

## **‘The Legal Profession’s Responsibility for Brexit’**

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### **Abstract**

**This paper argues that Brexit is a collective failure of the legal profession. The existing legal narrative of the European Union implies that power relationships reflect the division of institutional and sovereign competences. This misrepresentation was passed onto the general public who framed their personal frustration in this conventional narrative and demanded “taking back control”. The vote for Brexit resulted from a combination of four key features of this narrative - the ethos of interdependence, the promise of inclusion of the other, the claim of people’s political incapacity and the policymaking in terms of the extent of national sovereignty. This framework does not offer an explanation of the United Kingdom’s true position in the Union and in the world as well as gives false hope to those belittled and excluded. This chapter suggest an alternative account of the Union and calls for a new research agenda needed for the future of Europe – inquiring into the role of lawyers in the deconstruction of the European Union.**

**Key words: Brexit; Constitutionalism, Taking Back Control, The Legal Profession, Power, Sovereignty, Political Capacity, Deconstruction of the European Union**

### **Introduction**

The United Kingdom electorate’s decision in the 2016 referendum to leave the European Union sent shockwaves around Europe and the world. The difficult negotiations and the inability to secure a withdrawal agreement for an orderly Brexit showed that the UK’s decision to leave the Union was not thought through. The potential repercussions of the UK leaving the Union were not well analysed and it soon became clear that its position in the European legal structure was not well-understood.

This chapter argues that the legal profession plays a vital role in the general public’s understanding of the European Union. It further argues that lawyers bestow on the politicians and on the society at large a particular language and structure of thought and that the existing constitutional discourse of the EU eventually led to Brexit. Moreover, this contribution argues that lawyers have an ethical duty to analyse the distributional consequences of legal change and to offer analytical clarity about the state of law and society. This chapter explains how the

legal profession collectively failed in discharging this ethical duty in the process of Brexit and how it importantly contributed to it. Finally, it calls for a new research agenda – studying the role of lawyers in the deconstruction of the Union.

Part I explains the fundamental role of lawyers in the construction of the European Union and calls for the new research agenda - to study the role of lawyers in its deconstruction. Part II describes the Brexit referendum on EU membership. Part III argues that lawyers have a specific ethical duty to explain the distributional consequences of legal change, as well as to offer analytical clarity about the state of law and society. Part IV explains how the existing narrative of the construction of the European Union effectively led to the outcome of the Brexit vote and how an erroneous portrayal of the European Union failed the population of the United Kingdom and Europeans in general.

## **I. The Role of Lawyers in the Construction of Europe and their Role in its Deconstruction – The Need for a New Research Agenda**

Law has entered a period of unprecedented growth in a number of dimensions worldwide. The current amount of litigation, the number of lawyers, the density of legislation and regulation, expenditures on law, and its presence in public consciousness is unparalleled.<sup>1</sup> Marc Galanter has referred to this growth of law and lawyers as “legalization” of the global society.<sup>2</sup>

The same has been true in the context of the European Union. Due to our particular analytical toolbox, lawyers have a unique insight into the operation of society. We crucially shape the construction of Europe in multifaceted settings, far beyond the litigation arena. This omnipresence of lawyers at any point or pole of EU polity puts us in a privileged and sometimes monopolistic position when it comes to defining the cross-sector principles of unity of this fragmented and multilevel ensemble of the European Union.<sup>3</sup> We rely on our symbolic resources of words and concepts which help us gradually conquer an increasingly autonomous space in state and society and, thereby, rationalize the state in our own image.<sup>4</sup>

According to Antoine Vauchez, the European polity is deprived of a State that would organize in a stable and perennial way the mediation between social interests. Thus, lawyers tend to occupy a “structural hole”, bridging and mediating otherwise conflicting institutions and groups.<sup>5</sup> Moreover, the ideology of lawyers and our perception of harm, crucially impacts the construction of Europe and the distribution of spiritual and material values in the Union.<sup>6</sup>

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<sup>1</sup> Marc Galanter, ‘More Lawyers than People: The Global Multiplication of Legal Professionals’ [2011]; Scott L. Cummings, ‘The Paradox of Professionalism: Lawyers and the Possibility of Justice’ (2011) Univ. of Wisconsin Legal Studies Research Paper Archival Collection, 68.

<sup>2</sup> Ibid.

<sup>3</sup> Antoine Vauchez, ‘The force of a weak field: law and lawyers in the government of the European Union (for a renewed research agenda)’ [2008] 2 IPS 128, 140.

<sup>4</sup> Pierre Bourdieu, ‘The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law’ 438 (2012) Sur l’Etat: cours au Collège de France. Paris: Seuil 521.

