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Brexit – Exercise of Democracy or a Challenge to Democracy?

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ECLN CONFERENCE LISBON 2017

by

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Introduction

The Brexit story is full of surprises, unexpected turns and disappointments. Nobody really expected that the referendum of June 23, 2016 would result in a success for the Brexiters, and that the government would execute it with such decisiveness and rigor; many argued that the government simply had to follow what “the people” had decided and forgot about the advisory nature of the referendum and the constitutional principle of the supremacy of Parliament. Surprisingly for them, the High Court and the Supreme Court very clearly confirmed the constitutional need for the government to obtain parliamentary authorisation in order to trigger Article 50 TEU, and also surprisingly clear was Parliament’s vote on this authorisation, in spite of the fact that before the referendum a strong majority of the Parliament had defended exactly the opposite point of view. That Theresa May, having an absolute majority in Parliament for her party, should decide to call new elections in order to gain support for her strategy of a hard Brexit was unexpected, and so was the clear refusal of the British people to follow her. Nothing suggests that Theresa May will remain in office for the full period of the negotiations. Given her failure in the recent elections, it came as a surprise that these negotiations finally started on June 19 2017. The only obvious certainty is that the two years provided under the Treaty for coming to an arrangement on the conditions of Britain’s withdrawal will be over by 29 March 2019. And given the enormous workload and complexity that the negotiations entail, there is little hope that this deadline will be met. Would the negotiators emerge with an agreement? Would the agreement be accepted by a qualified majority of the Council, as required by Article 50 TEU? Would it receive the consent of the European Parliament, and would Britain accept it by simple act of Parliament? Or would a new referendum be needed? Many things can change within two years, including the weight of young British voters compared to that of the elderly, whose votes were decisive in the June referendum.

Many of these questions are closely related to the meaning of democracy, and if the title of the present paper offers the choice between characterising Brexit as an exercise of, or a challenge to, democracy, perhaps the only certainty is that, wherever the process may lead the Union, the outcome must be democratic. The answer to the question will consist of three parts:

1. The Brexit process is no doubt an exercise of democracy in some respect;
2. It must be understood as a challenge to democracy in some other respect;
3. And it is a process from which we can and should draw some lessons for the future.

In explaining this answer, further questions of great importance, such as “What actually is democracy?”, or the question of whether

“democracy” is a term that can be easily applied in EU contexts, cannot be answered in depth. For a number of questions of principle, reference is made to the proceedings of the last ECLN Conference in Thessaloniki in May 2015, published under the title “Legitimacy Issues of the European Union in the Face of Crisis”.¹ This book has only just come out. In its attempt to provide an explanation for the three answers above, the present paper focuses on four questions: Are the terms provided in the EU-Treaty for withdrawal of a Member State democratic? Was the process leading to the UK government’s provision of notice of withdrawal under Article 50 TEU democratic? What are the democratic rights of the citizens directly affected by a Brexit and how are EU citizens represented in the process? And what does the Brexit process tell us about democracy in practice?

I. The Brexit Process as an Exercise of Democracy

Paul Craig describes the first phases of the process in a brilliant essay titled: “Brexit: a drama in six acts”.² After a long public debate, David Cameron was given a clear mandate in the parliamentary elections of 2014 to carry out his strategy in the form he had proposed in the famous Bloomberg Speech of January 23 2013.³ As promised, he led negotiations with the EU on an arrangement satisfying the demands of the UK and, after these negotiations had been concluded, he submitted the question to the British people so that they could decide whether to remain in the EU under these new conditions or to withdraw from it. The answer was Brexit.

The argument that this process was an exercise of democracy can, at least, be based on four aspects of it: David Cameron’s strategy was democratic (infra 1.); putting the question of Brexit to an advisory referendum is an exercise of democracy (infra 2.); the conditions and the procedure that Article 50 TEU provides for a withdrawal from the EU are democratic (infra 3.), and the result of the Brexit process so far has been a surprising increase in democratic awareness among people throughout the EU (infra 4.).

1. The Cameron strategy was democratic

David Cameron understood that strong feelings existed in Britain against the EU and that people had problems with the increasing flow of immigrants into the country, with the financial burden of EU membership and with the constraints that EU legislation and policies seemed to place on sovereign UK policies, primarily in the social sector. The EU seemed to have competences that were too far-reaching. Contrary to his expectations, however, the “balance of competences

¹ Lina Papadopoulou/Ingolf Pernice/Joseph H.H. Weiler (eds.), *Legitimacy Issues of the European Union in the Face of Crisis*. Dimitris Tsatsos in Memoriam (Nomos, Baden-Baden 2017).

² Paul Craig, “Brexit: a drama in six acts”, *European Law Review* (2016), 447.

