

## Was It an Act of Self-Dissolution? Brexit and the Future of the United Kingdom\*

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*Il saggio comincia sottolineando il notevole impatto che il referendum sulla Brexit dello scorso giugno 2016 ha avuto sul sistema politico e costituzionale del Regno Unito, per poi elaborare alcune riflessioni sul futuro del Regno Unito stesso dopo l'uscita dall'Unione europea. In particolare l'autore sottolinea come la Scozia, dopo aver votato a grande maggioranza per restare nell'Unione europea, si trovi ora in una situazione piuttosto difficile ossia una "no win situation". L'indizione di un altro referendum sull'indipendenza appare nel breve termine improbabile soprattutto per ragioni economiche e comunque in caso di vittoria del Sì non pare scontato che alla Scozia verrebbe concessa una procedura facilitata per riaccedere all'Unione europea. Inoltre, nelle elezioni lampo del giugno 2017, lo Scottish National Party ha perso 22 seggi, il che indebolisce ulteriormente le posizioni indipendentiste. L'autore procede poi descrivendo la situazione in Irlanda del Nord, che appare, da un punto di vista sia economico che politico, ancor più instabile di quella scozzese, anche in quanto sarebbe l'unica parte del Regno ad avere una frontiera terrestre con il resto dell'Unione europea. Passando ad analizzare i risultati delle elezioni dell'Assemblea nord-irlandese, l'autore osserva come i partiti pro-europei abbiano guadagnato terreno mentre il partito unionista di Arlene Foster (DUP) appare aver pagato un alto prezzo per il suo inspiegabile sostegno alla Brexit; tuttavia gli Unionisti si trovano ora a prestare un supporto decisivo a Theresa May dopo la perdita della maggioranza nella Camera dei Comuni alle recenti elezioni. Il ruolo chiave del DUP, assieme ai 12 seggi ottenuti dal partito conservatore in Scozia, pare nel breve termine poter scongiurare la dissoluzione del Regno Unito. Detto questo, un momento di "scontro" costituzionale fra il Governo centrale e le nazioni "devolute" appare inevitabile all'orizzonte con riguardo al Great Repeal Act.*

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### 1. «*Great Brexpectations*»: *The Perspectives for the United Kingdom and Its Constituent Nations after the Brexit Referendum*

Prime Minister David Cameron resigns; the Labour shadow cabinet declares that it no longer has confidence in the leader of the Labour Party (who is however subsequently re-elected by party members on 24<sup>th</sup> September); the leader of the Scottish National Party Nicola Sturgeon raises the prospect of a second independence referendum for Scotland; Sinn Féin calls for the reunification of Ireland. All of these events were front-page news in the wake of the Brexit vote. The decision by the majority of British voters (*rectius* English and Welsh voters) to leave the EU has had a seismic effect on the political and constitutional system of the United Kingdom. Brexit is a multi-faceted issue: one could focus on the lively debate between British constitutional lawyers as to whether Article 50 of the EU Treaty is revocable<sup>1</sup>; one could discuss the impact of Brexit on the governmental system and on political parties; one could analyse the ramifications of Brexit for fundamental rights and so forth. In fact, there is no doubt that much ink will be spilled concerning this issue over the coming months (and perhaps years). In the meantime, this article will examine the consequences of Brexit for the UK's own union<sup>2</sup>.

Even prior to the vote that was held on 23<sup>rd</sup> June, a number of commentators had stressed the fact that the referendum was not only about the relationship between the United Kingdom and the European Union, but also about the very future of the United Kingdom. Almost all pundits forecast a victory for *remain* in both Scotland and Northern Ireland and therefore that the vote in England – which accounts for 80.9% of the British population – would be decisive. And this is how it turned out. The 23<sup>rd</sup> June referendum was in effect a “reverse” *West Lothian Question* where rather than having Scottish MPs voting on laws that ap-

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(1) See Pietro Manzini contribution herein.

(2) On the effects of Brexit for the United Kingdom see, among others, R. HAZELL, A. RENWICK, *Brexit: its Consequences for Devolution and the Union*, UCL Constitution Unit Briefing Paper, 2016, pp. 1-5; S. DOUGLAS-SCOTT, *British withdrawal from the EU: an existential threat to the United Kingdom?*, <http://www.centreonconstitutionalchange.ac.uk/blog/british-withdrawal-eu-existential-threat-united-kingdom>, 2014.

ply only in England, English voters decided that Scotland and Northern Ireland would have to leave the European Union in spite of the fact that both nations had voted to remain. The “multi-national” State of the United Kingdom has thus been split in half, with two nations in favour of Brexit and two against. There will now inevitably be speculation as to whether all of this has triggered an unstoppable process which will lead to the breakup of the United Kingdom<sup>3</sup>.

## 2. *Is Scotland in a «No Win Situation»?*

We shall start with Scotland, where the situation is somewhat paradoxical, given that less than three years ago a referendum on Scottish independence was held in which it was stressed that the vote concerned «two unions and not only one»<sup>4</sup>. There was in fact little doubt that, in the event of its secession from the United Kingdom, the rest of the country would have remained a member of the European Union as the “successor State”, whilst Scotland would have had to apply as a new State<sup>5</sup>. Many consider precisely the “European question” to have been one of the decisive elements in securing a victory for the “No” side in 2014, along with the economic risks, which will be considered below. Two years later, Scotland is still part of the United Kingdom, but precisely for this reason it is highly likely that it will have to leave the very European Union that two Scots out of three want to remain part of<sup>6</sup>.

