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THE IMPACT OF BREXIT ON THE LEGAL FRAMEWORK OF THE UNITED KINGDOM

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ABSTRACT

It's possible that the recently united nation isn't as "independent" as it had intended. It will be necessary to establish new agreements with the ex-spouse, divide assets, and pay maintenance. These agreements could not be as favourable as the ones that now exist, such as granting access to the Internal Market rather than "joined custody." Most importantly, as the contributions to this special issue have demonstrated, it may be exceedingly difficult, if not impossible, to remove the body of EU law that has become deeply ingrained in national legal systems over the years, frequently as a result of actions taken by domestic actors like the courts. Divorce is rarely an easy process. As previously mentioned, a UK that has finally been released from its marriage contract with the EU may find itself free but alone in the world community.

INTRODUCTION

If a Conservative government were elected to power in 2015, British Prime Minister David Cameron had pledged in 2013 to hold a "In or Out" referendum on the UK's membership in the European Union (EU) in 2017. This referendum appears (as of writing in January 2016) likely to take place in 2016 or 2017 at the latest, with the Conservatives having returned to power at

Westminster with their first majority since 1992. Such a vote would have an unpredictable result because polls frequently show slim majorities in favour or against. One thing that is certain is that the UK may very well decide to exit the EU in the next years. After more than 40 years of complete EU membership, these are pertinent topics in 2016. In order to respond to these concerns, we must re-examine and assess the advantages and disadvantages of continuing to be a member of the EU on a financial, economic, political, geopolitical, cultural, and other fronts. This is especially significant since, as is frequently the case, rather than being grounded in a sober, fact-based assessment of the advantages and disadvantages of each alternative, political discourse appears to have been shaped by the short-term, even populist, dynamics of UK electoral politics. In light of this, the special issue's objective is to make a meaningful contribution to the careful examination of the causes and, more importantly, the effects of a potential Brexit.

The impact of Brexit on the legal framework of the United Kingdom

A workshop aimed at addressing these topics was held on June 25, 2014, by the University of Birmingham's Public Law and Human Rights Research Cluster in collaboration with the Institute of European Law (IEL). The workshop featured four connected sessions with political scientists, public officials, EU and constitutional lawyers, and historian and former diplomat Sir Stephen Wall as the keynote speaker. This session was a part of the IEL's silver anniversary celebrations. The principal objective of the organisers was to impart knowledge on the potential effects of a "Brexit" on English and UK law, with a focus on its political, historical, and economic backgrounds. Concurrently, the workshop included an investigation of the nature of the modern European Union. The majority of the papers that were given during the workshop are contained in this European Public Law special edition. Although it is obvious that not every facet of a "Brexit" could be covered in a one-day workshop or even in a special edition of a magazine like this one, the editors and writers hope to shed light on a number of important areas. These specifically cover the following topics: (a) the UK's EU accession history, which is essential background information for any discussion of the country's recently proposed "Brexit"; (b) a discussion of one option the UK may consider to structure its relationship with the EU following such a move; (c) an analysis of the implications for British businesses and citizens; and (d) an evaluation of the implications for specific elements of the UK constitution and common law. Sir Stephen Wall opens the special issue with an insightful historical essay. A brief biography is required. Former British diplomat Sir Stephen advised Prime Minister John Major on foreign policy and Prime Minister Tony Blair on the EU. He collaborated extensively with five foreign secretaries. He is also the official historian of Britain’s relations with her EU partners, taking up

