

Brexit: A Way Forward

Edited by

Marcello Sacco

Leeds University Law School

Series in Law



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Preamble

Marcello Sacco
Leeds University Law School, UK

This collection was edited in November 2018. As of this month, everyone might share at least two ideas about Brexit: it is an important challenge, and it will be somehow sorted out. Although agreeing on these two statements, the general public still seems to both underestimate the complexity of the issues arising from Brexit, and reduce the dimension of Brexit to few matters such as immigration, which in turn is only one among a long list of important issues. As Brexit day is approaching, people seem to share increasing tension and pessimism that may be summarised by the rumours about possible shortages of food, closure of harbours, lack of medicines, and civil unrest. In order to address the complexity of Brexit and the concerns of people, the aim of this collection is twofold: on the one hand, it tries to depict the real dimension of Brexit; on the other hand, it tries to purport the idea that there is a way forward.

The real dimension of Brexit can be appreciated only with the awareness that this process will affect almost every aspect of contemporary British society. This consideration is valid both for suppositions on advantages from Brexit and for predictions of inconveniences from leaving the EU. This because even if the majority of British citizens will carry on as usual, the rules behind their usual habits will be largely affected by Brexit. Indeed, as for every EU Member State, the UK legal framework is permeated by EU legislation, which would need to be substituted by national legislation covering national matters and international issues. In this second case, the legislation may take the shape of international agreements, which take time to be prepared and ratified. This is why people fear food shortages: not because of any international sanction, rather due to the absence of rules that promptly and efficiently substitute the EU ones that are currently in force.

In order to avoid any legislative vacuum, ones think that the conclusion of a withdrawal agreement with the EU before March 2019 seems to be the best solution. However, also the withdrawal agreement would be only a temporary patch as the UK will have to reassert its international stance. This will take a lot of time because the position of the UK in the

international context does not depend on the UK only. This depicted international dimension of Brexit sometimes shadows the national side of the issue. However, this aspect is not less serious than the previous one, starting from the common concern about the substitution of the currently-in-force EU law. Also in the national context case, ones suggest that a great repeal bill may solve the issue by including the EU law into UK legislation. However, this seems to be just another patch because, for instance, every single legislative act will have to be adapted in order to substitute any mentioned EU institution with the new-appointed UK bodies. In addition, a certain extent of such EU retained law will probably need to be substituted due to its intrinsic supranational scopes. These processes need time and a scheduled political agenda. In order to support this kind of processes, the chapters of this book try to depict practical steps to approach the analysed issues.

Such general concerns are common issues when dealing with all the matters related to Brexit, some of which are the focus of the chapters included in this edition. In order to depict the real dimension of Brexit, this project is a multidisciplinary collection seeking to discuss the broad pervasiveness of the ongoing process. The areas of the included disciplines are: social sciences, national and international law, and policy. In reading the chapters of this multidisciplinary edition, the readers might be interested in specific topics as well as exploring their inter-disciplinarity and trans-disciplinarity. The exercise to connect one another the explanations included in different chapters may allow the reader to frame Brexit into its correct broad dimension. For instance, while editing the collection, I found an interesting post-Brexit link, among others, between the chapters introducing the possible choice of non-UK courts for international disputes with the chapter about the Erasmus programme. On the one hand, every chapter addresses a different matter and describes its background, explains the challenges posed by Brexit, and suggests possible ways forward. On the other hand, their contents are interconnected as it happens with every facet of our society. Lastly, while the following chapters consider different issues to frame both the origin and the impact of Brexit, this preamble aims to make a short reflection on the starting point of Brexit, which is the referendum that took place the 23 June 2016. After more than two years, the referendum is still present in political discourses for two reasons: the first reason is its result, and the second reason is a common feeling that such democratic instrument has somehow failed. While I acknowledge the result of the referendum, I would like to try to reason about the democratic nature of the instrument.