During the upheaval in the immediate aftermath of the referendum, Scottish First Minister Nicola Sturgeon appeared as the operator with the coolest head and a definite plan, acting almost as if she were the head of government of an independent country. Three days after the

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(3) J.O. FROSINI, *Il referendum sulla Brexit: verso la dissoluzione del Regno Unito?*, in *Diritto Pubblico Comparato ed Europeo*, 3, 2016, pp. 831-832; Id., *Una doppia secessione? Il futuro del Regno Unito dopo la Brexit*, in C. Martinelli (ed.), *Il referendum Brexit e le sue ricadute costituzionali*, Maggioli, forthcoming.

(4) J.O. FROSINI, *L'indipendenza della Scozia: l'uscita da due unioni?*, in *Quaderni costituzionali*, 2, 2013, p. 442-446.

(5) J. CRAWFORD, A. BOYLE, *Annex A Opinion: Referendum on the Independence of Scotland – International Law Aspects*, UK Government, 2012, pp. 98-104.

(6) J.O. FROSINI, *Il referendum sulla Brexit*, cit., p. 832.

vote, the First Minister declared that the Holyrood Parliament would take steps to defend the interests of Scotland basically suggesting that it could veto the triggering of Article 50 of the EU Treaty. The overwhelming majority of legal scholarship – including strongly anti-Brexit commentators – immediately responded that, in legal terms, Scotland could not prevent the British Government from starting the process of the United Kingdom's withdrawal from the EU. For example, according to constitutional lawyer Mark Elliot, even following the launch of the process of devolution in 1998, the sovereignty of the Westminster Parliament remains undisputed as the Sewel Convention<sup>7</sup> stipulates that the UK Parliament cannot legislate without the consent of the national assemblies only in relation to devolved matters, whilst the European Union and more generally international treaties are reserved to Westminster<sup>8</sup>. As we shall see this position was then confirmed by the Supreme Court in the famous Miller case (see, *infra*, §5).

Again a few days after the vote (on 26<sup>th</sup> June 2016) an opinion poll published in the Sunday Times rekindled the hopes of secessionists. In the light of the Brexit referendum, it reported that a majority of Scottish voters now backed independence from the United Kingdom (52% against 48%), thereby reversing the position in the 2014 vote.

On the following day, during an extraordinary session of the European Parliament called to discuss Brexit, the Scottish National Party MEP Alyn Smith gave a speech that appeared almost as a plea for help: "Scotland did not let you down. Please, I beg you, do not let Scotland down now". The appeal was followed by a standing ovation in the chamber.

Finally, on 29<sup>th</sup> June – again with the air of the head of an independent government – Sturgeon flew to Brussels where she met Commission President Juncker and the then President of the European Parliament Schultz (although not the President of the European Union Tusk,

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(7) J. GALLAGHER, *Conventional Wisdom: Brexit, Devolution and the Sewel Convention*, A Gwilym Gibbon Centre Working Paper, Work in progress, v. <http://ggcpp.nuff.ox.ac.uk/wp-content/uploads/2017/02/Conventional-wisdom-Brexit-Devolution-and-the-Sewel-Convention.pdf>. Also Peter Leyland's contribution herein.

(8) M. ELLIOT, *Can Scotland block Brexit?* Public Law for Everyone, <https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/>, 2016.

who considered that it would not be appropriate to meet the Scottish First Minister). Both Juncker and Schultz expressed their solidarity with Sturgeon and the people of Scotland, but nothing more.

As time passed by, however, the new secessionist drive started to fizzle out: according to a YouGov survey published by the Guardian, 53% of Scottish voters wanted to remain part of the United Kingdom despite the prospect of leaving the EU, a trend which has subsequently been confirmed<sup>9</sup>. In the meantime, the spirits of nationalists were further chilled by the publication of the Gers (Government Expenditure and Revenue Scotland) report on 24th August 2016, which stated that Scotland had accumulated a notional deficit for financial year 2015-2016 of more than 14 billion pounds, largely due to the low price of North Sea oil. This inevitably raises a question concerning the effects that these figures would have had if Scotland had chosen to become independent. In fact, they confirm beyond doubt the argument of those who opposed independence in 2014, i.e. that it would amount to a massive gamble in economic terms. It is sufficient to note that only four years ago Scottish income from Brent amounted to 10 billion pounds, whilst in 2016 tax receipts had fallen to only 60 million pounds. The comments made by Scottish Liberal Democrat leader Willie Rennie were amongst the sharpest, asserting that «The nationalists' case for independence has been swallowed up by a £14bn black hole», adding that «... It's a dark day for Scottish nationalism but it is even darker for the Scottish economy. The oil shock and the Brexit shock should not be compounded by an independence shock».

