed immensely. It never went on “like before”; though nobody would claim it handled its current crises successfully. Banking regulation is still weaker than in the United States, the debt crisis remains unsolved and, facing migration, Europe is lacking a common regime. However, those problems do not necessarily get worse with the Brexit. And it is cheap if critics agree on the failure of the EU, without being able to agree on how an EU should be constructed that does not fail. As long as one side wants to have strict banking regulation, while the other one tries to protect its domestic financial institutions, as long as one side wishes a European fiscal system, while the other insists on domestic control over the budget, as long as one side wants a common refugee policy, while the other one refuses to accept any immigration at all, it will be pointless to speak of the failure of “the EU” to solve its problems. If there is one thing to be learned from sovereigntists it is that the EU cannot permanently outsmart its member states.

This is why one should not be deceived when politicians now demand that the EU has to change – preferably the way they always wanted it to. Exactly because the EU consists of democratic states, it will not change unless the member states agree on it. But they do not, and neither do their voters: the British, who want to protect the City from banking regulation, or the Germans, for whom their moral convictions concerning immigration are more important than a European consensus. The much lamented EU elites have either lost political influence so heavily that they - like the European Commission - rather function as privileged bystanders in the crises, or they are so powerful because they represent the

member states that follow their own interests only. The European Central Bank as the result of a failed institutional compromise between France and Germany is point in case. In the same logic, the British could not wait to welcome employees from the new member states after the eastward expansion of the EU and voluntarily refrained from using transitional rules. That precisely this migration boost – not the refugees of 2015, which barely arrived in Britain – was one of the main motifs for people voting “leave” last week, is a typical sign of the weakness of the political will Britain shares with most of other member states. It belongs to democratic autonomy as the daily bottle of Scotch to individual freedom. That the member states are unable to agree on so many important questions is not the fault of the EU. It is the EU. For the same reason one should not believe those who claim to like “Europe”, but not the EU. For the time being, The EU is the imperfect political form of Europe. To be dissatisfied with it is one thing. A different thing is to make a smooth transition from questioning the EU’s policies to questioning its existence. What is the point in insisting to solve problems alone that cannot be solved but in common?

## **Financial Services, the EU, and Brexit: An Uncertain Future for the City?**

*Niamh Moloney*

*London School of Economics and Political Science, Law Department*

[\[N.Moloney@lse.ac.uk\]](mailto:N.Moloney@lse.ac.uk)

The financial services industry is of central importance to the UK economy. It represents some 7% of GDP. It also generates major exports for the UK - in the region of one-third of UK financial services are exported to the EU.<sup>1</sup> News reports in the immediate aftermath of the referendum result included the sharp drop in banking stocks; the overtures being made to attract UK financial business away from the City to other EU centres; and plans by leading financial institutions to move some operations away from the City. Vivid illustrations all of the importance of the Brexit vote for the City and the UK financial services industry.

The financial services sector is one of the most heavily regulated sectors of the modern economy, reflecting the need to protect the public interest in a strong and stable financial sector. The EU has, up to now, provided the framework within which UK regulation of the financial sector has been designed, applied, and supervised.

The nature of the UK's relationship with the EU following its exit from the EU has yet to be determined. But the consequences of the extraction of the UK from EU financial governance are likely to be disruptive in nature and long term in duration. This short note highlights some of the many implications from a regulatory perspective.

### **The UK and the International Financial Market**

The arguments posed in favour of a 'Leave' vote often referenced the possibility of lower levels of financial regulation. The UK's exit from the EU is very unlikely to bring any significant change to the nature of UK financial regulation. This is because financial regulation is global in nature. Much of it derives from the standards set by the International Standard Setting Bodies (ISSBs) - for example, the Financial Stability Board, the Basel Committee on Banking Supervision, the International Organization of Securities

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<sup>1</sup> HM Treasury, *The Long Term Economic Impact of EU Membership and the Alternatives* (April 2016).

Commissions, and the International Association of Insurance Supervisors - and is shaped politically by the G20.

On exit from the EU, the UK's ability to influence and impose its preferences on these international standards will be severely diminished. At present, the UK has four channels through which it can protect its interests in financial regulation. First, as a member of the major ISSBs, it can directly advocate for UK interests – as it did during the Basel Committee negotiations on the pivotal crisis-era 'Basel III' banking regulation reforms. Second, the EU acts as collective bloc on these ISSBs where a common position can be constructed (the Commission typically sits on the ISSBs, whether directly or in an observer capacity) - collective EU interests also shaped the Basel III reforms. Third, as international standards are implemented in the EU through the adoption of related EU Directives and Regulations, the UK, through the legislative process, can protect UK interests by influencing how Member States implement the standards. The adoption of the behemoth Capital Requirements Directive IV/Capital Requirements Regulation 2013 (CRD IV/CRR) – which acts as the EU's banking rulebook and which implements Basel III - saw the UK achieve a number of negotiating successes designed to ensure the implementation process would not undermine UK interests. Finally, the EU's European Supervisory Authorities, established in 2011 as part of the EU's crisis-era institutional governance settlement and on which all the EU Member States are represented, play a key role in implementing international standards - the European Banking Authority, for example, has been a major institutional player in the design of the detailed technical rules required to implement CRD IV/CRR/Basel III. On an EU exit, the UK will lose three of these four channels for influence. But it will remain obliged to implement international standards.

Other international consequences follow. As has been well charted in the literature, the EU has, in the wake of the financial crisis, become one of the 'great powers' in international financial regulation. Part of the EU's related regulatory capacity (or ability to shape outcomes) internationally derives from the EU's ability to impose 'equivalence' requirements on third country access to the single market in financial services. The UK will no longer benefit from this regulatory capacity which has been used by the EU to negotiate access by EU firms to third country markets. For example, the removal by the US of the costly 'reconciliation' requirement imposed on EU firms (to reconcile their financial accounts to US GAAP – the US accounting standard) was agreed because the EU adopted, as a bloc, International Financial Reporting Standards: the US agreed accordingly to accept accounts following International Financial Reporting Standards. A technical issue, certainly, but one of great practical significance for the many large UK firms listed on US stock exchanges.



### **The UK and the Single Market**

On an exit from the EU, the financial services industry will no longer have access to the massive single market in financial services on the basis of current arrangements. There is no clarity at the moment on the nature of the UK's potential access arrangements. But a number of comments can be made with a reasonable degree of certainty.

The financial services 'passport' – through which UK financial institutions access the single market - will not be available in its current form. The passport is based on the 'home' country of a financial institution (where that firm is registered) supervising that firm and applying the EU's 'single rulebook.' The passport allows a firm to provide services cross-border and to use branches without being subject to duplicate regulation or supervision. For this reason, international banks and financial institutions have established subsidiaries in the UK so that, as UK home-regulated firms, they can access the single market and avoid the complexities, opacities, and uncertainties of third country access arrangements. The passport depends on mutual trust between national supervisors and is, accordingly, dependent on harmonized regulation and on coordinated supervision of financial firms. The financial crisis led to a political and institutional consensus in the EU on the need for a harmonized single rulebook that would protect the single market against cross-border risk transmission, support pan-EU financial stability, facilitate cross-border market access – and also meet the EU's G20 commitments with respect to financial regulation reform. This single rulebook is of massive scale and depth, being composed of 'level 1' legislative rules, 'level 2' technical delegated rules adopted by the Commission, and 'level 3' soft guidelines and other measures adopted by the European Supervisory Authorities. It runs to thousands of pages of text and its adoption has required a monumental effort by the EU's rule-making institutions, by regulated actors, and by a wide range of stakeholders. The UK has implemented most of these rules and will be required to continue with the implementation process until it leaves the EU. In all likelihood most if not all of these rules would have been adopted by the UK without an EU imperative, as they reflect the G20's reform agenda, the requirements imposed by the international standard setters, and the changed post-crisis global consensus on how regulation should be designed and applied.

On an exit, the UK will no longer have access to the financial services passport. Under the European Economic Area/Norway model, it would have access to the single market but would be required to apply the single rulebook - and would not be involved in the negotiations on and the development of this rulebook. This matters as the single rulebook is highly dynamic. For example, the EU's current major regulatory project for financial services is Capital Markets Union (CMU), which was launched by the Commission in September 2015. CMU is a liberalization project. It is designed to deepen EU capital markets, strengthen market-based finance, and reduce the current dependence on bank

financing in order to support pan-EU growth. Its importance to the City – the major capital market centre in the EU - was immense. On exit, and under an EEA model, the UK will not be able to influence CMU-related negotiations, despite their acute importance for the City. The UK will also lose the ability to shape refinements to the single rulebook which could protect its interests. EU financial regulation is currently being reviewed - the massive crisis-era single rulebook contains a number of automatic ‘review clauses’ which are now being activated. On exit, the UK will be outside this review process and unable to influence it to protect UK interests. To take one example, the famous ‘bankers’ pay bonus cap’, which was fiercely resisted by the UK, is now being reconsidered, particularly with respect to whether new rules governing the proportionality with which the cap applies are required. The UK will have no voice in these discussions should they not be completed prior to a UK exit. And in the interim, it is difficult to see how the UK will be able to exert any form of influence in ongoing Council negotiations on financial regulation – not least as a euro area qualified majority is now in place in the Council and there will be few incentives for euro area Member States to coalesce with the UK: the interests of those Member States with large financial centres - notably France, Germany, the Netherlands, Luxembourg, and Ireland - can be expected to dominate. Previously, the UK has been an influential and effective influence on financial regulation negotiations. For example, many of the exemptions and calibrations contained in the massive Markets in Financial Instruments Directive II/Markets in Financial Instruments Regulation 2014 (MiFID II/MiFIR), which will govern EU investment firms, markets, and infrastructures from 2017, and which are designed to ensure the new rules are calibrated to reflect different market sectors, are a product of UK negotiation successes.

Beyond the EEA model, any other access model would, given the highly regulated nature of financial services (both in the EU and globally) involve some sort of ‘equivalence’ arrangement, with the UK seeking access as a ‘third country’ to the single market. The rules governing third country equivalence and related access to the single financial market are different across different EU financial regulation measures. Sometimes the equivalence decision is held at EU level (with the Commission), more often it is held at Member State level. Equivalence decisions are not automatic and it is hard to see how any equivalence negotiations with the UK – whether by the EU or individual Member States - would not become highly political given how competitive the global financial market is. As the UK has adopted the single rulebook, and as it would likely keep it if it was seeking some form of single market access, formal regulatory equivalence would not pose a major problem. But significant challenges for the UK could be generated by any new rules which the UK would be required to follow, or at least to adopt in such a way that the equivalence assessment was met, and which it had not been able to influence. New EU rules are on the horizon. These include rules governing investment fund regulation which would be of significant importance to the UK asset management sector. In addition, much of the single rulebook, with which the UK would have to show equivalence, takes the form of highly detailed

technical rules which are proposed by the European Supervisory Authorities. The UK will not have a seat or vote on these Authorities on Brexit and will not be able to influence the new technical rules that will be proposed by these Authorities.

But equivalence under current EU financial law is not simply a matter of regulatory equivalence. It also involves an assessment of supervisory/enforcement equivalence, and here the difficulties could be considerable given the highly elusive nature of equivalence determinations with respect to supervision and enforcement. The UK might, for example, come under pressure to adopt a tougher approach to enforcement or to change its approach to supervision. At present, no such pressure can be applied within the single market.

Finally, and assuming it was operating outside an EEA arrangement, the UK would lose the EU Treaty guarantees relating to single market access. At present, the right of UK firms to choose the form in which they access other Member State markets (whether service provision, branches, or subsidiaries) is protected as a matter of EU law. This guarantee would no longer be available and UK financial institutions would accordingly become vulnerable to requirements to, for example, establish costly subsidiaries.

### **The UK and the Euro Area**

It is very unlikely that, politically, the euro area will be neutral or disinterested with respect to the UK remaining the major centre for euro-denominated trading in the EU (as it currently is). Prior to June 23, there were significant tensions relating to euro area interests and influence, particularly as the euro area can now form a qualified majority voting bloc in the Council and so shape EU/single market decision-making more generally, and as Banking Union has created new incentives and opportunities for euro area interests to be pursued. The UK's efforts to minimize the dangers of euro area caucusing and of any potential discrimination against single market Member States who do not form part of the euro area have had traction. Notable outcomes include the successful action by the UK against the ECB's 'location policy' for central clearing counterparties – a critical part of financial market infrastructure - which the UK claimed discriminated against non-euro-area central clearing counterparties by requiring euro area location.<sup>2</sup> Similarly, the 'double lock' voting arrangement which applies to the European Banking Authority's Board of Supervisors, and which requires a double majority of Banking Union Board members and of non-Banking-Union Board members, were driven by the UK. Most recently, the February 2016 New Settlement on the relationship between the UK and the EU was designed to give legal, but

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<sup>2</sup> Case T-496/11, *European Central Bank v UK*. The case was decided on an issue relating to the scope of the ECB's powers.

more importantly political, protection to the UK (and the single market) against euro area caucusing risks and was the European Council's response to the UK's call for legally binding principles that safeguarded the operation of the Union for all 28 Member States and protected the single market.<sup>3</sup>

The New Settlement is now null and void. On an exit, and assuming a non-EEA arrangement, the legal protections against discrimination within the EU on currency grounds, both in the Treaty and in specific EU financial services measures, will fall away. Even within the EEA, the UK will no longer have a seat or vote on the European Banking Authority – it will have only observer status. The consequences could be severe for euro-denominated trading and financial services. Location requirements, for example, could be imposed on the UK's access, as a third country, to the single market. Such location requirements could require certain euro-denominated business/trading to be carried out in the euro area. This is a particularly likely outcome with respect to critical market infrastructures, such as stock exchanges and central clearing counterparties, in relation to which rescue/resolution responses involving ECB/euro area liquidity support might be needed. These requirements are all the more likely to follow given the political and institutional support in some quarters for a more integrated 'Financial Union,' based on Banking Union but which would also include more intense institutional integration with respect to capital markets.<sup>4</sup> Operating outside the EU Treaties and their guarantees, the UK would have little protection against a Financial Union which sought to repatriate certain euro-denominated trading through regulatory means. Network effects may also follow. If euro area business shrinks, the UK market might become less liquid and lose business more generally.

#### **The UK and the Domestic Market**

Finally, for those UK firms that do not trade with the EU, an exit from the EU will also generate costs and uncertainties. This is because of the changes which will be required to the legal operating environment for financial services in the UK.

Much of UK financial legislation is in the form of EU Regulations which apply directly in the UK. These rules will cease to have legal effect on an EU exit. They must be replaced if a

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<sup>3</sup> Decision of the Heads of State or Government Meeting Within the European Council, "Concerning a New Settlement for the United Kingdom with the European Union," European Council Meeting, 18 and 19 February 2016 (EUCO 1/16), Annex 1. See N. Moloney, *Capital Markets Union: "Ever Closer Union" For the EU Financial System?*, 41 EUROPEAN LAW REVIEW (2016) 307.

<sup>4</sup> *Completing Europe's Economic and Monetary Union*. Report by Jean-Claude Juncker, in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi, and Martin Schulz (June 2015).

regulatory vacuum, in an area of the economy which demands high levels of regulation if the public interest is to be protected, is to be avoided. During this replacement process, and aside from any consideration of equivalence-related obligations which may arise, the UK will also have to decide which of the obligations it has implemented through Directives it will keep 'on the books'. This will be a mammoth task given the vast scale, breadth, and complexity of the EU financial regulation rulebook and the great depths at which it is embedded in national regulatory systems. The UK will also have to decide what to do with the vast array of guidelines, templates, FAQs, and so on which have been adopted by the European Supervisory Authorities. Although in the form of soft law, these measures have become part of the regulatory fabric supporting the UK financial sector and protecting the public interest in stable markets, and have also shaped the business and operating models adopted by financial firms.

The unpicking from the macro EU financial regulation order, and in a manner which brings minimum disruption to the financial services sector and its users, of a coherent and stable micro UK financial regulation order - which protects investors and supports financial stability - is a task which confounds the search for a metaphor which illustrates the immense complexity engaged. It can only be hoped that UK regulators and policy makers – and the UK financial services industry - are not, at the same time, required to grapple with dislocation in the financial markets.



## **The Personal Implications of the Referendum Results for (German) EU Citizens Living in the UK**

*Jule Mulder*

*University of Bristol Law School*

[\[jule.mulder@bristol.ac.uk\]](mailto:jule.mulder@bristol.ac.uk)

According to the Office for National Statistics' 2014 estimate, 300,000 UK residents were born in Germany and 131,000 are German nationals.<sup>1</sup> This makes them the fifth biggest group of immigrants in the UK by country of birth—preceded only by people born in India, Poland, Pakistan and the Republic of Ireland—and the twelfth largest group of immigrants in terms of nationality.<sup>2</sup> Thus, although Brexit's rhetoric against immigration has not directly targeted Germans, a large number will be affected by the UK's changing relationship with the EU. Just as for other EU citizens, their future status in the UK is all but certain.

