Can Brexit Be Turned Into a Democratic Shock?
Five Points

Agustín José Menéndez

Can Brexit Be Turned Into a Democratic Shock? Five Points

Agustín José Menéndez

ARENA Centre for European Studies at the University of Oslo promotes theoretically oriented, empirically informed studies analysing the dynamics of the evolving European political order. The research is multidisciplinary and organized along four key dimensions: A European democratic order; the EU's executive order; expertise and knowledge in the EU; and European foreign and security policy.

Centre for European Studies
University of Oslo

twitter.com/arena_uio

facebook.com/arena.uio

Abstract

This paper argues that to make sense of Brexit, we have to start by clarifying what was the actual content and relevance of the 'Brexit deal' agreed between the United Kingdom and the European Union in February 2016, and how that deal allowed the British Prime Minister to shape the terms of the debate in order to further short-term and narrowly partisan interests, and, at the same time, provided the European Council with a new opportunity to further the locking in of the neoliberal turn of the EU. It also argues that causes of the leave victory are many and complex. Pending a full analysis of the social and economic geography of the vote, it is clear that the thesis favoured by a good deal of media pundits – the leave vote reflecting the triumph of low nationalistic bordering on xenophobic feelings – is too simplistic and reductionistic by half. Such an explanation fully misunderstands how the migration issue is shaping political debate in Britain and the rest of Europe, while obscures the influence that the ongoing neoliberal mutation of the EU is likely to have had in the outcome. The paper finally concludes that for Brexit to be turned into a democratic shock, with the potential of leading to a fairer and more democratic EU and UK, it is necessary to avoid *Brexit as usual*, i.e. the British and European leadership finding a formula to leave things unchanged despite the outcome of the referendum, and take Brexit as the incentive to redefine what European integration is and should be.

Keywords

Introduction

To make sense of Brexit, it seems to me that we have to start by clarifying what was the actual content and relevance of the 'Brexit deal' agreed between the United Kingdom (UK) and the European Union (EU) (section I), and how that deal was essential in allowing the British Prime Minister shape the terms of the debate (section II). The causes of the victory of leave are many and complex. It is highly reductionistic – and precipitated – to conclude that leavers are rabid nationalists. This entails not only a confused and reductionist understanding of what nationalism is about, but also misunderstands both how the migration issue is shaping political debate in Britain and the rest of Europe (section III) and the weight that the ongoing mutation of the EU is likely to have had in the outcome (section IV). For Brexit to be turned into a democratic shock, with the potential of leading to a fairer and more democratic EU and UK, it is necessary to avoid *Brexit as usual* and take Brexit as the incentive to redefine what European integration is and should be (section V).

I. The 19 February 2016 deal: New settlement for the United Kingdom or first draft of a new European Constitution?

As is well known, the European Council agreed on 19 February 2016 a set of principles by reference to which the terms of British membership in the European Union would be renegotiated in the eventuality that a majority of Britons voted against Brexit in the referendum. In a fit of either absent-mindedness or of Foreign Office cunning, the agreement was said to establish as a 'new settlement' for the United Kingdom, a term which is far from being a neutral one in British constitutional history.

The first thing to notice is that the procedure followed by the European Council was rather odd. The agreement was preceded by more or less informal negotiations between the British Prime Minister and the President of the European Council, resulting in a letter and draft European Council resolution formally penned by Donald Tusk on 2 February.[1] There was barely any intervention, if any at all, of national parliaments or of the European Parliament.[2] On the British side, the renegotiation was not regarded as a constitutional matter, but as an ordinary business item. On the basis of the just mentioned draft, there were negotiations in the European Council on 18-19 February, leading to the final agreement on the principles which would guide the eventual actual renegotiation. This is as close as one can get to a classical diplomatic deal behind closed doors, despite the fact – as we will see in the coming paragraph – that the terms of the agreement were far from routinary.

---

[1] 'Letter by President Donald Tusk to the Members of the European Council on his proposal for a new settlement for the United Kingdom within the European Union', 2 February 2016, available at: http://www.consilium.europa.eu/en/press/press-releases/2016/02/02-letter-tusk-proposal-new-settlement-uk/ (last accessed 30 June 2016).

[2] Tusk reported to the European Parliament *ex post*, that is, after the 18-19th European Council. See: http://www.consilium.europa.eu/en/press/press-releases/2016/02/24-tusk-report-european-parliament/ (last accessed 30 June 2016).

The second thing to notice is that despite the Council underlining that the agreement contained punctual and if one is allowed to use the term, purely idiosyncratic 'concessions' to the United Kingdom, the fact of the matter is that the agreement was hardly about the UK and very much about the future shape of the EU. This can easily be shown by means of considering the three main issues dealt with in the so-called 'new settlement'.

Firstly, there were formal concessions intended to allow the British Prime Minister to claim that he had extracted major concessions from the EU; most if not all of these concessions could be presented as 'realising' Cameron's views on what could and could not be expected by the UK as a Member State of the Union. But they were mostly reiterations of general EU policy, with the drafting only accelerating the speed at which the underlying policy was evolving. This is clearly the case of the annexed Declaration of the Commission on free movement of persons, which far from innocently, is referred as a declaration on the 'abuse' of the right of free movement of persons. The small letter of what the Commission says amounts to a summary of the ways in which the European Court of Justice (ECJ) has developed its *Dano* line of jurisprudence and of the legislative proposals in the pipeline aiming at what piously can be said to be a 'recalibration' of the right of free movement of persons.[3] Similarly, Member States are empowered to refuse entrance and to decide expulsion of all 'economically non-active' individuals, and to limit access to social benefits of migrants, very especially if part of their family is not resident in the host state. The British Prime Minister can certainly claim that it is far from irrelevant that the European Council and the Commission frame the problem in the terms of 'abuse' of the right of free movement. But leaving aside the substantive value of what is said,[4] it is clear that the shift towards a much more restrictive understanding of the breadth and scope of the right to free movement of persons has not been fuelled exclusively by British demands. Indeed, what is said there is likely to remain the blueprint of the redefinition of the right of free movement after Brexit (or for that matter, even if the people of the UK had voted differently and eventually a different British government with different priorities had been elected and opposed the restrictive view of free movement, restrictions would be likely to be favoured by a number of Member States). In brief, the British Prime Minister got a licence to eventually do what the UK could have done nonetheless. What is really relevant is

---

[3] C-333/13, *Dano*, ECLI:EU:C:2014:2358. See also C-67/14, *Alimanovic*, ECLI:EU:C:2015:597 and, of course, C-308/14, *Commission v. United Kingdom*, ECLI:EU:C:2016:436. The latter ruling was, by sheer coincidence, published within days of the Brexit vote.

