A SHORT HISTORY OF BREXIT

Chapter · December 2020

CITATIONS
0

READS
2,558

1 author:

Violeta Besirevic
Pravni fakultet Univerziteta Union
34 PUBLICATIONS **61** CITATIONS

SEE PROFILE

Violeta Beširević*

A SHORT HISTORY OF BREXIT

Following Michel Foucault's idea of the "history of the present," this chapter represents a short genealogy of the past contexts and conflicts that gave rise to the Brexit vote. It consists of five parts. After the Introduction, part two traces the United Kingdom (the UK) membership in the European Union (the EU), highlighting the birth and rise of the British Euroscepticism and the UK's exceptional position in the EU. Part three focuses on the main causes of the Brexit vote: dissatisfaction with a limitation of the parliamentary sovereignty, a vital principle of the UK Constitution; England's dissatisfaction with the process of devolution that changed its dominant position in the UK; and animosity towards EU immigrants. Part four sheds light on the road to the Brexit, explaining the EU law's and UK's constitutional imperfections that produced an unprecedented constitutional crisis in the country in modern times. In the form of conclusions, part five offers some speculations about the Brexit finality.
Keywords: Brexit, European Union, Withdrawal from the EU, UK Constitution, Devolution

I Introduction

To write about the history of Brexit may appear paradoxical, first, because it is present, ongoing event, and second, at the time of writing, the finality of Brexit was not on the horizon. Nevertheless, an essay about the history of Brexit can be tolerated as an example of Michel Foucault's concept of the "history of the present", defined as a critical genealogy which gave rise to the present phenomenon, uncovering its past contexts and conflicts.[1]

---

* *S.J.D.* Central European University; Professor of Law, Union University Law School Belgrade, violeta.besirevic@pravnifakultet.rs, besirevv@ceu.edu. The funding from the project No. 47028, supported by the Serbian Ministry of Education, Science and Technological Development, is thankfully acknowledged.

1 See in M. FOUCAULT, *Discipline and Punish:The Birth of the Prison*, transl. A. SHERIDAN, New York 1977. For the analysis of Foucault's 'history of the present', see, e.g. D. GARLAND, What is a "history of the present"? On Foucault's genealogies and their critical preconditions, *Punishment & Society*, 16, 4, 2014, 365–384. I am grateful to Srđan Milošević for drawing my attention to Michel Foucault's concept of the 'history of the present'.

Brexit stands for "British exit" from the EU, announced in the historic referendum of 23 June 2016, when a slim majority of British citizens (52%) voted in favor of the UK leaving the EU. Those who voted "Leave" wanted the UK to take back control over its laws and policies, end spending on the EU and control migration.[2] Or in the words of a zealous Brexit supporter, Nigel Farage: "Britain should reassert itself as a proud, patriotic country that has control of its borders, represents itself on the world stage and makes its own law in our own sovereign parliament."[3]

The aim of this short essay is twofold: firstly, to present how Brexit, "arguably the most important political event in Europe since the fall of the Berlin wall",[4] emerged out of the enduring UK skepticism towards the EU; secondly, to shed light on the Brexit process, both from the UK law and EU law perspective, taking into account the requirements of the British Constitution and the "exit" clause in the Lisbon Treaty. I intend to be critical rather than prosecutorial and set up the discussion more in law than in politics.

The essay reflects the Brexit-related developments to December 2019.

II UK Membership in the EU: From Euroscepticism to Exceptionalism and Back

Three facts testify about Euroscepticism in the UK. First, the evolution of the EU shows that from the very beginning of the integrations, the UK has seen itself as its keen supporter , rather than a direct member. Second, unlike most EU Member States, the UK had first acceded to the former European Economic Community (EEC) and then asked its citizens what they thought about the country's membership, and not vice versa. Third, the UK has always resisted the EU activities favoring integration deepening. For example, it has never joined either the eurozone or the Schengen area, and it managed to opt-out from the full application of the EU Charter of Fundamental Rights (the Charter) on its territory. In 2012, the UK did not sign the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), aimed at mitigating the consequences of the recent financial crisis in Europe, nor accepted to assist the eurozone countries hit by financial crisis. I will briefly elaborate on each of these facts in turn.

2 D. FELDMAN, V. FIKFAK, The Constitutional Impact of National Referendums and the UK Secession from the EU, *European Review of Public Law*, 31, 1, 2019, 147; G. DE BURCA, Is EU Supranational Governance a Challenge to Liberal Constitutionalism?,*University of Chicago Law Review*, 85, 2, 2018, 337–367.

3 Cited in M. WIND, Brexit and Euroscepticism: Will "Leaving Europe" be Emulated Elsewhere?,*The Law & Politics of Brexit*, ed. F. FABBRINI, Oxford 2017, 230.

4 F. FABBRINI, Introduction, *The Law & Politics of Brexit*, ed. F. FABBRINI, Oxford 2017, 1.

1. United Kingdom and the Foundation of the European Communities: 'Should I join or should I not?'

The UK skepticism towards the EU is not a passing phenomenon. Instead, it is an enduring feature of its relations with the EU, throughout the history of the European integrations. The truth is, it was Winston Churchill, who in the mid-1940s repeatedly argued in favor of establishing 'United States of Europe,' with reduced trade barriers, free movement of persons, a common military, and a common High Court as a dispute resolution mechanism.[5] However, it is also true that he had never perceived the UK as a part of it. On the contrary, he had stressed that the UK was "[…] with Europe but not of it. We are interested and associated, but not absorbed."[6]

Some explain this self-centered approach by the economic and social ties that the UK had within the Empire and the Atlantic alliance at that time, and the fact that it did not want to relinquish the state control over the coal and steel industries, nationalized right after the World War II.[7] Besides, independence and sovereignty concerns also played a significant role in rejecting to join "the Inner Six."[8] Accordingly, when the European Coal and Steel Community (ECSC) was established in 1952, the UK was not among its founding countries.[9] Nor it was among co-founders which established the EEC and the European Atomic Energy Community (Euratom) in 1958. Nevertheless, the UK joined the EEC in 1973.[10] The issue is why, in the meantime, it changed the discourse.

To cut a long story short, it had not taken long for the UK to realize that not joining "the Inner Six" was a mistake. Triggering events were loss of the former world-power status, exemplified in transformation of the Empire into the Commonwealth of independent states and the Suez Crisis, as well as its rather slow economic progress.[11] Moreover, the Suez Crisis signalized emergence of a bipolarized world, in which most of the political and economic global issues would be resolved under the United States and the Soviet Union influence. Thus, without having much space for maneuvering, only two years after the Treaty on EEC came into force (1958), the UK

5 J. MCCORMICK, *Understanding the European Union: A Concise Introduction*, 3rd ed, Hampshire – New York 2005, 59.

6 Z. ARNOLD, *The Struggle to Unite Europe, 1940–1958*, New York 1958, 6.

7 N. FOSTER, *Foster on EU Law*, Oxford 2017, 9–10.

8 *Ibid*., 9.

9 The six founding countries were Germany, France, Italy, Belgium, the Netherlands, and Luxembourg. The same countries also co-founded the EEC and EURATOM. The ESCS, the EEC and the EURATOM: the Communities, hereafter.

10 The EEC Treaty was the most important among treaties establishing the Communities. The ECSC Treaty expired in 2002, while the EURATOM Treaty is still in force. However, since 1965 and so-called the Merge Treaty, all former Communities had common institutions.

11 FOSTER, *On EU Law*, 10.

submitted an application to join the EEC.[12] It will turn out that it was its first application, out of three.