Scotland is thus in a blind alley<sup>10</sup>. On the one hand, it does not have any legal or constitutional powers that would enable it to veto the United Kingdom's withdrawal from the EU. On the other hand, the highly

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(9) N. KHOMAMI, *No real shift towards Scottish independence since Brexit vote – poll*, The Guardian on-line, 2016.

(10) On the options that are available to Scotland after the referendum see M. FLETCHER, R. ZAHN, *What options are available to Scotland to remain within the EU given the "Brexit" referendum result?*, in *Edinburgh Law Review*, 21(1), 2017, pp. 98-103. Of particular interest is Jacques Hartmann's thesis that the Faroe Islands might constitute a model for Scotland: J. HARTMANN, *The Faroe Islands: possible lessons for Scotland in a new post-Brexit devolution settlement*, in *Edinburgh Law Review*, 2017, forthcoming.

unfavourable economic data published in August 2016 appear to have reduced the likelihood of the nationalist government headed by Nicola Sturgeon calling for a second independence referendum in the near future<sup>11</sup>. Furthermore, many authors are convinced that even today if Scotland did become independent a special deal for fast-track re-entry into the EU would be unlikely<sup>12</sup>.

Finally, as we will see in more detail below, the poor result of the SNP at the general election on 8<sup>th</sup> June 2017 seems to have weakened the nationalists, position even further.

### ***3. Northern Ireland: a Return to the Troubles or Reunification of the Emerald Ireland?***

In some ways the Northern Irish question is even more delicate than the Scottish question since, were the United Kingdom to leave the EU, the only land border between it and the European Union would be the one with the Republic of Ireland<sup>13</sup> and there is widespread concern at the idea that, after many years of free movement and relative peace, the country might risk returning to a heavily guarded border, resulting once again in tensions in frontier areas<sup>14</sup>.

Paradoxically, the Brexit referendum was a political victory for nationalists from Sinn Fein, who backed the Remain campaign, whilst the Democrat-

(11) J. GALLAGHER, *The Scottish government's Brexit paper suggests that the last thing Nicola Sturgeon wants is an independence referendum*, The Constitution Unit, 21<sup>st</sup> December 2016, <https://constitution-unit.com/2016/12/21/the-scottish-governments-brexit-paper-suggests-that-the-last-thing-nicola-sturgeon-wants-is-an-independence-referendum/>.

(12) P. ANDERSON, *Scotland, Brexit and Spain: A special deal for Scotland is unlikely*, *blogs.ile.ac.uk/europpblog/2017/01/16/scotland-brexit-and-spain/*, 16<sup>th</sup> January 2017.

(13) V. GRAVEY, *Brexit and UK-Irish relations: between low and high politics?*, King's College London, 2016, <http://ukandeu.ac.uk/brexit-and-uk-irish-relations-between-low-and-high-politics/>; A. GODDEN, C. McCORMICK, *A New Relationship? Brexit, Republic of Ireland and Northern Ireland*, Royal Irish Academy, Constitutional Conversations, N. 3, 6 May 2016 [https://www.ria.ie/sites/default/files/brexit\\_report.pdf](https://www.ria.ie/sites/default/files/brexit_report.pdf).

(14) E. BURKE, *Who will speak for Northern Ireland*, The RUSI journal, 161:2, 2016, pp. 4-12; A. SMITH, M. McWILLIAMS, P. YARNELL, *Does Every Cloud Have a Silver Lining?: Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Rights*, in *Fordham International law Journal*, 1, 2016, pp. 79-130; F. BIONDI, I. GONCALVES RAPOSO, *The impact of Brexit on Northern Ireland: a first look*, <http://bruegel.org/2016/12/the-impact-of-brexit-on-northern-ireland-a-first-look/>, 2016.

ic Unionist Party and First Minister Arlene Foster supported Leave. In fact, a majority of Northern Irish residents (56%) voted to remain in the EU, and the party of the then Deputy First Minister the late Martin McGuinness<sup>15</sup> started making hay over the fact that the wishes of a majority of Northern Irish voters would not be respected thanks to the (“treacherous”) English, who would force the six counties out of the EU. It is no coincidence that the party headed by Gerry Adams, which is represented both in the Stormont Assembly and the Dublin Parliament, has called for a border poll on Irish reunification. Even more significant, the then Irish Prime Minister Enda Kenny and Micheál Martin, the leader of the largest opposition party Fianna Fail, also called for a debate regarding a referendum on the issue of reunification.

There is no doubt that the vote of 23<sup>rd</sup> June has profoundly altered the political situation in Northern Ireland and it would not be overly audacious to bet that Northern Ireland may not even exist in the not too distant future<sup>16</sup>. Leaving aside the well-founded fears of a return to violence were a hard border to be created between the two parts of the Emerald Isle, another factor of major concern is the negative economic effects that would result from withdrawal from the EU. In fact, according to a number of commentators these effects could be disastrous<sup>17</sup>. In February 2016, a report com-

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(15) S. FENTON, *Brexit will have a “devastating” impact on Ireland, Martin McGuinness warns*, The Independent on-line <http://www.independent.co.uk/news/uk/politics/brexit-ireland-economic-impact-devastating-martin-mcguinness-a7364961.html>, 2016.

