

# Brexit – Exercise of Democracy or a Challenge to Democracy?

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## Abstract

*The Brexit process is no doubt a challenge to the EU. Is it also a challenge to democracy? Or is it just an exercise of democracy? Looking closer at both, the provisions for the withdrawal from the EU and their application by the UK and the EU no serious violation of democratic principles can be determined. Some doubts, however, arise with regard to certain aspects of the process in practice, starting from the conditions and preparation of the referendum up to the effect given by a broad majority to its result, notwithstanding the advisory nature only. The present contribution discusses questions of appropriate democratic participation to a referendum of the given kind, of dealing with systemic lying and manipulation in political processes, binding effects of a referendum in a parliamentary democracy and the role of courts in relation to the parliament and the government when it comes to decide upon far-reaching constitutional issues. Some lessons are drawn from the experience of Brexit so far, not least for the rising awareness of citizens of the Union for political developments across borders and of challenges to democracy the abuse of new information technologies can bring about at all political levels. Whatever the outcome of the process with all its threats to democracy it brings about, it will trigger a transformation both of the UK and the EU. Should Brexit really happen, the door so remains open for an enlightened return as an expression of democracy.*

## Introduction

The Brexit story so far is full of surprises, unexpected turns and disappointments. Nobody really expected that the referendum of 23 June 2016 would result in a success for the Brexiteers, and that the government would strive to 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 consultative nature of the referendum as well as the constitutional principle of the supremacy of Parliament. Surprisingly for them, the High Court and the Supreme Court has very clearly confirmed the consti-

tutional need for the government to obtain parliamentary authorisation in order to trigger Article 50 TEU and also surprisingly clear was the Parliament's final vote on this authorisation, in spite of the fact that before the referendum a majority of the Parliament had defended exactly the opposite point of view: Remain.

That Theresa May, having an absolute majority in Parliament for her party, would decide to call new elections in order to gain support for her strategy of a hard Brexit, was unexpected as well, and so was the clear refusal of the British people to follow her. Nothing suggests that Theresa May will politically survive the process or even remain in office for the full period of the process. Given her failure in the 2017 general elections, it came as a surprise that the negotiations on a withdrawal agreement started at all: 19 June 2017.

The only obvious certainty was at this time that the remaining part of the two years period provided under the Treaty for coming to an arrangement on the conditions of Britain's withdrawal would be over by 29 March 2019. Given the complexity of the subject there was little hope that this deadline would be met. Surprisingly, the negotiators did emerge with an agreement in time. And this "Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community", as agreed at negotiators' level on 14 November 2018,<sup>1</sup> was even accepted by the Council of 27, as required by Article 50 TEU. It was also expected to receive the consent of the European Parliament. As it was rejected by the UK Parliament, however, it was difficult to see how a timely ratification could be reached to avoid a hard Brexit, as it was the wish of the majority voting in the UK Parliament on 14 March 2019. Would a second referendum be needed, or new elections, before such a step is taken? An extension of the Article 50 TEU deadline with the agreement of the 27 was necessary in any event. This agreement even seemed to be questioned for a while, since Italy was thought possibly to veto the extension.<sup>2</sup> The only way to avoid a hard

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1 Draft Agreement, TF50 (2018) 55–Commission to EU27, full text available at: [https://ec.europa.eu/commission/sites/beta-political/files/draft\\_withdrawal\\_agreement\\_0.pdf](https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf) (accessed 19 March 2019).

2 For an attempt of blocking: see Georgi Gotev, 'Farage to lobby EU countries in search of Brexit extension veto', at: <https://www.euractiv.com/section/eu-elections-2019/news/farage-to-lobby-eu-countries-in-search-of-brexit-extension-veto/> (accessed 19 March 2019); see also: Focus online of March 19, 2019: 'Geheim-Pakt mit Salvini? Wie Brexit-Vater Farage die EU austricksen will', at <https://eulawanalysis.blogspot>.

Brexit in this case would have been the revocation of the Article 50 notice.<sup>3</sup> Yet, at the EU summit of 22 March 2019, an extension was granted until 31 October 2019, though nothing indicates that an agreement will be found and finally be ratified by all parties until then. – Following the 2019 European elections and after Theresa May stepping down, the new Prime Minister Boris Johnson even more strongly envisages a no-deal Brexit. This is as suprising as audacious, given the clear majority in the Parliament is against this solution. Probably the Parliament will not allow it to happen, though time is too short for new elections or for organising the second referendum. The next surprise, thus, is to come. The second extension of the Article 50 deadline may be unavoidable.

The 2019 local elections in the UK had shown a manifest move away from the Tories and the Labour Party, and commentators saw this as an expression of disappointment of people with the way the Brexit process was handled by the Government and in the Parliament so far. Since no solution could be found, the UK had decided to participate in the European elections of 26 May 2019. This was a new challenge since the question may be asked: What was the point of participating in the elections for a Member State that is about to leave the Union. Or is it not?

A second referendum or new elections in the UK may lead to no-Brexit at all. Millions of petitioners asked for revoking the Article 50 notice,<sup>4</sup> and again, hundreds of thousands anti-Brexit campaigners were marching in London demanding a second referendum at the ‘Put it to the People march’ of 23 March 2019. Given the increasing weight of young British voters compared to that of the elderly, whose votes were decisive in the June 2016 referendum, and with a view to the fact that Brexit is decisive for the young generations’ future above all, the last word is not spoken yet.<sup>5</sup>

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com/2019/03/extension-and-elections-we-need-to-talk.html?fbclid=IwAR3sRomrzRbRRAVnh7ProT9M7VPdrRO2TXxTayljNu1h3pbQM8AMku88BfA&m=1 (accessed 19 March 2019).