<sup>5</sup> Vauchez (n.3).

<sup>6</sup> For the role of consciousness in the construction of the EU see Damjan Kukovec, ‘Law and the Periphery’ (2015) 21(3) EJM 406.

Law should be understood as a discourse of power.<sup>7</sup> The relative autonomy that law enjoys in the exercise of this power is the product of the specific historical conditions that made autonomy possible in terms of the production and reproduction of a distinct corpus juris.<sup>8</sup> But with power comes responsibility. The European Union is faced with several crises such as the immigration crisis, the euro crisis, the populist crisis and generally, the crisis of trust in the EU's institutions. To what extent does the legal profession contribute to these crises? What was the legal profession's responsibility to explain to the population the consequences of the Brexit vote? The research has so far focused on the construction of the European Union by the legal profession. The time has come to turn to the research of the role of lawyers in its deconstruction.

The European legal profession could be compared to a set of churchgoers who believe in its mission and proselytize the population with its beliefs. Yet, several dangers of disconnectedness between the population and the lawyers and consequently with other elites, arise. The legal profession too often unequivocally relies on its own disciplinary assumptions leading to its belief that the main social problem is the lack of enforcement of existing legal concepts and tools. We too often adhere to the proven recipes on the definition and the role of law in our societies.<sup>9</sup> Lawyers do invite in other professions – economics, sociology and others - to help us find new ways to effectively grasp the ills of society. Too often, however, our own assumptions remain unchallenged in such multidisciplinary endeavours. This can contribute to various social ills, including Brexit.

## II. The UK Brexit Referendum

The United Kingdom is an example of a representative democracy, which means that the Parliament decides on behalf of the people. Thus, referenda were historically not a part of decision-making in the United Kingdom. Yet, when deciding the country's membership of the EU, a referendum has been the procedure of preference in the UK. In fact, the first ever UK nation-wide referendum in the country's history was held on 5 June 1975, when the UK voted in a referendum on the membership of the then - European Economic Community. Forty-one years later, in June 2016, a referendum was held on whether the UK should remain in or leave the European Union.

The overall result was a surprise, even to the Leave campaigners.<sup>10</sup> It should not come as a surprise, however, that the vote of the UK to leave the Union was strongest in communities which were economically more disadvantaged than average, with below average education levels - generally in a class of those left behind. Older, working-class, white voters, citizens

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<sup>7</sup> Yves Dezalay and Mikael Rask Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' (2012) 8(1) ANNU REV LAW SOC SCI 433, pp. 814–15)

<sup>8</sup> Bourdieu (n.4).

<sup>9</sup> Damjan Kukovec, 'Hierarchies as Law' [2014] CJEL 131.

<sup>10</sup> See eg. Gaby Hinsliff, 'A pyrrhic victory? Boris Johnson wakes up to the costs of Brexit' (*The Guardian*, 24 June 2016) <<https://www.theguardian.com/politics/2016/jun/24/a-pyrrhic-victory-boris-johnson-wakes-up-to-the-costs-of-brexit>> accessed 13 February 2019.

with few qualifications, those who were ill-equipped to prosper in a modern economy voted disproportionately for Brexit,<sup>11</sup> notably those in the periphery of England and Wales.<sup>12</sup>

In times of discontent and especially if voters have little experience with referendums, voters may be more likely to “vote with the boot.”<sup>13</sup> Referendums enable those who are unrepresented to be given a voice and to cast a voice against the elites.<sup>14</sup> Those who felt excluded from the mainstream of UK economic and social development used the referendum not just to express their view about the UK’s membership of the EU, but to express their concern and disagreement with the daily state of their lives.<sup>15</sup>

Studies have shown that attitudes to the European Union cannot be explained by a highly inertial variable like national identity and the fear of its loss. The result will be more dependent on immediate political issues, policy concerns and elite cues than on deeply rooted historical identities.<sup>16</sup> Risk assessments, cost-benefit calculations and emotional reactions to EU membership were all fundamental factors in the referendum result.<sup>17</sup> Thus, referendum campaigns matter. The more information the electorate has, the more important the generic attitudes are for the final vote and the more important issue-specific considerations are.<sup>18</sup>

As several observers noted, the Remain campaign was a disaster.<sup>19</sup> There was a barrage of warnings about the economic risks of Brexit. With few exceptions, notably those from the “economists for Brexit” group, economic analyses were unanimous on the conclusion that the United Kingdom would be worse off under any plausible form of Brexit. The Remain campaign was relentlessly dire in its economic prognostication, but these warnings were not embraced by the people. A series of gloomy, worst-case scenario economic forecasts for the UK post-Brexit by the Remain campaign were branded and effectively retorted by the Leave campaign as “Project Fear”. This conclusion was not difficult, given the lack of an analytical framework which would offer an explanation of the UK’s true position in the Union and effectively support the economic warnings.

