

# SPOTLIGHTS





# AUTONOMY AND THE DIGITAL PERSON

**Marietta Auer**

Recently, a book appeared in France and immediately received a full-page review in a major German newspaper: *La fin de l'individu. Voyage d'un philosophe au pays de l'intelligence artificielle* by the French philosopher Gaspard Koenig. The title says it all: a philosopher's voyage into the land of artificial intelligence merits the conclusion that the digital society is the end of the individual person as we know it. However, does one have to accept this conclusion? Is digitalisation indeed the end of the autonomous person and of free will? This question, recently discussed not only by a prominent French philosopher but also by many other voices from philosophy, sociology, cultural theory and computer science, is obviously important for many legal issues as well. It raises the question of how legal debates can make use of the vast treasure of knowledge generated by the whole array of sciences and humanities. This is where legal theory comes into play.

## **Law as a social system**

The first step towards an answer on how to fuse legal and social knowledge into legal theory is to understand the law as a subsystem of modern society. Any major social change such as digitalisation is highly likely also to affect the law, in particular, its conceptual structure. How can legal theory conceptualise such a shift? One useful way is to look at key concepts of modern law such as autonomy, and related concepts such as the individual, the person and freedom of will. All of these share the property of being not only legal but also social concepts with a strong philosophical foundation that bears the normative basis of modern society. Internal shifts of meaning of these and other core concepts of modern law thus provide a litmus test for similar changes within the normative basis of modern society.

In order to understand such changes and to formulate an adequate legal theory of the digital society, however, it is important to look not only at the outward surface of a concept like autonomy but also at the more subtle change of its internal meaning against a rapidly changing social background. 'Autonomy' has been a legally relevant concept for at least the past two centuries. Thus, in order to ask a theoretically meaningful question about the impact of the digital society on legal autonomy, it does not lead very far to ask whether the law still recognises individual autonomy in the digital age and to answer that question with a simple 'yes' or 'no', as Koenig seems to suggest. In fact, the answer to that question seems to be a clear 'yes' without teaching us anything about the specific form that autonomy takes on under the changing social parameters of the digital society. Instead, it seems more useful to ask questions like what autonomy specifically means under the changed social circumstances of the digital society, whether these changes cause new disruptions in the philosophically loaded normative meaning of autonomy as a legal concept, and what all of this might teach us about our self-definition as autonomous agents within the digitised modern society.



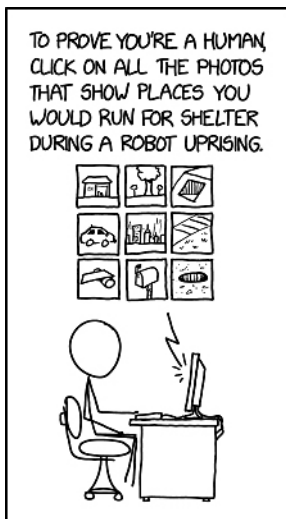
### The modern person: individual or dividual?

What does it mean to be an autonomous person? While this question is a legal issue, it is also a fundamental problem of philosophy. More precisely, the legal import of the question depends on the philosophical background of the concepts of autonomy and the person. Thus, a sufficient understanding of the latter concepts is essential for coping with the former question of law. In Western thought, the specifically modern understanding of the person emerged in the 17th and 18th centuries with the rise of enlightenment thinking. One of the earliest thinkers to explore the idea of the moral person as the bearer of natural rights was Samuel Pufendorf. Writing one century before Immanuel Kant, Pufendorf already explored the idea that there is a quality of freedom to act morally attached to every moral person and that it is this very quality which bestows equal human dignity upon each and every human being. This idea reached its final and most elaborate form in the writings of Immanuel Kant around 1800.

This is, however, where things became difficult. In the history of ideas, the year 1800 also demarcates what is known as the *Sattelzeit* at the transition to industrial modernity. The *Sattelzeit* describes the formation of the modern, differentiated society which has emerged since the 19th century until today. One of the core differentiations of modern society, unknown to premodern conceptions of society, is the divide between law and morality. This distinction implies, in particular, a separation between the moral concept of autonomy and the legal concept of freedom. Even though the terms are often conflated and used interchangeably in morality and law, they do not mean the same thing. Interestingly enough, this separation occurs at the same time as autonomy appears as a core concept of modern law.

In Kantian philosophy of law, autonomy means internal freedom, which is equivalent to freedom of conscience as a moral category, ruled by the categorical imperative. The legal concepts of freedom or 'autonomy', on the other hand, pertain to the sphere of external freedom, also known as *Willkür*. There are, therefore, two complementary concepts of freedom that point in opposite directions: one inward towards one's own conscience, and the other outward towards the other persons. Internal freedom is equivalent to moral autonomy, whereas the relationship between autonomy and external freedom is more complex. According to the Kantian principle of right, 'any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law'. Thus, Kant tries to address the problem of conflict between concurring external freedoms with a formula closely resembling, or actually paralleling, the famous categorical imperative. The latter, however, only applies to the internal spheres of morality. Kant's concept of right thus leads to a normative dilemma for the external conception of law embraced by modern

society: the law, restricted to the external sphere of freedom, cannot command moral action, because the law holds no power over the internal forum of morality. Nonetheless, the law cannot do without the tacit presupposition of moral action, because the Kantian principle of right is only functional if human beings use their external freedom responsibly, that is, in analogy to the moral principle of right as guided by the categorical imperative. The Kantian gap between law and morality, between external and internal freedom, thus presumes a blank cheque of social morality in order to work as a social theory.



Against this background, we can put the key question with regard to autonomy in the digital society as follows: in what sense does the digital society change our self-understanding as autonomous agents, and how does the law reflect this change when it addresses the autonomous person as a legal actor in the sphere of external freedom? In other words, is there a restricted sense of moral autonomy in the digital society, and does this have any effect on the construction of the person as the bearer of legal autonomy?