- 3 For the possibilities of this option from a legal point of view see the judgment of 10 December 2018 of the ECJ in case C-621/18 – *Wightman*, ECLI:EU:C:2018:999.
- 4 See Petition: Revoke Article 50 and remain in the EU, with 4,366,791 signatures by March 23, 2019, 16:32, at: <https://petition.parliament.uk/petitions/241584> (accessed 23 March 2019).
- 5 For the legal aspects of the remaining outcomes a fortnight before the 29 th of March 2019 see the blog of Catherine Barnard & Steve Weatherill, ‘Extension and elections: We need to talk about Article 50’, at: <https://eulawanalysis.blogspot.com/2019/03/extension-and-elections-we-need-to-talk.html?fbclid=IwAR3sRomrzRbRRAVnh7ProT9M7VPdrRO2TXxTayljNu1h3pbQM8AMku88BfA&m=1>.

What we are experiencing these days in the UK and the EU with regard to the Brexit process is closely related to the meaning of democracy. If my task at this Lisbon conference, as the title of the present paper suggests, was to develop some thoughts about the choice between characterising Brexit as an exercise of, or a challenge to democracy, perhaps the only certainty is, wherever the process may finally lead the Union to, that the outcome *must* be democratic. Let me develop my thoughts on the basis of these three:

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 some lessons can be drawn for the future.

Some questions cannot be examined in depth at this place: ‘What actually is democracy?’, or whether ‘democracy’ is a term that can be easily applied in EU contexts at all. Reference may be made insofar 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’.<sup>6</sup>

The present paper rather focuses, first, on the provisions of the EU-Treaty regarding the withdrawal of a Member State: They seem, indeed, to provide for an exercise of democracy (infra I.). Second, the process leading to the UK Government’s notice of withdrawal under Article 50 TEU: With a view, in particular, to the democratic rights of the citizens directly affected by a Brexit and how EU citizens are represented, it rather looks like a challenge to democracy (infra II.). This leads to the question what lessons can be learned from this process: What does it tell us about democracy in the EU (infra III.)?

### *I. The Brexit Process as an Exercise of Democracy*

Paul Craig has described the first phases of the process in a brilliant essay titled: ‘Brexit: a drama in six acts’.<sup>7</sup> After a long public debate, David

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6 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).

7 Paul Craig, ‘Brexit: a drama in six acts’, *European Law Review* (2016), 447.

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 23 January 2013.<sup>8</sup> 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. But even more than 3 years after the referendum of June 2016 the UK is still a Member State of the EU, it participated in the European elections of May 2019, and its future role in – or relation to – the EU remains undefined.

The conclusion 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* A.); putting the question of Brexit to an advisory referendum is an exercise of democracy (*infra* B.); the conditions and the procedure that Article 50 TEU provides for a withdrawal from the EU are democratic (*infra* C.), and the result of the Brexit process so far has been a surprising increase in democratic awareness among people throughout the EU (*infra* D.).

#### *A. The Cameron Strategy was democratic*

David Cameron understood that strong feelings existed in Britain against the EU and that people had problems with (a) the increasing flow of immigrants into the country, with (b) the financial burden of EU membership and with (c) the constraints that EU legislation and policies seemed to place on sovereign UK policies, primarily in the social sector and health care. The EU seemed to have competences that were too far-reaching. Contrary to his expectations, however, the 'balance of competences review' David Cameron had initiated in 2012 revealed that there was no unjustified EU competence.<sup>9</sup> With a view to finding an appropriate arrangement with the EU, Cameron puts emphasis rather on a stronger subsidiarity control over the exercise of EU competences, an enhanced role of the national

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

9 See GOV.UK, 'Guidance. Review of the balance of competences', at: <https://www.gov.uk/guidance/review-of-the-balance-of-competences> (accessed 19 March 2019). An official conclusion upon all the documents and work published has not been published yet.

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 resulting arrangement 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 nor convincing in substance, nor clear regarding the legal implications.<sup>10</sup> It was not the ‘far-reaching fundamental change’, nor the ‘updated European Union’ he had called for in the Bloomberg speech, nor the return to the ‘common market’.<sup>11</sup> 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’ on this basis 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 the Parliament in 2016.

### *B. Advisory Referendum and Democracy*

Is an advisory 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 a referendum that is not legally binding. In the present case the referendum was advisory, so the Parliament allowed the government to ask for the opinion of the people without implying that the outcome would determine the policies of the government or the Parliament. While the principle of parliamentary sovereignty may well exclude an act of Parliament – or a popular vote, authorised by the Parliament – from being binding for the Parliament in future and so restricting the Parliaments’ own freedom to decide at any time whatever it considers necessary, no such restriction follows from an advisory referendum.

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10 See the critique by Sylvie Goulard, *‘Goodbye Europe’* (Flammarion, Roubaix 2016).

11 David Cameron, Bloomberg speech (n 8), summarising his view of what the British peoples’ ‘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?”’.

Meanwhile, the Divisional Court of England and Wales and, on appeal, the UK Supreme Court were asked to decide upon the question ‘whether a formal notice of withdrawal can lawfully be given by ministers without prior legislation passed in both Houses of Parliament and assented to by HM The Queen’.<sup>12</sup> With Judgment of 20 January 2017 the UK Supreme Court has confirmed the view taken by the High Court<sup>13</sup> that an express authorisation by the Parliament is required for the government to file the notice under Article 50 TEU. The Supreme Court stressed, in particular, that ‘Parliamentary sovereignty is a fundamental principle of the UK constitution’. Quoting from Dicey’s *Introduction to the Study of the Law of the Constitution* the Court emphasises that the ‘Parliament, or more precisely the Crown in Parliament, lays down the law through statutes – or primary legislation as it is also known – and not in any other way’. And as the withdrawal from the EU would necessarily change the law applicable within the UK and the rights of her citizens, Brexit would not be possible without an act of Parliament.<sup>14</sup> In rejecting the government’s argument that filing the notice under Article 50 TEU would not be an exercise of the Royal prerogative the Supreme Court so protected the constitutional rights of the Parliament and democracy in Britain.