### III. The Social Role of Lawyers

Why should lawyers have played any role in the process of Brexit and specifically within the Brexit referendum? For every legal matter, when for instance faced with a divorce or when filing for bankruptcy, when faced with a criminal charge or when drafting a contract, laymen need experienced and specialized lawyers. Laymen (including non-specialized

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<sup>11</sup> Matthew J. Goodwin and Oliver Heath, *The 2016 Referendum, Brexit and the Left Behind: An Aggregate-level Analysis of the Result*, *The Political Quarterly*, Vol. 87, No 3, July-September 2016. 323-332, at 325.

<sup>12</sup> *Ibid.* The strongest support for Brexit was in the West Midlands, The North-East, Yorkshire and the Humber and Eastern England (all above 56%), in usually Eurosceptic and immigrant-averse parts of England.

<sup>13</sup> Kristof Jacobs, ‘Referendum in Times of Discontent; The Dutch 2016 Referendum in a comparative perspective’ (2018) 53 *Acta Politica* 489.

<sup>14</sup> *Ibid.* at 127.

<sup>15</sup> Goodwin and Heath (n.11) 331.

<sup>16</sup> Harold Clarke, Matthew Goodwin and Paul Whiteley, ‘Why Britain Voted for Brexit: An Individual-Level Analysis of the 2016 Referendum Vote’ [2017] 70(3) *Parliamentary Affairs* 439–464.

<sup>17</sup> *Ibid.*

<sup>18</sup> Andreas Goldberg and Claes de Vreese, ‘The dynamics of EU attitudes and their effects on voting’ [2018] 53(4) *Acta Politica* 542–568.

<sup>19</sup> <https://www.theguardian.com/politics/2016/jul/05/how-remain-failed-inside-story-doomed-campaign> accessed 13 February 2019.

lawyers) do not know what they do not know and legal assistance is fundamental in countless social settings. Small changes in wording can have profound consequences, a wrong form can lead to unenforceability of a contract or bar a potential claimant from litigation. A wrong statement could lead to a guilty verdict for an innocent person.

An old Latin principle originating from Roman law and still applicable today, states “Ignorantia Iuris Nocet” – not knowing the law is harmful. This means that a person who is unaware of a law may not escape liability for violating that law merely because one was unaware of its content. Likewise, the ignorance of the operation of the legal system, by the legal profession and the society at large, presents similar risks.

In the complex and highly legalized world, lawyers’ task is to assist the population. Formal equality is the very basic premise of the global liberal order and each person should receive proper legal advice. Moreover, lawyers are supposed to protect the weakest, stand up for them and provide analytical clarity about their legal position in society.<sup>20</sup> The legal profession should provide this assistance also when fundamental issues, such as the future of a country in one of the most complex legal structures of the world, the European Union, are discussed.

What role should the legal profession thus play in the process of Brexit? Heineman, Lee and Wilkins present the fundamental roles of lawyers as expert technicians, wise counsellors and effective leaders.<sup>21</sup> Lawyers as technical experts give their clients and others access to the complex machinery of the law. Lawyers acting as “wise counsellors” help their clients understand not only what is legal, but also what is right. Lawyers as “effective leaders” should be decision-makers on important matters which involve complex considerations beyond the law.<sup>22</sup>

While playing these roles, lawyers have responsibilities to their clients, to the legal system as well as responsibilities to society at large. While Heineman, Lee and Wilkins focus on corporate legal departments, large law firms and leading law schools, the ethical framework they propose has resonance in the many other important settings of legal work, including in the framework of larger social developments such as the referendum on the future of the nation.<sup>23</sup>

This chapter builds on their framework in the context of the process of Brexit. Lawyers as technical experts would have had to clarify already at the time of the referendum campaign that several forms of Brexit would lead to a violation of the Good Friday Agreement, which brought peace to Northern Ireland in 1989. Some lawyers, acting as technical experts or wise counsellors warned of the legal downsides of Brexit. Dimitry Kochenov, for instance, argued that while UK citizenship has been one of the top-quality nationalities in the world, it will drop

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<sup>20</sup> The Law and Society movement was particularly important in this respect. See Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974)

<sup>21</sup> Ben W. Heineman Jr., William F. Lee and David B. Wilkins, ‘Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century’ [2014] *HLJ* 5  
<<https://clp.law.harvard.edu/assets/Professionalism>> accessed 13 February 2019.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid* at 5.

quite radically in quality after Brexit as a result of the loss of free movement rights in 27 Member States.<sup>24</sup>

