

Britain Alone!

The Implications and Consequences of
United Kingdom Exit from the EU

Edited by

Patrick J. Birkinshaw
Andrea Biondi

96

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Prof. Andrea Biondi is Professor of European Law and Director of the Centre of European Law at King's College London

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Foreword

This book contains a fascinating collection of contributions on the possible withdrawal of the United Kingdom from the European Union.

As is made clear, the issue of withdrawal, even for the most impartial observer, may have profound constitutional implications for the United Kingdom itself: possibly for its very survival as a United Kingdom, since doubts may arise about Scotland, Wales and Northern Ireland; and in any event for its internal constitutional arrangements.

And across many fields of law and policy where the Member States of the European Union are now part of an interwoven fabric, difficult questions will arise.

The decision, if it is for withdrawal, will be only the starting point. Indeed, the contributions to this book bring home one of the essentials: that withdrawal from the EU, if it occurs, will raise a great variety of important issues – social, economic, political, constitutional, legal – which will still need to be resolved.

Moreover, many of these are vital issues which may need to be resolved, after the decision, by negotiation with the EU and its Member States of the terms of withdrawal – and above all, by agreement on the extent of re-engagement with the EU. To take just three examples, it can be assumed that the issues will include continued access, on some basis, to the European internal market; the role of UK financial services, as the key element in the UK's economy, in relation to the Eurozone and to European capital markets; and cooperation and interaction on the environment, a subject of possibly even more fundamental importance for the future of us all.

The choice offered in the referendum between 'remaining in the EU' and 'leaving the EU' is therefore perhaps misleading. Although there is no relevant precedent, to leave the EU, as has been said elsewhere, is not exactly like leaving a golf club.

A further, more fundamental question might have been whether a referendum is the appropriate method of taking such a decision. It is still a rather novel method of decision-making in the UK, and insofar as it might be hoped that it would resolve the issue definitively, the recent example of the Scottish referendum is not reassuring.

Foreword

In any event, all will, it is hoped, agree that the decision should be based on informed debate. This book therefore serves a potentially very valuable service, with expert contributions on a wide range of crucial issues.

Francis G. Jacobs
Professor of Law at King's College, London and
Jean Monnet Professor

Introduction

Patrick J. Birkinshaw & Andrea Biondi

By the end of the current United Kingdom Parliament in May 2020, that Parliament and the people of the United Kingdom will have addressed some of the most momentous constitutional issues facing our society in fifty years, possibly a century. These questions will involve an In/Out referendum on the EU, the British (United Kingdom) bill of rights and the future of the European Convention on Human Rights, further devolution, and the question of English-only MPs voting for English laws. Unlike Blair's government which enjoyed huge majorities in the House of Commons and which presided over major constitutional changes in the UK the present Conservative Government has a modest Commons' majority of twelve in the new Parliament, and is likely to face considerable difficulties in the House of Lords, especially in its European measures. One only has to recall the difficulties faced by John Major with a Commons majority of twenty-one in 1992, gradually whittled away by 1997 and his Parliamentary battles over Europe. We expect interesting times. They began immediately after the Queen's Speech in May 2015.

In terms of the UK's global position, the most important question is our membership, or otherwise, of the European Union. The UK has been a member of that Union and its predecessors, the EEC and EC, since 1973. This book examines the implications of withdrawal from the EU. Also up for scrutiny could be our membership of the European Convention on Human Rights. The UK was one of the founding members of the Council of Europe, which produced the ECHR. The Council has as its core mission the promotion of human rights, democracy and the rule of law through the continent. The UK ratified the ECHR in 1951 and accepted individual petition to the Court of Human Rights in 1966. The attack on the ECHR, and particularly the European Court of Human Rights as well as the UK Human Rights Act 1998 which implemented much of the ECHR, has been as sustained as those on the EU. This theme is referred to in several contributions but the focus in this book is on withdrawal from the EU.

While our relationship with the Union has often been a strained one, several factors have combined to curdle domestic perspectives on the UK's relationship with Europe. Sovereignty, or rather loss of sovereignty, has been a persistent complaint.

Loss of power, over regulation and bureaucratic expansionism have been other long-standing gripes. Being different, never really trusting European initiatives or initiatives in Europe and harping back to halcyon days of a self-sufficient Commonwealth were often repeated. Complaints grew of loss of commercial freedom and enterprise, loss of autonomy in international trade negotiations and loss of resources such as fisheries. The UK opted out of Union policies, in particular those of monetary union and the Schengen Agreement on abolition of internal border controls, and the non-Union financial stability measures although it was not alone in these opt outs. The pre-Lisbon Justice and Home Affairs provisions on criminal law were opted out off only for the more important measures to be opted back into.