It was for the Parliament, thus, to give or not to give the green light for the notice. And voting upon the authorisation of the government to give notice of withdrawal to the President of the Council as specified by Article 50 TEU, each individual Member of Parliament was called 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 it, this was no doubt an expression of democracy.

### *C. The Terms of Article 50 TEU as an Expression of Democracy*

Democracy means free self-determination of people, citizens of a political community. According to the concepts of post-national democracy and

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12 See (2017) UKSC 5 Judgment of 24 January 2017 – *Miller*, para. 2, at: <https://www.google.com/search?q=uk+supreme+court+brexit+judgment&coq=uk+supreme+court+brexit&aqs=chrome.2.69i57j0l3.20422j1j7&sourceid=chrome&ie=UTF-8#> (accessed 21 March 2019).

13 Divisional Court of England and Wales, Judgment given on 3 November 2016 – *R (Miller) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768.

14 UKSC (n 12), paras 43, 100, 101.

multilevel constitutionalism, democracy is not limited to States only.<sup>15</sup> 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 negotiated, on their behalf, by their governments. With the constitution of the EU people, citizens of the Member States, 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 right of withdrawal reflecting the ‘principle of voluntariness’ laid down in Article 50 TEU,<sup>16</sup> 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, the membership to which similarly remains the sovereign choice of each of the participating peoples.

There is an important difference to the constitution of a State, even of a federal State: Article 50 confirms the voluntary character of the membership to 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 peoples 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 the 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 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 the rights of free

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15 Ingolf Pernice, ‘Multilevel Constitutionalism and the Crisis of Democracy in Europe’, 11 *EuConst* (2015), pp 541–62, available also as: WHI-Paper 02/2015.

16 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. See also: Kalypso Nicolaidis, *Exodus Reconciling Sacrifice. Three Meanings of Brexit* (Unbound, London 2019), p 188: Brexit as a demonstration of “how the freedom to leave defines the very essence of the EU”.



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.<sup>17</sup>

#### *D. 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, France and others, including 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 and movements arose spontaneously in reaction to these threats to integration and peace in Europe.

One of them, Pulse of Europe, 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.<sup>18</sup> 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. After some silence in 2018 this movement has taken up speed in the run-up to the European elections in May 2019 and must continue to counter those who see their future in political structures devised in the 19<sup>th</sup> century with consequences nobody would 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 victory of *Macron* 2017 with his clear commitment to the European Union in France seemed to signal an awakening of people all over Europe, people who have realised that the current period of crisis and

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17 See *infra* II.1.

18 See: <https://pulseofeurope.eu> (accessed 21 May 2019) – After the French elections of 2017 the activities of Pulse of Europe slowed down for a while, but new momentum was found in 2019 with a view to the European elections.

depression must have an end and that our common future is a future within and not without the European Union. Polls showed that approval of the EU were rapidly increasing since June 2016, with increases of 18% in Germany, 15% in the Netherlands and 12% in Spain.<sup>19</sup> In this sense, the outcome of the elections in Austria, the Netherlands and France, and perhaps even that of the 2017 elections in the UK indicate that neither the disintegration of Europe nor a hard Brexit or, perhaps, any Brexit at all, is what people in Europe ultimately want to see. If this is true, the Brexit process has so far proved to not only be an exercise of democracy, but even stimulated democracy far beyond the UK.

## *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. Four issues that seem to require special reflection will be discussed below in order to stimulate further thought: the role of the citizens (infra A.); the role of lying and voters' manipulation (infra B.); the effects of a consultative referendum (infra C.); and the specific role of the judiciary (infra D.).

### *A. Union Citizens who have made use of their fundamental Freedoms*

If democracy is a mode of citizen's self-determination and means that citizens of a polity shall participate in the process of decision making on matters that directly or indirectly affect them, then the question already mentioned of participation of Union citizens who have established their residence in a Member State that decides to leave the Union, or the role of the

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19 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-brexite-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', at: <http://www.europarl.europa.eu/news/de/press-room/20170427AVI72828/zustimmung-zur-europaischen-union-steigt-wieder-laut-eurobarometer> (accessed 22 August 2017).

citizens of this State who have made use of the freedoms offered by the Treaties with regard to such decisions, is a question of democracy.

### *1. Decisions with no Voice for those affected*

In the case of the UK, the problem was clear: When the British people voted for Brexit, and when the British Parliament decided that the UK would leave, Union citizens from other Member States had no voice, nor representation; they were just ignored in what is for them a very existential matter. Similarly, and perhaps even more strikingly, even British citizens who have chosen to make use of their freedom to move to another Member State and who have been established there for a certain number of years already, as well as UK nationals who have been working in the European institutions and therefore live in Belgium or another Member State for more than fifteen years, are excluded from participating both in the referendum and in the UK elections.<sup>20</sup>

In an early reaction to the referendum, Francesca Strumia not only stresses the damage of these consequences for the very concept of EU citizenship, but also very clearly describes the effects if this popular vote from the ‘democratic perspective’:

‘The problem is that, for the significant minority that opposed Brexit with their vote, it is the voice of others that forces exit. This is, of course, the regular course of democracy: winner takes all. In this case, however, the winner takes away from all, winners and losers, part of the political self that supranational citizenship entails: voice in the European Parliament, and for migrant British citizens, voice in local elections in other Member States. Any supranational loyalties that some British citizens may have developed together with such political self are going to be automatically disabled.’<sup>21</sup>

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20 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.

21 Francesca Strumia, ‘Brexiting European Citizenship through Voice of Others, in: 17 *German Law Journal* (2016), Brexit Special Supplement, p 109, 111, at: [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9E93BD73EF9A007BFD13C1BEC1E77119/S2071832200021805a.pdf/brexiting\\_european\\_citizenship\\_through\\_the\\_voice\\_of\\_others.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9E93BD73EF9A007BFD13C1BEC1E77119/S2071832200021805a.pdf/brexiting_european_citizenship_through_the_voice_of_others.pdf) (accessed 22 May 2019).

