Brexit and the Uk: Charting the Constitutional and Legal Obstacles*

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Il contributo, redatto all'indomani del referendum *tenutosi nel Regno Unito a giugno 2016, si concentra su alcune tra le principali implicazioni costituzionali e legali di Brexit. La prima sezione affronta il significato costituzionale della crisi politica all'esito del* referendum *e l'impatto delle elezioni generali del 2017. La seconda sezione analizza i dubbi costituzionali sollevati dal caso Miller successivo al* referendum*, incluse le relazioni tra il Parlamento e il Governo e l'indipendenza costituzionale dei tribunali. La terza sezione si occupa dell'impatto di Brexit sull'integrità territoriale del Regno Unito, con particolare attenzione alla Scozia e all'Irlanda (del Nord e del Sud). La sezione finale adotta il paradigma della Costituzione multilivello per dimostrare la complessità del compito legislativo di fuoriuscita dall'Unione europea. L'articolo è stato rivisto per l'ultima volta a giugno 2017, quando ancora molti aspetti di Brexit erano irrisolti e le negoziazioni erano sul punto di decollare.*

1. *Introduction*

The Brexit referendum result came as an unwelcome shock to many who work in the field of public law but in view of the new populism manifesting itself in Europe and the United States perhaps the news should not have been a great surprise. Of course, the European Union has been taken for granted by a generation of citizens throughout Europe. The post second world war settlement between nations has been consolidated by the common recognition of a bedrock pan European political structure and links have been forged by individuals and between institutions across national boundaries. The manifest advantages of barrier free trade, collaboration in commerce and education and ease of travel have been

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accepted as the norm. Notwithstanding the EU's shortcomings as a top down mechanism for governance wedded to capitalism, associated with bureaucracy and over regulation, and with limits in democratic accountability, the decision to withdraw from the club of nations and the rejection of the bedrock pan European political organisation appears to be a reckless gamble. On the other hand, the Brexit vote and the drastic outcome which will probably follow is a further manifestation of an emerging political movement throughout Europe and beyond which is expressing itself differently in each individual nation but has certain characteristics in common. There are many citizens and groups in society previously represented by trade unions and socialist or social democratic parties who increasingly feel left out of the party and have nowhere to turn politically but to emerging extremist parties. The Brexit campaign led by UKIP and the Eurosceptic wing of the Conservative Party has successfully tapped into a fear of immigration which is not confined to the UK. They have been assisted by sympathetic newspaper proprietors who have deployed their titles to systematically demonise Europe over a prolonged period. Moreover, the national leaders of other member nations and EU policy makers have failed to adequately address pressing issues such as immigration which has been blamed on the absence of border controls between member states.

This article focuses on some of the constitutional and legal implications of Brexit. The uncodified constitution of the United Kingdom has a range of diverse sources but it depends heavily on conventions and it is regarded by many commentators as flexible. This flexibility is understood in the sense that it has developed incrementally over centuries in response to changing political circumstances. At this stage, in advance of negotiations, it is not possible to predict the shape of things to come; nevertheless, the discussion that follows suggests that the core institutions and principles will be confronted by a series of unprecedented challenges which may lead to a redefinition of the system of government and of governance. The article is divided into four sections. The first section reports on the constitutional significance of the immediate political fallout of the referendum and the impact of the 2017 General Election. The second section proceeds to consider the constitutional questions thrown up by the *Miller* case (and other related cases) fol-

lowing the referendum, including the relationship between Parliament and the executive and the constitutional independence of the courts. The threat to the continued territorial integrity of the United Kingdom with particular attention to Scotland and Ireland (North and South) is discussed in the third section. The final section uses the paradigm of the *Multi-Layered Constitution* to assess the complexity of the legislative task of disengagement from the European Union.

2. *Political Fallout*

The referendum result had an immediate political impact and from a constitutional standpoint this provided an illustration of a change in political leadership without resort to an election. Prime Minister David Cameron was responsible for calling the referendum. It was a calculated gamble which failed to come off. A national vote for "remain' would have dealt a blow to critics in his own party and UKIP, and in doing so, it would have strengthened his own authority. On the other hand, the Brexit result of the referendum undermined his credibility both as Prime Minister and as the political leader of the Conservative Party. He therefore announced his intention to resign, pending the election of a new leader. In the absence of a confidence vote or a two thirds majority in favour of an election, the Fixed Term Parliament Act 2010 after the date of the 2015 election determined the date of the next general election as May 2020. In other words, in this situation there was no constitutional requirement for a general election. However, any Prime Minister must be able to command a majority in the House of Commons. Since the Conservative Party in June 2016 enjoyed an overall majority of 9 seats, it followed that his successor would be the next elected leader of the Conservative Party. As a high profile public figure who campaigned for Brexit the former London Mayor, Boris Johnson, was regarded as a leading contender to win the leadership but once the contest began his credibility as a candidate was undermined by rival Brexit campaigner, Michael Gove.

Following the elimination of candidates in the initial rounds of the contest Theresa May was selected without a vote from the wider Conservative Party membership. This was after the other remaining candidates conceded victory. As the winner of the leadership contest she was in-

vited by the Queen to form a government. Mrs May had served as a leading member of the Cameron government but as a relatively passive member of the "remain' camp she was able to secure the leadership of the Conservative Party. Once in place, she sought to unify the party and strengthen her position by appointing prominent Brexit supporters to lead the negotiations in the key posts of Foreign Secretary (Boris Johnson), Brexit Secretary (Liam Fox) and Minister of Trade (David Davies). In repeating her widely quoted mantra "Brexit means Brexit" the emphasis was placed on reflecting the democratic will by fully implementing Brexit. However, there was only a relatively small majority in the referendum favouring Brexit and crucial parts of the UK, including London, Scotland and Northern Ireland had supported the remain position. It became increasingly clear after Brexit was triggered at the end of March 2017 that the government's negotiating stance, undoubtedly influenced by the Eurosceptic wing of the Conservative Party, tended to favour what has been termed "Hard Brexit". In essence, this position demanded strong immigration controls and imposing full control over national borders, giving up access to the single market and insisting upon a return to parliamentary sovereignty. With the negotiations on the immediate horizon, and the Conservative Party enjoying a strong lead in the opinion polls, Mrs May decided to prompt an early election (June 9 2017) to consolidate her position further as leader, and, at the same time, obtain a mandate for a relatively "Hard Brexit"[1].