A sharp opposer of the UK accession to the Communities was the then French president Charles de Gaulle, who vetoed the British application twice, in 1963 and 1967, when the UK reapplied. De Gaulle's motivation was both political and personal. As a politician, he saw the UK not only as a major political rival within the Communities, but also as a channel for the US's influence in Europe.[13] De Gaulle also could not forgive the initial approach of the UK to the integrations. Besides the Anglophobia, De Gaulle had a personal motivation to block the UK, as he still remembered the second role given to him at the wartime summits of the allied powers.[14] When Charles de Gaulle resigned in 1968, the UK submitted third application in 1969, which was finally accepted in 1973.[15] Prior to that occasion, no referendum had been organized to let the people tell their opinion.

2. Confusion of a Young Member and Birth of British Euroscepticism

The notion of 'Euroscepticism', which lies at the heart of the UK relations with the EU, appears in a hard and soft version: in the hard version, 'Euroscepticism' can be defined "as principled opposition to the project of European integration as embodied in the EU, […] based on the ceding or transfer of powers to supranational institutions such as the EU."[16] In its soft version, Euroscepticism implies "opposition to the EU's current or future planned trajectory based on the future extension of competencies that the EU is planning to make."[17] In the UK, the soft version of Euroscepticism emerged during Margaret Thatcher's rule, to be radicalized in the Brexit time.[18] I will explain its roots here.

If you are a woman who is reading this essay, at least once in your life you have experienced remorse for buying wrong shoes right after you came home from shopping. They were either brilliant, but obviously too tight, or not at all your cup of tea, but for some reason appeared fitting the purpose. This is the closest description of the UK's

12 Together with the UK, Denmark, and Northern Ireland also applied. As they formed a package with the UK, their applications were rejected in 1963, as well.

13 For more details, see J. MCCORMICK, *Understanding the European Union*, 65. Note that Denmark's and Northern Ireland's application were also accepted in 1973.

14 *Ibid.*

15 *Ibid.*

16 A. SZCZERBIAK, P.TAGGART, *Opposing Europe? The Comparative Party Politics of Euroscepticism*, vol. 2, Oxford 2008, 3.

17 *Ibid*.

18 For more see A. ALEXANDRE-COLLIER, Euroscepticism under Margaret Thatcher and David Cameron: From Theory to Practice, *Observatoire de la sociétébritannique,* 17, 2015, 115–133.

position soon after it joined the club of "the Inner Six." The economic stagnation in the 1970s and then emerging stagnation in the European integrations explain this fact.

It is difficult to understand the source of the UK's frustration with the EEC in the early days of its membership without knowing what a driving force for the UK to join the EEC was. One should keep in mind that the main reason for establishing the former Communities was Political Messianism, that is reconciliation among the former enemies, directed towards establishing stable democracy, both on a national and European level, and economic progress.[19] Looking back at that time, there is a claim that a sole reason for the UK to join the EEC was a need to boost its economy and not promoting democracy or stability.[20] In short, the UK was interested in joining the Common Market, and pretty ambivalent towards all the other EEC's aims and activities. The words of Margaret Thatcher that "the Treaty of Rome itself was intended as a Charter for Economic Liberty" well illustrate the British enduring approach to the European integration project.[21] Consequently, the UK was ready to transfer a part of its sovereignty to the EEC in exchange for liberalization of trade and other benefits offered within the Common Market.

However, it turned out that the time when the UK joined the EEC was the time of economic stagnation rather than progress. In the 1970s, oil crisis hit all Western economies badly and caused high inflation and stagnation in the Western world.[22] In the UK, not only that the oil price increase requested a substantial budget spending, but an aggravated budget spending was also caused by a very high financial contribution allocated by the EEC.[23]

There is one further wrinkle. Life was not a bed of roses for the EEC either. The oil crisis revealed that the EEC was in a political stagnation and that the Member States were unable to reach a common position towards the developments in the rest of the world.[24]

Accordingly, because of its frustration with very high financial contributions to the EEC, economic stagnation and apparent political stagnation within the Communities, the UK's opposition to the Communities started only two years after joining.[25]

---

19 For more see, e.g., J. H. H. WEILER, Europe in Crisis – On 'Political Messianism', 'Legitimacy' and the 'Rule of Law', *Singapore Journal of Legal Studies,* December issue, 2012, 248–268; see also V. BEŠIREVIĆ, The Constitution in the European Union: The State of Affairs, *European Constitutionalism: Historical and Contemporary Perspectives,* eds. A. DUPEYRIX, G. RAULET, Brussels 2014, 15–16.

20 FOSTER, *On EU Law*, 10.

21 M. THATCHER, *Speech to the College of Europe ('The Bruges Speech')*, 20 September 1988, https://www.margaretthatcher.org/document/107332 (accessed on 20 November 2019).

22 FOSTER, *On EU Law*, 10.

23 *Ibid*.

24 Dž. VAJLER, *Ustav Evrope: „Ima li novo odelo svog cara?" I drugi eseji o evropskoj integraciji*, transl. D. LOPANDIĆ, T. MIŠČEVIĆ, Beograd 2002, 60.

25 *Ibid*.

Then Labour Government, led by Harold Wilson, was the first among several British governments prone to calculate the costs and benefits of the UK participation in the European integrations, and eager to renegotiate the terms of the state membership in the Communities/EU. As David Cameron wanted in 2016, in 1975, Wilson wanted citizens' backup on this matter and, therefore, just two years after joining, a referendum was organized with a simple question: "Do you think the UK should stay in the European Community (Common Market)?"[26] The package with the new terms for the membership was on the table, as well. Almost 65% out of 67% who voted, endorsed the UK membership in the EEC under the new terms.[27]

Although the membership was approved with a respectable margin, the 1975 referendum did not signal the end of the opposition to the EEC. On the contrary, the fight against Brussels intensified when Margaret Thatcher became the Prime Minister in 1979. At that time, although the UK was among the three poorest Member States of the EEC, its net contribution to the EEC budget was the biggest.[28] As Marlene Wind explains, the non-proportionality was a result of the fact that the UK had a rather modest agricultural sector and therefore received a small portion of farm subsidies, which constituted more than 70 % of the EEC budget at that time.[29]

The first biggest victory over the EEC the UK achieved in 1985 when, after Thatcher threatened not to pay into the Community budget, it managed to obtain reduction of its contribution, known in the history of the EU as 'UK rebate'. The Brexit populist mantra about ending spending on the EU activities is deeply rooted in Margaret Thatcher's words when she confronted the EEC: "We are not asking the Community or anyone else for money. We are simply asking to have our own money back."[30] Apart from winning the 'rebate', Thatcher also sent a clear message to other Member States that "the Community is not an end in itself" but rather a community of independent sovereign states.[31] The reduced UK contribution obtained in 1985 is still in effect in the EU. As is Thatcher's political legacy within the Conservative party, which paved the way to radical Euroscepticism in the time of Brexit.[32]

To sum up, the British Euroscepticism was born out of a great disappointment with the EEC in the early days of the UK membership, when the EEC failed to provide (albeit unintentionally) what the UK only expected – economic progress.

---

26 M. WIND, Brexit and Euroskepticism: Will "Leaving Europe" be Emulated Elsewhere?,*The Law & Politics of Brexit*, ed. FABBRINI, Oxford 2017, 226.

27 FELDMAN, FIKFAK, National Referendums and the UK Secession from the EU, 141.

28 WIND, Brexit and Euroscepticism 226.

29 *Ibid*.

30 *Ibid*.

31 See THATCHER, *The Bruges Speech*.

32 For more see ALEXANDRE-COLLIER, Euroscepticism under Margaret Thatcher and David Cameron.

3. Three Examples of the UK's Exceptionalism within the EU

Early born Euroscepticism led to many faces of the UK's exceptionalism within the EU. The contemporary claims of the national exceptionality are mostly connected with the United States. "American exceptionalism" in foreign policy, law, human rights and many other areas is subject of numerous critical or affirmative studies, and therefore captures the most attention of those interested in the 'exceptionality' phenomenon. Yet, the claims of the British exceptionality attracted much attention at the Brexit time. The claim can be reduced to the following: "[Great] Britain was never really European [...] its island mentality and history has always led it into a position of conflict with Europe."[33] My aim is not to prove or disapprove this claim here, I will leave it to the sociologists, but to explain, from the perspective of the EU law, the UK exceptional position within the European Union.