What are the possible personal implications for German, and other European citizens, who exercised their EU right to free movement and immigrated to the UK? Of course the short (legal) answer is that nothing will happen in the short term even though protection under the 1969 Vienna Convention on the Law of Treaties is far from clear. European law is still applicable in the UK and the “new deal” negotiated in February 2016, will not be implemented. Changes can only come about once and if Article 50 TEU is triggered, and then, only if the withdrawal agreement changes the status of EU citizens in the UK, or free movement rights in general. While the reduction of (European) immigration was one of the top priorities for the Leave campaign, it is less than certain that EU immigration will actually be limited under the agreement that will have to be negotiated. In my view it is inconceivable that the EU will allow the UK access to the internal market without the right to free movement of persons or workers. This is the case not only because the EU has no interest in offering the UK a favourable deal (thereby encouraging other Member States to leave the Union) but also because the four freedoms are tightly and logically connected.

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<sup>1</sup> See *Population by Country of Birth and Nationality Report: August 2015*, OFFICE FOR NATIONAL STATISTICS (27 August 2015) available at <http://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/populationbycountryofbirthandnationalityreport/2015-09-27>.

<sup>2</sup> In 2010 Germans were the fifth largest group in terms of both, nationality and country of birth. See *DataBlog*, THE GUARDIAN (September 9, 2010), available at <http://www.theguardian.com/news/datablog/2011/may/26/foreign-born-uk-population>.

Why should the EU allow the UK to benefit from the internal market (by exporting services/goods) while preventing other Member States and its citizens from doing the same (by providing human capital and a workforce)? Leaving the EU does thus not necessarily mean a reduction of EU migration, a fact which was also conceded by the Leave campaign, although conveniently only after the referendum.<sup>3</sup> Even if the withdrawal agreement includes provisions to limit European immigration, it does not necessarily follow that this will directly affect the citizens who are already here. After all, the UK as well as the EU has an interest in accepting a sort of grandfathering of rights for citizens who already exercised their right to free movement. Otherwise the approximately 1.3 million Britons who currently live somewhere else in the EU might be obliged to return to the UK,<sup>4</sup> which could put increasing pressure on the social services and the NHS. Finally, even if the UK introduces a (retroactive) “Australian style point system” as suggested by Nigel Farage,<sup>5</sup> many European citizens being would probably be able to stay in the UK because they are university educated. Immediate change seems unlikely, but the detachment from the European Union and the possible rejection of direct effect always bears the risk that protection under the treaties, or the eventual withdrawal agreement, will be less effective than the current regime and that rights will be watered down over the years.

Moreover, the lack of immediate legal consequences does not mean that there are no personal implications for Germans, or other EU citizens, who live in the UK. Beyond the obvious concerns about the economic well-being of the UK, Brexit has a real effect on many jobs and what they entail, including new concerns about job security and career prospects, and the unseemly and uncomfortable anti-immigration rhetoric that is poisoning the political discourse and life.<sup>6</sup> Take, for example, the academic staff at UK universities of whom more than 15% are non-British EU nationals.<sup>7</sup> Brexit will affect funding of research projects and student/staff exchanges within the Erasmus program, the

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<sup>3</sup> Ben Quinn, *Leave campaign rows back on key immigration and NHS pledges*, THE GUARDIAN (June 25, 2016), available at <http://www.theguardian.com/politics/2016/jun/25/leave-campaign-rows-back-key-pledges-immigration-nhs-spending>.

<sup>4</sup> Alberto Nardelli, Ian Traynor & Leila Haddou, *Revealed: thousands of Britons on benefits across EU*, THE GUARDIAN (January 19, 2015), available at <https://www.theguardian.com/uk-news/2015/jan/19/-sp-thousands-britons-claim-benefits-eu>.

<sup>5</sup> Adam Donald, *Immigration points-based systems compared*, BBC NEWS (June 1, 2016), available at <http://www.bbc.co.uk/news/uk-politics-29594642>.

<sup>6</sup> Harriet Agerholm, *Brexit: Wave of hate crime and racial abuse reported following EU referendum*, THE INDEPENDENT (June 27, 2016), available at <http://www.independent.co.uk/news/uk/home-news/brexit-eu-referendum-racial-racism-abuse-hate-crime-reported-latest-leave-immigration-a7104191.html>.

<sup>7</sup> See *Free Online Statistics*, HIGHER EDUCATION STATISTICS AGENCY, available at <https://hesa.ac.uk/stats-staff>.



recruitment of talented students and staff from other European countries, as well as the research focus and activities that might no longer be recognised as relevant within the UK academic community. What are European lawyers, like myself, supposed to do during the time of withdrawal negotiations and post-Brexit? While constitutional European lawyers may be on high demand to comment on the negotiations and changing relationships in the near future, others whose research focuses on substantive EU law, such as EU employment law, EU procurement law, or EU environmental law, may find themselves in a position where they have to retrain to become national lawyers in their respective fields.

Alternatively, academics may choose to leave the UK as it turns its back on Europe. This, of course, would have profound effects on the UK as a research power house. It will also affect academics' career paths. Here, German citizens, whether academic or not, may have the advantage that the strong German economy should be able to accommodate these Brexit exiles' home-coming. Young EU migrants from, for example, Greece, Spain or Portugal, may not find themselves in such a comfortable position. They may have to try their luck in other European countries, which will often include the need to learn yet another language. But even for Germans, a return to their home-country after years in the UK undoubtedly will have effects on their career prospects. Many German academic and non-academic workers in the UK, including myself, have been attracted by the openness and flexibility of the British (academic) labour market, which often values talent more than titles and degrees.<sup>8</sup> German academia, with its much stricter degree and career path requirements, will not necessarily be able to recognise the work experience gained in the UK's very different academic and educational system. Moreover, a choice to return is, of course, much more than an economic cost/benefit calculation. Many European citizens arrived in the UK as students or young professionals and now have made a home in their host country. They are often very well-integrated,<sup>9</sup> have friends and family in the UK, and will not easily be able to leave their host country without significant personal costs, including the potential loss of personal relationships and private networks and support. After years in the UK, the home country can often look much more foreign, strange, and unfamiliar than the country of choice. Nevertheless, Germans, just like other EU citizens, will have to ask themselves whether there is a future for them in a country whose majority just rejected the post-war European consensus and where xenophobic, anti-immigration

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<sup>8</sup> See, e.g., Oliver Imhof, *Why I'll leave the UK if Britain votes no to Europe (Opinion)*, THE GUARDIAN (February 24, 2016), available at <https://www.theguardian.com/commentisfree/2016/feb/24/leave-uk-brexit-german-london-human-rights>.

<sup>9</sup> See, e.g., Helen Pidd, *Britain's German-born population prefers life under the radar*, THE GUARDIAN (December 14, 2012), available at <https://www.theguardian.com/uk/2012/dec/14/german-born-population-uk-census>; Natalie Tenberg, *Krauts in Limey Land: Germans Go Eurotrash in London*, SPIEGEL ONLINE INTERNATIONAL (June 13, 2005), available at <http://www.spiegel.de/international/krauts-in-limey-land-germans-go-eurotrash-in-london-a-357978.html>.

rhetoric and anti-intellectualism have become acceptable within the mainstream political discourse.<sup>10</sup>

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<sup>10</sup> See, e.g., Oliver Imhof, *Why I will be leaving Brexit Britain (Opinion)*, THE GUARDIAN (June 25, 2016), available at <https://www.theguardian.com/commentisfree/2016/jun/25/why-leaving-brexit-britain>; Julia Ebner & Janet Anderson, *I'm an Austrian in the UK – I don't want to live in this increasingly racist country (Opinion)*, THE GUARDIAN (June 24, 2016), available at <https://www.theguardian.com/commentisfree/2016/jun/24/country-increasingly-racist-austrian-uk-briton-netherlands-eu-referendum-result>.

## **Brexit: Time for a Reflection Period about the *Finalité* of European Integration**

*Martin Nettesheim*

*University of Tübingen Faculty of Law*

[\[nettesheim@jura.uni-tuebingen.de\]](mailto:nettesheim@jura.uni-tuebingen.de)

Some events seem to be outside the scope of political imagination, even if they are not improbable. That the United Kingdom, one of the European Union's (EU) largest and politically most influential Member States, might leave the EU, is one of these events. The outcome of the referendum of June 23, 2016 has evoked surprise and notions of doom. "Catastrophe", "explosion of a bomb", "drama," are only some of the terms used by politicians and media observers to express their surprise and to signal that they are overwhelmed by the outcome. Reactions in the immediate aftermath of the referendum were uncoordinated, conflicting, and did not show a strong spirit of European integration. For example, it is not self-evident why the foreign ministers of the six founding Member States should gather to strategize over the response to the referendum, thus effectively excluding the 21 other Member States.

The outcome of the referendum calls for a period of reflection. It has created a situation in which the Member States should try to clarify the purpose and destination of the integration process. Obviously, in light of conflicting views, such a process will be difficult and may only yield a plan that is far from comprehensive. Further, for historians of the integration process, a call for a period of reflection may well evoke mixed feelings. A "period of reflection" was launched after the rejection of the EU Constitutional Treaty in France and the Netherlands in late spring 2005, seeking to reconnect the citizens with the European project and lead to a decision about the fate of the Constitution. In January 2007, the German Presidency declared that this reflection period was over, and soon thereafter, the substance of the Constitutional Treaty was converted into what would later be called the Lisbon Treaty. Then, the main objective appeared to have been to ameliorate the effects of the negative referenda in France and in the Netherlands. This, of course, is a recurring pattern: similar moves took place after negative referenda in Denmark and Ireland. The art of circumventing or correcting popular referenda is – so it seems - rather well developed, and it is thus not surprising that some EU federalist are musing publicly about ways to undo the referendum of June 23rd. Retrospectively, it is still unclear what exactly the authorities were reflecting about after the negative referenda on the Constitutional Treaty, and how they thought their reflections would reintegrate disaffected

European citizens. An open discussion of diverging political options was not in evidence then; instead, the question only seemed to be how to achieve “more Europe”.

The immediate aftermath of the British referendum does, therefore, not bode well for those who hope that it might inaugurate a period for real reflection. Some seem to hope that a quick exclusion of the United Kingdom, combined with an unfavorable new status at the kid’s table, will serve as a warning for other Member States contemplating a devolution. Others seem to suggest that the referendum of June 23rd might serve as a springboard for a fast reform process headed towards “more Europe”, thereby overcoming resistance that might otherwise have hampered the deepening of the EU. Interestingly, few seem to think seriously about ways to bring critical, doubtful Europeans “back in”. Instead of convincing the EU citizens of the value of the achievements of the integration process, the old routines of the EU federalists have been activated again.

Granted, it is easy to downplay the democratic significance of the referendum of June 23rd. It is also possible to question its democratic legitimacy. The events leading up to the referendum warrant a discussion about the value and appropriateness of direct democracy. But it would be wrong to coningle the question of the proper place of direct democracy in the integration process with decisions as to how to deal with its outcome.

It seems almost tragic that a thorough discussion about the future of the integration process did not take place before the referendum, but will instead be forced by its results. The routines of the political process in Brussels seem immune to any deep reflection or meaningful contributions to the way the future of the EU should be imagined, other than to propagate “more Europe”. A questionable sense of a historic and unalienable mission, institutional interests, and an occasionally odd sense of moral superiority come together. It is not clear to what extent the increasing alienation of the EU citizens is taken as a sign of warning rather than as the political aberration of uninformed people without the “right consciousness” and “understanding” of the post-national constellation. One has to wonder, today, how many more defections by Member States will be necessary until those in the lead in Brussels accept the idea that a European integration against the will of its citizens will ultimately fail.

The search for the “finalité”, i.e. for the goal of the integration process will not be easy, and it will not yield clear results. The interests of the Member states were always conflicting, and EU integration was always about a complex compromise, leading, ideally, to a positive calculus for each Member state. Recent debates about “European values” might have led the architects of EU governance to believe that “value”-talk might serve as a substitute for effective EU governance and interest satisfaction. This, of course, would be erroneous. More than ever before are the diverging interests of EU Member States visible: One group of countries wants less austerity and more transfers. Others want more supra-

national political governance, under their own guidance, without a meaningful impact on their sovereignty. A third group believes in the value of abstract rules, enforced by a neutral instance, and wants to avoid transfers as far as possible. This is not a situation in which compromises will be easy.

But the necessity of a fundamental discussion about the future course of the integration process is obvious. The EU is based on an increasingly heterogeneous group of countries. Warning signs abound: The enlargement to 28 Member States with different cultural backgrounds, widely varying economic status, and quite distinct political interests could bring the institutional setting of the EU architecture to a breaking point. Even so, rather straightforward reforms, such as the reduction of the size of the European Commission, have so far been impossible. Instead, additional players, such as the European Council or the European Parliament, have emerged. Attempts to improve efficiency have been rather unsuccessful. If the EU has one *raison d'être*, it is efficient problem solving. It lacks, however, the institutional preconditions to achieve this.

What is perhaps even more important is that EU integration has always been characterized by “muddling through”, by compromise, a long process of half-way steps into the future, and the realization of projects by incremental progress. All this might have been unsatisfying, but it worked, at least in areas such as the establishment of a single market, the agricultural policies or the subsidization of regions. There might have been inefficiencies, administrative problems, and a waste of money. But these problems were not really visible, not the least because nobody wanted to look too closely. The success of EU integration was measured by the formulation of programs and policies, not by results. In recent years, however, the EU has embarked into areas in which results are suddenly a measuring stick, and what has emerged does not look too good. Economic governance in the Eurozone was sub-optimal, and the reaction to the stability problems of the Monetary Union did not eliminate the structural problems of a union of countries with widely diverging competitiveness and growth prospects. The creation of the Schengen zone was successful internally, but the accompanying plan to entrust the Member States at the periphery of the EU with the establishment of a functional external border regime was a failure. To highlight this is not intended to blame the European Commission. The responsibility lies with the treaty making and law making authorities, who never seriously asked or answered the question how to deal with “crisis situations”. As a result, an imperfect and compromising architecture has emerged that functions during relatively good times, but that might collapse in times of strain.

The recent political developments have illustrated the failures of EU policies in ways so far unprecedented, for example, in areas such as the EU agricultural policies. While over-supply in food was hidden in warehouses or dumped onto the world market, the failure of the Schengen regime or the Dublin regulation became an issue for the evening news. It

does not help to attack the frightened reaction of large parts of the people to pictures of refugee treks in the heart of Europe with accusations of a “wrong consciousness” or worse. The political reaction was also not helpful: A manifest disrespect for the operation of the common rules did not strengthen the belief that the EU is in control; politicians who argue that the protection of borders has become impossible do not contribute to the feeling of sound governance. And the attempt to force through measures of ad hoc integration, such as the redistribution of refugees in areas that have not been subjected to treaty integration, very probably increased the feeling that European Integration was not about self-governance but about the imposition of an external will.

A similar narrative could be told with regard to the crisis management in the Economic and Monetary Union: The establishment of the EFSF and the ESM evoked feelings of betrayal in Germany (citizens did remember the “no bail out”- promise and the pledge not to establish a “transfer union”). But the same feeling of betrayal became also manifest in the South: the loss of governmental freedom, the imposition of austerity and the involvement of a “Troika” were considered to violate principles of democratic self-government, which were never put on the table of EU integration. Indeed, an architecture based on the idea of market discipline and market pressure has been converted into an architecture based on supranational and horizontal pressure. Some economically strong countries assumed a policing function that they were never meant to play in a community of equal Member States. This endangered the inner texture of the EU.

The problem, of course, is that expectations about “good governance” are widely diverging. Conceptions of what constitutes a “good live” could not be more diverse. On the one hand, strong voices in the discourse propagate a cosmopolitanism with disdain for borders, nationalism etc. They do not have any difficulty with the idea of becoming members of a European “republic”. In a more or less arrogant undertone, they prefer to attack their opponents as attached to a mentality taken from the 19th century without a proper understanding of post-national constellations. These voices place their trust into the liberalizing forces of the EU – and the value of their EU citizenship. On the other hand, others seem to feel that a supranational organization as dis-functional as the EU will not be in the position to stabilize their lifeworld; instead, they might suspect the EU of being one of the causes of the disarray. Will the EU be able to convey that it is able and willing to take care of the living conditions of the citizens most affected by market liberalization and globalization? Will the EU be able to stabilize borders, to ensure that a job will not emigrate, to protect citizens against the danger of terror? It will be a long way. The EU is per definition a de-stabilizing force – in the sense that it opens national and sub-national structures. It will not be able to replace the state, at least not in the foreseeable future. The recent attempts in this direction seem to be misguided: The strength of the Member states is the strength of the EU.