These consequences seem to be at odds with the principle of democracy if it means self-determination. The problem is all the more serious as these citizens risk losing their rights automatically 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 giving effect to this protection.

## 2. *The Principle of loyal Cooperation as a negotiation Guideline*

Yet, for both, EU citizens in the UK, and UK citizens in other Member States, the loss of all their rights of European citizenship can be understood as a simple consequence of the constitutional principle of voluntariness. Thus, a democratic justification can be found in the fundamental decision to accept the Union Treaties including Article 50 TEU. But this provision cannot be read in isolation, it must be applied in accordance with other general principles of the EU and, in particular, with the principle of loyal cooperation (Article 4 (3) TEU). Triggering the Article 50 TEU-process would, thus, not be a simple reset – in a situation as it was prior to the accession to the EU, but rather an engagement of finding a just and sustainable solution through a (re-)negotiation of the respective rights of the citizens. Voluntariness, or the freedom to be or not to be a Member State, is coupled with a constitutional duty of cooperation and respect. In cases where people of a Member State do not feel comfortable any more with their membership in the EU, thus, the Treaty provides for a meaningful procedure, including the two-year period as a deadline for the negotiation of a suitable arrangement.

This constitutional duty of cooperation is, in some way, a compensation and guaranty for the citizens having made use of their rights under the Treaties. During the period of negotiation, which may even be extended if necessary, the principle of loyal cooperation under Article 4 (3) TEU fully applies and compels all sides to make every possible effort to find appropriate arrangements regarding all interests involved including, as a priority, to fully protect the *droits acquis* of the citizens. It is a constitutional duty of both sides at the negotiation table, the EU and the UK during the period of Article 50 TEU. The agreement to be reached has to respect the fundamental rights and freedoms of the citizens who have trusted in these guaranties; the full respect and protection of these rights must also play a key role when the Council, the European Parliament and the UK are taking their respective decisions in the ratification process.

Democratic self-determination, thus, goes hand in hand with the respect of the other and, in the case of withdrawal of a Member State from the EU, of the other's rights and interests. The EU institutions have a specific responsibility for making sure that these rights are protected.

### *3. Exclusion of Nationals in other Member States from the Vote*

The case of UK citizens who have established themselves in other Member States raises specific questions. These people 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 most from a decision taken by people (at home) who 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, are deprived of their democratic rights in Britain and had no voice in matters directly concerning them.<sup>22</sup>

Democracy goes along 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 longer period and are far away from the daily political developments at home, a sufficient explanation may be that these citizens would be no longer affected by the internal politics of their country.

This reasoning, however, does not satisfy the case in point. The Brexit referendum deeply affects the rights of these citizens abroad, much more than it affects 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 including these citizens in decision-making processes. If Union citizenship is the fundamental status of the citizens of the Member States of the Union, as the ECJ confirms in its established case law,<sup>23</sup> to exclude

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22 Ibid.

23 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*

those who have made use of their rights under the Treaties from participating in the making of national decisions withdrawing these rights in accordance with Article 50 TEU would compromise this very constitutional status.<sup>24</sup>

#### 4. *The European Parliament and the Union Citizens' Rights*

The protection of the rights of Union citizens on both sides, in the event of a withdrawal of a Member State from the Union, thus, is one of the major tasks particularly of the Commission to implement when negotiating an arrangement with the UK under Article 50 TEU; not only the – transitional – Withdrawal Agreement, but also an agreement on the future relationship between the UK and the EU must provide for the safeguard of these rights. 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, also 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 remedies would have to be found by the EU and the UK outside the Article 50 process.

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*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), pp 425, 429–32.

- 24 For the short description of the general rule see Koen Lenaerts/Piet Van Nuffel, *European Union Law* (3<sup>rd</sup> 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’.

### *5. Protection of acquired Rights by the Countries of Residence?*

Is it for each of the other Member States individually, in the event that the negotiations do not result in a satisfactory solution and, in particular, in case of a ‘hard Brexit’, to protect the ‘rights’ of these (ex-)EU citizens ‘as if’ the UK was still a member of the EU – and for the UK to protect the rights of the EU citizens in the UK? 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, and of the UK to act accordingly. 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. Yet, there is no secure guarantee for what had been achieved under the rule of ‘national treatment’. For there is no such legal duty under EU law, and the ECJ would have no competence to judge upon 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.

### *B. Lies and Democracy*

There was a lot of lying during the Brexit campaign. Apparently, lies were told at 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’.<sup>25</sup>

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

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25 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/>.

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?<sup>26</sup> If lies alone are not a challenge to democracy, any attempt to use information technology and services to individualise people's personal data and, on this basis, manipulate voters with wrong information in elections or a referendum certainly can be. This seems to have been the case both in the Trump and in the Brexit campaigns 2016.<sup>27</sup> And Steve Bannon, one of the key election campaign aids of Donald Trump, supported by secretive hedge fund billionaire Robert Mercer, is reported actually to continue his activities in Europe aiming to build up a right-wing eurosceptic front for the EU elections.<sup>28</sup>

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- 26 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).
- 27 See Carole Cadwalladr, 'The great British Brexit robbery: how our democracy was hijacked', *The Guardian* 7 May 2017, at: <https://www.theguardian.com/technology/2017/may/07/the-great-british-brexit-robbery-hijacked-democracy> (accessed 24 March 2019).
- 28 See Markus Becker, 'Rechte Front in Europa. Wer hat Angst vor Steve Bannon', *Spiegel online*, 25.7.2018, at: <http://www.spiegel.de/politik/ausland/stephen-bannon-will-die-rechtspopulisten-in-der-eu-einen-a-1220011.html>; Jamie Doward, 'Steve Bannon plans foundation to fuel far right in Europe', in: *The Guardian* 21. Juli 2018, at: <https://www.theguardian.com/us-news/2018/jul/21/steve-bannon-plans-foundation-to-fuel-far-right-in-europe>; more on this: Jan Sternberg, 'Steve Bannons Netzwerk gegen Europa', in: *Hannoversche Allgemeine* v. 13. Nov. 2018, at: <http://www.haz.de/Nachrichten/Politik/Deutschland-Welt/Steve-Bannons-Netzwerk-gegen-Europa> (all accessed 28 December 2018). For the situation one week before the European elections see: Holly Ellyatt, 'Steve Bannon is in Europe ahead of elections. And he's upsetting the locals', *CNBC* of 21 May 2019, at: <https://www.cnn.com/2019/05/21/steve-bannon-is-in-france-ahead-of-european-parliament-elections.html> (accessed 21 May 2019). But: Henry Samuel, 'Marine Le Pen denies Steve Bannon has role in her EU election campaign as he sets up camp in Paris', in: *The Telegraph*, 20 May 2019, at: <https://www.telegraph.co.uk/news/2>



