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PUBLIC JURIST

BREXIT - TO DEAL OR NOT TO DEAL

SYMPOSIUM

BREXIT AND THE FUTURE OF EUROPEAN INTEGRATION



GOVERNMENT & LAWS
COMMITTEE

PPAA SSS HKUSU
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ABOUT PUBLIC JURIST

Public Jurist is the official magazine of students belonging to the BSocSc (Govt&Laws) & LLB programme at The University of Hong Kong. It is a non-partisan interdisciplinary publication that serves as a forum for diverse viewpoints on Law and Politics at the local and international levels, and promotes intellectual exchanges between students and academics on topics of interest relating to current public and legal affairs. Articles are meant to be accessible to a broad audience, not only law students but also students from other disciplines, as well as the general public. *Public Jurist*, currently distributed by the Government and Laws Committee, Politics and Public Administration Association sss HKUSU, builds on the tradition of academic excellence of The Hong Kong Student Review of Political Science (previously known as "The Bulletin"), which was founded in 1977 as the quarterly magazine of the Association.

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FOREWORD

Professor Samson Tse

Associate Dean
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I am delighted to present the *Public Jurist*, the 2019 Special Issue focusing on Brexit and the future of European integration. I am eager to share my view about the values of having such an avenue, I mean a student-led, high quality magazine for members of the HKU community and beyond.

Public Jurist provides a great opportunity for engaging students and staff members bringing additional layers to the discourse of issues under debate. The writing or the commentaries can help readers understand essential critical-thinking and arguments behind a particular point of view. It can nurture rational thinking, citizenship, manners, organisation of thoughts, persuasion and writing skills. It has the capability to deeply engage the readers – students who are interested in international politics or local social issues – in relevant

learning and to inspire students to be deep thinkers.

Public Jurist also gives the writers the opportunity to test their thoughts and views against that of their peers. Studies and my own observations have shown that undergraduate students who contribute to deep-level conversations or magazine of this nature early are much more likely to continue contributing to wider, greater debate later on. Therefore, I encourage the Editors-in-Chief and Associate Editors to find ways to involve more HKU students from diverse cultural, political and disciplinary background in the writing.

EDITOR'S FOREWORD

Mr. Trevor T W Wan
Editor-in-Chief

BSocSc (Govt & Laws) & LLB III



The Government and Laws Committee is committed to fostering an environment that is conducive to the exploration of issues lying at the nexus of international relations and constitutional law. The interface of these two inextricably related academic fields underlies just some of the many aspects of the complexities and uncertainties surrounding Brexit and the future of European Integration. The future of Britain-European Union relations remains underimagined and potential frameworks governing them are yet to be born. Constitutional and legal ramifications of the saga have been said to be far-reaching, invariably revealing the tension between different branches of governments which form the core of British parliamentary democracy.

These are all issues that greatly interest GLawyers and the wider audience at the University of Hong Kong. That is what prompted the Editorial Board of *Public Jurist* to embark on this ambitious project to invite renowned scholars to contribute to this symposium: Brexit – to deal or not to deal, in which we hope to offer fresh perspectives

and angles on the topic. With the deadline to “Get Brexit Done” has once been postponed to next January, and it remains to be seen whether Parliament will sanction a deal eventually, this issue is indeed timely and the debates explored therein will continue to affect both parties even after Brexit is done.

The Government and Laws Committee is indebted to all contributors of the symposium, including, in no particular order, Dr. Nicole SCICLUNA from the Department of Politics and Public Administration at the University of Hong Kong, Dr. Krzysztof SLIWINSKI from the Department of Government and International Studies at the Hong Kong Baptist University and Mr. Thomas YEON, a PCLL Candidate at the University of Hong Kong. We also thank Professor Samson TSE, the Associate Dean (Undergraduate Education) of the Faculty of Social Sciences who has kindly written an inspiring foreword for this issue. I speak with confidence that with all of the excellent contributions, this issue will definitely excite readers and contribute to the scholarly conversation.

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SUBMISSIONS OF ARTICLES

Public Jurist welcomes articles typically of 500 – 2,500 words long, preferably using the APA reference style and typed in Microsoft Word format. Undergraduate and postgraduate students, as well as scholars from all disciplines are welcomed to submit articles for consideration. Should you have any enquiries, please contact the Public Jurist Editorial Board.



INTRODUCTION TO THE SYMPOSIUM BREXIT - TO DEAL OR NOT TO DEAL



Ms. Grace Y C Mak

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Three long years have passed since the British nation-wide referendum on exiting the European Union – yet the result of the referendum still lies unhonoured by the British government. The deadline for Brexit has been postponed repeatedly, with the latest fixed on 31 January 2020. Despite repeated warnings from European leaders like Jean-Claude Juncker and Donald Tusk that this deadline is 'final', one cannot stop but question whether the Boris Johnson administration can effectively deliver this result.

To many people both in Britain and beyond, the issue might be characterised as simply a yes / no question – but as events unfolded, the legal and political ramifications across the British Isles clearly exceeded the imagination of many Brexiteers and Remainers. In this issue of *Public Jurist*, we are graced with a symposium on "Brexit – to Deal or Not to Deal" composed of three excellent submissions which explore the tension in the British institutions domestically, as well as the implications of Brexit on the British constitutional order and the European integration.

Dr. Nicole SCICLUNA, Honorary Lecturer of the Department of Politics and Public Administration at the University of Hong Kong, outlines the struggles among the three institutional pillars in Britain in her article titled as **"Brexit between the rule of law and democratic politics"** including the executive, the Parliament and the courts and situates the debate over Brexit from a broader constitutional and democratic perspective in Britain. Dr. Scicluna looks at how conflicts arose between the executive and the Parliament in delivering Brexit while both claiming constitutionality and legitimacy, and how the 2019 Supreme Court decision on *R v Miller* adds to the controversies and uncertainty over Britain's constitutional democracy in the future.

