

ATLANTIC AND WESTERN EUROPE

A STUDY ON THE QUESTION OF NATIONALISM AND THE RULE OF LAW: BREXIT

By Carla Bassu¹, Diego Sánchez² and Philippe Mombaers³

Abstract

The phantom of unilateralism through the rise of populist and nationalist governments in Europe poses several questions on the essence of democracy itself. These include, but are not limited to, the role that public opinion plays and the effectiveness of the rule of law. Furthermore, the question of Brexit introduces the well-known factor of the direct *versus* representative democracy dichotomy.

This paper, briefly and concisely, seeks to analyse the question of Brexit through an interdisciplinary style, using both law and political science and focusing on the 2016 UK referendum on membership of the EU. Relying on the adaptation of law to a direct democracy model (based on Swiss case-law), the article will compare this to the legal status of the referendum in the UK, understood as a *sui generis* representative democracy model.

The authors find that the question of the rise of the nation state in the topic of Brexit is central to the issue of the influence exercised by leave campaigners to manipulate public opinion and exclude the United Kingdom from the European integration process.

The analysis centres on two sections: the first one is devoted to the background of nationalism in 21st century Europe, the second one develops the case study of Brexit based on two parts; the first explains the influence played by nationalism in the pursuit of the goal of leaving the EU, and the second argues through comparative law whether the annulment of the referendum is possible.



¹ Associate Professor of Public Comparative Law, University of Sassari.

² 2nd Year Law Student focusing on International and European Law, Universitat Abat Oliba CEU (Barcelona).

³ 2nd Year Law and Political Science Student, Universitat Abat Oliba CEU (Barcelona)

Background

The European Union is facing an identity crisis due to many different background factors which are exacerbated by its economic situation. The problem with the EU is more than merely institutional, as there is a widespread sentiment of distrust towards decision-making bodies, which are perceived as hostile and insensitive to common people's interests.

The major criticism of the European Union concerns the democratic deficit corresponding to a lack of representation of European citizens in EU institutions. (Manzella, 2014, p. 6) The recently renovated European Parliament has gained more and more importance over time but still it is not able to fully comply with the demand of representation expressed by the people in every member State. In such a delicate moment for supranational integration, it can be said that the future of the EU is related to an identity issue. (Caramani, 2015)

As shown by the Brexit story, the main obstacle that still prevents the achievement of a proper constitutional integration is Euroscepticism, based on the negative consideration of European institutions which, according to the *vox populi*, do not take enough care of the people's needs. Euroscepticism must be the starting point for a reconsideration of how the EU institutional structure can have strong representative spaces.

Moreover, the EU is targeted by populist movements which are the centre-stage of politics in many countries of the "old continent".

Anti-europeanism is a common feature of political parties which claim to be outsiders and different from traditional parties. These invoke new forms of participation and involvement of the people in public decisions, in other words, a new conception of direct democracy. In addition to the generalized wish for the crumbling of the European Union under the flag of sovereigntists, as an example we find: *Movimento 5 Stelle* in Italy, *Podemos* and *Ciudadanos* in Spain, the anti-Euro *AfD* in Germany, *UKIP* in the UK, and more radical xenophobic parties such as *PVV* in Netherlands.

The lack of democratic mechanisms, and limited representation, are key factors for the EU crisis. Reforms introduced to strengthen citizens' participation, such as the enhancement of European Parliament, have turned out to be unsatisfactory. A deep reconsideration of the decision-making process in EU institution is needed in order to overcome nationalistic issues and avoid squandering the European constitutional heritage.

Nation State

Seeking to define "Nation State", each concept will be discussed separately.

Regarding the word "State", its very essence varies depending on whether it's conceived through the perspective of legal positivism or natural law.

