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*City Law School Research Paper 2019/01*

**FRAMING THE METHODOLOGY OF JUSTICE, INJUSTICE AND BREXIT**

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30 April 2019

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## 'INTRODUCTION: FRAMING THE METHODOLOGY OF JUSTICE, INJUSTICE AND BREXIT'

Forthcoming in T. Ahmed and E. Fahey (eds.) *On Brexit: Law, Justices and Injustices* (Edward Elgar, 2019) ISBN 978 1 78990 300 3; 978 1 78990 301 0 (abridged version)

Tawhida Ahmed and Elaine Fahey<sup>1</sup>

### Abstract

*This chapter explores, and attempts to make more explicit, the diversity of methodological and analytical approaches within legal studies to Brexit as to its just or unjustness. It asks what are the diversity of perspectives and methodological approaches to Brexit and what do they tell us about the intellectual robustness of our study of Brexit? The chapter makes the case that legal issues of Brexit are challenging to explore because of different approaches to justice and injustice, and seeks to be more explicit about the existence and nature of these approaches in our study of Brexit*

**Keywords:** Brexit, justice, methodology, analytical framework, citizenship, vulnerability

### Introduction

As the heated discourses surrounding the UK's EU referendum vote demonstrated, a wealth of diverse, diverging and contradictory perspectives exist around what Brexit constitutes and the putative or likely impact Brexit will have on individuals and groups. For some, the calling of a referendum itself was democratically unjust; to others the referendum epitomised the very essence of a just democratic process for both the UK and the European Union more widely. Likewise, extensive discussions and views continue to be espoused on the pouring of resources into the EU and how this hinders or furthers justice in terms of allocation and redistribution of resources. Relatedly, the justice and injustice of the sharing of these and other resources, amongst British citizens, EU citizens, and others in the UK territory, brings up questions concerning what kind of British, European and indeed global society we want, envisage and, is most just. It brings to the fore questions about the value and structure of the state, in a world which has, of recent decades, been more vividly constructed as globalist, interconnected, and as being of 'beyond the state'. Brexit provokes us to consider the consequences of global governance for justice at national and international levels, as well as vice-versa, the effects of national level ideals of justice on global governance. It might invite significant reflections on what 'new' perspectives for Europe are or might be, what 'justice' is for the EU and where it fits into the EU's manifold other crises- but this is not necessarily the same question as asking about justice and injustice and *Brexit*.<sup>2</sup>

This book and introductory chapter explores how Brexit is intertwined with ideas of justices and injustices. The EU is the epitome of a globalised world: an organisation with a huge number of members, partners and collaborators, seeking to further common goals, with pooling of resources to address shared concerns. Much attention has been traditionally paid to the question of justices or injustices of such globalisation as regards the impact that *entering into, or increasing*, such global relations has on individuals or groups (as well as legal entities). This chapter intentionally analyses the reverse: that is the question of what justice is brought about by (the UK's) *withdrawal from globalisation* (in the sense of its exit from EU membership).

This chapter thus considers in Section I the issues of Brexit and justice as a challenge of concept and methodology; Section II a challenge in terms of geographical boundaries and sovereignty; Section III a challenge in terms of the framing of the state; and Section IV a challenge of actors, subjects and objects. Each section offers questions for critical thought for both authors and readers alike, before bringing this together briefly in Section V. The last section finally offers some concluding reflections, after introducing readers to the overarching themes and authors chapters.

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<sup>2</sup> Cf J. Habermas, "New perspectives" on Europe' *Social Europe* October 2018 or G. De Burca, D. Kochenov and A. Williams (eds), *Europe's Justice Deficit* (Hart, 2015).

## I. Framing Brexit as a Conceptual and Methodological Challenge

Justice discourses have consistently pervaded the UK's participation in the EU as to whether the UK's membership of the EU provided forms of justice or injustice to UK and other citizens, or for different policy areas. The UK joined the EU in 1972. In the 1970s and 1980s, issues of injustices raised included concerns around the upholding of parliamentary sovereignty,<sup>3</sup> but also opposition to EU economic policy.<sup>4</sup> Despite the 1975 British referendum vote to remain in the EU, over the next four decades, opposition to EU membership grew and also became intertwined with the politics of a range of domestic concerns for the British public, which emerged prior to the Brexit context. Nonetheless, membership of the EU was also seen to have raised the prospects of justice for many groups in the UK, not least women, and third country (EU or non-EU) nationals. Whilst not having full control over redistribution of goods and resources across the EU, the EU did provide the UK with a strong framework of non-discrimination, thus extending the capacity of UK nationals (and those of other EU citizens) to live a 'good life' within and beyond the territorial boundaries of their country of nationality.<sup>5</sup>

Conventional perspectives on justice in a globalised world focus on the effect of globalised relations on a substantive topic and/or the effects of an increase in such relations. With particular regard to Brexit, we see a reverse perspective of questions relating to justice emerge: that is what issues of justice does withdrawal from globalisation bring about? 'As an ethical concept, justice belongs to the realm of normative judgements about right and wrong, good and bad.'<sup>6</sup> This right or wrong or good or bad is about what is owed to others. Thus, like other questions of justice, perspectives on whether Brexit is 'just' is relational in nature. One's actions are just or unjust in regard to the impact they have on others.<sup>7</sup> However, justice is a highly contested subject, comprising of different areas as well as different approaches. Thus, whether Brexit is just or unjust (produces justices or injustices) depends on one's perspective on justice. As De Witte usefully points out, the main point of difference between alternative conceptions of justice lies in their starting point—i.e. what they see as the aims of justice.<sup>8</sup>