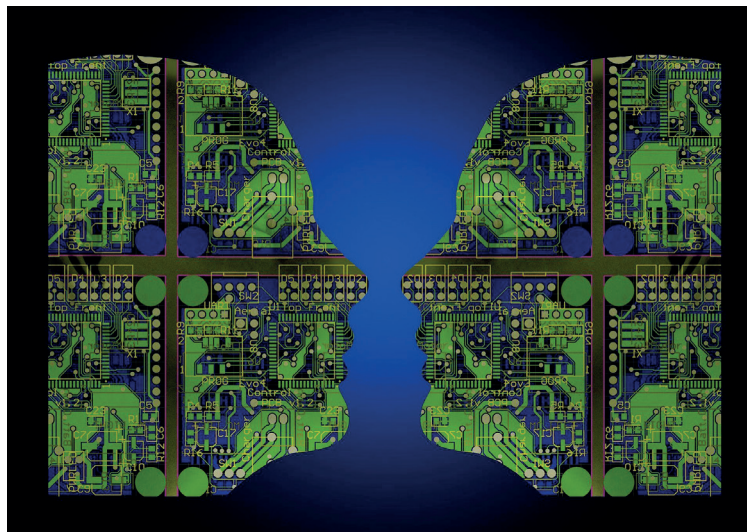
That there *is* in fact some change taking place in our self-definition as autonomous agents under the conditions of digitisation seems indubitable. This is why a title like Koenig's 'end of the individual' hits such a nerve in the current discourse. What exactly, however, is this change all about? Is it a truly qualitative change, a digital disruption, as thinkers like Koenig seem to suggest, so that we do indeed have to cope with something entirely new beyond the old paradox of Western individualism as exemplified by Kant's inability to bridge the gap between legality and morality? Or is the rise of the digital age just the next step in the development of structures already inherent in modern society, namely, the advent of yet another network technology with – of course – dramatically increased potential compared to previous mass communication media such as the telephone or letterpress printing, but without the extreme disruptive potential ascribed to it? If the latter thesis holds true, the underlying structure of the digital society might not be so different from the pre-digital society after all.

I argue that the second theory in fact offers more fruitful insights than the only superficially 'radical' first theory that the digital age comes as something essentially disruptive to our society – like a biblical plague. Digitalisation is not a biblical plague. Rather, modern society has been proto-digital from its very beginning. Its structure is essentially digital. Digital methods have, therefore, been a part of social practices at least since the 19th century, when the potential of large-scale social planning and social statistics became evident. Thus, the tools of the digital world amount to no less – but also no more – than the structurally congenial tools of modern society, the fulfilment of the technical promise of modernity, which is essentially countable, in a word: *dividual*.

The concept of the countable 'dividual' as the core of modern personhood was aptly coined by Gilles Deleuze as early as 1992 as the antonym to the old in-dividual associated with indivisible autonomy in the classic sense. According to Deleuze, 'we no longer find ourselves dealing with the mass / individual pair. Individuals have become "dividuals", and masses samples, data, markets, or "banks".' Digitisation, in other words, has the potential to transform the indivisible individual into a divisible dividual. The individual person as an impartible entity endowed with human dignity has become obsolete as a conceptual tool of self-description within the technical framework of the digital society. Digital technology makes it possible to circumvent exactly the indivisible character of the person as a social construction in all kinds of contexts, because it is now possible to generate a better, more precise representation of the empirical human being as the *product of digital information*. Digitisation apparently poses a fundamental problem for our self-understanding as autonomous persons. We can only be moral persons if we are individuals gifted with indivisible autonomy. If the indivisible quality of the person disappears behind algorithmically generated type profiles, this means that the individual is no longer conceived as indivisible, equal and free, but rather as divisible, calculable, predictable and in that respect unfree.

As a consequence, the concept of individual right, the unquestionable basis of modern law, seems to collapse into a 'dividual' right as well. The concept of right seems to be in danger of no longer addressing human beings as indivisible, free and autonomous persons, but rather as the predictable results of mere statistical distributions and type profiles. The individual disappears behind big data and algorithmic readability. The concept of personhood becomes irrelevant for the purpose of legal control, because data statistics literally know the individual person better than she knows herself. Moreover, big data analysis offers the astonishing feature that it is no longer dependent on the personal data of any given individual. It is in fact possible to predict the statistically relevant behaviour of any individual with greater precision from mere data patterns than from the individual's behaviour itself. All it takes is to combine the statistical frequency distribution of the behaviour of classes of given individuals with the skilful application of search criteria.

Is this Gaspard Koenig's 'end of the individual'? No, it is not. If it were true that we have been indivisible individuals up to now and that we are losing this individuality, we would most certainly fight to retain our self-definition. But that is obviously not what is happening. Instead, we are witnessing the opposite. Perhaps the most astonishing aspect of the development of the digital society is that we actually *want* it to happen exactly the way it is unfolding. We reinforce it every day by voluntarily consenting to giving away our data with every move we make on the internet. Everyone with a smartphone or those active on social media or in the digital economy actively participate in building a digital society on the basis of personal data without any certitude about how or in what contexts this data can and will be used in the future. At this point, virtually all of us already have a double existence in this world, as human beings and as data avatars. The fact that we actually *want* this to happen is the true challenge for our thinking about autonomy. For we assume quite naturally that we continue to exist as indivisible persons who are capable of exercising normatively significant autonomy in the sense of Kantian philosophy, whereas in fact we have stopped existing as individuals in the data world long ago and just have not noticed it yet. One can frame this as a paradox: *what does it teach us about our understanding of autonomy that we believe ourselves to be fully autonomous also and especially with regard to the heteronomous predictability of our own use of autonomy?*