Through positivism, it is conceived as an independent and neutral legal, social and political entity deprived from historicity and attributed individual personality. Kant summarised it as "the logical formal operation disconnected from all historic temporality". (González Vicen, 1952, p. 7)

Conversely, through natural law, the definition of State has been heavily influenced by the work of both sociology and international law. It acquires a prominent role in the consolidation of the internal order of the State and its defence from external elements, namely other states, ideological or cultural groups

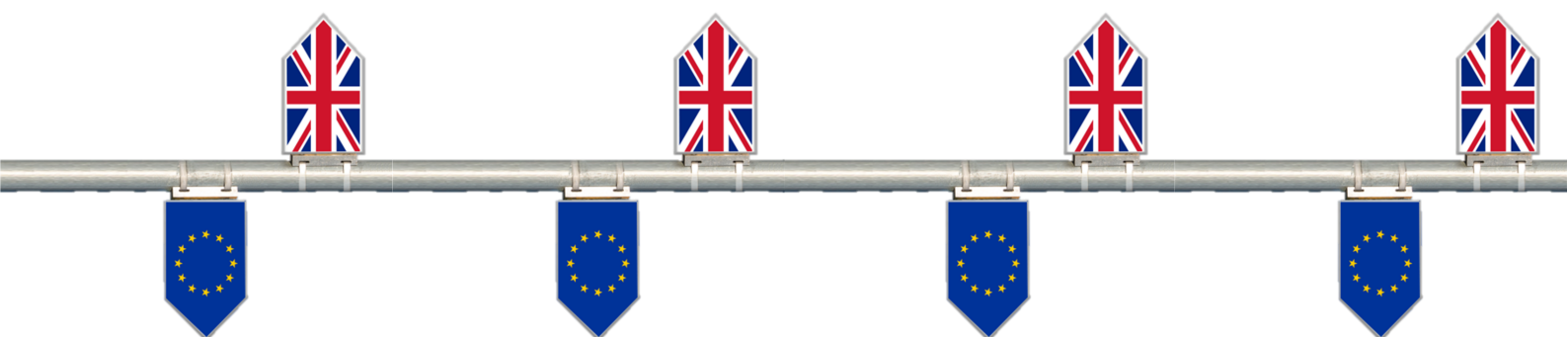
(contributing to the rigorous reduction from the international to inter-state sphere). (Carrillo Salcedo, 1976 in Calduch, 1991, p. 2) This definition benefited from development of geopolitical circumstances since the concept was created.

Regarding the second part of the definition, 'Nation', the Legal Dictionary of the Royal Academy of Jurisprudence and Legislation provides a dual definition of the word "Nation" comprising the main theories about it:

Community of individuals that live in the same territory under the sovereignty of a State recognized as such by the international community. The modern definition of nation, born after the liberal revolutions, was built from two essential theories: the one that sustains nation is defined by its linguistic, ethnic and cultural unity, and the other understands national unity based on the existence of a community of free citizens that have kept alongside their history a will to live together in a Nation-State (Real Academia de Jurisprudencia y Legislación, 2016, p. 741).

As observed, the second theory invokes both the concepts of state and nation, as well as the definition introducing each concept. The crux of the matter is found in the will to partake in a homogeneous culture and society, regulated under norms, and recognizing the external elements of the group (in other words, the remaining international community).

Therefore, the definition of Nation State, as coined in the Peace Treaties of Osnabrück and Münster concerning the new-born states after the fragmentation of the then-empires, would be as follows: The community of individuals that share language and culture, recognized by the international community with a perennial will of living together under a legal-political structure.



Case Study: Brexit

A sociological perspective

There is no doubt that the identity crisis flourishing within Europe in the last few years reflects the dichotomic battle between those supporting European integration, and the Eurosceptics opposing it.

Sociological theses currently dominating academia aim to demonstrate the existence of a unique identity that could replace the concept of Nation State. Zygmunt Bauman (2006) argues that collective identities (as the European Union) are in perpetual flux, notwithstanding that singular identities (classic Nation State) assimilated into the super-structure (EU) for the sake of partaking in a continuous path towards progress. Conversely, Giovanni Sartori (2001) contends that Nation States need an external identity to determine their own, because Nation States, by themselves, endow an international community of personality; in other words, create a reciprocal relation based on a mutual need.

