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Autor*innen/Author(s): Susanne K. Schmidt

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Zusätzliche Informationen/Additional information:

The author can be contacted at:
skschmidt@uni-bremen.de

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Susanne K. Schmidt

ORCID (0000-0001-7931-9935)

No match made in heaven. Parliamentary sovereignty, EU over-constitionalization and Brexit

Abstract: The abundant literature on the UK's Brexit-decision has focused on explaining the politicization and preference formation leading up to the referendum. But the institutional background has received much less attention. I argue that as a common-law country with a tradition of parliamentary sovereignty, the UK exhibits institutional features that pose a significant mismatch to the prevailing policymaking mode in the European Union. The latter relies heavily on the constitutionalization of the EU-Treaties with the four freedoms, competition law, and citizenship rights, and accords an extraordinary role to the European Court of Justice in policymaking. Constitutionalized European rules regarding freedom of movement and EU citizens' access to the welfare state drove the politicization of EU-membership in the UK. To understand why 'taking back control' found such resonance, it is important to reflect the core features of the UK polity.

Keywords: Brexit; EU citizenship; parliamentary sovereignty; European Court of Justice; free movement; over-constitutionalization;

Introduction

Analyses of the Brexit referendum abound.[i] Much of the Brexit literature has sought to explain political preference formation and politicization of EU membership (Hobolt 2016), the lack of European identity (Curtice 2017), or has connected the leave vote to low education and income, and high unemployment (Becker et al. 2017; Colantone and Stanig 2018). There has been less interest in exploring the underlying constitutional characteristics of the UK facilitating politicization, despite the distinct tradition of the UK vis-à-vis other EU member states (Lijphart 1999). Following de Wilde (2011: 559) politicization can be defined as 'an increase in polarisation of opinions, interests or values' regarding policy formulation. The UK parliamentary system stands out with its electoral rules ('first past the post'), predominantly two-party system, its tradition of parliamentary sovereignty and of common law (Lijphart 1999: 10-21). These pronounced majoritarian traits can be **(← p. 779)** regarded as in stark contrast to the political system of the EU. Integration in the EU is very much 'integration through law' with rulings of the European Court of Justice (ECJ) giving important impulses (Cappelletti et al. 1986; Byberg 2017). Grimm (2017) argues that the EU is characterized by 'over-constitutionalization' imposing important limits for majoritarian decision-making. Such non-majoritarian decisions rooted in 'over-constitutionalization' create a significant institutional mismatch with the UK's strongly majoritarian polity. Moreover, as a common-law country, the UK has been particularly responsive to European case law. Frequent references to and good compliance with ECJ rulings in national policy brought significant political attention to the role of the ECJ in EU policies. Relying on case law implies weak input legitimacy, arguably facilitating politicization in the UK's majoritarian system. In this paper, I argue that these institutional traditions are central to our understanding the Brexit process.

Crucial for the Brexit decision was the politicization of inner-EU migration to the UK (Dennison and Geddes 2018). After eschewing the possibility of a transitional arrangement for free movement, Premier Cameron could not realise his goals of ex-post exceptions and transitional arrangements at the European Council in

February 2016. For the politicization of free movement, the UK's liberal labor market, moreover, according to Boräng (2018: 23), works to foster a 'perceived socio-economic threat' from migration. This political-economic dimension has to be kept in mind (though it cannot be developed here due to space constraints). Rather my focus will be to what extent EU rules on free-movement are driven by ECJ case law, and why this constitutes a mismatch to the UK's institutional traditions.

In the following, I start by analysing this mismatch between over-constitutionalized policymaking in the EU and parliamentary sovereignty in the UK. I then turn to intra-EU migration as the most politicized policy field in the context of Brexit (Goodwin and Milazzo 2017; Parker 2017: 480). I trace how the EU's legal regime is shaped by over-constitutionalization, and show how the UK's common-law tradition implies far-reaching attention to these non-majoritarian roots of European case law.