Dr. Krzysztof SLIWINSKI, Associate Professor of Department of Government and International Studies at the Hong Kong Baptist University, revisits the nature and fundamental theoretical underpinnings of European integration, and provides an overview on the future of the European Union in **"Brexit - between Intergovernmentalism and 'Europeanism'"**. Dr. Sliwinski also tries to answer several unresolved questions emanating from Brexit, such as the role of the European Union and its institutions in European integration as well as its future, through investigating the relationship between the European Commission and the neighbouring country, and drawing on insights from the theoretical debate between national interests and the European society, illustrating the new ideology of Europeanism.

Mr. Thomas YEON, a Postgraduate Certificate in Laws Candidate at the University of Hong Kong provides an in-depth commentary on *Wightman v Secretary of State for Exiting the European Union* in his article titled **"A Symphony of Parliamentary Sovereignty: Orchestration by the ECJ and UKSC"**, examining the constitutional implications of the judgement and requirements for revocation in the process

of Brexit. Mr. Yeon notes two features of the ruling, namely the manifestation of parliamentary sovereignty in revoking the notification of withdrawal and the constitutional guidance provided in the interpretation of Article 50 of the Treaty of Lisbon on the withdrawal process.

This timely issue aims to engage both the immediate and broader debates surrounding Brexit in the course of the three years, hoping to illuminate further understanding on it.

With the General Election of the British House of Commons fixed on 12th December, we are unsure whether Boris Johnson will still retain his seat as Prime Minister, let alone the future of Brexit. The election and its results definitely open up a variety of routes in which Brexit can eventually end up, and layers of uncertainty are clearly visible. To the optimists, it might signal the eventual end of the Brexit stalemate; To the pessimists, it might just be the start of another round of chaos in which Theresa May has failed to resolve. One thing that we can be sure, however, is that what is seemingly a yes / no question remain unanswered, and Britain will definitely continue to tread on uncharted waters in hope of resolving possibility one of the biggest political crisis confronting the United Kingdom in recent decades.



BREXIT - BETWEEN THE RULE OF LAW AND DEMOCRATIC POLITICS



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On 23 June 2016, the British people voted, by a narrow majority, to leave the European Union (EU). To borrow from Winston Churchill, the referendum result did not mark the end of the UK's more than forty-year association with the EU. It did not even mark the beginning of the end, though it did, perhaps, mark the the end of the beginning. More than three years after the vote, the UK is still a member of the EU. Several scheduled exit dates have come and gone. At the time of writing, we still do not know when, and under what circumstances, the UK will leave the EU.

In the brief remarks that follow, I will discuss the implications of the Brexit process for the UK's constitutional order. I will focus on the battle raging within the institutions of British democracy to define and deliver Brexit. The outcome of this battle will determine the outcome of Brexit, but it will also have more far-reaching implications.

Brexit fault lines

Why have negotiations over the so-called 'divorce agreement' between the UK and the EU proved so difficult? Of course, untangling such a deep, longstanding, and multifaceted relationship was always going to be complicated. The EU comprises a customs union, a single market, and a unified legal system presided over by a quasi-constitutional court (the Court of Justice of the European Union, CJEU). As well as deep economic integration, the EU incorporates defence and foreign policy cooperation, facilitates scientific, research, and educational exchanges, among many other things. What, precisely, the UK would be 'leaving' and what kind of arrangements would replace the current ones were not questions that could be answered by a simple yes/no referendum.

Inevitably, then, the process of making Brexit a reality has exposed numerous fault lines. It has exposed and exacerbated tensions between the UK and the EU, as well as tensions between the UK and other EU member states, especially Ireland. Arguably, however, the greatest divisions Brexit has exposed are those within the UK itself. Most obviously, the 2016 referendum revealed the polarisation of the British electorate on the question of the country's membership of the EU. Fifty-two percent of voters opted to leave, forty-eight percent wanted to remain. Three years of acrimonious bickering over the correct interpretation of the result, as well as its legal, political, economic and social implications has only worsened this polarisation. As the UK heads towards its second general election in three years, committed constituencies within the UK continue to advocate for positions as diverse as a second referendum, a 'soft' Brexit, and immediate exit with or without a deal.

Beneath the surface of the referendum result lie further demographic and socio-economic divisions: between older people and younger people; between better educated people and less-well educated people; between



Photo: Stop Brexit March in London 2019

people who embrace the opportunities afforded by free movement and people who fear its costs. Brexit has exposed regional differences: Scotland, Northern Ireland, and London voted to remain; most of the rest of the UK voted to leave. Brexit has exposed divisions within both major political parties, the Conservatives and Labour. It remains a supreme irony that a referendum called by then-Prime Minister David Cameron in an attempt to smooth over rifts within his own Conservative party, may well, in the long run, contribute to the collapse of the Union itself in the form of Scottish independence and/or Northern Ireland's reunification with the rest of Ireland.

These are all significant issues. However, in this contribution, I will focus on a different site of contestation - that which is occurring amongst the institutions of British democracy. This is a contest over the meaning of Brexit. More precisely, it is a contest over *who gets to decide* the meaning of Brexit. The protagonists in this contest are the UK government, now led by Boris Johnson, the parliament, and the Supreme Court, all of which have some claim to legitimate authority to decide the matters at hand. The contestation among these institutions occurs at the intersection of law and politics. It reflects peculiarities and tensions within the UK's unwritten constitutional order, which privileges long-standing but vague conventions over detailed, codified rules. Let us briefly elaborate on some key dimensions of this conflict.