[4] Not much in my view, given that the actual cost of the 'abuse' of the right to free movement of persons is really insignificant not only in absolute terms, but more important, in relative terms; for example when compared to say, the 'abuse' of the right to free movement of capital; quite obviously there is a specific politics and a specific interest-basis in stressing one or the other. An entirely different question is whether the case law of the European Court of Justice pre-*Dano* was both consistent with positive law and coherent with the actual defence of the Social and Democratic Rechtsstaat, and underpinned by a coherent vision of community, society and individual. On the latter, my view is that it was not. See Agustín José Menéndez, *Which Citizenship, Whose Citizenship*, (2014) 14 *German law Journal*, 903-934. The *Dano* turn has not made the case law more consistent, but even more inconsistent; from that it does not follow that the solution is a centralised social policy.

that in the process, a 'new' understanding of free movement of persons, valid for all Member States, was rendered explicit and, had the Brexit vote been positive, would have been further entrenched.

Secondly, we find a set of measures that locked in the status quo concerning the power/competence configuration regarding the triangle of monetary policy, economic policy and financial regulation. This is an agreement within the agreement, an agreement that could be referred as the new but rather old settlement of the City of London. The way in which the conclusions were drafted suggests that there was a 'conflict' between on the one hand the Eurozone, that would have favoured monetary union extending to the whole of the European Union, and until that was the case, a single regulatory framework applicable to all European financial institutions (thus also to the City) and the European Central Bank acting as the microprudential supervisor of all European financial institutions; and on the other hand the United Kingdom, which would have been in favour of never becoming member of the Eurozone, and of retaining full control over the regulation and microprudential supervision of financial institutions established in the United Kingdom. In sum, this was said to be a conflict about the relation between the Eurozone and the City. The agreement was presented as a middle way between the British and the Eurozone preferences and interests. In exchange for the political pledge of the United Kingdom not to put obstacles to the 'deepening' of Monetary Union, the EU would have agreed that (1) any 'deepening' of economic and monetary union would be so designed as to respect free movement of capital within the EU as a whole; (2) that EU financial regulation would be so designed as to ensure free movement of capital within the EU at large; (3) that the Bank of England, and not the European Central Bank (ECB), would be the micro-prudential supervisor of British financial institutions.

It is important to notice that far from being only a 'middle way' solution, this solution was very much so the status quo, which is favoured by financial institutions, whether Eurozone or non-Eurozone – and for good reasons. The best of all possible worlds for financial capital is one in which the City is the financial capital of the Eurozone despite (and one could add precisely because) not being either physically within the Eurozone or (and above all) subject to the regulatory power the Eurozone.[5] To make the point with different words: writing in pre-referendum agreement the special status of London guaranteed the locking in of the pulverisation of sovereignty within the Eurozone. Had this agreement held, the euro was bound to remain a currency without a state because any serious attempt at political union would have required re-establishing the coherence between monetary, economic and financial power, and thus, setting limits to the free movement of capital from without the Eurozone (not to speak of capital from tax havens, including the London-based tax havens). The pre-referendum agreement prevented the Eurozone getting serious about redefining free movement of capital with a view to ensure the effectiveness of financial regulation. As a result, the pre-referendum agreement would have

---

[5] This is compatible with the rather open satisfaction with which financial capital with a direct stake in Paris and/or Frankfurt as financial centres contemplated and then received Brexit. Brexit is the only chance they have in the short run of substituting London as the financial capital of the Eurozone.

guaranteed that the Eurozone was not able to regulate effectively financial institutions ever. London as financial capital of the Eurozone would have been sheltered from effective financial regulation by free movement of capital, while financial institutions within the Eurozone would have had an easy time threatening to leave in case the Eurozone tried making use of some form of reinforced cooperation to tighten regulation within the Eurozone.

Thirdly, we find a blueprint of the future economic and trade policy of the European Union as a whole. Neither in the Preamble of the agreement nor in the various pieces that compose it can we find many, if any, references to equality, freedom (other than economic freedoms in one form or the other), solidarity or full employment (which, after all Treaty amendments and transformations of the EU, we can still find in the Preamble of the Treaties and in the opening articles of the Treaty on European Union). On the contrary, the agreement is full of references to the single market, competitiveness, the fostering of international trade agreements (a code word for the Transatlantic Trade and Investment Partnership, TTIP, and the other 'mega' trade agreements) and in general, to the need of alluring investors. The following paragraph from the Preamble is paradigmatic and is worth reproducing in full:

> Determined to exploit fully the potential of the internal market in all its dimensions, to reinforce the global attractiveness of the Union as a place of production and investment, and to promote international trade and market access through, inter alia, the negotiation and conclusion of trade agreements, in a spirit of mutual and reciprocal benefit and transparency.

This is but a condensed summary of the socio-economic blueprint contained in the Five Presidents' Report of June last year, which, as is well-known, favours placing under the automatic pilot of 'rules' not only fiscal policy, but also social and labour policy (with the rather peculiar objective of guaranteeing that all Member States of the Union have a 'triple A' social policy), with a view to 'reconfigure' the socio-economic model of all Member States, and especially, of the Member States of the 'periphery' of the Eurozone.[6] Again, this may be a policy favoured by the then incumbent British government, but clearly has not much to do with the terms of the relation between the United Kingdom and the European Union.