The result of the 2017 general election confounded the expectations of many commentators. Not only did the Conservative Party with 318 seats fail to win by securing an overall majority in the House of Commons, but also the Labour Party performed much better than expected. It polled 40% of the popular vote (its highest share since 2001) and secured 262 seats (an increase of 30 seats). Unlike the Libdems, Labour did not campaign for a "remain" position or for a second referendum on Brexit, but its manifesto favoured a milder form of Brexit. For example, the party were concerned to guarantee rights for EU nationals resid-

(1) An election could be held before the elapse of the five-year period specified in the Fixed Term Parliament Act 2011 because the call for a premature election by the Prime Minister was supported by a two thirds majority in the House of Commons.

ing in the UK and a reciprocal agreement for UK citizens in Europe. At the same time Labour proposed to negotiate a deal minimising the impact on living standards, levels employment and the erosion of worker's rights currently protected under EU law while maintaining standards of environmental protection[2]. The almost total collapse of the UKIP vote and decline in support for the Scottish Nationalist Party in Scotland which lost 21 seats (this is discussed in more detail below) were other features of the 2017 election.

In any event, the outcome of the election means that the Conservatives emerged in a much weaker position to negotiate Brexit; certainly they lack a clear mandate for "Hard Brexit". Mrs May as PM has to rely on at least one other party to obtain majority support in the House of Commons. There is no formal coalition agreement but any post-election arrangement with the Democratic Unionist Party (DUP) might operate on a "confidence and supply" basis, ensuring that the Conservatives as the incoming government have House of Commons support for the Queen's Speech (setting out their main political programme) and support for other major pieces of legislation. In terms of the overall picture, it is worth recognising that their partners, the DUP, only won 10 parliamentary seats, all in Northern Ireland, and polled a total of 292,000 votes. This is a relatively extreme party with dubious credentials. Moreover, as will become apparent later, in entering into any such agreement the Conservative government may be perceived as sacrificing its role under the Good Friday Peace Agreement as an impartial broker between the divided Unionist and Nationalist communities in Northern Ireland.

Lastly, it should be remembered that there has never been a comparable disengagement from membership of the EU. The notification of withdrawal procedure is set out under Article 50 of the Treaty of European Union. The Treaties will cease to apply at the date of withdrawal if that is less than two years from the date of notification, or two years after the date of notification unless extended by unanimous agreement. Ironically, until negotiations are held in late June 2017 the prob-

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(2) *Negotiating Brexit* in *A Manifesto for a better, fairer Britain*, http://www.labour.org.uk/index.php/manifesto2017.

lem is that no-one really knows what Brexit entails for the UK or for Europe. However, these political manoeuvres should not disguise the fact that not only did the referendum result itself come as a surprise to many politicians, but that ministers and civil servants were clearly unprepared for this eventuality. The absence of a comprehensive Brexit strategy has been for many reasons, not least because of the immense complexity of the task of negotiating a deal with Europe and then implementing its terms.

3. *Challenging Brexit in the Courts*

The government proceeded on the basis that under the Crown's treaty-making prerogative it had the power to trigger withdrawal under Article 50. In the *Miller* case the claimant challenged this assumption by way of judicial review[3]. It was argued by her that triggering Brexit without prior parliamentary approval would be unlawful. This is because leaving the EU would inevitably result in the loss of a number of rights enjoyed under EU law, including the right to vote at EU elections. The case raised important constitutional issues which concern the relationship between Parliament and the executive branch of government. Moreover, the legal problem arises precisely because national referendums have been rare, and there are no consistent rules governing, not only how and when they can be held, but also whether the referendum result creates a binding legal obligation[4]. Of pivotal relevance here, the European Union Referendum Act 2015 states "that a referendum is to be held on whether the United Kingdom should remain a member of the European Union"[5] but it did not specify what should happen next in response to the referendum result[6].

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(3) In the divisional court *R (Miller) v SS for Exiting the European Union* [2016] EWHC 2768; on appeal to the Supreme Court; *R (Miller) v SS for Exiting the European Union* [2017] UKSC 5.

(4) See P. LEYLAND, *Referendums, Popular Sovereignty, and the Territorial Constitution,* in R. RAWLINGS, P. LEYLAND, A. YOUNG (eds.), *Sovereignty and the Law,* Oxford, Oxford University Press, 2013, p. 148 and M. GORDON, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy*, Oxford, Hart Publishing, 2015, p. 342.

(5) European Union Referendum Act 2015 section 1(1).

(6) Miller (2017), para. 119.

A great deal hinged in *Miller* on the constitutional status of EU law under the European Communities Act (ECA) 1972. The general rule under the UK constitution which is classified under international law as "dualist", is that rights and obligations arising from treaties have to be transformed into national law by Act of Parliament before they can create rights enforceable in national courts[7]. Such rights relating to the EEC, and latterly the EU, were accepted as part of UK domestic law following the passage of European Communities Act 1972[8]. The 1972 Act which provided for the introduction of EU law has constitutional status as explained by Laws LJ in the *Thorburn* case[9]. This is because the EU is recognised as a constitutional source which has primacy over domestic law for as long as Parliament intends it to. Since 1972 a number of other statutes have been passed to incorporate later treaties. In doing so, these enactments have conferred different categories of rights on UK citizens. Rights of participation in EU institutions are among those rights. This includes the right to vote in elections for the European Parliament, introduced under the European Elections Act 2002. The Supreme Court concluded that Parliament did not envisage those rights changing as a result of ministers unilaterally deciding that the United Kingdom should withdraw from EU Treaties[10].

While it was not contested that the power to negotiate treaties still falls under the prerogative and lies with ministers, there is an equally important constitutional rule which recognizes that statutory power will always prevail over the prerogative power. In the *Case of Proclamations* Sir Edward Coke stated: «... the king by his proclamation ... cannot change any part of the common law, or statute law, or customs of the realm ...»[11]. Indeed, viewed historically the trend clearly supports the predominance of statute over the prerogative powers which accord-

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(7) Miller (2017), para. 55.

(8) Miller (2017), para. 64.

(9) See *Thoburn v Sunderland City Council* [2003] QB 151.

(10) Miller (2017), para. 83.

(11) (1611) 12 Co Rep 74.

ing to classic definitions are regarded as residual[12]. Later in the seventeenth century, after Charles I had been defeated by Parliament in the civil war and subsequently executed and then his younger son James II forced from the throne, this was confirmed in the *Bill of Rights* 1689. Under the conditions of constitutional monarchy accepted by William III and Mary I it was made explicit that: «the pretended power of suspending the laws and dispensing with laws by regal authority without consent of Parliament is illegal»[13]. This principle has since been supported by a line of significant case law. For example, in *A-G v De Keyser's Royal Hotel Ltd*[14] the government requisitioned a hotel in wartime under the Defence of the Realm Act and regulations, and then it sought to deny compensation available under the Defence Act 1842. The House of Lords held that the requisition and compensation were now governed by statute which superseded the prerogative power. In such circumstances the prerogative power was in abeyance in favour of the exercise of the statutory power.

In the much more recent *Fire Brigades Union case* Lord Brown-Wilkinson confirmed that:

«... it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament as expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme...»[15]. Professor Tom Poole argues convincingly that the containment of the prerogative reflects a clearly accepted principle: «The rules about prerogative and statute are rules about the institutional allocation of public power. They go to jurisdiction or competence and do not rely on judicial assessments of reasonableness, legitimate expectation or the like»[16].