³ David Cameron, “EU speech at Bloomberg”, 23 January 2013, at: <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg> (accessed 18 August 2017).

review” initiated in 2012 revealed that there was no unjustified EU competence. Emphasis was therefore put on a stronger subsidiarity control over the exercise of EU competences, an enhanced role of the national parliaments over EU policies and the deletion of the “ever closer Union” clause in the Treaties. If his strategy was to negotiate these issues with his colleagues in the EU and to submit the result to the scrutiny of the British people as a basis for the “remain” option, it is difficult to contest the democratic character of this process. The problem was that the outcome of these negotiations was neither strong or convincing in substance nor clear regarding the legal implications.⁴ It was not the “far-reaching fundamental change”, nor the “updated European Union” he had called for in the Bloomberg speech, meaning, basically, not the return to the “common market”.⁵ Nonetheless, to put the question of “Brexit or remain” to the British people was a great risk, to say the least, and his campaign for “remain” was more than difficult. This does not mean, however, that the strategy was undemocratic. On the contrary, in the 2014 elections it received full backing and the Brexit referendum was expressly authorised by Parliament in 2016.

2. Consultative referendum and democracy

Is a consultative referendum, as it was authorised by the Parliament, democratic? Difficult to deny. A referendum is an expression of direct democracy. Even in a representative democracy that is based upon the principle of parliamentary sovereignty, like Britain, there cannot be doubts about this, at least in a case where the Parliament in the exercise of its prerogatives expressly authorises the referendum. In the present case the referendum was consultative, so it allowed the government to ask for the opinion of the people without implying that the outcome would be binding upon the government or the Parliament. The principle of parliamentary sovereignty may exclude an act of Parliament – or a popular vote, authorised by the Parliament – from being binding for the Parliament in future and so restrict its own freedom to decide at any time it considers necessary, but no such restriction follows from a consultative referendum.

In a subsequent parliamentary vote on the authorisation of the government to give notice of withdrawal to the President of the Council as specified by Article 50 TEU, it was up to each individual Member of Parliament to make his or her own personal judgment of conscience whether or not to follow the people’s vote. If they felt bound, politically, to follow, this was no doubt an expression of democracy.

⁴ See the critique by Sylvie Goulard, *Goodby Europe* (Flammarion, Roubaix 2016).

⁵ David Cameron, Bloomberg speech (note 3), summarising his view of what the British people’s “disillusionment with the EU is”: “People feel that the EU is heading in a direction that they never signed up to. They resent the interference in our national life by what they see as unnecessary rules and regulation. And they wonder what the point of it all is. Put simply, many ask ‘why can’t we just have what we voted to join - a common market?’”.

3. The terms of Article 50 TEU as an expression of democracy

Democracy means the free self-determination of people. According to the concepts of post-national democracy and multilevel constitutionalism, it is not limited to states only.⁶ People can organise self-determination at diverse levels, and this is what the citizens of the Member States did when they accepted, according to their respective constitutional requirements, the European Treaties and their amendments as had been negotiated, on their behalf, by their governments. With the constitution of the EU they have not only created this particular supranational setting for pursuing their common political objectives and defined themselves as citizens of the Union; they have also set up the procedure allowing EU membership to remain voluntary. Thus, like the Constitution of the EU as a whole, the ‘principle of voluntariness’ laid down in Article 50 TEU,⁷ is also an expression of the citizens’ democratic self-determination in the profoundest sense of the term. The citizens of the Member States exercised their sovereign right to establish the EU, membership of which remains the sovereign choice of each of the participating peoples.

There is, however, an important difference to the constitution of a state: Article 50 underlines the voluntary character of this particular joint venture, with all the consequences it may imply. Though originally not thought to be of practical relevance, the exit option is part of the deal and an expression of a constitutional principle, which is formative of the EU. It underlines the openness, which the principle of democracy requires as a matter of self-determination, for people at any time to revise previous decisions whenever deemed necessary.

But democratic self-determination is not without limits. It is based upon the recognition and respect of human dignity and the fundamental rights of others. This is the reason why withdrawal from the EU is subject to a specific procedure. The terms of Article 50 TEU can, thus, be understood as an expression of these limits. They also reflect the fundamental requirements of solidarity, the principle of loyal and sincere cooperation and respect for the rights of EU citizens under the Treaties, in particular those of free movement and non-discrimination or, technically speaking: “national treatment” of foreign EU citizens. Therefore, though established by a democratic process, the question of whether or not the procedure and conditions set out in this provision are sufficient to ensure the effective protection of these rights and principles, needs further consideration.⁸

⁶ Ingolf Pernice, *Multilevel Constitutionalism and the Crisis of Democracy in Europe*, 11 *EuConst* (2015), pp 541-62, available also as: [WHI-Paper 02/2015](#).

⁷ On this principle as a particular characteristic of the EU see Ingolf Pernice, *The EU – A Citizens’ Joint Venture. Multilevel Constitutionalism and Open Democracy in Europe*, in: José M. Magone (ed.), *Routledge Handbook of European Politics* (Routledge, Abingdon, 2015), pp 184-201.