Brexit raises ostensibly *categorised issues of justice* for natural persons, and for legal persons, as well as for different policy fields such as employment, environment, health or education. Debates on the justice or injustices of Brexit have focused on, for instance, 'who' gets what in the substantive sense of material benefits or social goods. For example, as a sub-set of the immigration debate, Brexiteers saw EU membership as unfairly providing access to British goods to foreigners who were not seen as British, or as entitled. Strong views were expressed concerning pressures on resources and services such as housing, education and welfare benefits.<sup>9</sup> The broad argument being that the UK's participation in the EU as a global governance institution led to the overflow of EU migrants into the UK, and thus negatively affected the rights of the British to access goods and services – to which they felt they had a priority over others seen as migrants or as not belonging to the UK.<sup>10</sup> These sentiments were exacerbated by the complexity of the shared EU-UK supranational governance order, whereby the state – and by extension its citizens – are by and large responsible for the funding and provision of certain goods, such as the NHS, education for under 18s, and welfare benefits. Yet, the decision to exit the EU has equally raised concerns about the loss of access to these goods for individuals who had crossed borders and set up lives in the UK, contributing taxes through employment, and embedding their family lives on UK soil.

Perspectives such as those above pertain strongly to *distributive justice*, in the sense of community relations, and structural justice in terms of the ways in which those community relations are structured. Thus the impact of Brexit on the NHS and other employment workforce is one example,<sup>11</sup> as is the question of the democratic or representative fairness of the Brexit vote vis-a-vis those whom the decision affects. This brings into play questions such as the fairness of Brexit in human rights terms, as well as structurally in terms of the potential implications of the loss of access to (or detangling from) the EU courts and the EU

<sup>3</sup> Andy Mullen and Brian Burkett, 'Spinning Europe: Pro-European Union Propaganda Campaigns in Britain 1962-1975' (2005) 76 (1) *The Political Quarterly* 100-113, 107; Robert Shepherd, 'Leadership, Public Opinion and the Referendum' (1975) 46 (1) *The Political Quarterly* 25, 28; Conservative Research Department, 'Yes to Europe, The Conservative Guide for the 1975 Referendum Campaign' 96 28-52, 55-66 <[www.cvce.eu/obj/yes\\_to\\_europe\\_the\\_conservative\\_guide\\_for\\_the\\_1975\\_referendum\\_campaign-en-639fb9e5-ca77-4653-8870-6cfd7f0782c6.html](http://www.cvce.eu/obj/yes_to_europe_the_conservative_guide_for_the_1975_referendum_campaign-en-639fb9e5-ca77-4653-8870-6cfd7f0782c6.html)> accessed 20 October 2018

<sup>4</sup> Robert Shepherd, 'Leadership, Public Opinion and the Referendum' (1975) 46 (1) *The Political Quarterly* 25, 28

<sup>5</sup> Floris De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2016)

<sup>6</sup> Klara Helene Stumpf et al, 'A Conceptual Structure of Justice: Providing a Tool to Analyse Conceptions of Justice' (2016) 19 *Ethic Theory and Moral Practice* 1187, 1189

<sup>7</sup> Distinguished by Mill from duties that are ethically desirable, but not related to specific rights of others, for example charity.

<sup>8</sup> Floris De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2016) 19

<sup>9</sup> Rowena Mason, 'Priti Patel Warns of EU Migration Threat to UK Class Sizes' (*The Guardian*, 21 June 2016)

<<https://www.theguardian.com/politics/2016/jun/21/priti-patel-warns-of-eu-migration-threat-to-uk-class-sizes>> accessed 14 October 2018; also see Stuart Gietel-Basten, 'Why Brexit? The Toxic Mix of Immigration and Austerity' (2016) 42(4) *Population and Development Review* 673-680

<sup>10</sup> See Jonathon Portes et al in UK in a Changing Europe at <http://ukandeu.ac.uk/>

<sup>11</sup> 'Brexit Likely to have Far-reaching Effects on UK Health and Health Service, Experts Suggest' (London School of Hygiene and Tropical Medicine, 29 September 2017) <<https://www.lshtm.ac.uk/newsevents/news/2018/brexit-likely-have-far-reaching-effects-uk-health-and-health-service-experts>> accessed 14 October 2018



Charter on Fundamental Rights (EUCFR).<sup>12</sup> Amos argues that ‘the real diminution in human rights protection actually lies further down the track when retained EU law is converted into domestic law’,<sup>13</sup> while others lament that ‘a severe loss of rights will be seen as a result of leaving the EU.’<sup>14</sup> The UK government has excluded the EUCFR from the ambit of the EU Withdrawal Agreement, arguing that this is no loss as the Charter merely codified existing rights. Dupre challenges this perspective, arguing that the Charter is dynamic and ‘remarkably innovative’.<sup>15</sup> Not only did the Charter establish an up to date catalogue of human rights protection covering social, political, economic and social rights, it has also reached out to meet the needs of modern society, reflected through the development of rights relating to data protection and bioethics.<sup>16</sup> As a result, the coverage of the document guarantees the potentially far-reaching protection to all people living in the EU. Besides the extensive coverage of rights, it is important to point out that the loss of the Charter will also result in the loss of a highly effective remedy of protection which has no equal in the current framework of rights protection in UK law.<sup>17</sup> This is signified by important recent caselaw<sup>18</sup>, which highlights that the Human Rights Act 1998 does not provide equivalent levels of protection as are guaranteed by the EU Charter.<sup>19</sup>

A particular concern has also been the implications of Brexit for *gender justice*. Improvements in the UK’s gender equality, especially in the labour context, have resulted to a large extent from EU gender legislation. Fears now arise as to the UK’s loyalty to this advancement once it leaves the UK, including in the areas of equal pay, pensions, part-time and maternity rights, as well as the disproportionate poverty impact on women in the midst of any economic downturn arising from the UK’s exit from the EU.<sup>20</sup>

