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Time for Brexit: a constitutional analysis on the role of UK Parliaments in the withdrawal process

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I N D E X

INTRODUCTION

«To improve is to change, so to be perfect is to have changed often»

Sir Winston Churchill - June 23, 1925.

The truth on what Winston Churchill said almost one century ago, can be found and contemplated also in what is happening today in the United Kingdom. "Change often" is an imperative able to resume the past of a nation like the UK. It has passed from being an Empire, the greatest one during the 18th and 19th century till the WWII, to being a great country ruled by constitutional monarchy. Westminster Parliament has always been the central point of this greatness and uniqueness, it is organized in two chambers, House of Lords and House of Commons, both bearing almost the same powers and functions. These two chambers respectively represent the monarchy side and population one. The Government of UK alternates its chief of Cabinet between Tories and Wings or Democrats and Conservatives. Nowadays, it is not clear how it can be intended the "change" announced by Churchill's thought. Rather than a transformation, what is happening today may be considered as a "back-to-the-origin", or "revolution", or "taboo", or "divorce".

The statement of PM Theresa May[1] can be the most appropriated explanation of the event, that is "Brexit means Brexit". As a response, President of European Commission Jean Claude Juncker affirmed that the UK «will need to prepare itself to be treated as a third country» because «the choice is to eat what's on the table or not come to the table at all[2]». Hence, if perfection for Churchill[3] was enclosed in being open to changes, today this new wind of variation cannot be considered as such, rather it takes with itself several issues and consequences which embrace different areas. To this

[1]Independent.com, *Theresa May said Brexit Means Brexit*, 2016: https://www.independent.co.uk/news/uk/politics/theresa-may-brexit-means-brexit-conservative-leadership-no-attempt-remain-inside-eu-leave-europe-a7130596.html.

[2] EU Press release, *Speech President Jean-Claude Juncker's State of the Union Address*, September 2018: «It is Brexit that risks making the border more visible in Northern Ireland. It is not the European Union», http://europa.eu/rapid/press-release_SPEECH-18-5808_en.htm.

[3] Theresa May wrote a letter to Donald Tusk the 29 March 2017. It will be explored better in Chapter 2. Here the direct link of the document: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf.

extent, all of these considerations have converged to one final reasoning: is it really convenient for the UK to leave the EU and become a third country as Juncker declared?

The work investigates on several issues associated to the Brexit procedure, starting from referendum in 2016, proceeding with the influence on the effectiveness of parliamentary sovereignty of Westminster, arriving to the European Withdrawal Agreement and all the problems with the triggering of article 50 TEU[4]. Furthermore, the elaborate will focus on the role of devolved legislatures and the effects of the procedure on their institutions. Particularly, there will be explored the problems concerning the Northern Ireland's and the Scotland's role from the perspective of the relevant devolved legislatures. Because Brexit is unprecedented episode and there are no filters to manage it easily, it must only be in mind that neither the Government, nor the Parliament have the right means to solve the issues quickly. Furthermore, the work is going to explore all these factors throughout a deep analysis of the roles performed by regional Parliaments, namely which is the level of influence of these Parliaments in the process. In the end, the elaborate tries to realise what kind of possible solutions can be held at the end of this process, if there will be a safe ground for all the parts involved or not.

The argument of thesis has been driven by curiosity. In such historical period, where EU's authority seems to lose ground and is running out of steam, this event would have seen as another cause and element confirming the doubt. Brexit is an event of constitutional scale which reached universal entity during these two years. Moreover, it is unprecedented and the key element that re-addressed agreement – such as Good Friday Agreement, Northern Ireland Act, Scotland Act, Wales Act, TEU and others will be under observation in the chapters –, historical and political issues (in particular Northern Ireland's). It is, also, an instrument used to verify how much British institutions are still conserving an incredible and complex legal doctrine, albeit codified constitution is missing and maybe it would have been beneficial to make the process more linear. Devolved legislature are, indeed, a singular aspect and maybe not so much explored which can be unintelligible if it is not sightseen. That is the characteristic feature of the work, keep focus not only to the process but especially to the effect and the role of devolved legislatures due to Brexit application.

Northern Ireland and Scotland in particular (without forget Wales) share similar destiny but lay out by different histories, politics and agreements in the end. However, the purpose is the same, preserving their authoritarian – albeit subordinated to Westminster – status in the best way they can. Notwithstanding, the Brexit tsunami was not welcomed by devolved legislatures – Northern Ireland and Scotland voted to remain within UK -, it has run over them without so much power of

[4] Art. 137 TEU: http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-European-union-and-comments/title-6-final-provisions/137-article-50.html.

intervention[5]. In conclusion, the final part of the thesis tries to guide the reader to wonder what will be the possible and desirable outline at the end of negotiations. The job selected some possible future situations: a final agreement between UK and EU; the withdrawing of UK without any deal; a second referendum in the UK; the revocation[6] of the request of withdrawing through art.50 TEU. The analysis of an unexplored, ongoing, complex and powerful argument, full of changes of plan, comparing to what are the effects and the roles of national Parliaments in the process, is the core of the thesis. For example, the triggering of article 50 by Theresa May was stopped thanks to Miller intervention, and it will be explained in chapter 1 and 2 - and turn of events – as the recent appeal of Court of Session in Scotland to the ECJ asking a proposal of revocation of the request of withdrawing. All of them seem to be viable. Although, in October 2018 there will be the final decision on the issue by EU Council, or maybe there will be another stalemate without making step further.