⁸ See *infra* II.1.

4. Stimulating democratic processes in the EU

As part of the Brexit story, not only the developments in the UK but also the reactions they provoked in other Member States are of interest. It was a shock for many people, an alarm bell warning of the decline not only of the EU but also of national democracies. People feared that the British referendum would have a negative impact on national political developments in Austria, the Netherlands and France, as well as in Germany, due to populist, xenophobic and nationalist movements gaining ground at the same time as the European idea was coming under increasing pressure. As a result, new citizens' initiatives arose spontaneously in reaction to these threats to integration and peace in Europe.

One of these movements, PulseofEurope, was begun in January 2017 and has since brought tens of thousands of Europeans onto the streets in up to 130 European cities to demonstrate each Sunday at 2 p.m. for a United Europe of the citizens. The general fear that the Brexit process could stimulate disintegration and push Europe back into a situation that we thought we had overcome over the past 70 years thus had the positive effect of mobilising citizens who had hitherto been silent to engage and take ownership of the EU. This movement is continuing and must continue to counter those who see their future in political structures devised in the 19th century with consequences we would not wish to see again.

It may be going too far to construct some kind of causality, but the victory of Van der Bellen in Austria, the defeat of Wilders in the Dutch elections, and the great victory of Macron with his clear commitment to the European Union in France seem to signal an awakening of people all over Europe, people who have realised that the current period of crisis and depression must have an end and that our common future is a future within and not without the European Union. Recent polls show that approval of the EU has been rapidly increasing since June 2016, with increases of 18% in Germany, 15% in the Netherlands and 12% in Spain.⁹ In this sense, the outcome of the elections in Austria, the Netherlands and France, and perhaps even that of the recent elections in the UK, indicate that neither the disintegration of Europe nor a hard Brexit or, perhaps, any Brexit at all, are what people in Europe ultimately want to see. If this is true, the Brexit process has so far proved to be a stimulant of democracy far beyond the UK.

⁹ See Hans-Jürgen Schlamp, 'Zustimmung zur EU wächst. Danke Frau May, danke Herr Trump. Keine Lust mehr auf EU? Das war einmal – zumindest laut einer neuen Studie: Demnach steigt die Zustimmung der Europäer zur Union. Mit einer Ausnahme', in: Spiegel Online 20 June 2017, at: <http://www.spiegel.de/politik/ausland/europaeische-union-zustimmung-steigt-dank-brexit-studie-a-1152927.html> (accessed 22 August 2017). Similarly: European Parliament, "Aktuelles", of 28 April 2017: 'Meinungsumfrage "Eurobarometer special" des Europäischen Parlaments: Zustimmung zur Europäischen Union steigt wieder' (not available in English), at: <http://www.europarl.europa.eu/news/de/press-room/20170427AVI72828/zustimmung-zur-europaischen-union-steigt-wieder-laut-eurobarometer> (accessed 22 August 2017).

II. The Brexit Process as a Challenge to Democracy

At the same time, however, certain aspects and effects of the Brexit process raise critical questions and must be understood as a challenge to democracy. Only four issues that seem to require further reflection will be discussed below in order to stimulate further thought: the role of the citizens (1.); the role of lying and voters' manipulation (2.); the effects of a consultative referendum (3.); and the specific role of the judiciary (4.).

1. Union citizens who have made use of their freedoms

If democracy means at least self-determination and that citizens of a polity participate in the process of decision-making on matters that directly or indirectly affect them, then the question already mentioned about the role of Union citizens who have established their residence in a Member State that decides to leave the Union, or the role of the citizens of this State who have made use of the freedoms offered by the Treaties, is a question of democracy.

a. Decisions with no voice for those affected

With regard to the UK, the problem was easy to see: When the British people voted for Brexit, and when the British Parliament decided that the UK will leave, the Union citizens from other Member States had and no voice, no representation; they are just ignored in what is for them a very existential matter. Similarly, and perhaps even more strikingly, British citizens who have chosen to make use of the freedom to move to another Member State and have already been established there for a certain number of years, including those working in the European institutions, were excluded from participating both in the referendum and in the UK elections. Both cases seem to be fundamentally contrary to the principle of democracy. The problem is all the more serious as these citizens risk losing their rights as soon as the withdrawal takes effect, unless an agreement is reached under Article 50 TEU to protect these rights and to ensure the continuing role of the ECJ – as if the UK were still a Member State of the Union.