The question today is not deeper integration, but better problem solving. Despite their public rhetoric, it is not clear whether EU federalists have accepted this diagnosis. Some give the impression of wanting to walk in the same direction, perhaps even at a faster pace than before. They ask for more powers for the European Commission and the EU Parliament. They call for the establishment of a European Finance Minister with strong powers and command over an EU Budget used to subsidize projects of questionable value. The search for better EU governance has not yet begun, and it is questionable whether the EU institutions are the right platform.

At the heart of this search is the question of how much self-determination and how much efficient problem solving are warranted. These principles according to which such questions are decided may not be squared without conflict. It is a myth that the EU can at the same time be made more democratic and more efficient. Instead, the more efficient the EU becomes, and the more its institutions are able to overrule veto players, to overrule national decision making processes, or to raise and spend money, the less the influence of the individual. Size matters. The more decisions are left to the culturally embedded decision making processes in the member states or to a sub-national level, and the more veto players are allowed to raise their voices, the more the feeling of control and democratic self-determination will prevail. It is one of the grand delusions of the EU institutions to negate this conflict. Could it be that the supporters of the leave campaign in the UK might not have understood the specifics of the balance, but that they saw the dysfunction of the EU and opted for self-determination, even at an economic cost? Is this as irrational as some suggest today?





## **Safety Valves and Complete Exits in European Treaty Politics**

*Will Phelan*

*Trinity College Dublin, Department of Political Science*

[\[wtphelelan@gmail.com\]](mailto:wtphelelan@gmail.com)

It is common to describe the European Union as “new,” “unique,” “*sui generis*,” and hard to fit into existing categories of institutional arrangements, national or international. Indeed, debates on how to describe the EU are often lively and sometimes illuminating. In concrete terms, however, one of the best ways to understand the EU’s distinction from other forms of treaty-based trade and integration regimes is the EU’s distinctive lack of unilateral safeguard and escape valve mechanisms available to policy-makers in the various Member States.

In international relations scholarship one of the growing research agendas of the last decades has been on the way that treaty systems provide “escape mechanisms” or “safety valves” to manage the *ex post* costs of demanding and intrusive treaty obligations. In the area of trade politics, for example, many trade treaties allow states to unilaterally reintroduce trade barriers under the guise of “anti-dumping” or “safeguards” as trade openness becomes politically difficult, even if such trade barriers damage trading conditions and have little in the way of a persuasive economic rationale.

The justification for such escape mechanisms was persuasively set out in a seminal 2001 article in *International Organization* by Rosendorff and Milner.<sup>1</sup> They argued that treaties provide these escape mechanisms, despite the damage they can impose on the reliability of the treaty regime for firms and investors, because state policy-makers need to have a way to respond to political demands from their constituents and lobby groups to reduce their treaty commitments without exiting from the treaty system as a whole. In other words, allowing policy-makers the flexibility to effectively and temporarily (or “temporarily”) break their treaty commitments *within* the treaty system increases the stability of the treaty system as a whole, by reducing the incentive to *completely exit* from it. As Rosendorff and Milner explain, the central dilemma associated with such escape mechanisms is therefore between the costs of making such escape mechanisms available

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<sup>1</sup> B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INTERNATIONAL ORGANIZATION 829 (2001).

and retaining an overall agreement, compared with not making them available and the increased possibility of a state abrogating that agreement.

Contrasting with many of these other treaty regimes, the European Union radically reduces the scope for state policy-makers within the Member States to unilaterally and *ex post* reduce their fulfillment of treaty obligations in response to intense domestic political pressures. In one of the European Court of Justice's early and foundational cases, the *Pork Products* decision of December 1961,<sup>2</sup> the Court stressed that the Member States could not unilaterally introduce safeguard measures, no matter what the crisis in the national pig-meat sector. Instead the Court insisted that Member States must apply to the European institutions in advance to request the introduction of any such mechanisms, where the Treaties allowed it. The principle announced by the Court in *Pork Products* is an essential feature of the European legal order, and, indeed, is intimately related to the environment of compulsory fulfillment of European obligations that the Court went on to develop in decisions such as *Van Gend en Loos* and others throughout the 1960s and 1970s.

Of course, traders, investors, people wishing to move across borders, and so on are the beneficiaries of the greater certainty of transactions that results from the European treaties' greater restrictions on the availability of unilateral "safety valves" by the policy-makers of the participating states. But, as Rosendorff's and Milner's arguments indicate, the lack of such unilateral escape mechanisms within the European system of treaties increases the likelihood of a different form of uncertainty instead: the risk that domestic lobby groups and policy-makers within a participating state become attracted to the option of leaving the treaty system completely. The Brexit temptation therefore has a certain affinity with the logic of the European legal order as a whole, as the Court has developed it since its *Pork Products* decision in late 1961.

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<sup>2</sup> ECJ Case 7/61 *Commission v Italy* [1961] ECR 317.

## **Three Nearly-Certain Conclusions We Can Draw from the Uncertainty**

*Frank Schorkopf*

*University of Göttingen, Institute for International Law and European Law*

[\[Frank.Schorkopf@jura.uni-goettingen.de\]](mailto:Frank.Schorkopf@jura.uni-goettingen.de)

The European Union stands for the successful public ordering of “Europe.” Its goal is to shape and organize this political and economic area through law, a project involving societies of different mentalities, western democracies, old and young countries in transition, and former Great Powers. That might be ambitious enough, but pressure from outside the Union is also increasing. Alternative concepts campaign strongly to win supporters. The Union’s integration agenda is plagued by obvious economic, financial, and social problems. A dissenting spirit has emerged around strongly held convictions concerning what has caused the problems and who should be held responsible. It is a dissenting spirit that, following the Brexit-referendum 23 June 2016, will have significant consequences. Now we have the first withdrawal of a Member State from the European Union.

A week after the referendum we do not know more than its outcome. All those involved, in the United Kingdom and Brussels, as well as those in Berlin and other European capitals, are struggling to find their composure and to determine their position. In my view three conclusions can be drawn from the roiling uncertainty.

First, European integration has deformed electoral democracy in the Member States. Electoral democracy is understood as an inclusive form of legitimization for the self-determination of citizens by vote under the condition of equality. I am concerned with the reaction to the Leave campaign’s victory. Apart from those who feel confirmed in their skepticism towards direct democracy, the reactions draw attention to a structural unwillingness to accept majority rule. After all, electoral democracy is based on consensus, as well as the fight for majorities in Parliament in elections and the struggle in Parliament over votes concerning certain issues. In the end the elected majority is entitled to decide and the minority has to accept this outcome. Of course, abuses of the majority’s power are circumscribed by the Constitution and basic rights, which protect the minorities from the majority’s excessive creative drive. The Majority and minority combined, in this competitive and dynamic relationship, form the basis of the citizenry. Thereby electoral

democracy is neither exclusive nor non-pluralistic but preserves the majoritarian consensus until the next vote.

But only a few days after the referendum, its outcome is already being questioned. Very correctly, the German Chancellor opened her statement the day after the vote with the acknowledgement that *a majority* of British citizens had voted to leave.<sup>1</sup> Despite this, millions of British eligible voters are demanding a second referendum in the House of Commons; even a Cabinet Minister has insisted on another bite at the apple, arguing that the questions underlying Brexit are overly complex and pointing out that only a modest margin of votes carried the day. So, why give the minority a second chance simply because they are not satisfied with the first outcome? Commentators developed a sociogram of those who voted and noticed that the elderly prevailed over the young, so the future has to step behind the past. But why should this differentiation matter more than criteria such as sex, education, or income? One cynical answer is that the argument constitutes a kind of reverse-engineering in the search for ways to qualify and diminish the Leave campaign's ballot success in order to get to a preferred result: Remain.

In an electoral democracy the point of reference is not a situational group. The point of reference is the electorate, that is, all eligible voters with the same status and equal opportunities to participate. The polity is the citizens – the people. To me there is no doubt that this criticism on the referendum's outcome cannot be generalized. Imagine the opposite outcome, a majority for the Remain campaign, which would produce a different minority (the Leave voters) that would press similar claims of disenchantment (if not disenfranchisement) and demands for yet another vote. Democracy, as one commentator put it, simply does not mean never having to say "I lose."<sup>2</sup>

Second, it is now clear that the EU must become more people-oriented. Brexit has shown that European citizens from the political center are deeply dissatisfied with the Union and their representatives' agenda. This is the sentiment held by a majority despite the conclusion, expressed in the German Chancellor's post-referendum statement, that being part of the Union has personal advantages on every single individual already.<sup>3</sup> If it is true, then these advantages have to be made more evident to the people.

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<sup>1</sup> The Statement by 27 Member on 29 June 2016, includes the same wording, European Council, Informal meeting at 27, 29 June 2016, para. 1.

<sup>2</sup> See Russell Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 601, 634 (2003).

<sup>3</sup> Chancellor Merkel's press statement on 24 June 2016, German Transcript: <https://www.bundeskanzlerin.de/Content/DE/Mitschrift/Pressekonferenzen/2016/06/2016-06-24-statement-merkel.html>.

Apart from this statement, which I see more as a symptom of the problem, Brexit might trigger new integration steps. The first proposals in this direction are already on offer: Investments and a finalization of the Economic and Monetary Union. Moreover, in view of the President of the Commission (now embracing an idea proposed by Southern European States) unsolved issues of the Economic and Monetary Union should be solved through a renunciation of the longstanding policy of sound finances. Instead, debt-financed investments, wealth transfers, the “just distribution of the additional value of growth,” consumption, as well as the centralization of national budgetary authority, should be the Union’s future. As the European Council of 27 Member States put it: “Europeans expect us to do better when it comes to providing security, jobs and growth, as well as hope for a better future.”<sup>4</sup>

But Brexit should cause us to pause in our rush to integration to reflect on the causes of aversion for the EU and the parallel critique of elites. Necessary questions include the steps towards integration, which are overloaded with expectations of a European political space. There are also good reasons to re-examine the Monetary Union as such and the Schengen-Dublin-area. Behind, and bigger than, all of this is the nagging question of the viability of a European Society. Along with these questions one also has to ask about the causal contribution of Germany’s politics to Brexit. Did the mass influx of people in September 2015 have an impact on the crucial 3 % of British voters? The Leave campaign’s posters featuring miles-long queues of Syrian refugees suggests that it did.

Third, with this Brexit-decision, the European Council decisions from February 2016 will not become effective. The European Council offered the United Kingdom four structural changes in their Membership status (EUCO 1/16, Annex I), including the annulment of the “ever closer union among the peoples of Europe.”

But, in my view, the phrase “ever closer union” (Art. 1 TEU) lost its force long ago. Despite all that Europe is and has done, we still have not seen the necessary pan-European community of solidarity emerge. The wording stands for a theology of history pursuant to which the nation state is overcome by supranational integration. This theology is driven by the belief that the nation state is no longer able to face its recent challenges and shape its future in a globalized world. The “ever closer union’s” power holds some observers in such thrall that they regard Brexit as an unauthorized secession driven by a nostalgia for a now-impotent form of national democracy that must be overruled by the European citizenry and secondary European law—for the sake of Europe and for that foolish British majority. At this point I would add the marginal note that the scholars of European law contributed

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<sup>4</sup> European Council, Informal meeting at 27, 29 June 2016, Statement, para. 6.

to this by not working critically enough on the teleological justification for the EU. Many have been captured by the “Culture of Total Optimism.”<sup>5</sup> Internationalism has become an end in itself. Maybe we underestimated the vitality of the nation state and did not have (enough) confidence in its citizens to take this – unquestionably – insecure but courageous step out of the structured network of European States.

A Farwell to the formula of the “ever closer union” could be the beginning of a European pragmatism. Maybe we will turn to the former concept of a “multi-speed Europe,” renamed as a “Europe of Clubs,” or towards an extended Union method of intergovernmental cooperation. Integration will then only take place where a democratically legitimized consensus exists.

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<sup>5</sup> Giandomenico Majone, *The Deeper Euro-Crisis or: The Collapse of the EU Political Culture of Total Optimism*, EUI WORKING PAPER, LAW 2015/10.

## **Citizenship, Migration and Free Movement in Brexit Britain**

*Jo Shaw*

*University of Edinburgh*

[\[jo.shaw@ed.ac.uk\]](mailto:jo.shaw@ed.ac.uk)

Regardless of what happens in the next few months and years in the post-referendum UK, much of the harm has been done. The uncertainty, in particular, is killing. It will have a significant impact on many of the UK's most productive economic sectors including universities and financial services. It will cast a shadow over inward investment and over the willingness to take risks of those responsible, for example, for building new infrastructure. There will be a brain drain. Already in some respects the EU is acting as if the UK were no longer a Member State. It has no Commissioner since Jonathan Hill's resignation. After the EUCO summit on 29 June which took place without the UK's presence, EU27 conclusions were issued.

Many and various are the suggestions for how the UK's relationship with the EU and the 27 EU Member States might be shaped in the future. The obvious next step is that Article 50 TEU should be invoked and a notification of a decision to withdraw should be made. But whose is the decision: that of the people in the referendum, of the government of the day, or of Parliament? Is the notification once made revocable? Would two years be long enough to negotiate a withdrawal agreement and to regularise the legal situation of all affected parties in the UK and elsewhere. And will such an agreement or agreements, likely to be one or more mixed agreement involving the Member States as well, be the subject of an advisory opinion before the Court of Justice, slowing further the pace of withdrawal?

Some have turned to thinking about how to overcome the effects of the referendum. These ideas range from a second referendum to overturn the previous referendum (which is democratically dubious, even if a General Election may be held to clear the political sinuses sufficiently to make it conceivable), via a parliamentary vote to block the invocation of Article 50 TEU (treating the referendum result as purely advisory and asserting that parliamentary sovereignty demands a measure of Parliament), towards territorially differentiated statuses which preserve the integrity of the UK as a state but allow Scotland, Northern Ireland and Gibraltar somehow still to be part of the EU (which would constitute a sort of 'reverse Greenland', but is tough to envisage). If the latter initiatives fail, it is not hard to envisage that the UK may break up.

Many have speculated about the various ‘associate’ statuses which the UK may negotiate, including an option labelled ‘Norway+’, leading eventually to a Canada-type FTA (even though such does not exist at the moment). Under the latter heading, we discover that some people think that it is possible to maintain access to the single market, including passporting options for financial services firms, without having the free movement of workers. Good luck with that. Distinguishing between labour, enterprise and services is always a fun task quite apart from what might be acceptable to the EU27. A small number, finally, [simply refuse](#) to believe that Brexit will happen. To his credit, Andrew Moravcsik [said this](#) before the vote, and continues to maintain the argument. Since Michael Gove and Theresa May emerged as the frontrunners for the leadership of the Conservative Party on 30 June 2016, the chances are that Brexit means Brexit, with all the consequences that may flow from this.

[Under one scheme](#), to promote territorial differentiation, which has been offered for our consideration, we read that ‘Citizenship and migration-law, would have to be reconsidered, but the ensuing difficulties could be negotiated.’ Someone who writes such a statement has obviously never had any dealings with the UK Home Office, both at the meta-level of drafting impenetrable legislation and at the micro-level of decision-making and enforcement. In fact, a more realistic reading of what is happening below the surface (where EU institutional officials and Member State politicians urging – more or less gently – that the UK should get on and invoke Article 50 TEU) is that the deal to be offered to the UK on exit is more likely to be ‘EEA-’ than ‘EEA+’, as this [series of tweets](#) from Ben Judah shows. The [political failures](#) that got the UK to that point could not be more serious, as Rafael Behr highlights, and include a media (paper and broadcast) that is largely incapable of holding politicians to account for what they say. The [outlook](#) for the UK heading towards Brexit is bad.

Of course any glib statements to the effect that somehow we can expect business as usual in the UK will be subjected to careful and rigorous analysis over the months to come, by academics and others. What characterises such statements is a deep commitment to the enduring principle of [having your cake and eating it](#), as well as in some quarters a commitment to preserving the territorial integrity of the UK as a state by imaginative institutional means. The former principle was well in evidence during the referendum campaign. Fears that the UK might break up in the event of a Brexit vote should, of course, have been fed more effectively into the decision-making process about how to design the referendum and the referendum process. The notion of a ‘double lock’ for the different regions of the UK was put forward by the Scottish National Party, but rejected during the passage of the European Union Referendum Act 2015. Oh, how useful that would have been now, had it been adopted, although no one should discount how difficult these types of mechanisms would have been to design.