In sum, we can find a particular mismatch between the EU and the UK, where its tradition of parliamentary sovereignty led to high political sensitivity regarding the constraints of European case law, while the common-law tradition implied that the administration followed and implemented these constraints in a particularly detailed way. This institutional mismatch was important for the politicization of EU-membership, and it is necessary to understand why 'taking back control' could resonate so easily with British voters. With the study of a single case, the following analysis can only aspire to being a 'plausibility probe' in Eckstein's sense of inductively complementing existing theories, deriving hypotheses for subsequent large-scale research (Eckstein 1975: 108-111). However, the extent of institutional **(← p. 780)** mismatch of the UK polity, it is argued, is an omitted variable in existing research (George and Bennett 2005: 134).

A case of mismatch: institutional incompatibilities between the EU's over-constitutionalization and the UK's parliamentary sovereignty

The UK has always been a difficult member for the EU, demanding several special deals, such as the famous rebate, an exemption from joining the Euro or a special role in Justice and Home Affairs (Becker et al. 2017: 543). Membership in the European Union has lower than average support in the UK, and "the British public has consistently been the most Eurosceptic electorate in the EU ever since the UK joined in 1973" (Hobolt 2016: 1259-60). What are the institutional roots of the UK's special role in the EU? In the following, I will first discuss the importance of the European Court of Justice in the EU's policymaking process. I then turn to the political system of the UK, given its tradition of common law and parliamentary sovereignty. Judicialized policymaking in the EU, I argue, brought particular problems to the UK.

Over-constitutionalization in the EU

Starting with the 'coup d'État' of declaring the Treaty's direct effect and supremacy in 1963/64 (Stone Sweet 2007), case law interpreting the rules of the Treaties as quasi-constitutional requirements has pushed European integration beyond what legislative majorities could have achieved. The constitutionalization of the Treaties gives the European Court of Justice a unique power in the EU's political process. Early research noted its importance in the context of the 'integration through law' literature (Cappelletti et al. 1986; Byberg 2017). Political science concentrates more on the ECJ as a neutral arbiter enforcing legislative compromises (Börzel and Sedelmeier 2017), giving less attention to the importance of case law in policymaking, though its relevance in the single-market project has long been acknowledged (Alter and Meunier-Aitsahalia 1994).

The former German constitutional judge Dieter Grimm coined the term 'over-constitutionalization' to point to the consequences of constitutionalising the Treaty. National constitutions, notwithstanding their heterogeneity, focus on state organization and fundamental individual rights (Grimm 2017). Because of its

origin as an international treaty, the Treaty of Rome and its successors describe many material policies as cooperation aims, namely the four freedoms, competition law, and later, introduced in Maastricht, EU citizenship. As Grimm warns, over-constitutionalization greatly reduces the scope for majoritarian decision-making. European secondary law arising from the EU's **(← p. 781)** legislative process in the interplay of Commission, Council and European Parliament cannot simply overrule primary law (Schmidt 2018).

To sum up, for the understanding of policymaking in the EU and the degree of integration, over-constitutionalization is an important explanation. Moreover, when we turn to the characteristics of the UK polity, we see that there is a significant institutional mismatch.

Parliamentary sovereignty and common law in the UK

National polities differ in the way that sovereignty is conceptualized, depending on historical trajectories. Abromeit (1995) compared different concepts of sovereignty regarding institutional fit or misfit to membership in the EU. Comparing German constitutional sovereignty, British parliamentary sovereignty, and Swiss sovereignty of the people, the German legally defined concept of sovereignty fits the EU best. For Germans, used to obey their constitutional court in Karlsruhe, it is a small step to accept that the ECJ rules instead. For Switzerland, acknowledging that the ECJ has the last word, violates the Swiss conception of the people being the sovereign. In fact, the ongoing 2018/20 Swiss discussions of the new bilateral treaty between the EU and Switzerland bears evidence to the difficulty of accepting jurisdiction of the ECJ (Bundesrat 2018).