To these were added complaints of a Union that somehow transmuted from an economic union and a common market to a fully fledged political union claiming not just political sovereignty but also legal sovereignty including sovereignty over national constitutions. These latter themes are unravelling in the top courts of Member States as we write. There is no doubt, however, that the Union absorbed more and more characteristics of a multi-nation state so that federalism was often used to describe the relationship between the members and the union. These developments were accompanied by, what some saw as, increasingly interventionist social and employment policies including Union citizenship and human rights protection as well as a Union criminal law to protect an area of freedom, security and justice. While some saw these as the necessary corollaries of societies working more closely together and consequential residence rights based on free movement, others deeply resented what they chose to view as globalised alienation.

As so often in the UK's past, immigration came to be seen as a cause of deep felt discontent and a subject on which it is easy to foment nationalist fears. Now the threat was not from the new Commonwealth but from the new members of the EU, especially Eastern Europe. These fears were fanned by political parties. Both Labour and Conservative parties had significant anti-EU elements but the emergence of a populist and anti immigration party UKIP (United Kingdom Independence Party) initially appeared to eat into the Conservative vote. It subsequently became a threat to Labour. There is no need to recount the well-known UKIP onslaught on Europe. UKIP spoke on behalf of the frustrations of swathes of English voters who felt threatened by globalisation and accompanying immigration with effects on employment, wage restraint, public services and housing. The ideological anxieties of UKIP were echoed by Conservative Party politicians who were fearful of UKIP inroads into Conservative constituencies.

In January 2013, David Cameron outlined his ideas for EU treaty reform which he then hoped to negotiate successfully with EU partners before putting the results to an in/out referendum vote for the British people.¹ In his speech, Cameron argued for a

1. <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>. The European Union Act 2011 had already made a referendum a requirement before the UK could agree to an amendment of the Treaty on European Union or of the Treaty on the Functioning of the European Union; or before the UK could agree to certain decisions already provided for by TEU and TFEU transferring power to the EU.

Union of greater competition, flexibility, choice, openness, diversity, repatriation of powers, democratic accountability and fairness. 'I have no illusions of the scale of the task ahead.'

Subsequently, the most publicised change was in freedom of movement of EU workers² and a desire as expressed in some quarters to 'reclaim our borders'. By 2015, the Conservative Party manifesto for the general election contained the following proposals for restrictions on EU freedom of movement: EU workers would have to earn for 'a number of years' in the UK before receiving benefits such as tax credits which top up low wages and child benefit; there would be no job-seeking benefits for EU job seekers; there would be residency requirements for social housing; restrictions on unemployment benefit; return of EU workers after six months if unemployed; restrictions on child benefit and child tax credits where children are living abroad; stronger powers facilitating deportation and preventing re-entry will be introduced – although one should note Eurosceptic opposition to the European Arrest Warrant making extradition easier! There will be tougher penalties for those abusing free movement provisions. Non-EU spouses will face restrictions on joining EU spouses with income thresholds and language tests. Free movement rights will not apply to new Member States until their economies have converged more closely with 'existing Member States'. Generally, immigration law and enforcement will be strengthened.

Most of those proposals are unlikely to be welcomed by the other EU partners. The governing provisions on Union citizenship and free movement are well-established principles that guarantee to confer lawfully on EU migrant citizens the right to equal treatment with nationals in the host state.³ If the UK negotiated a change in EU law to legitimise any proposed reforms to free movement, changes in secondary law would be subject to scrutiny by the ECJ. If the objective was a reform agreed with all other Member States by a change in the treaty this would be likely to meet with overwhelming opposition. If the UK left the EU then preservation of free movement and residence rights – EU citizenship would no longer apply under Article 20 TFEU – would depend upon the arrangements with the other members of the EU that the UK could successfully negotiate. If a status quo ante were to be sought to protect the rights of UK citizens then it is difficult to see what advantage the UK would gain from Brexit unless it only applied to existing arrangements and did not cover future arrangements.⁴

2. See David Cameron's JCB Staffordshire Speech November 2014. <https://www.gov.uk/government/speeches/jcb-staffordshire-prime-ministers-speech>.