b. The principle of loyal cooperation as a negotiation guideline

However, in the first case described above it is possible to base the justification upon the terms of Article 50 TEU. For foreign Union citizens in the UK the loss of all the rights of European citizenship would be a necessary consequence of the principle of voluntariness. Thus, the democratic justification can be found in the earlier fundamental decision to accept the Treaty of Lisbon, including Article 50 TEU. Triggering Article 50 would, thus, be something like going back to square one: (re-)negotiation of the respective rights of the citizens. It was inserted with a view to finding a reasonable solution in cases where people of a Member State do not feel comfortable any more with

their membership in the EU, and the Treaty provides for a procedure including the two-year period as a deadline for the negotiation of a suitable arrangement. However, during this period of negotiation the principle of loyal cooperation under Article 4 (3) TEU fully applies and compels all sides to make every effort to protect the “droits acquis” of the citizens. It is a constitutional duty of both sides at the negotiation table, the EU and the UK, to make every possible effort to effectively ensure the protection of the vested interests and the specific legitimate expectations of the citizens affected. Not only are both sides compelled to reach an agreement, but the agreement has to respect the fundamental rights of the citizens concerned; these rights must play a key role when the Council, the European Parliament and the UK take their respective decisions in the ratification process.

c. Exclusion of nationals in other Member States from the vote

The fate of UK citizens who have established themselves in other Member States is a different story. These people must find themselves in a trap. First, they have been invited to make use of their rights offered by the Treaties, particularly since the internal market would not have become a reality without people moving from one country to another; and second, they are likely to suffer from a decision taken by people who have stayed at home and have not even had any experience of residing in another EU country. British citizens, therefore, having made use of their right to free movement within the EU for more than 15 years, or having served as a European civil servant in one of the EU institutions, have been deprived of their democratic rights in Britain and have had no voice in matters directly concerning them.¹⁰

Democracy goes hand in hand with rights. If there is a general practice among states to exclude their nationals from participating in a vote after they have lived abroad for a long period and are far away from all the daily political developments at home, the explanation may be that these citizens are no longer affected by the internal politics of their country. This reasoning, however, does not satisfy the case in point. The Brexit referendum does affect these citizens abroad, much more than even the general public in Britain. Not to include them in the vote, therefore, is not only a serious challenge to the principle of democracy but also serves as a punishment for having exercised the rights given by the Treaties to the Union’s citizens and thus, would emerge as an indirect barrier to the freedom of movement contrary to Articles 21 and 45 TFEU.

It is, primarily, a matter for each Member State to devise specific provisions for including these citizens in decision-making processes. If Union citizenship is the fundamental status of the citizens of the

¹⁰ After fifteen years of residing outside Britain it seems that British citizens no longer have the right to vote: see Gov.UK, “Voting when you’re abroad”, at: <https://www.gov.uk/voting-when-abroad> (accessed 22 August 2017); see also Section 2 (1) of the European Union Referendum Act 2015, together with Section 1 (2-4) of the Representation of the People Act 1985.

Member States of the Union, as the ECJ confirms in its established case law,¹¹ excluding those who have made use of their rights even by participating in the making of national decisions, withdrawing these rights would be at odds with this constitutional status.¹²

d. The European Parliament and the Union citizens' rights

In any event, the protection of the rights of Union citizens on both sides, in the event of a withdrawal of a Member State from the Union, is one of the major tasks the Commission must deal with in negotiating the arrangement with the UK under Article 50 TEU. In performing this task, the Commission is under the control of the European Parliament, which directly represents the citizens of the Union – those of the UK as well as those of the other Member States. As long as the UK is a Member State, this representation therefore extends to all Union citizens, including the British. Hence, the European Parliament plays a particularly important democratic role in the negotiation process with the UK. If no satisfactory solution is found to protect the rights of all the citizens – who have exercised their fundamental freedoms under the Treaties – the European Parliament has a responsibility to refuse ratification of any arrangement under Article 50 (2) TEU.

If it is true that without an agreement the situation of the citizens affected by the withdrawal might be worse than what they would have with the agreement, adequate compensation would have to be found by the EU and the UK outside the Article 50 process.

e. Protection of acquired rights by the countries of residence?

Is it for the other Member States, in the event that these negotiations do not result in a satisfactory solution, individually to protect the “rights” of these (ex-)EU citizens “as if” the UK were still a member of the EU? While, formally, there is no reason for them to do so, it is difficult to imagine that the 27 could seriously stop treating UK citizens as Union citizens. Solutions have to be found under national law, at least to maintain the *status quo* for those who have established residence in these countries before the withdrawal of the UK takes place. They may be based upon principles like the principle of legitimate expectation or the protection of acquired rights. But there is no secure guarantee for what had been achieved under the rule of “national treatment”. For there is no legal duty under EU law, and the ECJ would have no

¹¹ ECJ Case C-184/99 – Grzelczyk (2001) ECR I-6193 ECLI:EU:C:2001:458, para 31, and Case C-34/09 – Ruiz Zambrano (2011) ECR I-01177 ECLI:EU:C:2011:124, para 41. See also Christian Calliess, *The Dynamics of European Citizenship: From Bourgeois to Citoyen*, in: Allan Rosas, Egils Levits and Yves Bot (eds.), “The Court of Justice and the Construction of Europe. Analyses and Perspectives on Sixty Years of Case-law” (T.M.C. Asser Press, The Hague 2013), p p 425, 429-32.