### The digitally conditioned self at the crossroads of legal theory

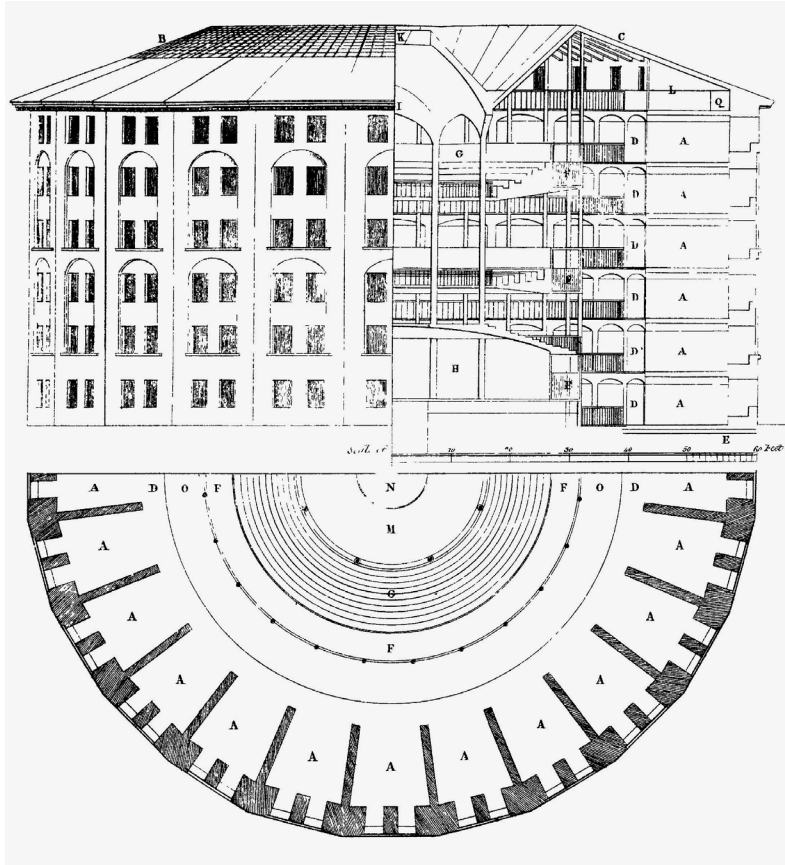
I will conclude by arguing that I do not believe in the end of the individual, but I do believe that we have to get used to a novel concept of autonomy in the digital world, whether or not we approve of it. Again, the starting point is that digital networks are not so different from pre-digital networks or communication media after all. Human beings have always depended on networks to define themselves. They cannot express themselves in any other way than through interaction with others. This applies particularly to the technical networks of the industrial age. It is, therefore, unreasonable to imagine a person endowed with full autonomy existing prior to and outside any network and then turning towards the network in order to say 'yes' or 'no' to their participation. The reality is quite different: we can only unfold our autonomous personality through participating in networks. We have to define autonomy also as a product and not only as a limit of our development through networks. There is no such thing as uncorrupted autonomy, defined as network-free autonomy.

What in particular, then, makes the digitally conditioned self so dubious to critics like Gaspard Koenig? As argued before, it is the paradox of modern society that it offers external freedom but cannot, at the same time, demand the exercise of moral autonomy in its fulfilment. And it is precisely this phenomenon, this built-in deficit of modern society, that is amplified and exploited by digital mass media and especially by social networks in an unprecedented way. Social networks seem to have developed into a congenial infrastructure for antisocial behaviour. By using social media, the digital society is deliberately conditioning itself into a dysfunctional use of freedom which runs against its tacit precondition of moral autonomy. If this is the case, however, why does the law not simply prevent abuses of digital freedom by appropriate regulation? The answer to this question, again, turns on the philosophical dilemma of autonomy underlying the legal concept of freedom: it is not the case that we do not regulate digital platforms because we *cannot* do so, but rather because we do not *want* to do so. In more precise terms, we *cannot want* to do so, because the notion of undivided external freedom *by definition* prevents us from selecting the desired from the undesired uses of legal external freedom.

At this point, one may still argue that each individual nonetheless remains free to exercise moral autonomy by using digital technologies responsibly. There is, however, a second, even more serious side of the problem concerning the *form* of freedom into which we condition ourselves in digital contexts. I describe this form as a collective education towards a consumptive use of freedom. Freedom itself becomes the object of consumption in the way it is made accessible through digital tools. In other words, the digital infrastructure we have built teaches us to use external freedom like a commodity and thereby to unlearn the use of moral autonomy. The reason for this is a formal – one might even say architectural – problem: the consumed freedom remains passive by virtue of its very form, which is conditioned through the one-sided, passivising architecture of the digital infrastructure which virtually reduces the world to a user surface.

This idea is, finally, also the key to overcoming the general complaint of the loss of personhood in the digital age as voiced by Koenig. We should shift the power of critique from the concept of personhood to the architecture of the digital infrastructure. The important thing to note is, again, that there is no freedom and no autonomy in the technical world untouched by its preconditions. The crucial question of digital autonomy is, therefore, not whether to use digital technology at all, but rather how to articulate autonomy within the structures of the technically preconditioned world

– and, even more importantly, how to build a technical infrastructure which leaves the individual pathways to autonomy intact. Algorithms have the power to deconstruct individual human beings into statistical artefacts. But neither power nor technology are evil as such, and human beings have been calculable all along. The true problem for the digital self lies in the obstruction of personal autonomy by conditioning individuals into the merely passive exercise of freedom. This is where the regulation of the digital world should begin, that is, with the philosophical demand for autonomy remaining in the background.



Plan of Jeremy Bentham's panopticon prison, drawn by Willey Reveley in 1791



# MIGRATION AND TRADE: TWO SIDES OF THE SAME COIN?\*

Thomas Duve

Sick and hungry people came to the cities in droves, strangers who roamed the streets. City authorities and elites began to fear the loss of public order and social peace, and searched in vain for an explanation to make sense of these developments. Maybe world trade was to blame, maybe failed harvests or corruption, or perhaps the migrants had brought their misery upon themselves. Whatever or whomever was to blame, decisions had to be taken and possible impostors weeded out from those truly in need. A new law was proposed according to which people were to receive aid at their place of birth. Those with official documents proving that they were entitled to support were to be cared for in special centres created for that purpose. This type of approach was already being practiced successfully in other countries facing the same problems. However, the new law, welcomed by many cities, also provoked criticism. Not least the Church voiced concerns. Was this still in line with the principles of Christianity?