3. Although both secondary legislation and recent case law of the Court (Case C-333/13 *Dano*, ECLI:EU:C:2014:2358 leave some degree of discretion to Member States as far as access to public benefits and welfare support are concerned. See also Case C-67/14 *Alimanovic* [2015] EUECJ (15/09/15). See also on prisoners' voting rights *Thierry Delwigne v. Commune de Lesparre-Médoc* etc [2015] EUECJ C-650/13 (6 Oct 2015).

4. If the EU has not irreversibly vested the nationals of the Union with a legal heritage of rights including free movement and residence [see J Herbst *German Law Journal* (6:2005) 1755 and *Leaving the EU* Research Paper 13/42 (July 2013) House of Commons Library] then the UK and EU would have to negotiate a transitional period to protect vested rights such as free movement and residence. Art. 50 TEU exists for the purpose of 'taking account of the framework for [a state's] future relationship with the Union' (see chapter six). This occurred when Greenland left the EEC in 1975. In the absence of such an agreement, Greenland retained the 'substance' of free

The refugee crisis in the summer of 2015 showed David Cameron's resistance to EU based solutions to an international problem. Cameron insisted on a distinctly British approach to the crisis. The ongoing crisis is testing European solidarity to its limits. It is a catastrophe together with terrorism threatening the continuation of the Schengen agreement itself. The scheme to deal with quotas allocating refugees to Member States announced by the President of the EU Commission in September 2015 seemed unlikely to apply to the UK.

Along with the above manifesto promises on free movement came calls for a 'red card' policy for national Parliaments or perhaps groups of Parliaments to veto EU legislation; exemption from the 'ever closer Union' Treaty provision; but in the latter case the point was suggested that exempting the UK from such a treaty provision might be accompanied by loss of a veto power in the Council; preserving our trade negotiating rights at the international level irrespective of an EU competence; boosting competitiveness and reducing 'red tape': guaranteed protection for the UK and its access to the common market and non-discrimination against the UK for its non-membership of the Eurozone. In October 2015, the EU state leaders requested the desired reforms be put in writing. Cameron's letter to the President of the EU Council in November 2015 seemed modest. Nevertheless, it met with a hostile reaction from members of his own party.

With Brexit becoming the largest single issue to affect the United Kingdom's place in the world, the Centre of European Law, King's College University of London and the Institute of European Public Law of the University of Hull organised a Conference in May 2014 at Senate House University of London. The conference theme was 'Britain Alone! The Implications and Consequences of United Kingdom Exit from the European Union.' The theme became the title for our jointly edited book. We are grateful to Lisa Zoltowska and Kluwer Law International for their generous support and encouragement for this conference.

Many of the presentations of that day are updated and have been included in this edited volume. Several new contributions have also been added. Brexit was becoming the biggest issue in the oncoming election – although it was somewhat muted in the

movement rights for workers from the EEC in Greenland but as the Commons paper explains '[the Commission] did not say whether the rest of the EU should retain these rights for workers from Greenland.' (p 15). Future membership of the EEA and EFTA and the implications for free movement agreements are examined in chapter twelve.

In the absence of any transitional or special treaty arrangements then under international law, withdrawal from a treaty releases the parties from any future obligations to each other 'but does not affect any rights or obligations acquired under it before withdrawal': see *Leaving the EU* above and citations. In other words vested or acquired rights are retained.

In terms of non-EU, EEA and Swiss nationals the UK has not signed up to the Schengen arrangements on visas and border controls and it is not 'automatically bound by EU legislation on border controls, non-EU immigration and asylum': *Leaving the EU* above p. 67. The UK has not opted into the recast directives on asylum but is bound by the legislation adopted in the first phase of 2000–2005. The UK has opted into the revised Dublin regulations on preventing asylum shopping and which establish hierarchically which state should have responsibility for processing a claim.

In the case of non-EU/EEA/Swiss entrants to the UK the existing legal restrictions on entry and immigration would still apply. See Piris Chapter 6 *infra*.

immediate months before the run-up to the election in 2015. Indeed, polls suggested an increasing support for European membership among UK voters after the 2015 election.⁵ Polls, however, had not had a good election.

The May 2015 election led to a Conservative majority of twelve in the House of Commons. In the event, only one UKIP MP was elected to Parliament despite 3,881,099 (12.6 pc of the total) UK votes. The election result meant that a referendum on membership of the European Union would take place by 2017 – pressure immediately grew for such a referendum to take place within 2016. The European Union Referendum Bill was introduced in the House of Commons and faced its second reading on 9 June 2015. The Committee stage, as a committee of the whole House, took place on 16 June.