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(12) See Miller (2017), para. 41; C. MUNRO, *Studies in Constitutional Law,* 2nd ed., London, Butterworths, 1999), p. 257.

(13) Miller (2016), para. 99.

(14) [1920] AC 508.

(15) *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 at 552E.

(16) T. POOLE, *Losing our Religion? Public Law and Brexit*, UK Const L Blog (2 Dec 2016).

Returning to the case, the claimant in *Miller* had argued that a process would commence through the exercise of the prerogative which would, in effect, undermine the ECA 1972 and other statutes relating to the EU, while the Secretary of State attempted to argue that the prerogative power to withdraw from treaties had been unaffected by the ECA. Further, Parliament enacted the EU Referendum Act on the clear understanding that a Brexit vote would result in this outcome. At first instance, the Divisional Court in unanimously finding in favour of *Miller* were of the view that «... Where background constitutional principles are strong, there is a presumption that Parliament intended to legislate in conformity with them and not to undermine them»[17]. In light of the drafting of ECA 1972 section 2 the Court held that: «Parliament intended to legislate by that Act so as to introduce EU law into domestic law [and create rights] in such a way that this could not be undone by exercise of Crown prerogative power»[18]. The Supreme Court confirmed that: «In light of the terms and effect of the 1972 Act, and subject to considering the effect of subsequent legislation and events, the prerogative could not be invoked by ministers to justify giving Notice: ministers require the authority of legislation before they can take that course»[19].

Reviewing *Miller* in strict legal terms, the granting of a remedy backedup by impeccable legal reasoning might be regarded as a case which provides clarification of an important constitutional question. The sovereignty of Parliament over the prerogative powers of the executive has been elaborated by a challenge using the judicial review procedure to uphold the rule of law, but the decision has been turned into a testing ground for not only the core principles of the constitution, but also the institutions which uphold them. The claimants and the courts stressed the challenge is about the legality of the governmental action under the prerogative, not about whether Brexit itself should take place. Nevertheless, some advocates of Brexit, aided by elements of the media[20],

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(17) Miller (2016), para. 82.

(18) Miller (2016), para. 92.

(19) Miller (2017), para. 101.

(20) The headline on the front page of Daily Mail on 4th November 2016 featured photographs

projected the original Divisional Court decision as judicial interference with a legitimate political process which had been set in train by the referendum. The response in headlines and articles included personalized attacks on the credibility of individual judges[21], threats to mount protests outside the Supreme Court and calls to change the system of judicial appointments. The Prime Minister and Lord Chancellor/Secretary of State for Justice responded with an acknowledgment of the importance of judicial independence as a central part of the UK constitution but this was qualified by also defending the freedom of the press. A number of constitutional commentators were concerned to point out that the institutional integrity of the courts depends upon responsible reporting by the press and broadcast media[22]. More decisive condemnation of intemperate attacks on individual judges was called for to resist such an assault on judicial independence[23].

In light of its importance the Miller case on final appeal was considered by all 11 Supreme Court justices. The upshot is that the Supreme Court upheld the decision of the Divisional Court on the limits of the exercise of the prerogative. Although the prerogative to negotiate treaties remains, its exercise would have conflicted with the European Communities Act 1972 and resulted in the loss of the claimant's rights available under legislation relating to the EU. In terms of constitutional process, the impact of this litigation not only highlights the importance of parliamentary sovereignty as a constitutional principle, but it has also

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of the judges in their wigs and robes: In giant letters *Enemies of the People* followed by *Fury over out of touch judges who defied 17.4 Brexit voters and could trigger constitutional crisis.*

(21) The case was decided by distinguished judicial figures: the Lord Chief Justice (Head of the Judiciary), Master of the Rolls (Next most senior judge) and a senior Lord Justice of Appeal.

(22) See *e.g.* "So far as the press is concerned, the reaction to the *Miller* decision was rabid – attacking not only the litigants but also the judges who were pilloried on the front pages of what have become little more than propaganda sheets for UKIP.' K. EWING, *A Review of the Miller Decision*, UK Const L Blog (10 Nov 2016); «By stirring up popular anger to pressure judges into deciding a case contrary to law to benefit the executive at the expense of Parliament, the reaction to *Miller* presents a grave threat to our constitutional order ...» N. BARBER, J. KING, *Responding to Miller*, UK Const L Blog 7 Nov 2016.

(23) Under s.3 of the Constitutional Reform Act 2005 ministers «... must uphold the continued independence of the judiciary'. See *e.g.* http://www.bbc.co.uk/news/uk-37889197 *Theresa May backs judges' independence after Brexit ruling.*

had the effect of subjecting the government's Brexit strategy to parliamentary oversight. The immediate effect was for legislation to be introduced to sanction the triggering of the Brexit[24]. The bill was subject to debate in both Houses with amendments passed in the House of Lords notwithstanding government opposition. Further, on the day following the judgment, the PM announced the government's intention to publish a white paper outlining its Brexit plans (discussed below)[25].

4. *The Impact of Brexit on Devolution*

At one level the institutions established as part of the devolution arrangements have been deployed since June 2016 to provide a forum for official discussions between the UK government and the devolved administrations in developing a common negotiating position. The Joint Ministerial Council (JMC) comprising the leaders of the UK government and the devolved administrations meets on a regular basis, sometimes in plenary sessions, chaired by the Prime Minister[26]. The JMC has met in plenary on more than one occasion following the referendum. At the first meeting a sub-committee entitled the Joint Ministerial Committee on EU negotiations JMC (EN) was set up chaired by the Secretary of State for Exiting the EU. In the run up to Brexit the JMC(EN) met on a monthly basis. The UK government claims to act in the interest of the whole of the UK and it participates in the consultative process set in place as part of the devolution framework[27]. Given the priorities set out in the discussion papers and statements published in Edinburgh, Cardiff and Belfast there is very little prospect of reaching an agreed negotiating position which is acceptable to all parts of the UK[28].

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(24) European Union (notification of withdrawal) bill 2017.

(25) Hansard, Theresa May Q2 in response to Chris Phelp, 25 January 2017. *The United Kingdom's exit from and new partnership with the European Union,* February 2017, Cm 9417.

(26) *The United Kingdom's exit from and new partnership with the European Union*, Cm 9417, February 2017, part 3 Strengthening the Union.

(27) See Memorandum of Understanding and Supplementary Agreements, March 2010, Part D: Concordat on International Relations.