¹² For the short description of the general rule see Koen Lenaerts/Piet Van Nuffel, *European Union Law* (3rd ed. Sweet & Maxwell, London 2011), 8-008: “Art. 21 TFEU opposes national legislation which places at a disadvantage certain of the nationals of the Member States concerned simply because they have exercised their freedom to move and to reside in another Member State”.

competence to judge upon the preliminary questions of national courts on this issue.

Similarly, should no suitable arrangement be reached with the UK on the issue of EU civil servants and employees coming from the UK, the Council of the 27 would have to find an appropriate solution protecting their acquired rights according to the general principles of Union law.

2. Lies and Democracy

There was a lot of lying during the Brexit campaign, and apparently lies were told by all sides in the campaign: claims that could not stand. A fact check by The Telegraph led to the conclusion:

This is now particularly important: some of these claims have helped swing the UK to Brexit, and now the country must face the consequences.¹³

Is lying undemocratic; is it a challenge to democracy? And is it perhaps particularly undemocratic when lies and fake news are distributed and advertised through social media and other IT-based mechanisms? What if such news and disinformation are distributed on a massive scale through botnets in social networks? Is there a specific challenge in the case of targeted propaganda based upon big data analysis, such as that offered by undertakings like Cambridge Analytica?¹⁴ If lies alone are not a challenge to democracy, any attempt to use IT services to individualise people's personal data and, on this basis, manipulate voters with wrong information in elections or a referendum certainly can be.

A distinction, however, may be drawn between representative democracy with parliamentary elections (infra a.) and direct democracy with referenda on questions with irreversible effects, as in the case of Brexit (infra b.).

a. Trust in parliamentary democracy and systemic lying

Representative democracy, in which citizens vote for a party or for someone to be a member of parliament, is based upon trust. The representative of the people is given a mandate to determine the future policies of the country. What he or she promises will be measured against the action taken in reality. Such accountability and the risk of not being elected again if people understand that they were misled in

¹³ See Ashley Kirk, EU referendum: The claims that won it for Brexit, fact checked, in: The Telegraph 13 March 2017, at: <http://www.telegraph.co.uk/news/0/eu-referendum-claims-won-brexit-fact-checked/> (accessed 14 June 2017). With an impressive list of lies see also Brexit Lies at: <http://brexitlies.com/>.

¹⁴ See the alarming confession of Michal Kosinski, reported by Hannes Grassegger and Mikael Krogerus, 'Ich habe nur gezeigt, dass es die Bombe gibt', in: Das Magazin no 48 of 3 December 2016, available at: <https://www.dasmagazin.ch/2016/12/03/ich-habe-nur-gezeigt-dass-es-die-bombe-gibt/> (accessed 16 June 2017). See also Jamie Doward and Alice Gibbs, 'Did Cambridge Analytica influence the Brexit vote and the US election?', in: The Guardian 4 March 2017, available at: <https://www.theguardian.com/politics/2017/mar/04/nigel-oakes-cambridge-analytica-what-role-brexit-trump> (accessed 16 June 2017). After heavy critiques Cambridge Analytica does not seem to have maintained its claim, see: Patrick Beuth, 'Die Luftpumpen von Cambridge Analytica', in: Zeit Online of 7 March 2017, available at: <http://www.zeit.de/digital/internet/2017-03/us-wahl-cambridge-analytica-donald-trump-widerspruch> (accessed 16 June 2017).

the election campaign serve as a remedy against lies. Trust is lost, and another candidate or party may be elected. Thus, lies do not seem to be undemocratic *per se*.

However, the red line is crossed when lies become systemic, and when they turn into a subtle manipulation as in the case of psychographic targeting on a mass scale, with the effect that trust is lost not only for individual candidates or parties but in the entire system. Systemic lying thus entails an erosion of the democratic system and is a major challenge to democracy.

b. Direct democracy: the risks of irreversible decisions

Trust seems to play a different role in the case of direct democracy with popular voting. Direct democracy suggests that mature people are taking their future into their own hands. A mechanism of accountability and “repair”, as in the system of “time-limited entrustment of power”, does not exist. Once the vote is given in a referendum, there is no need for accountability. Nobody can be checked and nobody has to fear a sanction for misbehaviour or a wrong decision. All the citizens, whether they have participated in the vote or not, equally bear the consequences of the “decision of the people”. Correct information on the background and implications of the vote, a serious public debate and a keen sense of responsibility on the part of the people voting are conditions for the functioning of direct democracy.