The question initially proposed to be put to those entitled to vote in the referendum (the electorate is that of a UK Parliamentary general election with modifications allowing peers to vote as well as Commonwealth and Irish Republic citizens in Gibraltar) will be: ‘Should the United Kingdom remain a member of the European Union?’ Following a recommendation from the statutory Electoral Commission it was agreed to change the wording to one which did not, the Commission believed, favour a vote in favour of the status quo. The Commission recommendation was: ‘Should the United Kingdom remain a member of the European Union or leave the European Union?’

Factors that could well arise on possible amendments include the following. Should there be a fixed majority in favour of ‘No’ to take effect? Should there be majorities in favour of leaving in all UK countries, and what of Gibraltar? Should the age of voting be reduced for the referendum to 17 or 16? An immediate question was whether Government ministers should abide by a collective decision in favour of voting ‘Yes’ – David Cameron’s stated preference – or whether they would be allowed a free vote. Would the government refrain from campaigning for a ‘Yes’ vote which would involve deployment of the resources of the state in the month before the referendum? Confusion and attempted clarification and the prospect of dramatic divisions over amendments inevitably arose. A government proposal to relax the so-called ‘purdah’ rules before the EU referendum was defeated in the Commons.⁶ The rules provide for restrictions on government publicity and publicly funded communications favouring one position for up to twenty-eight days before polling day (see p. 10). There were thirty-seven Conservative MPs who helped defeat the government. There should be little doubt that many politicians and citizens will see the ensuing months as a battle to the death over Europe. We have only been able to trace events until January 2016. A development in September saw the largest British trade union, Unite, warn that any negotiated settlement between David Cameron and EU partners leaving a reduction in employment rights would be opposed by the Union. This outcome could influence its members to vote against continuing EU membership it warned.

5. *Financial Times* 3 June 2015, p. 6. By September 2015 polls suggested a tiny minority in favour of leaving the EU.

6. HC Debs Col 78 et seq (7 September 2015). The restriction is contained in s. 125 Political Parties, Elections and Referendums Act 2000. Section 125(3) contains exceptions.

The attack on Europe was not aimed solely at the EU. The ECHR had also been subjected to vitriolic criticism. Should the UK be unable to persuade our partners in the Council of Europe of changes in the ECHR to satisfy the UK government, then not only would membership of the ECHR be brought to termination; our membership of the Council of Europe would also be placed in doubt. In June 2015, the Foreign Secretary stated that leaving the ECHR was not an option. The Prime Minister's Press Office memorandum on the Queen's Speech of May 2015 spoke of bringing 'forward proposals for a Bill of Rights to replace the Human Rights Act' restoring 'common sense' to human rights laws while protecting existing rights 'which are an essential part of a modern, democratic society' and which would give better protection against abuse. With the prospect of widespread opposition to repeal of the HRA, proposals will be subject to yet further consultation.

One has to acknowledge that the pro-European initiative has been waning. The efforts and vision required to bring Europe back from catastrophe post-1945 are now consigned to history. So too are the memories of more recent European dictatorships and Soviet hegemony in Member States. Events in the Ukraine have rekindled memories of the latter. The EEC and its successors have produced peace in western Europe for sixty years and assisted in the transformation of thirteen former dictatorships to EU members since 1980. But the craving for European peace and security that impelled economic integration over sixty years ago seems no longer there. It is too early to assess the effects of terrorist outrages on European unity or disunity. European disunity is no response to global dilemmas.

The Eurozone crisis has been a sickening blow to economic prosperity as well as the reputation of the EU; although the proverbial green-shoots may be emerging in some member states, in others crisis management appears endemic. The Commission and European Central Bank together with Germany and the International Monetary Fund have been associated with austerity measures that have been accused of bringing the European ideal to its knees and overriding national democratic will. Where lies the balance between supranationalism and national democratic will? The refugee crisis outlined above has stretched solidarity to breaking point.