(28) *Scotland's Place in Europe*, Scottish Government, December 2016, 'Securing Wales' Future', Welsh Government, January 2017, *Foster and McGuiness comment following Joint Ministerial*

4.1 *Scotland and Brexit*

In terms of future prospects the result of the Brexit referendum presents a very real threat to the integrity of the United Kingdom. Turning first to Scotland, the Scottish electorate voted in favour of remain by a large margin with 62% favouring "remain", and 38% supporting "leave". During the passage of the Referendum Bill through Parliament the Scottish Nationalists had unsuccessfully attempted to table amendments to require a majority in each part of the United Kingdom before Brexit could be activated. In the campaign which preceded the 2014 Independence Referendum in Scotland the SNP had advocated application for EU membership as a central plank of its plan for an independent Scotland. It was a policy that faced criticism as being difficult to implement, given that European nations such as Spain, who themselves faced demands for secession, were likely to oppose such an application. However, the future economic prospects for Scotland outside of the European Union would have been uncertain. Since 2014 there has been a further downturn in the economic prospects for an independent Scotland. This deterioration has been largely brought about by increased borrowing by the Scottish Government[29] and the sharp drop in the price of oil. A relatively high oil price is needed to justify the high cost of extraction of North Sea oil. In the wake of the Brexit referendum in the autumn of 2016 the SNP launched a national consultation in Scotland as a prelude to independence but as the UK negotiating position veered towards a form of "Hard Brexit" the Scottish First minister, Nicola Sturgeon, responded by calling for an immediate second referendum on Scottish independence[30]. However, the situation changed significantly following the 2017 General Election. In Scotland the result was an unexpected setback for the SNP. As well as losing 21 seats, their share of the popular vote in Scotland fell back from nearly 50% to 36.9%. The Conservatives gained

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Committee meeting, 24 October, 2016. chech.

(29) Scotland Act 2016, Section 20.

(30) Under the Scotland Act 1998 the Westminster government would have to agree to any such referendum.

12 seats, Labour 6 seats and the Libdems 3 seats[31]. Under the charismatic leadership of the strongly pro-union Ruth Davidson, this was the first time for more than 50 years that the Conservatives have figured as an electoral force in Scotland at a general election[32]. Premature calls for a second independence referendum before the outcome of Brexit negotiations were known, coupled with voter fatigue after the protracted and divisive campaign leading up to the Scottish Independence Referendum in 2014, might, at least partly, explain this decline in support for the SNP. The degree of economic uncertainty referred to above was another contributory factor, but given the strength of the "remain" lobby in Scotland the Scottish Conservative MPs travelling down to Westminster also fought the election offering a softer form of Brexit[33]. Nevertheless, the SNP still regards independence as being its ultimate goal. There is no immediate prospect of a second independence referendum following the relatively poor showing of the SNP in the 2017 general election. The timing will be crucial because failure to win a majority in a second independence vote would kill the issue for a generation. While there may be no immediate prospect of Scottish independence, Nicola Sturgeon, the Scottish First Minister, would like to achieve a special deal for Scotland, allowing it to remain a member of the single market as part of the Brexit negotiations[34]. The chances of achieving such a deal on the single market are remote, given that it would set a precedent for Catalonia and other European territories with independence aspirations within Europe.

The Scottish Government stress that "Hard Brexit" would not only severely damage Scotland's economic, social and cultural interests but that it will

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(31) http://www.bbc.co.uk/news/uk-scotland-scotland-politics-40246330.

(32) https://yougov.co.uk/news/2016/09/01/davidson-now-more-popular-sturgeon-scotland/, 46% Yes versus 54% No.

(33) «We want to agree a deep and special partnership with the European Union», in *Forward Together: Our Plan for a Stronger Scotland, A Stronger Britain and a Prosperous Future*, *The Scottish Conservative and Unionist Party Manifesto,* 2017.

(34) «First ministers clash over separate Brexit deal for Scotland», *The Guardian*, 25th November 2016.

also hit jobs and living standards[35]. For example, Scotland benefits from migration and would lose EU funding which would be a blow to the university sector. However, it should be remembered that the Scottish, Northern Irish and Welsh governments will not be officially represented at the Brexit talks[36]. As will be apparent from the procedure under the JMC referred to above, any deal keeping Scotland as part of the UK within the single market will be subject to the negotiations conducted by the UK government. In view of this position, the practicality of achieving a special deal for Scotland remains questionable. In the first place, if the remainder of the United Kingdom were outside the single market there would have to be customs borders set up between England and Scotland[37]. In the second place, as stated above, there is no indication that a special deal for the devolved parts of the UK would be acceptable to the EU.

Certain constitutional implications of Brexit post-devolution arise through the law-making relationship between Westminster and the devolved legislatures. It has been suggested that the devolved Parliament in Scotland, and the Assemblies in Northern Ireland and Wales, might have been able to disrupt the Brexit process because of the so-called Sewel convention[38]. As a result of devolution each law-making body has the capacity to pass laws concerning policy areas falling within its competence. A number of these policy areas coincide with the subject matter of EU law. Although the Westminster Parliament retains sovereignty post-devolution, the government minister, Lord Sewel, stated in the House of Lords during the passage of the Scotland Bill (1998) that he expected a mechanism to be established to allow the Scottish Parliament (SP) to indicate whether or not it gave its consent to Westminster legislating for Scotland concerning provisions where overlap existed.

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(35) See *Scotland's Place in Europe, Scottish Government*, Edinburgh, December 2016.

(36) J. MATHER, *The Impact of European integration,* in M. O'NEILL (ed), *Devolution and British Politics,* London, Longman, 2004, 272 ff.

(37) «Nicola Sturgeon Brexit demand that Scotland remains in EU single market if UK leaves is "impossible"», *The Telegraph*, 14th October 2016.

(38) See *e.g.* «The role of the devolved legislatures in implementing the withdrawal agreement», in *The process of withdrawing from the European Union*, House of Lords, European Union Committee, 11th Report of Session 2015-16, HL Paper 138, p. 19.

The assumption at the heart of this convention was that the Westminster Parliament would not normally legislate with regard to devolved matters without the consent of the devolved legislature[39]. The practice within the Scottish Parliament and the NI and Welsh Assemblies requiring the passage of legislative consent motions is also referred to as the Sewel Convention. In general, (Sewel) legislative consent motions have been used for minor provisions in Westminster Bills[40] but, as mentioned above, it was suggested by some politicians that the Sewel convention could be employed as a means of exercising a partial veto over Brexit, given that the effects of withdrawal would undoubtedly impact hard on the areas devolved to the Scottish Parliament under the Scotland Act 1998. Although the convention has been given additional legal recognition under the Scotland Act 2016[41], following the Supreme Court ruling in *Miller* it is clear that the need to obtain consent is not equivalent to giving the Sp (or Welsh and NI Assemblies) a veto over triggering Brexit, or over any repeal legislation which follows in its wake. While conventions are of crucial importance as part of the uncodified Uk constitution they are not enforceable in the courts[42]. As the Supreme Court observed in refusing to give legal effect to the Sewel Convention, «Judges ... are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question ... but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world»[43].