This account of a poverty crisis, the state's attempt to overcome it through legislation, the debates regarding who is worthy of support and who obliged to provide it, could be the description of present-day events. In fact, however, these issues, discussions and proposed measures date back to the 1540s, in what is now Spain. We know of these problems because leading theologians of the time voiced their views on the matter. One treatise arguing against the proposed law, *In causa pauperum deliberatio*, received particularly great attention. Its author was the Dominican Domingo de Soto, who published the text in 1545, the same year that he was sent to the Council of Trent to act as an advisor to Emperor Charles V. Domingo de Soto is seen as one of the central figures of the so-called School of Salamanca. This school of theologians – associated above all with Francisco de Vitoria, who is considered its founding father – has by now gained a firm place in the history of theology, philosophy, economics and the natural sciences. It also played an important role in legal history: during the decades of early modern state formation, shaped by the Reformations, European overseas expansion and the media revolution, its members made fundamental contributions to contemporary thought on punishment and guilt, contracts and restitution, and the legitimacy both of rule and of resistance. Indeed, the juridical-political language of their works influences international law up to the present day.



\* This text is based on an article originally published in German in the *Frankfurter Allgemeine Zeitung* of 31 July 2018, p. 11.

### Cosmopolitan reasoning

Domingo de Soto's argumentation regarding the right way to deal with the poor is in many ways typical of the thinking of the School. While its rationality has become alien to us, it nevertheless remains impressive in its depth and coherence. De Soto's reasoning also draws our attention to a historical connection that may be particularly thought-provoking given the current discussions on migration, the right of asylum and free world trade. Crucially, de Soto derived the right of people in need to be provided with what they required for self-preservation, and the universal duty to provide the poor with basic means for subsistence, from the same reasoning he and others used to legitimise the free movement of goods and missionaries. These early modern theologians and philosophers conceived of a world community that existed beyond all political units – all cities, all states – and was linked by rights and duties shared by all. The normativity of this world community was called the *ius gentium*. In their development of these ideas, the theologians and philosophers of the School of Salamanca drew on ancient thought, on Roman and canon law, and on the theology and philosophy of the Middle Ages. They derived from this *ius gentium* (which in subsequent centuries developed into the much more narrowly defined international law) the rights to freedom of movement, to engage in trade or mission – but also the concomitant duties to tolerate others engaging in these activities and to provide everyone with everything necessary for self-preservation, irrespective of where they were from. Thus, the free movement of goods and people and the opportunity for commercial profit resulting from it, on the one hand, and the duty to ensure a livelihood for everyone, on the other, were two sides of the same coin.

This cosmopolitan perspective led Domingo de Soto to make seemingly utopian demands for social policies: an obligation to provide aid to those in need, a right to a guaranteed subsistence

minimum, and the duty of all political communities to tolerate peaceful migration, whether those migrants be Christian or not. But the argument on the basis of the *ius gentium* was ambivalent: it also served to legitimise European expansion. As shown by Domingo de Soto and, particularly effectively, by Francisco de Vitoria in his famous lectures on the New World in 1539, the Spanish presence in the Americas could not be justified by papal donation, as the Catholic kings had claimed, nor by the supposed inability of the indigenous 'barbarians' to hold property or to form a system of government, as some jurists had argued. While the papal bulls and decrees were nothing more than worthless pieces of paper for Protestant Europe, which was growing and consolidating precisely in this period, the contemporary encounter with the great Aztec and Inca civilisations clearly showed that those prejudged 'barbarians' had the same intellectual capacities as the overseas arrivals and were absolutely able to rule themselves according to coherent political and social criteria. Taking into account all these factors and constantly updating their reasoning according to

new information arriving every month from overseas, the theologians of Salamanca argued that it was the *ius communicationis* – the right to move, to trade and to evangelise freely and peacefully throughout the whole world, derived from the *ius gentium* – that legitimised the Spanish presence in America. Anybody who sought to curtail this right could face a just war, a *bellum iustum*.



Padrão dos Descobrimentos, Belém (Lisboa)

Some modern interpreters see this argumentation as proof that the thinkers of the School of Salamanca were courageous critics of the Spanish Crown; others read it as the work of cynical apologists of power, granting their sovereigns a kind of sophisticated and pious alibi. Francisco de Vitoria has been hailed the 'father of international law', but his thinking, and above all the use made of it by the architects of Eurocentric, colonialist international law at the end of the 19th and the beginning of the 20th centuries, has also been severely criticised, not least by the representatives of so-called Third World Approaches to International Law (TWAIL). Vitoria's and de Soto's contributions to the poverty debate are also ambivalent, particularly regarding the question of who is to be considered truly in need. However, their modern critics often overlook the fact that the two thinkers used their argumentation not just to legitimise Spanish overseas expansion but also applied it to problems that led them, for example, to postulate a general duty to alleviate the famine in contemporary Salamanca. Thus, in several cases, thinkers of the School arrived at views different to those of the Crown. Had their argumentations been followed, in these as in other cases, it would have had enormous economic consequences for those in power.

### The code of capital?

In the 500 years since Vitoria and de Soto articulated their argumentation based on the *ius communicationis*, European thinkers and lawyers used the *ius gentium* above all to expand the right to trade and the legitimate exercise of power. Grotius, Locke, Vattel and Schmitt, to name but a few, and in the 19th and 20th centuries also a number of so-called 'semi-peripheral jurists', forged out of the *ius gentium* an interstate law that primarily served European imperial interests. It also protected the informal European empires, the multinationals of the early modern period like the Dutch East India Company. Crucially, the *ius gentium* was also developed in imperial practices, as recent legal historical studies have emphasised. The result was the transfer of an unimaginable amount of resources from the colonies to the European metropole. It is estimated that in the course of this early modern globalisation, about 12.5 million people from Africa were traded as slaves, that is, as goods. They, too, contributed to the profits that made Europe and North America what they are today. In recent years, awareness of these connections has been rising, leading to the toppling of quite a number of monuments.