What, however, are the benefits of the Union? 'What, in other words, has Europe done for us?'⁷ Not much, argued one commentator, apart from providing 57% of our trade, structural funding to areas hit by industrial decline, clean beaches and rivers, cleaner air, lead free petrol, restrictions on landfill dumping, cheaper mobile charges, cheaper air travel, improved consumer protection and food labelling, a ban on growth hormones and other harmful food additives, better product safety, single market competition bringing quality improvements and better industrial performance, break up of monopolies, Europe-wide patent and copyright protection, no paper work or customs throughout the Union, price transparency and removal of commission on currency exchanges throughout the Eurozone, freedom to travel, work and live across the Union, funded opportunities for young people to undertake placements abroad, access to European health services, labour protection and enhanced social welfare,

7. The following is from Simon Sweeney *Letters The Guardian* 12 January 2013.

smoke-free work places, equal pay legislation, holiday entitlement, the right not to work more than a 48-hour week without overtime, the strongest wild-life protection in the world, improved animal welfare in food production, EU funded research and industrial collaboration, EU representation in international forums, bloc EEA negotiation at the World Trade Organization, Freedom, Security and Justice measures necessary for security and safety, support for democracy and human rights and anti-trafficking across Europe and beyond and contributing to better living standards and educational, social and cultural capital.

The EU has provided a platform on which the UK can make its contribution to the resolution of global problems that can only be successfully tackled collectively. The editors view the benefits of these achievements positively. Counter arguments will be advanced in the ensuing debate and referendum.

David Cameron was not alone in suggesting that a referendum on European membership would be necessary. The then Labour leader Ed Miliband qualified his assurance on a referendum stating this would occur if there were a further transfer of powers to the Union. The Liberal Democrats came to support a Union referendum despite their avowed support for the European Union. Above all the rhetoric there was a sense that the argument had to be addressed that the people of the United Kingdom had not agreed in the 1975 EEC referendum to the European Union of 2015 and that the narrative was no longer the same. The changes required approval by plebiscite. We do not know whether all the contributors to this book agree with such a plebiscite or not. We believe, however, that all would agree that now that it is to take place the people should vote on full, impartial and undistorted information on the pros and cons of continuing membership. The debate was supposed to be informed by the Coalition Government's Balance of Competencies' Review between the EU and Member States. This was hailed by the government as the most extensive analysis ever undertaken of the UK's relationship with the EU. The House of Lords Select Committee on the EU described the thirty-two reports as 'ambitious' and 'unprecedented' and 'for the most part' 'fair and neutral assessments'. But the reports had not been well publicised and contained, the committee reported, omissions and displayed over-emphasis of the government position.⁸

It is not only on the global level that we face enormous uncertainty. The future of the UK as an integrated union of four countries has also been brought into question.

8. Below *Twelfth Report* paras 25–28. These points are developed in chapter five. The coalition government's 'balance of competencies' review, announced in July 2012, on EU and national competencies was significantly downplayed by the government. Such a response from the government was heavily criticised by the House of Lords EU Select Committee (HL 140 (2014-15 *Twelfth Report*)). If the review was intended to inform public debate '[T]his seems an unrealistic aim, as long as the public are unaware of the Review's existence.' [Para 57] 'The lack of balance in the Single Market: Free Movement of Persons, Animal Health and Welfare and Food Safety and Fisheries reports, and the undue weight given to evidence reflecting the Government's own position, is a disappointing blemish on the Review as a whole.' [Para 28] The Treaty of Lisbon (TEU and TFEU), for the first time in an EEC/EC/EU treaty, listed the 'exclusive' competencies conferred on the EU by member states together with competences shared with member states, coordinated economic policies and supporting, coordinating or supplementing competences: TFEU Arts 2-6. Member states retain competences not conferred upon the Union: TEU Art. 4.

The Scottish independence referendum question, like that of Europe, has not disappeared. The response to a Scottish decision not to secede from the Union in September 2014 was greeted with a call in some quarters for the promotion of England as a devolved country in its own right with its specific devolved powers including an English Parliament making English legislation. David Cameron's response advocated English only MPs in the Commons voting on English bills (English votes for English laws), or English and Welsh MPs only [E & W] voting on English and Welsh only subjects. Such a reform presumes that the entity of an 'English only bill' or 'English and Welsh only bill' can be readily identified.

Would such a measure passed into law benefit from the constitutional principle of Parliamentary sovereignty around which so much of Brexit enthusiasts rally? The concept of 'English' is a limiting one which cuts across sovereignty. It is inherently confined. The press release accompanying the Queen's Speech referred to a change being brought about by Standing Orders of the House of Commons, not legislation. Opposition to such a change in Standing Orders appeared initially to grow among government supporters. Such a method may be seen as an attempt to avoid litigation. This is far removed from the question before the Appellate Committee of the House of Lords in *Attorney General v. Jackson*.⁹ Here the House of Lords Appellate Committee had to rule on the legality of the Parliament Act 1949, and legislation passed thereunder, which enhanced the position of the House of Commons in the legislative process while reducing that of the House of Lords by restricting the duration of the latter's veto powers.