This argument had been based on an assumption that any such legisla-

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(39) The so called Sewel convention is reiterated in the Memorandum of Understanding (Cm. 4806 2000, para. 13) and in section 28(7) of the Scotland Act 1998 (see below).

(40) See B. Crawford, *Ten Years of Devolution,* in *Parliamentary Affairs,* Vol 63, No 1, 2010, pp. 89-97, p. 94.

(41) Section 2 of the Scotland Act 2016 adds to section 28 of the Scotland Act 1998 'But it is recognized that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'. See also section 2 of the Wales Act 2017.

(42) See P. Leyland, *Constitutional Conventions and the preservation of the spirit of the British Constitution,* in *Diritto Pubblico*, Maggio-Agosto 2014, 411 at 417 and pp. 422 ff.

(43) *R (Miller) v SS for Exiting the European Union* [2017] UKSC 5, para. 146.

tion as it affects Scotland normally requires not only consultation (which needs to take place under the Sewel Convention (discussed above) but ultimately the formal consent of the Scottish Parliament[44]. This was a tenuous argument to rely upon since section 28 (7) of the Scotland Act 1998 states that: «This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland». Furthermore, section 57 of the Act provides that «... any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes of section 2(2) of the European Communities Act 1972». Furthermore, the Scotland Act specifically lists EU matters and the negotiation of treaties as subjects reserved for Westminster[45]. In other words, notwithstanding the Sewel convention the sovereignty of the Westminster Parliament remains intact. Indeed, the main thrust of the *Miller* judgment is to recognise the fundamental importance of the principle of sovereignty by requiring legislation to trigger Brexit.

Nevertheless, the part of the judgment dealing with conventions is far from convincing and may even leave the door ajar for further legal challenges. This is because the provisions concerning legislative consent motions, although they are referred to as the Sewel convention, have been codified by Parliament in all the devolution legislation[46]. Beyond labelling the Sewel Convention as a "political convention" and stating that Parliament would have used other words to make the statutory provisions binding, the Supreme Court does not explain with reference to the wider constitutional context, including other legislation which refers to conventions[47], why it attributes unenforceable status to the provisions regarding

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(44) Scotland Act 1998, Section 28(8) «But it is recognized that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament».

(45) See SA 1998, Schedule 5, 7(1) International relations, including relations with territories outside the United Kingdom, the European Communities (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

(46) For example, see the Scotland Act 1998 section 28((8) and Scotland Act 2016, section 2.

(47) The provisions regarding 'Money Bills' in section 1 of the Parliament Act 1911.

legislative consent motions[48]. Given the claw back provisions (e.g. under SA 1998 section 28 (7) referred to above) allowing Westminster to continue to make laws for the devolved parts of the United Kingdom[49], if this key convention is not strictly observed, it not only denies a right to consultation at devolved level, but it also potentially allows the government of the day to determine the limits of devolution whenever it feels like it.

4.2 *The Implications of Brexit for Northern Ireland and the Republic of Ireland*

We turn next to Northern Ireland, which also voted in the Brexit referendum for remain but by a narrower margin than in Scotland[50]. At the time of writing, as set out briefly below, the political situation in Northern Ireland is extremely delicate and the result of the 2017 general election increases significantly the sensitivity of the situation.

First, we need to recognise that, in Northern Ireland there are special issues which arise, in part, because the devolution arrangements are fashioned from a negotiated settlement ending three decades of armed struggle; and, in part, this is because withdrawal from the EU by the United Kingdom will inevitably impact on the relationship between the United Kingdom and the Republic of Ireland. For example, it needs to be remembered that:

«The 1998 Good Friday Agreement also included a binding obligation to give effect to the choice of a majority in Northern Ireland to leave the UK. Given that Northern Ireland had been created in order to accommodate the will of a majority in a particular region of Ireland to remain in the UK, it is not surprising that the continuance of such a majority was seen as necessary for the status of Northern Ireland within the Union to be maintained»[51]. But it is clear that a referendum within Northern Ireland as a prelude to reuniting Ireland would almost certainly

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(48) Miller (2017), para. 148.

(49) See *e.g.* Scotland Act 1998, section 28(7) discussed above.

(50) 55.8% voted remain against 44.2% voting leave.

(51) R. McCrea, *Is the United Kingdom a Mini-EU?,* UK Const L Blog 18 July 2016. Section 1(1) of the Northern Ireland Peace Agreement enacted as section 1 of the NIA 1998.

wreck the current peace settlement altogether (and is therefore unlikely to happen). The point to note is that any change to the constitution of Northern Ireland as set out in the legislation[52] requires the consent of the people of Northern Ireland and that withdrawal from the European Union constitutes such a change[53]. Although it is worth mentioning that the UK Supreme Court in the *Miller Case* did not accept that triggering Brexit necessarily affects the legal right to self-determination which underpins the entire agreement[54].

Second, the acceptance of devolution in Northern Ireland was founded upon supra-national agreements involving the Republic of Ireland[55] and these agreements relied upon the common EU membership of the United Kingdom and the Republic of Ireland. In consequence, Brexit has the potential to undermine the Good Friday accord and the terms of the Northern Ireland Act 1998 itself which is, in effect, a constitution for Northern Ireland. For example, the North/South Ministerial Council representing the government of the Republic of Ireland and the government of Northern Ireland at ministerial level was established to develop co-operation on a cross border all-island basis[56]. As Professor McCrudden explains «The North/South Ministerial Council and the Northern Ireland Assembly were (and are still) mutually dependent; one cannot successfully function without the other»[57]. The object according to the agreement was to develop consultation, co-operation and action within the island of Ireland on matters of mutu-

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(52) Northern Ireland Act 1998, section 1.

(53) As part of the *Miller* case discussed above it was argued before the UK Supreme Court that the effect of NIA read together with Belfast Agreement and the British Irish agreement is to require an Act of Parliament prior to triggering Brexit. See *Re Court of Appeal (NI) In the matter of an application by Raymond McCord* UKSC 2016/0205; See *Ref AG for NI – In the matter of an application by Agnew* UKSC 2016/0201.

(54) *R (Miller) v SS for Exiting the European Union* [2017] UKSC 5, paras 134 and 135. See section 1 of the Northern Ireland Act 1998.

(55) The Good Friday Agreement was subsequently enacted as the Northern Ireland Act 1998.

(56) Northern Ireland Act 1998, section 52.

(57) C. MCCRUDDEN, *Northern Ireland and the British Constitution since the Belfast Agreement*, in J. JOWELL, D. OLIVER (eds.), *The Changing Constitution,* 6th ed., Oxford, Oxford University Press, 2007, 241.

al interest within the competence of the administrations. This currently includes the input by Northern Ireland Ministers to national policy making in the domain of Eu law and policy; the consideration of the Eu dimension in the North/South Council; and approaches to Eu issues in the British/Irish Council; it also includes cross-border policing and criminal justice co-operation[58].