(16) Also see: IRISH CONGRESS OF TRADE UNIONS, *The Case Against Brexit*, [http://www.ictu.ie/download/pdf/brexit\\_briefing\\_paper.pdf](http://www.ictu.ie/download/pdf/brexit_briefing_paper.pdf).

(17) On the economic effects of Brexit for Northern Ireland see A. BARRETT, A. BERGIN, J. FITZGERALD, D. LAMBERT, D. MCCOY, E. MORGENROTH, I. SIEDSCHLAG, Z. STUDNICKA, *Scoping the Possible Economic Implications of Brexit on Ireland*, Research Series, n. 48, November, The Economic and Social Research Institute, Dublin, 2015, pp. i-73; J. BRADLEY, *Brexit, Northern Ireland and the Island Economy: An Update*, The Institute of International and European Affairs, Dublin, 2015, pp. 1-7. P. MAC FLYNN, *The Economic Implications of Brexit for Northern Ireland*, Nevin Economic Research Institute Working Paper Series, April, 2016, pp. 1-31. For a specific study on the effects for the agri-food sector see M. ALLEN, *Northern Ireland’s agri-food sector - background and possible “Brexit” considerations*, Northern Ireland Assembly, Research and Information Service Briefing Paper, 22 September 2016, pp. 1-25. Finally for an analysis of the economic effects on all the devolved nations see: UK PARLIAMENT, *Inquiry on political and economic implications of Brexit for Scotland, Wales and Northern Ireland, and on the devolution settlement as a whole*, <https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/inquiries/parliament-2015/brexit-devolution/>, 2017.

missioned by the Northern Irish Ministry for Enterprise, Trade and Investment was published in which it is clearly stated that the risks associated with Brexit would be much more serious for Northern Ireland compared to the rest of the United Kingdom. In fact, whilst it was considered that GDP would fall for the United Kingdom as a whole by between 0.1 and 4%, the reduction in GDP for Northern Ireland could amount to as much as 5.6%<sup>18</sup>. In other words, to borrow the analogy used by Kevin Meagher in a *New Statesman* article<sup>19</sup>, if the United Kingdom risks catching a cold from leaving the EU, Northern Ireland is risking full-blown influenza. Even were Theresa May to be successful in negotiations with the EU in maintaining access to the single market, the loss of agricultural subsidies and regional development funds would be a massive blow to the Northern Irish Government.

Between 2007 and 2013, Northern Ireland received a total of 2.4 billion pounds and the agreements concerning regional development funds through to 2020 are vital for this country's economic strategies and innovation<sup>20</sup>. Northern Ireland would be damaged not only by the fact of no longer being a "point of entry" to the European single market, but also by the increase in transaction costs, which would constitute a significant block on economic cooperation with the Republic of Ireland. There are obviously also concerns regarding the possible deterioration of commercial relations between the six counties and the Republic of Ireland. It was no coincidence that on 4<sup>th</sup> July 2016 the Northern Ireland Chamber of Commerce signed a cooperation agreement with the Chamber of Commerce of the Republic of Ireland with the aim of enhancing interaction between businesses throughout the island<sup>21</sup>.

In the meantime, there has been a spike in Irish passport applications, so much so that in recent months some Belfast post offices ran out of the

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(18) OXFORD ECONOMICS, *The Economic Implications of a UK Exit from the EU for Northern Ireland*, London, 2016.

(19) K. MEAGHER, *Brexit is the beginning of the end for Northern Ireland*, *The New Statesman*, 2016.

(20) L. BUDD, *The Consequences for the Northern Ireland Economy from a United Kingdom exit from the European Union*, Briefing Note: CETI/OU, 2/15, 2015, p. 13.

(21) J.O. FROSINI, *Il referendum sulla Brexit*: cit, pp. 833-835.

necessary forms. As a striking demonstration of the disruptive effects of Brexit, no other than the son of the hard-line unionist Ian Paisley – the historic leader of the Democratic Unionist Party and former First Minister – recommended that residents of his constituency in North Antrim apply for an Irish passport ... an assertion that only a few months ago would have been absolutely inconceivable from a radical unionist.

Another effect of the instability caused in Northern Ireland as a result of Brexit is that the province will become an increasing financial burden for the British Exchequer. In fact, even now one in three people works for the public sector and the fiscal deficit is so high that the Treasury is forced to transfer a subsidy of around 9 billion pounds each year. One must really wonder how long English taxpayers will be willing to continue to pick up the tab for such a minuscule part of the population of the United Kingdom<sup>22</sup>. The agreement between the Tories and the DUP after the election on 8<sup>th</sup> June 2017 (see, *infra*, § 8) with more money promised for Northern Ireland might increase this disgruntlement even further.

If these are the effects of a withdrawal from the EU, one must inevitably ask what the effects of Irish reunification would be. In 2015 a large-scale study coordinated by Kurt Hübner from the University of British Columbia demonstrated that Irish reunification would generate 36 billion euros over the first eight years, with benefits in particular for Northern Ireland<sup>23</sup>. In short, economic studies demonstrate that Northern Ireland would have a lot to gain from leaving the United Kingdom and reuniting with the Republic of Ireland. This however is an economic argument, which does not take account of the political and legal obstacles that would arise in the event that a process to reunify the island of Ireland were launched.