Brexit between parliamentary and popular sovereignty

The UK does not have a written constitution. The cornerstone of its unwritten constitution is the principle of parliamentary sovereignty. The British legal scholar, Albert Venn Dicey (1885, pp. 39-40), summarised the principle in the following terms: 'The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament ... has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'

As a democratically-elected chamber, the House of Commons represents the British people. Yet, its members are not obliged to determine or give effect to their constituents' will every time they vote on government legislation. As the political philosopher and parliamentarian, Edmund Burke, argued to his own constituents in 1774, a member of parliament properly represents of his or her electors by exercising his or her judgement on their behalf, not by slavishly following their opinions. Thus, on any specific issue, it is possible that the 'will of the parliament' will not align with the 'will of (the majority of) the people'. If citizens are not happy with the laws their representatives pass, they should vote them out at the next election (Burke himself only served one term in parliament as it was clear that he did not have enough support to be re-elected).

This brings us back to the Brexit referendum. There are many reasons why holding a yes/no vote on such a complex and consequential question might be a bad idea. However, the device of a popular referendum sits particularly badly with the doctrine of parliamentary sovereignty (Lagrou, 2019). Consequently, the 2016 vote was not actually a referendum, as that term is usually understood, but rather a non-

legally binding plebiscite whose purpose was to gauge public opinion, rather than impose a particular course of action on the government and parliament (Goss, 2016). Politically, though, the situation was very different. Both the Remain and Leave campaigns were conducted as if the result *would be decisive*. Thus, when voters delivered a result that parliament was unwilling (and, arguably, also unable) to carry into effect, the scene was set for a showdown between *popular sovereignty* and *parliamentary sovereignty*.

The executive government as the people's champion?

If, over the past three years, parliament has embodied the Burkean model of representative democracy, it is the executive government that has emerged as the would-be champion of popular democracy. David Cameron, having campaigned unsuccessfully for remain, resigned the day after the referendum. His successor, Theresa May, came to office promising to honour the referendum result; helpfully clarifying that 'Brexit means Brexit'. Much of May's three-year premiership was consumed by the task of working out exactly what (and how) the UK would be 'leaving' and then squaring that vision with the EU's priorities. The Irish border issue quickly emerged as the most intractable sticking point. Having promised a) to take the UK out of the EU customs union and single market, b) to avoid the need for a 'hard' border between Northern Ireland and the rest of Ireland, and c) not to create a customs border between Northern Ireland and the rest of the UK, May was trapped within a 'Brexit trilemma' of her own making.

Nevertheless, May was steadfast in her insistence that the UK had to leave the EU in order to deliver on the referendum result, and that failure to do so would be an unacceptable breach of democratic principles. With this goal in mind, she fashioned herself as a strange sort of people's champion, negotiating a



Photo: Lady Hale, President of the United Kingdom Supreme Court delivering the court's judgement on *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland*

Withdrawal Agreement with the EU in late 2018 that seemed to please no one, and then trying three times to ram it through the House of Commons. Convinced that she was acting with the people's mandate to deliver 'leave', May responded to parliament's intransigence not with genuine attempts at cross-party consultation and negotiation, but with accusations that the parliament was 'betraying' democracy and the British people by betraying Brexit. This deeply unhelpful rhetoric has further undermined the UK's parliamentary democracy.

May finally accepted defeat in mid-2019, stepping down as Conservative party leader on 7 June. Following an intra-party leadership contest, she was succeeded by Boris Johnson on 25 July. Johnson has continued in May's vein, presenting himself as the man who will deliver Brexit against the opposition of an obstinate and undemocratic parliament. It was Boris Johnson's decision to prorogue (suspend) parliament - ostensibly to prepare his government's policy agenda, but really to stop the parliament from interfering with his Brexit plans - that enabled the UK

Supreme Court to leave its own mark on the Brexit process, and on the UK's unwritten constitution.

The Supreme Court as parliament's champion?

On 24 September 2019, the UK Supreme Court handed down one of the most significant decisions in recent British constitutional history. The eleven judges of the Court unanimously found that Boris Johnson's prorogation of parliament was unlawful (see *Miller (No 2)/Cherry*). Whenever a court makes a decision involving the interpretation of constitutional law, one may ask whether it is really *interpreting* the constitution as it stands, or *changing* it. This question looms even larger in *Miller (No 2)*. Here the Court was called to rule on the interpretation of an unwritten constitution, particularly the meaning and application of the principle of parliamentary sovereignty.

The Court's decision has attracted both praise (largely from opponents of Brexit) and scorn (largely from advocates of Brexit). The subject matter of the case is so highly

politicised that it is all but impossible to offer an objective legal assessment of the verdict. Yet, the decision is rightly described as controversial. The spectacle of the judicial branch of government deciding what is and is not democratic is unusual to say the least. In the Court's defence, it may be argued that the judges are not usurping constitutional power, but merely returning it to parliament, where it rightly belongs. The counter argument is that the Court *has* usurped power, and upended the constitution, by overriding the decision of a democratic executive in an area that is usually within the executive's prerogative. There is merit to this argument. If the House of Commons does not want to enact Johnson's agenda, it should pass a motion of no confidence and pave the way for early elections, rather than continue to frustrate the government's plans (Zhu, 2019).

At any rate, *Miller (No 2)* brings us to where we are now. Parliament reconvened and jostling with the Prime Minister for control of the Brexit agenda. Having agreed his own Withdrawal Agreement with the EU, it remains to be seen whether Boris Johnson is more successful than Theresa May in having it enacted.

Conclusions

Brexit is not just about Brexit. It is about the meaning and locus of sovereignty in a modern democratic state, the impossibility of 'taking back control', and the limits of law when it comes to answering political questions. The British people were asked in June 2016 whether or not they wanted to remain in the EU and they chose, narrowly, to leave. Ordinarily, it would be for the government, acting through parliament, to fill in the gaps - defining 'leave' and working out (in negotiation with the EU) how it is to be achieved. But on this issue, the government and parliament have been at loggerheads for the past three years. Both have some claim to the political authority and constitutional legitimacy needed to act. That is, both have enough authority and legitimacy to stymie the other, but not enough to act decisively. However the UK's Brexit stalemate is resolved, the ramifications for the UK's constitutional democracy will be felt long into the future.