This academic confrontation is a palpable reflex of political reality, in which part of the population keeps believing in the so-called super-structure. Although, following Sartori, this would not suppose a detriment of the national identity, but rather, somehow confirms it. However, many others perceive it as a threat to their national identity, unchaining a considerable collision of identities unleashing the creation of new nationalist parties returning to manifestos full of traditional values and prioritising the nation over the community - so-called Euroscepticism.

In that sense, globalization does not presuppose change in national identity (see Treanor, 1997 in Martí, 2001), especially if both fragmentation and homogenization, unique features of this process, act as two forces that self-compensate to reorder society in a prematurely changing world. (Boutros-Ghali, 1992, para 11)

Sociological and political analysis of Brexit campaign propaganda

Manipulation reminds us of the controversial enterprise Cambridge Analytica which significantly influenced the outcome of the EU referendum. This occurred because it centres mainly on exploration and data analysis seeking patterns within a great data volume, mostly extracted from Facebook, which serve to influence each user on a personalized basis.

This personalization undoubtedly follows the classic AIDA (Attention, Interest, Desire, Action) model that empowers it significantly compared to the traditional TV announcement or advertisement. Serving the interests of the Leave.EU group, this data served to transform social networks into a massive propagandistic tool.

A clear example of fake news is found in an article elaborated by the Express newspaper entitled: “Merkel calls for EU army to defend Europe as relations with UK and USA weaken”. (Gutteridge, 2017) The article explains how the chancellor demands the EU creates a unified army led by Germany. However, the so-called statement was a declaration of intentions regarding NATO. (NBC News, 2018)

Under a sociological criterion, what is attractive is the effect these types of news create amongst its readers. The Confirmation Bias is the unconscious predisposition that reinforces our preconceptions, regardless of whether these are positive or negative, in whatever field of reality. (see Wason, 1968) In the current case, very commonplace in the media, a piece of fake news pretends, through a fallacy, to strengthen the favourable opinion to the withdrawal from the EU. This is a misrepresentation of reality to a large scale, both because of the target volume, and the daily rising proportion of fake news created that impacts public opinion to the extent it may have even altered the preferences in the EU referendum.

Likewise, another example is found on Boris Johnson’s *BrexitBus* that read: “We send the EU £350 million a week - let’s fund our NHS instead. Vote Leave. Let’s take back control”. An unrealistic proposition if considered the UK’s net contribution to the EU in the 2016-17 financial year equates to approximately 8,1 million pounds. (HM Treasury, 2018, p. 13) To claim the UK pays more weekly than annually simply constitutes both a misrepresentation of reality and an undoubtful miscalculation that influenced irreversibly on British voters.

This proves the cognitive bias of anchoring. It consists of the tendency to focalize an issue from a single perspective, excluding or subjugating any other information to the first one perceived. This is an instinctive mental reaction aimed at conserving an idea through a single perspective, due to the complexity of attempting to break a well ascertained mental structure.

This controversial slogan constitutes indisputably a key point to understand the genesis of the Euroscepticism materialized in the Brexit.

The legal perspective

UK legislation defines a referendum as an “other poll held, in pursuance of any provision made by or under an Act of Parliament, on one or more questions specified in or in accordance with any such provision”. (*Political Parties, Elections and Referendums Act* (PPERA) 2000, section 101, subclause 1) In addition, case-law distinguishes between a legally binding, and a non-legally binding referendum. (R (*Wilson and others*) v *The Prime Minister*, paras 35-36)

Courts can annul or set aside any binding referendum result if “general corruption, bribery, treating or intimidation” are proven. (*Representation of the People Act* (RPA) 1983, section 164, subsection 2) Hence, common law has the power to avoid any vote outcome, but only if these conditions are met.

Likewise, acknowledging the advisory (non-legally binding) nature of the EU referendum, (R(*Miller*) v *Secretary of State for Exiting the European Union*, para 121) case-law considers that for any court to set aside the vote, it shall ascertain a *material breach of rules*, in addition to the elements of *certainty* and *finality* to allege misconduct. (*Wilson*, paras 36, 37-38, 49) In other words, (a) it must be proven that the result of the vote would have been different if there was no breach of rules, and it (b) excludes facts pending judicial confirmation. (*Ibid.*, paras 38-39) Thus, the law responded to adapt adequately and proportionally to significant challenges, such as the EU referendum.