In the case of a binding referendum, the outcome is not subject to another political check. Yet people who find themselves misled would not accept the result as legitimate and binding if the campaigns for or against the issue at stake were poisoned by lies and manipulation. The loss of trust affects the legitimacy of the system and is particularly serious in cases of irreversibility. A decision to trigger the process of Article 50 TEU is a case in point.

A consultative referendum, in contrast, leaves responsibility for the final decision to the parliament. It remains for the MPs individually to make their independent and responsible judgement upon what the outcome of the referendum would mean for her or him. The judgements made by each party and each individual MP, together with their consequences and the policies subsequently adopted, will themselves be judged by the voters at the next election. Thus, as long as a referendum is not binding, the democratic system as such is no more challenged than in the case of any other parliamentary vote in a representative democracy.

3. Effects of a Consultative Referendum?

Was the referendum on Brexit binding or consultative only? The distinction becomes doubtful in this case. Neither the new British government, nor the Members of the UK Parliament seem to have taken the Brexit referendum as a simple expression of the opinion of the voters to guide their future consideration of all relevant factors for their

own position. Rather, it was declared that there was a democratic imperative to follow the outcome of the referendum without further ado. Apparently, there was little critical analysis of the circumstances leading to the referendum's surprising result. Did the MPs who simply followed it as "the command of the people" take their personal responsibility seriously, as elected representatives of their respective constituency, to follow their own conscience in taking their decision? Although the majority of the Parliament had been in favour of "remain", what were the reasons for the change of mind after the referendum? It was as if the fact that the people had been misled by lies and fake information was ignored. Even the Opposition, the Labour Party, ordered their MPs to vote in favour of Brexit when the Parliament had to decide upon authorising the government to trigger the procedure of Article 50 TEU.¹⁵ The only explanation is that the referendum, which was not meant to be legally binding,¹⁶ was nevertheless understood, politically at least, to have a binding effect.

In such circumstances lies and manipulative practices are a challenge to democracy even if the referendum is, formally, consultative only. At least, it is difficult to understand why the MPs did not use the opportunity created for them by the Supreme Court to take an independent decision. Was it the fear that their constituencies would rebuke them if they deviated from the decision taken by "the people"?

4. Courts and Democracy

It was only through the intervention of the High Court and the Supreme Court that the authorisation to trigger Article 50 TEU was put to the Parliament. Without going into detail on the intense debate on the respective prerogatives of the executive and the Parliament in this case, it was the judiciary who saved the specific form of democracy existing in Britain: a representative democracy based upon the principle of parliamentary sovereignty. Based upon an impressive constitutional analysis, first the High Court and then, on appeal, also the Supreme Court made it clear that the Prime Minister could not trigger Article 50, as she had intended to do, without an act of Parliament authorising this step.¹⁷ The intention was to challenge the British democratic system, and it was commendable of the Courts to stop Theresa May. But what does this mean for the concept of democracy? If the Parliament is supreme or sovereign, why is it necessary for Courts to intervene? Is it a challenge to democracy if Courts take on this role?

The answer is no, at least from a German constitutional law perspective. Democracy is a basic constitutional principle, but it is a constitutional

¹⁵ The decision was taken by a majority of 498 against 114 votes. Nonetheless, 20% of the Labour Party MPs, including 13 serving frontbenchers, were "defying the whip", see: "MPs vote to give May power to trigger article 50 – as it happened", in: *The Guardian* of 1 February 2017.

¹⁶ See the convincing argument in the Judgment (2017) UKSC of 24 January 2017, *Miller v. Secretary of State*, paras. 116-125, at: <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf> (accessed 21 August 2017).

¹⁷ *Ibid.*, in particular paras. 43-83.

principle and neither the only one nor absolute. Without the rule of law, without respect for the fundamental rights of the individual, without the division of powers laid down in the Constitution – written or not – democracy could not function. The courts, acting as the guardians of the Constitution, are therefore not a challenge but a constituent part of the system and a safeguard of democracy.

In some way, the Supreme Court confirms this specific task of the judiciary in the constitutional system of the UK:

By the end of the 20th century, the great majority of what had previously been prerogative powers, at least in relation to domestic matters, had become vested in the three principal organs of the state: the legislature (the two Houses of Parliament), the executive (ministers and the government more generally) and the judiciary (the judges).¹⁸

With a clear reference to the rule of law, it emphasises that:

the role of the judiciary is to uphold and further the rule of law; more particularly, judges impartially identify and apply the law in every case brought before the courts. That is why and how these proceedings are being decided.¹⁹

This important constitutional role is not necessarily contrary to the principle of sovereignty of the Parliament, for the Parliament preserves the right at any time to set aside judgements of the courts by an express act of abrogation.

III. Lessons learned

Given the subsequent developments in European politics after Brexit, at least four lessons can be learned from the Brexit process as it stands today. They are about lies, democratic dynamics, transborder effects and the role of the citizens.