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BREXIT - BETWEEN INTERGOVERNMENTALISM AND 'EUROPEANISM'



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Abstract

This short paper puts the case of Brexit in the context of academic debate regarding the nature of European integration and the future of European Union. In doing so, it revisits in its first part three major theories of European integration, namely: Intergovernmentalism, Liberal Intergovernmentalism and Supranationalism.

The second part of the paper, toys with an idea that European integration and its institutional form namely European Union have so far produced a set of seemingly unquestioned assumptions and values, which amounts to the status of an ideology, hence the term 'Europeanism' is used with reference to contemporary EU.

Introduction

On August 2nd, British government published a document under an ominous title: Operation Yellowhammer HMG Reasonable Worst Case Planning Assumptions. It is a contingency plan, based on an assumption that there is no compromise and that the Brexit should happen in its worst possible form – no-deal form. The document foresees among others: reintroduction of controls on UK goods and with it huge disruption in trade, disruption in tourism, electricity price increase, disruption in medical and fresh food supplies, cross-border financial service difficulties, personal data and law enforcement data flow cancellation, finally, 282 vessels illegally fishing in British waters (Operation Yellowhammer, 2019).

Brexit matters and it matters a great deal. It will influence the lives of millions of people on both sides of la Manche (English Chanel) and beyond Europe. It is likely to wreak havoc, at least in the short time, for consumers, producers, tourists and law enforcement agencies to name just a few.

As much as it is an impossible task to predict the consequences of Brexit (as of submission of this paper there is still no knowing whether any deal is to be secured), it is certainly a fascinating case for analysts, who try to comprehend European politics. What is the nature of European integration? Is the process of integration reversible? If so, under what conditions? What is the role of European Union and in particular its institutions in all of this? Finally, what is the future of EU – an embodiment of liberal institutionalism? These questions and alike are staple food for academics, who no doubt need to attend to them in the context of Brexit.

This paper is an attempt at addressing some of those questions, in which case possible political and economic consequences of Brexit are left for later enquiry. What is at

stake, at least academically speaking, is our understanding of the nature of European Integration and with it, our theoretical debates.

National interests vs. European (transnational) society

One of the major discussions among academics working on EU relates to the character of European integration and consequently European politics. This discussion usually oscillates between those, who support the idea that the EU is ultimately an intergovernmental institution and those who posit that over the years it has acquired supranational characteristics, which makes EU member states highly limited in practicing their sovereignties.

Both sides of this debate put forward important arguments which should be revisited, albeit briefly. Let us then start with intergovernmentalists and in particular with Stanley Hoffmann's version of Intergovernmentalism.

In his seminal essay titled: *Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe*, Hoffmann asserts that building of a successful community in Europe becomes more difficult with the number of member states since the policymakers are entangled with simply too many concerns and pressing issues arising from both domestic and external environments. Briefly - the more states, the more concerns and pressing issues, the more difficult it is to build a genuine community (Hoffmann, 1966, p. 863). Most importantly and apparently still contemporary, he provides an answer to the fundamental question: why must there be a diversity of nations? The answer appears to be simple and obvious. Firstly, there is the matter of legitimacy of national self-determination (the only principle that transcends all blocs and ideologies). Secondly, the unquestionable "newness of many of the states, which have wrested their



Photo: The European Parliament building located in Strasbourg, France

independence by a nationalist upsurge and are therefore unlikely to throw or give away what they have obtained only too recently".

On the first of one, the argument of economic sovereignty was crucial from the very beginning for the pro-Brexit campaigners in the UK. In fact, the British joined European communities and maintained its membership in the European Union only as long as a certain balance of power was to be held vis-à-vis Paris and Bonn/Berlin (Somai And Biedermann, 2016, p. 149). Moreover, many among the British elite, openly rejected the idea of shared sovereignty, especially if it implied Germans dominating the European integration process (Lawson, 1990, p. 9).

"Take back Control" is argument number one, presented by the most vocal supporters of Brexit. It departs from an assumption that: "Britain is a great nation with a proud history that has been forced into

subservience to the unelected bureaucrats of Brussels. Outside the EU, Britain could resume its place as a powerful independent power. It is the world's 5th biggest economy and 5th most potent military force with its own nuclear deterrent. It is a permanent member of the U.N. Security Council. Freed from restraints in Europe, Britain could rebuild ties with natural English-speaking allies in the Commonwealth and strengthen the Special Relationship with the United States. As long as Britain leaves the EU Customs Union and Single Market, then it can forge free trade deals with countries around the world." (debating Europe, 2019).

As for the second argument offered by Hoffmann, the so-called Big Bang enlargement of 2014, as well as all subsequent enlargements, brought to the fold of the European Union a number of central and eastern European states, which had only recently regained their independence (except for Slovenia, which



Photo: Viktor Orbán, Prime Minister of Hungary speaking at the European People's Party Helsinki Congress in 2018

was a newly created state after the fall of the Republic of Yugoslavia).

As much as all of these newly admitted members were characterized by a deep enthusiasm towards the European project as well as European Union as an institution, soon the pace of the processes of the integration and the depth of the limitation of national sovereignties became problematic for many in the region. Hungary's Prime Minister Mr Victor Orbán and Polish Law and Justice leader Mr Jarosław Kaczyński are a case in point. Their major rhetoric revolves around the argument that the European Union is in fact akin to the late Soviet Union, which similarly (according to the writer Vladimir Bukowsky) trumps national sovereignties (The European Union, the New European Soviet?, 2011).