II. *Divide et impera*: Attaching the new settlement to the referendum question

The referendum question was the following: 'Should the United Kingdom remain a member of the European Union or leave the European Union?

- Remain a member of the European Union

---

[6] With such rules, which are said to make States leaner, fitter and more competitive, to be steered by a new set of 'independent authorities', including a European Fiscal Council to crown the network of national fiscal authorities, and the brand new 'competitiveness authorities'. See the Five Presidents' Report, available at: https://ec.europa.eu/priorities/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en (last accessed 30 June 2016).

• Leave the European Union'

On the face of it, the question was simple and well-formulated. In reality, the question was intentionally tricky. Once the question was constructed together with the 19 February deal (never miss reading the attachment to an email!), it was far from obvious what any of the two alternatives actually meant.

Firstly, voters did never have the chance of supporting the United Kingdom remaining in the European Union. Those voting to 'remain' where at the same time endorsing the European Council decision of 19 February, which would have formally led to the renegotiation of the terms by reference to which the United Kingdom was member of the European Union. This was not really a vote for keeping things as they were, but for prolonging EU membership under the condition that the EU changed (under the condition that the EU kept on moving in a very specific socio-economic direction). As was pointed in the previous section, the European Council decision did not only affect the status of the United Kingdom, but had the potential of further locking in the ongoing mutation of the European Union that has been accelerated and radicalised since the beginning of the crises.[7]

Secondly, the British government and the European Council had no intention or will to render specific what leaving the EU would mean and entail, despite the fact that the deep social, political, economic and cultural intermeshing of the United Kingdom into Europe was bound to make it essential to determine under which terms the UK would relate to the EU once it had stopped being a Member State (to this I come back in section V). One can only speculate about why the terms of leaving were not even sketched. Quite obviously, by not determining what leaving entailed, left the door open to all kinds of speculation about what it would mean, in particular licensing all kinds of doomsday scenarios (which fitted the well-tested political marketing strategy of mobilising fear to persuade voters). Moreover, in the event of a negative vote, lack of specificity increased the discretion that British and European authorities would have in terms of negotiating the terms of Brexit (and of making Brexit less than Brexit; something to which I also come back in Section V).

Posed in such terms, the question was bound to provoke that the referendum debate cut across the main social, economic, political, cultural (and even geographical) cleavages in the United Kingdom. Certainly all referenda affect pre-existing cleavages, if only because they force into a binary logic issues that tend to be complex and nuanced. But in this case, the way in which the people were asked to pronounce themselves was indeed contrived. There was a clear political calculus behind the holding of the referendum, and indeed behind the terms under which it was held. This calculus was three-fold.

Firstly, the British Prime Minister expected to win the referendum. Winning comfortably would be nice, but perhaps it would be politically preferable to end up winning comfortably after a campaign during which the outcome was uncertain for a

---

[7] Agustín J. Menéndez, 'A Europe in Constitutional Mutation?', (2014) 20 *European Law Journal*, 127-41.

long time (as was the case with the referendum on Scottish independence). Indeed, the tactics of the Prime Minister was very similar in both cases, especially when it came to reliance on the argument of fear and doomsday scenarios in the last two weeks of the campaign. But while these tactics worked dandily in the case of Scotland, they utterly failed now.

Secondly, the British Prime Minister expected winning the referendum to bring major political gains. For one, a victory in the referendum would weaken those in the Conservative party that had made constant use of the ghost of Brexit to improve their standing within the party and to weaken the Prime Minister himself. For two, a victory in the referendum would represent a major blow to UKIP in the next electoral cycle (a far from irrelevant consideration because even if UKIP failed to make it into Westminster in the last elections, scores of its candidates ended second in their constituencies, and could next time be seen as a real alternative to the conservative candidate). For three, the very holding of the referendum in Cameron's terms placed the leader of the Labour Party in an impossible lose-lose situation, between the devil of being seen as an irresponsible leader if he denounced Cameron's manoeuvre to make of the referendum the excuse to lock in his political agenda for Britain and for Europe, or the deep blue sea of campaigning for 'remain' despite his life-long commitment to a very different Britain and a very different Europe. For four, a victory in the referendum would have buried Scottish independence as a salient issue for the next decade (and the very holding of the referendum placed Scottish nationalists in a very uncomfortable position, as it was the victory of the no that would have furthered the cause of Scottish independence, at the same time that such independence would then be likely to be justified in the name of remaining within the EU, even if preferably not joining the Eurozone, but keeping the pound).

Thirdly, the British government and the members of the European Council shared a fundamental political calculus – that that of making Brexit an occasion to push further the transformation of the European Union, in the very terms described in the first section. A victory in the referendum would have rendered almost impossible to question the terms agreed with the United Kingdom, even if the agreement was not, as I have already argued, about the United Kingdom, but about the shape of the European Union. Fixing the terms of the agreement before the referendum created the conditions under which the will of the British people could be invoked to legitimise the terms of the agreement. This political calculation could explain the basic puzzle at the basis of the agreement, namely, why the European Council not only accepted a good deal of Cameron's requests, but above all, why it decided to accept Cameron's way of approaching the problem. There were obvious alternatives. The simplest one was to force Cameron to negotiate both the terms of remaining and the terms of leaving (including a pledge to active Article 50, which would have made sense, and avoided the legal services of European institutions spending the weekend after Brexit torturing Article 50 to extract from it what cannot be extracted from it, namely, the prerogative of European institutions to activate it).[8] A more elaborate

---

[8] Jennifer Rankin and John Heanley, 'EU parliament leader: we want Britain out as soon as possible', *The Guardian*, 24 June 2016, available at: http://www.theguardian.com/politics/2016/jun/24/top-eu-leader-we-want-britain-out-as-soon-as-possible (last accessed 30 June 2016).