The possibility of citizens to express their vote, either in a referendum or in any kind of election, is meant to be a milestone in every democratic system. However, it may be time to reflect on the real effectiveness of the exercise of the vote as a democratic instrument. I have three main concerns: the first concern is about the idea that in democracy the majority wins, while it seems that often the minority prevails; the second concern is about the possibility of citizens to vote freely, while it seems that often they are manipulated in their choices; and the third concern is about the acceptance of the vote, while it seems that often this is disregarded. There are several samples all around the world where the legitimate vote of people may be accompanied by such kind of concerns. The worldwide scandal of a social network selling the data of people to manipulate their political choices should introduce the doubt that the reflection of this preamble may be legitimate at least. Although, in this preamble, Brexit represents the occasion to reason about the democratic effectiveness of the exercise of the vote, the raised concerns seem to be common issues among modern democracies. Thus, the following reflections aim to suggest a way forward Brexit that may include a deep analysis of our democratic systems in order to guarantee citizens the exercise of a real democracy.

My first concern is about the idea that in a democracy the majority wins, while it seems that often the minority prevails. In 2016 the population of the UK was 65.6 million, with a growing trend. Not all these people were entitled to vote as some of them were underage and others were residents but not citizens. In addition, almost 5.5 million Britons lived abroad, which causes a total amount of almost 71.1 million people with a presumed right to express their vote in the Brexit referendum. However, only 46.5 million people were allowed to vote, and the difference of 24.6 million individuals represents the UK citizens and residents excluded from expressing their choice. These individuals were British young people, immigrants (only those from non-Commonwealth countries) who moved in the UK, and expats who proudly maintained their British citizenship for more than 15 years. These excluded ones will be probably the most affected by the referendum's result, but they had no voice on it. So the electorate was 2/3 of the whole number of UK citizens and residents. As the turnout was 72.2% of the electorate, it represented 47.2% of the UK citizens and residents. As 17,410,742 electors voted to leave, it can be argued that 24.5% only decided for everyone. In spite of this, the Brexit referendum is legitimate and valid. In addition, as said, the same concern about the democracy of numbers could arise from several non-UK samples. For instance, in 2017 the current French President obtained 24% of the electorate's votes at the first round (8.7 million), which is only 12.9%

of the 67.2 million French inhabitants. Looking at Italy, which has a different electoral system, one of the two parties that support the current Government in 2018 obtained 17.4% of the electorate's votes, which is 5.7 millions as 9.4% of Italian inhabitants. Also in these two cases, the elections are legitimate and valid. Before criticising any electoral legislation, my concern is about the fact that our democratic systems' suffrage regularly excludes almost 1/3 of citizens and residents. Therefore, the right to vote seems still far from being universal and able to guarantee democracy.

My second concern is about the possibility of citizens to vote freely, while it seems that often they are manipulated in their choices. In 2016, the general understanding of Brexit was limited to a series of slogans. Indeed, immediately after the referendum, the leave campaigners admitted that there were no plans behind those slogans. They had three major points to pursue: national sovereignty, immigration, and money. These are good points indeed, no doubt about the fact that any country should think carefully about them. However, the key is that titles should be followed by programmes to properly understand the extent of any issue. On the contrary, when slogans are so effective for the political campaign, programmes seem to be left aside. There may be several reasons why people do not ask for programmes. The first reason is that slogans may touch human feelings so intensively that people simply rely on them. Indeed, "Take Back Control" had such a power. The second reason is that there is a lack of familiarity with direct-democracy instruments because our democratic systems are mainly representative. Indeed, in the UK, they had 3 referendums in 41 years. Thus people may have simply relied on the slogans of their representatives. The third reason is linked to the massive use of social networks that on the one hand increases the slogan-effect, and on the other hand is subject to either non-ethic or even illegal manipulation. Other than from social networks, the manipulation of the referendum on Brexit had several sources, as UK Judges have recently agreed on. In addition, as said, similar concerns may arise from non-UK samples. Thinking about slogans, the current US President won thanks to a series of incredibly effective slogans like "Americans First" and "Make America Great Again". The former slogan has been meant to be so effective that it has been exported, in Italy for example. Italy is worth a mention also about its 2016 constitutional referendum when Italians did not vote on the topic itself but against the Prime Minister, who resigned after the negative result. On the one hand, people followed the misleading message of the propaganda; on the other hand, Italians are not familiar with the instrument, and they may have used the occasion offered by the referendum to express their opinion about the Prime Minister. Although

legitimate means, my concern is about their effective democratic extent when electors are not consciously and fully aware of their vote's implications.