In addition, the Northern Ireland Act 1998 casts in legal form many of the provisions of the Good Friday Agreement. In turn, this agreement is tied into Human Rights protection under the Human Rights Act 1998 and also rights protected under EU law. Moreover, the agreement specifically addresses issues to do with discrimination, equal opportunity and employment law. For instance, it might be argued that the constitutional equality guarantee under s 75 of the Northern Ireland Act imposing an obligation to promote good relations might also be affected by the implementation of Brexit[59]. It can therefore be anticipated that virtually any Brexit agreement is destined to undermine the functioning of crucial aspects of the processes which have been set in place[60].

Third, the relationship between the United Kingdom and the Republic of Ireland is called into question by Brexit. One of the foundations of the entire European project is the absence of any control relating to free movement. This principle applies over the land border Northern Ireland shares with the Republic of Ireland. As one commentator puts it: «... implicit in the Agreement is the idea of Eu citizenship across the island of Ireland, with all that implies in relation to freedom of movement and of trade. The political significance of an open border in Ireland is obvi-

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(58) The British Irish Council also established under the Good Friday Agreement and Nia 1998 is intended «to promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands». Membership was to comprise of representatives of the British and Irish Governments, devolved institutions in Northern Ireland, Scotland and Wales, when established and, if appropriate, elsewhere in the United Kingdom together with representatives of the Isle of Man and the Channel Islands».

(59) This point was discussed as one of the arguments in the *Agnew* Case. See *Ref AG for NI – In the matter of an application by Agnew Uksc 2016/0201.*

(60) The special relationship with the Irish Republic including the importance of open borders is referred to in section 4 of the White Paper. See 'The United Kingdom's exit from and new partnership with the European Union' Cm 9417, February 2017, pp. 21 ff.

ous to all who live on the island, and perhaps is not sufficiently remembered elsewhere in these islands»[61].

Turning to assess the situation in terms of the current political crisis, the devolved government in Belfast collapsed in December 2016 following accusations of impropriety against the DUP leader and First Minister, Arlene Foster over a failed green energy incentive scheme. Her refusal to take responsibility for this failure and resign triggered an election on 2 March 2017. There was a complex spread of voting preferences between the parties, but for the first time since the launch of devolution in 1998 unionist parties failed to secure a clear majority of seats in the assembly[62]. A lack of agreement between the main parties on controversial issues, such as a the legacy of "the troubles", an Irish Language Act, the Bill of Rights and marriage equality, has, to date, prevented the resumption of devolved power sharing after the election and this, in turn, raises the possibility of a return to direct rule from Westminster.

Against this background the General Election result in June 2017 compounded the NI position further. This is because, as noted earlier, it produced a hung Parliament and any arrangement between the Conservative government, and the 10 DUP MPs elected to the House of Commons to secure a majority for the Conservatives, could potentially undermine the peace process. This is because the UK government and the Irish Government are required to act as impartial co-guarantors of the Good Friday Agreement which has just been discussed. In the words of a leading SDLP politician (also voiced by Sinn Fein) after the election, the influence of the DUP on «the British government is a cause for deep concern that must be addressed to assure the public and political parties of the independence of the talks process [intended to lead to the restoration of power sharing and he also added]. ... The Irish government will be critical to that and they should reassert their role as co-guarantors of the agreement»[63].

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(61) K. CAMPBELL, *Sand in the Gearbox: Devolution and Brexit*, *UK Const Blog,* 5 Sept 2016.

(62) The hard line unionist DUP with 28 seats and hard line Republican Sinn Fein with 27 seats emerged as the largest parties while the Ulster Unionists 10 seats, Social Democratic and Labour Party 12 seats and Alliance 8 seats were the next largest parties.

(63) SDLP leader, Column Eastwood, *The Guardian*, 15th June 2017.

Obviously, it is not possible to anticipate the way events will unfold in Northern Ireland as the Brexit process begins. This is particularly difficult in the light of the discernible contradictions in the positions taken by the main actors. In a positive sense the DUP claims to strongly support the resumption of devolution, and it is committed to furthering socio-economic policies to promote jobs, healthcare and infrastructural investment in Northern Ireland. However, the DUP was strongly in favour of Brexit and also draws support in Northern Ireland for its "real respect" agenda that seeks to preserve the Ulster-Scots heritage and promote the public expression of Orangeism through parades and displaying symbols of Britishness. The DUP also refuses to endorse human rights norms accepted throughout the remainder of the UK. In particular, the DUP opposes same sex marriage and is anti-abortion. One DUP MP is a climate change denier, another believes in teaching creationism in schools. With a deal in prospect between the Conservative Party and the DUP under discussion the openly gay Scottish Conservative leader, Ruth Davidson, sought assurances from the Prime Minister that Lesbian and Gay rights would not be compromised. On the other hand, the DUP in common with the Republican SDLP and Sinn Fein is resistant to a "Hard Brexit" which involves imposing border controls with the Republic of Ireland[64]. Moreover, the government of the Irish Republic has expressed support for maintaining the *status quo* and avoiding a hard border[65]. The introduction of a hard border would not only conflict with the Good Friday Agreement but it would have profound implications for the trading position between the UK and the Irish Republic[66]. Despite the difficult issues it raises, there is strong support throughout Ireland for retaining a common travel area. However, the survival of an entirely open border with another EU nation (the Irish Republic) conflicts with one of the prime motives of the Eurosceptic ad-

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(64) «Frictionless border with Irish Republic assisting those working or travelling in the other jurisdictions.». Also committed to: «Safeguarding the rights of British citizens in the EU and those from member States living here». Standing Strong for Northern Ireland, DUP, Manifesto, 2017, http://www.mydup.com/publications/view/2017-westminster-manifesto.

(65) 'Irish Republic signals support for UK plan to avoid post-Brexit "Hard Border", *The Guardian*, 10th October 2016.

(66) Britain is Ireland's largest export partner with 1.2 billion a week traded between the two countries. Many citizens from the Republic shop in Northern Ireland.

vocates of Brexit, namely, to gain control over the UK's borders. Given this divergence in view reflected in the Irish position, any Conservative partnership with the DUP is likely to moderate the negotiating position of the Conservative government on this crucial issue.