As it has already been noted, the UK had been granted numerous general exemptions with regard to the European policies aimed at achieving 'an ever closer union among the peoples of Europe.'[34] For the purpose of this discussion I will consider three examples that well illustrate this point.

First and foremost, the UK exceptional position in the EU is perceptible in the field of human rights protection. The source of the UK's major concern has always been the protection of social and economic rights in the EU, which are essentially ignored at the UK's constitutional level.[35] The UK has opposed social and economic rights on very disputable ground: it has perceived them as positive rights requiring state resources for their materialization. Therefore, the UK has always treated the values that stand behind social and economic rights as principles rather than rights.[36]

At the time of the Maastricht Treaty, the protection of social and economic rights gained in significance on the EU level.[37] In 1989, the UK refused to sign the Community Charter of Fundamental Social Rights of Workers, and then it opted-out of the Maas-

33 G. DELANTY, *A Divided Nation in a Divided Europe: Emerging Cleavages and the Crisis of European Integration*, *Brexit: Sociological Responses*, ed. W. OUTHWAITE, London 2017, 113.

34 See, e.g., J. W. DE ZWAAN, 'Brexit': State of Play and Perspectives, *European Review of Public Law*, 31, 1, 2019, 23.

35 For more see I. HARE, Social Rights as Fundamental Rights, *Social and Labor Rights in a Global Context: International and Comparative Perspectives*, ed. B. HEPPLE, Cambridge 2005, 170–176.

36 *Ibid*.

37 For a general position of the Communities/EU on the protection of social and economic rights, see, e.g., V. BEŠIREVIĆ, Socio-Economic Rights in the Constitution for Europe: Between Symbolism and Legal Realism, *Rethinking Socio-Economic Rights in an Insecure World*, eds. N. UDOMBANA, V. BEŠIREVIĆ, Budapest 2006, 37–48.

tricht Social Protocol.[38] The Maastricht Treaty and the Amsterdam Treaty referred to the social dimension of the EU policies in a symbolic way mainly thanks to the opposition of the UK.[39] Because it included social and economic rights, the same opposing approach the UK took towards the EU Charter of Fundamental Rights, although the Charter at first was not adopted as a legally binding instrument. Due to its potential application before the national courts, behind the move to make the difference in the Charter between the rights and the principles was the UK: according to the Charter, the latter are judicially enforceable only in the interpretation of legislative and executive acts and in the assessment of their validity.[40]

Nonetheless, when in 2009 the Charter, as attached to the Lisbon Treaty, became legally binding and therefore became a part of the enforceable EU Law, the UK decided (together with Poland) to opt-out of the Charter. The trouble for the UK was the fact that the Charter did not indicate which provisions contained rights and which principles, meaning that all of the UK's national acts could have been subjected to fundamental rights scrutiny based on the Charter.[41]To prevent such a scenario, the UK managed to obtain the Protocol № 30 on the Application of the Charter to Poland and the UK, adopted to limit the application of the Charter in the UK (and Poland). Many, including the UK Government (to calm down trade unions), have suggested that the Protocol was not a clear opt-out mechanism, but rather a clarification that "nothing in the Charter creates any new rights, or extends the ability of any court to strike down UK law."[42] Yet, the fact is that the Charter is applicable in the UK only to the extent to which the UK recognizes the related rights and principles in its legal system. The Protocol № 30 is still in force.

The second example of the UK's exceptional position within the EU concerns the monetary integration and the UK's rejection of the common EU currency – the euro. The euro was introduced by the Maastricht Treaty, whose adoption signaled that the construction of the EEC, as a limited project of functional integration based on market interests, had reached its limits. By signing the Maastricht Treaty, the Member States established the EU, a new form of political governance, sometimes described as a "supranational federation", distinguishable from a classic federation, but which existed

38 For more see M. WEISS, The Politics of EU Charter of Fundamental Rights, *Social and Labor Rights in a Global Context,* ed. B. HEPPLE, Cambridge 2002, 80.

39 BEŠIREVIĆ, Socio-Economic Rights in the Constitution for Europe, 40.

40 For more see C. BARNARD, The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty*?, eds. S. GRILLER, J. ZILLER, Vienna 2008, 257–283.

41 *Ibid*.

42 *Ibid*. See also E. SPAVENTA, Fundamental Rights in the European Union, *European Union Law*, eds. C. BARNARD, S. PEERS,Oxford 2017, 250–251.

parallel to it.[43] And, indeed, institutional designs of a common foreign and security policy, protection of human rights, common currency, the EU citizenship, the greater role of the EU Parliament, and the establishment of the EU Central Bank, all envisaged in the Maastricht Treaty, testified that in addition to the economic, the Treaty created the political union, as well.[44]

As the UK's main motivation to join the European project was economic progress, the British political elite was rather ambivalent towards establishing 'an ever closer union among the peoples of Europe,' announced as a desirable goal in the Maastricht Treaty. Therefore, the UK asked and managed to obtain (together with Denmark) the right not to participate in the monetary integration, which entailed use of euro as the national currency, setting of the monetary policy by the European Central Bank and participation in the European Stability Mechanism, the euro bailout fund. As a consequence, the UK preserved the pound sterling as a national currency, while the Bank of England, although participating in the European System of Central Banks, has continued to set monetary policy to this day.[45]

In the aftermath of the 2008 financial crisis, the absence of its membership in the eurozone was a fine excuse for the UK to decline help in preventing several eurozone countries, including Greece, Ireland, Portugal, Spain and Cyprus, from becoming insolvent.[46] For the same reason, the UK refused to sign the TSCG in 2012, a broader policy response to the euro crisis that envisaged introduction of stronger national rules and mechanisms to strengthen the EU fiscal rules.[47]

The third example is also telling. Namely, the UK has never fully participated in the EU area of freedom, security and justice, not even when the Lisbon Treaty merged policy and judicial cooperation in criminal matters into the main EU structure in 2009.[48] The most prominent is its absence from the Schengen zone. Thus, the UK showed no enthusiasm when, some of the EU Member States signed the Schengen

43 See in A. VON BOGDANDY, The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty, *Columbia Journal of European Law*, 6, 1, 2000, 27–54.

44 The EU legal nature is still a contested issue. For a discussion, see, e.g., V. BEŠIREVIĆ, Ko se boji federalne Evrope? Kritički ostvrt na 'lisabonsku' odluku Saveznog ustavnog suda Nemačke, *Pravni zapisi*, 1, 2011, 53–79.

45 For more see M. CHANG, Brexit and EU Economic & Monetary Union: From EMU Outsider to Instigator, *The Law & Politics of Brexit*, ed. F. FABBRINI, 164–182.

46 J. DAMMANN, Revoking Brexit: Can Member States Rescind their Declaration of Withdrawal from the European Union?, *Columbia Journal of European Law*, 23, 2, 2017, 279–280.

47 For more about the Treaty, see, e.g., European Commission, Communication From The Commission: The Fiscal Compact: Taking Stock, C(2017) 1200 final, Brussels, 22 February 2017, https://ec.europa.eu/info/sites/info/files/1_en_act_part1_v3_0 (accessed on 20 November 2019).

48 D. CURTIN, Brexit and the EU Area of Freedom, Security, and Justice, *The Law & Politics of Brexit*, ed. F. FABBRINI, Oxford 2017, 185.

