Three Nearly-Certain Conclusions We Can Draw from the Uncertainty

Frank Schorkopf
University of Göttingen, Institute for International Law and European Law
[Frank.Schorkopf@jura-uni-goettingen.de]

The European Union stands for the successful public ordering of "Europe." Its goal is to shape and organize this political and economic area through law, a project involving societies of different mentalities, western democracies, old and young countries in transition, and former Great Powers. That might be ambitious enough, but pressure from outside the Union is also increasing. Alternative concepts campaign strongly to win supporters. The Union's integration agenda is plagued by obvious economic, financial, and social problems. A dissenting spirit has emerged around strongly held convictions concerning what has caused the problems and who should be held responsible. It is a dissenting spirit that, following the Brexit-referendum 23 June 2016, will have significant consequences. Now we have the first withdrawal of a Member State from the European Union.

A week after the referendum we do not know more than its outcome. All those involved, in the United Kingdom and Brussels, as well as those in Berlin and other European capitals, are struggling to find their composure and to determine their position. In my view three conclusions can be drawn from the roiling uncertainty.

First, European integration has deformed electoral democracy in the Member States. Electoral democracy is understood as an inclusive form of legitimization for the self-determination of citizens by vote under the condition of equality. I am concerned with the reaction to the Leave campaign's victory. Apart from those who feel confirmed in their skepticism towards direct democracy, the reactions draw attention to a structural unwillingness to accept majority rule. After all, electoral democracy is based on consensus, as well as the fight for majorities in Parliament in elections and the struggle in Parliament over votes concerning certain issues. In the end the elected majority is entitled to decide and the minority has to accept this outcome. Of course, abuses of the majority's power are circumscribed by the Constitution and basic rights, which protect the minorities from the majority's excessive creative drive. The Majority and minority combined, in this competitive and dynamic relationship, form the basis of the citizenry. Thereby electoral

democracy is neither exclusive nor non-pluralistic but preserves the majoritarian consensus until the next vote.

But only a few days after the referendum, its outcome is already being questioned. Very correctly, the German Chancellor opened her statement the day after the vote with the acknowledgement that *a majority* of British citizens had voted to leave.[1] Despite this, millions of British eligible voters are demanding a second referendum in the House of Commons; even a Cabinet Minister has insisted on another bite at the apple, arguing that the questions underlying Brexit are overly complex and pointing out that only a modest margin of votes carried the day. So, why give the minority a second chance simply because they are not satisfied with the first outcome? Commentators developed a sociogram of those who voted and noticed that the elderly prevailed over the young, so the future has to step behind the past. But why should this differentiation matter more than criteria such as sex, education, or income? One cynical answer is that the argument constitutes a kind of reverse-engineering in the search for ways to qualify and diminish the Leave campaign's ballot success in order to get to a preferred result: Remain.

In a electoral democracy the point of reference is not a situational group. The point of reference is the electorate, that is, all eligible voters with the same status and equal opportunities to participate. The polity is the citizens – the people. To me there is no doubt that this criticism on the referendum's outcome cannot be generalized. Imagine the opposite outcome, a majority for the Remain campaign, which would produce a different minority (the Leave voters) that would press similar claims of disenchantment (if not disenfranchisement) and demands for yet another vote. Democracy, as one commentator put it, simply does not mean never having to say "I lose."[2]

Second, it is now clear that the EU must become more people-oriented. Brexit has shown that European citizens from the political center are deeply dissatisfied with the Union and their representatives' agenda. This is the sentiment held by a majority despite the conclusion, expressed in the German Chancellors's post-referendum statement, that being part of the Union has personal advantages on every single individual already.[3] If it is true, then these advantages have to be made more evident to the people.

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[1] The Statement by 27 Member on 29 June 2016, includes the same wording, European Council, Informal meeting at 27, 29 June 2016, para. 1.

[2] *See* Russell Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 601, 634 (2003).

[3]   Chancellor Merkel's press statement on 24 June 2016, German Transcript: https://www.bundeskanzlerin.de/Content/DE/Mitschrift/Pressekonferenzen/2016/06/2016-06-24-statement-merkel.html.

Apart from this statement, which I see more as a symptom of the problem, Brexit might trigger new integration steps. The first proposals in this direction are already on offer: Investments and a finalization of the Economic and Monetary Union. Moreover, in view of the President of the Commission (now embracing an idea proposed by Southern European States) unsolved issues of the Economic and Monetary Union should be solved through a renunciation of the longstanding policy of sound finances. Instead, debt-financed investments, wealth transfers, the "just distribution of the additional value of growth," consumption, as well as the centralization of national budgetary authority, should be the Union's future. As the European Council of 27 Member States put it: "Europeans expect us to do better when it comes to providing security, jobs and growth, as well as hope for a better future."[4]

But Brexit should cause us to pause in our rush to integration to reflect on the causes of aversion for the EU and the parallel critique of elites. Necessary questions include the steps towards integration, which are overloaded with expectations of a European political space. There are also good reasons to re-examine the Monetary Union as such and the Schengen-Dublin-area. Behind, and bigger than, all of this is the nagging question of the viability of a European Society. Along with these questions one also has to ask about the causal contribution of Germany's politics to Brexit. Did the mass influx of people in September 2015 have an impact on the crucial 3 % of British voters? The Leave campaign's posters featuring miles-long queues of Syrian refugees suggests that it did.

Third, with this Brexit-decision, the European Council decisions from February 2016 will not become effective. The European Council offered the United Kingdom four structural changes in their Membership status (EUCO 1/16, Annex I), including the annulment of the "ever closer union among the peoples of Europe."

But, in my view, the phrase "ever closer union" (Art. 1 TEU) lost its force long ago. Despite all that Europe is and has done, we still have not seen the necessary pan-European community of solidarity emerge. The wording stands for a theology of history pursuant to which the nation state is overcome by supranational integration. This theology is driven by the belief that the nation state is no longer able to face its recent challenges and shape its future in a globalized world. The "ever closer union's" power holds some observers in such thrall that they regard Brexit as an unauthorized secession driven by a nostalgia for a now-impotent form of national democracy that must be overruled by the European citizenry and secondary European law—for the sake of Europe and for that foolish British majority. At this point I would add the marginal note that the scholars of European law contributed

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[4] European Council, Informal meeting at 27, 29 June 2016, Statement, para. 6.

to this by not working critically enough on the teleological justification for the EU. Many have been captured by the "Culture of Total Optimism."[5]   Internationalism has become an end in itself. Maybe we underestimated the vitality of the nation state and did not have (enough) confidence in its citizens to take this – unquestionably – insecure but courageous step out of the structured network of European States.

A Farwell to the formula of the "ever closer union" could be the beginning of a European pragmatism. Maybe we will turn to the former concept of a "multi-speed Europe," renamed as a "Europe of Clubs," or towards an extended Union method of intergovernmental cooperation. Integration will then only take place where a democratically legitimized consensus exists.

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[5] Giandomenico Majone, *The Deeper Euro-Crisis or: The Collapse of the EU Political Culture of Total Optimism*, EUI WORKING PAPER, LAW 2015/10.