And the other side of the coin? The right to migrate, the right to be provided with what is necessary for self-preservation in any location, and the general legal obligation to enable opportunities for livelihood – all also postulated by Domingo de Soto – have not experienced a similarly extensive legal elaboration. This is astonishing not least because other philosophers and jurists were arguing for similar obligations, such as Hugo Grotius in his *De iure belli ac pacis libri tres*, who here, as in many other instances, follows Francisco de Vitoria's earlier reasoning. Whereas Grotius supported his claim for a duty to take in refugees mainly with references to antique authorities and offered little in the way of additional philosophical arguments, Samuel Pufendorf provided the latter in his *De iure naturae et gentium* of 1672, a work which was subsequently translated into many languages. In this text, Pufendorf not only wrote that human beings should not act like dogs, barking at strangers, he also established certain general obligations of humanity, *officia humanitatis*, to which corresponded certain (albeit not enforceable) rights. According to Pufendorf, even during a famine, one is not permitted to expel migrants whose lives would be threatened should they return to their original home.

### The presence of the past

Of course, the fact that some Aristotelian-Thomist thinkers of 16th-century Salamanca and Protestant natural rights theorists in 17th-century Germany held that the free movement of goods and people, basic rights to migration and trade, the opportunity for profit and the duty to secure the livelihood of the poor belonged inseparably together does not create obligations for us today. What does, however, is our actions in the past – the undeniable fact that European prosperity and African poverty are historically inseparable. The texts from Salamanca and the arguments of Grotius and Pufendorf serve to draw our attention to the strong original connections between the philosophical and legal legitimation of the free movement of goods and of people, and to the simultaneity of rights of mobility and trade with the duty to care for the needy and to provide livelihood opportunities. Both rest on the same cosmopolitan reasoning.

Looking at legal history since the 17th century, however, the effectiveness of the regimes developed in European law to protect these different rights varies greatly: there is strong protection for trade and only weak protection for migration. The current simultaneous ‘crises’ of migration and of world trade also demonstrate that, without a cosmopolitan perspective such as that of the non-state-bound *ius gentium*, we quickly come up against the limits of our national, supranational and international law, which ultimately always take the state as their frame of reference. Would it not be time to recognise that globalisation, which for centuries has made Europeans a great deal of money, is not only associated with rights but also with minimum obligations of equal binding force?

It was not by accident that after World War II, Europe constituted itself as a ‘community of law’ and founded its identity above all on a shared legal culture that had developed over the course of centuries. Among the key achievements of this legal culture is the idea that law does not only serve to protect power, that it does not take as its yardsticks only individual self-interest and economic considerations, but instead assumes a minimum of reciprocity and coherence. To insist on these is perhaps the core of our understanding of law and the very particular task of legal scholars. At the University of Salamanca, which celebrated the 800th anniversary of its foundation in 2018, and among the scholars of its epoch-making school, there was never any doubt that law could only be just if it was coherent and consistent. We would do well to remind ourselves of this.



Jacob Lawrence, The Migrations Series, Panel no. 3, 1940–1941

# BREXIT AND THE POWER OF HISTORICAL NARRATIVES\*

Stefan Vogenauer

## Brexit day

It was meant to be the moment in time when ‘church bells were rung, coins struck, stamps issued and bonfires lit to send beacons of freedom from hilltop to hilltop’. Those celebrating were to be seen ‘weaving through the moonlit lanes of Sussex, half blind with scrumpy, singing Brexit shanties at the tops of their voices’. Such was the vision of Brexit Day offered by then newspaper columnist Boris Johnson, now Prime Minister of the United Kingdom, three days before the UK was first supposed to withdraw from the European Union (*Daily Telegraph*, 26 March 2019).

In reality, it was significantly quieter when the UK finally left the EU on 31 January 2020. What remained striking, however, were the endeavours of the ‘Brexiters’ time and again to work with historical imagery. Bonfires? These burn annually up and down the country to commemorate the uncovering of the Gunpowder Plot of 5 November 1605, the plan of Guy Fawkes and further catholic assassins to blow up the Houses of Parliament together with the king. ‘Remember, remember! The fifth of November’, begins the verse that English schoolchildren learn to recite. Church bells, cider and moonlit lanes? These evoke the idyll of a rural England that has long since vanished. The analogies know no limits. Politicians are not afraid to equate the EU with the Soviet Union, to describe member states as ‘vassals’, or to call the day of the referendum ‘independence day’, thus alluding to the American Revolution.

The ‘Remainers’ have long mocked this sort of reminiscence. This is also true of professional observers and explainers, of journalists and academics, particularly those from abroad. Almost without exception, they were surprised by the result of the 2016 Brexit referendum. The decision to leave was taken as irrational and an act of wilful self-harm. There was a certain sense of bewilderment, not least amongst Germans, that a people generally known as the paragon of common sense and sober pragmatism would take what appeared to be such an obvious economic and socio-political wrong turn. How could this happen?

For a start, there might be different understandings of common sense at play. Let us assume, with the *Oxford English Dictionary*, that arguments from common sense are those that appeal to or are in accord with our instinctive understanding and sound judgement. Such innate and tacit understandings are bound



\* This essay is an updated and shortened version of a lecture given in July 2019 to the Frankfurter Wirtschaftspolitische Gesellschaft von 1947. It addresses a number of questions that connect the Institute's Research Fields *Legal Transfer in the Common Law World* and *Legal History of the European Union*.

to be conditioned by our experiences, past and present, and these experiences will differ from one country to another. Once they are taken into account, and particularly when the UK and the German experiences are contrasted, the outcome of the referendum appears to be much less outlandish than many foreign observers are prepared to believe.