As in Scotland the need for (Sewel) legislative consent motions in respect to the effect of a Great Repeal Bill (or any other comparable legislation) on Northern Ireland reflects the wider principle of consent which is now a feature of the UK constitution since the introduction of the current phase of devolution[67]. There is no indication how the question of consultation and consent, other than through the JMC, might be addressed as part of the Brexit process of negotiation[68]. However, according to the White Paper[69] any Great Repeal Bill will deal with *transferred matters* and make changes to the *powers of devolved Ministers* and of the *devolved legislature* (such an impact is bound to be the case for any repeal bill). Under the NI Assembly's Standing Orders any one of these devolved matters on its own would certainly require a (Sewel) legislative consent motion (discussed above). By doing so, this process might introduce further uncertainty as to the outcome following consultation at the devolved level. The suspension of devolution in NI and return to direct rule from Westminster could be used by the Westminster Government to circumvent the need to obtain legislative consent for any Great Repeal Bill or other Brexit enabling legislation[70]. But such an outcome would be highly provocative from the standpoint of the nationalist Sinn Fein and SDLP, and, according to their own pronouncements, the DUP are anxious to see the restoration of devolution in Northern Ireland.

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(67) Consultation is now an integral part of constitutional practice. See eg B. WINETROBE, *A Partnership of Parliaments? Scottish Law Making under the Sewel Convention at Westminster and Holyrood*, in R. HAZELL, R. RAWLINGS (eds.), *Devolution, Law Making and the Constitution* (Exeter, Imprint Academic 2005) but the Sewel Convention has not operated in precisely the same way in Northern Ireland. See J. MORISON, G. ANTHONY, *Here, There, and (Maybe) Here Again*, in R. HAZELL, R. RAWLINGS (eds.), *Devolution, Law Making and the Constitution* (Exeter, Imprint Academic 2005), p. 178.

(68) See C. HARVEY, *Complex Constitutionalism in a Pluralist UK*, *UK Const L Blog* (2th July 2016).

(69) The Great Repeal Bill: White Paper, 30th March 2017, Cm 9446.

(70) C. HARVEY, D. HOLDER, *The Great Repeal Bill and the Good Friday Agreement – Cementing a Stalemate or Constitutional Collision Course?, UK Const L Blog* (6th June 2017).

5. The Great Repeal Bill: Decoupling and the Multi-Layered Constitution

The starting point in approaching the question of disengagement from the EU is to recognise the complexity of the current multi-layered constitution[71]. Although the proposal for a Great Repeal Bill was first published before the 2017 general election, existing links with Europe cannot easily be severed because of the implications which cut across layers of government and of governance. The concept of the *multi-layered* constitution which recognises that the constitutional architecture of the United Kingdom operates on a vertical and a horizontal axis can contribute to understanding the impact of Brexit[72]. Viewed vertically from a top-down perspective there is a widely recognised system of multi-levelled governance[73] which means that power (both legislative and political) has been spread away from the Westminster Parliament[74]. The *locus* of power has been channelled "upwards" to the European Union and "downwards" to devolved legislatures in Scotland, Wales and Northern Ireland[75].

On the other hand, the horizontal axis provides insight into the way power is actually exercised and regulated as part of what is here termed a "multi-layered constitution". Laws not only originate from the EU, the Westminster Parliament or devolved parliaments and assemblies, but at the same time policy delivery involves a greatly increased interface between the levels of government and between the public sector and the private sector. The extensive shift towards contracting out and privati-

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(71) See N. BAMFORTH, P. LEYLAND, chapter 1, *Public Law in a Multi-Layered Constitution*, in N. BAMFORTH, P. LEYLAND (eds.), *Public Law in a Multi-Layered Constitution,* Oxford, Hart Publishing, 2003.

(72) F. MAYER, *Multi-Layered and multi-levelled? Public law architecture for the 21st Century' European Law Books* 3 March 2007; Walter Hallstein-Institut für Europäisches Verfassungsrecht Paper 5/06 (2006), 10.

(73) I. PERNICE, *Methods of Dividing and Controlling Competencies*, in M. ANDENAS, J. USHER (eds.) *The Treaty of Nice and Beyond: Enlargement and European Reform*, Oxford, Hart Publishing, 2003, pp. 137 ff.

(74) M. O'NEILL, *Great Britain from Dicey to Devolution*, *Parliamentary, Affairs* Vol 53, NO. 1, Jan 2000, 69-96.

(75) See N. BURROWS, *Devolution,* London, Sweet and Maxwell, 2000.

sation has meant that public services are no longer routinely delivered by public bodies directly[76]. Central government, devolved government and local government rely upon the private sector to carry out functions that were previously performed exclusively 'in house' by governmental bodies. The list is extensive, ranging from hospital services, to street cleaning and refuse collection, but many of the companies discharging these functions are multi-national enterprises[77]. Alongside this trend, industries and services, including the public utilities of electricity, gas and water and rail in the transport sector which were previously under State control, have been privatised and subjected to statutory regulation[78]. In turn, these regimes of regulation are frequently tied into community regulation[79]. Indeed, regulation is at the core of EU policy-making and the pace of burgeoning regulation was set out.

Clearly, the trend towards multi-levelled and multi-layered government is not a phenomenon only confined to the United Kingdom. From a wider European perspective, it is obvious that the prevalence of supra-national and sub-national levels of government has meant that, in a formal sense, multi-levelled government and multi-layered governance (explained below) has become a shared characteristic of many nations forming the EU[80]. Of course, it is envisaged that the legal effect of Brexit will be withdrawal from the institutional framework of the EU and its capacity to make laws, and, at the same time, the removal of the jurisdiction of the European Court of Justice in interpreting and enforcing the law relating to the EU in the UK. However the strands of multi-layered governance permeating these layers will remain crucial. As Malone

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(76) See *e.g.* the Local Government Act 1999.

(77) Veolia is one such multi-national.

(78) P. LEYLAND, *UK Utility Regulation in an Age of Governance*, in N. BAMFORTH, P. LEYLAND (eds.), *Public Law in a Multi-Layered Constitution,* Oxford, Hart Publishing, 2003, pp. 202 ff.

(79) See *e.g.* Council Directive (EC) 2009/72 concerning common rules for the internal market in electricity, [2009] OJ L211/55, art 35(40); Council Directive (EC) 2009/73 concerning common rules for the internal market in natural gas [2009] OJ L211/94, art 39(4). For more detailed discussion see C. GRAHAM *Regulating Public Utilities: A Constitutional Approach* (Oxford: Hart Publishing, 2000), pp. 118 ff.

(80) See N. BERNARD, *Multilevel Governance in the European Union*, (The Hague, Kluwer, 2002).

points out in the field of law and regulation: «In the two decades from 1967 to 1987 when the Single European Act finally recognised the authority of the community to legislate in [the area of environmental protection], almost 200 directives, regulations and decisions were introduced by the Commission ... The case of environmental regulation is particularly striking, partly because of the political salience of environmental issues[81], but it is by no means unique. The volume and depth of community regulation in the areas of consumer product safety, medical drug testing, banking and financial services, and of course competition law is hardly less impressive»[82].