Yet, a more concerted collective effective intellectual leadership of the legal profession was lacking. One plausible reason for this lack is that the traditional concepts of the legal profession's uniqueness are narrow and outdated and, as a result, its ethical imperatives are weakened.<sup>25</sup> This leads Heineman, Lee and Wilkins to expand the range of modes of thinking we want in our lawyers so that they can be outstanding technical experts, wise counsellors and effective leaders. They offer an exemplary, non-exhaustive, list of the competencies and modes of thinking, which are central to the roles of expert, counsellor and leader, rooted in the progressive and realist movement in the first half of the 20<sup>th</sup> century.<sup>26</sup>

This chapter adds to their list that ethical lawyering also means explaining the distributional consequences of smaller or larger scale legal change and also entails offering analytical clarity about the state of law and society. Most lawyers see their duties owed to their clients or to the courts and acting in the public interest while doing so. Limiting the legal profession's responsibility to their immediate interlocutors, however, undermines legal profession's social responsibility.

Legal profession's social responsibility goes beyond the regulators' current formal requirements.<sup>27</sup> As former Harvard Law School Dean Minow noted, more than in any time of recently memory, lawyers need to lead in the creation of solutions to pressing problems that affect us all. The problems the world faces are stark and there are persistent and accumulating issues of injustice. Minow cites mass disparities in wealth and health and concludes by saying that a civilization advances when what was once viewed as misfortune becomes seen as injustice.<sup>28</sup>

Similarly, Felix Frankfurter once wrote that we fail in our important office if [...] lawyers [...] fail to catch the glorious vision of the law, not as a harsh Procrustean bed into which all persons and all societies must inexorably be fitted, but as a vital agency for human betterment."<sup>29</sup> The legal profession, scholarship as well as practitioners, fails if it is unable to explain how to use European Union law as agency for human betterment rather than detriment and unable to portray an accurate analytical picture of society and consequences of legal change.

The profession's responsibility is collective and cannot be pinned down to a specific institution or to a specific segment of the legal profession. This responsibility is not limited to

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<sup>24</sup> Dimitry Kochenov, EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights? LSE 'Europe in Question' Discussion Paper Series (2016). For a meticulous methodology of measuring nationality quality applied to all the nationalities in the world, D. Kochenov (ed.), The Henley & Partners – Kochenov Quality of Nationality Index (1st ed.), Zürich: Ideos, 2016 ([www.nationalityindex.org](http://www.nationalityindex.org)).

<sup>25</sup> Heineman, Lee and Wilkins (n 21) 5.

<sup>26</sup> Ibid.

<sup>27</sup> See, for example, the Solicitor's Regulation Authority available at <https://www.sra.org.uk/handbook/>, visited March 27 2019.

<sup>28</sup> Martha L. Minow, Making Global Lawyers for the 21st Century available [https://clp.law.harvard.edu/assets/Minow\\_Blue\\_Paper.pdf](https://clp.law.harvard.edu/assets/Minow_Blue_Paper.pdf), visited March 27 2019.

<sup>29</sup> Felix Frankfurter, The Law and the Law Schools, 1 A.B.A. J. 532 (1915), reprinted in II THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 673-677 (Steve Shepperd, ed., 1999).

lawyers who actively participate in politics.<sup>30</sup> Explanation of distributional consequences of legal change and offering analytical clarity about the state of law and society should have been a fundamental ethical duty of lawyers when acting as wise counsellors and effective leaders in the referendum campaign and in the entire process of Brexit.

#### **IV. Analytical Uncertainty about Brexit – The Failure of the Legal Profession**

Explanation of distributional consequences of legal change and offering analytical clarity about the state of law and society is particularly important in the context of the European Union. Legal science created the discourse of law<sup>31</sup>, including of European Union law<sup>32</sup> and practitioners daily contribute to the ever-increasing complexity of the legal system. The EU is an extremely complex legal construction, viewed both in terms of “law in books” and “law in action”. It comprises numerous regulations, directives and decisions, it is in a constantly dialectical relationship with the laws of the Member States and international law. It is managed by a complex structure of institutions and individuals, managed by a particular type of consciousness.<sup>33</sup> Moreover, its structures remain largely unexplored.<sup>34</sup> Finally, as Brexit withdrawal negotiations have shown, there is a seemingly endless list of contentious legal issues connected with Brexit. The United Kingdom is facing up to one of the biggest and most complex legal challenges in the country’s history. The legal profession thus has urgent responsibility to educate the public about immense complexities of law and of the implications of legal change.