Conversely, the Venice Commission understand referendums in a dual perspective; (a) from the *principle of rule of law*, they must abide by the law, including procedural rules; (b) and from the *principle of sovereignty of the people*, as they materialize people’s capacity to decide. (Venice Commission 2018, para 26)

Hence, both the international and domestic perspective on a referendum share the element of compliance to the law, whereas *a priori* a dilemma arises on the question of sovereignty within the UK legislation, a question of which the following part deals with.

Professor A. V. Dicey explains Parliament sovereignty as “the right to make or unmake any law... and... that no person or body is recognised... as having a right to override or set aside the legislation of Parliament”. (Dicey, 1915, p. 3) It’s important to note that the legitimacy of this right to legislate derives directly not from the transference of sovereignty from the people through vote, but from the power of the Crown, (*Miller*, para 43) as the sovereign, something alternatively referred to as “what the Queen-in-Parliament enacts is law”. (Bogdanor, 2009, p. 13 in Public Administration and Constitutional Affairs Committee, 2017, p. 9)

On the contrary, the practice of popular initiatives covering a wide range of subjects constitutes the roots of Swiss direct democracy (Rayner & Voutat, 2014, pp. 61-62) - a reason why referendums in Switzerland are considered “as an effective defense against unpopular legislation”. (Rappard, 1912, p. 116)

Moreover, the Swiss case-law posits that the freedom to vote is guaranteed on the sincerity of the compulsory debate that ensures the legitimacy of decisions is realized through direct democracy. (1C_338/2018, consid. 2.1.) Therefore, it affirms that any vote result shall be unlawful if it does not translate in a faithful and surely manner into the expression of the voters’ free will. (*Ibid.*, consid. 2.1.) However, how do you prove the unlawfulness of a vote if it is secret?

As an example, after the vote on the UK membership to the EU, many campaigners for a second referendum backed their claim on surveys to prove Leave voters changed their minds. But, if ballot papers are anonymous due to the vote secrecy within the right to vote, what would be the rationale of a survey if there is no empirical way to truly demonstrate what someone really voted? (BGE 90 I 69 S. 73, consid. 2.b) For this reason, Swiss case-law excludes surveys from examination. (1C_338/2018, consid. 4.3.). In fact, it considers a vote result as distorted when citizens were misinformed about the objective and the scope of the project under vote. (*Ibid.*, consid. 2.1.)

The process to reach that conclusion varies depending on whether the petition was submitted, (a) before or shortly after the scrutiny, or (b) a long time after it. *Grosso modo*, the former contemplates the effect of a serious faulty procedure, whilst the latter, requires examining; i) vote difference, ii) the possible influence of irregularity on the outcome, and iii) legal certainty, in order to sustain the annulment. (*Ibid.*, consid. 4.1.) To sum up, the misinformation shall transcend the mere individual to the global perspective in order to claim the vote was contrary to the truthful voters' opinion.

Swiss case-law allows for a wide variety of factors which could make it legitimate to avoid a binding vote result, in contrast to the specific grounds set forth in UK legislation. Even though both legislations adopt a duty of the executive power to inform, in the judicial practice, this varies significantly regarding the enforcement of any measure against the result.

The EU Referendum Act established a duty of the government to publish information about membership of the EU, in addition to introducing restrictions on the people's ability to legally challenge its result. (*European Union Referendum Act* (EURA) 2015, section 7, subsection 1) Recalling case-law on the grounds for courts to set aside a vote result, a violation of this government's duty towards voters (see EURA 2015, section 7) could have had constituted a material breach of rules as it may have irreversibly influenced voters to cast their votes favouring one specific option. (see *Wilson*, paras 36-37)