For the UK, the extent to which the ECJ defines the order of competence in the EU constitutes an institutional mismatch. The tradition of parliamentary sovereignty emphasizes the freedom to legislate in any area, with courts not being able to challenge parliament's decisions (Goldsworthy 2015). Note that following from the majoritarian system, parliamentary sovereignty works in tandem with the unfettered prerogative of the executive, also termed 'elective dictatorship' (Lijphart 1999: 12). Lord Justice Ryder points out

that 'the idea that courts could embark upon the judicial review of legislation never became a feature of our constitutional settlement (…) the check on Parliamentary supremacy in the United Kingdom was Parliament itself through 'the power of a free public opinion represented by the Commons'.' (Ryder 2017: 123). As Dicey termed it in the late 19th century, parliament has 'the right to make or unmake any law whatever'. But supreme EU law cannot be changed by parliament. With the UK's accession, the British parliament recognized the supremacy of EU law under the European Communities Act of 1972. Because this bound future parliaments as well, EU membership sits uneasily with the tradition of parliamentary sovereignty (Elliot 2004).That later parliaments cannot undo this decision but have to accept the supremacy of EU law was settled for the UK only with the *Factortame* ruling (C-213/89) in 1990 (Barber 2011). Parliamentary sovereignty also conflicts with a strong understanding of judicial review. "The judiciary is seen as a potentially undemocratic force; therefore, no judicial review **(← p. 782)** of legislation exists, or it is strongly limited" (Tabarelli 2013: 342). This presents a stark contrast to the history of expansive interpretation of the four fundamental freedoms. As the former President of the ECJ, Skouris, argued, no area exists that can be seen as exempt from possible interference with the four market freedoms (Höpner 2010: 145). To name a few examples, environmental policies on bottle deposits can be framed as interfering with the free movement of goods – as can be a prohibition of tobacco advertising; or the prohibition of abortion can be a restriction of the freedom to provide services. Because the EU legal order knows no exclusive domain that is reserved for member states (Börzel 2005: 223), European judicial review has such a large impact on the order of competences between the European and the member-state level, restricting parliamentary sovereignty 'to make or unmake any law whatever'. In the context of Brexit, the tradition of parliamentary sovereignty has received some attention, in particular following the 2017 *Miller* judgment. *Miller* strengthened the rights of parliament in the Brexit process (Ewing 2017; Reyes 2017), in itself a break from the tradition of executive dominance.

Another important institutional characteristic of the UK has not been discussed in the Brexit context: It is a common-law country, meaning that legal principles set up by judges are treated as law, without necessary codification by the legislature (Dainow 1966/1967). 'Case law (…) has been the key tenet of the common-law tradition, to the point that cases and precedents can be considered de facto if not *de iure* the main repositories of Anglo-American law' (Mattei and Pes 2008: 273). While parliamentary sovereignty stands in opposition to the supremacy of EU law, the common-law tradition implies that the UK's administration is much attuned to implementing case law alongside legislation. Not only may the UK be particularly sensitive to the loss of sovereignty going via integration through law, it is also likely to implement these constraints with explicit reference to the ECJ. In fact, comparative research finds that the UK's compliance record is 'exemplary' (Börzel et al. 2010: 1364), despite the low public support of membership.

The UK's struggle with constitutionalized free-movement rights

An important result of the European Council meeting in February 2016 dealing with Premier Cameron's requests was the amendment to Regulation 492/2011 that the UK government had negotiated. In times of extraordinary migration, a safeguard mechanism could be triggered, allowing a member state to restrict benefits for EU citizens for the first four years of residence.[ii] The Commission stated that the UK met the pre-conditions of this safeguard. In a recent analysis, Beach and Smeets (2019: 2) characterise this deal as 'quite exceptional reforms in which the EU bent over backwards to **(← p. 783)** accommodate the United Kingdom, perhaps even going beyond the bounds of the EU Treaties themselves in the issue of immigration.' In the following analysis, I show how these bounds of the Treaty were rather flexible bounds until recently, continuously expanded by the ECJ. Turning to intra-EU migration to the UK, we find that the common-law tradition made this judicial origin of European rights of access to welfare for EU citizens particularly transparent.

Free movement and the indivisibility of the four freedoms

The four freedoms, of goods, services, persons (comprising the freedom of establishment for companies and the free movement of workers), and capital go back to the Treaty of Rome. The Treaty of Rome states on the freedom of movement of workers in Article 48 (2): 'Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.' (now Article 45 TFEU, Treaty on the Functioning of the European Union). The claim to equal treatment is backed by the general prohibition to discriminate on the grounds of nationality in Article 7: 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.' (now Article 18 TFEU). As member states have kept their national welfare systems as their own responsibility, free movement and non-discrimination produce a potential conflict. Geddes and Hadj-Abdou even speak of 'a radical experiment in open borders', given that 'social solidarity and cohesion' (Geddes and Hadj-Abdou 2016: 222) remains the responsibility of national welfare states.