As predicted, and indeed for [reasons](#) I outlined earlier, immigration issues certainly played a substantial role in the campaign, especially in England and Wales, alongside concerns about sovereignty ('taking back control'). However, thus far what we know about referendum voting choices largely stems from a [survey](#) that is rather simplistic in its approach to unpicking arguments and motivations. Perhaps it would be best to describe what appears to have been a key factor as 'fear of immigration', rather than immigration itself. As it stands, the UK's large urban centres, which are the most diverse and multicultural places, on the whole voted to remain, although this was less true in the [North of England](#), where there seems to be a strong sense amongst many voters that they have simply been left behind by globalisation, both economically and culturally. Moreover, there seems to be widespread horror and revulsion in the UK at the wave of xenophobic and racist attacks on people and property since the referendum by a minority belonging to the radical right. The reality, however, is that the genie of a populist radical right in the UK is now out of the bottle, and the landscape of political parties will probably never be the same.

But the underlying trends pointing inexorably in this direction are longer rather than shorter term. The truth is that UK political discourse about migration has for some time elided any 'moral' differential between free movement and immigration from third countries (and between labour migration and asylum seeking). As I have [argued before](#), politicians in the UK have long been uncomfortable navigating the space between the political truth of popular hostility to immigration and the legal commitments of the UK to the EU Treaties. On that account, EU citizens exercising free movement rights are simply 'lucky immigrants', and since – as things stand – the UK cannot impose controls on the numbers or types of migrants from those countries, they have become the butt of particular hostility, not only from what might be described as older white working class communities, but also amongst settled migrant communities, especially those from South Asia, who are bitter about increasing restrictions upon family visits (never mind family reunification which is now subject to very substantial income-based controls) which have been delivered in the name of being tough on immigration. If the UK electorate has indeed delivered a message on immigration then it does need to be [respected](#), even if this is likely to mean very substantial costs elsewhere across the UK as a whole, e.g. in relation to a predicted economic downturn hitting lower income households more heavily than those on higher incomes. Indeed, [Cameron told](#) the European Council meeting on 28 June that freedom of movement was at the heart of the UK electorate's decision to vote to leave the EU.

David Cameron's earlier 'renegotiation' of the terms of UK membership of the EU in February 2016 contained substantial sections on free movement, including a proposed emergency brake in respect of so-called 'in work' benefits paid to newly arrived migrants, an indexation of child benefit where it is payable to children resident outside the host state, apparent attempts to roll back the case law of the Court of Justice in *Metock* concerning third country national family members of EU citizens and steps to open up further the possibility of

deporting EU citizens who commit serious criminal offences. Since the UK did not vote to remain in the EU in the referendum held on 23 June, however, that 'deal' has now officially ceased to exist and will never come into force. Political leaders in Brussels and in the Member States have rushed to remind the UK that it cannot simply be resuscitated. In any event, it seems these concessions were not enough for the UK electorate, and this is hardly surprising given the consistently confused messages on European integration that Cameron has given throughout his premiership.

The UK now appears to have entered a phase of modest 'Bregret', as it becomes increasingly clear that there are no concrete plans as to what should happen next after the Leave vote. It probably hasn't (yet?) entered a full blown phase of [buyers' remorse](#), although bad economic figures as well as the increasing evidence that pledges made during the campaign cannot be delivered upon might push voters in that direction. In fact, it has been academics who have led the way both before and after the referendum, setting out in plain terms the various options around the EEA, EFTA and other association statuses. In contrast, politicians have often come out with highly contradictory statements, seemingly indicating that what they want for the UK is all the advantages of EU membership and none of the 'burdens' (as they see them).

It has, therefore, become a consistent trope that somehow the UK wants to preserve the single market, but without free movement, as if the free movement of labour were somehow easily severable from the free movement of services and enterprise. To achieve this, some have already mooted income or activity restrictions to try and preserve the core of free movement whilst cutting away at the edges. Let's have a quick look to see if this is possible without wholesale regulation of free movement and access to labour markets. Remember, this is not the type of [proposal](#) that Martin Ruhs has come up with, whereby free movement and the integrity of national welfare states could be balanced against each other by means of greater restrictions on access to welfare states (equivalent to those imposed on third country nationals with 'no recourse to public funds' or similar stamped in their passports) which in itself is already an abrogation of the principle of non-discrimination on grounds of nationality. This would bring lower income or temporarily unemployed EU migrant workers closer to the situation of those who are completely outside the labour market, whose situation has been clarified in recent years by the Court of Justice as lying, in effect, outside the protective scope of EU citizenship. Ruhs' proposal is a reasonable one, bearing in mind that across a diverse European Union income disparities may place particular pressures upon specific Member States, which have their own internal redistributive policies and labour market regulatory issues to contend with. It recognises the point that the overwhelming majority of economists make, which is that immigration is a net fiscal gain for the host state, but equally allows solutions to be tailored to local circumstances. Moreover, these types of disparities in income and GDP should be self-correcting over a period of time and free movement – with its lower barriers to entry and

transaction costs – is precisely a flexible rational solution to the problems that disparities within the Union raise. On that account, much free movement is likely to be temporary. Perhaps some sort of arrangement relating to equal treatment and access to the welfare state might be possible post-Brexit under the oft-cited safeguard clauses in the EEA Agreement (Articles 112-113), but again this would need to be negotiated, and there seems little appetite for this amongst the Member States.

On the contrary, the proposal for a migration cap – even an emergency one – takes us into new territory, and is not a step that seems easily compatible with either EU law or the EEA Agreement, even by way of a safeguard clause or a separate protocol. We would need to question whether we are entering a world in EU law where we seek to distinguish students and professionals from fruit pickers? Between nurses and retirees? Where there may be a distinction between stocks and flows of EU citizens and workers. Where bright line restrictions on third country national family members will also come into consideration. Surely there comes a point where free movement ineluctably slides into immigration control, with all the consequences in terms of restrictions and enforcement that flow from this, both for those who are already residing in another Member State, and for those who might move in the future.

And in the short term, there are pitfalls aplenty, as [Migrants Rights](#) has pointed out. A week after the vote, the assurances of fair and humane treatment of EU citizen residents have been few and far between (and certainly lacking in detail), especially on the part of those who would have legal and political authority to deliver on such statements. For example, the new frontrunner for the leadership of the Conservative Party, Theresa May, and thus the favourite to lead the negotiations, has said that those statuses are indeed ‘subject to negotiation’. Already now, uncertainties abound. What of those who now face a period of unemployment lasting more than six months and who have not reached five years residence? Will the UK pursue an energetic expulsion policy? What will happen to permanent residents once Brexit is a reality, if free movement is not part of the package (as May has declared it should not be)? Should they be offered citizenship or just indefinite leave to remain? At what cost, as the fees currently are very high and rising? What will happen to those who have not reached five years residence at the date of Brexit? How will their situation, those of their (sometimes third country national) family members be regulated given the manifest inability of the Home Office and the various associated agencies even to deal effectively with their existing workload without putting several million more people under immigration control? The transition from [freedom](#) to restriction will be painful for many. There will be many cases that fall through the cracks, and vast amounts of insecurity and pain.

In contrast, on the other side of the Channel, Member State governments can see particular reasons to encourage the brain drain amongst the young and the talented that (according

to the predictions) the UK is going to face. Let's think about giving EU citizenship (i.e. national citizenship) to students who spend some years studying in our universities, [says Prime Minister Renzi of Italy](#). So far, just a vague proposal, even a glib one. But it is a sign of the times.

Indeed, there are many who are seeking a solution to immigration uncertainties – and other pitfalls of potentially losing EU citizenship – through citizenship. EU citizens are naturalising in the UK (or at least seeking permanent residence documentation as the first step to naturalisation). The Irish government has pleaded with UK citizens not to overwhelm their passport services with work and is said to have taken on additional staff already. Anecdotal evidence from Belgium highlights large numbers of UK citizens resident there making applications for citizenship. Dual citizenship may be the answer for many (especially in Northern Ireland, which already has more than 0.5m Irish passport holders), further undermining, of course, the case that Brexit is all about asserting sovereignty understood as a zero sum game. The renewed arguments for Scottish independence have a strong kernel of concern for the fate of EU citizenship – both for Scots themselves and for those resident in Scotland who fear for their rights.

Welcome to Brexit Britain. An archipelago of contradictions.

## **Four Impious Points on Brexit**

*Alexander Somek*  
*University of Vienna Law Faculty*  
[\[alexander.somek@univie.ac.at\]](mailto:alexander.somek@univie.ac.at)

### **Popular Sovereignty**

The Brexit referendum confronted us with a “return of the repressed.” It represents a momentous eruption of popular sovereignty. The people have spoken. Liberals cringe: “Ugh, this is the voice of unreason.”

What the British people have decided is undoubtedly unwise in economic terms. It is also of questionable value, geopolitically considered. But this does not matter. It sticks. This is how the political asserts itself *vis-à-vis* the economic.

We did not expect to see this happen in Britain where the people are reputed for their pragmatism and good judgment. This explains why Brexit is, above all, a major ideological blow to economic liberalism.

Not surprisingly, a debate has already started whether the people are really needed in a democracy. Germans, whose constitutional fondness of the people has always been narrowly circumscribed, have already resumed whispering that referenda are of no good at all. The people are bearable only if mitigated by means of representation. But is this really the attitude with which you win the hearts and minds of disaffected ordinary folk?

### **Migration and the Neoliberal Left**

If I read some of the major sentiments driving the opposition against the EU correctly, then they were largely nurtured by the scare of increasing immigration. It may be open to debate whether the fears were well-founded with regard to internal EU migration. I would guess that the presence of Poles or Slovaks gives rise to less visible and noticeable cultural cleavages than the migration that originates from former nations of the Commonwealth. But I may be mistaken about that.

In any event, there is one important lesson to be learned here. Anti-immigration sentiments are the political fertilizer of the right. The political right uses evil sentiments in

order to drive their populist cause. In the face of evil sentiments feeding into a sinister political strategy, the liberal and left-wing opposition is inclined to resort to the moral high ground and to blame ordinary people for their racism, their xenophobia, their narrow-mindedness or their nostalgia.

Such a reactive attitude is reinforced by the tendency of the predominantly neoliberal European left to distinguish itself from the right by embracing open borders. But this stance is a position of last resort. It is indicative, alas, of the fact that the left has become devoid of ideas.

The warm embrace of migration by the neoliberal left suggests that, from their perspective, migrants seem to have assumed the role left vacant after the demise of the industrial proletariat. In a sense, migrants count as the last class of history. Immigration is considered to be important, for it will give rise to a universally inclusive society.

Indeed, the neoliberal left believes that inclusion is the standard panacea available for the resolution of social ills. As if there was need for additional evidence for this point, my dear German colleague Maximilian Steinbeis, for whom I have the highest respect, just proposed, on the day after the Brexit decision, that Germany should now offer Britons moving to Germany a fast track to citizenship. As if making everyone German is the solution to all problems!

No doubt, there is greatness and validity to the idea that we extend universal respect to all human beings without regard to their ethnicity, religion or origin and welcome them in our midst. At the same time, there is nothing particularly progressive about universal respect. It is very basic and not part and parcel of a social project. On the contrary, migration reconfirms bourgeois values. Migrants pursue their private self-interest, quite legitimately so. They have to be confident that they can benefit from more, rather than less, competition. Under adverse circumstances, they have to put up with living in shadowy zones of legality and keeping a low profile. Some of them bring rural mores and strange religions to a place of the world where city-life has become the standard and humanity has made much progress towards ridding itself of the authority of priestly elites. Hence, the connection between migration and social progress is at best a weak one.

Concededly, when we are confronted with refugees, there is something deeply appealing about Christian solidarity with suffering. But the locale of universal *agape* is voluntary church work. It has never made any contribution to significant changes of social structures.

In a word, the left should refuse to have migration forced upon it as the major point of contention *vis-à-vis* the right and accept that migration controls can make good sense. Societies need to be bounded in order to govern themselves.

The difference between the right and the left lies somewhere else. It concerns whether we conceive of our social existence as a struggle or as a common effort to overcome the imprisoning features of our decentralized cooperation.

### **Transforming Europe into a Left-wing Project**

It cannot be doubted that those who believe in the future of Europe need to distinguish themselves from the political right.

Reasonable ideas have never and will never originate from the right. Members of the Front National or the FPÖ are partisans of stupidity and clients of corruption.

New ideas won't arise from complacent neoliberalism either. Indeed, its lingering predominance is a great danger to the European Union, for it is the adherents to neoliberalism who will soon take it for granted that the time is ripe to return to business as usual. It is the ruling neoliberal class that is likely to embarrass the European Union even more.

New ideas will have to originate from the left. But one needs to be circumspect at this point. These ideas are not going to originate from the eco-neoliberalism represented by green parties. They are more concerned with sustainability (including, for many, sustaining their bourgeois privilege) than with social justice. They are also the major culprits for the false identification of social progress with open borders.

Rather, new ideas will have to originate from social democracy.

The major challenge that European societies are confronted with can be captured in the catch-phrase "from careers to jobs to tasks." The next generation of Europeans will have to live in a world where the work-life balance and the structure of work is going to be decidedly different from what it has been before. The members of this generation will have to learn the moral lesson that being employed is definitely not a meritorious achievement. Undoubtedly, it will have to be considered as a matter of luck or, realistically, as something that they owe to those who stay unemployed. Rapid technological progress already confronts us with our equal dispensability. The basic structure of our societies needs to be reconsidered from the perspective of this experience.

Hence, the new specter haunting European societies, the unconditional basic income, may be the key unlocking the door to a new form of solidarity. Europe can now become the agent drafting a new social contract. It is essential, therefore, that a European Union reverses its perverse federalist make-up. The current combination of free movement

conflicting with nationally-conceived social welfare systems is a recipe for political disaster. We cannot go on like this.

The integration project has already advanced far enough to allow us to start over again. It is now in the position to accord priority to the full package of human rights.

For decades we have deluded ourselves that the Union is new and totally unprecedented. We have joined in the chorus of those singing that it must not become a state.

If we want the Union to be more than an ailing international organization—and I think we should—we have to want it to be a state.

### **Obstacles**

On our path towards this goal we are confronted with two major obstacles.

Our biggest obstacle is that we do not have politicians that are up to this task. A political lightweight like Jean-Claude Juncker is not, nor is an old-fashioned social democrat like Martin Schulze. “Mutti” is a weakling whose power at the international level is owed to the contingent fact that she happens to be the chancellor of Germany.

It is quite clear what needs to be done. Social democrats of Europe need to unite. The democracy deficit can only be solved by developing a party system that confronts European citizens with real choices.

It would be utterly wrong to tinker with institutions again. We have to have some idea of what kind of society we want to build on the European continent. Once we have a somewhat clearer idea concerning our objectives we can talk meaningfully about the institutions and the size of the future Union. We should not continue with the old mistake of building Europe first and then asking what it is supposed to be in the end.

The second obstacle concerns remnants of a misguided drive for imperial splendor. The Union is too large. It is composed of too many heterogeneous elements. Not only should enlargement no longer be a policy objective, the Union should have the courage to waive good bye to those lacking the courage or moral decency to create a social world for the twenty-first century.

Europe may now have an opportunity to rid itself of a few nuisances and avoid admitting more in the future. In this respect, Brexit may have established, indeed, a healthy precedent.



## **Brexiting European Citizenship through the Voice of Others**

*Francesca Strumia*  
*University of Sheffield School of Law*  
[\[f.strumia@sheffield.ac.uk\]](mailto:f.strumia@sheffield.ac.uk)

### **Introduction**

The British vote on 23<sup>rd</sup> June, opting by a rather slim majority to leave the European Union, has sent waves of uncertainty rippling through the island and the continent, as well as through some milestones of European integration. One of these is European citizenship. Paradoxically, it receives a hard shake at the hand of national citizenships,<sup>1</sup> exercised through a referendum.

Any student of European citizenship has learnt a few things by heart. First, European citizenship derives from national citizenship, to which it adds without replacing it.<sup>2</sup> Second, it is a condition centered on the right to free movement, to the point that European citizens not exercising their right to free movement are subject to reverse discrimination.<sup>3</sup> Last, according to the European Court of Justice, it is destined to be the “fundamental status” for nationals of EU Member States.<sup>4</sup>

The British vote, if eventually leading to real Brexit rather than just national political farce, shows new facets of each of these citizenship tenets. This essay questions these new facets, reflecting on the new vulnerabilities that the link between national and European citizenship reveals; on the condition of mobile European citizens held to ransom from static ones; and on the opportunity that recent events entail for the Union to reaffirm a direct link to its citizens. The essay ultimately endeavors to distil from the dismay of the first hours an initial post-referendum research agenda on the prospects of supranational citizenship, in Europe and beyond.