Comparing Swiss-UK case-law unfolds a solution to clarify the application of UK law regarding annulment. (*White v Jones* [1995] UKHL 5, Lord Goff of Chieveley, p. 13) Consequently, to examine the violation of this duty of information, which could ultimately affect the exercise of the freedom of vote, it is necessary to prove voters' misinformation due to an error made by the Government. However, in the case of the EU referendum, the allegations derive from the campaigning of the Leave parties. (see *Marcus Ball v Alexander Boris de Pfeffel Johnson*, 2019, para 3; Electoral Commission, 2018, paras 4.86-4.90.) In contrast to Swiss constitutional proviso, which acknowledges political parties contribute to the free formation of opinion of voters, (Constitution fédérale suisse, Article 34, incise 2) in the UK legislation parties are not held responsible for misinformation in the way that governments are. (PPERA 2000, schedules 19 and 20) For this reason, if campaigners are not bound by a duty to provide correct and accurate information to voters, there would be no grounds to set aside the general outcome.

Conclusions

Our work reaffirms that nationalist rhetoric during the EU referendum campaign won immediate popularity due to the lack of connection between the people and the common project of EU integration. To identify with the project means there exists a knowledge proved upon the immediate experience of each person about the EU. Thus, if little or no knowledge exists, no involvement or solid relationship is established between society and the supranational structure it belongs to.

Through the diffusion of fake news, eurosceptic groups exploded voters' bias by blaming the EU for the issues the UK nowadays deals with. It created the ideal conditions to compromise the formation of

opinion of each voter and manipulate them towards voting in favour to the Leave alternative. In other words, this misinformation consisted of providing more attractive, concise and circular arguments to exploit weak awareness of the implications of EU membership.

Furthermore, the rule of law constitutes one of the pillars of contemporary democracies, ensuring it duly performs its duties. However, following Swiss democratic experience, there cannot be an exercise of the right to vote without the respect, by the Government and political parties, to the duty to inform voters in an accurate and manner. This transcends the mere formality as it pretends to guarantee the majority was truly cognizant of the text or proposal under vote. Hence, it is not the individual vote, but the diligent exercise of this duty by the Government and political parties, that would be subject to judicial review in order to determine whether voters' were able to form, without any inaccurate or wrong information, their own opinion that would then translate into a vote.

Finally, the EU referendum experience demonstrated the UK's current legislation does not safeguard the substantial content of the right to vote: the free formation of voters' opinion. Because political parties were not subject to any duty to inform, no ground would exist to legally challenge the vote result based on their campaigning propaganda. As such, it remains in Parliament's hands to empower voters through a more comprehensive electoral legislation that protects them in case parties seek to dishonestly or unfairly obtain their votes.

References

Arrêt du tribunal fédéral du 10 avril 2019 (1C_338/2018).

Bauman, Z 2006, *Liquid Modernity*, Polity Press, Great Britain.

BGE 90 I 69. *Arrêt du 29 avril 1964 dans la cause Couchepin contre Grand Conseil du canton du Valais*.

Boutros-Ghali, B 1992, *An Agenda for Peace*, viewed 3 June 2019, <https://digitallibrary.un.org/record/144858>

Calduch, R 1991, *Relaciones Internacionales*, Editorial Ediciones Ciencias Sociales, Madrid.

Caramani, D 2015, *The europeanization of politics: the formation of a European electorate and party system in historical perspective*, Cambridge University Press, New York.

Conseil fédérale de la Confédération suisse 2018, *Constitution fédérale de la Confédération suisse du 18 avril 1999*, viewed 1 June 2019, <https://www.admin.ch/opc/fr/classified-compilation/19995395/index.html#id-1>

Dicey, AV 1915, *Introduction to the Study of the Law of the Constitution*, Macmillan, London, viewed 2 June 2019, http://files.libertyfund.org/files/1714/0125_Bk.pdf

Dworkin, R 1986, *Law's Empire*, Harvard University Press, United States of America.

