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Pushing Grimm’s arguments further

To conclude, I would like to suggest to the reader two directions in which Grimm’s arguments could be pushed further.

First, Grimm develops the overconstitutionalisation thesis by reference to the development of the economic freedoms and of the principle of undistorted competition as the key yardsticks of the validity of European law. That is a fundamental aspect of the European democratic equation, but far from the only one. The political vacuum at the heart of the European democratic deficit is caused not only by the fragmentation and pulverisation of national regulatory power through an asymmetric enforcement of economic freedoms, but also by the affirmation of monetary stability (“sound money”) as the alpha and omega of monetary policy, while the objectives of economic, social and tax policy are increasingly subordinated to the maintenance of the value of the currency, and the keeping clear of the means of further accumulation of capital (most obviously through the relative recent transformation of financial stability into a fundamental end, and not merely a subordinate means). Applying Grimm’s overconstitutionalisation thesis beyond the internal market and into monetary and economic policy would throw light not only on the implications of the massive transformation of European primary law triggered by the ongoing financial, economic and fiscal crises, but also on the historical interrelationship of the changes. Indeed, the leading case signalling the shift in the understanding of economic freedoms (Cassis de Dijon—Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein (120/78) EU:C:1979:42; [1979] 3 C.M.L.R. 494) was decided barely months after the European Council agreed on the launch of the Exchange Rate Mechanism in late 1978, a decision that brought about some of the key changes later codified into Economic and Monetary Union (including the fateful decision not to make use of central banks as lenders of last resort to the states).

Secondly, Grimm’s thesis is largely built by reference to the relationship between German and European law (although there are some appropriate references to other legal systems, outstandingly the Italian and the French). It could be further tested by means of relating it systematically to the constitutional experience of other Member States.

In conclusion, Dieter Grimm’s writings over the last two decades have built bridges between an occasionally too inner-regarding national democratic constitutional theory, uncritically assuming a unique association between state and democracy, and a European legal scholarship too taken by itself to be ready to seek its own foundations in the tradition of democratic constitutional theory. At a critical moment, when the EU is undergoing manifold crises that its leaders have managed to postpone but not to solve, these two books by Dieter Grimm make more fundamental reading than ever.

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Very few political events in recent history have ever sparked such a vivid debate as Brexit. Over the last couple of years, the latter has not only triggered numerous discussions, ranging from the legal to the economic to the political, but has also mainly challenged our former assumptions about the future of Britain and the EU. Within this context, the new volume The UK after Brexit: Legal and Policy Challenges, edited by the Liverpool law professor Michael Dougan, offers one of the first comprehensive legal additions to the burgeoning international literature on Brexit. As the editor claims in his thorough introduction,

“UK withdrawal is not just about finding a new relationship with the EU – it is also about opening our own legal and political systems to processes of far-reaching change.”
Moreover, the book aims to contribute to the wider Brexit debate since it wishes to, “vindicate and indeed celebrate the value of academic expertise as well as its potential to improve and enrich public understanding of the most pressing challenges facing our society.” (pp.5–6)

With scholarly contributions originating from some of the top British universities, *The UK after Brexit* certainly lives up to its aims. The timing, moreover, could not have been better. As Britain prepares to leave the EU, calls for a new referendum or a fair (soft) Brexit deal safeguarding UK’s interests have become louder, both in and outside of Westminster.

This new volume offers a three-dimensional analysis of the Brexit legal and policy issues—first, the hard-core British constitutional issues; secondly, UK substantive policies; and, thirdly, UK external relations. In other words, the volume is focused on the day after Brexit—and how the country should handle its numerous internal and external challenges ahead.

The first part (“Constitutional Issues”) deals with key constitutional law matters ranging from the role of the British courts after Brexit (Thomas Horsley) to devolution (Jo Hunt), the relationship between the UK Parliament and Government (Michael Gordon) as well as the heated issue of the Northern Irish border (Michael Dougan). Horsley discusses the future role of domestic courts after the repeal of the European Communities Act (ECA 1972) with the EU Withdrawal Bill. As Horsley remarks, the ECA greatly empowered British courts in terms of judicial review and provided them “constitutional instruction” for years. To address the institutional impact of Brexit on domestic courts, Horsley proposes different models: replacing the ECA with another statutory source, and not doing so. With the recently voted-on Withdrawal Bill, while nationalising the EU *acquis* on Exit Day, the UK gives domestic courts “fresh instruction” on the interpretation of EU-derived law, following the CJEU’s standards.