The Good Friday Agreement from 1998 stipulates that the constitutional and legal status of Northern Ireland cannot be altered without the support of a majority of unionists, which means that, as things stand, it is

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(22) S. FENTON, *Northern Ireland will suffer because of Brexit, but the mainland couldn't care less*, The Independent on-line, v. <http://www.independent.co.uk/voices/northern-ireland-brexit-land-border-republic-of-ireland-checkpoints-eu-funding-sovereignty-a7379246.html>.

(23) KLC CONSULTING, *Modeling Irish Unification*, Harvard Club, New York, 2015.

highly unlikely that the North could be reunited with the rest of the island. That said, were Northern Ireland really to suffer long-term pain as a result of the economic effects of Brexit, then reunification with Ireland and the resulting “reincorporation” into the European Union could become an attractive choice not only for the nationalist community, but also for unionists.

All of this appeared to be confirmed by the early elections in Northern Ireland (see, *infra*, § 4).

#### ***4. The Effect of Brexit on the Elections in Northern Ireland: a Clear Victory for the Remainers***

On 2<sup>nd</sup> March 2017 early elections were held for the Northern Ireland Assembly due to the resignation of the then deputy First Minister the late Martin McGuinness in dissent on what he considered to be the poor management of a renewable energy programme (though his bad state of health, which led to his parting just a few weeks later, was also considered to be another factor that led to the early dissolution). These elections were called for by Sinn Féin with the aim of gaining seats from the Democratic Unionist Party, *i.e.* the two parties at the opposing ends of the political spectrum and who had diametrically opposite positions on Brexit.

In analysing the results of the elections one should bear in mind that the electoral system that is used is the Single Transferable Vote (STV) which is based on multiple preferences.

The elections re-confirmed the DUP as the first party in Northern Ireland but with a slight decrease with respect to the previous election (-1.1%) and 28 seats (out of 90). All of this should be considered in the light of a considerable increase in turnout (64.8%, compared to 54.9% in 2016). Although by a very slender margin the DUP remained the largest party it lost ten seats in the assembly.

Sinn Féin won 27 seats, thus drastically closing the gap on the DUP. The percentage of first preferences was 27.9%, an increase of 3.9% in comparison to the previous election. The Ulster Unionist Party got 12.9%, with a 0.3% with respect to 2016 and ten seats, while the pro-remain Social Democratic and Labour Party (SDLP) became the third largest party with 11.9% of first preferences and 12 seats in the Assembly.

Alongside Sinn Fèin the other party that did surprisingly well was the anti-Brexit Alliance Party with 9 seats.

One could thus affirm that these elections saw a “Brexit effect”. The clear winner was Sinn Fèin, which clearly aims at gaining the support of the majority of “remainers” in Ulster and to push its agenda forward. Reunification with the Republic of Ireland is certainly an objective and Brexit has given new life to the republicans. One should note, however, that both the UUP and the SDLP are in favour of Brexit, given the “unionist” nature of the former and the affiliation to the Labour Party of the latter<sup>24</sup>. As underlined above the Alliance Party is staunchly remain.

### ***5. The Miller Judgment: Scotland, Wales and Northern Ireland Do Not Have a Veto Power***

Probably, in hindsight Theresa May regrets following this path, but it is common knowledge that after the referendum the government claimed that, on the basis of the Crown’s treaty-making prerogative, it had the power to trigger withdrawal under Article 50 without a vote in Parliament. This was contested by numerous legal scholars and politicians. The British-Guyanese entrepreneur Gina Miller took her adversity a step further and challenged this assumption by way of judicial review in front of the High Court and indeed the latter handed down a decision in her favour<sup>25</sup>. The hysterical reaction of the Europhobic English tabloids bears vivid testament to the importance of the High Court judgment. The Daily Mail defined the three judges “Enemies of the People!” posting their “mugshots” on its front page, the Sun spoke of a “bombshell judgment”, the Daily Express evoked Churchill’s famous speech, “we shall fight them on the beaches”, and even the usually composed, albeit Eurosceptic, Daily Telegraph opened with “Judges vs the People”. Never in the history of the United Kingdom has there been such a vehement attack against the

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(24) See *SDLP urges Sinn Fèin to take Commons seats for Brexit deal*, dal Belfast Telegraph (25/1/2017) <http://www.belfasttelegraph.co.uk/news/brexit/sdlp-urges-sinn-fein-to-take-commons-seats-for-brexit-vote-35395550.html>.

(25) For a more detailed description of the Miller judgment see Peter Leyland’s contribution to this special issue herein.

judiciary, so much so that Justice Minister Lizz Truss was heavily criticised for her silence, and when the Minister finally intervened in defence of the British justice system, many observers in any case noted that it had been “*too little too late*”. However, this reaction by the tabloids must come as no surprise as for years they have been fiercely critical of everything that has anything to do with Europe, creating a strong sense of hostility (if not even full-blown hatred) towards the European institutions<sup>26</sup>.