The legal profession, however, failed to adequately explain the European Union legal structure, the operation of power in the European Union and thus the implications of the leave vote for the UK. This does not mean a lack of explanation of the stakes of leaving the Union in an approachable way, one that could be made more understandable to the general public. The argument equally does not call for a reconciliation of the cool rationality and values of the legal profession with the irrational passion of the people.

Rather, the central problem is an inadequate analytical picture of the European Union and a consequential misrepresentation of power relationships in lawyers’ daily work that in fact sparked Brexit. Politicians appropriate the thought and language – the narrative about European integration - from various professions including lawyers, economists, sociologists, historians and others and this thought finally trickles down to the population who appropriate it in the context of their own daily troubles.

The conventional legal narrative of the Union assumes that the EU is constituted as an institutional structure in which national sovereignty has been disaggregated and certain sovereign powers have been taken over by EU institutions from the Member States.<sup>35</sup> The UK population was promised that Westminster would take back control of its legislation after

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<sup>30</sup> Nick Robinson, ‘The Decline of the Lawyer Politician’ (2017) 65(4) BLR Review 657; HLS Center on the Legal Profession Research Paper No. 2015-10.

<sup>31</sup> Duncan Kennedy, Three Globalizations of Law and Legal Thought: 1850-2000, in THE NEW LAW AND ECONOMIC DEVELOPMENT (D. Trubek & A. Santos eds., 2006).

<sup>32</sup> Kukovec (n 6) and Kukovec (n9)

<sup>33</sup> Kukovec (n 6).

<sup>34</sup> For the argument that complexity of the EU is an obstacle to its democratic potential see Kukovec (n 9).

<sup>35</sup> See e.g. J. H. Weiler, The Transformation of Europe, 100 Yale L.J. (1991).

Brexit, taking it out of the hands of European bureaucrats or other nations of the EU with which the UK needs to compromise. When institutional powers form the focus of the construction of the EU, this indeed sounds plausible.

“Taking back control” was the principle slogan of the campaign arguing for the UK to leave the European Union. It is not easy to counter this catchy slogan, as all the answers to life’s problems can be reduced to it. Mental health gurus would advise us to “take back control of your life”, newspaper advertisements urge us to “take back control of your fertility”, we hear about the need to take back control of our relationship, of our finances, our retirement, our cybersecurity, of our children, of our own mind. Taking back control appears to be a recipe to heal all of the life’s problems particularly when the population genuinely believes that power relationships in the European Union reflect the division of institutional competences.

A retreat to national sovereign powers, however, can prove to be an illusion in today’s interdependent, polycentric<sup>36</sup> and unequal world. Several constraints on UK legislation and decision-making power will remain. Some regulatory constraints will come from the United States and other partners with whom the UK will wish to trade. An extremely important constraint on the UK’s legislation will inevitably continue to be the European Union. EU institutions form an important cluster of regulatory power, extending both formally and informally far beyond the borders of the European Union in competition law and countless other legal domains, such as environmental law, privacy law and so on.<sup>37</sup> Formal regulatory power includes the extraterritorial effect of EU law and informal power includes the desire of multinational corporations to standardize their production globally and adhere to a single rule. Given the power of the European Union internal market, EU rules are often converted into global rules. This has been referred to as “the Brussels Effect.”<sup>38</sup>

The EU is currently the only jurisdiction that can wield unilateral influence across a number of areas of law and the markets, other states, and international institutions can do little to constrain Europe’s global regulatory power.<sup>39</sup> The effect of EU legislation is so strong that the UK, when it leaves the Union, or any neighbouring country trading with the EU would to some extent remain a “vassal state” – a state strongly influenced by the EU’s legislation without an influence on its making, no matter what kind of Brexit is negotiated in the end.

Furthermore, in several areas of law, such as health, consumer protection or animal welfare, the UK, much as it tries to differentiate itself with the rest of Europe, may soon realize to be more in tune with the ethical or safety standards of the European Union than with the standards of its other trading partners. It may thus voluntarily aim for the same or at least similar standards to those of the Union.<sup>40</sup>

Moreover, the recent news on Japan’s demands for greater concessions from the UK than Japan was able to get from the EU in free trade agreement negotiations attests to the economic and political power of the European Union’s internal market that the United Kingdom alone cannot match. The demands that the United Kingdom drops its request in

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<sup>36</sup> Polycentric EU, Van Zaben and Bobic eds., Cambridge University Press (forthcoming 2019).

<sup>37</sup> Kukovec (n.9).

<sup>38</sup> Anu Bradford, The Brussels Effect, 107 NW. U. L. REV. 1 (2013).

<sup>39</sup> Ibid.