one was to impose terms of remaining and leaving that would make the choice neater and reduce the extent to which the question was contrived. Ex post facto, European leaders have been very vocal at characterising the referendum, and the way in which Cameron combined it with the pre-referendum agreement, as a reckless attempt at dealing with purely internal affairs through the Brexit issue. This seems a far from implausible claim. But contrary to poor scholars, European leaders could have prevented the British Prime Minister from doing exactly that. Alternative ways of approaching the Brexit referendum were not merely hypothetical, because, as is well-known, it was the European Union, not the United Kingdom, which had real bargaining power in hand. It was not in the interest either of the British government or of the collective actor that the European Council is, that the European bargaining power was used. If one is allowed a rather parochial illustration, the point that this political calculus was at work can perhaps be illustrated by the way in which the Spanish Minister of Foreign Affairs (reluctantly) informed the Spanish Parliament about the terms of the agreement with the United Kingdom. The agreement is not presented as a muddled through compromise, but actually as an agreement that improves the European Union[9] – which, from the ideological, political, cultural and social perspective of the Minister, may well be correct.

III. Are all or most 'leavers' rabid nationalists?

Why did the majority of British citizens opt for leaving? It is not only too early to answer that question, but perhaps it is simply impossible to answer it. It is banal but still true to say that if there were more than seventeen million 'leave' votes, there are potentially more than seventeen million cases for leaving the European Union.

In the era of tweets and Facebook messages, such an answer is deemed to be simply unacceptable. Waiting for sociologists and demographers to make a serious analysis of the variables carrying more weight on the sense of the vote is regarded as simply off-putting. So pundits and commentators *toutes confondues* have engaged into furious and superficial writing to explain why most British voted no.

By far, the most widely accepted thesis is that the no vote was fuelled by what are said to be 'anti-immigration feelings'. In the words of a Spanish commentator who published his op-ed literally hours after the final results were proclaimed, the Brexit vote had been fuelled by 'arrogance, fear and rejection of the foreigner', and indeed 'the true cause of Brexit [was] a rejection of Europe at its best: the Europe that guarantees the free movement of persons, the Europe of shared sovereignty and cultural pluralism, the Europe that slowly and carefully crafts consensual rules

---

[9] 'Comparecencia del señor ministro de Asuntos Exteriores y de Cooperación en funciones (García-Margallo Marfil), para informar con carácter previo sobre el contenido de los asuntos que se tratarán en el Consejo Europeo de los días 18 y 19 de febrero de 2016', Diario de Sesiones del Congreso, 17 February 2016, available at: http://www.congreso.es/public_ofici ales/L11/CONG/DS/CO/DSCD-11-CO-15.PDF (last accessed 30 June 2016), page 5: 'As you will see, honourable colleagues, not everything in the decision that will be discussed tomorrow are concessions extracted from the Union by the British government. Many of its contents are steps forward in the right direction'.

instead of relying on national parliaments'.[10] There is no doubt that a good deal of the leaders of the 'leave' campaign have become specialists in the despicable art of the political innuendo with racist overtones. There is no doubt that far from few of those voting 'leave' may well be open racists. Britain has its quota of racists and xenophobists. Fortunately, the British Nationalist Party enjoyed only an ephemeral success, but the fact that it enjoyed it is a symptom of at the same time a deep malaise and of an old malaise.[11] Still, can we really say that the outcome of the Brexit referendum was caused by a rejection of 'Europe at its best'? Is it true, in Paul Mason's terms, that Britain has become a rainy, and if not fascist, at least racist island?[12]

I am not a Twitter fan, so I am inclined to think we should better wait for a full analysis of the vote; and even when we have the full data, I would be in favour of not jumping too quickly into conclusions. But even now it seems to me that the emerging explanation of the outcome of the referendum is obviously flawed, for the following three related reasons.

Firstly, three patterns seem to emerge from the very comprehensive demographic analysis published by *The Guardian*:[13]

One: social class and socio-economic position were the best proxies of the way people voted. In terms of the careful analysis of the London (formerly also Manchester) newspaper; 'Average educational attainment, median income and social class in English local authorities were the strongest predictors of how residents in that area voted in the referendum'.[14] In brief, class mattered, because class is a good proxy of the feeling and the reality of having lost or having gained from the socio-economic transformation of the United Kingdom in the last decades,[15] which is for good and for bad closely related to membership in the European Union. Or applying to this

---

[10] Ignacio Molina, 'La Conjura contra los necios', available at: http://elpais.com/elpais/2016/06/24/opinion/1466765082_780752.html?id_externo_rsoc=FB_CM_OP (last accessed 30 June 2016).

[11] The imperial legacy cuts both ways. On the one hand, it has resulted in deep and engrained racist reflexes. On the other hand, as Danny Dorling has stressed several times, it has acquainted most Britons with cultural pluralism; and indeed the practice of cultural pluralism is perhaps the best antidote against racism. See Danny Dorling, 'Should we stay or should we go', Lecture at the LSE, 10 May 2016, available at: http://www.lse.ac.uk/public Events/events/2016/05/20160510t1830vOT.aspx (last accessed 30 June 2016).

[12] Paul Mason, 'Britain is not a rainy, fascist island – here's my plan for ProgrExit', *The Guardian*, 26 June 2016, available at: https://www.theguardian.com/commentisfree/2016/jun/25/britain-rainy-fascist-island-progrexit-brexit (last accessed 30 June 2016).

[13] The Guardian, 'EU referendum: full results and analysis', http://www.theguardian.com/politics/ng-interactive/2016/jun/23/eu-referendum-live-results-and-analysis (last accessed 30 June 2016).

[14] Caelainn Barr, 'The areas and demographics where the Brexit vote was won', *The Guardian,* 24 June 2016, available at: http://www.theguardian.com/news/datablog/2016/jun/24/the-areas-and-demographics-where-the-brexit-vote-was-won (last accessed 30 June 2016).