Turning now to the judgment in *R (Miller) v Secretary of State*, one could assert that the decision is a brief summary of British constitutional law<sup>27</sup>. In fact, this judgment is a pleasure to read for comparative public law enthusiasts and it is immediately apparent that it was written by a bench of highly refined jurists. One thing that is striking to discover is that the Government did not seek to assert that the referendum of 23<sup>rd</sup> June was legally binding. Nevertheless, with a highly refined style, the High Court seized the opportunity, even though it was not obliged to do so given that the legal question related to the limits on the exercise of the royal prerogative, to reiterate that the referendum was only *advisory*. Paragraphs 105 to 108 are an extremely important part of the judgment and a very useful instrument for refuting all those who have asserted the view over the last year that, in enacting the *Referendum Act 2015*, Parliament had “delegated” to the British people the decision over whether or not the United Kingdom was to remain in the European Union. This, however, was not the case, as was clearly explained to Members of Parliament in a briefing paper<sup>28</sup> published on 3<sup>rd</sup> June 2015, which was also cited in the High Court judgment (see para. 107). In fact, in the section entitled «Types of referendum» it is stated that:

«This Bill requires a referendum to be held on the question of the UK’s continued membership of the European Union (Eu) before the end of 2017. It

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(26) J.O. FROSINI, *The High Court “Trumps” the May Government: La Sentenza R (Miller) v Secretary of State for Exiting the European Union... E adesso?*, in *Diritto Pubblico Comparato ed Europeo online*, 2016.

(27) G.F. FERRARI, *R (Miller) v Secretary of State for Exiting the European Union: Eterogenesi dei fini e populismo in una nuova pagina della storia britannica*, in *Diritto Pubblico Comparato ed Europeo online*, 2016.

(28) *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* UKSC 2016/0196, para. 107.

*does not contain any requirement for the UK Government to implement the results of the referendum, nor set a time limit by which a vote to leave the EU should be implemented» (italics added)<sup>29</sup>.*

The May Government rather stubbornly decided to appeal against the decision in the Supreme Court. Of great interest in the context of this article is the fact that Richard Gordon (the Lord Advocate in Scotland), James Wolffe (Wales' *Counsel General*) and John F. Larkin (the Lord Advocate Attorney General of Northern Ireland) all intervened to clarify whether withdrawal from the European Union is in contrast with the powers assigned to Scotland, Wales and Northern Ireland after the start of the devolution process in 1998. In other words the question was whether these three nations could veto the triggering of Art. 50 in any way.

With an 8 to 3 majority the Supreme Court rejected the Government's appeal and more importantly in the context of this article it unanimously threw out the claim that the devolved nations had a veto power to stop Brexit<sup>30</sup>, thus confirming the majority of the legal scholarship<sup>31</sup>. In particular the Supreme Court declared that:

«Lord Advocate and the Counsel General for Wales were correct to acknowledge that the Scottish Parliament and the Welsh Assembly *did not have a legal veto* on the United Kingdom's withdrawal from the European Union. Nor in our view has the Northern Ireland Assembly. Therefore, our answer to the second question in para. 126 above is that the consent of the Northern Ireland Assembly *is not a legal requirement* before the relevant Act of the UK Parliament is passed»<sup>32</sup> (italics added).

In the following paragraph the Supreme Court pointed out that:

«In reaching this conclusion we do not underestimate the impor-

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(29) E. UBEROI, *European Union Referendum Bill 2015-16*, House of Commons Library, Briefing Paper N. 07212, 3 June 2015, p. 25.

(30) *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* UKSC 2016/0196, par. 107, para. 150.

(31) *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* UKSC 2016/0196, par. 107, para. 151.

(32) *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* UKSC 2016/0196, para. 107, para. 150.

tance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law»<sup>33</sup>.

A few days after the Supreme Court decision the Government presented the *European Union (Notification of Withdrawal) Bill* and on 13<sup>th</sup> March, despite the admirable resistance of the House of Lords which temporarily gave hope to many remainers by approving two amendments<sup>34</sup>, the House of Commons rejected these changes, thus forcing the Upper House to approve the bill in order to avoid a political and constitutional crisis.

On 27<sup>th</sup> March Theresa May met with the First Minister Nicola Sturgeon in Glasgow and emphasised once again her opposition to a second Scottish independence referendum while Brexit is still being negotiated. From this point of view Scotland appears to be evermore in that “no win situation” underlined above (see § 2). In fact, the May Government will never allow an independence referendum until the UK has left the EU, but at that point were the nationalists to win their battle, Scotland would already have left the EU and it would have no certainty of a fast-track re-entry given the possible veto exercised by Spain and other member States of the EU.

From this point of view the decision by Nicola Sturgeon, after a vote in the Scottish Parliament, to sign an official letter to the British Government requesting a second referendum (the very same day Theresa May consigned her request for withdrawal from the European Union to President Tusk) seemed to be a rather weak political move given the present circumstances.

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(33) *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* UKSC 2016/0196, para. 107, para. 151.

(34) J.O. FROSINI, *Non ci resta che sperare nei Lords... La Corte Suprema conferma che l'invocazione dell'art. 50 deve essere approvata dal Parlamento*, in *Quaderni costituzionali*, 1, 2017, 148-150.