<sup>40</sup> <https://www.theguardian.com/money/2019/feb/18/electrical-goods-eu-safety-standards-consumer-legislation-brexit> accessed 13 February 2019.

international trade agreements for honouring human rights standards or the prospect of chlorine-washed chickens imported from the United States onto the plates of the consumers are just some of the sobering examples of its negotiating power with Third Countries and of a diminishing effect Brexit can have on the UK's laws, on the level of its standards and its overall prestige. The comparison between a country's position in and out of the European Union gives weight to the argument that the European Union strengthened its Member States.<sup>41</sup>

Thus, "taking back control" when a country leaves the Union can be effective only in certain specific pockets of legislation. In which field of law could the UK effectively take back control when leaving the Union? Agriculture certainly comes to mind, though UK agricultural industry, now faced with a prospect of the loss of subsidies, imposition of EU's tariffs on its products and cheaper imports from other markets around the world, where lower wages and lower animal welfare standards enable production at lower cost, is currently among the most concerned sectors of the UK society.<sup>42</sup> Tax law is another field of law which might be attractive, however Luxembourg, the Netherlands and Ireland are de facto tax havens, despite being Members of the Union.

Small legal changes can have large distributional consequences<sup>43</sup> and strong cases could be made for autonomous, albeit marginally autonomous, decision-making in specific fields of law. The case in which pockets of legislation and how "taking back control" would actually be operational, be worth pursuing and would actually deliver the promise of real control, has not been made.

Furthermore, the benefits of this limited autonomy of legislation would have to outweigh the overall costs of effectively losing complete control of effective participation in the regulation done in Brussels over other fields or parts of legislation in which the EU would remain to be a de facto decision-maker. The UK currently does wield important decision-making power in the Council of Ministers and in the European Parliament. In addition to the number of votes, it often votes in unison with Germany in the Council of Ministers, importantly shaping European integration and EU rules. This power will to a large extent be gone with Brexit, while the influence of the EU on the UK will remain.

There will be countless constraints on the UK's decision-making power when it leaves the Union and its sovereign autonomy will remain symbolic in several respects.<sup>44</sup> Exiting the Union cannot promise "taking back control of our laws" – such a wholesale promise would inevitably be erroneous.<sup>45</sup>

The operation of power in the European Union, however, is misunderstood in even more fundamental ways. The conventional constitutional discourse assumes an institutional framework with the EU institutions as the centre and Member States as the periphery of the EU, or the other way round. In other words, this narrative presupposes that Brussels is the centre of power in the European Union and that London, Berlin, Athens or Prague are

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<sup>41</sup> Andrew Moravcsik *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* [1998].

<sup>42</sup> <https://www.theguardian.com/environment/2019/jan/04/no-deal-brexite-would-be-catastrophic-uk-farmers-warns-nfu> accessed 13 February 2019.

<sup>43</sup> Duncan Kennedy, *The Stakes of Law*, or Hale and Foucault!, 15 L. STUD. FORUM 327, 354,–55 (1991)

<sup>44</sup> For a more detailed discussion of global decision-making, see Kukovec (n.9).

<sup>45</sup> *Ibid.*

(increasingly) peripheral.<sup>46</sup> In this debate, the United Kingdom sees itself as peripheral and strives for an empowering exit. This, however, misses the hierarchical construction of society.

During the campaign, Brexiteer MP Jacob Rees-Mogg was faced with an argument that leaving the EU would wreck the economy and ruin the life chances of the UK's children and grandchildren. He replied that Greek and Spanish economies are "basket cases". He cited youth unemployment in Italy at forty per cent, he noted that the Italian economy has not grown since 2000 and concluded by "how lucky we are to be shackled by our Italian friends."<sup>47</sup> His reply was extremely effective in the campaign, but oblivious of the fact that the UK's position in the EU is far different from Greece's and also different from the position of semi-peripheral regions in Europe. The latter have a different hierarchical position in the EU and thus fundamentally different structural problems than the United Kingdom.

The lens through which the legal profession as well as the population perceives the Union needs to be adjusted.<sup>48</sup> The focus should not be on the hierarchical relationship between the Union and national legal orders, but on a hierarchical relationship between people and regions. The UK's position in the EU is not at all peripheral, on the contrary, it is privileged, it is a society of the centre, where actual social power is concentrated. The centre countries or regions, the UK along with the Netherlands, Germany, Sweden and others are those with a much higher gross domestic product (GDP) per capita than the regions of the periphery. They invest more money in research and development and have the best universities. They have more capital and more ingoing and outgoing foreign direct investment (FDI). Their actors, products and services have more prestige. Internationally recognized brands come from the centre, which give their owners significant market power. The centre exports final products and is the seat of powerful corporations and law firms.<sup>49</sup> The position of the European periphery is inverted.<sup>50</sup>