Andrew Moravcsik and his take on the nature of the European Union has added much

value to the debate. As of the beginning of the 90's, Moravcsik saw the European Union very much as a neo-realist structure, which enabled the most economically influential actors to reap the benefits of the European integration at the expense of the economically weaker EU member states. His major thesis is summed up neatly by the theory of Liberal Intergovernmentalism, which is based on two assumptions: the national interest derives from a competition that takes place between various domestic actors and, the stronger (economically) the EU member state is the higher the chances for the EU institutional framework to protect and project their interests. In the words of the very author: "In the first stage, national preferences are primarily determined by the constraints and opportunities imposed by economic interdependence. In the second stage, the outcomes of intergovernmental negotiations are terminated by the relative bargaining power of governments and the

functional incentives for institutionalization created by high transaction costs and the desire to control domestic agendas this approach is grounded to fundamental concepts of international political economy negotiation analysis and measurement theory" (Moravcsik, 1993, p. 517).

One might look no further than the recent actions of the European Commission (especially regarding the "rule of law" vis-à-vis Poland and Hungary) and the subsequent voting of the European Parliament – much in line with the interests of the most powerful countries in the EU; the Eurozone and the economic decisions of the European Central Bank – driven by German budget discipline attitude (the Greek financial and economic crisis) or the Italy's budget vs. French budget and finally Bulgaria's Energy mix issue. All these cases support the intergovernmental view, which is akin to neorealism in sense that international institutions serve as platforms of power projection of the more influential players at the expense/over the less influential ones.

On the other side of the academic debate, one identifies Supranationalism. Focusing on governance and rulemaking, Supranationalism posits that the intergovernmental bargaining and decision-making take place within the context of the expansion of transnational society and the growing role of supranational rules. These [...] gradually, but inevitably, reduce the capacity of the member states to control outcomes (Rosamond, 2000, 127). Proponents of Supranationalism follow the argument, which stipulates that: "as integration proceeds, the Court and the Commission will routinely produce rules (policy outcomes) that would not have been adopted by governments in the Council of Ministers, or in summitry. [...] the long-term interests of member state governments will be increasingly biased toward the long-term interests of transnational society, those who have the most to gain from supranational governance." (Stone Sweet and Sandholtz,

1997, 315).

It is important to notice that the departure of the UK from the EU does not necessarily prove that the intergovernmentalists offer the most convincing explanatory framework of how the EU functions. Nor is it the proof that the supranationalists are wrong. In fact, both of these schools of thought overlap to an extent. What is more, as 'middle tier' theories they offer only partial explanations of the EU.

'Europeanism' - a new ideology?

Recently Jan-Werner Müller, a professor of politics at Princeton University, published a representative op-ed at Foreign Policy online, under the self-explanatory title: "If You're Not a Democracy, You're Not European Anymore" (Müller, 2017). The author claims that by activating the so-called "nuclear option" by the European Commission against Poland on the 20th of December 2017, invoking the article 7 of the Lisbon Treaty: "The commission, the official "guardian of the European treaties," charged that the Polish government's so-called reforms of the judiciary posed a serious threat to basic European values, in particular the rule of law" (underlined by author). He goes on to assert that the action taken by the European Commission should not be seen as yet another proof of European crisis (or one of many crises to be precise) but "If anything, the commission did the right thing for European integration by taking a stand on what exactly the EU stands for and what membership in it means. The alternative would have been turning a blind eye to a slow erosion of democracy and the rule of law in several member states — a process that calls the very core of European integration as a political project into question" (Müller, 2017).

This short extract serves well as an illustration of certain trait, which is shared by most 'Euro- enthusiasts', which, in the opinion of the author of this paper, is

quite relevant to Brexit. The proponents of European integration and by extension of European Union tend to depart from a rather curious set of assumptions. Firstly, they seem to claim that there is no viable alternative to the European Integration and its institutional form. In this context, the sole idea of Brexit is seen as irrational. To question the European integration and EU itself is tantamount to going against pure reason. Secondly, it implied that almost any criticism of Europe and European integration or EU, especially the one that departs from national positions, is a proof of 'right-wing populism', 'sovereignism' and will surely lead to fascism. At the least, it is an effect of deliberate misinformation and low level of education not mentioning the emotional attitude to politics and traditional (outdated) philosophical outlook accompanied by equally outdated moral code. Lastly, it is implied that Europe is European Union and vice versa, so to be European automatically means to be an unabashed enthusiast of European Union. Conversely, if one raises critical questions regarding the nature of European politics within the framework of European integration and specifically European Union, anti-European attitude is self-evident.

The European integration as a project is comparatively juvenile. Commenced in 1950 (by the Schuman Declaration) it was initially based as we know on pragmatic, mostly economic agenda albeit with crucial political foundations and consequently – political ramifications. After 69 years, it has grown substantially to involve a political, institutional and ideological elements.

Latest developments regarding the relationship between the European Commission and Hungary or Poland, prompt us to look at the European Union from an ideological perspective. In this respect it is claimed that 'Europeanism' has in fact become a new ideology, shared among intellectual, political, judicatory, societal, and even major economic elites that

influence or shape European Union as an institution and its major policies.

As an ideology 'Europeanism' is a somewhat exotic mixture of various seemingly incoherent trends that give current European Union its intriguing characteristics. On the one hand, economically one can easily identify numerous elements of neoliberalism, especially regarding the financial aspects of the European integration. Likewise arguments used by the major proponents of the European integration vis-à-vis USA, China or Japan are of neoliberal character. At the same time, with reference to international trade in agricultural products, intellectual property or internal (single market) competition (freedom of labour) one rather easily spots distinct elements of protectionism and overregulation. Finally, in terms of philosophical outlook and especially moral issues 'Europeanism' seems to be mostly focusing on progressive agenda.