One other example is that Brexit also provokes questions of *climate justice*. In this sense, Olawuyi talks of the loss of structural support in terms of a coordinated EU environmental framework for the UK, and the resulting fragmentation of that framework. This encourages injustices in divisions between countries and regions, eg as already exists ‘especially the North-North divide and the North-South divide’,<sup>21</sup> leading to variances in environmental justice. Further, the UK’s leaving of the EU creates concerns around energy poverty for the UK, since the EU had facilitated an integrated accessible energy market across the European region.<sup>22</sup> As a result, the UK had increased its dependency on the EU market.<sup>23</sup> Substantively, the UK can make less progress on its own than with the EU as a ‘regional watchdog’.<sup>24</sup> The EU also provides a forum for exchange of ideas and best practices.<sup>25</sup>

Both conceptually and methodologically, never has a question of international organisations law divided a society so much as this UK-EU ‘Exit’ decision. Its lamenters and opponents point to extreme benefits, seemingly diametrically opposed to its exponents and mostly out of proportion to its proponents, proclaiming freedom, sovereignty and a brighter future. The novelty of the issues surrounding exit from international organisations, whereby scholars increasingly investigate the procedural and substantive issues surrounding the uncharted and novel territories of exit indicate on a wholly practical level the

<sup>12</sup> ‘What does Brexit mean for Equality and Human Rights in the UK?’ (Equality and Human Rights Commission, 20 July 2017) <<https://www.equalityhumanrights.com/en/our-human-rights-work/what-does-brexit-mean-equality-and-human-rights-uk>> accessed on 14 October 2018

<sup>13</sup> Merris Amos, ‘Red Herring and Reductions: Human Rights and the EU (Withdrawal) Bill’ (UK Constitutional Law Association) <<https://ukconstitutionallaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/>> accessed 14 October 2018

<sup>14</sup> See Douglas-Scott in this book, Ch.6.

<sup>15</sup> Catherine Dupré, ‘Human Dignity is Inviolable. It Must be Respected and Protected: Retaining the EU Charter of Fundamental Rights After Brexit’ (2018) 2 EHRLR 101-109

<sup>16</sup> ‘Why Do We Need the Charter?’ (European Commission) <[https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter\\_en](https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en)> accessed 18 October 2018

<sup>17</sup> Joelle Grogan, ‘The Good, the Bad and the Ugly Arguments for Ditching the EU Charter of Fundamental Rights’ (London School of Economics, Law Brexit Project, 1 February 2018) <<http://blogs.lse.ac.uk/brexit/2018/02/01/the-good-the-bad-and-the-ugly-arguments-for-ditching-the-eu-charter-of-fundamental-rights/>> accessed 18 October 2018

<sup>18</sup> *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62.

<sup>19</sup> See Joelle Grogan in this book.

<sup>20</sup> For example, see: Roberta Guerrina and Annick Masselot, ‘Walking into the Footprints of EU Law: Unpacking the Gendered Consequences of Brexit’ (2018) 17(2) Social Policy and Society 319-330; Collete Fagan and Jill Rubery, ‘Advancing Gender Equality Through European Employment Policy: The Impact of the UK’s EU Membership and Risks of Brexit (2018) 17(2) Social Policy and Society 297-317; Women’s Budget Group and Fawcett Society, ‘Exploring the Economic Impact of Brexit on Women’ (March 2018) <<https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=049e3458-12b0-4d0f-b0a6-b086e860b210>> accessed 20 October

<sup>21</sup> Damilola S Olawuyi, ‘Advancing Environmental Justice in a Post-Brexit United Kingdom’ from the Brexit: The International Legal Implications Series Paper No. 13 (Feb 2018) BIICL, 4 <[https://www.cigionline.org/sites/default/files/documents/Brexit%20Paper%20no.13\\_0.pdf](https://www.cigionline.org/sites/default/files/documents/Brexit%20Paper%20no.13_0.pdf)> accessed 20 October 2018

<sup>22</sup> Directive 2009/72/EC requires removal of obstacles to cross-border interconnections and sale of electricity on equal terms within the EU: Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC OJ L211/09

<sup>23</sup> In order to maintain this and not become isolated and energy poor, it will need to comply with EU energy law.

<sup>24</sup> Damilola S Olawuyi, ‘Advancing Environmental Justice in a Post-Brexit United Kingdom’ from the Brexit: The International Legal Implications Series Paper No. 13 (Feb 2018) BIICL, 4-5 <[https://www.cigionline.org/sites/default/files/documents/Brexit%20Paper%20no.13\\_0.pdf](https://www.cigionline.org/sites/default/files/documents/Brexit%20Paper%20no.13_0.pdf)> accessed 20 October 2018

<sup>25</sup> Damilola S Olawuyi, ‘Advancing Environmental Justice in a Post-Brexit United Kingdom’ from the Brexit: The International Legal Implications Series Paper No. 13 (Feb 2018) BIICL, 5 <[https://www.cigionline.org/sites/default/files/documents/Brexit%20Paper%20no.13\\_0.pdf](https://www.cigionline.org/sites/default/files/documents/Brexit%20Paper%20no.13_0.pdf)> accessed 20 October 2018

novelty of such questions. Brexit has a range of binary frames: its vote; its negotiation sparring partners; its opposing view of divergence and convergence of EU and UK law going forward on socio-economic terms. To frame its potential impact or effects, at the time of writing, is highly problematic because largely hypothetical and mooted claims remain a constant. UK Government impact case-studies, similarly to European Parliament impact studies remain mired in debates as to their contestability, their comprehensiveness, their accuracy. To frame Brexit firstly arguably entails seeking an objective understanding of its meaning or its core.