Agreement that created a free travel zone in 1985. Most of the EU Member States gradually joined this largest free travel area in the world, but not the UK. It remained outside of the main part of the Schengen rules by securing adoption of a legally binding Protocol to the Treaty of Amsterdam.[49] Ironically, together with some other reasons, the massive immigration had been the major cause that triggered the UK's road to Brexit. I now turn to this issue.

III Why Brexit?

Possibility for a Member State to leave the European Union has only been recently envisaged in the EU law. Before 2009, when a new reform treaty – the Lisbon Treaty – came into force and provided the unilateral right to withdrawal from the EU, the withdrawal had been subject of an intense scholarly debate rather than a real-life event.[50] To suppress the claims that the EU was a rigid union impossible to be left, the drafters of the Lisbon Treaty inserted Article 50 in the revised Treaty on EU (TEU) underlying that "Any Member State may decide to withdraw from the European Union in accordance with its own constitutional provisions[…]." However, as Giuliano Amato, the principal drafter of Article 50 explained, there was a hope that this article would be a dead letter, not meant to be used.[51] To the drafters' great surprise, only seven years elapsed before the exit clause was activated.

Having in mind that the UK has participated at the minimum level in the EU political and financial integrations, and taking into account a great extent of penetration of the EU law into the UK's national legal system, which would be difficult to reverse, a real issue is what nudged the UK citizens to vote in favor of the Brexit.

This is not a place for comprehensive legal and political analysis. For the purpose of this discussion, I will highlight the following three reasons that may explain the Brexit vote: (1) frustration over the loss of unconstrained parliamentary sovereignty; (2) England's dissatisfaction with devolution; and (3) a massive flow of immigration. Consider the following.

49 See S. PEERS, The UK and the Schengen System, *The UK in a Changing Europe*, 3 December 2015, https://ukandeu.ac.uk/the-uk-and-the-schengen-system/ (accessed on 20 November 2019).

50 True is, it was Algeria, which first formally left the EEC when declared independence from France in 1962. In 1982 Greenland also decided to withdraw, but Denmark stayed, and therefore this is an example of partial withdrawal of a Member State.

51 FABBRINI, Introduction, 1.

1. Brexit as Call for Restauration of Parliamentary Sovereignty

The UK hostility towards supranational powers of the EU institutions, in particular the European Commission and the Court of Justice of the EU (CJEU), has been generated from the clash between its principle of parliamentary sovereignty – a fundamental principle of the UK Constitution, and the principle of the supremacy of the EU law, initially developed by the CJEU and later attached to the Lisbon Treaty in the form of a declaration.

On the one hand, the principle of parliamentary sovereignty provides that (a) there is no legal or any other power superior to the UK Parliament and (b) that the Parliament can make or unmake any law. As a famous constitutional theorist A. V. Dicey explained:

> These[…]are the three traits of Parliamentary sovereignty as it exists in England: first,the power of the legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws; secondly, the absence of any legal distinction between constitutional and other laws; thirdly, the non-existence of any judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void or unconstitutional.[52]

Moreover, as the Parliament cannot bind itself for the future, if later adopted norm clashes with an earlier norm, then a latter norm is taken to be impliedly repealed or disapplied by the former.[53] Finally, for an international treaty to be legally enforceable in the UK, it must be incorporated in the UK law by an Act of Parliament.[54]

On the other hand, ever since 1964, when it first ruled in the *Costa* case, the CJEU has repeatedly stated that the nature of the European integrations requires the precedence of the Community (now EU) law over national law.[55] The Court explained that if the Community law/EU did not equally and uniformly bind all member States, the aims of the integration could not been achieved.[56] One should also have in mind that according to the established CJEU jurisprudence, any norm of the EU law takes any precedence of any norm of national law, regardless of the rank and time of adaption of the national law.[57] Consequently, the EU law takes precedence over the national

52 A. V. DICEY, *Introduction to the Study of the Law of the Constitution*, 8th. ed., London 1915, 39, http://files.libertyfund.org/files/1714/0125_Bk.pdf (accessed on 20 November 2019).

53 These rules are explained in P. CRAIG, G. DE BURKA, *EU Law: Text, Cases and Materials*, Oxford 2015, 296.

54 *Ibid*.

55 For more see *Flaminio Costa v. E.N.E.L.*, Case 6/64, Judgment of 15 July 1964.

56 *Ibid*.

57 For more see *Amministrazione delle Finanzedello Stato v. Simmenthal SpA*, Case 106/77, Judgment of 9 March 1978.

constitution, as well. The supremacy doctrine, developed by the CJEU, was attached to the Lisbon Treaty as Declaration 17 Concerning Primacy which indicated that such a primacy operated "under the conditions laid down by the […] case law."[58] In practice, application of the supremacy doctrine depends on the Member States, in particular national courts which should ensure application the EU law. Yet, with exception of the Dutch courts, most national courts, and in particular the constitutional courts, still insist that the authority of the EU law derives from the national constitutions and not from the CJEU jurisprudence or the sovereignty of the EU.[59]

Coming back to the UK: after the initial confusion about the relationship between the UK law and the EU law, in 1991 the House of Lords in the *Factortame* case stated, albeit in obiter, that when the Parliament enacted the European Community Act in 1972 (when the UK decided to join the EEC) it had accepted entirely and voluntarily a limitation of its sovereignty.[60] However, more recently, the Supreme Court in the *HS2* case expressed its reservations towards the possibility that Parliament, when enacted the said law in 1972, had completely authorized the abrogation of fundamental constitutional principles contained in constitutional instruments or recognized at common law.[61]

Anyhow, while the judges in the UK more or less had accepted supremacy of the EU law over the national legislation, for many parliamentarians and politicians the idea that the EU law had supremacy over Parliament and its acts was problematic: if the EU had gained supremacy over Parliament, then this meant that Parliament had given up its sovereignty.[62]Accordingly, one of the claims that led to Brexit vote was a claim that the UK had transferred control over country to Brussels by limiting its parliamentary sovereignty. Therefore, re-establishing parliamentary sovereignty, the central tenant of the UK Constitution, was one of the major goals of those who supported Brexit.[63]

2. Devolution's Impact on Brexit

The second reason why the UK citizens endorsed Brexit, concerns its internal political problems. In the last twenty years, the UK constitutional landscape has been significantly changed. The changes were channeled exactly through the concept of parliamentary sovereignty. In 1998, the UK Parliament adopted the Human Rights Act

58 See*The Lisbon Treaty, Declaration 17 Concerning Primacy.*

59 For a discussion see, e.g., CRAIG,DE BURKA, *EU Law*, 279–314.

60 For more see *Factortame Ltd v. Secretary of State for Transport*, (1991) 1 AC 603, 658.

61 *R (HS2 Action alliance Ltd) v. Secretary of State for Transport*, (2014) UKSC 3, 207.

62 S. MACKIE, Brexit and the Trouble with an Uncodified Constitution: R (Miller) v Secretary of State for Exiting the European Union, *Vermont Law Review*, 42, 2, 2018, 309; FELDMAN, FIKFAK, National Referendums and the UK Secession from the EU, 141–142.

63 *Ibid*.

(a quasi-constitutional bill of rights), devolved legislative power to Scotland, Wales, and Northern Ireland, and some years later, created a new Supreme Court. It turned out that devolution, which in the UK terms meant "the process of transferring power from the center to the nations and regions of the UK,"[64] a most dramatic constitutional change, led to a growing resentment in England.