This rather incomprehensible amalgamate is based on a three-fold premise that seems to hold unquestionable value for the so-called 'Euro-enthusiasts'. Firstly, most if not everything that is EU/European related is of positive value. Secondly and consequently, most if not everything that is EU/European related is positive for all parties involved. Thirdly, most if not everything that is EU/European related brings an added value to the whole world.

Such explanatory framework helps us better understand some of the reactions coming from Brussels and many other European capitals, which are full of irritation if not anger and sometimes even arrogant remarks regarding the politicians and voters who started the whole Brexit affair in the first place.

After all, as one of the greatest Euro-enthusiasts, Guy Verhofstadt, known for emotional speeches in the European Parliament himself adamantly put it in his

book (Europe's Last Chance: Why the European States Must Form a More Perfect Union):

"United States of Europe" will be better able to stop the next terrorist attack, to respond to the next economic downturn, to listen to the voices of the people before it's too late. Fragmented as it is, Europe today can barely tread water as it fails to respond to the refugee crisis, the sputtering economy, and the rise of terrorism and xenophobic politics. Devastating internal divisions that limit our ability to respond effectively undermine even the seeming unity of scorned Europeans after the Brexit vote." (Verhofstadt, 2017, loc. 399).

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A SYMPHONY OF PARLIAMENTARY SOVEREIGNTY: ORCHESTRATION BY THE ECJ AND UKSC

Case commentary: Case C-621/18 *Wightman v Secretary of State for Exiting the European Union* (request for a preliminary ruling under Article 267 TFEU)



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Since the Supreme Court of the United Kingdom's ("SC") landmark judgment in *R (on the application of Gina Miller) v Secretary of State for Exiting the European Union*,¹ the legal position and powers of the Westminster Parliament have been at the epicentre of the Brexit legal conundrum. The recent preliminary ruling given by the European Court of *Wightman v Secretary of State for Exiting the European Union*² has added an extra layer of complexity to it by holding that the Parliament can unilaterally revoke the notification to withdraw from the European Union ("EU") under Article 50 of the Treaty of Lisbon ("TEU"). Agreeing with Advocate General Sánchez-Bordona's ("AG") opinion,³ the ECJ held that certain constitutional requirements have to be satisfied for a member state to revoke the notification unilaterally. This Note analyses the AG's opinion and ECJ's judgment, suggesting that it is a prudent manifestation

¹ [2017] UKSC 5.

² Case C-621/18 *Wightman and another v Secretary for Exiting the European Union* [2018] 12 WLUK 94.

³ Case C-621/18 *Wightman and another v Secretary for Exiting the European Union* [2018] 12 WLUK 94, Opinion of AG Sánchez-Bordona.

of the doctrine of parliamentary sovereignty. It will also briefly examine the constitutional implications of the judgment on the Brexit process in terms of any requirements for revocation. It will be argued that *Wightman* offers, in line with *Miller*, a second opportunity to shape and influence the Brexit process.

Advocate-General's opinion and the European Court of Justice's ruling

To begin with, the AG recognised that the right of a State to be no longer bound (withdrawal or denunciation) by a treaty is "a manifestation of that State's sovereignty."⁴ By corollary of principle, the unilateral nature of withdrawal is "conducive to the possibility of unilaterally revoking the notification of that decision;" unilateral revocation is also "a manifestation of the sovereignty of the departing Member State."⁵ The intention of the sovereign state is, however, "not definitive and may change."⁶ Any claims of such change, and therefore any revocation of the notification of withdrawal, must be expressed "in accordance with... [the sovereign state's] constitutional requirements."⁷ This may be manifested in, for example, "a political change that gives rise to a change in the will of the departing State..."⁸ This shows that the credibility of the notification of withdrawal is heavily dependent on its constitutional basis. Once any intervening political intervention undermines the credibility of the original notification, the parliamentary intention is also expected to change in order to reflect the latest public opinions.

The AG further strengthened the case for revocability when interpreting Article teleologically. He recognised that Article 50(1) is not a "fossilised concept," and it respects "the national identities of the

member states."⁹ It also allows "a change in the sovereign will of the Member State...in order to halt a process of withdrawal from the EU which the Member State has decided to reverse."¹⁰ When the public opinions and parliamentary intentions within the Member State do not evince a clear position, the doctrine of *favour societatis* may be considered as a key element in reaching a solution which is the "most consonant with the survival...of the Union."¹¹ This is largely in line with the TEU's objective of achieving "an ever closer union among the peoples of Europe."¹² This is a careful delineation of the position of the EU regarding political uncertainty in a Member State, as a teleological interpretation of Article 50 was not considered as strictly necessary and should only be considered if the Government cannot advance a credible stance in favour of withdrawal. Furthermore, it should be noted that the fundamental rights enjoyed by nationals of the departing Member State as EU citizens also play a significant role in favouring a teleological interpretation of Article 50 - that revocation is possible unless the Member State's intention of departure is crystal clear. This reflects the majority of *Miller* in stating that any frustration of citizens' rights as an EU citizen can only be done by parliamentary legislation.

The ECJ's ruling is generally consistent with the AG's opinion, emphasising the special status of the TEU and the constitutional character of the EU.¹³ The ECJ also explored the constitutional requirements of withdrawal. In the following sections, the ECJ's judgment and its implications will be analysed. It will be argued that the judgment represents prudent respect for parliamentary sovereignty in the United Kingdom, and successfully protects the integrity of Article 50, despite any possible doubts over a teleological approach to interpreting it.

4 *ibid* [93].

5 *ibid* [94].

6 *ibid* [100].

7 *ibid* [104].

8 *ibid* [107].

9 *ibid* [131].

10 *ibid* [132].

11 *ibid* [134].

12 Article 1 TEU.

13 (n 2) [44].

Analysis of the European Court of Justice's judgment

The question posed to the ECJ was "where, in accordance with Article 50 [TEU], a Member State has notified by the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and if so, subject to what conditions and with what effect relative to the Member State remaining within the European Union?"