In fact, member states did not embark into this 'experiment' light-heartedly. Among the original six, Italy pressured for free movement of labor, given its high unemployment. Italy had set itself the goal of a yearly net-emigration of 200.000. But its attempts to push for a European labor market in regional organisations like the ECSC and the OEEC did not succeed. Once economic development picked up, Italy secured bilateral treaties for labor migration, but these allowed host countries to define the conditions. Yearly net-emigration thus fell short of the self-set aim (Romero 1993: 50). When negotiations on the EEC Treaty started in 1955, the other five continued to oppose the idea of a free circulation of labor, just having successfully coped with high unemployment in the years following the war, and profiting from the bilateral arrangements with Italy and other countries of the Mediterranean. The agreement on the free movement of workers in the Treaty of Rome settled for the twelve year transition period of gradual liberalisation and against

a supranational employment policy. As member states retained control over their migration policy, the gradual opening for workers of **(← p. 784)** other member states fell short of any privilege as Italy found out in the 1960s, when workers from Turkey and Portugal entered on a larger scale (Romero 1993: 53-55). The high growth rates of the 1960s de-escalated the conflict, but member states "rebuffed any attempt to interfere with their full sovereignty on recruitment policies" (Romero 1993: 55)). While the indivisibility of the four freedoms has been an important argument of the EU in negotiating the Brexit Treaty[iii], historically it does not exist (Barnard and Fraser Butlin 2018). Free movement was the result of intense bargaining. It is complemented by the coordination of national security systems for migrant workers that was agreed in regulations no. 3 and no. 4 in 1958 (currently set by regulations 884/2004 and 987/2009 (White 2010)).

Important for our context is how much the free-movement regime has been shaped by case law of the ECJ, elucidating the constitutional requirements following directly from the Treaty, as well as the conditions resulting from secondary law. It was the Court which defined the status of worker under the Treaty, and therefore the precondition to the privileges of equal treatment. As Davies (2003: 195) shows, the Court set out the concept of 'worker' relatively broadly in a series of cases in the 1980s (C-53/81; C-139/85; C-196/87). Following *Levin* (C-53/81), work has to be 'genuine and effective' though not 'purely marginal and ancillary'. In C-14/09 *Genc*, the Court even regarded, under specific circumstances, a five hour contract per week as sufficient. Equal treatment under the free movement of workers also provides that those EU citizens not earning a living have a right to national social support without further preconditions (C-139/85).

An active Court furthermore helped to establish equal treatment of EU workers in member states' social security. Martinsen and Falkner have shown in some detail how the evolution of the secondary law of social-security coordination was shaped by case law of the Court, frequently referring to the constitutional demands of free movement. Revisions of the regulations partly codified and partly aimed to overrule this case law. The Court countered time and again attempts of member states to control their social-security

spending into other member states with reference to the Treaty's prohibition of discrimination on the basis of nationality (Martinsen and Falkner 2011).

The Treaty of Maastricht took a further step by introducing EU citizenship rights in Article 18 TEC: 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.' This was a last minute addition that was not accompanied by intensive discussions (Aziz 2009), showing that governments did not accord high political importance to the status. The qualifications regarding 'limitations and conditions' as well as 'measures adopted' emphasized the continued sovereignty of member states in shaping citizenship regimes. **(← p. 785)**

Notwithstanding the qualifications of the new Treaty addition, the Court embarked on a journey that appeared to promise equal rights to EU citizens, disregarding their financial means (Wind 2009; Thym 2017). 'In a sequence of judgments the Court in the meantime has considerably expanded its case law leading some commentators to the assumption that migrant citizens who are not economically active now have the right to claim all benefits available in the host State on the same terms as nationals' (Hailbronner 2005: 1248). One notable ruling was C-184/99 *Grzelczyk*, in which the Court declared member states' duty to a 'certain degree of financial solidarity with nationals of other Member States' (No. 44). The ruling was passed in the middle of the negotiations on the citizenship rights directive 2004/38 (CRD). This Treaty interpretation strongly conditioned what the EU legislators could write into the directive (Wasserfallen 2010). The interaction between case-law development and legislation resulted in some ambiguities of the CRD. On the one hand, following *Grzelczyk*, there is a duty of assistance, and EU citizens cannot automatically be expelled. On the other hand, member states can demand of EU citizens to be financially self-sufficient and to have a comprehensive health insurance (Article 7(1b)) until five years of legal residence.