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<sup>1</sup> In plural, in consideration of the fact that nationals of other Commonwealth countries resident in the U.K. were allowed to vote in the referendum.

<sup>2</sup> Treaty on the Functioning of the European Union, 2012 OJ (C 326), 47, art. 20.

<sup>3</sup> See Case C-64/96 and C-65/96 *Uecker and Jacquet v Land Nordrhein-Westfalen*, EU:C:1997:285.

<sup>4</sup> See, e.g., case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458.

### Exit through Voice

Much ink has been spilled on the relation between national and European citizenship. Some have argued that supranational citizenship devalues national, to the point that “residence is the new nationality”.<sup>5</sup> I have argued elsewhere that European citizenship actually enhances national citizenship.<sup>6</sup> The Brexit vote greatly enhances the power of national citizenship to inflict a fatal wound on supranational citizenship. This is a corollary of the “*ius tractum*” nature of European supranational citizenship.<sup>7</sup> European citizenship follows national citizenship like a shadow follows the body that carries it along.<sup>8</sup> This means, among others, that European citizenship is lost together with national citizenship. It is precisely in this latter perspective that the European Court of Justice has issued its strongest warning on the exercise of national powers in terms of acquisition and withdrawal of nationality.<sup>9</sup> Relevant powers, albeit belonging to the Member States, have to be exercised in compliance with EU law, and in particular taking into account the rights of European citizens. Denaturalization decisions that cause a national of a Member State to lose European citizenship are subject to an assessment of proportionality.<sup>10</sup>

The Brexit vote, assuming that it is eventually determinative of a UK Brexit decision,<sup>11</sup> blows up all these legal bulwarks protective of the status of European citizenship. European citizenship, this time, is not lost as a side effect of the loss of national citizenship, but rather it is going to be lost by decoupling national and European citizenship. This decoupling is impliedly admitted by the provisions introduced by the Treaty of Lisbon that formalized the possibility of withdrawal of a Member State.<sup>12</sup> A Member State could

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<sup>5</sup> Gareth Davies, “*Any Place I Hang my Hat?*”, or: *Residence is the New Nationality*, 11 EUROPEAN LAW JOURNAL 43 (2005).

<sup>6</sup> See, e.g., Francesca Strumia, *Individual Rights, Interstate Equality, State Autonomy: European Horizontal Citizenship and its (Lonely) Playground in Trans-Atlantic Perspective*, in CITIZENSHIP AND FEDERALISM: THE ROLE OF RIGHTS (Dimitry Kochenov ed., forthcoming 2016)

<sup>7</sup> Dimitry Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights*, 15 COLUMBIA JOURNAL OF EUROPEAN LAW 169 (2009).

<sup>8</sup> FRANCESCA STRUMIA, SUPRANATIONAL CITIZENSHIP AND THE CHALLENGE OF DIVERSITY – IMMIGRANTS, CITIZENS AND MEMBER STATES IN THE EU (2013), at 315.

<sup>9</sup> Case C-135/08, *Janko Rottman v Freistaat Bayern*, EU:C:2010:104.

<sup>10</sup> *Id.*

<sup>11</sup> Something on which some doubts begin to linger according to the reactions of politicians as well as constitutional scholars in the UK. See, e.g., Nick Barber, Tom Hickman, Jeff King, *Pulling the Article 50 ‘Trigger’: Parliament’s Indispensable Role*, U.K. CONST. L. BLOG (June 27, 2016), available at <https://ukconstitutionallaw.org/>.

<sup>12</sup> See Treaty on European Union, 2012 OJ (C 326), 13, art. 50.

decide that it is in the best interest of the country to secede, with all the citizenship consequences that secession entails. The dynamics of Brexit are however particularly troubling. It is the very citizens that have made the democratic choice to give up their supranational status, as well as to strip it off their dissenting fellow nationals. From the point of view of this latter group, a new Achilles' heel of supranational citizenship is revealed, one that has a legal as well as a democratic face.

From a legal perspective, supranational citizenship emerges extremely vulnerable. It turns out that notwithstanding the activism of the European Court of Justice in shoring up one of its most ambitious creatures, European citizenship remains fragile. Under the Universal Declaration of Human Rights anyone has a right to a nationality.<sup>13</sup> International law entails protections against statelessness. However no one has a right to a supranational citizenship, and in fairness most people live their lives without one, or with one that they do not exercise. The referendum result makes one thing clear: legal protections, when it comes to supranational citizenship and its rights, only go so far.

From a democratic perspective, a popular vote on continued membership of the EU may seem a victory in the context of an entity that has been accused for decades of carrying along a democratic deficit.<sup>14</sup> Yet it is a pyrrhic victory from the angle of supranational citizenship. The very political exercise of national citizenship potentially ends up silencing, for many, their supranational citizenship and its political side. Voice on the basis of national citizenship may determine the exit from supranational citizenship. The problem is that, for the significant minority that opposed Brexit with their vote, it is the voice of others that forces exit. This is, of course, the regular course of democracy: winner takes all. In this case, however, the winner takes away from all, winners and losers, part of the political self that supranational citizenship entails: voice in the European Parliament, and for migrant British citizens, voice in local elections in other Member States. Any supranational loyalties that some British citizens may have developed together with such political self are going to be automatically disabled.<sup>15</sup>

Ultimately these results qualify some of the above mentioned scholarly arguments on the effect of supranational citizenship on national citizenship.<sup>16</sup> Residence based on

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<sup>13</sup> Universal Declaration of Human Rights, art. 15.

<sup>14</sup> See Joseph H. Weiler, *Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy*, 12 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 94 (2014), at 100-101.

<sup>15</sup> This is Hirschman's triptych: exit, voice, and loyalty. See ALBERT HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* (1970).

<sup>16</sup> See *supra*, notes 5 and 6.

supranational citizenship “is the new nationality”<sup>17</sup> only until national citizenship does not outlaw such residence. And while supranational citizenship enhances national citizenship in many ways, it does so in a rather contingent manner.

### Supranational Citizens Held to Ransom

Supranational citizenship’s enhancement of national citizenship has to do with the free movement rights that supranational citizenship entails. It allows partaking, through the principle of non-discrimination on the basis of nationality, of the rights of nationals in a host Member State. It also allows exporting entitlements that a national has in the Member State of nationality so that these can be enjoyed in the Member State of residence.<sup>18</sup>

European supranational citizenship is centered on the right to free movement. In fact, it is only activated in situations that are not purely internal, that is, situations that involve a European citizen residing, working, or travelling to a Member State other than his own.<sup>19</sup> This transnational character of European citizenship has attracted various criticisms. Accounts of European citizenship focus on the tiny minority of migrant European citizens and unduly disregard the perspective of the static citizens, to whom European citizenship means little or nothing.<sup>20</sup> Also, the promise of supranational equality that European citizenship brings about is watered down by reverse discrimination of static citizens: not only the European citizens who stay at home enjoy no protection, they may find themselves treated less favorably, for instance for purposes of family reunification, than migrant European citizens.<sup>21</sup>

The Brexit vote brings new viewpoints on these considerations. It represents the revenge of the static European citizens against the migrant ones. And, based on the data that has

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<sup>17</sup> See G. Davies, *supra* note 5, at 56.

<sup>18</sup> See, e.g., Case C-499/06 *Halina Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie*, EU:C:2008:300; case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions*, EU:C:2011:500; (the rationale for the judgments in these cases is that obstacles to fruition of benefits while residing outside the Member State of nationality unduly restrict the freedoms conferred by the Treaties on European citizens)

<sup>19</sup> The doctrine of the genuine substance of European citizenship, inaugurated by the Court in *Ruiz Zambrano*, case C-34/09, *Ruiz Zambrano* EU:C:2011:124, overcomes this requirement but is left with uncertain prospects.

<sup>20</sup> See, e.g., Agustín José Menéndez, *Which Citizenship? Whose Europe? – The Many Paradoxes of European Citizenship* 15 GERMAN LAW JOURNAL 907 (2014).

<sup>21</sup> See Alina Tryfonidou, *Reverse Discrimination in Purely Internal Situations: an Incongruity in a Citizens’ Europe* 35 LEGAL ISSUES OF ECONOMIC INTEGRATION 43 (2008).

been released on the correlation between age group and vote, a revenge of the perpetually static against the potentially mobile.

Hence it turns out that the minority of migrant European citizens, who are so tightly protected in their rights by the legal architecture of supranational citizenship, are held to ransom by the majority of their static fellow nationals. If the latter pull the cord, their supranational citizenship and the transnational opportunities that it brings about are gone. In the light of this, the relative weight and meaning of supranational citizenship, including for settled versus migrant supranational citizens, need some rethinking. As does the vertical link that supranational citizenship weaves between the Union and its people.

### **Caring for the Discrete and Insular Minorities?**

In the early days of European citizenship, several studies compared it to federal citizenship.<sup>22</sup> If European citizenship were a real federal citizenship, it would entail a direct link between the Union and its citizens, with which the Member States would not be able to interfere. In that respect, federalism really “splits the atom of sovereignty”.<sup>23</sup> However, such accounts have lost traction in the EU context, and arguments along these lines have gradually gone quiet, while the study of EU citizenship has rather focused on its potential as transnational citizenship, on its political capacity, on its repercussions for solidarity.<sup>24</sup> An echo of the early federalist aspirations survives perhaps in the Court’s proclamation, less adamant as of late,<sup>25</sup> that European citizenship is destined to be the fundamental status for nationals of the Member States. The Brexit vote may, on the one hand, be the latest disproof of the Court’s mantra. On the other hand, it presents an opportunity to reconsider the nature and the prospects of the feeble direct link between the Union and its people. After all, this is the first time in EU history that a pocket of European citizens who had automatically acquired their supranational citizenship with the Treaty of Maastricht raises its political voice to clearly state that they want to remain European citizens.<sup>26</sup> If this

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<sup>22</sup> See, e.g., CHRISTOPH SCHÖNBERGER, *UNIONSBÜRGER: EUROPAS FÖDERALES BÜRGERRECHT IN VERGLEICHENDER SICHT* (2006).

<sup>23</sup> See *US Term Limits v. Thornton* 514 US 779 (1995) (J. Kennedy concurring), at 845 (Federalism requires ‘a relationship between the people of the Nation and their National Government, with which the States may not interfere’).

<sup>24</sup> See, e.g., Dora Kostakopoulou, *European Union Citizenship: Writing the Future* 13 *EUROPEAN LAW JOURNAL* 623 (2007); Jo Shaw, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, in PAUL CRAIG AND GRÁINNE DE BURCA (EDS.), *THE EVOLUTION OF EU LAW* (2011); Michelle Everson, *A Citizenship in Movement*, 15 *GERMAN LAW JOURNAL* 965 (2014).

<sup>25</sup> See, e.g., Case C-333/13, *Dano*, EU:C:2014:2358.

<sup>26</sup> European citizenship did not formally exist at the time of the 1975 UK referendum on EU membership. On the other hand citizens voting in the EU accession referendums in the context of the 2004 enlargements were not European citizens beforehand.

pocket represents a defeated minority at national level, is it a minority that the EU can disregard in shaping its position towards the UK?

Beyond the significant minority of the British remainers, the referendum result leaves the EU with a number of other minorities, whose interests have been squeezed out of the political process: the EU citizens residing in Britain, and the UK nationals residing in the rest of the EU, particularly those that British electoral laws have left disenfranchised. The way the EU will deal with all these minorities will be revealing of the nature of supranational citizenship and of the strength of the vertical link between Union and citizens. Important questions arise: should, or could, the EU take the interests of the British remainers into account? Should it protect UK nationals residing in the EU? Should it protect the EU citizens in the UK?

The answers to these questions depend in good part on how one interprets the link between the citizens and the Union. If supranational citizenship is a horizontal extension of national citizenship, entirely dependent on the sorts of the latter, then there is little that the EU can or should do. It should certainly protect the interests of the EU citizens in the UK, as these remain through their national citizenship, full supranational citizens. However, the Union from this perspective owes no duties to the UK nationals, who willingly or unwillingly are renouncing their supranational citizenship. On the other hand, if supranational citizenship, albeit rooted in a mechanism of mutual recognition of national citizenships,<sup>27</sup> engenders some kind of direct link between the Union and its people, then the Union owes some consideration to its discrete and insular minorities that have remained defeated, or excluded, from relevant political processes.<sup>28</sup> Of course, this does not mean that the EU could ever contradict or disregard the results of a national political consultation, or the ensuing position of the relevant Member State. But it may mean that in shaping its negotiation with a withdrawing Member State it has to internalize the interests of its unwillingly exiting citizens.

Answers to these questions bear important consequences beyond the contingencies of the moment. First, they harbor important signals for other constituencies of European citizens. Second, they point to the outcomes of a project, supranational citizenship, which was ultimately rooted in an attempt to win the people to the cause of integration by extending

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<sup>27</sup> See Francesca Strumia, *EU Citizenship and EU Immigration: Walking the Line between Third Country Nationals' Right to Belong and Member States' Power to Exclude?*, EUROPEAN LAW JOURNAL (forthcoming 2016).

<sup>28</sup> See *United States v. Carolene Products Company*, 304 U.S. 144 (1938) (footnote 4).

'special rights' to Community citizens.<sup>29</sup> The ways those special rights may be lost or taken away matters for the very texture of the citizenship they contributed to shape.

### Conclusion

Once the dismay and inebriation of the immediate referendum aftermath will have waned, the world may be left with a crumbling Europe, and researchers will be left with some hard thoughts. Some of these, it has been suggested, pertain to supranational citizenship. Events of the last few days cast old principles under new light and prompt a renewed research agenda on the prospects of supranational citizenship. The latter concept may seem left in agony, in the wake of resistance to migration, strained transnational solidarity, burgeoning nationalism and now popular opt-out. Yet it is still one that attracts much attention around the globe. While the British vote to relinquish their supranational citizenship, Mercosur countries in South America, countries belonging to the Gulf Cooperation Council, and countries in the Caribbean Community are working hard to build one, looking at European citizenship for guidance and inspiration.<sup>30</sup> The curiosity and reliance it has inspired set a challenge for European supranational citizenship. In the face of the small contingent that has chosen to proclaim: "Cives Europaei esse nolumus", and regardless of the eventual effect of that proclamation, the concept needs to compose itself and regain its way. The way forward begins from addressing the legal and political questions that the British vote has raised.

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<sup>29</sup> See Pietro Adonnino, *A People's Europe. Reports from the ad hoc Committee*, BULLETIN OF THE EUROPEAN COMMUNITIES 7/85 (June 27, 2016), available at <http://aei.pitt.edu/992/>.

<sup>30</sup> See Decision of the Council of MERCOSUR, 'Estatuto de la Ciudadanía del Mercosur. Plan de Acción', n. 64/10, December 2010; Economic Agreement of the Gulf Cooperation Council, preamble; DAVID S. BERRY, *CARIBBEAN INTEGRATION LAW* (2014), at 258-259; Caribbean Court of Justice, *Shanique Myrie v. Barbados*, [2013] CCI 3(O), par. 66-71.





## **Chronicle of a Death Foretold? Thinking About Sovereignty, Expertise and Neoliberalism in the Light of Brexit**

*Ntina Tzouvala*  
*Durham University Law School*  
[\[konstantina.tzouvala@durham.ac.uk\]](mailto:konstantina.tzouvala@durham.ac.uk)

*“The true nature of the international system under which we were living was not realised until it failed.”*

Karl Polanyi  
*The Great Transformation: The Political and Economic  
Origins of Our Time*  
(1944)

There is a certain degree of irony in writing about Brexit for a law journal- a read put together, hosted and read mostly, if not exclusively, by ‘experts’. The irony lies in the fact that the outcome of the UK referendum on the EU was, amongst other things, a rejection of experts; or rather, of current mobilizations of expertise and the political allegiances of a large number of experts. Despite this irony, or precisely because of it, I will reflect on three interrelated questions that, in my mind, determined the content and outcome of this historic referendum. First, I will discuss the discourse of ‘sovereignty’ and ‘control’ at the centre of the Leave campaign. Secondly, I will focus on the role of expertise and (technocratic) knowledge both in the construction of the European project and in the revolt against it. Finally, I will argue that given neoliberal hegemony and its heavily unequal distributive outcomes, revolts against contemporary structures of power, both national and inter/supranational are to be expected. Therefore, the question for progressive lawyers is how to mobilize our expertise so that these revolts do not become the exclusive playing terrain of the extreme right with unforeseen consequences.