To remind, the UK is a multi-nation state composed of England, Scotland, Wales, and Northern Ireland. It was constituted in 1707 when the Kingdom of England and Wales united with the Kingdom of Scotland and formed the Kingdom of Great Britain.[65] In 1800, the Kingdom of Great Britain united with Ireland and created the United Kingdom of Great Britain and Ireland. In 1922, Southern Ireland first achieved partial independence, but then achieved complete separation from the UK in 1949 and became Ireland, also known as the Republic of Ireland. Until late 1990s, as the largest nation in the UK, England had a dominant position within the UK constitutional structure.[66]

Historically, except in England, claims to self-government have always been present in all other parts of the UK.[67] In contemporary times, the pressure for devolution culminated in 1998 and led the UK Parliament to adopt devolution acts – the Scotland Act, the Government of Wales Act, and the Northern Ireland Act. These acts divided legislative powers between the UK Parliament and the institutions of the devolved regions.[68] Devolution went asymmetrically: Scotland got the strongest set of powers, while Wales was assigned with a marginal range of powers.[69] Since the primary purpose of devolution for Northern Ireland was a conflict resolution, Northern Ireland received an extensive range of powers similar to Scottish. Besides, the uniqueness of this devolution was the fact that the devolution act was signed by two states – the United Kingdom and Ireland.[70] One should bear in mind that each of the three devolutions involved referendums – but only in the devolved territories itself, and not in England.[71] Moreover, devolution that began in 1998 was further expended: the powers assigned to Scotland were increased in 2012 and 2016, and those of Wales in 2010 and 2017.[72] This contributed to further detachment of the devolved territories from the UK. In

64 D. TORRANCE, Introduction to Devolution in the UK, *Briefing Paper*, 19 June 2019, 4, https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8599#fullreport (accessed on 20 November 2019).

65 For this historical overview, see E. F. DELANEY, Judiciary Rising: Constitutional Change in the United Kingdom, *Northwestern University Law Review*, 108, 2, 2014, 661–662.

66 *Ibid*.

67 For more see TORRANCE, Introduction to Devolution in the UK.

68 DELANEY, Judiciary Rising: Constitutional Change in the United Kingdom, 563.

69 S. TIERNEY, Brexit and the English Question, *The Law & Politics of Brexit*, ed. F. FABBRINI, Oxford 2017, 99.

70 DELANEY, Judiciary Rising: Constitutional Change in the United Kingdom, 563.

71 TIERNEY, Brexit and the English Question, 99–100.

72 For more see TORRANCE, Introduction to Devolution in the UK.

short, the contemporary UK Parliament does not fit with Dicey's concept of the UK Parliament anymore.

Now, the political ramifications of devolution process came to the forefront in the time of the 2016 EU referendum, when most of the voters in Scotland (62%), and Northern Ireland (55,8%) voted in favor of remaining in the EU, while in England (53,4%) and Wales (52,5%) voted to leave.[73]A subsequent analysis on the 2016 EU referendum has revealed two facts. First, those most inclined towards Brexit in England were also those most dissatisfied with the devolution.[74] Second, the results in Wales were influenced by the English voters who, in a significant number, lived in Wales.[75]

Now, England was left outside of devolution process for obvious reasons: it makes 85% of the UK population and if England were legislatively devolved and got similar powers as Scotland, the UK Government and Parliament would be deprived of most of their functions.[76] However, the consequences of having been left outside of the devolution emerged soon. First of all, except through the UK parliament, England did not participate in making devolution settlements, and therefore did not contribute to the national conversations on devolution, once the process of devolution was implemented. Second, the devolution did not cause significant even out of spending as it was expected, which also frustrated England.[77] Finally, devolution created, albeit on a small number of occasions, a situation where proposed laws affecting only England were passed or rejected against the wishes of the majority of MPs coming from English constituencies.[78]

For all these reasons, devolution has generated in England a sense of marginalization, nationalism and emergence of the 'English Question', recognized in 2015 by the House of Lords Constitution Committee:

> England predominates in the UK both economically and demographically. Its representatives have an overwhelming majority in the House of Commons. It could be argued that devolution is a way for the other nations in the UK to distinguish themselves from England. The 'English Question' encompasses a number of questions about England's governance. How, within the Union, should England be governed? Is there a way to allow England a separate voice

73 For referendum results visit https://www.bbc.com/news/politics/eu_referendum/results (accessed on 20 November 2019).

74 TIERNEY, Brexit and the English Question, 95.

75 See F. PERRAUDIN, English People Living in Wales Tilted it towards Brexit, Research Finds, *The Guardian*, 22 September 2019, https://www.theguardian.com/uk-news/2019/sep/22/english-people-wales-brexit-research (accessed on 20 November 2019).

76 TIERNEY, Brexit and the English Question, 95.

77 *Ibid.,* 102.

78 *Ibid.*

within the UK without undermining the Union? Should power be devolved, or decentralized, and if so how?[79]

The 'English Question' began to be particularly emphasized after the 2014 Scottish referendum on independence, when proposals to recognize England as a nation, with "English votes for English laws" demand, got significant support.[80] Accordingly, a strong sense of marginalization within the UK best explains why England saw Brexit as an opportunity to re-examine devolution and initiate constitutional redesign that would again recognize England's dominant position.

3. Brexit as Anti-Immigration Discourse

Finally, immigration issue was one of the most salient issues in the 2016 EU referendum. The Essex Continuous Monitoring Surveys, which is considered as the most comprehensive study of the Brexit vote to date, indicates that concern over immigration was the central reason for those who voted in favor of the 'Leave.'[81] In addition to demography, "Matters of identity were equally, if not more strongly, associated with the Leave vote—particularly feelings of national identity and sense of change over time."[82] The fact that immigration issue played the central role in the 2016 EU referendum should not surprise anyone: generally, it has been demonstrated that the most substantial negative attitude towards the EU is rooted in the Member States citizens' feeling that their national identity is endangered by EU integration or/and immigration.[83] The situation in the UK additionally confirms this fact.

Thus, as noted earlier, the UK refused to join the Schengen zone. Apart from the wish to keep for itself a border control, an essential exercise of state sovereignty, one would expect that the UK also wanted to prevent potentially massive flow of migrants. Ironically, this is precisely what the UK failed to achieve. Following the accession of Central and East European countries in 2004, most of the old Member States shielded their labor markets against the immigration from the new Member States, by introducing a temporary ban on freedom of movement for their citizens. The UK did not do the same, and soon after, 600,000 job seekers from the new Member States ended up in the

79 House of Lords Select Committee on the Constitution, The Union and Devolution, *10th Report of Session 2015–2016*, HL Paper 149, 352.

80 TIERNEY, Brexit and the English Question, 107.

81 M. GOODWIN, C. MILAZZO, Taking Back Control? Investigating the Role of Immigration in the 2016 Vote for Brexit, *The British Journal of Politics and International Relations*, 19, 3, 2017, 451.

82 SWALES, Understanding the Leave Vote, *NatCen*, 11. http://natcen.ac.uk/media/1319222/natcen_brexplanations-report-final-web2.pdf (accessed on 20 November 2019).

83 For more see GOODWIN, MILAZZO, Taking Back Control?, 455.

UK.[84] Ever since, the immigration on a great scale had continued to grow: shortly before the 2016 EU referendum, data from the Office of National Statistics had shown that net migration had risen to 333,000 per annum and that most immigrants were coming from Bulgaria and Romania.[85] Statistics, thus, demonstrated that promises coming from the then Prime Minister David Cameron and the Conservative Party about returning net migration to 'tens of thousands a year, not hundreds of thousands,' were, in fact, delusions.[86] The European refugee 'crisis' in 2015, exemplified in the mass movement of more than 1 million people who fled to Europe in front of wars and poverty, additionally made immigration a highly salient issue in the Brexit vote.[87]

Those who have analyzed the roots of anti-immigration discourse in the UK pointed at the link between anti-immigration attitudes and welfare concerns, despite the fact that between 2000 and 2014, net immigration in the UK was smaller than in Italy, Spain, Germany, or France, for example.[88] One should also know that the UK has a higher portion of immigrants coming from the non-Member States than the other Member States. Still, it seems that in the UK animosity towards EU immigrants is higher than towards other immigrants.[89] Simon Tilford, who follows British-EU relations and the UK and EU social and economic policy, argues that this animosity was born out of the government constant failure to respond to serious citizens' welfare concerns including falling wages, a lack of housing, the problems in the health and educational services and a weak social status of the white working class.[90] Apparently, for those who oppose immigration, xenophobia towards EU citizens is less problematic than animosity towards immigrants coming from Africa or Asia that is generally considered racist.[91]

Consequently, surveys conducted after the Brexit vote indicated that the 'Leave' vote was the strongest in the areas with the most significant influx of the EU citizens in the last decade.[92]

---

84 DAMMANN, Revoking Brexit, 279.

85 GOODWIN, MILAZZO, Taking Back Control?,456.

86 *Ibid*., 455.

