Patrick J Birkinshaw—*European Public Law: The Achievement and the Brexit Challenge*

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2020 is yet another year with a major challenge for our collective well-being and for the basic components of the human commons. International, national and local public bodies and collective actors—that is, charities, international corporations and small and medium-sized enterprises—have to pull together to find the means to overcome logistical hurdles in manufacturing personal protective equipment, dispatching masks, operating ventilators and achieving successful vaccines and drugs. The human, social and economic costs of failing to properly address the COVID-19 crisis would be immeasurable. Optimists discuss how to build a more resilient and sustainable society. Pessimists flag cybersecurity threats and risks to our privacy if tracing and zooming develop in an unwieldy manner. Scholars may turn to European shared values of 'justice, solidarity and equality' (Article 2 of the Treaty on European Union) to start developing answers to the post-COVID-19 situation. Other scholars may soon undertake a post mortem of the pre-COVID-19 collective frenzy, where alarm bells and indications that a major pandemic might be looming were set aside as other concerns, such as financial troubles, protectionism and nationalism, took centre stage in 2019. In an intensively interconnected physical, economic, social and political world, European public law seems to have failed to deliver on 'justice, solidarity and equality'. In *European Public Law—The Achievement and the Brexit Challenge* Patrick Birkinshaw (Emeritus Professor at the University of Hull and former editor of *European Public Law*) provides us with an excellent forensic analysis of the dynamic interactions between the European Union (EU) systems and national

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systems that have shaped institutional, procedural and substantive limits on public power in the UK and Europe.

Benefitting from the extensive references to case law and literature gathered over the course of the first two editions (2003 and 2014), this edition recounts the Europeanization of UK public law from the early days when the UK became a member of the (then) European Economic Community until Brexit. This journey through time takes the reader across 14 chapters divided into three parts.

The first part sets the overall legal landscape of European public law: its context (chapter 1); a comparative tour of law and government at EU level, in the UK and in France and Germany (chapter 2); the contribution of the EU, French and German systems to European public law (chapter 3); and the main features of UK constitutional law and European integration (chapter 4). The second part discusses substantive issues including: subsidiarity (chapter 5); transparency (chapter 6); national participation in EU affairs (chapter 7); judicial review (chapter 8); citizenship and the protection of human rights (chapter 9); public liability (chapter 10); complaints and grievance procedures (chapter 11); and competition, regulation, public service and the market (chapter 12). The final part deals with future considerations (chapter 13) and a discussion of the legacy of European public law in the UK (chapter 14).

As this overview of the chapter headings shows, *European Public law—The Achievement and the Brexit Challenge* leads the reader through the most remarkable changes in the building of EU public law and their impacts on UK public law. It charts this as a 'multi-dimensional process', including convergence and cross-fertilization between public law systems in two different directions. The first direction relates to the top-down and bottom-up interactions between the EU level and national systems, and the second to the direct and indirect influences between member states (sections 1.03 and 1.04). For instance, chapter 3 extensively covers the contribution of French and German public law to European public law, asking whether EU law is a system of administrative law. It is difficult to clearly identify all the reciprocal influences on each other's legal systems: there is 'no rational conceptualisation' at the end of the day. There is neither a transplant strategy nor convergence by design: 'It is simply that different systems have to work in ever-increasing proximity and borrowing or influencing are standard and universal characteristics.' (page 25) However, 'As the world moves ever closer together temporally and in terms of communication and as ancient barriers and not so ancient evaporate or are dismantled, and new ones emerge, we must increasingly seek

enlightenment from each other to see how political power may be tempered with legal discipline.' (page 30) This way may help to advance how 'the content of the law reflects values which protect us all' (page 26).

In this endeavour one silver lining of this book is to offer the opportunity to chart where there have been changes since the previous edition (published in 2014). As the addition of 'Brexit' in the title indicates, many chapters have been augmented with a section pertaining to the impact of Brexit on UK public law. These discussions of Brexit have been included throughout the book in relation to national constitutional law and the *Miller* cases (page 234), devolution (page 297), and procurement (page 733), culminating in a full chapter on the legacy of European integration covering the last 60 pages of the book. Other changes include more detailed discussions of the UK devolution (sections 5.06-5.09), Article 290 of the Treaty on the Functioning of the European Union and comitology (section 6.05), access to justice and judicial protection (section 8.11) and the German case law on the European Financial Stability Facility (section 2.12). It is equally interesting to note that some key topics did not need to undergo any structural change: public liability had seen sea changes before 2014, but its main features seem to have been settled for now (chapter 10). Equally telling, but probably more disturbing, is that the proposal for reforming transparency and access to documents at EU level has not made any significant progress over the last six years!