### 6. *The Lost Gamble: the Snap Elections of June 2017*

In a surprise move, just three weeks after triggering Art. 50 Theresa May unilaterally announced that there would be snap elections on 8<sup>th</sup> June. Setting aside the dubious constitutionality of this announcement before the vote in Parliament in light of the Fixed Term Parliaments Act of 2011, suddenly, the fantasy scenario of a change in government during the two-year negotiation period was not so fantastical anymore and Brexit could be reversed. The move was particularly surprising because Theresa May had repeatedly insisted that there would be no early elections. This was clearly a bold move to gain a comfortable majority in Parliament before heading into negotiations with the EU at a time when the opposition was extremely weak. On 18<sup>th</sup> April, the day of the announcement, the Conservatives were polling double the dismal 24% of Labour<sup>35</sup>.

During the election campaign May insisted that this was not a second referendum on Brexit yet the election had been called to ensure Brexit was implemented. Rather, keeping in line with priority number one as set forth by the White Paper, she sought to guarantee stability and certainty (which after «Brexit means Brexit became her new mantra»). «Britain is leaving the European Union and there can be no turning back.»<sup>36</sup>. Indeed, Labour heeded this warning. The choice was seemingly between a soft Brexit and a hard Brexit, but no party was really advocating for avoiding Brexit altogether. They all took for granted that Article 50 could not be reversed<sup>37</sup>. Those millions who truly oppose Brexit found themselves «politically homeless» as Tony Blair put it, with no party reflecting the same sentiment<sup>38</sup>. Tim Farron and the Liberal Democrats came closest to opposing Brexit, advocating for remaining in the Single Market, which was not explicitly on the referendum ballot; but it is still a soft version of Brexit. Farron advocated for a second referen-

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(35) M. SMITH, Voting Intention: Conservatives 48%, Labour 24% (18-19 Apr), *YouGov.co.uk*, 20<sup>th</sup> April 2017.

(36) T. MAY, *Statement to the Press*, 18<sup>th</sup> April 2017.

(37) Again see Pietro Manzini's article herein.

(38) S. KNIGHT, *The Return of Tony Blair*, in *The New Yorker*, 12<sup>th</sup> May 2017.

dum on the final deal, but that, too, was not necessarily a vote for Remain, even if we assume Article 50 is revocable.

One of the most paradoxical things May said was «The country is coming together but Westminster is not»<sup>39</sup>. She suggested that the demonised Remainers (~48%) and regretters have already come to terms with Brexit in ten short months before it has even really begun. But surely, she could not have been referring to the Scots who voted to remain — the Scottish Parliament had just voted on March 28<sup>th</sup> for a second independence referendum. To add insult to injury, she accused Parliament of being obstructive in dutifully exercising its rightful sovereignty, the same Parliament that voluntarily approved an unamended authorization bill to activate Article 50. Jeremy Corbyn, on the other hand, astutely treated the elephant in the room (Brexit) as a settled issue, campaigning instead on domestic issues like the NHS and education and suddenly the tide turned. Theresa May started running into trouble and as the campaign proceeded she appeared aloof, ill at ease and mechanical (thus earning herself the nickname “Maybotic”) while Corbyn, despite harsh attacks from the right-wing tabloids, seemed far more spontaneous and genuine. The opinion polls indicated that Labour was closing the gap and indeed on the night of the elections disaster struck for Theresa May: instead of a “strong and stable” government what the Prime Minister actually obtained was a hung parliament with the Tory majority completely wiped out.

### *7. Can Northern Ireland Unionists and Scottish Tories Save the United Kingdom with a Soft Brexit?*

The only positive news for the Tories on the night of the elections was the conquering of 12 seats in Scotland under the leadership of a rising political star, Ruth Davidson. Again this is of the utmost importance in analysing the effects of Brexit on the future of the United Kingdom because, as Peter Leyland underlines in this special issue, the Scottish Conservative and Unionist Party had their own manifesto and pushed for a much softer form of Brexit by affirming that:

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(39) T. MAY, *Statement to the Press*, 18<sup>th</sup> April 2017.

«We want to agree a deep and special partnership with the European Union. This partnership will benefit both the European Union and the United Kingdom: while we are leaving the European Union, we are not leaving Europe, and we want to remain committed partners and allies to our friends across the continent»<sup>40</sup>.

Davidson and the Scottish Tories are well aware of the fact that their consensus north of the border will soon erode if they do not ensure that the Brexit negotiations go to the benefit of Scotland. While the Tories (and also Labour) gained seats in Scotland it was a bad night for Nicola Sturgeon and the SNP. Evidently the talk of a second independence referendum which would take Scotland into the realm of the unknown politically, legally and economically did not convince the electors. Paradoxically, *at least in the short term*, Brexit would appear to have reinforced the Union rather than weakened it because there are evidently many Scots that believe they can get a better deal through their representatives in the Tory and Labour parties who are better equipped to condition the national government (especially the latter, given that Theresa May does not have a majority of her own).