**The Return of Sovereignty? Mapping the Debate About Control**

In 2011, Martti Koskenniemi was confidently stating that ‘we no longer see any magic in sovereignty’.<sup>1</sup> These were still the times of ‘functional interventionism’, responsibility to protect, humanitarian intervention, and the relatively uncontested expansion of international economic law. Therefore, it might come as a surprise that on the 23<sup>rd</sup> of June the ‘magic of sovereignty’ was decisive for the victory of Leave. As Will Davies already pointed out, the Leave campaign’s choice to make ‘take back control’ their central slogan, was a manoeuvre of political genius that ‘worked on every level between the macroeconomic and the psychoanalytic’.<sup>2</sup> Even though the discourse oscillated wildly between references to national, parliamentary and popular sovereignty (the last being a non-existent concept for UK constitutional law, anyway), a desire to reclaim control from the supranational level and to subject decision-making to some form of democratic control was a common, and successful narrative.<sup>3</sup> It does not concern us here whether this was a realistic expectation, whether the leaders of the Leave campaign are staunch proponents of democratic participation (they are not), or whether the contemporary configuration of the UK political system is truly democratic and enabling of genuine popular control over decision-making (it is not). The point remains that this was a political battle won (and lost) on grounds of sovereignty.

My first observation focuses on the discipline of law, and more specifically, its orientation, political choices, methodological starting point, and unintended consequences. Being an international lawyer by training, I will primarily emphasize the role of international law. Since the early 1990s, a large part of the discipline devoted itself in arguing about the contemporary irrelevance and/or undesirability of sovereignty.<sup>4</sup> The argument was (aspiring-to-be) descriptive as much as it was unapologetically normative: sovereignty is not, and should not, be the cornerstone of international law anymore; political authority over territories and populations is only legitimate when it serves the rights of individuals

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<sup>1</sup> Martti Koskenniemi, *What Use for Sovereignty Today?*, 1 ASIAN J. INT’L L. 61, 63 (2010).

<sup>2</sup> Will Davies, *Thoughts on the sociology of Brexit*, POLITICAL ECONOMY RESEARCH CENTRE (June 24, 2016), available at [http://www.perc.org.uk/project\\_posts/thoughts-on-the-sociology-of-brexit/](http://www.perc.org.uk/project_posts/thoughts-on-the-sociology-of-brexit/).

<sup>3</sup> ‘Nearly half (49%) of leave voters said the biggest single reason for wanting to leave the EU was “the principle that decisions about the UK should be taken in the UK”. One third (33%) said the main reason was that leaving “offered the best chance for the UK to regain control over immigration and its own borders.”’ Lord Ashcroft, *How the United Kingdom voted on Thursday... and why*, LORD ASHCROFT POLLS (June 24, 2016), available at <http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/>.

<sup>4</sup> See, e.g., STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999); Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT’L ECON. L. 841 (2003); Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513 (2009).

and the functionality of the global neoliberal economic system. In fact, the two converged dangerously. Some commentators, or international legal/political initiatives did not explicitly reject sovereignty, but they defined it away. Of course, the thinking of international lawyers is not simply a matter of personal ideas. Thinking that sovereignty does not exist or does not matter is the first step for shaping reality according to this belief. In Philip Alston's words: 'International lawyers have, in many respects, served as me handmaidens of the changes wrought by globalization. Indeed, the characteristics of sovereignty have changed so much partly because of the role they have played in facilitating many of those changes and in seeking to reflect the new realities, both in their normative and institutional dimensions.'<sup>5</sup> Arguably, this discursive and material move away from sovereignty is not *a priori* a problem. Nevertheless, it becomes one, if one acknowledges (and cares about) two intertwined realities: democratic participation and economic redistribution to the benefit of the poor have so far materialized effectively only on the national level. This is not to say that the Brexit vote was one in support of democracy or fairer economic distribution. Still, these cataclysmic events could be an opportunity for some reflection of the deeply elitist and detached character of the discipline, and much more so of some of its specific projects, including 'global governance' or 'global constitutionalism'.<sup>6</sup>

#### **Between Neoliberal Elitism and Far-right Anti-intellectualism: The Role of Expertise in the Brexit Debate**

This leads me to my second point about the role and representations of expertise in the debate preceding the referendum. Few pronouncements capture the spirit better than Michael Gove's aphorism that 'Britain had enough of experts'.<sup>7</sup> In a nutshell, the debate can be summarized as a clash between neoliberal technocracy and far-right anti-intellectualism. Crucially, both positions are inherently inimical not only to some sort of emancipated society but also to liberal democracy, even though lawyers might be inclined to only blame the latter. For if blanket rejection of expertise shows contempt for informed debates and, more broadly, for the necessity to reflect seriously on the human condition and social questions, the unconditional reliance and praise of (certain forms of) expertise is anchored to the inherently conservative belief that certain people are fit for governing

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<sup>5</sup> Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 3 EUR.J.INT'L LAW 435, 435 (1997).

<sup>6</sup> For a poignant critique see: Zoran Oklopcic, *Beyond Human Rights: Beyond a Convertible Vattelian?*, VOELKERRECHTSBLOG (Jan. 18, 2016), available at <http://voelkerrechtsblog.org/beyond-human-rights-beyond-a-convertible-vattelian/>.

<sup>7</sup> Henry Mance, *Britain has had enough of experts, says Gove*, FINANCIAL TIMES (June 3, 2016), available at <https://next.ft.com/content/3be49734-29cb-11e6-83e4-abc22d5d108c>.

while others only fit to be governed.<sup>8</sup> In this respect, arguments about the purported inability of the public to decide on ‘complicated questions’, such as the one of the EU membership are commonplace among legal academics.<sup>9</sup> Here, the political role of expertise at work becomes obvious. First, it is a common discursive strategy to emphasize the ‘ignorance’ of those voting against the EU, but not of those voting for it, even though there is no good reason to assume any major discrepancies.<sup>10</sup> Secondly, such an approach frames the project of integration as one of highly complex macroeconomic targets and not of national/supranational identities, values or peace. Even though I do not necessarily disagree with such a framing, it is inconsistent with rhetoric supportive of the EU invoking common values, democracy or the existence of a European identity. Relatedly, unconditional reliance and invocation of expertise purposefully ignores that implication of such experts, be it economists or lawyers, in the construction of a structure of economic governance, including the EU, with profoundly unequal distributional effects. In terms of pure tactics, economists and other experts have not realized in full how their profession was discredited both by the 2007-2008 economic crisis, their inability to foresee it, and most importantly, its lasting impact on the lives of large sections of the public.

#### **A Dysfunctional Order: The Rise and Destructive Potential of Neoliberalism**

It is precisely the crisis of 2007-2008 that lies at the heart of the present turmoil, which is much broader than the Leave vote anyway. Even though the dismay of the British working class goes back to the years of Thatcher, and despite the fact that the genealogy of British Euroscepticism is quite distinct from its continental counterparts, it is at least doubtful whether a similar referendum would have had the same outcome ten or fifteen years ago. My point here is that the Leave vote is a reflection of the deep stratification of the UK society. Arguably, this stratification is multileveled and irreducible to a single explanatory scheme. Nonetheless, I cannot help thinking that the prevailing sense of ‘loss of control’ is at least partly the consequence of the neoliberal hegemony over both the EU and globally. Even though a comprehensive history and detailed analysis of neoliberalism surpasses the purposes of this short note, a working definition could be that neoliberalism is a model of capitalist accumulation that arose as a response to the Keynesian state and to 19<sup>th</sup> century

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<sup>8</sup> COREY ROBINS, *THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO SARAH PALIN* (2011).

<sup>9</sup> ‘There is ample scholarship on the limits if not perils of direct democracy when citizens too are asked to decide complex policy choices in the absence of a clear understanding of the available options and potential consequences of their vote.’ Laurent Pech, Maximilian Steinbeis, *Five Questions on Brexit to LAURENT PECH*, VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL (June 26, 2016), available at <http://verfassungsblog.de/five-questions-on-brexit-to-laurent-pech/>.

<sup>10</sup> See, generally, EUR. COM., *EUROPABOMETER, POST-REFERENDUM SURVEY IN IRELAND: PRELIMINARY RESULTS* (2008), available at [http://ec.europa.eu/public\\_opinion/flash/fl\\_245\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_245_en.pdf).

laissez-faire liberalism and it rests upon the idea of generalized competition and state intervention for the construction, guarantee and expansion of these competitive relations in an ever increasing sphere of social co-existence, including the structure and functions of the state itself.<sup>11</sup> Even though there are strong arguments about the links between ordoliberalism, the German 'stream' of neoliberalism, and the origins of European integration,<sup>12</sup> it is safer to assume that neoliberal hegemony over the project of regional integration in Europe was solidified with the Maastricht Treaty. Around the same period, a wave of liberalization redefined international law bringing about significant changes to international trade and investment law that solidified that position of big capital and diminishes the space for state intervention in order to minimize or channel the adverse effects of free markets.<sup>13</sup> As I argue elsewhere,<sup>14</sup> the quantitative expansion and qualitative refinement of international law (broadly conceived) after the 1990s is not a mere coincidence to the rise of neoliberalism, but rather a necessary precondition of neoliberal hegemony. Removing or at least disciplining democratic and popular control over economic decision-making has been a central concern for neoliberals. From Hayek's (neoliberal) federalism<sup>15</sup> to Röpke's emphasis on the need to tame national and popular sovereignty through international law,<sup>16</sup> the trend toward increasingly internationalized and legalized forms of economic decision-making is intrinsically linked to neoliberal thinking and practice.

However, a mere repatriation of sovereign powers will not solve the problem, especially in states like the UK, where neoliberalism is 'indigenous' and not externally imposed. This is partly due to the fact that, despite the hopes of aspirations of Leave voters, the leaders of

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<sup>11</sup> For some good points of reference see: MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE 1978-1979* (2008); PIERRE DARDOT, *CHRISTIAN LAVAL: THE NEW WAY OF THE WORLD: ON NEOLIBERAL SOCIETY* (2014).

<sup>12</sup> Michelle Everson, *Europe at the Crossroads: Professor Everson comments (Part 3)*, BIRKBECK COMMENTS (June 15, 2016), available at <http://blogs.bbk.ac.uk/bbkcomments/2016/06/15/europe-at-the-crossroads-professor-everson-comments-part-3/>.

<sup>13</sup> DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE* (2008); ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER* (2011).

<sup>14</sup> Ntina Tzouvala, *The Ordo-liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale*, EUR.Y'BOOK INT'L ECON. L. (forthcoming 2016).

<sup>15</sup> Friedrich A. von Hayek, *Economic Conditions of Inter-state Federalism*, 5 *NEW COMMONWEALTH Q.* 133 (1939); Jorg Spieker, *F. A. Hayek and the Reinvention of Liberal Internationalism*, 36 *INT'L HISTORY R.* 919 (2014).

<sup>16</sup> Wilhelm Röpke, *International Law and Economic Order*, 86 *RECUEIL DES COURS* 203, 250 (1954).

the Leave campaign were on average more neoliberal than the consensus on EU-level.<sup>17</sup> In fact, this real sense of ‘loss of control’ is not only linked to the transfer of decision-making to supranational bodies, but also a direct consequence of the inherent logic of neoliberalism. This process of disenfranchisement and stratification works on many levels. First, because of privatization a growing number of functions, services, even material spaces are being removed from democratic control and subjected to market forces. Therefore, voters can even nominally decide an ever-narrowing range of questions. The convergence of political parties to the new neoliberal ‘centre’ further means that the electorate can only choose between different versions of essentially the same programme, while even the mildest Keynesian politics end up in political exile. Even in the world of expertize, economics departments have become so monolingual in their orientation that students began revolting.<sup>18</sup> Secondly, the disciplining of the state in accordance with market principles means that citizens are re-imagined as customers driven by some (imaginary) rational desire to maximize utility and not as parts of a political community that liberate or clash for the greater good -elusive as this may be. Thirdly, the elevation of competition into the organizing principle of every singly aspect of human (co)existence comes with accepting the essential zero-sum nature of competition as an organising principle of society. In short, neoliberals were happy to acknowledge that unlike free exchange, free competition does not come with a promise of final equilibrium:

Instead of being frank about the fact that the extraordinary chances of gain which the game of the market economy offers for the good players are accompanied by chances of losing for those who are less capable or less fortunate, and that all those who want to participate in this game are obliged to take their chance, the propaganda [of classical liberalism] promised prosperity and happiness to all without exception.<sup>19</sup>

As Wendy Brown has argued convincingly, these ideas and practices of neoliberalism lead to the creation of a ‘permanent underclass’, since sizeable sections of the society are excluded from democratic participation, social integration, even genuine participation in

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<sup>17</sup>George Eaton, *Farage tries to shed his Thatcherite skin*, NEWSTATSMAN (June 1, 2014), available at <http://www.newstatesman.com/politics/2014/06/farage-tries-shed-his-thatcherite-skin>.

<sup>18</sup> *An international student call for pluralism in economics*, INTERNATIONAL STUDENT INITIATIVE FOR PLURALISM IN ECONOMICS (May 4, 2014), available at <http://www.isipe.net/>.

<sup>19</sup> Alexander Rüstow, *The General Sociological Causes of the Economic Disintegration and Possibilities of Reconstruction*, in INTERNATIONAL ECONOMIC DISINTEGRATION 272 (Wilhelm Röpke ed., 1942).

the market.<sup>20</sup> The referendum results in the North East of England, a region rapidly de-industrialized, destroyed by Thatcherism, ignored by subsequent governments and let down by New Labour, can be explained and contextualized satisfactorily only if we accept the profoundly exclusionary and socially destructive effects of neoliberal governance both on national and on international levels. The victory of Leave was at least partly an angry and self-defeating anti-establishment rising of those who rightly feel that they have consistently been on the losing side for the last forty years. If this is the case, the result was less about the EU and more about the 'establishment' of the UK, ranging from the Prime Minister to condescending columnists and readers of the liberal centre-left Guardian.

### Conclusion

This short note did not aspire to provide a comprehensive explanation of the outcome of the UK referendum. Undeniably, factors such as nostalgia for the British Empire,<sup>21</sup> discomfort with 'multiculturalism' or unapologetic racism, collective hysteria over migration, a highly dysfunctional political system, and shamelessly misleading statements contributed significantly to the result. My contribution aimed to highlight the issues that I consider of direct interest to lawyers, particularly to international lawyers. Therefore, I emphasized the complex relationship between sovereignty (and its erosion), expertise and neoliberalism. My main argument is that the described complex relationship between the three (always coupled with other factors), created a 'perfect storm' for a fairly disastrous outcome. In this respect, we need to distinguish between root causes, contextual factors and outcomes of a process. My analysis above does not imply that the outcome of the referendum will help us solve any of the grave issues that paved that way for this very outcome. If anything, chances are that the situation will deteriorate both regarding xenophobia as well as the economic marginalization and political disenfranchisement. The total lack of a Brexit plan and the exceptionalism of the British ruling class mean that the Leave negotiations will be disastrous, if they ever happen in the first place.

However, the point remains. The outcome of this referendum was a warning for the rapid de-legitimization of a specific paradigm of governing the economy, organising public life and ordering spatial matrixes. It is not a great secret that in politics, as in nature, vacuums are filled quickly. With the far-right on the rise, progressive lawyers and citizens need to mobilize fast, in order to avert what looks very much like a looming disaster. Importantly,

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<sup>20</sup> Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratisation*, 34 POLITICAL THEORY 690, 691(2006).

<sup>21</sup> Nadine El-Enany, *Brexit as Nostalgia for Empire*, CRITICAL LEGAL THINKING (June 19, 2016), available at <http://criticallegalthinking.com/2016/06/19/brexit-nostalgia-empire/>.

this requires a degree of self-reflection about our own role in the construction of societies so unfair and unequal that exhibit signs of self-destruction.

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## **The European Fallout**

*Neil Walker*

*University of Edinburgh School of Law*

[\[neil.walker@ed.ac.uk\]](mailto:neil.walker@ed.ac.uk)

I can hardly begin to express what Brexit means for Britain and Scotland. Like many, I am shocked. I am shocked in part by the result itself, and in part by the very fact that I *am* shocked by the result, despite all the warning signs. Denial and wishful thinking affect us all, so before Remainers place too much blame on complacent, arrogant, elitist politicians, we should look to ourselves. They are but our mirror.