My third and last concern is about the acceptance of the vote, while it seems that often it is disregarded although democracy does not mean free vote only, but also acceptance of any legitimate result. On the other side of the spectrum, only 24 hours after the Brexit referendum a petition was launched on the official petition website of the UK Government and Parliament in order to ask for a second referendum. It reached more than 4 million signatures, which seems to be the biggest support the petition website has ever seen. As one may imagine, other petitions were immediately started to ask for a third referendum in case that the second referendum had been authorised. So far, all these kind of petitions have been rejected. However, the idea of a second referendum is still present in the national and international political debates. Is it democratic that people do not accept the result of a democratic referendum? On the other hand, is it democratic to ignore the democratic request for a new referendum? What seems certain is that the agreement on a second ballot presents the risk to start an endless story. On the other hand, numeric and manipulative concerns may have some right to ask for a new referendum. However, the result of the Brexit referendum was ratified by the UK Parliament, which guaranteed on the legitimation of the result. Also, the UK Courts, as said, are sanctioning leave campaigners for illegal propaganda without further discussing the result of the referendum. Therefore, everything seems to be legal and legitimate even if ones do not accept the result of the ballot. In addition, as said, similar concerns about the acceptance of the vote could arise from other samples. For instance, as the legality of the Brexit referendum is acknowledged, and the UK is leaving the EU, the opposite happened with the referendum in Catalonia to leave Spain that was disregarded because local people were not allowed to vote for their independence. Two situations have been depicted: one where citizens do not accept a vote, and one where the government does not accept a vote. Additionally, there is a third situation when the result of a ballot is accepted but suddenly called into question due to unexpected social changes. For instance, Scottish citizens in 2014 voted to remain in the UK, but in 2016 they opted to remain in the EU. Also, Gibraltar had two sovereignty referendums in 1967 and 2002 when they decided to fully remain in the UK, but in 2016 they voted not to leave the EU. The case of Gibraltar is particularly emblematic due to the almost unanimous results of the three mentioned referendums. It seems difficult to predict what the next steps of Scotland and Gibraltar will be. In spite of this, my concern is that the non-acceptance of a democratic vote may affect the democratic

extent of the exercise of the vote itself. This might bring intolerance and civil unrest. However, it seems fair that the result of a ballot be democratically contested after that the social situation has changed.

To conclude, I strongly believe that any democratic expression that comes with any of these three concerns represents a failure of contemporary representative and direct democracy. Representative democracy is failing because political propaganda seems often empty. Everything is summarised into slogans, which may become programmes if and only if one wins. Electors realise that their representatives may not know what to do only after having elected them, having trusted electoral slogans that were manipulative rather than argumentative. Direct democracy is failing because people do not know how to use it. In part, this is people's own fault when not interested enough, but in part, they are the victims of the system. A way forward in this situation may be that people be more socially active and engaged, and that politics give objective instruments to allow such activity and engagement. In two words, our society should develop a new paradigm of *participative democracy*. Participation may support citizens in expressing their vote during direct democracy occasions, and it may support democratic representatives in taking their decisions. There are several ways to foster participative democracy. In Switzerland, for instance, they have almost 10 referendums a year. This means that citizens are both engaged in promoting campaigns and familiar with the instrument of referendums. Another interesting participative tool is peer review, which occurs when draft documents are published in order to receive feedback that may be useful to write the final version of the documents themselves. The European Union offers good examples of participative policies that aim to involve civil society representatives. Unfortunately, what is happening with Brexit is the opposite. Indeed, the current picture shows the legitimate Government and Parliament that want to exercise their representative prerogatives in deciding on the withdrawal, and citizens that want to exercise their legitimate direct prerogatives in having the final voice on the agreement with the EU. Both claims seem to be individually legitimate, but there is an evident lack of cooperation between the two sides, which in turn would be very useful at the moment. Participative democracy would mean that the Prime Minister publishes everything she has asking for feedback rather than simply sharing a final document suggesting to take it or leave it. On the other hand, it would also mean that citizens ask to take part in the process rather than to be the final judges of a document that would be hard to understand without having been previously involved into its drafting. In this direction, the idea of editing this collection is first of all an attempt to be part of the process, to