The complexity of delivering Brexit will be particularly acute because many industries have been made subject to multifarious forms of statutory regulation. This regulation cuts across national boundaries and cuts across the public private divide. As Professor Prosser recently pointed out: «The role of independent regulation is regularly supervised at European level. ... Because of [the implications of EU directives], co-operation between various regulatory authorities in Europe has become increasingly important, and it is these EC law requirements which are the most important for the spread of independent regulatory authorities beyond the UK ...»[83]. The implications of Brexit will be profound in the field of regulation as «Many EU laws make references to EU agencies and institutions setting standards or performing functions in relation to EU law»[84]. Such laws concerning, for example, the environment or medicines would almost certainly need to be replaced by domestic layers of regulation.

Having outlined the scale of the problem, it is perhaps unsurprising to observe that no detailed plans have been formulated so far by the government, but in response to political pressure, as already noted, they

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(81) R. MACRORY, *Environmental Regulation as an Instrument of Constitutional Change,* in J. JOWELL, D. OLIVER (eds.), *The Changing Constitution,* 7th edn., Oxford, Oxford UP, 2015, pp. 300 ff.

(82) G. MALONE, *The Rise of the Regulatory State in Europe*, (1994) 17 *West European Politics*, 77-101 at pp. 85-86.

(83) T. PROSSER, *Regulation and Legitimacy*, in J. JOWELL, D. OLIVER (eds.), *The Changing Constitution,* 7thedn, Oxford, Oxford UP, 2011, p. 317.

(84) S. DOUGLAS-SCOTT, *The "Great Repeal Bill": Constitutional Chaos and the Constitutional Crisis?*, UK Const L Blog (10 Oct 2016).

published a White Paper[85] which may be revised following the failure of the Conservative Party to win a majority in the 2017 General Election. In view of the challenges ahead it may be assumed that the main effect of any "Great Repeal Bill"/Act would be to repeal the ECA 1972 but also to continue to recognize the vast bulk of EU law which underpins current domestic law[86]. «This explains the intention to transpose, wholesale, all of the directly applicable EU law that applies in the UK on Brexit day»[87] and also where necessary rely on continuance clauses[88]. To do otherwise would be a recipe for immediate chaos. Rather, the principal concern over any such "Great Repeal Bill" will relate to the way Parliament delegates power under the domestic legislation to allow European legislation to be repealed on a selective basis[89]. It is ironic that if such power were to be given to ministers without adequate parliamentary scrutiny it would contradict the taking back of control promised by the advocates of Brexit in the referendum campaign. European Union law performs a crucial role not only in regulating many fields as noted above, but also in protecting rights, including the employment rights of workers. And so, will this legislation be drafted with an all embracing "Henry VIII clause"[90] empowering ministers to selectively dismantle provisions of this kind? It is not possible to provide an answer at the time of writing but the Constitution Committee of the House points out: «The "Great Repeal Bill" ... is likely to involve a massive transfer of legisla-

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(85) *The United Kingdom's exit from and new partnership with the European Union* Cm 9417, February 2017.

(86) The White Paper refers to three primary elements: repeal of the European Communities Act 1972 and return of power to UK politicians and institutions; preserve EU law where it stands at the moment before the UK leave the EU; enable changes to be made by secondary legislation to the laws after leaving.

(87) J SIMSON CAIRD *Legislating for Brexit: the Great Repeal bill*, House of Commons Library, Briefing Paper, Number 7793, 21th November 2016, pp. 22 ff.

(88) S. DOUGLAS-SCOTT, *The Great Repeal Bill: Constitutional Chaos and Constitutional Theory, UK Constitutional Law Association blog*, 10th October 2016.

(89) See H. WADE, C. FORSYTH, *Administrative Law,* 11th edn, Oxford, Oxford University Press, pp. 725 ff.

(90) These are clauses added to a bill to enable the government to repeal or amend legislation by subordinate legislation without further parliamentary scrutiny.

tive competence from Parliament to Government. This raises constitutional concerns of a fundamental nature, concerning as it does the appropriate balance of power between the legislature and the executive»[91]. The 2017 General Election result is very significant as the constitutional mechanics of Brexit kick in. This is because, as mentioned above, the election has produced a hung Parliament presenting difficulties for the government in getting legislative measures passed by the House of Commons, but it also means that the government only has a bare majority on Parliamentary Committees. In turn, this reduces the ability of the governing party to depend on committees approving proposed changes to legislation without amendments and increases the likelihood of effective oversight from the relevant select committees[92]. Both Houses of Parliament have set up committees dedicated to scrutinising European legislation[93] and the House of Commons has recently established an Exiting of the European Union Committee[94]. The EU Committee of the House of Lords has stressed that: «Parliament has a duty to scrutinise and hold the Government to account for decisions that will profoundly affect the United Kingdom. It will also be a vital forum for public debate and challenge, on the many issues that will arise in the course of negotiations»[95]. In sum, this outcome might restrict the use of Henry VIII clauses and ensure adequate scrutiny of powers under any Great Repeal legislation. The question of whether these committees can be adapted to cope effectively with the enormous demands of Brexit remains unclear.

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(91) See The *Great Repeal Bill* and delegated powers, House of Lords, *Select Committee on the Constitution*, 9th Report of Session 2016-17, HL 123, 39.

(92) Public Bill Committees of between 16-50 MPs examine legislation clause by clause at the committee stage while 20 Departmental Select Committees of 11-14 MPs hold the executive to account. In each parliamentary session the parties are represented on these committees in proportion to their strength in the House of Commons.

(93) House of Commons European Scrutiny Committee; European Union Select Committee of the House of Lords has sub-committees on Economic and Financial Affairs, Internal Market, Infrastructure and Employment, External Affairs, Agriculture, Fisheries, Environment and Energy, Justice, Institutions and Consumer Protection, Home Affairs, Health and Education

(94) See «The UK's negotiating objectives for its withdrawal from the EU», HC 815, December 2016.

(95) See «Brexit: parliamentary scrutiny, European Union Committee», 4th Report of Session 2016-17, 20 October, 2016, para. 7.

6. *Conclusion*

This discussion of the constitutional and legal implications has shown that the Brexit decision sets in train an unpredictable and potentially destructive tide of events which are not only testing the durability of the nation's political institutions, but also in the long run the integrity of the United Kingdom itself. The *Miller* case was an important part of a process which not only required legislation to be placed before Parliament but also prompted the government to publish a white paper outlining aspects of its Brexit strategy. On the devolution front, the Joint Ministerial Council provides an avenue for consultation on the terms of Brexit negotiations. The effect of a hard Brexit requiring border controls has the potential to cause a breakdown of devolution in Northern Ireland, and a second Scottish independence referendum remains a possibility if the divergence in expectations between the demands of the SNP and the UK negotiating position cannot be adequately reconciled. The commitment to Brexit has been confirmed with the triggering of Article 50 but the unexpectedly close result of the 2017 General Election demonstrates the degree to which public opinion remains divided on the issue, and the failure to gain a decisive endorsement from the electorate will undoubtedly impact on the negotiating stance of the UK government.