87 For more on the 2015 refugee 'crisis', see V. BEŠIREVIĆ, T. PAPIĆ, From Sovereignty to Post-Sovereignty and Back: Some Reflections on Immigration and Citizenship Issues in the Perspective of Refuge 'Crisis', *Rights Across Borders: Citizenship and Immigration in Europe*, eds. G. TIMSIT, S. FLOGAITIS, Athens 2017, 123–165.

88 S. TILFORD, *Britain, Immigration and Brexit, Center for European Reform*, 30 November 2015, available at https://www.cer.eu/publications/archive/bulletin-article/2015/britain-immigration-and-brexit (accessed on 20 November 2019).

89 *Ibid*.

90 *Ibid*.

91 *Ibid*.

92 GOODWIN, MILAZZO, Taking Back Control?, 452.

IV A Constitutional Road to Brexit: What went Wrong?

Having in mind the long-lasting UK skepticism towards the EU, persistent demands for exemptions from the EU policies, the supremacy of the EU law, which coupled with internal constitutional restructuring weakened once the unconstrained principle of parliamentary sovereignty, and last but not least, citizens' animosity towards the EU immigrants, one could hardly be surprised with what followed.

To remind, in the aftermath of the last economic and financial crisis in Europe, the UK refused to participate in the EU efforts to mitigate consequences of the crisis. Although the crisis in Europe contributed to the rise of euro-skeptic voices throughout the EU, they were particularly reinforced in the UK.[93] In 2013, to silence euro-skeptic members of his Conservative Party and get support for the 2015 election, David Cameron, the then UK's Prime Minister, promised a referendum on the country's EU membership by the end of 2017.

After he won the election, Cameron once again tried to shape the EU according to the British vision of the European integrations. He requested from the EU several concessions including the UK' exemption from EU policies aimed at achieving 'an ever closer union among the peoples of Europe,' stronger power of national parliaments to block EU legislation, explicit protection for non-eurozone countries, and permission to restrict benefits for EU immigrants.[94] Although he got far less than requested, he was convinced that he got enough to satisfy the UK's voters and called referendum for 23 June 2016.[95] The rest of the story is well-known.

Only a day after Brexit, the UK found itself in a constitutional puzzle since the 2016 EU referendum did not envisage what the Brexit would look like. On one side, the puzzle was caused by the EU law. Namely, Article 50 of the TEU encourages a Member State, wanting to leave the EU, to do it following its own constitutional rules. Apart from this requirement, Article 50 does not provide any other condition for a Member State to exercise the right to withdrawal, but directs both the Member State and the EU to conclude a withdrawal agreement specifying the conditions of withdrawal or, failing that, allows a Member State to leave the EU without an agreement, two years after it had notified the European Council about the withdrawal. Practically, at the time when it makes a decision to leave the EU and notifies the EU institutions about the withdrawal, a Member State neither knows under which conditions it would leave

93 DE BURCA, Is EU Supranational Governance a Challenge to Liberal Constitutionalism?, 347–348.

94 G. WITTE, Europe wants Britain to stay in the E.U., but not at any cost, *The Washington Post*, 17 February 2016, available at https://www.washingtonpost.com/world/europe/europe-wants-britain-tostay-in-the-eu-but-not-at-any-cost/2016/02/17/1aeb45c8-d048-11e5-90d3-34c2c42653ac_story.html (accessed on 20 November 2019).

95 For more details see DAMMANN, Revoking Brexit, 281–282.

the EU (this will be a subject of a withdrawal agreement) nor what would be its future relationship with the EU (this will be a subject of a separate agreement once the state leaves the EU).

On the other side, the constitutional puzzle over the road to Brexit stemmed from the UK constitution, as well. The UK has an unwritten constitution whose essential character is its flexibility.[96] As the Parliament cannot bind itself for the future, this means that the issue at stake never gets settled since the Constitution does not provide the finality of the decision.[97]

Consequently, due to imperfections of Article 50 of TEU, which regulates the withdrawal from the EU, and absence of the written constitution in the UK, which would make the constitutional road to Brexit more explicit, ever since the UK citizens voted for the Brexit, the UK is asking itself "what to do with Brexit." The following developments well illustrate this fact.

Originally, Brexit was due to happen on 29 March 2019, two years after the official process to leave was instituted by the UK's notification to the European Council. However, many unknowns related to a unilateral right to withdraw from the EU, both on the UK and the EU side, soon after the Brexit vote led to a series of constitutional battles, mainly between the executive on one side, and the Parliament on the other side, and made the leave prolonged three times so far. As constitutional controversies over Brexit also involved the Supreme Court, its interventions provoked ample discussions about appropriateness of the 'judicialization of mega-politics.'[98]

It was first the Supreme Court which warned the then Prime Minister Theresa May (who succeeded Cameron soon after the referendum) that the 2016 EU referendum could not trigger automatically the consequence of the "Yes" vote, because the Act which authorized referendum about the EU membership made no provision on that.[99] The Court ruled that the Ministers could not notify the EU about the UK's wish to leave without an act of the Parliament.[100]

96 M. LOUGHLIN, The British Constitution: Thoughts on the Cause of the Present Discontents, *New Zealand Journal of Public and International Law*, 16, 1, 2018, 2–3.

97 K. L. SCHEPPELE, Interview on Is Brexit a British Constitutional Crisis, *Interactive Constitution*, 31 October 2019, https://constitutioncenter.org/interactive-constitution/podcast/brexit-and-the-uk-constitution (accessed on 20 November 2019).

98 'Judicialization of mega-politics' is a term coined by Ran Hirschl to describe judicial interventions in highly political matters including a right to secede, electoral outcomes, regime change, war-making, restorative justice, collective identity, core executive prerogatives in foreign affairs, national security and fiscal policy. See R. HIRSCHL,The Judicialization of Mega-Politics and the Rise of Political Courts, *Annual Review of Political Science*, 11, 2008, 93–118;

99 *R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union (Appellant)*, 2017, UKSC 5, 119.

100 *Ibid.*, 124.

Having obtained the parliamentary approval, the UK Government, led by Theresa May, notified the European Council about its decision to exit on 29 March 2017.[101] The Prime Minister May managed to make a deal with the EU, which consisted of the Withdrawal Agreement and political declaration specifying terms of future relations between the two parties.[102] Although the Withdrawal Agreement was approved by the European Council on 25 November 2018, during 2019 the UK Parliament voted down the EU–UK Brexit deal three times, mainly dissatisfied with the backstop settlement, designed to secure no border barriers between Northern Ireland and the Republic of Ireland after Brexit.[103]

Under Theresa May's term the deadline for the UK to exit was prolonged twice, last time it was pushed to 31 October 2019. However, the storm over the Withdrawal Agreement led to her resignation and yet another constitutional crisis. This time the constitutional mess was even more prominent.