Law in action can be understood as a hierarchical structure of society as constructed in any moment in time.<sup>51</sup> The United Kingdom has significant clusters of hierarchically privileged actors who find themselves, what could in many respects be interpreted as higher in the hierarchies of production in the global structure of nearly any human activity—production of goods, services, dreams, and intellectual activity—than actors from a random peripheral country. CEOs, lawyers, bankers, professors, pop stars, and athletes are part of these.<sup>52</sup>

Law in books – the EU directives, regulations, the Treaty - derives its fabric, either the deep structure of thought or its particular understanding of harm, from the centres of the EU. By the time it reaches Brussels, the debate on the adoption of new laws has already been structured by academia, industry, research institutions, lobbying groups, national legislators and so on. The hierarchically privileged shape the most important social vectors, including the social understanding of harm. This tends to reproduce the hierarchical position of the centre

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<sup>46</sup> Kukovec (n.9).

<sup>47</sup> See <https://www.youtube.com/watch?v=or-tzhDLUqo> accessed 13 February 2019.

<sup>48</sup> Kukovec (n.9). see also Damjan Kukovec, The poverty of Constitutionalism, Denmark, Copenhagen University (November 2019) available at [https://www.youtube.com/watch?v=a\\_l3yXhkYZM](https://www.youtube.com/watch?v=a_l3yXhkYZM) accessed 13 February 2019.

<sup>49</sup> Kukovec (n.6).

<sup>50</sup> Ibid.

<sup>51</sup> Kukovec (n.9).

<sup>52</sup> Ibid.

regions, while the concerns of the periphery are often foreclosed from operating powerfully.<sup>53</sup> The UK as a whole thus remains a privileged society in the EU. One of the reasons for the difficulties the Brexit process poses for the United Kingdom is in fact the rising awareness of the privileges the UK is giving up by exiting the Union.

This brings us to the central problem of EU governance. Structural privileges to harm in the hands of those in hierarchically privileged positions are not articulated. Centre - periphery relationship in terms of regions and countries is a macro perspective of a plethora of hierarchical relationships in the EU. Each person is a node of multiple hierarchical relationships and those need to be articulated substantively and geographically in order to understand the power relationships in the Union. Those in a hierarchically privileged position have more privileges to harm those in a subordinate position.<sup>54</sup> This reproduces the existing distribution of material and spiritual values in the Union and acts as the central disintegrating factor of the European Union.

Lawyers' ethical responsibility is to adequately portray social operation of power and to articulate "ought" solutions,<sup>55</sup> which in the context of the discussion of power and exclusion should mean articulating new legal doctrines which portray the unjust nature of the imbalance of privileges to harm. Because these imbalances of privileges to harm are not well articulated, possibilities of resistance to unjust hierarchies which permanently exclude certain sections of populations remain unexplored.

People's daily struggles in the EU legal structure are not structurally discussed and not sufficiently addressed.<sup>56</sup> Likewise, the discussion of Brexit missed the hierarchical construction of the United Kingdom and the structural privileges to harm the English and Welsh periphery. The legal profession has an ethical responsibility to articulate its powerlessness. During the Brexit referendum campaign, however, people falsely believed that Brexit, whatever form it took, would bring them actual empowerment.

Instead of articulating powerlessness, the legal profession offers a model of integration that obscures it. The relationship between Member States' sovereign powers and EU institutions is perceived as central to the understanding of power relationships. The theory of integration follows this thinking, focusing on the portrayal of the EU in terms of the progressive loss of sovereign powers concurrent with deeper integration starting from a free trade agreement continuing to customs union, the common market and finalizing in the political and monetary and possibly budgetary union. Democratic theory follows this narrative focusing on people's political capacity in this progressively centralized institutional structure. As the governance structure is based on interdependence of national and EU institutions, institutional interdependence becomes its guiding ethos. Finally, "inclusion of the other" is understood as

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<sup>53</sup> Kukovec (n. 6).

<sup>54</sup>For the argument that law, and life should be understood as a constant struggle, and the critique of David Kennedy's work to date see Kukovec (n.9) David Kennedy may have finally understood the point in David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

<sup>55</sup> Ben W. Heineman Jr., William F. Lee and David B. Wilkins, 'Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century' [2014] HLJ 5

<<https://clp.law.harvard.edu/assets/Professionalism>> accessed 13 February 2019.

<sup>56</sup> Kukovec (n.9).

an undercurrent of the entire European legal system that tames the passion of the nations, and includes other nationals in national and European governance structures.

Brexit is a result of a combination of four key features of this conventional narrative.<sup>57</sup> It results from the ethos of interdependence, the promise of inclusion of the other, the claim of people's political incapacity and the policymaking in terms of the extent of national sovereignty.