Why in principle should bills for England alone [or E & W], passing through selective procedures, differ from those of the devolved legislatures? The latter bills have to be within legislative competence and not contrary to EU or ECHR law. They may be prevented from being submitted for Royal Consent where they contain, inter alia, provisions which are incompatible with international obligations. It should be noted that E or E & W bills have to be certified by the Speaker as being 'within devolved legislative competence'. This is a justiciable term of art and invites legal challenge. Unlike Parliament Act Bills, or indeed all other public bills, English [or E & W] bills will not be put to the whole Commons in *all* stages of the bill procedure but only to a part of that chamber. Here we would argue that a part of the chamber cannot replace the whole. Earlier models involving English-only MPs [or E & W] would have confirmed our view. However, the model set out in the Conservative Party Manifesto does not use an exclusively English-only [or E & W] procedure.¹⁰ English-only [or E & W] MPs will

9. [2005] UKHL 56. See Lord Thomas in *Recovery of Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 esp paras 119–126.

10. *The Conservative Party Manifesto 2015*, p. 70. <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>.

The Commons Procedure Committee raised the subject of English votes for English laws in 1999: HC 814 (1998–99) paras 7–10. The use of standing orders to bring about E or E&W votes is not a new proposal. It is also perceived as an antidote to the long identified 'West Lothian Question' whereby Scottish, Northern Irish or Welsh MPs in Westminster may vote on purely English matters whereas English MPs in Westminster cannot vote on devolved issues in devolved Parliaments. The Commons Procedure Committee reported in July 2015 'The Committee is satisfied that certification by the Speaker in pursuit of Standing Orders of the House

sit at various stages, i.e., at the Committee stage to examine bills in detail after second reading and at a Grand Committee after report at which a consent to legislate motion will be put. Thereafter it will go to a third reading of all the House for a vote and to the Lords. This combination of procedures appears to have been crafted in the hope of avoiding questions of sovereignty being raised in the courts. The Order addresses the procedure for Bills commencing in the Lords and statutory instruments.

As we write the UK Supreme Court has joined its EU counterparts in asserting a domestic constitutional space or identity for ‘UK constitutional questions’. The judgments of two recent domestic cases argue for a national primacy in constitutional litigation involving domestic constitutional interpretation of questions containing an EU element.¹¹ The UK government and Parliament have every reason to be cautious of judicial intervention in matters constitutional. This involves questions of whether a ‘statute’ is law, as in *Jackson*, or whether legislation is to all intents inviolable. Interesting questions remain to be addressed and resolved in domestic and EU jurisprudence (see Chapter 1).

The chapters which follow address the major concerns and uncertainties associated with Brexit. We commence with the impact that our European Union experience has had on the UK constitution. The subject of Brexit is then examined from a Scottish, Northern Irish and Welsh perspective. The constitutional questions and implications of a referendum are analysed. In Part II concerned with ‘managing alone?’ the question ‘Why Leave?’ is posed and examined. The implications for environmental law and the complications associated with negotiating treaties are explored. The chapters from then on cover Brexit and opting out in the areas of judicial protection, EU criminal law, immigration, equality, labour rights and the EU Charter of Fundamental Rights. The final chapters in Part II cover aspects of financial and economic governance: state aids and the single supervisory mechanism and banking regulation.

We are delighted with the quality of the contributions and the level of argument and detail that the authors have brought to this discussion. We are grateful to all of them. We cannot claim comprehensive coverage of all issues and possibilities involved in a departure from the European Union. Indeed, the enormity of those issues and possibilities makes the prospect of Brexit daunting.

The editors wish to record their gratitude and appreciation for the assistance in this project of Maria Kendrick who is also one of the contributing authors. We are also grateful once again to Liza Zoltowska for her patience and unstinting support in helping us realise and bring to fruition this project together with the support of Christine Robben and Kluwer Law International.

should not be subject to any form of review in the courts. Since it is for the courts to determine the application of Article IX Bill of Rights ... the Committee cannot rule out the possibility that a determined challenger to a certification might be granted leave to apply for judicial review or succeed in the application.’ Procedure Committee *English Votes for English Laws Standing Orders: Interim Report* Summary HC 410 (2015-16). See Hansard HC Debs 22 October 2015, cols 1159 et seq. See Cabinet Office *English Votes for English Laws* July 2015 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441848/English_votes_for_English_laws_explanatory_guide.pdf.