The *multidisciplinary nature of the Brexit analysis* required arising from the tremendous legal, economic, political, socio-cultural, environmental and other related issues at stake complicates its divisive beginnings and the thorny issues thrown up by it further. One of the key features thus of understanding the methodological revolution in European Union law has been its commitment to law-in-context and to a non-doctrinal understanding of law, politics and policy. A good example of the methodological issues involved in Brexit is evidenced by the 'UK in a Changing Europe' research forum, which assembles multidisciplinary academics and a number of leave and remain supporters to its work as an independent source of research and analytical reflection on Brexit.<sup>26</sup> The complexity and intricacy of the range of issues raised is also borne out from an analysis of law firms and chambers in the UK advertising Brexit practices, invariably bringing on board a vast array of personnel and additional interdisciplinary expertise. The multi-disciplinary nature of Brexit is important to acknowledge, and is both welcome and testing at the same time. It is welcome, because questions of the implications of Brexit are not solely legal questions, but rather, as argued in this collection, much of the debate on Brexit has been (certainly implicitly, if not expressly, framed as) about questions of justice in society, which pertains to non-legal concepts, critiques and judgments. At the same time, this is testing because law and legal research must challenge itself, methodologically, to answer these questions. This raises questions of research design, extra-legal expertise and the appropriate utilisation of the research outcomes.<sup>27</sup> Doctrinal research has often been accused of 'neglect[ing] the real world consequences of doctrinal theories',<sup>28</sup> since it focuses on technicalities and exposition of existing knowledge. However, Brexit has triggered researchers to begin from a 'world' challenge as a basis for research. This book is a modest contribution to raising awareness of how legal researchers approach their topics from that world problem starting point.

Contributors are asked a series of questions on their *understanding of justice* in their chapter:

- What does justice or injustice mean in your research?
- Whose justice is affected in your case studies?
- Does the notion/your perspectives of justice in Brexit change depending on your case study?
- Is it possible to be objective in your research as to the question of the justices or injustices of Brexit?
- How do you frame issues of injustice generally? Are they procedural or substantive? Methodological? Normative?

We also asked participants the following series of questions as a means of *framing* the challenges of Brexit:

- How do 'binary' framing issues impact on your work?
- What is the single conceptual challenge of writing about Brexit for you?
- How do you engage with issues of novelty surrounding exit from an international organisation?

Furthermore, we asked participants the following series of questions as to *methodology* and Brexit:

- What methodology do you adopt as to Brexit?
- How do questions of methodology differ from conceptual framing, in your view?
- What methodological challenges does your case-study hold up?
- What is evidenced-based data in your work? What do you regard as independent or objective evidence as to Brexit? Whose perspective governs how you engage with this/outline it?
- What elements of your case-study are doctrinal?
- What challenges have you found in existing literature for your capacity to prioritise your case-study? How do you relate these to be methodological?
- Do socio-legal issues inform your own understanding of your methodology?
- How is impact and effect framed in your work?
- Is your over-arching normative point influenced by any methodological point?

<sup>26</sup> See The UK in a Changing Europe: <http://ukandeu.ac.uk/>

<sup>27</sup> See further, Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Legal Methods Matter in European Legal Scholarship', (2014) 20(3) European Law Journal 292-316 at 301ff.

<sup>28</sup> Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Legal Methods Matter in European Legal Scholarship', (2014) 20(3) European Law Journal 292-316at 293

This takes us onto broader issues of framing, beyond methodological issues.

## II. Framing Justice and Sovereignty Claims in Brexit

A broader methodological challenge is to engage with how sovereignty is a dominant feature of the Brexit debate. It stands also as one of the most non-conclusive and conflicted issues as to EU integration, and operates as a de facto and de jure framing 'shadow'.

The UK's vote on 23 June 2016 to leave the EU is a very important study in the idea of how the Nation State engages with sovereignty. It is probably also a useful examination of the significant conflict between the nation State, globalisation and the global legal order. It is a difficult 'take' on the notion of contemporary sovereignty. Britain has always famously been 'the awkward partner' of Europe in the eyes of manner.<sup>29</sup> Contemporary historians claim that Brexit is a rather more recent step in the UK's efforts to proactively influence European cooperation. Rather, most instances of its isolationism in the past were self-induced and there are multiple legacies of UK influence on economic policy, sometimes quite protectionist.<sup>30</sup> On whatever view, the UK has always had a rather muddled history in its attempts to join the European Union—vetoed by the French in 1963 and 1967 on the basis that the UK saw the (then) EEC primarily as a trading bloc and was insufficiently committed to the broader project of European integration. It is also a striking example of the contours of contemporary sovereignty and perhaps also British exceptionalism. Some suggest that it is a very unsurprising outcome when a longer-term perspective is taken on the trajectory of EU integration since 1973, which has evolved radically since then from a common market project. It moves away from the view that internationalisation and global cooperation is a *fait accompli* of contemporary times and fits in with the narrative of Trump and other sources of rising nationalism.<sup>31</sup> The preamble to the Treaty of Rome establishing the European Economic Community in 1957 resulted in the six original signatories to the Treaties declaring that they were determined to lay the foundations for an ever-closer union among the peoples of Europe. By the time a vote had been put to the peoples of the UK in June 2016, a diversity of 'concessions' negotiated by the UK with the EU to roll back the full weight of the free movement of persons, in particular, did not achieve popular or political agreement.<sup>32</sup> Brexit was the culmination of over forty years of difficult membership of the EU for the UK, which has long been regarded as a laggard, outlier or troublesome member, with constantly wavering public support for its internal market and reasonably consistent opposition to political and economic integration of other sorts.<sup>33</sup> The underlying contestation of sovereignty has been constant and ongoing in the evolution of the relationship and has never abated, however constructed.