With regard to lies, disinformation and manipulation and their effects on democratic decision making a distinction should be drawn between the functioning of representative democracy with parliamentary elections (infra 1.) and direct democracy with referendum on specific political questions with irreversible effects, such as in the case of Brexit (infra 2.).

### *1. Parliamentary Democracy and Systemic Lying: Trust and Distrust*

Representative democracy, where people vote for a party or for someone to be a member of Parliament, is based upon trust. The elected representatives are given a mandate to determine the future policies of the country. Yet, their promises in election campaigns will be measured against their action taken in reality. Such accountability and the risk of not being re-elected if people understand that they were misled in the election campaign serve as a remedy against lies. Trust is lost when lies are discovered, and another candidate or party may be elected. In this regard, democracy can also be described as the institution of distrust. It inherently provides a remedy or sanction in the case of failure of a party or policy-maker to honour a pledge. Lies, therefore, 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 of the electorate as in the case of psychographic targeting on a mass scale, with the effect that trust is lost not only in individual candidates or parties but in the entire system. This might be the reason why following the 2016 presidential elections in the United States of America, the threats of foreign hacking (*Hillary Clinton's* e-mails) disinformation campaigns, as well as psychographic targeting became, and continues to be, one of the major political topics in the country, in the EU and beyond.<sup>29</sup> And rightly so: Systemic lying entails an erosion of the democratic system and is a major challenge to democracy.

The threat to democracy is becoming even more serious when the manipulation is coupled with illegal and in-transparent funding from (foreign) governments or organisations as it was reported being the case in the

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019/05/20/marine-le-pen-insists-steve-bannon-has-no-part-eu-election-campaign/ (accessed 21 May 2019).

29 See Ingolf Pernice, 'Protecting the global digital information ecosystem: a practical initiative', *Internet Policy Review* 5 March 2019, at: <https://policyreview.info/articles/news/protecting-global-digital-information-ecosystem-practical-initiative/1386> (accessed 25 March 2019).

Brexit campaign.<sup>30</sup> Targeted subversive advertising with fake news through social media of this kind is about to undermine the openness and fairness of the public discourse as a fundamental condition of the democratic process, and such experience call not only for a special responsibility of the online platforms operating such social media, but also for regulation and law enforcement. The President of Germany, Frank Walter Steinmeier, rightly warned at re:publica 2019: ‘those who create an online forum for political discourse also carry responsibility for democracy – whether they like it or not!’;<sup>31</sup> while France has already taken legislative action to turn this responsibility into concrete duties.<sup>32</sup>

## 2. *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 and informed 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

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30 Carole Cadwalladr, Facebooks role in Brexit – and the threat to democracy, TED talk of 16 April 2019, at:

[https://www.ted.com/talks/carole\\_cadwalladr\\_facebook\\_s\\_role\\_in\\_brexit\\_and\\_the\\_threat\\_to\\_democracy](https://www.ted.com/talks/carole_cadwalladr_facebook_s_role_in_brexit_and_the_threat_to_democracy) (accessed 8 May 2019).

31 Frank Walter Steinmeier, Introductory Speech at Re:publica, 6 May 2019, p 5, also calling for transparency: ‘as long as casual lies and reputable news reports, as long as checked facts and mere opinion, as long as reason and hate speech appear one after another in people’s newsfeeds, with nothing to distinguish between them, demagogues will have it far too easy. We need the sources of our information to be crystal clear, particularly when political ads are concerned. Those who target tailored political messages at specific audiences must be forced by the site operators – and where necessary by law – to show their face, to reveal who exactly sent the ad, who financed it, and what other ads this person or organisation is sending. In other words, they must make transparent whose game are they playing – and how we can opt out of the game’, at: [https://www.bundespraesident.de/SharedDocs/Downloads/DE/Reden/2019/05/190506-Republica-Englisch.pdf?;jsessionid=729867EFFF010CC0C0CFF783B1A0E7A8.1\\_cid378?\\_\\_blob=publicationFile](https://www.bundespraesident.de/SharedDocs/Downloads/DE/Reden/2019/05/190506-Republica-Englisch.pdf?;jsessionid=729867EFFF010CC0C0CFF783B1A0E7A8.1_cid378?__blob=publicationFile) (accessed 8 May 2019).

32 See the French law on the combat of manipulation of information: LOI n 2018–1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l’information, JORF n 0297 du 23 décembre 2018, at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037847559&categorieLien=id> (accessed 8 May 2019).

for accountability. Nobody voting ‘yes’ or ‘no’ can be checked and nobody – except campaigners – 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’. Yet, correct information regarding the background and the 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 any other political check. People who find themselves misled upfront of the vote would not accept the result as legitimate and binding, however, 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 as such, and is particularly serious in cases of irreversibility. The decision to trigger the process of Article 50 TEU is a case in point.

An *advisory* referendum, in contrast, leaves full responsibility for the final decision to the Parliament. It remains for each MP individually to make her independent and responsible judgement upon what the outcome of the referendum would mean to her, and what decision to take. This choice has to be made by each party and each individual MP, well conscious of the implications for the policies they may adopt subsequently; the MP’s remain fully accountable to the scrutiny of the voters of their constituency at the next election. Thus, as long as a referendum is not binding – and MP’s are taking their responsibilities seriously – the democratic system as such is not more challenged by lying and manipulation than in the case of any other parliamentary vote in a representative democracy.