11. Chapter 1 pp. 21-27.

We have been able to track developments until 17 December 2015. By mid-December, the EU Referendum Bill had passed all Parliamentary stages. An attempt to lower the voting age to include 16 and 17 year olds failed. The government re-introduced powers to relax the ‘Purdah’ rules (above p. 5) allowing ministers to make press and media statements on routine EU business in the run-up to the referendum. Lords’ amendments placing a duty on the government to report on the outcome of negotiations with member states on the UK’s concerns regarding EU membership, as well as the government’s opinion on what was agreed, were accepted. Also accepted was a duty on the government to publish a report on rights and obligations arising from EU membership and arrangements agreed with non-EU member states by the EU. The reports have to be published at least ten weeks before the date of the referendum. The outcome of discussions at the EU summit on 17–18 December 2015 is outlined in a postscript to Chapter 6 (Jean Claude Piris). At proof stage we were able to add that David Cameron allowed a ministerial free vote on in or out of the EU despite the government policy of negotiating terms supporting an in vote. The freedom to campaign against collective government policy arises after the terms of renegotiation are agreed.

PART I Constitutional Issues

CHAPTER 1

Britain Alone Constitutionally: Brexit and *Restitutio in Integrum*

Patrick J. Birkinshaw & Mike Varney

§1.01 INTRODUCTION

In this first chapter, we set out to examine the lasting legacy of UK membership of the European Union (EU), and to a lesser extent the European Convention on Human Rights (ECHR), on the UK's constitution and public law. Suffice to say forty three years ago there was very little that was *judicial* in our constitutional law. The common law of judicial review was in a comparative adolescence despite a three hundred year, and sometimes proud,¹ heritage. Law in context courses adopted the view that to concentrate on the courts in UK constitutional law would be to give a completely inaccurate view of our constitution. 'It has been a particular weakness of public law in the United Kingdom in the past that this is exactly what has happened.'² The fact that government could do what any other individual could do, and infinitely more besides under statutory and prerogative powers, did not encourage judicial examination of governmental legitimacy. If we were to leave the Union, and for good measure the Council of Europe,³ what lasting constitutional and legal legacies would the European experience leave us?

We will set out briefly how, and to what extent, the constitution has become judicialised and how legality (dare one say legitimacy?) has become a key principle.

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1. On the sometimes proud heritage see: S. Sedley, *The Sound of Silence: Constitutional Law without a Constitution*, in *Ashes and Sparks* Ch. 7 (2011) and S. Sedley *Lions Under the Throne: Essays on the History of English Public Law* (2015); P. Craig *UK, EU and Global Administrative Law* (2015).
 2. G. Wilson p. V *Cases and Materials on Constitutional and Administrative Law* (2nd ed. 1976).
 3. See *European Human Rights – A Force for Good or a Threat to Democracy?* Lord Phillips Centre of European Law, King's College London 17 Jun. 2014. See S. Boyron (2016) 1 *European Public Law* 149 on analysis of judicial speeches and judgments on 'Europe' by UK judges.

How sovereignty and our constitution have changed and how our public law has been enriched by European influence. Let us start with three positions on Community and Union law.

§1.02 THREE POSITIONS

‘Community law has little direct effect on the ordinary life of private citizens. In so far as it imposes obligations, it does so mostly in relation to industrial and commercial activities and does not touch citizens in their private capacities. Our basic legal system and legal methods will remain unchanged.’ [OFFICIAL REPORT, House of Lords, 8th May, 1967; Vol. 282, c. 1203, Lord Gardiner, Lord Chancellor.]

‘In future, in transactions which cross the frontiers, we must no longer think of English law as something on its own. ... This means a great effort for the lawyers. We have to learn a new system.’ Lord Denning *Bulmer v. Bollinger* [1974] 2 All ER 1226 at 1232 b

‘My views on matters European are well known. British justice is the envy of the world, and I will not countenance any attempt to replace it with a pan-European justice system. It would be entirely wrong for Britain to hand over control of Justice and Home Affairs entirely to the European Union or its Court of Justice and, under this Government, that is not going to happen ...’ [7 April 2014 Column 87]

‘... I am clear that I do not want, and will not tolerate, the idea of us becoming part of a Europeanised justice system.’ [Ibid, Column 93] Justice Secretary Grayling.⁴

It is a movement from complacency and misunderstanding, to endeavour and to contempt. Is the next phase in our relationship with Europe to be determined by uncertainty and prevarication? If the UK voted to leave the EU it would present this country with a position of unprecedented complexity in relation to unravelling laws, rights and privileges emerging from well over forty years of supranational engagement and partnership.