[15] See Mike Savage, *Social Class in the 21st century*, London: Pelican, 2015 for a nuanced approach to class in the United Kingdom.

purpose the rule of thumb of one Guardian columnist, it matters whether you drive or whether you do not own a car and *have to* take the bus.[16]

Two: Age mattered. As was already pointed, seniors were prone to vote leave; a majority of the young tended to vote remain.

Third: Geography mattered. In aggregate terms, Northern Ireland and Scotland voted to remain, while England and Wales voted to leave; but in London there was a clear majority to remain. Geography altered the first two voting patterns, but only up to a point. While there was an extra leave or remain factor in different parts of the United Kingdom, geographical patterns, once disaggregated, did not divert fully from the pattern resulting from class and age: while London as an aggregate was in favour of remaining, remain did not win in all areas of London.

Secondly, the fact that class, age and geography go a long way to explain the result of the referendum, is compatible with immigration being highly relevant in accounting for the result of the referendum. But immigration was not the ultimate cause, but the issue around which the ultimate causes were triggered.

Thirdly, that immigration mobilised leave voters does not mean that either all or most 'leave' voters are racists. Immigration has become a toxic issue in British and European politics for two related reasons. First is the proclivity of political classes to put immigration off the political agenda for fear of triggering racist reflexes. Migration becomes either a question to be decided by reference to absolute rights and duties (not subject to political decision-making), or by reference to technical considerations of what will be good or bad for the economy. As a matter of fact, it is the very decision to depoliticise immigration that gives politicians most likely to play with racist reflexes the chance to impose the terms and discourse under which migration is discussed. If one pushes a deeply political issue through the door, the issue tends to come back as a hitting ball through the window. Second is the radical separation of immigration policy from overall socio-economic policy. To put it differently, whether immigration should or should not be favoured, promoted or accepted is regarded as something that has to be decided by reference to the existing socio-economic model. This obscures the fact that the consequences of immigration depend not so much on migration flows themselves, but on the socio-economic structure of the hosting polity. In that sense, it is as foolish to claim that absorption capacity is a faked term concocted to exclude migrants as to pretend that absorption capacity cannot be radically increased by adopting different socio-economic policies. In particular, if the receiving society is deeply unequal, incoming migration is likely to result in the further aggravation of inequalities, with those already worse off seeing their own position deteriorate. In such circumstances, the reiteration of the claim that *we* have to be solidaristic with the migrants becomes the cover of a further turn of the negative redistribution screw. But if the receiving society is egalitarian, the equal treatment of migrants can be widely seen not only as required as a matter

---

[16] Linda Grant, 'Don't Blame all babyboomers for Brexit', *The Guardian*, 27 June 2016, https://www.theguardian.com/commentisfree/2016/jun/27/dont-blame-babyboomers-brexit-generation-voted (last accessed 30 June 2016).

of humanitarian duty, but also as the best guarantee that the fair distribution of opportunities and income will be preserved.

From such a perspective, it is not sheer chance that the leave vote has been very strong in areas and social classes that used to be Labour strongholds. Paul Mason has equated the leave vote with a change in migration policy from below.[17] Such a will is not the stepchild of racism, but of the will to oppose further redistribution of income from labour to capital. If immigration policy has become the terrain in which economic conflict takes place, it is not because the less well-off chose it to be that way. The fact that *the present immigration policy* discharges the solidaristic burden with the refugees on those who have already been losing ground in the name of *regaining competitiveness* is what creates the opportunities of the Le Pens and Salvinis of this world to pretend they are the true representatives of the down-trodden, and the chance to persuade losers that everything will be solved if only doors will be closed to the migrants. The only way to prevent the hijacking of the losers by the extreme right is to take seriously not only their grievances, but also that they are right in linking *this* migration policy with their falling behind. It is necessary to make it clear that the problem is not the migrants, but the toxic mix of a fully unplanned migration policy (courtesy of the neoliberal understanding of labour markets and of free movement as the right to seek 'actively' for employment without the mediation of public agencies) with a deeply unequal socio-economic order, which makes the loser bound to lose even more the more open the doors are to immigration.[18]

IV. If the Union was so great, why would anybody be tempted to leave it?

It is interesting to notice that most analysis of the Brexit campaign and outcome have focused on the British side of Brexit. The victory of the leave side is even taken as revealing the nature of the British people, as we saw in the previous section. Even less flamboyant analyses tend to focus on the United Kingdom, from its system of government to its socio-economic transformation since Thatcher, if not since Heath. But can it be that the vote is also revealing of the state of the European Union? To put it differently, if everything was fine in the kingdom of Europe, would the advocates of Brexit have got traction not only to win, but even to get the referendum called? Moving from the rhetorical to the practical questions, we can ask ourselves how and in which sense the present shape of the European Union contributed to the negative outcome of the referendum.

It seems to me there are at the very least three factors to be considered.

Firstly, the European Union has become something the European Communities were not, namely, what could be labelled as an anti-nationist project, a project allergic to

---

[17] Paul Mason, 'Brexit wins, an illusion dies', 24 June 2016, available at: https://medium.com/mosquito-ridge/brexit-wins-an-illusion-dies-b60b6efad2d7#.kmjuf81ny (last accessed 30 June 2016)

[18] Ha Joon Chang, *23 Things they didn't tell you about capitalism*, London: Penguin, 2010.

collective identities.[19] The unencumbered individual has become the imagined subject of European law, capable and willing to be constantly on the move, willing to redefine itself without being weighed down by previous allegiances. The latecomer term 'competitiveness' comprises very aptly the political philosophy of the ongoing European constitutional mutation. As Alexander Somek has persuasively argued, only such a radically unencumbered individual could indeed agree to the present understanding of economic freedoms at the core of European law.[20] As long as most people are not, do not want to be, and simply cannot afford to be unencumbered individuals, collective identities are necessary. Politics, and very especially democratic politics, require commitment in time and space, a commitment that gives rise and is supported by a collective identity and collective goods. Still, European law has become allergic to both collective identities (national constitutional identities reduced to idiosyncratic rules regarding the composition of family names,[21] and no European identity being considered other than that of commitment to ever increasing competitiveness once the European Social state has been proclaimed dead).[22]

The denial of collective identities is the quickest way to foster nationalism, and very especially exclusionary if not racist nationalism. The paradox is that the anti-nationism of European integration, reflected in the unqualified and unconditional condemnation of borders and celebration of movement, has not only fed the old European demons of exclusionary nationalism, but also led to the identification of secession, either from the European Union or from existing Member States, as the only way to regain self-government.