### C. ‘Advisory’ Referendum?

Was the British referendum on Brexit binding or advisory only? The European Union Referendum Act 2015 does not specify that it should bind either the Government or the Parliament.<sup>33</sup> Given the sovereignty of Parliament, a referendum in Britain is not binding, as a rule, except if expressly

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33 Section 1 of the European Union Referendum Act 2015 reads: ‘A referendum is to be held on whether the United Kingdom should remain a member of the European Union’, available at: <http://www.legislation.gov.uk/ukpga/2015/36/contents/enacted/data.htm> (accessed 15 March 2019).

specified in the parliamentary Act.<sup>34</sup> The UK Supreme Court has confirmed this view.<sup>35</sup> Nonetheless, the distinction becomes doubtful in this specific case. Neither the new British Government, nor the great majority of the Members of the UK Parliament seem to have taken the Brexit referendum as a simple expression of the opinion of the voters just to guide their independent consideration of all relevant factors for their own position. Rather, it was suggested that there was a democratic imperative to follow the outcome of the referendum without further ado.

Be it as it may, there was a 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, being elected representatives of their respective constituency, to follow their own conscience in taking a responsible decision? Though – prior to the referendum – 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.<sup>36</sup> The only explanation is that the referendum, which was not meant to be legally binding, was nevertheless understood, politically, to have a binding effect. For Vernon Bogdanor it was

‘... the first time in British history Parliament is enacting a policy in which it does not believe. The majority of MPs and peers are Remainers. So also are the majority of members of the Cabinet. They believe that they have been instructed by the British people. The sovereignty

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34 See explanations by Haroon Siddique, 'Is the EU referendum legally binding? Parliament is sovereign and, if Brexit wins, Cameron will not be legally obliged to invoke the Lisbon treaty to start an EU exit', in: *The Guardian* 23 June 2016, at: <https://www.theguardian.com/politics/2016/jun/23/eu-referendum-legally-binding-brexite-lisbon-cameron-sovereign-parliament> (accessed 25 March 2019).

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

36 The decision was taken by a majority of 498 against 114 votes. Nonetheless, 20% of the Labour Party MPs, including 13 serving front benchers, 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, at: <https://www.theguardian.com/politics/blog/live/2017/feb/01/article-50-debate-vote-bill-pmq-theresa-may-jeremy-corbyn-ivan-rogers-to-give-evidence-to-mps-about-why-he-quit-as-uks-ambassador-to-eu-politics-live> (accessed 25 March 2019).

of the people, therefore, has overcome the sovereignty of Parliament – a very significant constitutional event!<sup>37</sup>

In such circumstances lies and manipulative practices are a challenge to democracy even if the referendum is formally consultative. 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’?

Least to say, the history of the referendum and the irritations it caused for many of the MPs may be an explanation for the almost chaotic dealing of the Parliament with the Withdrawal Agreement and its incapability to take any positive decision on the conclusion of the Brexit process at all. With the second extension of the Article 50 deadline until 31 October 2019, there is time for finding a solution. In a desperate attempt to find agreement in the House of Commons on the Withdrawal Agreement – fourth time after three failures – Theresa May has announced the 21<sup>st</sup> of May 2019 to include in the bill on the Withdrawal Agreement a referendum to be held on yes or no to ratify it after the Parliament has voted for it.<sup>38</sup> Not much, however, seems to justify the expectation that this initiative will allow the Parliament to accept the proposed ‘new deal’.<sup>39</sup> It is difficult to see that the Parliament will come to any common position at all and, thus, deliver on its democratic responsibilities.<sup>40</sup> These difficulties may have led to the major shifts away from the two leading parties in the local

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37 Vernon Bogdanor quoted in a comment of Antony G Gordon (12th December 2018) at Research Gate: ‘Is the EU referendum vote legally binding?’, at: [https://www.researchgate.net/post/Is\\_the\\_EU\\_referendum\\_vote\\_legally\\_binding](https://www.researchgate.net/post/Is_the_EU_referendum_vote_legally_binding) (accessed 25 March 2019).

38 ‘Theresa May makes statement on “new Brexit deal”’, speech of 21 May 2019 at: <https://www.youtube.com/watch?v=z6II96yzu2I> (accessed 21 May 2019), with a 10 points offer to the MPs regarding changes to the Political Declaration, to reflect her ‘new deal’. The speech, however, is broadly understood as containing little new ideas, except for the second referendum, and would not bring about a positive decision of the House of Commons, see Chris Morris, ‘Brexit: Is there anything new in Theresa May’s “new deal”?’, at: <https://www.bbc.com/news/uk-48359350> (accessed 21 May 2019).

39 See Chris Morris (n 38).

40 More optimistic still the analysis of Christos Katsioulis, ‘The House of the Rising Sun’, IPG 28.3.2019, at: <https://www.ipg-journal.de/regionen/europa/artikel/detail/the-house-of-the-rising-sun-3358/> (accessed 21 May 2019).

elections of 2 May 2019,<sup>41</sup> and they could well end in a serious crisis of the British democracy.

The referendum, as it is envisaged here, might even not offer people to rethink Brexit as such, but only give the choice between Brexit with the Agreement or without it. Would such a referendum really allow the Parliament to take up its constitutional responsibilities – or, contrarily, be an expression of a definitive abandon of democratic control?

#### *D. Courts and Democracy*

Following the referendum, 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 at all. Without going into details of the intense debate on the respective prerogatives of the executive and the Parliament in this case, it was the judiciary who insofar had saved the specific form of democracy existing in Britain: A representative democracy based upon the sovereignty of parliament as a fundamental principle. As a result of an impressive constitutional analysis, 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.<sup>42</sup> If the intention was to challenge the existing British democratic system, 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 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. 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.