The importance of the devolved nations is reinforced even further by the agreement reached between Theresa May and the DUP. Eighteen days after the elections on 26<sup>th</sup> June 2017 an agreement was signed by Gavin Williamson for the Conservatives and Jeffrey Donaldson for the DUP (*i.e.* the two parties' Chief Whips) in the presence of Theresa May and Arlene Foster, the leaders of the two parties. On the basis of this "Supply and demand" arrangement Theresa May will preside over a minority Conservative government with the external support of DUP. In particular DUP will support the Tories on all motions of confidence; the Queen's Speech; the budget; finance bills, money bills and appropriation legislation; legislation pertaining to national security and, most importantly in the context of this special issue, *all legislation* pertaining to the UK's exit from the European Union. The DUP will also support the ongoing commitment of the Tories to the

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(40) 'Forward Together: Our Plan for a Stronger Scotland, A Stronger Britain and a Prosperous Future', *The Scottish Conservative and Unionist Party Manifesto*, 2017. One could make the argument that the relationship between the Scottish Conservative and Unionist Party and the Conservative Party in England and Wales is rather like that between the Christian Social Union in Bavaria and the Christian Democratic Union in the rest of Germany.

Union of Great Britain and Northern Ireland and both parties agree to adhere to the provisions of the Good Friday Agreement. Furthermore, no poll or referendum on the future of Northern Ireland's constitutional status will be held without the "consent of the people". Finally the agreement ensures the commitment of the DUP to work towards the formation of a new Northern Ireland Executive; and the commitment of the UK Government to work with Northern Irish parties and the Irish government on this objective. In what the Americans would consider to be pure "pork barrel politics" the DUP was able to secure an extra £1 billion for the health, infrastructure and education budgets of Northern Ireland outside the Barnett Formula<sup>41</sup>.

All the opposition parties have heavily criticized this deal. Jeremy Corbyn stated that the «Tory- DUP deal is clearly not in the national interest but in May's party's interest to help her cling to power».

Tim Farron of the Liberal Democrats stated that:

«The public will not be duped by this shoddy little deal. While our schools are crumbling and our NHS is in crisis, Theresa May chooses to throw cash at ten MPs in a grubby attempt to keep her cabinet squatting in Number 10»<sup>42</sup>.

Not surprisingly the funding deriving from the deal has infuriated the leaders of the other devolved nations. Carwyn Jones, First Minister in Wales, was quoted as saying it was an «outrageous straight bung to keep a weak prime minister and a faltering government in office» and described the deal as essentially «cash for votes». Similar comments were made by Leanne Wood, leader of Plaid Cymru, who said the funding that went with the agreement was a «bribe».

The question is now of course whether this agreement will resist and what «supporting *all legislation* pertaining to the UK's exit from the European Union» actually means. Will the DUP prevent the establishment of a hard border between Ulster and the Republic of Ireland? And if so does that not signify that Foster's party has imposed a soft Brexit?

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(41) Which implies that similar funding will not be given to Scotland or Wales.

(42) R. PERRING, 'Grubby attempt to keep squatting: Tim Farron blasts 'shoddy' DUP deal with Theresa May', Daily Express, 26<sup>th</sup> June 2017.

### 8. *The Great Repeal Act: the Source of a Constitutional Clash with the Devolved Nations?*

In the meantime tensions are slowly rising between the government and the devolved executives in Scotland and Wales with regard to the Great Repeal Bill. This is the bill with which Parliament will repeal the European Communities Act 1972, and in so doing, return power to UK politicians and institutions. The Bill will preserve EU law where it stands at the moment before Britain leaves the EU. Parliament (and, where appropriate, the devolved legislatures) will then be able to decide which elements of that law to keep, amend or repeal once the UK has left the EU. This is where the tensions are rising between London, Edinburgh and Cardiff because many of the areas covered by EU law are devolved matters and therefore the First Ministers of Scotland and Wales, Nicola Sturgeon and Carwyn Jones, are worried that this will lead to an erosion of their devolved powers. In a joint statement issued on 13<sup>th</sup> July the two chief executives stated:

«Our 2 governments – and the UK government – agree we need a functioning set of laws across the UK after withdrawal from the EU. We also recognise that common frameworks to replace EU laws across the UK may be needed in some areas. But the way to achieve these aims is through *negotiation and agreement, not imposition*. It must be done in a way which respects the hard-won devolution settlements»<sup>43</sup> (italics added).

The two leaders then go on to make a very serious accusation towards the May Executive:

«Regrettably, the bill does not do this. Instead, it is a naked power-grab, *an attack on the founding principles of devolution*, and could destabilise our economies»<sup>44</sup> (italics added).

Finally, Sturgeon and Jones warn the British Government that:

«On that basis, the Scottish and Welsh Governments *cannot recommend*

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(43) *Joint statement from First Ministers of Wales and Scotland in reaction to the EU (Withdrawal) Bill* (<http://gov.wales/newsroom/firstminister/2017/170713-joint-statement-from-first-ministers-of-wales-and-scotland/?lang=en>).

(44) *Ibidem*.

*that legislative consent* is given to the bill as it currently stands»<sup>45</sup> (italics added).

In the light of this statement it looks as though Britain is heading for a constitutional clash between the central and devolved governments that could adversely affect the Brexit negotiations and the very Union of Great Britain and Northern Ireland, however as the saying goes we all know that «it is dangerous making predictions, especially about the future...».

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(45) *Ibidem*.