When looking at present and past experiences, it is possible to distinguish three types of cause underlying the vote to withdraw from the EU: immediate causes, as examined by the social sciences; recent causes, as studied by contemporary historians; and profoundly long-term causes, as analysed by historians concerned with the more distant past. The latter causes are the focus of this essay because they have been less commented upon so far; yet they might have been decisive in the vote to leave: the power of historical narratives remains strong.

### **Immediate causes: the perspective of the social sciences**

Most explanations offered for the result of the referendum relate to contemporary factors. The first of these is the economy. The rigid austerity in the public sector in the decade after the 2007/2008 financial crisis led to real income losses and a drastic scaling back of public services. Public libraries were closed, schools left crumbling. The provision of healthcare, though one would barely have thought it possible, declined even further. The North-South divide deepened, along with the gap between London and the rest of the country. Whole areas and generations felt and feel left behind. The referendum can thus be seen as sounding the alarm bells in order to put the political class on notice.

In fact, according to the second explanatory approach, the result of the referendum mirrors populist dissatisfaction with elites. This was not only directed against the political class, which the British public still had not forgiven for the parliamentary expenses scandal that had emerged in 2009. It also targeted the 'experts', whose predictions were met with suspicion. Was it not the case that even her Majesty had humiliated economists with the naive question as to why they had not seen the financial crisis coming?

A third cause of the result, we are told, was the on- and offline disinformation campaign before the referendum: the dissemination of 'fake news', the distorted reporting on the functionality of the European Union, and the legendary bus with the unfeasible promise to redirect the national contribution to the EU budget directly to the NHS – 350 million pounds per week.

Fourth, it is said that the Brexiteers took advantage of nationalist, xenophobic and at times openly racist attitudes of the public. Germany's conduct during the migration crisis in the summer before the referendum stirred up fears of an infiltration of foreigners, be it the hundreds of thousands of Eastern Europeans that were already in the country, or the 80 million Turks who were allegedly sitting on packed suitcases.

Fifth, and finally, it has been pointed out that the result of the referendum was distorted by conscious or unconscious decisions on the eligibility to vote and the voting modalities. This led to a situation where many of those who would have voted to remain were not entitled to vote or could only do so with a great deal of effort. This group included students and UK citizens residing on the continent.

Economists, political scientists, sociologists and media scholars have extensively analysed all of these phenomena. There is no doubt that the factors they identify were hugely influential in the outcome of the referendum. At the same time, they suggest a certain historical contingency: perhaps it could have all been so different, and insignificant domestic political events in the run up to the referendum might have brought about a majority for 'remain'?

### Recent causes: the perspective of contemporary history

Talk of such contingency sounds less convincing, once the focus of enquiry moves to past experiences. With regard to the more recent past, contemporary historians have frequently pointed out that the breeding ground for the exit vote had been prepared for quite some time. The Euroscepticism of the British before and certainly after joining the then European Economic Community (EEC) in 1973 is proverbial. They were always 'reluctant Europeans' and an 'awkward partner' for the other member states.

No other country and its people were more opposed to the process of integration. Non-participation was deemed a virtue, be it via opt-outs from the Euro, Schengen and, initially, the EU Charter of Fundamental Rights, or via a reduction of the contributions to the EU budget through the so called 'UK rebate'. Symbolic acts, such as flying the EU flag on public buildings, remained undone. The European passport, a further symbol, was resented, particularly by older citizens. In the political discourse on the relationship with the EU an 'us against them' mentality permeated. Against this background, it might be argued, the outcome of the referendum was not surprising at all.

### Profoundly long-term causes: a *longue durée* perspective

Yet, even the explanations offered by contemporary historians, valuable as they are, merely scratch the surface. Once an effort is made to trace the deeper causes underlying the referendum, it quickly becomes obvious that the UK's exceptionalism in the process of European integration is but a symptom of a more fundamental and far longer evolution of ideas. From this perspective, it is possible to observe continuous developments stretching across the centuries. Viewed in their entirety, they coalesce, as it were, into an intellectual and cultural history of Euroscepticism: the decision to withdraw from the EU appears less as a reaction to current or recent historical developments and more as the result of long-lasting cultural conditioning, subjective historical truths, and the emotions bound thereto.

With regard to Brexit only few attempts have been made to adopt such a long-term perspective, which historians often refer to as *longue durée*. It requires us to take into account the particularities of the UK with regard to its constitutional, colonial and economic history (some of which predate today's 'United Kingdom', so they are in fact features of English rather than British history). These particularities, in the view of many Britons, militate against membership in the EU and explain the desire to leave.

To this purpose, a simple thought experiment will help. For once, let us dispense with the stereotype of the 'leave' voter being a grumpy old unemployed Northerner without any qualifications. Think of a group of middle-aged, educated, urbane and affluent professionals instead. Ask them about their self-image and identity. They might even



consider themselves to be Europhiles. Yet, after pausing for reflection and discussion, they might agree on the following answer: 'We are a sovereign, democratic, liberal and cosmopolitan nation that is based on the rule of law and can look back on a thousand years of unbroken and successful history.' This, they might suggest, fundamentally differentiates their country from the continental states, whose histories have been shaped in very different ways.

This point of view itself has historical forerunners, particularly from the 19th century, when it served to provide legitimacy for the country's 'splendid' or 'noble isolation' from the continent. In the run-up to the referendum, a group of 'Historians for Britain' revived it with reference to a supposedly uninterrupted, uniquely British path of development, which led to the distinctive character of the UK (for a German observer, there is a whiff of *Sonderwegstheorie*). Their arguments have certainly not gone unchallenged, with many others highlighting the disruptive elements of British history and its embeddedness in broader European developments.



For the purposes of this essay, it is not relevant which of these two camps has a claim to the elusive prize of best approximation to 'the historical truth'. What matters is rather that British constructions of identity are pieced together by presenting the UK as antithetical to *Europe* as a continent rather than to the *European Union*. As Matthias Häußler has recently shown in the *Vierteljahreshefte für Zeitgeschichte* (2019, 263), this approach emerged in the British writing of history from the 1980s onwards, and it has now become a formative narrative in the political discourse.