Though the directive made clear that member states were keen to uphold differences in entitlements between economically active and inactive EU citizens (recitals 16, 19, 21, Articles 7 & 12), following the directive, the Court continued extending rights to equal treatment in member states' welfare systems until autumn 2014. With the case of *Dano* (C-333/13), the Court started to take the restrictions on equal treatment of the CRD seriously. Member states' rights to exclude economically inactive EU citizens from their welfare state were elucidated. Whether this amounts to an about-turn of the Court (Blauberger et al. 2018), or merely a clarification of existing limits being rooted in the Maastricht Treaty, remains contentious in the literature (Carter and Jesse 2018; Davies 2018). During the UK referendum campaign, these free movement rights were particularly politicized.

Before turning to the question, of how the UK dealt with intra-EU migration and the extent of judicially mandated equal treatment, we can summarize as follows: Over-constitutionalization implies that integration is driven to a considerable extent by case law of the Court, in a non-majoritarian way. The depth of European integration cannot be explained through political-preference aggregation alone. The UK's institutional traditions are in a relative mismatch to the EU's polity. **(← p. 786)**

Intra-EU migration to the UK and its institutional preconditions

In opting against transitionally suspending the free movement rights for new member states in 2004, the UK both acted on wrong assumptions (that most other member states would open-up immediately) and wrong forecasts. "However, even in the worst case scenario, migration to the UK as a result of Eastern enlargement of the EU is not likely to be overly large. The evidence brought together indicates that net migration from the AC-10 to the UK will be broadly in line with current migration movements" (Dustmann et al. 2003: 8). The Workers Registration Scheme (WRS) that was operated for the Eastern EU-8 member states in the transition period showed that about half a million workers registered in the first 2.5 years, while it was unclear for how long these persons stayed in the UK (Drew and Sriskandarajah 2007). The non-British resident population grew in total from 5% in 2004 to 8.4% in 2014[iv], and migration from Poland

was described as possibly the largest movement between two countries in peace times (Okólski and Salt 2014). The extent of migration was not only substantial; it also has to be seen in the context of several institutional characteristics of the UK.

To begin with, inhabitants in the UK are not obliged to register with the authorities. ONS (Office of National Statistics) data on migration therefore works with estimates. Only in 2019, it was found that data had underestimated by up to 16% the extent of EU-migration, a finding that downgraded the status of the official migration statistics to experimental: 'This means an increase in the estimate of EU migration from 178,000 to 207,000 for the year ending March 2016.'[v] Neither is there precise data as to claimants (and their nationality) of welfare state services (Sumption and Altorjai 2016: 3).

The UK's welfare state relies in part on non-contributory welfare. In-work benefits complement a flexible labor market, giving incentives for taking up work, even if it is low-paid. Labor regulations are hardly enforced. This combination means a propensity to attract lower skilled migration, also lowering the overall benefits from labor migration (Ruhs 2015: 19, 24). Estimates found higher in-work benefits but lower out-of-work benefits of EU migrants compared to the overall population (Ruhs 2015: 22). Although analyses showed overall benefits from intra-EU migration (Dustmann and Frattini 2014), the lack of data, and the political discussion on how to restrict early access to welfare benefits overshadowed the debate. Moreover, it has been shown for the UK that workers with lower wages come under pressure while higher wages profit from additional labor supply (Ruhs and Vargas-Silva 2018). Boräng (2018) analyses, how labor market structure and wage formation influences the position and attitudes towards migrant workers. This interaction of labor market institutions and labor migration explains why liberal market economies are more closely linked with labor migration **(← p. 787)** control (for instance via a grading system), which then leads to strong support for (highly contributing) migrants (Manow 2018: 60).