Brexit has a highly complex history involving the British relationship with Europe over several decades, constantly marked by exceptionalism, opt outs, or referenda. 'Punch drunk' on sovereignty is how some have depicted Brexiteers, suggesting the intoxication of sovereignty as an idea and a fantasy in a globalised world where transnational cooperation is self-evidently necessary for a large amount of trade and services. Some even argue that leaving the EU is one of the most protectionist acts in the UK's history, where it seeks not to be part of either a customs union or a single market of half a billion consumers.<sup>34</sup> The mantra of 'take back control' was a core slogan of the Brexit 'Leave' campaign. The decision to leave

<sup>29</sup> Stephen George, *An Awkward Partner: Britain in the European Community* (3<sup>rd</sup> edn, OUP 1998)

<sup>30</sup> Laurent Warzoulet 'Britain at the Centre of European Cooperation (1948-2016)' (2018) 56 *JCMS* 955

<sup>31</sup> Christophe Hillion, 'Leaving the European Union, the Union Way: A Legal Analysis of Article 50 TEU' (2016) 8 *epa* SIEPS 1; Christophe Hillion, 'Accession and Withdrawal in the Law of the European Union' in Anthony Arnall and Damian Chalmers (eds), *Oxford Handbook of European Union Law* (OUP 2015); Christophe Hillion, 'Accession and Withdrawal in the Law of the European Union' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* (CUP forthcoming); Heather Hofmeister, 'Should I Stay or Should I Go? – A Critical Analysis of the Right to Withdraw from the EU' (2010) 16 *EurLJ* 589; Paul Craig, 'Brexit: A Drama in Six Acts' (11 July 2016) *ELRev* (August 2016) *Oxford Legal Studies Research Paper No. 45/2016* <<http://ssrn.com/abstract=2807975>> accessed 20 October 2018

<sup>32</sup> European Council, A New Settlement for the United Kingdom within the European Union [2016] OJ C691/16 1–16 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2016.069.01.0001.01.ENG&toc=OJ:C:2016:069:TOC>> accessed 20 October 2018>; Joint statement by the EU leaders and the Netherlands Presidency on the outcome of the UK referendum on 24 June 2016 <<https://www.consilium.europa.eu/en/press/press-releases/2016/06/24/joint-statement-uk-referendum/pdf>> accessed 20 October 2018; Informal meeting of the European Council 29 June 2016, Statement <<https://www.consilium.europa.eu/media/20462/sn00060-en16.pdf>> accessed 20 October 2018; Council Decision (EU) 2016/1316 of 26 July 2016 amending Decision 2009/908/EU, laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council OJ L208/42; Paul Craig, 'Brexit: A Drama in Six Acts' (11 July 2016) *ELRev* August 2016 *Oxford Legal Studies Research Paper No. 45/2016* <<http://ssrn.com/abstract=2807975>> accessed 20 October 2018

<sup>33</sup> Allen Neely, 'British Resistance to European Integration: An Historical and Legal Analysis with an Examination of the UK's Recent Entry into the EMS' (1991) 10 *Penn State Intl L Rev* 113; Patrick Le Galès, 'UK as an Exception or the Banal Avant Garde of the Disintegration of the EU' (2016) 87 *Socio-Economic Review* 42; Helen Wallace, 'Possible Futures for the European Union: A British Reintegration' Harvard Jean Monnet Working Paper No. 7/00 Symposium: Responses to Josckha Fisher <<https://jeanmonnetprogram.org/archive/papers/00/00f0701.rtf>> accessed 20 October 2018; Catherine Barnard, 'The Opt-Out for the UK and Poland from the Charter of Fundamental Rights: Triumph over Rhetoric' in Stefan Griller and Jaques Ziller (eds) *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty* (Springer 2008)

<sup>34</sup> Damian Chalmers, 'LSE Law Brexit Special #4: Trade after Brexit' (2017) *LSE Law Policy Briefing Paper No. 23* <<https://ssrn.com/abstract=2941354>> accessed 20 October 2018



the customs union and single market is taken with the intent of being free to negotiate trade deals with all of the world.

The alleged incompatibility of the freedom of movement of persons with the dissatisfied post-industrial northern economic blight might be one explanation of the Brexit vote. The perceived incompatibility of migration with British 'sovereignty' arising from overwhelmed public services unable to cope with influxes of foreigners or the alleged undercutting of British jobs by foreign workers is another. A large number of the substantive justice versus injustice concerns outlined in the methodology section above pertain to this. A further might be the intoxicating cry of 'taking back control' in response to the perceived restraint of European laws upon the sovereignty of the Member State(s), but again, this is only an incomplete explanation of Brexit. The geographical explanation of North versus South, young versus old, rich versus poor, urbanite versus the rest, form again further inadequate and divisionist views on Brexit, but above all entails highly only one consistent factor- that the social changes setting the stage for Britain's historical vote took place some time ago.<sup>35</sup>

A large amount of uncertainty on all sides was evident as to the precise benefits and disadvantages of leaving from an economic perspective. These multiple uncertainties have rolled over into the negotiations as the costs of the so-called 'divorce' bill. The sovereignty 'claim' of Brexit is one of the most vibrant case-studies in contemporary times in the global legal order and thus worthy of considerable study and reflection. Unfortunately, however, it is likely to be a claim which may easily fall short of the desired outcome for those seeking back 'control'. Above all, there was no political or bureaucratic planning for a Leave vote and as a result there has been a scramble to amass the detail, procedure and planning needed to execute the perceived outcome of the vote.