This has occurred not least because it ties in with perceptions and 'felt truths' that are difficult to capture empirically. The fictitious answer of our hypothetical Brits about their shared identity can be broken down into seven basic features that are central for the self-image of the 'Brexiters': sovereignty, democracy, rule of law, liberalism, cosmopolitanism, war and continuity. This may be surprising

at first glance, particularly for present-day Germans who might see the first five of these features as equally constitutive for their own national identity. However, for Germans the concepts used have very different connotations and this has immediate effects on the respective relationships with the European Union.

### *Sovereignty*

This is particularly clear when looking at 'sovereignty'. The concern to 'take back control' was central for the leave campaign. Sovereignty, according to the British understanding of the concept, is indivisible by its very nature. This reflects historical experience. England, and later the UK, has been strongly centralised since the Middle Ages. At first, the King ruled without notable restrictions, and so did Parliament after wrestling power from the monarch. Parliamentary sovereignty continues to be the central constitutional principle of the UK. Moreover, until very recently, the regions had no powers worthy of mention, and this continues to be the case for local authorities. As a result, a culture of compromise among the constitutional powers and institutions has never emerged.

The German experience in particular has been a very different one. The Holy Roman Empire and later the German Confederation of 1815 lacked clear hierarchies. Interests had to be balanced, and



for a long time undivided sovereignty remained just an idea. Once it was realised, war beckoned. Thus, in Germany there is a strong perception of the EU as a structure in which national sovereignty is shared and pooled in order to ultimately gain more sovereignty in areas where, in light of global developments, individual member states no longer possess the power and the ability to perform sovereign acts themselves. That this requires compromises between states is seen as the necessary price to be paid.

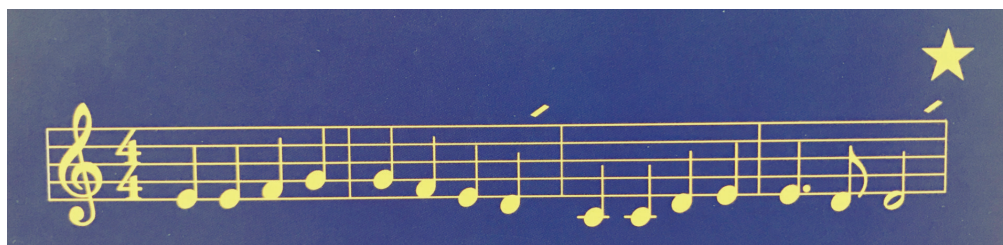
Viewed from the other side of the Channel, this approximates surrender. Not least for this reason, reversing the orientation laid out in the European Treaties towards an 'ever closer union' and returning to a loosely defined free trade area has been a major concern of the UK from the outset of its membership.

### *Democracy*

'Democracy' likewise has a particular connotation in the UK. Almost every general election within living memory has guaranteed a stable majority in the House of Commons. The hung parliaments emerging from the 2010 and the 2017 general elections are widely regarded as aberrations. So is power sharing by coalition government. In normal circumstances, there is no need for the government of the day and its ruling party to compromise. There are no other serious constitutional checks and balances either: the House of Lords has not had the possibility to bring down legislation since 1910, the monarch only has a ceremonial role, and no court of law can strike down an Act of Parliament as invalid. Thus it was not entirely inaccurate when the then Lord Chancellor, Baron Hailsham, suggested in 1976 that the British political system resembled an 'elective dictatorship'.

The flip side of this system is the abrupt and brutal loss of power if the next election goes the other way. Since 1832 at the latest, there has been a direct link between the voter, his or her Member of Parliament and the ruling party. If the voter is not satisfied, he or she can 'kick out' the MP and the government. The people are sovereign. Never does this come to life more vividly than on the day after a general election when the removal vans stop in front of 10 Downing Street and the belongings of the outgoing Prime Minister are loaded up.

How different to Germany, with its party lists, seemingly eternal coalitions, constant compromises and the judicial review power of the courts. In the European Union all of this is even more pronounced. The division of powers between the institutions is notoriously obscure, with the Parliament traditionally having the weakest role and no possibility of deselecting the Commission. The Commission is basically run by civil servants. It is easy to get the impression that there is a lack of accountability, as the same people stay in office no matter how the elections go. Therefore, while many Germans find it difficult to regard the Union as being a democracy that is worthy of the name, this is nigh on impossible for most British observers.



### *Rule of law*

Moreover, the UK is used to a very specific conception of the rule of law. As developed in the 19th century, its first and foremost aim was that no politician should be above the law. It secured freedom of expression. There were no 'political crimes' for criticism of those in power. At the same time, in the Europe of the Restoration, Metternich censored the press and the Göttingen Seven were dismissed from their positions.

Even today, English law is very much concerned with retaining and guaranteeing a space where everyone is free to do as he or as she pleases. It is an important feature of the rule of law that there are sizable spheres of life that are not 'juridified', ie where both the legislature and the courts refrain from intervention. The judiciary in particular shows much more restraint on questions of legal policy than in Germany, where the Federal Constitutional Court arguably has to engage in a certain degree of activism in order to uphold the *Rechtsstaat*. It is therefore not surprising that criticism of the alleged 'Brussels regulation frenzy' and the 'judicial activism' of the European Court of Justice is much more vehement on the other side of the Channel than in Germany.

### *Liberalism*

In a similar vein, Johnson's description of Brexit as 'the great project of European liberalism' during the referendum campaign is not particularly astonishing if a peculiarly British world view is adopted. Since the 'Corn Laws' of the first half of the 19th century, 'liberal' is more or less synonymous with free trade. The self-image is that of a sea trading nation. In the late 20th century, the free trade ideology was reinforced by Margaret Thatcher's neoliberal economic and social model, with the ideal of a night-watchman state, low taxes and radical deregulation.