The discussions in the reviewed book lead to three more general questions about legal changes in European public law, their underlying processes and the overall direction of travel.

First, the UK public law system is in itself at a crossroads between two legal communities: it has one foot in Europe and the other one in common law. This distinctiveness in UK public law has been thoroughly discussed by Paul Craig in UK, *EU and Global Administrative Law—Foundations and Challenges* (Cambridge: Cambridge University Press 2015), for instance. This is not a mere doctrinal or theoretical statement. In *European Public Law—The Achievement and the Brexit Challenge* concrete consequences of this distinctiveness are elaborated upon. In particular, the development of judicial review to include proportionality as a 'common law standard of review' (i.e. outside the scope of application of European law) is extremely contentious. According to Birkinshaw, even if it is difficult to calibrate the intensity of judicial review depending on the specific context, proportionality has fostered the development of a greater culture of justification, where the reasoning of public bodies is searched more deeply than under the traditional 'Wednesbury' (or reasonableness) test (page

438). Equally fascinating is how equality has been incrementally embedded in UK public law, even if the UK relies partly on specific duties and procedural schemes, such as the public sector equality duty (Equality Act 2010, section 149), leading to its own specific case law (section 8.05). This illustrates the complexity of charting 'Europeanization as one single uniform process, while the detailed analysis of the borrowing and exchanges between legal systems illustrates the creativity and malleability of legal techniques in adapting to their specific contexts.

Secondly, this book makes questions arise about the fitness of public (administrative and constitutional) law in times of crisis. The EU has been plagued by various political, economic and financial crises over time. One of these crises, the 2008 financial crash, led to the case law on *Pringle*, discussing sovereign bonds (section 13.02) and more generally questioning solidarity in Europe. Despite this discussion, however, solidarity remains a weakness in Europe, as European public law has not succeeded in developing a coherent and robust legal framework to accommodate this objective (see recital 6 of the Treaty on European Union: 'Desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions') in a meaningful and justiciable way. Sadly, this failure has been illustrated acutely with the first EU reaction when COVID-19 struck Italy. Now, Europe has officially acknowledged its initial harshness. Yet, at the time of most pressing need, help came first from China, Russia and Cuba in very material terms of doctors, ventilators and masks. Only in a second step did help come from within European partners. Although it may be easy to pick up on only a few media announcements, which may be more of a public relations enterprise than a more enduring and far-reaching commitment to solidarity, one cannot miss the initial aloofness of the EU and the absence of a legal pathway in European public law to trigger a solidary reaction across the EU member states and the EU. When thinking about possible advancement in European public law, this collective dimension may have to receive due attention.

Finally, the UK is now leaving Europe, which leads to many political and legal questions for the future of UK public law as well as the future of Europe. Achievements such as the protection of human rights, including those of minorities, and judicial limitations on arbitrary powers are being challenged. In recounting the evolution from the House of Lords to the UK Supreme Court, Birkinshaw seems to accept that the UK Supreme Court has become a fully-fledged constitutional court in order to address issues arising between the devolved UK entities and the UK as a whole (section 5.14). Yet, its very powers to protect citizens are forever

weak as long as no formal constitution entrenches them. The discussions about repealing the UK Human Rights Act 1998 also lead back to political uncertainty over the roles that judges need to fulfil in a democratic society (section 14.25) and the appropriate limits to these roles. Similar questions are more present than ever at EU level, with the proceedings against Poland, for instance (e.g. CJEU, Case C-791/19 R, *Commission v Poland*). On this score, if there is no Europeanization of solutions it seems that some fundamental issues pertaining to the maintenance of democratic societies and individual freedoms are more than shared across European states.

As Birkinshaw writes: 'The need for legal cooperation to address global corporations and their efforts to avoid appropriate responsibility, privacy invasion and exploitation, the problem of global crime and terrorism and exploitation of migrants will remain in any post-global arena.' (page 30). In a post-COVID-19 society, public law scholars in the UK and in Europe will need general overviews and analyses of how we got to the place we have arrived at along the lines of the model of the questions asked in *European Public Law—The Achievement and the Brexit Challenge*. Old institutional, procedural and substantive challenges will be put in a new light. There may be political will, economic needs and social demand for imagining a different society—in the UK, in Europe and beyond. European public lawyers have to take up this small window of opportunity and rise up to meet one of Birkinshaw's most stimulating questions: 'What have we to learn from each other?' (page 29)

The 3rd edition of *European Public Law—The Achievement and the Brexit* Challenge (2020) by Patrick J Birkinshaw is published in hardback by Kluwer in the European Monographs Series, priced £159.00 ISBN 9789041197511.