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41 See BBC News on 'England localelections 2019', at: <https://www.bbc.com/news/topics/ceeqy0e9894t/england-local-elections-2019> (accessed 21 May 2019): 'the two main parties have suffered significant losses... The Lib Dems were the biggest winners on the night...'

42 UKSC (n 35), in particular paras. 43–83.

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 20<sup>th</sup> 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)’.<sup>43</sup>

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’.<sup>44</sup>

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

### *III. Lessons learned: Democracy in the EU*

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 of national policies and the important role of the citizens.

#### *A. 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 the 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

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43 Ibid., para. 41.

44 Ibid., para 42.

charts'.<sup>45</sup> 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 and beyond.

British people were waking up and walking away from Brexit. Already the negotiation guidelines adopted by the European Council on 29 April 2017<sup>46</sup> showed that the EU had certain top priorities difficult to 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 was 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, would fall far short of allowing Britain substantial financial relief.<sup>47</sup> Apart from all the other difficulties and burdens that will gradually emerge, could the result of the June 2017 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 had to pay. What other claims might be made?

What seems to be more important is how people will react given the insight that expectations about positive effects of Brexit on their lives were based upon misleading or false information.

### *B. Dynamics of Democracy: What if Brexit loses Support?*

The outcome of the June elections was unexpected and a clear 'no' to the declared strategy of the Prime Minister. Yet immediately after the elections Theresa May confirmed that she would ensure stability in the country. This is perhaps what the country needs most in a situation that looks any-

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45 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](https://www.youtube.com/watch?v=danwAOT_WDU) (accessed 16 June 2017).

46 Available at: <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-ecu-brexit-guidelines/> (accessed 16 June 2017).

47 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 – Großbritanniens Welt der alternativen Fakten', in: 70 ifoSchnelldienst 11/2017 of 8 June 2017, p 12–5.



thing but stable. It includes a lack of clarity about the objectives Britain would want to achieve in the Brexit negotiations that had started on Friday 19 June 2017. Given the failure of the Prime Minister's attempt to get stronger backing in the elections for her 'hard Brexit', a clear parliamentary vote against it and the repeated rejection in March 2019 of the Withdrawal Agreement signed in November 2018 by the Parliament, it remains an open question what Britain will finally strive to achieve and what deal, if any, 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 2017, it was thanks to a conservative group of MPs from Northern Ireland that after the promise of new financial support for their region, allowed the government not to lose its majority.<sup>48</sup>

The next test was the vote in the UK Parliament on the 'European Union (Withdrawal) Bill' providing for the repeal the European Communities Act 1972 'on exit day' (section 1), while retaining substantive EU law 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.<sup>49</sup> It was aiming at 'constitutional change and legal continuity'.<sup>50</sup> But without the European 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 is no 'legal continuity' after Brexit. And 'implementing the withdrawal agreement' (section 9) presupposes that, in fact, there is such an agreement – which is still not the case three years after the referendum.

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48 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).

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

50 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).

There are reasons to believe that if, after the extension of the Article 50 deadline and, probably further 2 or more years of negotiations, there is any agreement at all, or the agreement will be rather close to what the law is today. People asked to ratify such an agreement on the future relations of the UK with the EU may then rightly ask the question of whether or not it is worth approving Brexit; they might refuse the ratification of the agreement because Britain's situation would be much worse than it is today. While the estimated aggregated cost of 'hard Brexit' for Britain are up to € 57 bn yearly, with welfare going down by 2.39%, the costs of 'soft Brexit' would be lower, but still around € 32 bn, with a welfare decrease of 1.34%.<sup>51</sup> More importantly, given the fact that the EU has been created for achieving goals that States alone would be unable to achieve on their own, British people may understand that Brexit would mean a real loss of sovereignty instead of the promised gain.<sup>52</sup>

In such conditions – and given the clear interest of the ever-growing body of young voters striving to remain – there is a good chance, finally, of there being a majority for remaining in the EU. As a result, even after a ratification of the Withdrawal Agreement and years of further negotiations on the future relationship between the EU and the UK, Brexit may not be the choice of the then majority of the British people.

Yet, as no valid agreement was reached until 29 March 2019, and if even after the end of the extended deadline – the 31 October 2019 – the Withdrawal Agreement is not ratified, a hard Brexit 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

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51 See: Bertelsmann Stiftung (ed), 'Estimating the impact of Brexit on European countries and regions. Policy Paper, 2019, introduction and the comparative tables showing losses per country, at: [https://www.bertelsmann-stiftung.de/fileadmin/files/user\\_upload/EZ\\_Estimating\\_the\\_Impact\\_of\\_Brexit\\_2019\\_ENG.pdf](https://www.bertelsmann-stiftung.de/fileadmin/files/user_upload/EZ_Estimating_the_Impact_of_Brexit_2019_ENG.pdf); outside the UK the losses are estimated considerably lower, with the highest rates for Ireland and some limited gains for the U.S., China, and India (p 11 and 18).

52 For more details: Ingolf Pernice, 'European Constitutionalism and the Constitutions of the Member States. Implications for Brexit', in: 2017 Boletim da Faculdade de Direito XCIII Tomo I, p 211, 239–241. On the terms of 'European Sovereignty' coined by the French President Emmanuel Macron, in this sense see also Tom Eijsbouts, 'European Sovereignty', editorial *European Constitutional Law Review* 2018, p 4–6, furthermore id, 'Germany's Grand and Growing European Sovereignty' in Hardt, Sacha, Heringa, Aalt Willem, and Waltermann, Antonia: *Bevrijdende & Begrenzende soevereiniteit* (Den Haag, Boom juridisch, 2018), pp 10, 28–31, and id., 'Sovereignty the European Way', in this volume.

withdrawn.<sup>53</sup> Doubts on this view<sup>54</sup> have been rejected by the ECJ in 2018,<sup>55</sup> and so the door still remains open for a quick end of the Brexit process until the definitive closure of the Article 50 deadline.