participate, to give a contribution to solve Brexit for the better, without judging anyone.

In order to conclude this too long preamble, I would like that a positive outcome from Brexit be a participative-democracy shift. Participative democracy fosters active citizens, while a negative populism just fires up the mass. I am not sure about the direction in which the recent pro-EU march in London walks. Whatever it is, my personal feeling is that people marching for a new referendum is also due to an underlying general sentiment of democratic failure. I am quite sure that any result of the referendum would have been willingly accepted if the campaign had been more transparent and participative. However, the issue is that also a second referendum on the same topic in two years would probably mean a democratic failure at this stage, especially because the current democratic situation has not evolved into a new participative dimension yet.

Contributors

Editor

Marcello Sacco is PGR at the Leeds University School of Law where he develops his research project on the European Union governance of international human rights law. He graduated at the University of Pavia (Italy) in Political Sciences and concluded his Master *Cum Laude* in International Sciences at the University of Siena (Italy) where he is still affiliated as an external expert. Marcello was also visiting scholar at the Universities of Paris-Est Créteil (France) and Cork (Ireland).

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Authors

Sarah Alwahaibi is a PhD student at the University of Leeds doing research on "the principle of mutual trust and the EU private international law". Her research interest concerns international commercial litigation.

Melanie Brown is a PhD candidate at Bournemouth University. Melanie's research focuses on copyright law within the European Digital Single Market, with an emphasis on how these laws interact with the film industry and film archives. She also has a strong interest in moral copyright laws, and how these impact upon the cultural heritage sector. She graduated from Aberystwyth University with a degree in Criminal Law. She also holds a Master's degree in Human Rights Law from Sunderland University. For her Master's dissertation, Melanie explored compulsory licensing of essential pharmaceuticals in public health emergencies. Melanie has also worked as a corporate paralegal in a commercial law firm.

Oriana Casasola is a PhD student at the School of Law of the University of Leeds in European Cross-Border Insolvency Law. She has received an LLM degree from the University of Udine (Italy) and an LLM in International Economic and Business Law from the University of Groningen (The Netherlands). Oriana has also concluded the Master of Honour Programme at the University of Groningen, an inter-academic programme with a multidisciplinary approach to scientific and social issues. Her PhD

is about the harmonisation of transaction avoidance actions within and outside insolvency law, supervised by Professor Gerard McCormack and Doctor Zinian Zhang. The relevant research areas of the thesis are: European Private Law, European and Comparative Insolvency Law and Comparative Private Law. Currently, she is also engaged in research as an assistant of Prof. Stephan Madaus of the Martin Luther University of Halle-Wittenberg. This second project involves comparative research of transnational protocols in insolvencies of groups of companies.

Valentina Di Pietro is a PhD student in Management at the University of Limoges (France). Her research focuses on British entrepreneurs in the South West of France and aims to analyse business models to identify the key elements that determine the success or failure of businesses. She obtained the Master in philosophy applied to management at the University Gabriele d'Annunzio of Chieti-Pescara (Italy).