Regarding the complex constitutional process of Brexit, Gordon points out the tensions inherent (1) between parliament and government and (2) between direct and representative democracy, regarding the execution and the legitimacy of Brexit, respectively. Most importantly, Brexit may bring significant constitutional change in Britain, in terms of parliamentary and judicial review as well as institutional balances. The magnitude of this change is still uncertain, even after the recent vote on the much-debated Great Repeal Bill. Lastly, two separate issues, namely devolution in England and the Northern Irish border, raise different legal and policy inquiries. Hunt criticises the unitary state strategy promoted throughout the Brexit process by the Tories. As pointed out, devolved administrations in the country should seek political rather than legal avenues to resettle and reclaim their power. Regarding the Northern Ireland border, Dougan also points out the political commitment of both the UK and Ireland to resolve the matter in the most beneficial way. However, a hard Irish border raises significant legal issues such as residency rights that cannot be settled easily.

The second part (“Substantive Policies”) provides readers with an introspective of a number of challenges the UK is facing ahead in core aspects of its internal policy: namely, the future of EU citizens residing in the UK (Stephanie Reynolds), financial governance (Niamh Moloney), employment (Catherine Barnard), environmental (Veerle Heyvaert and Aleksandra Čavoški) and IP law (Luke McDonagh and Marc Mimler), as well as cross-border criminal co-operation after Brexit (Valsamis Mitsilegas). Reynolds discusses the implications regarding the future of EU citizens residing in the UK after Brexit. As claimed, the British Government has yet failed to provide certainty to these citizens, without reaching a political settlement with the EU on the matter. Such a settlement, that the UK has insisted during Brexit negotiations to be reciprocal, should afford, as pointed out, meaningful residence rights to EU citizens satisfying certain criteria.

Uncertainty has pervaded other UK policy areas as well. Regarding employment policy post-Brexit, Barnard addresses the issue from the perspective of EU-derived employment rights, as compared with rights derived by national legislation. Theresa May’s early promises to respect the *acquis* and build on it...
aimed to continue attracting businesses and workers alike also in the new era. However, the potential absence of a trade deal with the EU would force businesses to leave the country for more attractive—EU or otherwise—destinations: that is, at the cost of any existing beneficial employment law regime. Regarding UK environmental law, which originates to a large extent from EU law, Heyvaert and Čavoški argue that the absence of EU–UK co-operation in the field in the future would jeopardise environmental protection in the UK as well as threaten Britain’s position as a main trading partner of the EU. As with employment law, environmental protection standards in the UK, built over 40 years of EU *acquis*, should not be hampered. Enforcement remains another challenge, as the authors argue, owing to the loss of the EU’s enforcement machinery and the reliance solely on domestic courts on the matter. Furthermore, in the field of financial services governance, in which the UK has been an innovator throughout the years, Moloney asserts that the UK is not likely to see a major regulatory change after Brexit. Rather, change in the field will be more operational than regulatory and will certainly not lead to deregulation. Uncertainty will certainly play out here as well, since it is doubtful whether the UK will keep its competitive advantage as a global financial services leader post-Brexit. Lastly, in the fields of IP and criminal law, where EU law has had a profound and transformative influence, Brexit will be a catalyst of change. Regarding IP law, as McDonagh and Mimler point out, there is a big question as to how certain heavily EU law-regulated IP areas such as trade marks and copyright will be regulated and adjudicated in the UK in the future. There is also an added complexity due to the existence of EU agencies competent in the field and any acquired IP rights, as well as the international developments in patent law and the creation of a unified patent court. Finally, regarding cross-border criminal co-operation after Brexit, Mitsilegas stresses the paradox inherent in the future EU–UK relationship. Britain will have to comply with the full EU *acquis* in the field, without cherry-picking in the form of successive opt-outs, if it wishes to continue reaping the benefits of this security co-operation post-Brexit. Thus, paradoxically, the UK will be bound to more EU law compliance in the field than it has been until now.