Secondly, the European Union has become over-integrated. The point is not that there should be ultimate and fixed limits to the degree of European integration, but that the depth and the timing of integration should take seriously the economic, political and cultural consequences of integration. Contrary to the common market project, the single market project and monetary union were rather explicit exercises in social engineering, as they implied an exceedingly fast reconfiguration of national socio-economic models. The mutation of the European Union, very especially its socio-economic mutation, has left its trace in the Brexit debates. Some of the 'remain' advocates tried to mobilise arguments that used to be powerful ones, especially during the Thatcher years. From a British perspective, EU law and the Court of Justice could still be seen as champions of the rights of workers. But the argument sounded much less powerful than it used to, because advocates of 'leave' could counter-argue that the same EU and the same ECJ was the champion of free movement of capital, and had indeed acted as an enforcer agent of the interest of financial capital all through the Eurozone crisis. The reengineering of national socio-economic models was bound to generate not only opposition among the losers, but also to reveal the capacity limits of the European Union. As a result, the two key

---

[19] Emmanuel Todd, *L'Illusion Economique,* Paris: Gallimard, 1999.

[20] Alexander Somek, *Individualism*, Oxford: Oxford University Press, 2008.

[21] Case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:806.

[22] Brian Blackstone, Matthew Karnitschnig and Robert Thomson, 'Europe's Banker Talks Tough', *Wall Street Journal*, 24 February 2012, available at: http://www.wsj.com/articles/ SB10001424052970203960804577241221244896782 (last accessed 30 June 2016).

legitimacy sources of the Union, legitimacy derived from national democratic processes and output legitimacy, have been seriously compromised. As Fritz Scharpf and Wolfgang Streeck have stressed, the government of the crises has indeed led to a wide and explicit denial of national autonomy (epitomised by the suspension of sovereignty of 'assisted' Member States) and at the very same time a radical deterioration of the Union's capacity to deliver (epitomised by the catastrophic European management of the Greek economy, and to a lesser extent, of all economies of the Eurozone periphery).[23]

Thirdly, major mistakes made during the government of the crises have resulted in the Eurozone fostering national cleavages that endanger the long-term capacity of the European Union to survive. In April 2010, it was decided that the 'widow' cross border financial risks generated during the first decade of EMU were to be nationalised by the 'debtor' states. In other words, the risks resulting from French and German banks fuelling the geometric growth of Greek private debt were to be placed on the shoulders of Greek taxpayers, and of Greek taxpayers only; in turn, the taxpayers of all other Eurozone states would assume the 'contingent risk' that Greek taxpayers could not return the money. This entailed turning what was a private debt relationship into a relationship opposing the taxpayers of the Eurozone. The flip side of the decision was that private banks were allowed to escape the consequences of their reckless credit behaviour in the previous decade (a purist would have spoken of the moral hazard involved in doing that). It is hard to think of a more effective way to revive national cleavages within the Eurozone. Transforming private debt into public debt, and then defining creditor and debtor positions along national lines was bound from the very beginning to be an engine of nationalistic rhetorics, a perfect device to prevent that grievances were articulated along social class lines. There were alternatives, including making the banks pay, and subsequently nationalising the banks causing losses on shareholders. These alternatives were not followed, perhaps because political leaders have massive incentives not to do so.

If the way in which the fiscal crises of the Eurozone periphery awoke the old demons of Europe within the Eurozone, the way in which the Eurozone handled the negotiations with the Greek government in the winter and spring of 2015 transformed the perception of the Eurozone within and outside the Eurozone. It will be deeply unfair to reduce the Greek drama of 2015 to a matter of German domination. But it would be hard to contest that the German government has been rather inept in terms of avoiding that impression from becoming a plausible interpretation of facts. The spectre of German domination revived far from happy memories in many European states. Is it fully far-fetched to wonder whether such unhappy memories have not contributed, even if marginally, to the pattern of vote of senior citizens in the United Kingdom, independently of ideological proclivities? It is seniors that have either direct memories of the war (even if by now few do so) or of

---

[23] Fritz Scharpf has emphasised the costs of over-integration and the costs of not rolling back over-integration. See among his many fundamental contributions, 'After the Crash. A Perspective on Multilevel European Democracy', (2015) 21 *European Law Journal*, 384-405. See also Wolfgang Streeck, *Buying Time*, London: Verso, 2014 and 'Heller, Schmitt and the Euro', (2015) 21 *European Law Journal*, 361-370.

the immediate postwar. Is it mere anecdote that the one senior European politician that was more vocal in public support of Yannis Varoufakis during the 2015 negotiations was no other than Norman Lamont, who would be hard to characterise as an erratic Marxist?

V. Brexit as usual?

Does the fact that a majority of Britons have expressed their will to leave the European Union mean that the British government has to request the opening of formal negotiations to that purpose, triggering Article 50 of the Treaty of European Union?

It seems some pundits think the issue is far from obvious. And it is a matter of time before they will be joined by legal scholars, if some legal scholars have not volunteered already to produce arguments showing there is no obligation on the British government, either under British or European law, to trigger Article 50.[24] Suspending for a moment the question of whether there could be good arguments for throwing doubts on whether the referendum result requires unconditionally the United Kingdom leaving the European Union, allow me to focus on the arguments that have been put forward to contest the legitimacy and compelling character of the result. These seem to me to be mainly three.