Building on case law: the rights of EU citizens

Because a non-contributory, tax-financed welfare system is very open to claims by migrants, particularly when there is no registration requirement, the UK had introduced a habitual-residence test as early as 1994, under the Conservative Government. Previously, income support had been granted irrespective of length of residence in the UK. The term 'habitual residence' draws on the rules of the European regulation of social security. For the definition and determination of habitual residence, the UK government uses criteria established by the ECJ in its case law, taking into account the length of residence, prospects of employment, existing links to the UK, and the intention to settle there (Kennedy 2011b). The common-law tradition becomes apparent here, and ECJ rulings figure prominently in administrative guidelines and political discussions.

In 2004, linked to Eastern enlargement, the government introduced a new right-to-reside test for EU-citizens, that needs to be passed before the habitual-residence test applies (O'Brien 2015). This test is relevant for accessing different benefits (job-seeker allowance, child- and housing benefits) and was meant to ensure that EU citizens settling in the UK are either self-sufficient or economically active (Kennedy 2011a: 4). The concomitant privileging of UK nationals, led the European Commission to initiate an infringement procedure in 2010 (Kennedy 2011a: 15f). In defense, the responsible Secretary of State for Work and Pensions, Iain Duncan Smith, claimed that without the test the government might have spent up to £ 2.5 billion a year in additional benefits – a politically disputed estimate (Kennedy 2011a: 18f). While the infringement procedure lingered on, the UK Supreme Court backed the government in mid-2011 in the *Patmalniece* case, agreeing that equal benefits to EU-citizens would result in an undue financial burden for the UK. This backing is in line with what we would expect from courts in the tradition of parliamentary sovereignty that defer to parliament (Tabarelli 2013: 344). The Commission took the UK to the ECJ in 2013, which decided the infringement procedure (C-308/14) in favour of the UK just days before the June 2016 referendum.

Other UK reforms closely followed the evolving ECJ case law. It also has to be kept in mind that the reforms were part of the austerity programme in the wake of the financial crisis (Hemerijck 2013: 358, 370). A revised habitual-residence test with more individualized questions, guided by an intelligent IT system, including queries regarding efforts to get into work (Kennedy 2015: 8f) mirrored the ECJ's requirement of individual assessments in its ruling of *Brey* (C-140/12). In mid-2014, the government introduced a Genuine Prospect of Work test (GPoW), drawing on the case *Antonissen* (C-292/89), and the Court's connection of the eligibility of EU citizens for **(← p. 788)** jobseekers' allowance with their 'genuine chances of being engaged' (No. 21) (Kennedy 2015: 17-19). Because the ECJ accords worker status once employment is not only 'marginal and ancillary' but 'genuine and effective' (case 53/81 *Levin*), the UK government set a minimum earning threshold of £ 150/week, corresponding to 24 hours a week at the National Minimum Wage, to meet the criteria. Those persons earning less, are individually assessed with detailed guidelines of the responsible Department of Work and Pensions (DWP) (Kennedy 2015: 21). Internal data of the DWP showed that about 90% of claimants in 2015/16 did not pass the test.[vi] The 2018 administrative guideline[vii] that provides the details for applying these different rules is 142 pages long. The document gives 46 references to case law of the ECJ (automated search C-), four references to the citizenship directive, and two references each to regulations 883/2004 and 987/2009 – showing how much implementation draws on case law and rather than EU-legislation.

Given the extent of politicization and continuous reforms tackling spending on EU citizens, it is surprising that some legally possible restrictions were introduced rather late. Only in 2014, the UK restricted payment of unemployment support for EU jobseekers in the first three months (Harris 2016: 147). However, the roll-out of universal credit since 2013, which includes jobseeker's allowance (JSA) and to which job-seeking EU citizens are not eligible, also made this question less relevant.[viii] Moreover, in the British system, it is in-work benefits for the working EU-poor that make up the bulk of the cost. In 2013/14 about 551,000 working EEA received tax credits, but only about 24,000 EU nationals received JSA.[ix] Thus, Harris (2016)

refers to estimates of £37 million savings a year after the introduction of the habitual-residence test (p. 140), and £10 million over the next six years for restricting access to housing benefits for EU-job seekers, also from 2014 onwards (p. 150).