We asked participants the following series of questions in this regard:

- How do we understand sovereignty in the contemporary global legal order?
- What is control and sovereignty in the contemporary global legal order?
- How should we understand British exceptionalism in Europe and its sovereignty claims?

### III. Framing the (Rational) State: on Brexit

As already alluded to, as an act of leaving an international organisation which had strong free movement of persons requirements, Brexit brings forth questions of what kind of justice is owed to those outside of our state boundaries, and in particular, when persons who have had rights to enter these state boundaries find themselves subsequently unwelcome. The discussion about justice has often been limited to a specific territory, i.e. a nation.<sup>36</sup> Just as with the question of justice within a nation-state, the question of what justice means outside of the nation state, and thus whether justice should be blind to the boundaries of the nation state (cosmopolitanism) or should be confined to those geographical territories (statism) is not universal.<sup>37</sup> Justice issues in globalisation are linked to concerns about 'people at a distance, transcending national borders'.<sup>38</sup> Justice debates in global governance are also linked to participation in structures outside of the state system. As Young explains, links to people at a distance occur through social processes, and institutions are a response to these obligations, rather than their basis.<sup>39</sup> Systems and fora of international relations, international law, and international organisations, limit the ability of states to act entirely autonomously. Such systems of global governance have been argued to promote justice, but equally have been argued to erode justice, or to cause injustices. The UK's membership of the EU – ie its participation in global governance - entailed a European cosmopolitanism, which took the UK out of its nationalist comfort zone.

One of the most elementary features of Brexit has been to map out a new pathway for a State to reclaim its sovereignty having become enmeshed in a supranational legal entity. It poses many questions as to 'rational State' behaviour in the international legal order and also in particular issues of compliance with

<sup>35</sup> Brendan O' Neill, 'Brexit Voters Are Not Thick, Not Racist, Just Poor' (The Spectator, 2 July 2016) <<https://www.spectator.co.uk/2016/07/brexit-voters-are-not-thick-not-racist-just-poor/#>> accessed 20 October 2018; Matthew Goodwin, 'The 2016 Referendum, Brexit and the Left Behind: An Aggregate-Level Analysis of the Result' (2016) *The Political Quarterly* 1; Robert Ford and Matthew Goodwin, 'A Nation Divided' (2017) 28(1) *J of Democracy* 17

<sup>36</sup> Goran Collste, 'Globalisation and Global Justice' (2005) 59(1) *Studia Theologica* 55-72, 55

<sup>37</sup> Laura Valentini, *Justice in a Globalized World: A Normative Framework* (OUP 2011)

<sup>38</sup> Goran Collste, 'Globalisation and Global Justice' (2005) 59(1) *Studia Theologica* 55-72, 55

<sup>39</sup> "All agents who contribute by their actions to the structural processes that produce injustice have responsibilities to work to remedy these injustice" from Iris Marion Young, 'Responsibility and Global Justice: A Social Connection Model' (2006) *Social Philosophy and Policy* 102-130, 102. See further, "we have obligations to those who condition and enable our own actions, as they do to us" (at 106).

that order.<sup>40</sup> Others demonstrate how treaty withdrawal has entered a new constitutional matrix.<sup>41</sup> This confidence now appears increasingly fallacious. Instead, the era of exit from international organisation is exemplified by the Trump Administration; UK, EU and ECHR planned exits; and exits by African countries from the International Criminal Court, and marks an important shift in considering the behaviour of States at a global level.<sup>42</sup> In this new era, the idea of the rational State actor is a much more complex and nuanced construct. It entails that a range of lens and perspectives may readily be adopted as to what Brexit is and *how* it may be devised.

Scholars of joint EU and Public international law have advocated notably to engage more with the constructivist challenge of Brexit, as a disruptive shift in EU-State dynamics that can only be managed through a radical rethink of its multi-level components, in trying to fight out. For example, Weiler has sought to argue vociferously for a kinder and gentler Brexit.<sup>43</sup> Alternatively, Streinz has argued for the inverse application of sincere cooperation to attempt more actively to accord the UK greater competences to facilitate its desire to negotiate trade deals.<sup>44</sup> The range of nuanced opinions as to how to depict the rationality of the UK in its Statist aspirations is of much significance here for our methodological lens. It demonstrates principally that the constructivist challenge of understanding the 'rational state' in contemporary times is more of an art than a science and that the subjects and objects of EU action shift greatly depending upon voice, time etc. Any challenge to the precepts of rational behaviour perhaps all too quickly presupposes its irrationality and its *exceptional* casual implications. As Francis argues exit from international organisations has entered a new legal and political era recently its coming of age.<sup>45</sup> It is a context of shortcomings, weaknesses, purely hypothesised observations and difficult causal constructions. It is not a context that facilitates easy analysis thereof and has distinctive legal and political analytical strands.<sup>46</sup>

These challenges have manifold consequences for analysis at micro level. Specifically, how to unpack the methodological questions of justice and injustice as to Brexit? This alone at macro level is a feat, yet alone micro level.

We thus asked contributors the following questions:

- How do you view the rational State?
- What is behavioural in your analysis?
- How do you engage with international organisations in your work?

Beyond sovereignty claims, we seek to reflect upon the conceptual notion of *actorness* in Brexit. Aspects of the political campaign to leave the EU may be said to be highly aligned with specific actors, who have set in motion a series of debates triggering the questions and issues arising for discussion here. It is thus from a scientific perspective use to seek to isolate the concept of actors here.