Thus, the efforts of Theresa May's successor, Boris Johnson, to put the Brexit into effect has revealed, on one side, that "each and every part of [the UK constitution] is changeable at the will of Parliament,"[104] and, on the other side, that parliamentary sovereignty still exists. Thus, in the negotiations with the EU Johnson managed to obtain a revised Withdrawal Agreement, but as previously, it was approved by the European Council, but not by the UK Parliament.[105] Moreover, the Parliament enacted a law forbidding Johnson to make the UK leave the EU without having the Withdrawal Agreement implemented into the UK legal system.[106] He then tried to prorogue the Parliament, and the Queen agreed. However, his advice given to the Queen went eventually to the Supreme Court which was asked again to clarify the constitutional rules implicated in the efforts to put the Brexit vote into effect.[107] The Court ruled that the advice for prorogation was unlawful on twofold grounds, nicely summarized by Meg Russell: "One is that if the Parliament is not there to scrutinize the executive, parliamentary accountability fails. And second […] if the executive can get rid of the Parliament so easily, the Parliament cannot be Supreme."[108] Thus, the prorogation of the Parliament did not happen.

101 European Council, Brexit, https://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/ (accessed on 20 November 2019).

102 See *ibid*.

103 For more see Brexit: All You Need to Know about the UK Leaving the EU, *BBC NEWS*, 29 October 2019, https://www.bbc.com/news/uk-politics-32810887 (accessed on 20 November 2019).

104 DICEY, Introduction to the Study of the Law of the Constitution, 85–86.

105 See Brexit: All You need to know about the UK leaving the EU.

106 See Sec. 1 (4) of the European Union (Withdrawal) (№. 2) Act of 2019 adopted by the UK Parliament.

107 *R (on the application of Miller) (Appellant) v. The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*, 2019, UKSC 41.

108 M. RUSSELL, Interview on is Brexit a British Constitutional Crisis, *Interactive Constitution*, 31 October 2019, https://constitutioncenter.org/interactive-constitution/podcast/brexit-and-the-uk-constitution (accessed on 20 November 2019).

At present, as no compromise was made between the Prime Minister Boris Johnson and the Parliament, the UK is facing new elections, scheduled for 12 December 2019. In the meantime, the deadline for the UK to leave the EU is prolonged again, this time for 31 January 2020.

V Concluding Remarks: Will Brexit mean Brexit?

By the time of its publication, we will know more about the destiny of the Brexit than it was known at the time when the chapter was finalized. From November 2019 perspective, the ultimate issue was if Brexit would mean Brexit: would the UK leave the EU by 31 January 2020 when the latest deadline for the withdrawal from the EU expires?

There are several possible scenarios. First, by 31 January 2020 newly elected UK MPs may decide to accept and approve the revised Withdrawal Agreement which has already been approved by the European Council, and pave the way for the UK to leave the EU. Second, if the UK Parliament again refuses to approve the Withdrawal Agreement, the UK may decide to leave the EU without a withdrawal agreement. Third, the European Council, in coordination with the UK and upon its request, may decide to prolong again the deadline for the exit day, and thus prolong the present agony, as well. Finally, the UK may decide not to leave the EU at all. Whatever happens in the future, two facts are undeniable.

First, the UK may decide to stay in the EU without any legal consequence: the CJEU ruled that the withdrawal notification envisaged in Article 50 of TEU is revocable as long as a withdrawal agreement has not entered into force, or in its absence, for as long as the withdrawal deadline (the original or extended) has not expired.[109] A Member State has to make a decision to stay under its constitutional requirements. Then it has to revoke the notification by a notice addressed to the European Council in an unequivocal, unconditionaland written manner.[110] The CJEU has stressed that the purpose of the revocation is to confirm the EU membership of the state concerned under the unchanged terms, and to bring the withdrawal procedure to an end.[111] Accordingly, if the UK decides to stay, nothing will be changed in terms of its membership in the EU.[112]

109 *Andy Wightman and Others v. Secretary of State for Exiting the European Union*, C-621/18, Judgment of 10 December 2018, 75.

110 *Ibid*.

111 *Ibid*.

112 For the impact of Brexit on the EU, see, e.g., A. ČAVOŠKI, The Implications and Impact of Brexit, *Pravni zapisi*, 2, 2019.

Second, if the UK decides to leave the EU, it is very likely that Brexit will not fulfill all expectations of its supporters, at least not the one concerning the promise that the UK will 'take back control over its laws and policy'. Thus, restoring the unconstrained sovereignty of the UK Parliament might be difficult to achieve having in mind that it is clear, even today, that the EU law will retain its supremacy in respect of the EU legislation which remains in force in the UK after the exit day (this possibility is already announced for practical reasons).[113] Additionally, according to the present solution, the 2018 European Union Withdrawal Act allocates to the Ministers and not the Parliament a wide discretion in deciding which rules of the EU law continue to operate after the exit day and which domestic laws have to be amended in order to remove inconsistences between the domestic laws and the retained EU legislation.[114] Next, it is highly unlikely that Scotland, Wales and Northern Ireland will accept adjustments to devolution settlements, which would restore the unconstrained supremacy of the UK Parliament. One should keep in mind that neither of these regions was substantially included in the UK-EU negotiations nor they possess the power to veto the withdrawal. In short, it is highly questionable that the Brexit will allow the UK 'to take back control of its laws and policy', because it is not clear who is going to exercise the recovered control and over which issues. Accordingly, the possibility for the UK Parliament to take back control in Dicey's sense of parliamentary sovereignty appears remote.

Finally, whether the promises given to the Brexit supporters will be met depends also on the future of the UK-EU relations after the exit day. Yet, what is the future relationship that works for both the UK and the EU, is an issue for a new discussion.

Sources and literature

Documents and cases

House of Lords Select Committee on the Constitution, The Union and Devolution, *10th Report of Session 2015–2016*, HL Paper 149, 2016.

The European Union (Withdrawal) Act 2018.

The European Union (Withdrawal) (№ 2) Act 2019.

European Commission, *Communication From The Commission: The Fiscal Compact: Taking Stock, C(2017)1200 final, Brussels, 22 February 2017.*

113 Sec. 5 (2) of the 2018 European Union (Withdrawal) Act, adopted by the UK Parliament, envisages: "[…] the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day."

114 FELDMAN, FIKFAK, National Referendums and the UK Secession from the EU, 166–168.

The Lisbon Treaty, Declaration 17 Concerning Primacy.

Factortame Ltd v. Secretary of State for Transport, (1991) 1 AC 603.

R (HS2 Action alliance Ltd) v. Secretary of State for Transport, (2014) UKSC 3.

R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant), [2017] UKSC 5.

R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland), [2019] UKSC 41.

Flaminio Costa v. E.N.E.L., Case 6/64, Judgment of 15 July 1964.

Amministrazione delle Finanzedello Stato v. Simmenthal SpA, Case 106/77, Judgment of 9 March 1978.

Andy Wightman and Others v. Secretary of State for Exiting the European Union, C-621/18, Judgment of 10 December 2018.

* * *

ALEXANDRE-COLLIER, A., Euroscepticism under Margaret Thatcher and David Cameron: From Theory to Practice, *Observatoire de la sociétébritannique*, 17, 2015, 115–133.

ARNOLD, Z., *The Struggle to Unite Europe, 1940–1958*, New York 1958.

BARNARD, C., The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?, *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty*?, eds. S. GRILLER, J. ZILLER, Vienna 2008, 257–283.

BEŠIREVIĆ, V., Socio-Economic Rights in the Constitution for Europe: Between Symbolism and Legal Realism, *Rethinking Socio-Economic Rights in an Insecure* World, eds. N. UDOMBANA, V. BEŠIREVIĆ, Budapest 2006, 37–48.

BEŠIREVIĆ, V., Ko se boji federalne Evrope? Kritički ostvrt na 'lisabonsku' odluku Saveznog ustavnog suda Nemačke, *Pravni zapisi*, 1, 2011, 53–79.