this important venture where the late Alan Milward left.[1] He paints an intriguing picture in his narrative of how the UK reluctantly entered the EU. It's safe to argue that this mindset has persisted ever since. "The United Kingdom, at heart, never wanted to join the European Community and, at heart, never stopped hankering after a world where it would be safe for it to leave," the author astutely observes in the opening of his paper. In this regard, Joseph Weiler recently made clear that the only way to placate this counter-intuitive mindset would be to leave the EU. A "no concession" or "rule change" might resolve this deeply ingrained "identitarian" problem. Professor Ciarán Burke of Schiller University in Jena, Ólafur Ísberg Hannesson, and Kristin Bangsund, both from the EFTA Surveillance Authority, address a specific alternative that the UK could pursue in the case of a Brexit in their contributions. They propose that the UK might join the European Economic Area (EEA) and the European Free Trade Area (EFTA) in order to accomplish this goal, assuming that maintaining established markets is a desire shared by the UK and its EU allies. According to the authors, the EEA model would be the best option for the UK since it would combine the clear advantages of being a part of the Internal Market with a less restrictive regulatory framework that would provide the country more flexibility in a number of areas. The looser, but more intricate, bilateral agreement governing Swiss-EU ties is favourably compared with the EFTA/EEA model following an analysis of the legislative and enforcement processes and a comparison with those of the EU. The potential effects of Brexit on British businesses and residents are covered in the next two paragraphs. Marja-Liisa Öberg first examines the potential ramifications of "Brexit" on British individuals who would no longer be EU members. Öberg's key argument, in keeping with the preceding contribution's leit-motif, is that it is implausible for any Member State to sever all ties to the Internal Market in the event of its withdrawal from the Union. A departing state's requirement to establish a bilateral or multilateral agreement in order to carry on with its participation in the Internal Market is all but unavoidable. She looks at whether and under what circumstances residents of third countries are granted rights and obligations in the EU Internal Market that are equivalent to those enjoyed by EU citizens, and she contrasts the legal status of citizens of withdrawal states with that of EU citizens. The prospect of applying the Polydor doctrine in this situation to provide citizens of third countries the same level of empowerment as citizens of the EU is investigated. In his contribution, Adam Łazowski makes the case that the British business community would not profit from leaving. One the one hand, the UK would be bound by EU law even in the event of a unilateral departure or amicable divorce. It would be quite unlikely to remove EU law from UK legal orders in a laborious and resource-

[1] Stephen Wall, *Official History of the United Kingdom and the European Community Volume II, 1963–1975* (Routledge 2012).

intensive manner. However, departure would unavoidably result in uncertainty about future ties with the EU, which would have an impact on the business community in the UK and probably not produce the anticipated efficiency. The final two articles take a perspective on UK constitutional law, addressing common law, sovereignty, and the place of EU law in UK law both before and after "Brexit." The UK Parliament's function and viewpoint are the subject of Graham Gee and Alison L. Young's first contribution, while the judiciary is the subject of Sophie Boyron's second. Gee and Young examine the legislative discussions on the European Union Bill in 2011 and the European Communities Bill in 1971–1972, with regard to the use of the term "sovereignty." In both situations, fundamental worries about the diminution of the political power that can be wielded by domestic political institutions were frequently concealed behind the language of sovereignty. When parliamentary debates from nearly forty years apart are compared, it becomes clear that concerns about the erosion of sovereignty in favour of European political institutions' ability to enact laws have given way to concerns about its erosion to the benefit of the courts, particularly domestic courts. The writers are prompted to consider whether a "Brexit" would result in "regaining" sovereignty via this change. Politicians' perspectives are frequently used to examine the "Brexit" debate, particularly their perceptions of and insights into European politics and legislation. In contrast, Sophie Boyron concentrates on the opinions and perceptions of the senior judiciary. She maps the senior judiciary's perception of Europe by examining five extrajudicial speeches given between October 2013 and February 2014, a time frame that was especially fruitful for cases involving EU law or the European Convention on Human Rights in the UK's highest courts. More specifically, she draws attention to its tactics which one may refer to as "a search for judicial self-determination" to lessen the influence of both European treaties on the British constitution. Boyron assesses and contends that a novel extrajudicial procedure for amending the constitution may be taking shape.

The overall conclusion drawn from the articles in this special issue regarding the legal impact of "Brexit" on the UK is that the nation cannot have its cake and eat it. On the one hand, it is evident that "Brexit" aims to restore sovereignty and "UK independence," and it may even strengthen democracy. Conversely, the goal is to maintain a significant level of involvement in the internal market. Persuasively, Öberg (for British nationals) and Łazovski (for British companies) contended that following a "Brexit," it might be challenging to fully engage in the Internal Market. Naturally, the 2.2 million British nationals who reside permanently in other EU member states as well as the millions more who visit them on vacation will always be welcomed. However, they might face considerably more bureaucracy and less favourable treatment as tourists, residents,