Institutional mismatch in practice

The case study elucidates how the institutional mismatch between the UK and the EU polities contributed to the politicization of inner-EU migration following Eastern enlargement in the UK. Bruzelius et al. (2016: 404) give support to my interpretation. They write: 'Nonetheless, recent debates on EU immigration and welfare access in Britain suggest that the idea of 'semi'-sovereignty is not widely recognised in political circles and conflicts strongly with traditional understandings of parliamentary sovereignty.'

Intra-EU migration was the single most important political issue leading to the politicization of EU-membership, resulting in the vote for leave. Once the decision against a transition period was taken, British flexible labor markets and the wage difference motivated significant and unexpected migration from new Eastern member states, leading to a noticeable rise of the EU-migrant population. Constitutionalized rights to EU equal treatment **(← p. 789)** combined with a low threshold of the worker status as defined in ECJ case law. In the UK common law tradition, these judicial principles found a direct way into administrative practices, leaving the reference to the ECJ's interpretations intact. These frequent references to ECJ rulings substantiating claims to social rights highlighted the institutional conflict with UK parliamentary sovereignty, thereby undermining the legitimacy of EU migrants' social rights. Poor statistics on movement, claims, and economic contribution of EU migrants then added to politicization. That 'take back control' could find such resonance is rooted in the institutional mismatch between an EU that has constitutionalized and judicialized many policy choices, and the common-law tradition of the UK, that made the stark contrast with legitimacy rooted in parliamentary sovereignty so transparent.

Conclusion

In this article, I have argued that the abundant literature on the Brexit decision has paid insufficient attention to the long-standing institutional underpinnings of the Brexit decision. There is a notable mismatch between the UK polity with its strong majoritarian traits and its common-law tradition on the one hand, and an EU that is marked by over-constitutionalization on the other. The relevance of constitutionalized case law for EU policies was traced for the free-movement regime that became so politicized in the UK. The common-law tradition of the UK clearly highlighted the relevance of case law for EU policies at the same time. Institutional mismatch can thus contribute to explain why 'taking back control' became so important in the UK.

Drawing on a single case study, I could only argue in the sense of a 'plausibility probe'. Malta and Ireland, two other member states share institutional traits with the UK, might undermine my central argument. However, both Malta and Ireland are small states and are, importantly, non-net contributors to the EU budget. Thus, the benefits of EU-membership for both states are more directly apparent than they were for the UK. As we know from Scharpf's analysis, input- and output-legitimacy are interdependent (Scharpf 2009). Institutionally, it is plausible that other member states struggle less with over-constitutionalized policymaking in the EU. This may be the case but need not necessarily imply that the UK remains 'the odd one out'. As much as Brexit is connected with quite unique conditions of politicization of EU membership (as analyzed in much of the literature), embedded in institutionalized conditions (as I have argued), Brexit can also be read as a sign of warning about fundamental problems in the EU integration process. As heterogeneous as the Union has become with rounds of enlargement, it is plausible that European policies have to cater for greater diversity. Constitutionalising policy choices, accepting case law rather than political preferences to shape policy decisions, implies the danger of shifting political contestation to another level.[x] **(← p. 790)**

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[ii] http://www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions/

[iii] European Council: Informal meeting at 27, Brussels, 29 June 2016 https://www.consilium.europa.eu/en/press/press-releases/2016/06/29/27ms-informal-meeting-statement/

[iv] https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/populationbycountryofbirthandnationalityreport/2015-09-27, Figure 2

[v] BBC, 21.8.2019: "EU migration to UK 'underestimated' by ONS", https://www.bbc.com/news/uk-49420730

[vi] Interview DWP 22 February 2017.

[vii] Part 3 - Habitual residence & right to reside - IS/JSA/SPC/ESA. Vol 2 Amendment 3 9 February 2018 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/572413/dmgch0703.pdf

[viii] Interview German Embassy, London 21 February 2017.

[ix] Interview DWP 22 February 2017.

[x] I am grateful for discussion with Philip Manow that made this point clearer to me.

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