Neither of these ideas is easy to reconcile with EU membership. On the one hand, being a member implies the loss of the possibility to conclude the much-invoked 'global trade deals', sovereign trade agreements with third countries outside the Common Market. On the other, from the point of view of the Brexiteers, membership forces the British under the yoke of a paternalistic European social model. When they hear 'Europe', they hear the bleak clattering of the small cogwheels of bureaucracy. They think of petty prohibitions and – once again – regulation, the proverbial 'red tape' of the 'Brussels bureaucrats'. When asked which bits of EU law they actually object to, Brexiteers inevitably refer to the Regulation Laying Down Quality Standards for Bananas and the Working Time Directive, as applied to hospital doctors.

### *Cosmopolitanism*

The slogan of 'global Britain' and the corresponding idea of a non-European identity of the UK are not entirely implausible either, at least if viewed from the other side of the Channel. Since the 17th century, British politics has been resolutely oriented towards overseas. World domination in the 19th and early 20th centuries cemented the self-image as a leading nation politically, economically and culturally. Today's cosmopolitanism and global outlook is closely linked to yesterday's imperialism.

As late as 1945 a good third of the world population lived under the Empire. Half of world trade was transacted in Pounds Sterling. One third of European industrial production took place in Great Britain. At the time of the founding of the EEC, the volume of British trade with the Commonwealth considerably exceeded that with the six founding members. For a long time, the UK saw itself in

the centre of three overlapping circles of influence that embraced the Commonwealth, the USA and Europe – and precisely in that order. In the parliamentary debates preceding the 1973 accession to the EEC, one speaker pointed out that the post office in his village received numerous letters from Sudan, Malaysia and Jamaica, but hardly any from Belgium.

To this day, the idea of a linguistic, historical and cultural Anglosphere is an integral part of British identity. Relatives live in New Zealand and not in Slovenia. Stopping over in Auckland has always felt more like home than visiting Ljubljana. Accession to the EEC evokes very different memories. It coincided and was inextricably linked with the process of decolonisation and the decline of the Empire, as well as the loss of economic hegemony. The hope that membership would compensate for this loss was soon disappointed, not least because it occurred at the time of the first major oil price crisis. Against this background, the post-imperial identity construction of 'global Britain' generates a resonance for many Britons that is entirely incomprehensible for Germans, with their non-seafaring past and their belated and feeble attempts at becoming a colonial power.

### *War*

At least as relevant for the respective attitudes to EU membership are the different perceptions of the world wars, particularly World War II. What constitutes a traumatic collective memory in Germany is still celebrated as Britain's 'finest hour'. A country that has not witnessed any armed conflict with a foreign power on its own soil since 1066 is much more at ease with glorifying its military achievements and heroic tales.

It is certainly no accident that at the time of Brexit two new movies turned out to be instant blockbusters: an epic about Winston Churchill and the story of the evacuation of Dunkirk. It is often said that the war persists with the British because they were the victors. This has a direct impact on their relationship to Europe. Europe only appears in this narrative as a place that must occasionally be saved from itself. While the motto 'Never Again' was virtually constitutive for early German efforts towards European unity, it hardly played a role in the British debate on Europe. The idea that the EU is primarily a peace project is acknowledged, but not given similar prominence.

### *Continuity*

This links up with the last of the seven identity-constituting factors mentioned above, the supposedly uninterrupted continuity of the island's polity since the Norman invasion. Standing apart from the continent, it seems, was a recipe for being spared from catastrophes. Europe equalled war, chaos and revolution. England was synonymous with slow, careful and unbloody change. In retrospect, these perceptions result in a hazy sentiment of being a chosen people, favoured by fate and somehow always standing on the right side of history. It was this sentiment that Labour Party leader Hugh Gaitskell tapped into when he argued in 1962 that joining the EEC would mean the end of a thousand years of history.

The optimism that all crises will be overcome, even and especially without Europe, still runs through today's debates on Brexit. The unshakeable belief that a 'better deal' exists somewhere outside the EU, the assumption that you can 'have your cake and eat it too', Johnson's mantra that the Brexit problem can be solved with verve, brinkmanship and self-confidence alone – from the outside it all seems like acute self-deception. From the internal perspective it integrates seamlessly into a historical world view in which Britannia will invariably land on her feet in the end.

### Narratives, identities and politics

Against the self-image of the fictitious Brits, on which the historical identity constructions of the Brexiteers were presented here, it may be objected that it is just that: fictitious. In reality, the country, the people and their self-perceptions are all significantly more pluralistic and diverse. But it is striking that many of the most influential Brexiteers read for a university degree in a historical discipline. In addition to Johnson and his Chief Adviser at the time of Brexit, Dominic Cummings, this includes long-time MPs Jacob Rees-Mogg, Bill Cash, Douglas Carswell, John Redwood and, in the European Parliament, Daniel Hannan. This enumeration alone shows that it is the world view of a particular class or group that permeates the political discourse. Other voices are drowned – those in power are, unsurprisingly, the ones controlling the construction of ‘the’ narrative.

From the point of view of professional historians, the use of historical arguments in the Brexit discourse is frustrating. ‘Much of this history is so very un- and antihistorical’, complained Jessica Reinisch of Birkbeck College, London. ‘History has become a caricature of parochial dreams, nostalgias and made-up analogies.’ (Cambridge Core Blog, 21 February 2019, <https://www.cambridge.org/core/>) And indeed the Brexiteers do not address how to reconcile British colonial rule with the rule of law, nor the fact that World War II would not have been winnable if it had not been for the USA and the Soviet Union – as they also fail to mention that the EU’s ‘Bendy Banana Regulation’ did not actually ban the selling of bendy bananas.

The belief in the blessings of Brexit has been compared to a religion or ideology. This is not entirely wrong. But an ideology can only exist on the basis of a particular world view. Therefore, constructions of identity are also relevant when they are incorrect. Historical narratives can develop a life of their own. This is also important for the frequently asked question about the relevance of history for the future. Today there is a broad consensus that no instructions for future action can be derived from history. But we access the present through our understanding of what has happened previously, saturated by historical experience. The discourse surrounding Brexit shows that, when looking to the future, it is difficult to free ourselves from the ghosts of the past.