But my inability to express the meaning of Brexit also has to do with the sheer uncertainty of what will follow. The skies are ominously dark, the short and long term forecasts are deeply unpredictable. The leadership of Leave is divided between those Conservative Brexiteers who, having won, seem to have no appetite to claim the spoils of victory, and the Faragistes in and beyond UKIP whose first—and not entirely irrational—instinct is to worry that others will betray the revolution, and who, therefore, have moved quickly to set themselves up as its self-styled guardians. In neither case, is there a well-planned route ahead, a clear sense of who should lead the expedition, or a strategy for dealing with disgruntled Remain-voters in Scotland and Northern Ireland strongly minded to support the renewal of referendum politics that might well lead to the break-up of Britain. Meanwhile, of the 52% who voted to depart, many responded more to the seductive sweep of the general campaign invitation “to take back control” than to any specific grievances with the EU. Predominantly older, white, socially conservative, and located in more economically marginal neighbourhoods, this constituency of the “left behind”<sup>1</sup> turned against a political class they saw as dominated by socially liberal university graduates with values fundamentally opposed to theirs, on identity, Europe—and particularly immigration. They will have to wait to see what the promised restoration of control will mean and when, if ever, it will come to pass. To say that there is a gap between expectations and likely delivery is an understatement. And presumably, further disappointment will not leave the protestors any more enamoured of the political class.

All that is before we take into account Europe’s unready and unco-ordinated response to the British vote and to the prospect of exit negotiations. The Commission President’s first

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<sup>1</sup> ROBERT FORD & MATHEW J. GOODWIN, REVOLT ON THE RIGHT: EXPLAINING SUPPORT FOR THE RADICAL RIGHT IN BRITAIN (2014).

response was to urge full steam ahead under Article 50 TEU, but subsequent interventions by Merkel and some others have been more circumspect. In any case, the formal right of initiative under Art 50 lies with the leaving party, and it already seems domestic constitutional doubts over whether this initiative could or should be taken prior to further intervention and approval from the sovereign UK Parliament might provide a deeper rationale, or at least an alibi, for those counselling against precipitous action from the UK perspective. In the cold post-referendum light of day, then, it seems that neither side is in a hurry to finalise the terms of separation and work out the basis of their new relationship. It may yet be, therefore, that they never make it to the negotiating table.

But what of the fallout of the Brexit vote for the rest of the EU? Again, this is uncharted territory, resistant to accurate plotting and sure forecasting. But let me point to just three ways in which the European project has suffered damage, or been made more vulnerable, and certainly more challenging, as a result of the Brexit vote and of the process now unfolding.

The first has to do with the EU's *structural* capacity to absorb difference. Elsewhere I have argued that the UK referendum, with its crude in/out choice, abjectly failed to register the range of "in-between" options available under Europe's still evolving system of differentiated integration.<sup>2</sup> With its opt-outs from the Euro and Schengen, and also from some wider aspects of criminal justice and immigration policy under the Area of Freedom, Security and Justice, the UK was already a major beneficiary—probably *the* major beneficiary—of the EU's variable geometry even before it cut a new "customised membership" deal in February that would have allowed exemption even from the founding Treaty commitment to "ever closer Union." Opinions differ, of course, as to how much differentiation the EU can bear without this leading to its irreversible disintegration. But we should be aware that there are already as many as 50 different types of differentiation provided for under the Treaties, as well as various outer circles of association—or forms of "external differentiation"—for candidate states, members of the European Economic Area, the European Free Trade Association, and others more loosely connected through the European Neighbourhood Policy. And it is differentiation on this scale and of this complexity that has allowed the EU to pursue a course of Enlargement that is acceptable to a key coalition; to core states who seek deeper integration, to new members and others (like the UK) who wish to guard against a political imperative that requires all to integrate at the rate of the most Europhile states, and also to aspiring members and associating states seeking the best form of accommodation with a regionally dominant supranational polity of shifting size and scope.

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<sup>2</sup> Neil Walker, *The Brexit Vote: The Wrong Question for Britain and Europe*, VERFBLOG (June 16, 2016), available at <http://verfassungsblog.de/walker-brexit-referendum/>.

This is a fine balance, however, and avoiding the danger of disintegration depends upon ensuring that the price of flexibility is subscription by existing members to the core commitments of membership. Britain has sought to upset that balance, seeking to sacrifice its insider flexibility in search of a more advantageous relationship from the outside. It is a gambit which, if pursued to its conclusion, will probably fail, as the rest of the EU will be in no mood to be generous to their soon to be ex-spouse, and as, in any case, it is hard to imagine, outside some of the wilder fantasies of the Brexiteers, in what areas the UK could strike a better deal with the EU outside rather than the one it has already secured inside. Yet the wider injury may be to the system of differentiated integration itself. Rather than the trend-setter in the outer possibilities of differentiation, the British case will become a cautionary tale of the limits of this kind of architecture, and perhaps the cue for a more defensive and rigid approach—a return to a “one size first all” politics at a time when the pressures of economic integration around the Euro call for as much flexibility as possible.

The second injury caused by Brexit is *motivational*. We learn from one recent survey of EU citizens across nine member states that 70% believe that Britain leaving would be a bad thing, and only 16% believe it would be a good thing.<sup>3</sup> We hear from another survey of eight large states, however, that nearly half would like their own referendum on membership, and if this was granted an average of one third would vote to leave, with Eurosceptical highs of 48% in Italy and 41% in France.<sup>4</sup> If we put these two sets of figures together we must draw some sobering conclusions. British membership of Europe is so valued by the rest, I would venture, not just because of the economic, political and cultural contribution it makes, but also, and in the end more significantly, because of the signal it sends about the stability of the whole. While all the big states remain on board, break-up is unthinkable. If one leaves, confidence in the club diminishes, and as our second survey shows, many will feel emboldened to follow the lead of the British Leavers. No-one could have failed to notice that the most confident and most strident voices from Europe in early response to the Brexit vote have been from the nationalist Right—from Le Pen, Wilders, Salvini and the like—savouring the opportunity to sow precisely the kind of blended anti-immigrant and anti-European discord that was so evident, and so evidently successful, in the British debate. These remain minority views, even in their own countries, but they are also loud and increasingly co-ordinated views across Europe. If the counter-view presents itself simply as a series of uncoordinated defensive postures by European governments, or

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<sup>3</sup> Bruce Stokes, *Euroscepticism Beyond Brexit*, PEW RESEARCH CENTER GLOBAL ATTITUDES & TRENDS (June 7, 2016), available at <http://www.pewglobal.org/2016/06/07/euroscepticism-beyond-brexit/>.

<sup>4</sup> Bobby Duffy, *Half of People in Nine European Countries Believe UK Will Vote to Leave the EU*, IPSOS MORI (May 9, 2016), available at <https://www.ipsos-mori.com/researchpublications/researcharchive/3731/Half-of-people-in-nine-European-countries-believe-UK-will-vote-to-leave-the-EU.aspx>.

from EU institutions whose only headlines are the inevitably negative ones that will be generated by British exit talks, then the motivational problems will surely deepen.

Which brings me, finally, to the problem of *initiative*. One of the most EU-assertive responses to the Brexit vote has come from Emmanuel Macron, the French economy minister, who in joining calls for EU reform, urged a new democratically founded supranational project to be put to a pan-European referendum for the first time. Of course, those with reasonably long memories—and one of Europe’s enduring political problems is that of collective amnesia—will recall that one of the factors in the European Constitutional Convention process of 2003-05 losing its early momentum was the decision (or rather, the non-decision) not to co-ordinate the national ratification referendums for fear of collective failure, and instead to seek either to avoid referendums entirely or run them on a strictly county-by-country basis. This strategy, of course failed, the project foundering on the plebiscitary defeats in France and the Netherlands in the spring of 2005. Macron is correct to note, then, that Europe has never had the courage to do what he now suggests. But there is nevertheless something deeply paradoxical in his suggestion.

The Brexit vote continues an unpredictable pattern of “no” votes in referenda (only some of which were subsequently reversed) on key questions of European integration, from the ratification of most of the major reform Treaties of the past 25 years to the non-ratification of the Constitutional Treaty itself, and from the non-accession of Norway to the recent Dutch rejection of a New EU association agreement with Ukraine. Arguably, those who try to make the case for Europe in a national referendum typically stand at a deep disadvantage. The binary logic of a referendum vote can all too easily be framed as an opposition between the national and the European interest, and when one is dealing with a national *demos* that framing will work to the advantage of those who position themselves most directly as guardians of the national interest. This is precisely why the alternative idea of a pan-European approach was briefly mooted in 2003, and why Macron raises that prospect again today. With a pan-European approach, it is possible to organise, speak and capture the political mood across borders, to produce a joined-up case for Europe to match the nationally organic counter-cases, and to avoid the appeal to Europe being reduced to a remote abstraction or the mere instrument of a national good. But herein lies the paradox. Macron is asking us to consider investing in a process that has delivered many setbacks to European integration at precisely the point it has delivered its latest and perhaps sharpest setback. What is more, he asks us to invest in it on such a scale that the cost of failure would be unprecedentedly high, perhaps fatally so.

We can see where he is coming from, of course. Today it feels that the long-term future of Europe has to be about more than consolidation of past goods and might well depend on the kind of democratic refounding that a popular initiative implies. Brexit has helped bring us to that point, while also leeching the confidence and motivation needed to seize any

initiative to move beyond that point. But here at least, Brexit's message is double-edged, posing a challenge and asking a question of the European project that needed to be put sooner rather than later

Buffeted by the storms of the past week I am loath to write these words, and maybe this is just another example of wishful thinking; but, as the saying goes, it is an ill wind that blows no one any good.



## **The Brexit Referendum and the Crisis of “Extreme Centrism”**

*Michael Wilkinson*

*London School of Economics*

[\[M.Wilkinson@lse.ac.uk\]](mailto:M.Wilkinson@lse.ac.uk)

The result of the Brexit referendum sends shockwaves through the political fabric of the UK, Europe and beyond. It is the latest instance in a series of anti-systemic shocks to hit the EU, but will almost certainly not be the last, as discontent with the status quo and a disconnected elite continues unabated across the Continent (and is replicated across the Atlantic), and the European Union provides a convenient target for voters to express their anger and resentment.

Although the crisis, as any other, opens up opportunity, this is more likely to be seized by right-wing nationalist parties, providing further momentum to push for ‘Rexit’ (right-wing exit from, or renegotiation with, the EU), most notably in France and Austria although anti-European sentiment is growing from Helsinki to Athens, via Amsterdam, Rome and Budapest. This, however, can no longer be dismissed as an unfortunate and contingent set of political turning points: it seems intimately connected to the current trajectory of the Union itself.

Brexit exposes cleavages that will continue to pose problems not only for the political and constitutional future of the UK and the European Union but also for maintaining the entire edifice of liberal democracy. Careful dissection of the fissures that connect and disconnect national, European, material and ideological fault-lines will be required in due course. Many different meanings can and will be attributed to this event.

Three will be offered here. First, there is the real possibility that Brexit will mean Brexit in the same way ‘Oxi’ meant ‘Oxi’, i.e. it will mean Remain. It will result in a political or constitutional fudge, containing social tensions temporarily only for them to erupt in an even more spectacular fashion down the line. Second, there is the risk it will contribute to a right-wing unraveling of the entire project of integration, next to which Brexit pales in comparison. Although there are important features which isolate the Brexit debacle, viewed in the whole, there is little cause for thinking the EU is likely to reform in a meaningful direction, and many reasons to be skeptical. At its most basic, however, I suggest there is a third meaning to Brexit, that it exposes a deeper crisis in what has been

labeled 'extreme centrism' – the currently hegemonic position that rejects any alternative to the political status quo as unimaginable and obstructs any democratic resistance to it.<sup>1</sup> Brexit represents a genuine challenge to this position, if less to a European Union that was constructed from the outset on a fear of democratic alternatives. The EU, however, is paralyzed by its own contradictions, torn between the continuity of a project that requires transnational solidarity, a rule-book that increasingly proscribes it and political elites that seems incapable of serious reform. How meaningful such reform can be without addressing underlying structural problems in the Eurozone, and in the economic system more generally is, in any case, doubtful.

### **Reading Brexit as Bremin?**

Immediate political implications for the UK political scene are likely to be multiple, varied and (like the result itself) hard to predict with any certainty. Although David Cameron has announced his resignation, he leaves a poison chalice to his successor, having not yet triggered Article 50 withdrawal proceedings. The two most prominent Brexit Tories appear reluctant to press forward with a leave campaign that failed to offer even a glimpse of a post-Brexit strategy and that was based on promises that were reneged upon even before the final votes were counted. The decision to hold a referendum itself, although ostensibly arising from internal party concerns about the fear of hemorrhaging votes on the Eurosceptic wing of the Conservative Party to UKIP, and possibly based on the assumption that in a Tory-Liberal Democratic coalition the manifesto promise would be quietly buried, provided Cameron an opportunity to cement his legacy on the broader canvas by being remembered as the Conservative Prime Minister who finally resolved the European issue that has wracked the conservative establishment for decades. Ah well.

A major realignment of the party system is one possible outcome, with a reunited centre ground attracting support from Remainers across the party political spectrum, possibly from all three major parties and the various parts of a now openly fractured United Kingdom. This will lead to the possibility in a new general election of the creation of a European-style grand coalition that will frustrate the leave vote or offer a fresh referendum. Although a temporary fix that will please many, the longer term costs to political stability could be high (Brexit exposing fracture not only along national lines, but along inter-generational, class-based and geographical lines). The 52% of voters from across the political spectrum opting to leave would be unrepresented, except for a UKIP party that only a fraction of them currently support. Nigel Farage, or equivalent, would be the major beneficiary.

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<sup>1</sup> See TARIQ ALI, *THE EXTREME CENTRE: A WARNING* (2015).



Predictably, it is the Labour party that is fracturing first. Due to its internal crisis, it may be that Jeremy Corbyn goes before Cameron’s successor is even in place, despite being one of the few domestic politicians with an overwhelming democratic mandate and social base. The removal of Corbyn would be significant for the European project as a whole, as one of the only Remain campaigners to show unequivocal support for EU free movement. The argument now coming from the centre of the Labour party, (as well as across the political establishment) in an attempt to divert the rightward drift, is that free movement must be renegotiated, despite being a core principle of European integration, and currently accepted even by those countries that have negotiated looser free trade agreements.

Those on the Left inclined to Euroscepticism were cautioned that the immediate impact of Brexit would be a sharp turn to the Right, the dismantling of workers protection, a harsher policy towards immigration, and deregulation of the financial sector; in other words, however problematic the EU, the Brexiteers would far outflank its structural neo-liberal bias. The ‘lesser-of-evils’ argument appealed to sound and genuine concerns. If appearing defeatist and lacking in ambition, there was encouragement from other Left-wing parties in Europe (Podemos in particular) and the pan-European alternative platform headed by Yanis Varoufakis, that a broader movement might emerge if only the British Left bided its time.

Corbyn, showing the amount of enthusiasm in the EU that could only be expected of a politician whose old-fashioned social-democratic views are increasingly hard to square with its current neo-liberal trajectory, kept a substantial majority of Labour voters in Remain. Although many are frustrated with his equivocal campaign, the more pertinent concern might be how many more votes Corbyn would have taken to Leave had his instincts led him to front a ‘Lexit’ (left-wing exit) campaign, which never materialized beyond the fringes of the Socialist Workers Party and a few isolated intellectuals.<sup>2</sup> A stronger ‘Lexit’ voice would have given a different complexion to the referendum result and affected the manner of its interpretation.

This raises a broader point. European integration has proved to present a real dilemma for a Left that is deeply committed to Europeanism and internationalism, but increasingly at odds with what the EU represents in terms of a political economic and geo-political project of neo-liberalism and neo-colonialism. This is a trap from which it presently looks difficult to escape.

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<sup>2</sup> This include notable experts on European integration. See Chris Bickerton, *Brexit is not the Property of the Political Right. The Left is Disenchanted Too*, THE GUARDIAN (June 22, 2016), available at <https://www.theguardian.com/commentisfree/2016/jun/22/brexit-property-right-left-eu-expert>.

With a mainstream political class that is totally disconnected from any popular base, there is an obvious danger in the loss of one of the few politicians in the UK who can lay claim to it. The problem for Corbyn - or whoever replaces him - is not merely to reconstruct the Labour party, but to reconnect with Leave voters (many in Old Labour heartlands), who, devastated by post-industrial decline that followed the harsh neoliberal programs of Margaret Thatcher in the 1980's (and largely adopted if softened by her 'third way' successors) showed no signs of backing a political elite which has left them to the vicissitudes of the global marketplace.