Sanja Ivic is a Research Fellow at the Institute for European Studies, Serbia and Associate Research Fellow at the Institute of Applied Ethics, University of Hull (UK). She completed her Postdoctoral research at the University of Paris 10, France. She is a member of Editorial Boards of three peer-reviewed international journals: *International Law Research* (Canada), *American International Journal of Contemporary Research* (USA) and *Journal of Law and Conflict Resolution* (Africa). She also cooperates with various international scientific institutes and teams. She is currently a Board Member of the International Society for Philosophers. Her publications include books and articles on various subjects in the fields of philosophy and European studies. Her book *European Identity and Citizenship: Between Modernity and Postmodernity* was published by Palgrave Macmillan in 2016. Her book *Paul Ricoeur's Idea of Reference: The Truth as Non-Reference* is published by Brill in 2018.

Martina Künnecke trained as a lawyer and legal translator in Britain and Germany. She completed her PhD examining English and German Administrative law and is lecturer at the University of Hull Law School. Dr Künnecke has published in the field of comparative law, EU law and legal translation. She is a member of the Institute of European Public Law and the Institute of Linguists. Her research was cited by the House of Lords. She is passionate about student mobility in the EU and established a close collaboration with the Directorate General for Translation in the European Commission to secure internships for law students with an interest in legal translation.

Vincent Lagarde is associate professor in Entrepreneurship at the University of Limoges (France). He coordinates research programs and PhD theses on the atypical and marginal entrepreneurs, the neo-rurals, the refugees, the expatriates, among others. He is interested in their strategies and their business models, as well as in their economic and social impacts in the host territories, especially in rural areas. After being a local elected official, he now advises some French and European elected officials on rural development issues.

Alessandro Liotta – Master of Laws at Università degli Studi di Palermo (2014), LL.M. in International Tax Law at King's College London (2016), PhD candidate in “Law and Business”, LUISS Guido Carli (Rome), Faculty of Law, with a dissertation in Tax Law on the application of CFC legislation to IP Holding Companies. Visiting Researcher at UNIL (Université de Lausanne), from October 2017 to December 2017 and Visiting Scholar at UC Berkeley, Boalt Hall Law School from February 2018 to July 2018. Member of the Science Center of Public Finance and Tax Law at Vilnius Universitetas (Vilnius University, Vilnius, Lithuania). Admitted to the Italian Bar (2017). Main interests: Tax Law, both from a domestic and an international perspective, and EU Law issues, especially those related to Tax Law.

Hazel Lobo is a part-time PhD candidate in the School of Law at Reading University. Her research focus is drawn from her work as an environmental regulatory compliance specialist in a small environmental consultancy. She teaches, part-time, on the Environmental Law and Practice pathway of the distance learning LL.M. at De Montfort University and supervises undergraduate and postgraduate dissertation students at the University College of Estate Management. A Fellow of the Institute of Paralegals, serving on their Advisory Board, Hazel is also a member of UKELA, the Socio-Legal Studies Association, and the Society of Legal Scholars.

Gerard McCormack is Professor of International Business Law at the University of Leeds and has held academic positions at many other academic institutions in the UK and been a Visiting Professor in Singapore. He has published extensively particularly in the fields of insolvency, restructuring and secured credit law. He has also led externally funded research projects both for bodies in the UK and for the European Commission.

Gregory Messenger joined Liverpool Law School as a Lecturer in 2015. He was previously Junior Research Fellow in Law at the Queen's College, Oxford where he also completed his BCL and DPhil degrees. He has

previously taught public international law, world trade law, and international investment law at the Universities of Oxford and Durham as well as courses on English law at the University of Granada. Greg's research examines conceptual issues arising from the development and application of international economic law. His research interests are principally in world trade law, trade and public health, sustainable development and trade (including fisheries subsidies), the regulation of commodities, and theoretical approaches to international law broadly conceived.

Michiel Poesen is a PhD candidate at the Institute of Private International Law of the Law Faculty of KU Leuven. His doctoral research addresses cross-border contract litigation in the EU, and more particularly the classification of claims as matters relating to a contract. He also takes an interest in the consequences of Brexit for cross-border litigation. Before joining the Law Faculty, Michiel worked as a litigation associate in a Brussels based law firm.