Finally, the third and last part of the volume (“External Relations”) completes the volume, offering a perspective on some of the UK’s main external affairs issues affected by Brexit, namely the future of EU–UK relations (Paul Craig), trade policy (Marise Cremona), WTO membership (Gregory Messenger) and foreign investment protection (Mavluda Sattorova). Regarding trade policy, the UK would be better off negotiating a softer Brexit approach. Particularly since the EU, much like the US, is a world leader in setting global standards—especially in the field of labour and social rights—the UK should seek closer co-operation. As several authors in this volume point out, Brexit would cost the UK, inter alia, losses in its international negotiating power in areas such as trade policy, security and standard-setting. Opting to the default WTO rules, in the case of no trade deals with the EU or third countries—or at least for the time required to settle those, given their complexity—would be a hard transition for the UK. WTO law, unlike EU law, lacks a detailed regulatory framework. Adapting to and shaping WTO law in the post-Brexit reality would not be an easy game. Lastly, regarding foreign investments in the new era, transparency, inclusiveness and public participation should guide the treaty-making process. Foreign investors’ stakes should be carefully balanced with the British state’s legitimate interests, particularly in the new era.

In sum, the collective volume *The UK after Brexit* fulfils its promises. It is a significant contribution to the developing literature on Brexit and its complex legal and policy implications. All authors contribute to the ongoing debate from multiple dimensions: constitutional, internal and external affairs. Moreover, all of these analyses transcend time—they are focused on the future of Britain after Brexit, seeking answers to questions relating to change, be it constitutional, political, regulatory, policy, leadership and otherwise. Change should not come easily. In an interdependent world, “Brexit won’t really mean exit” from well-established standards or rules. As shown throughout this excellent collection of scholarship from diverse law areas, from criminal to trade law, EU law has had an enormous impact on the British legal order over the past 40 years. This *acquis*, combined with the EU’s global leadership in several policy
areas, from environmental to criminal co-operation, to data protection, to trade, will be hard for the UK to surpass. At the end of the day, Brexit turns out to be less about “taking back control” of the country, as Theresa May claimed at the start of her leadership, and more about the UK facing the realities of this interdependent world. All the contributions, written in a sophisticated manner, blend theory with practice, offering a high-level analysis of such complex policy questions. They are pragmatic and relevant, internationally oriented and targeted at a wider audience looking for informed answers. What remains to be seen is how flexible Westminster is to absorb such thorough academic contributions while shaping its future relationship with the EU and beyond.

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Global transformations of law and politics have led to the proliferation of legal theories of supranational and transnational polycentric legal orders beyond statehood and international law. Initially described by Philip Jessup as all law transcending national frontiers (P. Jessup, Transnational Law (New Haven, CT: Yale University Press, 1956), p.3), the meaning of transnational law has subsequently shifted in the last 60 years, and the concept now commonly signifies a distinct legal subsystem autonomous and independent of both international and national legal orders dominated by the state organisation (see, for instance, M. Maduro, K. Tuori and S. Sankari (eds), Transnational Law: Rethinking European Law and Legal Thinking (Cambridge: Cambridge University Press, 2014)).

While States still can influence transnational law-making and law enforcement to some extent, they cannot exercise full control over these processes, and their former auctoritas of legitimately exercised power has been weakened and transferred to the new bodies with specific modes of governance, administration and sources of authority. In transnational law, the hierarchy of state political settlements gives way to the heterarchy of societal contestations, and the autonomy of legal norms is challenged by hybrid normative orders and non-legal rules evolving in the law’s social environment.

Expert groups, scientific communities, business representatives, non-State administrators, NGOs and civil society agencies interact in transnational regimes. They transform the statist and monist concepts of law and constitute a plurality of legal orders and the polycentric global legal system in which the classic public/private distinction and the typically modern principle of territoriality bringing together topos, nomos, and ethnos have lost their theoretical and practical importance. Instead of monist and sovereigntist conceptualisations, transnational law, therefore, has to adopt a pluralist concept of law (P. Zumbansen, “Transnational Legal Pluralism” (2010) 1 Transnational Legal Theory 141).

Matej Avbelj’s book The European Union under Transnational Law: A Pluralist Appraisal contributes to this common mapping of post-sovereign pluralist transnational law by analysing legal developments in the EU and searching for the normative and value foundations of transnational European legal pluralism. The book aims at defining the theory of “principled legal pluralism” (p.3), and describes EU law as a value-oriented transnational system promoting specific normative frameworks and expectations. The first three chapters address general conceptual issues of transnational legal pluralism and its EU context. This general part is followed by four more specific chapters dealing with each of the four values of the rule of law, democracy, human rights, and justice; and the concluding part juxtaposes the pluralist and monist concepts of law and emphasises both functional and normative advantages of the pluralist concept of EU law.