First, the European ethos of institutional and general international interdependence ceases to animate the population. This ethos animated Europeans after the second World War, when Europe was divided and destroyed. Today, interdependence can be seen daily in our lives - in shops, schools, on television and the internet. The memory of the war has waned. Consequently, Europeans are not craving more institutional or other interdependence.

Second, the European Union professes "inclusion of the other". In this narrative, the European Union includes the foreign, the other, in its governance. Yet, some form of social exclusion is inevitable in any structure of governance. From a distributional perspective, this conclusion follows from the fact that there are always winners and losers in society. The idea that there is a constant inclusion of the other in the EU and that there are no losers of European integration, or of national social cohesion, cannot persuade those who are excluded.

Third, the population weary of the ethos of interdependence and faced with actual social exclusion, particularly those in the periphery of England and Wales, embraced the legal profession's discourse it believed adequately described social development and its ills. The population articulated their frustration with powerlessness and social exclusion by a claim of the lack of political capacity – claiming that the core of their daily problems was that the EU was taking this capacity away from them.

Fourth, the population framed their personal frustration and perception of the lack of political capacity in the conventional narrative of European integration. They articulated their empowerment as the legal profession does in the EU legal discourse, focusing on the issue of the extent of national sovereignty. The population of the UK thus demanded more sovereignty, taking back control and leaving the Union demanding "our historic right to govern our own country!" This results from the discourse of the legal profession and the shared belief that allocation of sovereign powers is related to real power distribution. The key elements of the legal profession's discourse about the EU collectively and effectively led to Brexit.

The portrayal of the European Union as an institutional structure led to the electorate's misunderstanding of the UK's position in the EU and gave an impression that Brexit is the solution to the problem of powerlessness. Actor Michael Caine's statement in support of Brexit, that he "would rather be a poor master than a rich servant"<sup>58</sup> indicates that the message of negative economic consequences of Brexit reached the population. It also indicates that the population embraced the conventional narrative about the European Union leading to the perception of the UK being a peripheral servant who can become free when leaving the Union.

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<sup>57</sup> For an exposition of this argument see also Damjan Kukovec, *Brexit and Misconceptions of Governance*, Harvard Law School lecture, May 2018 available at <https://www.youtube.com/watch?v=S11O-Ccvdls> accessed 13 February 2019. See also *Brexit – A Tragic Continuity of Europe's Daily Operation*; EUI Working paper (2016).

<sup>58</sup> See <https://www.youtube.com/watch?v=5DDvUaY-qQQ> accessed 13 February 2019.

The analytical framework misrepresenting power relationships that is reflected in Caine's statement was set up and is constantly used by the legal profession.

The problem of the lack of an adequate analytical framework, however, goes far beyond the question of the Brexit campaign. Rather, it goes into the heart of the question of the role of the legal profession in the construction of the European Union, as well as the role of lawyers in society in general.

## **Conclusion**

The number of lawyers is multiplying<sup>59</sup> and law truly is everywhere. This phenomenon challenges our existing understanding of the legal system and of the ethical duties of the legal profession.<sup>60</sup> The legal profession has an ethical obligation to the population to adequately portray power relationships and distributional consequences of legal change. This particularly includes articulation of privileges to harm, which are not portrayed in a structured way in the existing constitutional discussion.<sup>61</sup> The conventional narrative of the European Union and its misrepresentation of power relationships was passed onto the population who genuinely believed the existing constitutional portrayal of the EU reflects reality.

While it is not excluded that a discourse of the hierarchical structure of the Union would have equally led to Brexit, this analytical framework would assist the population in understanding the implications of their vote and in articulating their powerlessness. If a new referendum ever materializes, "Taking Back Control" and "Project Fear" coined by the Leave campaign should be countered with a slogan "Project Uninformed" or "Project Illusion".

Brexit is a collective failure of the legal profession. Lack of adequate explanation of the legal situation of people in the EU, including of reproduction of hierarchy, leads to misinformation and populism. Those belittled and excluded cling to the rhetoric of the importance and feasibility of regaining sovereign powers. The problem, however, extends far beyond Brexit, it is a daily problem in the operation of Europe and indeed, of the United States and the world. This contribution thus calls for a new research agenda needed for the future of Europe – inquiring into the role of lawyers in the daily deconstruction of the European Union.

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<sup>59</sup> Galanter (n.1).

<sup>60</sup> Kukovec (n.9); Damjan Kukovec, 'Economic Law, Inequality and Hidden Hierarchies on the EU Internal Market', [2016] MJIL 1.

<sup>61</sup> Kukovec (n.6).