Firstly, some pundits have stressed the fact that while a clear majority of 'young people' were in favour of 'remain', a majority of 'senior citizens' opted for leaving. This would be problematic, because seniors would be taking a decision that will burden not so much themselves, but the younger generations.

Secondly, there have been pieces of news reporting the alleged discontent among 'leave' voters, who, had they known more about the implications of the vote, would have voted to 'remain'. The fact that signatures have been collected in social media to have a second referendum has been interpreted as proving that British voters should have a second chance. Quite interestingly, the fact that the result was a narrow one is not taken to be highly relevant when putting forward this line of reasoning. In this sense, some pundits have claimed that it is part of European constitutional conventions to organise a second referendum when deciding European issues. Gideon Rachman, one of the leading columnists of Financial Times, has openly invoked the track record of Member States (and indirectly, of the European Union) on the matter so as to justify either a second referendum or a compromise that would keep the United Kingdom within the Union:

---

[24] Lawyers seem to be hard at work producing arguments according to which Brexit should be activated so that England and Wales, but not Scotland, Northern Ireland, and of all places, Gibraltar, would leave the Union. See: Gabriel Gatehouse, 'Brexit: Gibraltar in talks with Scotland to stay in EU', 27 June 2016, available at: http://www.bbc.com/news/uk-politics-eu-referendum-36639770 (last accessed 30 June 2016).

> […] there is no reason to let the extremists on both sides of the debate dictate how this story has to end. There is a moderate middle in both Britain and Europe that should be capable of finding a deal that keeps the UK inside the EU. Like all good dramas, the Brexit story has been shocking, dramatic and upsetting. But its ending is not yet written.[25]

Thirdly, some pundits and politicians have simply suggested that decisions such as Brexit should not be in the hands of citizens, either at all times, or during 'critical times'. The latter has been explicitly argued by the Italian sociologist Alessandro Orsini. It is worth quoting at length:

> By means of pushing for the referendum, Cameron has lifted the lid of Pandora's box, releasing the assassin of Joe Cox. That box, in times of crisis, full of anger and irrational fears, should be made to stay closed with the help of the anti-democratic strategies that, in full respect of democratic rules, relieve voters from the responsibility of deciding the course of international politics.[26]

Similarly, former President of the Italian Republic Giorgio Napolitano claimed hours after Brexit that it was an 'ill-fated risk' that should have been avoided, to hold a referendum on Brexit.[27] This line of reasoning echoes the reaction of a good deal of the European political class when the Greek government called a referendum in July 2015. While some of them went on record, it seems that almost all of them shared the view that the issues were 'too complex' and the people were not competent to decide.[28]

There is no doubt that referenda are complex procedures which may well have a rather ambivalent character from the standpoint of democratic theory and practice. The line between a democratic referendum and an authoritarian plebiscite may well be thin in some cases. Having said that, the line between repeating referenda on account of their eventual democratic shortcomings and authoritarianism is also a thin one, very especially when the repetition rule is set by reference to far from objective criteria.

---

[25] Gideon Rachman, 'I do not believe that Brexit will happen', *Financial Times*, 27 June 2016, available at: http://www.ft.com/cms/s/2/8f2aca88-3c51-11e6-9f2c-36b487ebd80a.html#axz z4CyeCN72P (last accessed 30 June 2016).

[26] Alessandro Orsini, 'La consultazione è stata un errore', *Il Messaggero*, 25 June 2016, available at: http://www.ilmessaggero.it/primopiano/esteri/consultazione_stata_errore-1816573.html (last accessed 30 June 2016). My translation: 'Nell'aprire la porta al referendum, Cameron ha aperto il vaso di Pandora, da cui è uscito l'assassino di Joe Cox. Quel vaso, in tempi di crisi, colmi di rabbia e di paure irrazionali, deve rimanere chiuso attraverso l'uso di opportune strategie anti-democratiche che, nel rispetto rigoroso delle regole democratiche, sollevino gli elettori dalla responsabilità di determinare il corso della politica internazionale'.

[27] Monica Guerzoni, 'Napolitano: "Un azzardo sciagurato Ora avanzare verso l'integrazione"', *Corriere della Sera*, 25 June 2016, available at: http://www.corriere.it/politica/ 16_giugno_25/referendum-brexit-napolitano-un-azzardo-sciagurato-ora-avanzare-l-integra zione-0b45d838-3a3b-11e6-b0cd-400401d1dfdf.shtml (last accessed 30 June 2016).

[28] Yannis Varoufakis, *And the Poor Suffer what they must?*, New York: Nation Books, 2016.

On what concerns the 'young against the elderly' argument, it seems to me it is based on a deeply problematic understanding of democracy. If this argument is accepted, one wonders what rules on eligibility to vote should follow. Should we go back to John Stuart Mill's weighted voting, only now granting multiple votes to the young, which would lose some of these votes as they became older? Should we indeed reverse the classical arguments in favour of restraining the vote or directly assigning power to elder citizens, now assigning the right to vote and decide not to the old, but to the young? Should we deprive of the right to vote anybody diagnosed with a terminal illness, on the basis that she or he is not be exposed to the consequences of her vote? The argument is simply silly. And while I do not share at all the classic argument to assign power to the elderly—Plato's Republic was not only governed by philosophers, but by old philosophers, something that in the *Laws* results in a nocturnal council made up of the old and wise—the argument is perhaps less silly than the one implicit in the challenge of the legitimacy of the referendum on account of the old deciding the fate of the young. And if I am allowed, I would add that it is hard to reconcile championing this argument with finding the *Mangold* ruling the epitome of legal reasoning.