More than a million people participated at the ‘put it to the people march’ of 23 March 2019 in London, with the aim to stop Brexit through a second referendum. It was perhaps one of the greatest demonstrations in British history.<sup>56</sup> And more than 5, 6 Million people have signed the petition ‘Revoke Article 50 and remain in the EU’ to the UK Parliament by 25 March 2019.<sup>57</sup> The Parliament said that it would consider the petition, and people would no doubt appreciate if upcoming votes on the steps to be taken until October 31 did not ignore what could develop to an even broader public support for reconsidering the former policies.

One test was the European elections on 23–26 May 2019. With the polls giving the new Brexit Party of Nigel Farage around 34% of the votes and with its clear choice for a hard Brexit, the political divide of the country may be growing stronger, and so is the challenge to the UK Parliament in the days to come in its task to keep the country together. Its way to deal with the Brexit process so far may feed concerns about the functioning of the democratic system in Britain; preference given by MPs to their position in an internal political power game around the Brexit instead of a concern for the future of their country, as can be observed, seems to result in a real challenge to democracy.

### *C. Growing Awareness of the Externalities of national Politics*

The developments in the UK received an unknown public attention in the other Member States. Media keep busy in reporting and discussing day by day the news from the UK, and rightly so since what is decided that will deeply affect people in and of all the other Member States. Organisations like Pulse of Europe are demonstrating their sympathy for and support of

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53 Craig, *Brexit* (n 7) pp 464–65.

54 Pernice, ‘European Constitutionalism’ (n 52), p 235–6.

55 ECJ case C-621/18 – *Wightman* (n. 3).

56 See: Tim Adams, ‘Put it to the People march: a formidable sea of humanity and powerful strength of feeling. They came to London from across Britain and Europe, filled with enthusiasm for the new three Rs: revoke, remain, reform’, *The Guardian* 23 March 2019, at: <https://www.theguardian.com/politics/2019/mar/23/put-it-to-the-people-march-against-brexit-london-revoke-remain-reform>.

57 See the Website at: <https://petition.parliament.uk/petitions/241584>.

the UK movements fighting against populist-nationalists who strive at the destruction of the European venture. They do so as well, actually, in other Member States with a view to the European elections of May 2019. This grassroots movement is an excellent example of exercise of democracy related to, or even triggered by the Brexit process.

What we learn from the Brexit-process, more generally, is that within the EU political developments in one country are of highest relevance to people in other Member States as well. Brexit isn't but one striking example. The great success of *Macron* in the French elections 2017 was 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, and even the vote of individuals in national elections, have an impact on people and politics in other Member States, such possible implications on others must seriously be taken into account in each Member State. This connectivity of what I call the European 'Verfassungsverbund'<sup>58</sup> entails externalities and horizontal effects and explains why the media and citizens in one Member State have a legitimate cross-border interest in political processes in other Member States. Accordingly, the shock of the Brexit referendum was felt to be a disaster in all other Member States. Similarly, recent 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. They have a stake, even if they have no voice.

Yet, things have begun to change in the wake of these shocks. People from all Member States are taking part in a European-wide public discourse on the shaping of our common future, and this includes national election campaigns and referenda. Thanks to the internet, rapid information can easily be gathered from all Member States, and arguments can be exchanged within social networks, through blogs and at discussion platforms, thus allowing discourses beyond borders and languages.<sup>59</sup> While

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58 For the concept: Ingolf Pernice, Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung, in: Roland Bieber / Pierre Widmer (Hrsg.), *L'espace constitutionnel européen. Der Europäische Verfassungsraum. The European Constitutional Area* (Zürich, Schulthess 1995), p 225–264, more recently id, 'European Constitutionalism' (n 52).

59 See also Ingolf Pernice, 'E-Government and E-Democracy: Overcoming Legitimacy Deficits in a Digital Europe?', in: Lina Papadopoulou/Ingolf Pernice/Joseph H.H. Weiler (eds), *Legitimacy Issues of the European Union in the Face of Crisis. Dimitrios Tsatsos in memoriam* (Nomos, Baden-Baden 2017) p 287, 305–7.

participation in national elections or referendums remain reserved for nationals of each country, views and experience from foreign stakeholders can have a considerable impact and increasingly do so.

#### *D. 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 also triggers a new step in developing 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 the effective participation of our countries and, thus, of the EU citizens, 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 from one year after the referendum up to now, reasons are given to assume that it has a potential to give a beneficial impulse to the European project. Together with the surprising outcome of the American election in 2016 it has raised awareness throughout Europe of the fundamental values the EU represents and has mobilised new citizens' movements determined to make the European Union more democratic and effective. 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 their hopes and expectations.

Whatever the outcome of the Brexit process might be, the withdrawal of the UK on the basis of a fair agreement on the future relationship with the EU, hopefully a „do-not-harm Brexit“, as Kalypso Nicolaidis thoughtfully calls for,<sup>60</sup> or the revocation of the Article 50 notice as a consequence of a second referendum, the experiences and lessons learned from the process – in spite of the costs it has caused – are important for the upcoming discussions on the reform of the EU. With the completion of the internal mar-

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60 Nicolaidis, Exodus (n 16), p 2, 188.

ket, including tax harmonisation, with a stronger role of the national Parliaments in the control of subsidiarity regarding the exercise of EU competencies and better parliamentary oversight of the European policies and, in particular, with new provisions for the enhanced involvement and participation of both, the European and national Parliaments, in the shaping and control of the common economic and fiscal policies of a reformed EMU, the EU could become closer to what *David Cameron* may have had in mind when in his Bloomberg speech of 23 January 2013 he called for an “updated European Union”.<sup>61</sup> And a future can be envisaged „where a transformed UK rejoins a transformed EU“,<sup>62</sup> ultimately, as an expression of democracy both sides.

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61 David Cameron, EU speech at Bloomberg, 23 January 2013, at: <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg> (accessed 25 March 2019).

62 Nicolaidis, *Exodus* (n 16), p. 189.