1. Lies have short legs.

“Lügen haben kurze Beine“: this is a German saying meaning that lies have short legs. They cannot go very far. Shortly before election day – June 8 2017 – a song entitled “She’s a liar, liar” came out. As the Guardian reported: “Remix by anti-austerity band Captain Ska mocking May’s claims of ‘strong and stable leadership’ tops Amazon UK downloads”. The title of the article was: “‘She’s a liar, liar’: anti-Theresa May song heads to top of charts”²⁰ More than a million downloads had been counted a few days later. The song seems to reflect feelings shared by more and more people in the UK.

British people are waking up and walking away from Brexit. The negotiation guidelines adopted by the European Council on 29 April 2017²¹ show that the EU has certain top priorities that are difficult to

¹⁸ Ibid., para. 41.

¹⁹ Ibid., para 42.

²⁰ See: The Guardian of 31 May 2017 <https://www.theguardian.com/politics/2017/may/31/liar-liar-anti-theresa-may-song-heads-to-top-of-charts>; for the song: https://www.youtube.com/watch?v=danwAOT_WDU (accessed 16 June 2017).

²¹ Available at: <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>

reconcile with the promises made by the Brexit campaigners and, in particular, by Nigel Farage and Boris Johnson. The first and most important of these priorities is the determination to “safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union”. Another is that the financial settlement should “cover all commitments as well as liabilities, including contingent liabilities”, which means that Brexit, at least for a while, will fall far short of allowing Britain substantial financial relief.²² Apart from all the other difficulties and burdens that will gradually emerge, can the result of the June elections be understood as a reaction of people who feel that they have been fooled? If so, this disaster for the Tories may be the first bill Theresa May has to pay. What other claims might be made?

2. Dynamics of Democracy: What if Brexit loses support?

The outcome of the June elections was unexpected and a clear “no” to the strategy of the Prime Minister. Yet immediately after the elections Theresa May confirmed that she will ensure stability for the country. This is perhaps what the country needs most in a situation that looks anything but stable. This includes a lack of clarity about the objectives Britain would want to achieve in the Brexit negotiations that started on Friday 19 June. Given the failure of the Prime Minister's attempt to get stronger backing in the elections for her “hard Brexit”, though, it remains an open question what Britain will finally strive to achieve and what deal people will accept.

The Brexit process so far has shown that a “democratic” decision made yesterday does not necessarily mean a lot for today and the future. A more flexible position, particularly with regard to the rigidities a hard Brexit would bring about for Northern Ireland, seems to be the order of the day. If the May government did not end in June, it was thanks to a conservative group of parliamentarians from Northern Ireland that, after the promise of new financial support for their region, that it did not lose its majority.²³ Similarly, regarding the freedom of movement and national treatment of EU citizens, it is the EU that is expected to stubbornly resist any attempt to single out free movement from the internal market freedoms Britain would be keen to benefit from in the future as well.

The next test will be the vote in the UK Parliament on the “European Union (Withdrawal) Bill” that will repeal the European Communities Act 1972 “on exit day” (section 1), while retaining substantive EU law

(accessed 16 June 2017).

²² According to some estimates, Britain will have to pay as much as 100 billion euros, while Boris Johnson seems to expect that the EU will pay large sums to Britain. For a legal assessment of the financial modalities of Brexit see: Steffen Hindelang, The Brexit Bill – Großbritannien's Welt der alternativen Fakten, in: 70 ifo Schnelldienst 11/2017 of 8 June 2017, p 12-5.

²³ See Jack Maidment, “DUP agrees £1bn deal with Conservatives to prop up Theresa May's minority Government”, in: The Telegraph, 26 June 2017, at: <http://www.telegraph.co.uk/news/2017/06/26/arlene-foster-meet-theresa-may-finalise-dup-deal-prop-tory-minority/> (accessed 22 August 2017).

applicable in the UK until it is amended through executive regulations concerning “deficiencies arising from withdrawal”, international obligations or the implementation of the withdrawal agreement.²⁴ It is thus aiming at “constitutional change and legal continuity”.²⁵ But without the Commission watching the full application of EU law and without the European Court of Justice judging upon questions of interpretation and validity Union-wide, there cannot be “legal continuity” after Brexit. And “implementing the withdrawal agreement” (section 9) presupposes that, in fact, there is such an agreement.

There are reasons to believe that if, finally, there is any agreement at all, this agreement will be very close to what the law is like today; people asked to ratify it may than rightly put the question of whether or not it is worth approving Brexit; they might refuse the ratification of the agreement instead because Britain’s situation would be worse than it is today. In such conditions – and given the clear interest of the ever-growing body of young voters striving to remain – there is a good chance of there being a majority for remaining in the EU. As a result, after two years of negotiations, Brexit may not happen at all.