Moving to Rachman's constitutional convention, such convention, as a matter of fact, says that referenda are to be repeated or bypassed when the outcome is contrary to the option that the collective leadership of the European Union favours. This seems hardly compatible with any minimally serious notion of democratic legitimacy. I do not claim that there can be no good case to repeat a referendum. In the 2001 Irish referendum on the Treaty of Nice Irish voters rejected ratification. However, less than 40 per cent of the voters turned up at polling stations. A low turnout could be a good argument to repeat the referendum especially if, as seems to have been the case in Ireland in 2001, there were barely any real debate before the referendum. Similarly, it could be agreed beforehand that given the transcendence of the decision, the outcome of a referendum will only be binding if there is a clear majority in favour of one of the options. In the same way that reinforced majorities are required to amend the constitution in many constitutional systems, it could make sense to require more than a simple majority of votes when the decision is especially transcendental (as the Canadian Supreme Court famously claimed on the issue of what majority would be required for Quebec to leave Canada).[29] That is a very different line of reasoning than the purely pragmatic, ad hoc justification of the constitutional convention forged by the European Council and invoked by Rachman.

Still, it is important to keep in mind that even if it is not most likely (but not impossible) that a second referendum will be called, the main operational consequence of the arguments in favour of a second referendum may not be the actual calling of such a referendum, but shaping the terms of the Brexit agreement.

Now it should go without saying that the United Kingdom may leave the European Union, but will not leave Europe. The United Kingdom is socially, culturally and politically enmeshed in Europe, as was already pointed out in the first section.[30]

---

[29] [1998] 2 SCR 217

[30] Brendan Simms, *Britain's Europe,* London: Allan Lane, 2016.

There are very good reasons why the European Union and the United Kingdom should indeed negotiate an agreement that will ensure that such links are kept. Because both the United Kingdom and the European Union aspire to be democratic polities, such an agreement should be a fully friendly one.

Still, and this is of essence, the fact that there are imperative reasons to negotiate a new agreement between the United Kingdom and the European Union is no good reason to turn Brexit into a mere empty phrase, as Rachman and many others, are actually favouring. Instead of explicitly ignoring the outcome of the referendum, Brexit could be simply avoided by means of defining Brexit as an agreement very close to the one that was voted down by the majority of those voting on 23 June. Call it, if you wish, *Brexit as usual*.

British citizens have democratically decided to leave the European Union. This requires that the terms of the agreement with the European Union should be such that the actual capacity to decide autonomously of *both* parties should be guaranteed.[31] The democratic potential (nota bene, I speak of potential) of Brexit is in that sense double. Firstly, it shatters for good the myth of the 'irreversibility' of policies, which is in itself a fabulous instrument to undermine democratic politics. Once the impossible (i.e. a country leaving the Union) has happened, and the sky has not fallen on our heads, many other things that were deemed as 'impossible' become subject to democratic decision-making again. Secondly, Brexit puts an end to European policy-making proceeding in the shadow of the double veto, of this and that policy being regarded off the bonds of the possible, because either the UK (most of the time, read the City of London) or the EU would veto it. Allow me to add that this is not an unqualified gain. The increased openness of politics and law can be made use of to implement catastrophic policies. That is not only the intrinsic risk congenital to politics, but also one that perhaps is to be weighed in with the far from optimal policies that have been implemented in the last two decades *despite* (and I would say precisely because) operating under the shadow of the double veto.

Is this a nostalgic plea for the lost world of the nation-state? Not really. European states, now and at least in the last two hundred years, run the risk of being ineffective unless they coordinate and cooperate with other states. But there is no reason whatsoever why state cooperation should not fundamentally aim at creating the conditions under which national decisions cannot only be effectively taken, but be taken autonomously, with a wide range of policy choices open to each state. This is in a nutshell the story not only of the 'Western' international economic order (the embedded liberalism that had Bretton Woods as one of its cores) but also of the European Communities, as Alan Milward gloriously synthesised in the title of his *The European Rescue of the Nation-State*. *United we diverge* is a more apt motto that *United we stand* to describe the political philosophy of European federalism.

---

[31] Neil MacCormick, 'New Unions for old?', in *Questioning Sovereignty*, Oxford: Oxford University Press, 1999, 193-204 remains a fundamental reflection on how to reconcile federalism and self-determination.

What Brexit could help us finally realising, as I argued in Section IV, is that the single market project and the monetary union project have pushed the European Union into a different path. The political centre has gained powers, but such powers have been placed in the hands of decision–making processes in which non-representative institutions (such as the European Central Bank and the Court of Justice) or the least representative ones (such as the Commission) have the final say. This undermines democracy and accountability and the very capacity of central institutions to act effectively. The more the dual input and output legitimacy deficit kick in, the louder are the class for pushing over-integration further, hardening the anti-nationist, anti-collective identities rhetoric and bite of European law. Brexit or not Brexit, both the European Union and the United Kingdom were in existential crisis. The social situation is objectively explosive in more than one Member State and the black demons of Europe are back among us. Whatever follows from Brexit, it is important to keep in mind that which would not have been so much caused by Brexit, as shaped and at most accelerated by Brexit. Brexit is not a deep cause, but a symptom and eventually a trigger.

From that perspective, Brexit could (nota bene again the conditional) be turned into a democratic shock. It seems to me we are using our very last opportunities to rethink European integration before the next constitutional accident triggers collapse or, even worse, hardens the ongoing mutation leading to a painfully slow derailing of the European Union. The terms of the agreement between the European Union and Britain could still be the first draft of a different way of understanding what European integration means. In that note, I take leave from the reader to conclude quoting at length the views of a pro-leave European federalist:

> I believe we can make this into the basis for a new internationalism in Europe, one that gives Europe a political meaning far more profound than the shallow cosmopolitanism that comes with the economic integration of the single market. A vote for Brexit is also a universal message to all other Europeans that politics can be about change and not just about defending the status quo.[32]

---

[32] Chris Bickerton, 'Brexit is not the property of the political right. The left is disenchanted too', *The Guardian*, 22 June 2016, available at: https://www.theguardian.com/commentisfree/2016/jun/22/brexit-property-right-left-eu-expert (last accessed 30 June 2016).

ARENA Working Papers

ARENA Working Papers

ARENA Working Papers

For older issues in the series, please consult the ARENA website: www.arena.uio.no