#### IV. Framing the Actors of Brexit

Actors arguably play a significant role in the question of whether Brexit is just or unjust. Thus, there is the question of withdrawal from the EU, and with which actor lies the prerogative to conduct this act.<sup>47</sup> The *Miller* case recognised that the rights created by EU law meant that Parliament and not the Executive had to authorise withdrawal from the EU. This recognition was premised on the idea of justice for the individuals who currently rely on EU law rights, many of whose democratic voice is exercised through Parliament. In addition, concerns are raised around whether the withdrawal agreement would be an international agreement and therefore it and the rights therein subject to potential repeal, unless they are entrenched into UK law.<sup>48</sup> Would individuals secure their rights in the withdrawal agreement before an international tribunal, having exhausted domestic remedies? There is also the question of what rights would remain for individuals, and how they would be protected.<sup>49</sup> As for the rights, the loss of EU rights would certainly deprive categories of EU citizens in the UK and UK citizens across other EU member states of their EU

<sup>40</sup> Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2<sup>nd</sup> edn, Columbia University Press 1979) 47 cited in Jeffrey Dunoff and Mark Pollack, 'Experimenting with International Law' (2017) 28 EJIL 1317

<sup>41</sup> P-H Verdier and M. Versteeg, Mila, 'Separation of Powers, Treaty-Making, and Treaty Withdrawal: A Global Survey' in C. A. Bradley (ed) Oxford Handbook of Comparative Foreign Relations Law 2019, Forthcoming).

<sup>42</sup> Daniel Francis, 'Exit Legitimacy' (2017) 50 Vand. J. Transnat'l L 297

<sup>43</sup> Joseph HH Weiler, 'Editorial: The Case for a Kinder, Gentler Brexit' (2017) 15(1) Intl J of Constitutional L 1

<sup>44</sup> Thomas Streinz, 'Cooperative Brexit: Giving Back Control over Trade Policy (2017) 15(2) Intl J of Constitutional L 271-290

<sup>45</sup> Daniel Francis, 'Exit Legitimacy' (2017) 50 Vand. J. Transnat'l L 297; Laurence R. Helfer et al, 'Treaty Exit at the Interface of Domestic and International Law' (2017) 111 AJIL 425

<sup>46</sup> Andrew Gamble, 'Taking Back Control: The Political Implications of Brexit' (2018) 25(8) J of Eur Public Policy, 1215

<sup>47</sup> For various discussions, see Catherine Barnard, 'Law and Brexit' (2017) 33 1 Oxford Review of Economic Policy 4-11

<sup>48</sup> Which would be difficult because of UK constitutional law, P. Daly, K. Hughes and K. Armstrong, 'Brexit and EU Nationals: Options for Implementation in UK Law' CEPS/CPL Working Paper Nov 2017 1-14

<sup>49</sup> Paul Daly, Kirsty Hughes and Kenneth Armstrong, 'Brexit and EU Nationals: Options for Implementation in UK Law' CEPS/CPL Working Paper (Nov 2017) 1-14

law rights. Contrarily, EU nationals that have resided in the UK for decades, are married to British citizens and have children that are UK nationals received letters from the Home Office stating that they ought to make plans to leave. Additionally, those officially recognised as permanent residents are likely to suffer even more bureaucracy and uncertainty following the need to register in some form under a new system.<sup>50</sup> Particular concerns surround the separation of families, and also for the increase and unfairness of deportation orders.<sup>51</sup> Brexit has already led to premature departures of EU citizens from the UK.<sup>52</sup>

The framing tool of the subjects and objects of EU law may usefully be deployed in these questions to consider the conceptual challenges of Brexit and its construct.<sup>53</sup> It is a procedure with unique subjects, internal to the UK, both EU and UK citizens alike. For example, its subjects may also be said to be the EU and UK itself. UK citizens in the EU may be said to form a cohort as the objects of EU law. Third country national family members and dependents etc of EU nationals in the UK also form another cohort arguably the objects of Brexit. Businesses in UK and EU affected by Brexit may fall into a range of categories, which will increasingly proliferate. Reflecting upon the subjects and objectives of Brexit may lead us to deduce a wider and more complex overlapping set of entities with interests and stakes in Brexit. It is but one example of a framing device which seeks to capture the increasingly broad subjects and objects of EU law. What may be said to be striking about existing scholarship on Brexit which outlines injustice is that it is overwhelmingly citizen-centric literature, which focuses upon the individual, the citizen, and their lost rights.

Part of the challenge methodologically of framing, taming, or naming Brexit as an intellectual process is that it has multiple subjects and objects. The UK itself will in theory transform from a subject of the Treaties qua Member state into an object of EU law. However, its likely convergence with EU rules in the future, along with its containment of the EU *acquis* in its domestic laws, will entail that its separation from the EU will be far from perfect or complete and is likely to amply display strong streaks of subject and object in its future relationship. Straightforwardly, the likely overlap of its place as a former Member State will be complex and reflect its tangled history. A 'State-centric' view of Brexit is, however, only one perspective; the place of the individual arguably constitutes a different view thereof. A key innovation of EU constitutional law with respect to public international law has been its radical attachment to realising rights for citizens as the subjects of EU law, thereby making a sharp break from public international law. EU citizens in the UK will become a distinctive and different set of subjects of a Withdrawal Agreement, with nuances in terms of temporal rights, their adjudication, enforcement and their shifting statuses over time. It remains to be seen what statuses UK citizens in the EU will be able to retain. UK and EU Businesses, traders, companies, corporations etc also constitute a distinctive demographic or constituency who will also experience shifts in status depending upon the nature of the agreement reached and the alignment of the UK to EU rules.

We proposed the following set of questions to contributors:

- Who is the subject of your work in terms of actors? The object?
- Who do you understand to be the actors who are the central subject and object of Brexit? How does the delineation of actors assist you or hinder your work?
- Are there overlapping subjects and objects in your work? What causes this overlap? How can you reflect more explicitly upon this overlap?