Electoral Commission 2018, *Report of an investigation in respect of Vote Leave Limited, Mr Darren Grimes, BeLeave, Veterans for Britain concerning campaign funding and spending for the 2016 referendum on the UK's membership of the EU*, London, viewed 30 May 2019, https://www.electoralcommission.org.uk/__data/assets/pdf_file/0019/244900/Report-of-an-investigation-in-respect-of-Vote-Leave-Limited-Mr-Darren-Grimes-BeLeave-and-Veterans-for-Britain.pdf

European Commission for Democracy through Law (Venice Commission) 2018, *Code of Good Practices on Referendums*, CDL-AD(2007)008rev-cor, viewed 29 May 2019, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)008rev-cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008rev-cor-e)

European Union Referendum Act 2015. (c. 36). [Online]. London: The Stationery Office. [Accessed 29 May 2019]. Available from <http://www.legislation.gov.uk/ukpga/2015/36/contents/enacted>

González Vicen, F 1952, *La filosofía del Estado en Kant*, Universidad de la La Laguna, Tenerife.

Gutteridge, N 2017, 'Merkel calls for EU army to defend Europe as relations with UK and USA weaken', *Express*, 13 January, viewed 4 June 2019, <https://www.express.co.uk/news/world/753750/Angela-Merkel-Germany-EU-army-Trump-Brexit>

Her Majesty (HM) Treasury 2018, *European Union Finances 2017: statement on the 2017 EU Budget and measures to counter fraud and financial mismanagement*, CM 5976, viewed 20 June 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691017/EU_finances_2017_Cm9576_web.pdf

Manzella, A 2014, Verso un governo parlamentare euro-nazionale?, in A Manzella & N Lupo (a cura di), *Il sistema parlamentare euro-nazionale*, Giappichelli, Torino.

Marcus Ball v Alexander Boris de Pfeffel Johnson (29 May 2019). Westminster Magistrates' Court (District Judge M. Coleman).

Martí, J 2001, *Etnicidad y nacionalismo en el siglo XXI*, Barcelona, viewed 7 June 2019, <http://digital.csic.es/bitstream/10261/38149/1/JMarti-2001-Etnicidad%20y%20nacionalismo%20en%20el%20siglo%20XXI....pdf>

NBC News 2018, *Angela Merkel Calls For Creation Of A 'True European Army'*, 13 November, viewed 9 June 2019. <https://www.youtube.com/watch?v=7gHOA2y9BzU>

Partington, R 2019, 'How has Brexit vote affected the UK economy? March verdict', *The Guardian*, 26 March, viewed 7 June 2019, <https://www.theguardian.com/business/2019/mar/26/how-has-brexit-vote-affected-the-uk-economy-march-verdict>

Political Parties, Elections and Referendums Act 2000. (c. 41). [Online]. London: The Stationery Office. [Accessed 29 May 2019]. Available from <https://www.legislation.gov.uk/ukpga/2000/41/contents>

Public Administration and Constitutional Affairs Committee. 2017. *Lessons learned from the EU Referendum*. (HC 496, 2016-17). [Online]. London: The Stationery Office. [Accessed 1 June 2019]. Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmpubadm/496/496.pdf>

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

R (Wilson and others) v The Prime Minister [2019] EWCA Civ 304.

Rappard, WE 1912, 'The Initiative, Referendum and Recall in Switzerland', *The Annals of the American Academy of Political and Social Science*, vol. 43, pp. 110-145, viewed 30 June 2019, <https://www.jstor.org/stable/1012542>

Rayner, H & Voutat, B 2014, 'Judicialisation and Direct Democracy', *Revue française de science politique*, vol. 64, No. 4, pp. 689-709, viewed 30 May 2019, doi: 10.3917/rfsp.644.0689

Real Academia de Jurisprudencia y Legislación 2016, *Diccionario Legal*, Editorial Aranzadi, España.

Representation of the People Act 1983. (c. 2). [Online]. London: The Stationery Office. [Accessed 1 June 2019]. Available from <http://www.legislation.gov.uk/ukpga/1983/2>

Sartori, G 2001, *La sociedad multiétnica: pluralismo, multiculturalismo y extranjeros*, Taurus, Madrid.

Wason, PC 1968, 'Reasoning about a rule', *The Quarterly Journal of Experimental Psychology* 20, 273-281, viewed 08 June 2019, doi:10.1080/14640746808400161

White v Jones [1995] UKHL 5.