BEŠIREVIĆ, V., PAPIĆ, T., From Sovereignty to Post-Sovereignty and Back: Some Reflections on Immigration and Citizenship Issues in the Perspective of Refuge 'Crisis', *Rights Across Borders: Citizenship and Immigration in Europe*, eds. G. TIMSIT, S. FLOGAITIS, Athens 2017, 123–165.

BEŠIREVIĆ, V., The Constitution in the European Union: The State of Affairs, *European Constitutionalism: Historical and Contemporary Perspectives*, eds. A. DUPEYRIX, G. RAULET, Brussels 2014, 15–35.

ČAVOŠKI, A., The Implications and Impact of Brexit, *Pravni zapisi*, 2, 2019, 437–452.

CHANG, M., Brexit and EU Economic & Monetary Union: From EMU Outsider to Instigator, *The Law & Politics of Brexit*, ed. F. FABBRINI, Oxford 2017, 163–182.

CRAIG, P., DE BURKA, G., *EU Law: Text, Cases and Materials*, Oxford 2015.

CURTIN, D., Brexit and the EU Area of Freedom, Security, and Justice, *The Law & Politics of Brexit*, ed. F. FABBRINI, Oxford 2017, 183–200.

DAMMANN, J., Revoking Brexit: Can Member States Rescind their Declaration of Withdrawal from the European Union?,*Columbia Journal of European Law*, 23, 2, 2017, 265–304.

DE BURCA, G., Is EU Supranational Governance a Challenge to Liberal Constitutionalism?, *University of Chicago Law Review*, 85, 2, 2018, 337–367.

DE ZWAAN, J. W., 'Brexit': State of Play and Perspectives, *European Review of Public Law*, 31, 1, 2019, 21–76.

DELANEY, E. F., Judiciary Rising: Constitutional Change in the United Kingdom, *Northwestern University Law Review*, 108, 2, 2014, 543–605.

DELANTY, G., A Divided Nation in a Divided Europe: Emerging Cleavages and the Crisis of European Integration, *Brexit: Sociological Responses*, ed. W. OUTHWAITE, London 2017, 111–124.

DICEY, A. V., *Introduction to the Study of the Law of the Constitution*, London 1915.

FABBRINI, F., Introduction, *The Law & Politics of Brexit*, ed. F. FABBRINI, Oxford 2017, 1–22.

FELDMAN, D., FIKFAK, V., The Constitutional Impact of National Referendums and the UK Secession from the EU, *European Review of Public Law*, 31, 1, 2019, 139–172.

FOSTER, N., *Foster on EU Law*, Oxford 2017.

FOUCAULT, M., *Discipline and Punish:The Birth of the Prison*, transl. A. SHERIDAN, New York 1977.

GARLAND, D., What is a "history of the present"? On Foucault's genealogies and their critical preconditions, *Punishment & Society*, 16, 4, 2014, 365–384.

GOODWIN, M., MILAZZO, C., Taking Back Control? Investigating the Role of Immigration in the 2016 Vote for Brexit, *The British Journal of Politics and International Relations*, 19, 3, 2017, 450–464.

HARE, I., Social Rights as Fundamental Rights, *Social and Labor Rights in a Global Context: International and Comparative Perspectives*, ed. B. HEPPLE, Cambridge 2005, 153–181.

HIRSCHL, R., The Judicialization of Mega-Politics and the Rise of Political Courts, *Annual Review of Political Science*, 11, 2008, 93–118.

LOUGHLIN, M., The British Constitution: Thoughts on the Cause of the Present Discontents, *New Zealand Journal of Public and International Law*, 16, 1, 2018, 1–19.

MACKIE, S., Brexit and the Trouble with an Uncodified Constitution: R (Miller) v Secretary of State for Exiting the European Union, *Vermont Law Review*, 42, 2, 2018, 297–343.

MCCORMICK, J., *Understanding the European Union: A Concise Introduction*, 3rd ed., Hampshire – New York 2005.

SPAVENTA, E., Fundamental Rights in the European Union, *European Union Law*, eds. C. BARNARD, S. PEERS, Oxford 2017, 227–261.

SZCZERBIAK, A., TAGGART, P., Opposing Europe? The Comparative Party Politics of Euroscepticism, vol. 2, Oxford 2008.

TIERNEY, S., Brexit and the English Question, *The Law & Politics of Brexit*, ed. F. FABBRINI, Oxford 2017, 95–114.

VAJLER, Dž., *Ustav Evrope: „Ima li novo odelo svog cara?" I drugi eseji o evropskoj integraciji*,transl. D. LOPANDIĆ, T. MIŠČEVIĆ, Beograd 2002.

VON BOGDANDY, A., The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty, *Columbia Journal of European Law*, 6, 1, 2000, 27–54.

WEILER, J. H. H., Europe in Crisis – On 'Political Messianism', 'Legitimacy' and the 'Rule of Law', *Singapore Journal of Legal Studies,* December issue, 2012, 248–268.

WEISS, M., The Politics of EU Charter of Fundamental Rights, *Social and Labor Rights in a Global Context: International and Comparative Perspectives*, ed. B. HEPPLE, Cambridge 2005, 73–94.

WIND, M., Brexit and Euroskepticism: Will "Leaving Europe" be Emulated Elsewhere?, *The Law & Politics of Brexit*, ed. F. FABBRINI, Oxford 2017, 221–245.

https://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/ (20. 11. 2019) [= Brexit: All You need to know about the UK leaving the EU, *BBC NEWS*, 29 October 2019, https://www.bbc.com/news/uk-politics-32810887 (20. 11. 2019)].

https://ukandeu.ac.uk/the-uk-and-the-schengen-system/(20. 11. 2019) (= S. PEERS, The UK and the Schengen System, *The UK in a Changing Europe*, 3 December 2015).

https://www.theguardian.com/uk-news/2019/sep/22/english-people-wales-brexit-research (20. 11. 2019) (= F. PERRAUDIN, English People Living in Wales Tilted it towards Brexit, Research Finds, *The Guardian*, 22 September 2019).

https://constitutioncenter.org/interactive-constitution/podcast/brexit-and-the-uk-constitution (20. 11. 2019) (= M. RUSSELL, Interview on Is Brexit a British Constitutional Crisis, *Interactive Constitution*, 31 October 2019).

https://constitutioncenter.org/interactive-constitution/podcast/brexit-and-the-uk-constitution (20. 11. 2019) (K.L. SCHEPPELE, Interview on Is Brexit a British Constitutional Crisis, *Interactive Constitution*, 31 October 2019).

http://natcen.ac.uk/media/1319222/natcen_brexplanations-report-final-web2.pdf (20. 11. 2019) (= K. SWALES, Understanding the Leave Vote, *NatCen*, 2016, 1–29).

https://www.margaretthatcher.org/document/107332 (20. 11. 2019) (= M. THATCHER, *Speech to the College of Europe* („*The Bruges Speech*"), 20 September 1988).

https://www.cer.eu/publications/archive/bulletin-article/2015/britain-immigration-and-brexit (20. 11. 2019) (= S. TILFORD, *Britain, Immigration and Brexit, Center for European Reform*, 30 November 2015).

https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8599#fullreport (20. 11. 2019) (= D. TORRANCE, Introduction to Devolution in the UK, *Briefing Paper*, 2019, 1–47).

https://www.washingtonpost.com/world/europe/europe-wants-britain-tostay-in-the-eu-but-not-at-any-cost/2016/02/17/1aeb45c8-d048-11e5-90d3-34c2c42653ac_story.html (20. 11. 2019) (= G. WITTE, Europe Wants Britain to stay in the E.U, but not at any cost, *The Washington Post*, 17 February 2016).