Interpretation of EU law (in particular, Article 50)

The ECJ stated that when interpreting a provision of EU law, account should be taken "not only of its wording and the objectives it pursues, but also of its context and the provisions...as a whole."¹⁴ From the outset, it is clear that the court is not limiting itself to the meaning of Article 50 itself, but adopting a teleological approach in attempting to unpack the meaning of the provisions in question. The emphasis on the need to consider the constitutional structure and purpose of the EU as a whole¹⁵ reflect what Eeckhout and Frantziou noted a "constitutionalist approach," which is an opportunity to "affirm that the structures [of EU] have come to constitute a new mode of post-State organisation, premised on cooperation, genuine respect for common values and fundamental rights, and a supranational citizenship."¹⁶ The revocability of the notification of withdrawal is thus not only a question surrounding the Parliament's political will, but also the need to maintain the integrity and pursuit of objectives of the EU. Whilst a teleological approach may be criticised as giving excessive weight to the objective of European integration in the status of Article 50, it is submitted that such

approach is justified as Article 50 is a key component in shaping the composition of EU membership under the TEU. To adopt a literal interpretation of Article 50 would ignore the political realities which public law responds to.

The intention of a departing Member State and the associated rights stripping implications

Having firmly established a teleological approach as its basis of approaching the question, the ECJ agreed with the AG's opinion that the intention of a departing Member State is "neither definitive nor irrevocable."¹⁷ Moreover, it was noted that the two objectives pursued by Article 50 are (i) "enshrining the sovereign right of a Member State to withdraw from the EU" and (ii) "establishing a procedure to enable such a withdrawal to take place in an orderly fashion."¹⁸ At this point, it is clear that Article 50 is not merely a matter of facilitating an expedient exit for a departing Member State, but more importantly, to respect the voluntary and flexible will of it. The sovereign will of the departing State is the most significant player in the Article 50 process. Given the absence of expression provision in EU law governing the revocation of notification to withdraw, the revocation should be "subject to the rules laid down in Article 50(1) TEU for the withdrawal itself...it may be decided upon unilaterally, in accordance with the constitutional requirements of the State concerned." Revocation is, in essence, a "sovereign decision" by the State to retain its status as a Member State of the EU; the status is neither suspended nor altered by that notification.¹⁹

The ECJ then moved to consider implications of withdrawal. The decision to withdraw is "liable to have a considerable impact on the rights of all Union citizens, including,

¹⁴ *ibid* [47].

¹⁵ (n 13).

¹⁶ P Eeckhout and E Frantziou, "Brexit and Article 50 TEU: a constitutionalist reading" (2017) 54 *Common Market Law Review* 695, 696-697.

¹⁷ (n 2) [49]. The AG made a similar suggestion in his opinion, at [99]-[102].

¹⁸ *ibid* [56].

¹⁹ *ibid* [59].

inter alia, their right for free movement, as regards both nationals of the Member State concerned..."²⁰ Forcing a Member State to leave after it has triggered the Article 50 process, despite a wish to remain "as expressed through its democratic process in accordance with its constitutional requirements," would be "inconsistent with the [TEU's] purpose of creating an ever closer union..."²¹ The intention of the Parliament will always have the final say in determining whether United Kingdom shall remain a Member State of the EU. This also reflects the origins and intention of Article 50, which in its final draft upheld "the voluntary and unilateral nature of the withdrawal decision."²²

Constitutional requirements

Building on the AG's recognition that any revocation must respect "national constitutional requirements,"²³ the ECJ noted that any revocation must be made in an "unequivocal and unconditional manner....after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements."²⁴ In the United Kingdom, given the judgment in *Miller*, this would suggest that the "constitutional requirement" in question would be passing primary legislation in the House of Commons revoking the notification of withdrawal as made under the European Union (Notification of Withdrawal) Act 2017. Noting that the sovereign State holds the final decision to revoke the notification to withdraw, the ECJ also correctly noted that any requirement of unanimous approval by the European Council would "transform a unilateral sovereign right into a conditional right subject to an approval procedure."²⁵ This also, prudently, confers the maximum respect for the Member State in deciding

on revocation. Whilst revocation has to be made in accordance with its constitutional requirements and must be made in an "unequivocal and unconditional manner" (presumably meaning that the revocation should reflect popular will), it is the sovereign State alone that can construct the validity and credibility of the revocation. The European Council would have no democratic legitimacy in deciding on the revocation decision.

Implications of the Court's judgment: the relationship between the European Union and the United Kingdom and parliamentary sovereignty

The unique status of this preliminary ruling is that it is also a matter of political importance and urgency. Whilst constitutional law litigation (especially in the field of human rights) may be seen as predominantly a matter of upholding principles and values, it is clear that the preliminary ruling is primarily aimed at providing an alternative gateway for the Government out of the Brexit conundrum. As the AG accurately noted, the *Wightman* litigation is "not merely a jurisprudential issue,"²⁶ and the legal consequences of Brexit are drawing "inexorably closer."²⁷

Parliament's position as delineated under Article 50

First and foremost, the judgment affirms the centrality of Article 50 in all questions regarding the notification of withdrawal and its revocation. As the Article concerns the structure and composition of the EU itself, any interpretation would "affect the Union's very identity as a constitutional order committed to the values laid down in Article 2 TEU."²⁸ The constitutionalist reading adopted by the court reflects a cardinal principle underpinning the relationship

20 *ibid* [64].

21 *ibid* [67].

22 *ibid* [68].

23 (n 3) [144].

24 (n 2) [74].

25 *ibid* [72].

26 (n 3) [41].

27 *ibid* [40].