It might also be a mistake to think Scottish independence will follow as an automatic reflex of Brexit, not least because joining the currency union would make demands diametrically opposed to the anti-austerity platform of the SNP. Would Scottish voters feel comfortable having economic policy dictated by a legal and political structure in which austerity is more important than solidarity, and where competitiveness trumps currency irreversibility? Nicola Sturgeon, praised as one of the few politicians to have maintained her standing, might find the ground rather less firm than it appears, not least as other European leaders have concerns about their own secessionist movements. This should at the very least be pause for thought.

Predictably too, constitutional lawyers are immediately grasping at straws in their narrow field of technical textual interpretation. Legally sophisticated but politically tone deaf arguments are deployed about how Brexit might still be avoided, the will of the majority frustrated, through either the Westminster or Scottish Parliaments, or the Courts, without giving any thought to the repercussions this would have on the deeper nature of the governing relationship. The flipside to an obstinate Remain is the fact that there is no formal method of involuntary and outright expulsion from the EU. This historical first opens up a constitutional quagmire on all sides.

#### **Reading Brexit as "Who's Next-it"?**

However profound the consequences for the political and constitutional future of the United Kingdom, it would be a mistake to view the Brexit event in splendid isolation, either in terms of cause or effect. The discontent of British voters is replicated elsewhere and in places that will have far less capacity to deal with the political and economic crises that result from its expression.

To be sure, there are significant local variations; in each country the material and political circumstances differ and so, therefore, will the reaction to the political and economic situation. Three immediately stand out in the Brexit case.

The first is that British reaction to the status quo may indeed be more spectacular due to the more spectacular form of neo-liberalism that preceded it, returning again to the apparent embrace of Brexit in working class communities feeling left behind not only by the Tories in the 1980’s but also their New Labour successors, and not only in England but also in Wales (which also voted with a similar majority to leave).

The second is that the British simply do not have the same political and constitutional imagination when it comes to the project of European integration as the rest of the EU. For the three countries at the ‘core’ of Europe (Germany, France and Italy), European integration is so firm a part of their postwar constitutional settlement that exit is unimaginable. For Spain, Portugal and Greece, as for the new members in Central and Eastern Europe, the EU offers a promised land of freedom and democracy after postwar political repression. But for how much longer? (It is curious to note that those countries which experienced Fascism in the post-war period are seeing a revival in left-wing politics, whilst those who lived with the experience of Soviet Communism seem to be moving in the opposite direction.)

Third, Britain lacked the most potent reason for disquiet with the project of European integration: the single currency, barely maintained with an ordo-liberal rulebook increasingly at odds with an unrestrained central bank, based on centralized economic management incompatible with divergent economic conditions and a regime that makes exit an extraordinarily costly option. If history is a guide, the first to leave this post-modern gold standard may be the most able to weather the political storms in the long run. But there is no formal avenue of exit from the single currency.

Britain, along with the Nordic countries and perhaps the Netherlands, stands in different material, political and constitutional relation to the European project. These differences are significant and will likely grow.

And yet, in European perspective, the Brexit referendum is only the latest if perhaps most dramatic in a line of events suggesting popular discontent with the project as far back as the French barely “Yes” (51%) on ratification of the Maastricht Treaty in 1992, continuing with the rejection of the Constitutional Treaty in France and the Netherlands in 2005, and most recently the Greek *Oxi* referendum in June 2015. In each case – and others in between - the status quo has been maintained, most spectacularly when the Syriza-led Greek government, elected on an anti-austerity mandate, first capitulated to the austerity regime imposed on them by the Euro-group, and then were re-elected by a resigned electorate a few months later at a cost to democracy that is still to be fully calculated.

These events demonstrate a European Union, and particularly its Eurozone core, stumbling from one crisis to the next, the “can being continually kicked down the road” with a series

of ad hoc reforms, and with little serious effort to resolve deeper structural problems. Euro group intransigence on austerity and the refusal to consider debt restructuring had made even the IMF break ranks with its ordo-liberal agenda. And as we were reminded during the negotiations with Greece, the Euro group itself is 'formally an informal institution' and not even subject to constitutional scrutiny.

Although the EU was rarely discussed in any detail during the referendum, this was as much to the advantage of the Remain campaign itself, as only a little digging would have revealed a European Union whose foundations were looking increasingly unstable and its institutions highly fragile, if not unfit for purpose, as the total collapse of the *acquis communautaire* during the Euro-crisis was followed by collapse of the Schengen and Dublin regimes under the strain of a (statistically minor but political major) crisis of displaced persons. This has, in the view of a prominent Europhile, led to a "rule of law crisis."<sup>3</sup> Expert opinion, so derided in the rhetoric of the Leavers, would give little comfort to those extolling the virtues of the European Union and the case for remaining in it. And indeed it is ironic that the expert's predictions of the result of the referendum (from the financial markets to the pollsters) were so terribly off target.

Writing in 2012, Joseph Weiler identified a transition in the project of European integration, proceeding no longer through law but through fear.<sup>4</sup> It is therefore significant that 'Project Fear', as the Remain campaign was appositely named by its opponents, was unable to move a stubborn populace in significant numbers, despite having the backing of virtually every single domestic and international institution of global capitalism, every major political party, virtually all the trade unions, and a cascade of major and minor celebrities.

Does even fear – that most potent of political substitutes - no longer work to hold the centre-ground?

The casual depiction of Leave as the preserve of a racist, bigoted, xenophobic (at any rate anti-immigrant) and uneducated underclass occludes a number of significant factors. Despite the occasionally odious rhetoric, and the horrific incidents of racism and violence on the streets, the data suggests anti-immigration per se was not the driving force for leave, but rather some vision of self-government, however illusory.<sup>5</sup> The promise of

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<sup>3</sup> See Guy Verhofstadt, *Europe's Rule of Law Crisis*, PROJECT SYNDICATE (April 11, 2016).

<sup>4</sup> Joseph H. H. Weiler, *Editorial: Integration Through Fear*, 23 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1 (2012).

<sup>5</sup> Nearly half of leave campaigners (49%) gave as their single biggest reason the principle that "decisions in the UK should be taken by the UK." See Lord Michael Ashcroft, "How the United Kingdom voted on Thursday... and Why" (24 June 2016), available at <http://lordashcrofthpolls.com/2016/06/how-the-united-kingdom-voted-and-why/>.

“regaining control,” irrespective of its merits, sincerity, or feasibility (or practical distinction to the promise of ‘closing borders’), was the decisive narrative, with “Independence Day” its crowning rhetorical flourish. This meaning will be resisted by liberal political elites eager to fend off any resistance to their position and with a much easier story to push of ignorant xenophobes nostalgic for an inglorious past. The dominant narrative now being offered by political elites, and apparently open to reception in other capitals, is to read Brexit as about immigration pure and simple, adopting a classic populist position, to the extent even of considering rescinding on the core principles of EU free movement. The underlying social and political problems can then, once again, be ignored.

The EU itself and its dominant members – evident to those who study it in any critical detail – is in any case far from a model of enlightened political liberalism and democratic accountability (let alone social solidarity). Its response to the humanitarian crisis in the Mediterranean has been woefully inadequate, with Merkel’s increasingly erratic diktats on border openings and closings, and the EU-Turkey deal displaying contempt for European and international norms that will be hard to restore.

Overall, the EU has looked utterly impotent in dealing with the systematic return of right-wing nationalism, in Central and Eastern Europe and even in its core. Indeed the EU adds fuels to the flames of a right-wing populism looking to exploit those most disaffected and vulnerable, and provides a useful scapegoat for domestic politicians against which to target discontent from economic globalization. It also tends to reinforce and normalise anti-immigrant sentiment as it gradually resembles “fortress Europe,” using NATO to patrol a Mediterranean sea that has witnessed thousands of tragic deaths.

Neither Brexit nor Bremain will resolve those issues. Nor will it do anything to address the growing imbalances in the Eurozone between north and south, core and periphery. There is, however, the real danger that Brexit might only divert attention from these more serious structural problems. As private debt is turned into public debt, citizens turn increasingly against each other, as notably occurred through the Greek crisis of 2015. This then exposes tensions and divergences in the material constitutional fabric of the Member States, with neglect of violations of social rights in the debtor countries matched only by

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The data has also been woefully misconstrued. See, e.g., Fredrik de Boer, “Everyone is Reading that Infographic Incorrectly” (26 June 2016), available at <http://fredrikdeboer.com/2016/06/26/everyone-is-reading-that-infographic-incorrectly/>.

attention to fears of moral hazard in creditor countries. As Wolfgang Streeck put it, “United Europe’ has never been so disunited in the last half-century as it is today.”<sup>6</sup>

From the perspective of a Franco-German axis, Brexit might be thought a useful riddance of a persistently infuriating and occasionally downright obstructive partner. Yet France, perhaps the country most ambivalent about the UK’s membership (for reasons not only of historical rivalry and cultural difference, but of political economy - the UK considered ideologically closer to German economic liberalism than France’s mixed affair) is too preoccupied with its own internal difficulties to take any advantage of Brexit. And in Germany, the extreme centre has its own problems to deal with, less now from a constitutional court that has capitulated on the decisive question of authority in its recent OMT reversal, but from the AdF and other Eurosceptic political fringes. There is anyway little reason for it to lead reform of a currency union from which it is emerging as the major beneficiary.

The political difference in France is that there is more potential for a serious Left wing alternative to develop as the realization is beginning to dawn that the single currency may have been a mistake of epic proportions. The French (not to mention the Italian) electorate has far more reason to be wary of the status quo, lacking the UK’s various opt-outs and differential treatment, and it maintains at least the remnants of a radical Left movement that, although weak, is far stronger than anything comparable in the UK. If hope is to come from anywhere, it might just be there. But there too, danger resides, due to the strength of the *Front National* and its own “Rexit” strategy, which will draw succor from the recent events.

#### **Reading Brexit as the Beginning of the End of Post-democracy?**

Both domestic and European perspectives suggest that what is unfolding across the Continent (and is reflected in other parts of the globe) is a crisis of extreme centrism. A political centre (moved so far to the Right over the last 40 years) and complacent liberal elites are barely clinging on in the wake of the political turbulence forged in the crucibles of an increasingly rampant global capitalism, but political alternatives are obstructed, derailed or fail to gather the sufficient momentum. If they increasingly reveal the nakedness of the Emperor, they also reveal the weakness (and frequently downright mendacity) of much of the opposition to it.

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<sup>6</sup> Wolfgang Streeck, *Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas*, 21 *CONSTELLATIONS* 213 (2014).

The biggest casualty of the various Euro-crises (financial and humanitarian) has been European democracy, or more specifically any non-nationalistic expression of it. Even Jürgen Habermas, so long an unrepentant supporter of the European project, regarded the deal struck with Syriza as resembling an ‘act of punishment’ against a left-wing government that dared openly to rhetorically oppose austerity whilst promoting values of European integration.<sup>7</sup> Whereas the ‘threat’ to the European order of economic stability from the Left in Greece was micro-managed to the last detail the EU has been impotent to intervene against the threat to its supposedly foundational values of democracy and the rules of law from the Right in Hungary, or Poland. The current trajectory is to punish the left and appease the right.

It is also notable that the British were permitted to renegotiate their terms of membership *from* the Right, with David Cameron successful in obtaining at least symbolic protections of the City of London, concessions towards a discriminatory welfare regime, and an emergency break on benefits.

This was a reminder that, given the opportunity, Brexit would look much like the status quo, only worse, at least for those values cherished by political liberals and the Left. But ‘lesser evilism’ on a number of counts, although undoubtedly persuasive, has meant that any critical position of the EU was given almost entirely to the Right to exploit, with a Remain campaign that was as complacent as the financial markets backing it.

The Brexit referendum might look like the last gasp of an idea – of democracy - that is dying a slow death. The immediate, kneejerk reaction of the extreme centre (in the UK and elsewhere) will be to attempt to bury it. The most lasting casualty of Brexit is therefore likely to be (what is left of) democracy itself, with suggestions that the vote should be effectively ignored through political intransigence or constitutional niceties and a complete failure to realize the long-term damage this could do, or the scale of change required to mend the ship of European integration on increasingly stormy seas.

But unless domestic and political elites grasp the seriousness of the underlying social and political problems, the kind of grandstanding and head burying that has followed the previous shocks to its system will only serve to make the eventual explosion more dramatic and almost certainly worse in its eventual consequences.

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<sup>7</sup> See Philip Oltermann, *Jürgen Habermas’s Verdict on the EU/Greece Debt Deal – Full Transcript*, THE GUARDIAN (July 16, 2015), available at <http://www.theguardian.com/commentisfree/2015/jul/16/jurgen-habermas-eu-greece-debt-deal>. This class-based aspect of Eurozone politics is not often addressed. Conditionality (austerity) is what Blyth calls a “class-specific put-option.” It protects the top 70% who have assets, and hurts the bottom 30% who most depend on public services. See M. BLYTH, *THE HISTORY OF A DANGEROUS IDEA* 258 (2013).

It is not surprising that many voters, in response to the crisis of legitimacy that affects the EU and its Member States, have turned towards right wing Euro-sceptic parties, in both core and peripheral counties. Their rhetoric has become more compelling, and in many cases is seen as the only alternative to a mainstream that is considered responsible for a severe economic downturn, a “secular stagnation” in the Eurozone, and is unable to extricate itself from an ordo- and increasingly neo-liberal project of economic integration that has virtually been elevated to supra-constitutional status.

There are important exceptions to this Rightward shift, but where anti-systemic parties have grown into Leftist and potentially pan-European political movements (such as Syriza, Podemos, and the Left Bloc in Portugal) they are presented by the European political establishment as a threat to the necessary ‘austerity’ programmes and even to the project of integration itself. This is neatly captured by Donald Tusk:

I am really afraid of this ideological or political contagion, not financial contagion, of this Greek crisis. Today’s situation in Greece... - we have something like a new, huge, public debate in Europe. Everything is about new ideologies. In fact, it’s nothing new. It’s something like an economic and ideological illusion, that we have a chance to build some alternative to this traditional European economic system.<sup>8</sup>

And yet, unless precisely such radical alternatives are explored, the EU will continue to stumble from crisis to crisis, until eventually the heart of the European idea is broken asunder. The sadness invoked by Brexit would pale in comparison to this calamity. As the rhetoric and practice of the political Centre is continuously exercised to divert the threat from the Right, thereby legitimizing (and even appropriating) much of its own anti-immigrant rhetoric and practice of intolerance, with hardly a concession to the Left, the ‘extreme centrism’ of our times is in danger of slipping into an abyss of nationalistic competition, within or without the EU.

The *telos* of European integration, based on the idea of ever closer union and *de facto* solidarity amongst the peoples of Europe, was already straining in credibility with the onset of the financial crisis, and has in truth been struggling since Maastricht’s Europe of ‘bits and pieces’.<sup>9</sup> The last year suggests definitive rupture with this *telos*, first with

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<sup>8</sup> Peter Spiegel, *Donald Tusk Interview: The Annotated Transcript*, FINANCIAL TIMES (July 16, 2015), available at <http://blogs.ft.com/brusselsblog/2015/07/16/donald-tusk-interview-the-annotated-transcript/>.

<sup>9</sup> See Dierdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MARKET LAW REVIEW 17 (1993).



Wolfgang Schäuble's tabling of (temporary) Grexit in response to Greek intransigence and now with a potentially more definitive voice of Brexit. The central reason is that unity and solidarity are becoming increasingly hard to square (and might be downright incompatible) with a *nomos* of integration that mandates competitiveness between nations, fiscal discipline and the long-term but mistaken view that all countries can eventually be like Germany.

The fate of the UK (in or out of Europe) is arguably marginal to this deeper tension. And the Brexit referendum will likely be dismissed by both domestic and European political elites as quickly as previous cries against the established order were drowned out. This is in part because the Union was never built as a democratic project, but rather on the basis of a fear of democracy, a fear of 'the people' that reflects the German experience above all.<sup>10</sup>

I have suggested elsewhere that this fear is based on a fundamental misdiagnosis of the breakdown of liberal democracy in the interwar period.<sup>11</sup> Then, as now, we focus on a crisis of democracy, and ignore the crisis of capitalism that preceded it. Until the latter is addressed, reiterations of the former will continue to shake the foundations of the system. The assumption of the left has generally been that a global capitalist system can only be successfully tempered or countered by transnational efforts. The demand now must be to show this assumption to be sound, not only in its theoretical shape but also on the concrete terrain of democratic political action. Does the crisis of extreme centristism foreshadow the beginning of the end of post-democracy?

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<sup>10</sup> See Christoph Möllers, *We are (afraid of) the People: Constituent Power in German Constitutionalism*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 87 (M. Loughlin & N. Walker eds., 2007).

<sup>11</sup> Michael Wilkinson, "The Reconstitution of Postwar Europe: Lineages of Authoritarian Liberalism," *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2745394](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2745394).