## V The challenges of research into Brexit: concluding thoughts

The above sections have sought to identify some of the challenges to our (legal) analytical and methodical understanding of the justices and injustices of Brexit. They have made the case that legal issues of Brexit are challenging to explore because of these different approaches, and seek to be more explicit about the existence and nature of these approaches in our study of Brexit. Conceptually, Brexit analysis will lead to an array of conclusions about its justices or injustices because the concept of justice itself is subject to a range of interpretations and starting points. Brexit also entails significant elements of mystery and unpredictability, given that, unlike the general trend of EU studies to date which have concerned our understanding of the creation and strengthening of participation in international organisations, we are exploring the novel perspective of withdrawal from an international organisation. Methodologically, Brexit analysis is testing, because to understand Brexit from the perspective of justice, will often require approaches beyond a traditional doctrinal one, and require legal researchers to embrace more

<sup>50</sup> House of Commons Exiting the EU Committee, 'The Government's Negotiating Objectives: the Rights of UK and EU Citizens' (para. 98) in Kirsty Hughes, 'Brexit and the Right to Remain of EU Nationals' (Nov 2017) (Brexit Special Extra Issue) Public Law 94-116

<sup>51</sup> See further, Adrienne Yong in this collection.

<sup>52</sup> Kirsty Hughes, 'Brexit and the Right to Remain of EU Nationals' (Nov 2017) (Brexit Special Extra Issue) Public Law 94-116

<sup>53</sup> Samo Bardutzky and Elaine Fahey (eds), *Framing the Subjects and Objects of Contemporary EU Law* (Edward Elgar 2017), Introduction

complicated multidisciplinary research methods.

As an act of withdrawal from an international organisation, Brexit provokes further critique of the importance of national sovereignty in the twenty first century. Whilst we have seen, in recent years, a proliferation in participation in international organisations and exit therefrom or defunding thereof (e.g. from the International Criminal Court to the World Trade Organisation), Brexit is a stark reminder, that this trend cannot and must not be taken for granted but is also taking place in parallel with many other populist movements against international organisations. Brexit thus requires us to take even more seriously the need to critique the means through which actors in national and international contexts can achieve their common goals, whilst facing ongoing hostility from the very partners purporting to be part of the common group. Likewise, debates on Brexit remind us that, in assessing justices and injustices, the state is not only – or predominantly – seen through the lens of the geographical nation, but that a fuller critique cannot ignore the transnational dimensions to the state. Finally, our understanding of the challenges of Brexit must also consider – and are influenced by – our perspectives on the relevant actors, be they subjects or objects, or perpetrators or victims.

Sections I-IV have explored a few – by no means – exhaustive – ways in which Brexit is intertwined with ideas of justices and injustices. The remainder of the book consists of more detailed exploration of some of the sub-topics of the Brexit debate. They cover issues from trade to human rights, from labour to health, from national sovereignty and geographical territory, to our understanding of the national and supranational in today's globalised world. We turn now to an introduction to each of the remaining substantive chapters of the book.

### **Organisation of the book project**

The book is organised into three distinct sections, correlating to the four thematic strands outlined here which the contributing authors have been asked to address throughout their contributions where feasible. Overall, *Section I* considers aspects of Governance and Brexit and draws upon the broadest thematic strands and widest notions of justice and its public administration. Section I includes a diversity of perspectives on theoretical aspects of justice and injustice and the relationship between the analytical and methodological. *Section II* analyses Citizens and Vulnerable persons rights and Brexit and sets out a range of casestudies which reflect upon practical issues and implications for individuals. The Section sets out many casestudies pertaining to the diverse subjects and objects of Brexit, all of which engage explicitly with the thematic strand, whilst *Section III* assesses Globalisation and Brexit, and engages in holistic assessments of contemporary global trade, political theory and globalisation with respect to Brexit. There, contributors assess in general terms the geopolitical understandings of Brexit with respect to justice, taking a large-screen lens at the nature of Statehood in the global legal order and the action of exit from a supranational organisation.

An outline of chapters per section follows next.

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### **Conclusions**

As the heated discourses surrounding the UK's EU referendum vote demonstrated, a wealth of diverse, diverging and contradictory perspectives exist around what Brexit constitutes and the putative or likely impact Brexit will have on individuals and groups, most of which may not be fully measurable for a very long time. Analyses of Brexit in legal studies brings up questions surrounding both substantive claims regarding the justices and injustices of Brexit, as well as about the robustness of our methodological approach to this contemporary and highly complex and divisive process.

The novelty of issues surrounding exit from international organisations indicate on a wholly practical level the novelty of framing rational state behaviour in a broader context. Brexit has a range of binary frames: its vote; its negotiation sparring partners; its opposing view of divergence and convergence of EU and UK law going forward on socio-economic terms which necessitate wider lenses. To frame Brexit arguably entails seeking an objective understanding of its meaning or its core. We argue that methodologies of justice provide a 'thick' substantive core for this exercise.

Brexit provokes us to consider the consequences of global governance for justice at national and international levels, as well as vice-versa, the effects of national level ideals of justice on global governance and this project thus attempts to engage at many levels with frames and paradigms, as to the State in the contemporary legal order, globalisation and sovereignty, amongst other themes.



This project thus seeks overall to make more explicit the methodological and analytical tools used in legal studies on Brexit, and thus to shed light on the strengths of our critiques on who and what Brexit is a just option for. The book project has methodology central to its core. It thus renders the project less time-bound and more inter-disciplinary and multi-disciplinary thereby enabling deeper engagements with others, within the UK and well beyond.

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