28 (n 16) 698.

between the EU and its Member States: the division of competence.²⁹ The judgment resoundingly puts the competence to decide on revocation firmly in the hands of the Parliament. The Parliament is and will always be in control of the Brexit process in terms of the continuation of negotiations and any decision to revoke its withdrawal notification.

The judgment also reflects the overarching necessity to respect the Member State's constitutional process. Following Eeckhout and Frantziou's analysis of a "constitutional reading," the judgment affords prudent respect to the United Kingdom's uncoded constitution as "a form of constitutional organisation inherently susceptible to change through politics."³⁰ Moreover, one must not ignore the distinction between the decision to withdraw (Article 50(1)) and the notification of the decision (Article 50(2)). It would be unrealistic to draw any formalistic distinction between them³¹ as a change in political realities (e.g. a shift of popular will under Article 50(1) to remain in the EU) would necessarily, as analysed above, undermine the credibility and legitimacy of the notification to withdraw (Article 50(2)). The validity of such change can, however, only be expressed by the Parliament in an unequivocal and unconditional manner.

The Parliament's position may also be seen as strengthened from the recent SC judgment in *R (on the application of Gina Miller) v Prime Minister*.³² In the unanimous judgment, the SC noted that the sovereignty of the parliament would be undermined "if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased."³³ An example of this would be a lack of legal limits on the Prime Minister's

power of prorogation. It is a court's duty to not only review a Prime Minister's decision to prorogue the Parliament, but also to consider the implications of such prorogation.³⁴ This is because the prorogation of Parliament means that vital functions which can only be exercised by the Parliament, including funding public services, would be suspended. The Court's affirmation of the cardinal nature of parliamentary sovereignty in the UK constitution is uncontroversial and flows nicely from *Miller*.³⁵ The Brexit process, as a matter of law, remains firmly in the hands of the Parliament. While the expediences potentially offered by executive decisions and solutions may offer a quicker alternative to complete the Brexit process (in whatever form it may take), the sovereignty of the parliament must always be respected.

The constitutional requirements of Article 50: a symmetry with Miller?

Under section 13(1)(b) of the European Union (Withdrawal) Act 2018 ("EUWA"), the House of Commons must approve a withdrawal agreement before the agreement can be considered as ratified. This provides for the implementation of the intention to leave the EU.³⁶ Nowhere it is suggested that the Parliament's intention before ratifying any withdrawal agreement must be fixed. Following the ECJ's reasoning, a corollary of the Member State's sovereign right to submit the notification to withdraw would be its sovereign right to revoke the notification. In terms of substance, the revocation decision has to be made in accordance with its constitutional requirements.³⁷

29 *ibid* 702.

30 *ibid* 710.

31 G Phillipson, "A dive into deep constitutional waters: Article 50, the Prerogative and Parliament" (2016) 79(6) *Modern Law Review* 1064, 1064-1069.

32 [2019] UKSC 41.

33 *ibid* [42].

34 *ibid* [43].

35 (n 1) [43] and [48].

36 G Phillipson and A L Young, "Wightman: What would be the UK's constitutional requirements to revoke Article 50?" *UK Constitutional Law Blog* (10 December 2018): <<https://ukconstitutionallaw.org/2018/12/10/gavin-phillipson-and-alison-l-young-wightman-what-would-be-the-uks-constitutional-requirements-to-revoke-article-50/>> (last accessed 14 January 2019)

37 (n 3) [75].

Given the 2018 Act provides for the implementation to withdraw, revoking the notification as submitted under Article 50 would necessarily strip the Members of Parliament off their rights to implement the withdrawal decision. To revoke using prerogative power, however, would render both the withdrawal agreement and any future framework between the EU and UK otiose.³⁸ This is because the Parliament will no longer be able to approve such instruments, once agreed. In both the AG's opinion and the ECJ's ruling, it is clear that the relationship between the criteria for triggering and revoking Article 50 is reciprocal: both triggering and revoking Article 50 must conform to the constitutional requirements of the Member State in question - in this case, the constitutional requirements of UK itself. At this point, the shadow of *Miller* flickers before us: the royal prerogative may not be exercised in a way that frustrates the intention of the Parliament as expressed in a statute.³⁹ The Prime Minister would not be able to use the prerogative in a way that frustrates the Parliament's intention of implementing the decision to withdraw from the EU, as evinced by the EUWA 2018.

Last but not the least, Phillipson and Young suggested that given the ECJ's emphasis on reciprocity and the need to ensure the democratic legitimacy of revocation, the insertion of an option for a referendum under section 13 of EUWA 2018 would not be sufficient. This is an accurate observation of the essence of the *Miller* judgment, as the provision of a referendum option does not entail sufficient credibility for revocation. Even if a second referendum opted for remaining in the EU, the lack of fresh legislation would mean that, based on *Miller*, the "constitutional requirements" for revoking the notification would not be satisfied, and thus any attempt to revoke the notification via non-legislative means would be unconstitutional.

Conclusion

The *Wightman* preliminary ruling authoritatively confirms that the power to revoke the notification of withdrawal is vested solely in the hands of the Parliament. Forming a conclusive symmetry with *Miller*, it supplied a clear direction and the respective constitutional requirements for the Government to consider if it considers revocation should become a real option. The manifestation of parliamentary sovereignty shows at, at the end of the day, the status of the UK as a Member State of the EU is not affected - it still has full competence to decide whether to continue the negotiations or revoke its notification of withdrawal. The teleological approach to interpreting Article 50 has also provided a clear and definitive guide in approaching the question of withdrawing from the EU: the status of the UK as a Member State of the EU contributes to the composition of the EU constitutional structure, insofar as it has not left the EU yet. Ultimately, the decision to stay as a Member State of the EU or leave it, under the Article 50 framework, is a matter for and only for the Parliament to decide: a manifestation of parliamentary sovereignty.

Endnotes

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38 (n 33).

39 (n 1) [51].



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