§1.03 THE CONSTITUTIONAL CHANGES

Jacob Rees-Mogg: ‘My right hon. Friend is fully aware that Parliament can overrule any court in this country by an Act of Parliament. That is how our constitution works; it is the absolute essence of our constitution and our democracy.’ [HC debs 7 April 2014 Column 64]

‘If it is not our judges – who are subject to our democratic control – who make decisions, we will not be able to run our own affairs.’ [Column 66]

However, in a separate passage Rees-Mogg invested our judges in our courts with the ability to interpret international treaties replacing the EU treaties – a denial of dualism he so fervently espouses elsewhere!⁵

Our first thesis is that sovereignty has changed under European influence. This is at the heart of political populist outrage against the EU. But sovereignty is often used in

4. <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140407/debtext/140407-0001.htm#14040711000001>.

5. See *ibid.* Column 65. On the changing focus of sovereignty arguments on Europe, see G. Gee & A.L. Young (2016) 1 *European Public Law* 131.

a simplistic sense. It may mean the most powerful or hierarchically most superior. It may relate to territorial integrity, the definition of nation or nationality, the conditions for the existence of an independent state and citizens of that state, or the power to conduct international negotiations on behalf of the state. Much of the Eurosceptic UK focus has been upon the legislative omnipotence of the Crown in Parliament and the inability of anyone else to overrule or set aside that legislation. Sovereignty of one class of laws over another does not entail *overall* sovereignty (below). The UK, it is argued, gave away sovereignty without the people or Parliament being properly informed and without an opportunity prior to 1973 to vote through a referendum on the transfer. Will ending membership of the EU return sovereignty back to the UK and, if so, return sovereignty [what kind?] to whom?

It is clear that our presence in Europe has led to a qualification of legislative sovereignty. Several judges have also spoken of a 'twin sovereignty' of the Crown in Parliament and the Crown in its courts.⁶ Sir John Laws, echoing Professor Hart,⁷ wrote twenty years ago that sovereignty resides in the *conditions* under which the exercise of governmental powers operate (including we add government control of Parliament) and not in the exercise of those powers.⁸ The implications have to be made explicit, he wrote, 'as a framework of fundamental constitutional principles'. This, it appeared, was the task for a common law constitution. The implications of this statement are addressed in this chapter.

Limitation (transfer) of sovereign rights or 'supremacy' was effected under the terms of the 1972 European Communities Act (ECA), which incorporated the jurisprudence of the European Court of Justice (ECJ) including its famous case law on supremacy and direct effect.⁹ That was legal supremacy within the competences of the then European Economic Community (EEC) and successive treaties. In Declaration No. 17 Treaty of Lisbon supremacy is now styled 'primacy'. The change in word as well as the detail in drafting, especially from the EU Constitutional Treaty, is not without significance. In the field occupied by EU law, national law must cede pride of place. In the UK, we have arrived at a position where constitutional principles and laws cannot be displaced in the way that legislation, regulations or case law may be. We discuss this below.

The UK's 2011 European Union Act (an Act to reassert sovereignty?) states that any directly applicable or effective EU law was effected via an act of Parliament (section 18). What Parliament gives Parliament may take back. The 2011 Act, it has been argued, itself establishes a new form of self-embracing sovereignty in so far as Parliament has bound its future action on many Union initiatives to a popular referendum. Bogdanor has argued that the people are now a constituent part of Parliament.¹⁰ Taking treaty changes, for instance, section 2(1) provides that a treaty

6. Lord Bridge in *X v. Morgan-Grampian* [1990] 2 All ER 1 at 13 (HL), Nolan LJ in *M v. Home Office* [1992] 4 All ER 98 at 146 (CA), Lord Mustill in *R v. Secretary of State for the Home Department ex p Fire Brigades' Union* [1995] 2 All ER 244, 267-68 (HL).

7. *The Concept of Law* (1961).

8. Sir John Laws (1995) *Public Law* 72 at 92.

9. Case 6/64 *Costa v. ENEL* [1964] ECR 545 and Case 26/62 *van Gend en Loos* [1963] ECR 1.

10. V Bogdanor (2012) 32 OJLS 179.