Nikos Skoutaris is a Senior Lecturer in EU Law at the University of East Anglia. He obtained his LLB from the University of Aberdeen, his LLM from Maastricht University and his PhD from the European University Institute. His research interests lie in the intersection between EU law, comparative constitutional law and conflict resolution theory. He has published extensively on Brexit and its effect on the UK territorial constitution.

Chapter 1

Brexit and the Emergence of Nationalist Narratives in Europe: Creating a New Narrative for the European Union

Sanja Ivic

*Institute for European Studies, Serbia;
Institute of Applied Ethics, University of Hull, UK*

1.1 Abstract

Brexit puts into question the idea of European identity and values as Brexit decided that British is not necessarily synonymous to European. Britain's decision to quit the European Union is a seismic moment for Europe as it points to the reality that nationalist political paradigms and discourses became European reality and put into question Europe's supranational nature. Due to various types of crises the European Union is coming back to the ideas of nations, nationalism and binary oppositions: we/they, European/non-European, national/postnational and so forth. European identity and values on which European integration is based (common values, freedom of movement, no borders, multiculturalism, tolerance, solidarity etc.) are put into question. Brexit reopened the gap between liberal (postnational) and conservative (nationalist) approaches in Europe, the European left wing and right wing politics, as well as the old gap between the East and West in Europe. This inquiry explores the emergence of modernist, nationalist narratives in the European Union in the time of crisis, which put into question postnational narratives on which the idea of European integration is based. It also offers the outline of new narratives for the EU, on which the postmodern idea of European identity should be founded.

1.2 Introduction

The European Union is founded on shared narratives¹ which represent the main European values which enabled creating European identity whose main function is to unify the peoples of Europe. According to Paul Ricoeur, it is impossible to imagine a culture without narration.² The same can be argued about a political community, such as the European Union. The European Union and narratives which it advocates should be perceived as dynamic, not static. Indeed, it seems that EU narratives are moving from emphasizing the significance of peace in preventing conflicts after the devastation of World War II³, significance of the development of a common market within which free movement of labour, capital and goods would be possible,⁴ the development of human rights and the concept of citizenship at Community level,⁵ to optimism in the 1990s when the EU “was seen as an entity always moving forward, always striving for more integration, both in terms of new members joining the club and of more institutional solutions that made sure that more and more competencies were transferred from a national to a supranational level”,⁶ up to contemporary nationalist narratives which stress the importance of border control and other nationalist categories which will further be explained in this inquiry. Europe has undergone many changes since the Treaty establishing the European Coal and Steel Community (Treaty of Paris), which established the European Community in 1951, to the Treaty

¹ Paul Ricoeur states that it is the plot understood in the broadest sense as a synthetical, configurative and integrative tenet of creation of “discordant concordance” of the work of narrative (Paul Ricoeur, *Time and Narrative* (Vol. 2, University of Chicago Press 1985) 14). Ricoeur emphasizes dominance of human need for Apollonian principle of order over Dionysian fascination with chaos. According to Ricoeur, entire communication is based on narrative.

² Paul Ricoeur, *Time and Narrative* (Vol. 2, University of Chicago Press 1985)

³ The European Union has emerged from the desire of European peoples for providing a new future in which mass conflicts between nation states at the continent of Europe will be prevented.

⁴ Six European countries - France, the Federal Republic of Germany, Belgium, Italy, Luxembourg and the Netherlands - unified on 18 April 1951 by signing the *Treaty of Paris* and forming the European Coal and Steel Community.

⁵ These narratives emerge with the rights promoted by the *Treaty of Rome*, which was signed on 25 March 1957.

⁶ Marcelo Gonçalves, 'Ricoeur and Patočka on the Idea of Europe and its Crisis' (2017) 9(2) *META: Research in Hermeneutics, Phenomenology, and Practical Philosophy* 509

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