In Varietate Concordia: How Path Dependency Affects the Brexit Negotiations

https://www.e-ir.info/2018/04/20/in-varietate-concordia-how-path-dependency-affects-the-brexit-negotiations/

PATRICK BIJSMANS AND MARK T. KAWAKAMI, APR 20 2018

While the EU proudly proclaims its motto to be “United in Diversity”, it is difficult to ignore the reality that various attempts at European harmonization have also engendered animosities and frustration between the EU Member States. Brexit is the most obvious manifestation of this tension. The divorce negotiations between Britain and the EU, which just have entered into their second year, are almost a self-fulfilling prophecy predicted back in the 1970s. While pointing to Brexit may seem too easy of an example to substantiate the statement above, there are some fundamental differences between the Brits and the Continental Europeans that not only have made their relationship increasingly difficult, but may make their divorce even more acrimonious.

From the start of the European integration process, Britain has been, in the words of Stephen George, an “awkward partner”, with warm feelings for European integration only present among pockets of society. Whether Britain is the only “awkward partner”, may be open to debate, but from the moment the European Communities were formed in the 1950s, the British position towards European integration has mostly been lukewarm. Joining the European Communities did not even appear to be an option at first; as their focus was primarily on the Commonwealth and the country’s “special relationship” with the United States.

Yet, as the British Empire dwindled and European integration got off to a successful start, the Brits changed their tune and applied for membership in 1961. Due to the French opposition, however, it was not until 1973 that Britain officially joined the Communities. It did not take long before problems arose, as the UK Labour party quickly pledged to renegotiate the membership deal; something that was accepted by the other Member States (sounds familiar, doesn’t it?). On 5 June 1975, the British people overwhelmingly voted in favor of continued membership (with a turnout rate of 64.62%, of which 67.23% voted in favor of continued membership).

So, the Anglo-European marriage did not start off well and it certainly wasn’t a marriage based on true love. From the get go, there has been a rather widely shared feeling that the British islands were somehow different from “the continent”. In his book, *A Cultural History of British Euroscepticism*, Menno Spiering refers to a cultural divide that lies at the heart of the British position towards the EU and argues “that over the years Homo Britannicus has branched off from Homo Europaeus.”The controversial issue of the British relations with “the continent” has cut through society and politics, with both major parties housing fierce opponents and convinced proponents of European integration.

Myths and stereotypes came to play an important role in British debates about Europe. From the decision to classify Kilts as women’s wear to the infamous curved bananas, the representation of the European Commission in Britain even offers a “Euromyth A-Z index”! In light of these realities, it should not come as a surprise that the now widely used (and abused) term Euroscepticism originates in Britain. It was first used by the British press during the 1980s to describe Margaret Thatcher’s strained position towards European integration. In fact, according to Nick Startin, the sceptic stance of large parts of the British media towards the EU has played a key role in a process that eventually resulted in the Brexit vote on 23 June 2016.

Specifically in the field of law, this difference between the Brits and Continental Europeans visibly manifests itself in

the debate over the principle of good faith. In civil law jurisdictions (from the Continental lawyer's perspective), the principle of good faith requires that the parties to a contract treat one another fairly and reasonably, even in adversarial situations. The doctrine of good faith applies even in pre- and post-contractual situations, when the parties are negotiating over the terms of contract or discussing damages after the contract has been breached. For example, in a sales contract, the principle of good faith attaches various information duties on the seller, who must provide all relevant information to the buyer that could potentially affect the buyer's decision to purchase the good or not.

In the UK (from a common lawyer's perspective), however, the principle of good faith – for the most part – is something strange and alien, if not something frowned upon. In the words of Lord Ackner in *Walford v. Miles* (1992), "the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties involved in negotiations." Rather, most common lawyers adhere to the principle of *caveat emptor*, or buyer beware, which is to suggest that it is the responsibility of the parties to investigate and figure out for themselves what they are getting themselves into. The other party to the contract is NOT expected to conduct themselves in a reasonable or fair manner. Even the esteemed English commercial lawyer, Roy Goode, spoke very critically against the principle of good faith, stating that "[t]he predictability of the legal outcome of a case is more important than absolute justice" and requiring courts and businesses to consider "vague concepts of fairness" within the context of commercial transactions is something that is undesirable because it would "make judicial decisions unpredictable…"

These two legal cultures were happily minding their own business, until the formation of the European Union. In attempting to harmonize the laws of its members, the EU implemented various Directives and Regulations with the aim of merging and marrying two distinct systems of law. The European legislatures' decision to preserve the principle of good faith in many of the European legal instruments (thus forcing it down the throats of many Brits) was always a source of awkward tension. Now that the UK is ejecting itself from the confines of the EU what interest would they have to keep the principle of good faith within their legislations? And perhaps more interestingly, what incentive – if any – does the British politicians and negotiators have to negotiate their exit in a fair and reasonable manner?

This post appears simultaneously on E-International Relations' *'Brexit: A European Perspective' and* Law Blogs Maastricht.

About the author:

Patrick Bijsmans is an Assistant Professor in European Studies at Maastricht University. His research interests include Euroscepticism, media coverage of EU affairs and the European public sphere, as well as issues related to teaching and learning in European Studies.

Mark T. Kawakami is an Assistant Professor in Private Law at Maastricht University. His research interests include international commercial/business law, corporate social responsibility, neuroeconomics, and alternative dispute resolution.