If no valid agreement is reached after the two years, the withdrawal will be the automatic consequence of the notice given under Article 50 TEU. This would be the worst scenario for all sides. Paul Craig has argued that the notice can be withdrawn.²⁶ I have doubts,²⁷ though in terms of politics no other Member State would refuse to accept Britain’s withdrawal of the notice and remaining. Would a new act of the UK Parliament be necessary for such a turn? Or would a second referendum be necessary? As the first referendum was consultative only and the Act of Parliament on Article 50 authorises notice of withdrawal without actually compelling the government to trigger the procedure, there is no reason to believe this.

In the event that this is regarded as impossible, no arrangement is realistically in sight, and no extension of the two-year deadline is likely to be reached, the EU and Britain could come to an ad hoc agreement, under Article 50 TEU, stating that Britain will have the same rights and obligations under the Treaties as a Member State until a new accession treaty is ratified under Article 49 TEU. It is difficult to see why the Council, the European Parliament or the British Parliament should refuse to accept such an agreement within a short period of time.

²⁴ Official Publication at: <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf> (accessed 23 August 2017).

²⁵ See Jack Simson Caird, “The European Union (Withdrawal) Bill: constitutional change and legal continuity”, in: *The Constitutional Unit*, 18 July 2017, at: <https://constitution-unit.com/2017/07/18/the-european-union-withdrawal-bill-constitutional-change-and-legal-continuity/> (accessed 22 August 2017).

²⁶ Craig, *Brexit* (note 2) pp. 464-65.

²⁷ Ingolf Pernice, *European Constitutionalism and the Constitutions of the Member States. Implications for Brexit*, in: 2017 *Coimbra Law Review*, forthcoming, available also as WHI-paper [01/2017](https://www.wheelwrightinstitute.org.uk/papers/01/2017/).

3. Growing awareness of the externalities of national politics

What we learn, at the very least, from the Brexit-process is that within the EU, political developments in one country are of highest relevance to people in other Member States as well; decisions in one country affect the others. Brexit is the most striking example. The great success of Macron in France is another. Both have the potential to change the EU considerably – in different directions – and so to change the life of millions of Union citizens in all the Member States.

What does this mean for democracy? If politics in one Member State, even the vote of individuals in national elections, has an impact on people in other Member States, they cannot be made without regard to these possible implications. Externalities and horizontal effects within the “Verfassungsverbund” are the reason why the media and citizens in one Member State have a legitimate cross-border interest in political processes in other Member States. The shock of the Brexit referendum was felt to be a disaster in all other Member States. Similarly, the political developments in Hungary and Poland are felt as a threat to democracy in Europe at large. The citizens of the Union do not feel neutral on such developments. Those of other Member States have a stake, but no voice.

However, things have begun to change in the wake of these shocks. Citizens are taking part in a European-wide public discourse on the shaping of our common future, including national election campaigns and referenda. Through the internet, information can easily be gathered from all Member States and arguments can be exchanged within social networks, blogs and discussion platforms, thus allowing discourses beyond borders. While direct participation in national elections or referenda remains reserved to the nationals of each country, views and experience from foreign stakeholders can have an impact and increasingly do so.

4. People and citizens of Member States acting as citizens of the EU

After all, the Brexit process is perhaps not only a challenge to, and an exercise of democracy; but more than this: it seems to have triggered a new step in democracy in the EU. It has led to a growing awareness of the values and benefits of the EU; people are becoming more responsible for their common European future and they are increasingly viewing the EU as their vehicle to secure peace, freedom and prosperity in Europe and as a common instrument for securing an effective participation in the shaping of globalisation.

Conclusion

The Brexit process was first considered to be a serious threat to the idea of European integration. Whether or not it will, ultimately, bring the EU back to 27 Member States, it seems to have a positive side too. Little more than one year after the referendum, there is hope that it has a potential to give a beneficial impulse to the European project. If –

together with the surprising outcome of the American election – it has raised awareness of the fundamental values it represents and even mobilised new citizens' movements to make the European Union more democratic, this unexpected positive effect may be understood as one that is impelling people to take ownership of the Union and push it towards a democratic reform that brings it in conformity with peoples' expectations.

Given that, at least during the Brexit negotiations, the UK would not be able to oppose any important steps towards a more democratic Union with a strong protection of citizens' fundamental rights and freedoms, the result could be that on "exit day" the EU will already look very different from what it is today. With the completion of the internal market, including tax harmonisation, with a stronger role of the national parliaments in the control of subsidiarity in the exercise of EU competencies and parliamentary control of European policies and, in particular, with new provisions for the enhanced involvement and participation of parliaments in the shaping and control of the common economic and fiscal policies in a reformed EMU, the future EU would be even closer to what David Cameron had in mind when he called in his Bloomberg speech for an "updated" EU as a basis of the referendum.