workers and service providers. The UK business community would of course continue to trade with the rest of the EU, arrangements would be made, through the EEA and EFTA, as shown by Burke, Ísberg Hannesson, and Bangsund, or otherwise, but Britain would be removed from most decision-making and see its political power reduced to persuasion and lobbying. Transitional and even permanent disruptions to trade are likely to occur, and will have consequences on profits and employment in Britain. Those in favour of 'Brexit' are probably accepting these clear disadvantages as the price to pay to gain 'independence', but whose independence? Gee and Young make a strong case that the likelihood of more parliamentary sovereignty outside of the EU is constrained because domestic and European case law—rather than the institutions that make laws in Brussels—shapes this potential. Not only will it take decades, but it's probably impossible to fully extricate English common law, Northern Irish law, and Scots law from the impact of the EU (and ECHR). Boyron further emphasises how the British constitution is less affected by these European legal systems thanks to the role of the national judiciary. This begs the question of whether further "independence," "sovereignty," and "self-determination" could not be attained within the EU without incurring the costs of exiting. In a recent speech, Sir Alan Dashwood posed the thought-provoking question of whether "ending a bad marriage with a messy divorce" would be the best way to go with the UK's relationship with the EU. The editors find it challenging to declare with certainty that this was a disastrous marriage, in part because of our differences in viewpoints. History suggests that practicality may have had a greater influence than genuine affection. Whatever the case, there is no denying that "Brexit" amounts to a divorce. There is no other way to categorise the profound symbolic and real-world effects on the UK-EU relationship that a "in-out" referendum would bring about. To be sure, it is clear that only mature democracies, like the UK, can afford considering ultimate decisions such as divorcing from the European Union. Divorce may be advisable when the marital arrangement is no longer convenient to at least one of the partners. However, considering the continued and significant participation of the UK in the development of EU policies, as well as the 'opt-outs' and special arrangements already secured by the UK (think of Schengen or the Euro), one has to seriously ask whether there is sufficient evidence that EU membership is no longer convenient for the country. It would take years, money, and effort to finish this divorce, as most are messy, expensive, and agonising. Indeed, it is possible to introduce several agreements that define the relationship between the newly established "independent" Britain and the EU. These might be found in the already-existing toolkit, like EFTA/EEA, or they could take on new forms with a little creativity. Weiler is accurate. In theory, no one can oppose the establishment of a "special status for Britain, as associate member or something similar." But on a practical level, this is the primary concern. It would probably be

challenging to negotiate this "special" (i.e., exclusive to Britain) agreement. Dealing with this issue may potentially annoy the other members of the EU. Furthermore, there might be challenges in putting the mutually beneficial agreement into practice, particularly if it aims to guarantee a "significant" UK influence outside of the standard EU governance framework. In light of this, the only aspects of divorce that seem most certain are its drawbacks. Weiler points out that the harm that Britain's exit from the EU will do to not only the EU but also to Britain and the rest of the world, cannot be overstated. One should consider the actual traction that the UK would have on its own in geopolitics of the twenty-first century, without getting into the challenges relating to the legal situation of the UK with respect to the trade agreements taken into by the EU by virtue of its exclusive competence. The days of the Empire and the UK's joint efforts with the United States to redefine the post-World War II economic order are long gone. Very unlikely. These are only a handful of the important queries regarding the UK's post-leave EU role in the world. As Dashwood noted: 'while withdrawal from the EU would mean that the UK recovered its power to act autonomously as a subject of the international legal order, we might find our newly recovered freedom rather lonely, especially in international trade negotiations'.[2]

There are two more points to raise that cast greater doubt on the benefits of a breakaway. Initially, there remains the spectre of the "Scotland issue." It doesn't take much to realise that there is a delicate balance and irony between the two issues, and that the risks of withdrawal and secession are merely two sides of the same coin. In the struggle to preserve the union with Scotland, Ten Downing Street has prevailed. It might then have to fight a second war to end its union with its European counterparts following a vote to leave the EU. If there is a general lesson to be learnt, it is that long-standing constitutional accords are difficult to untangle without major and unintended consequences. But here's the irony: by doing so, it may risk losing Scotland once more.

[2] Durham European Law Institute Annual Lecture, delivered by Professor Sir Alan Dashwood QC in Durham on 27 Feb. 2015.