The realization of the work has been built upon screening of reports, papers, articles of newspaper, on-line guides, information from videos – TLDR News UK[7] realized a series of videos facing all the main issues due to Brexit. The work's material has been huge and complicated to manage because the ongoing events change every day. Essentially, papers and reports were absolutely useful and vital in the overall of the work, because they give you a complete scenario and comment about a particular discussion held in House of Lords, rather than House of Commons or European Parliament. Also articles, papers, considerations and books made by experts, such as Kenneth Armstrong, Federico Fabbrini, Sir William Wade, Nicholas W. Barnier, Peter Leyland were strongly invoked to provide a professional support to the analysis[8]. It was also really useful participating to two workshops, held last March at UM Campus Brussels, titled "The Parliamentary Scrutiny of Brexit: Perspectives from Europe and the UK". These two meeting were organized by Thomas Christiansen and Diane Fromage, professors of University of Maastricht, with the participation of many teachers of some European universities.

Mainly, the path of EU Withdrawal Bill – it became Act in June 2018 - is the key element which, and around its iter, all the elements are interrelated in order to comprehend the real position of UK and in general its evolution in international relations.

[5] The role of devolution in general is reduced but present, it will be explored in chapter 3 and 4 in which extent and which kind of legal devices they can use.

[6] In 2017, there was already the question under consideration: https://www.quora.com/Brexit-Can-Article-50-be-revoked-and-if-so-under-what-conditions; in September 2018, Scotland asks EU court to rule if UK can revoke Brexit decision: https://www.irishlegal.com/article/scotland-court-of-session-rules-brexit-revocation-question-can-be-referred-to-european-court-of-justice.

[7] TLDR News on UK: https://www.youtube.com/channel/UCSMqateX8OA2s1wsOR2EgJA.

[8] Considerations and political debates held by the main figures of this procedure, such as Nicola Sturgeon, Martin McGuinness, Michael Barnier, David Davis, David Cameron, Alan Foster, Theresa May were vital for drawing such representation of the work too.

The organization of the work begins from UK referendum in June 2016. The UK Government formally informed the EU in March 2017 of its intention to depart from the block, thus triggering the Article 50, which gives it two years to leave the European Union. But in order to understand why and how UK was lead to take such critical decision, in Chapter 1, *"Historical comparison of UK's needs of being (or not being) part of the European Union",* has been done an historical research on how was the domestic feeling and the role of the UK in the international scenario in the early 60s, how was its political and general situation and consideration of the nation by the others member states such as France, Italy and Benelux. Furthermore, it is described hence how feelings and priorities can change over the years. Aftermaths, constitutional doctrines teach us that the legal substance of nation can be found in its own rule. In the particular case of UK, there is not a written constitution and that is another element which increased the problematic of the situation. As we said in the previous lines, Parliament is the core of this incredible and surprising nation. Thus, Chapter 2 *"Parliamentary Sovereignty during the Brexit process: constrained or revamped?",* is totally based on this constitutional principle, which has been literally undermined and undervalued during the first phase of the Brexit procedure. In fact, as we do know, Theresa May tried to overstep the Westminster parliamentary approval for the request of withdrawing. In this section of the work, we can understand all the phases and instances which pictured the event in question. Once we have defined the role of Government and Parliament within the England borders, it was automatic and imperative focusing on the role of devolved legislatures, their part in this constitutional event and the influence and effects they are affected by. And this is the theme of Chapter 3, titled *"The role of devolved legislatures"*. In the end, the implications for parliaments of having "Hard" or "Soft Brexit", are described in Chapter 4, named *"Conclusions: the place of parliaments according to the "hard" of "soft" Brexit perspective"*. Brexit will be as much a proof for the UK as it will for the EU[9].

A country like UK maybe was not aware of all the risks and bad consequences of facing this new constitutional event. As President of European Commission Jean Claude Juncker affirmed: «Of course Brexit means that something is wrong in EU. But Brexit means also that something was wrong in Britain[10]».

[9] The central normative argument is based on *democracy*: if the national legislature intentionally chooses to pass legislation which is in conflict with EC law then this should be upheld and applied by the national court since the legislature is the expression of that country's democratic will. Democracy as much as parliamentary sovereignty result paramount and in conflict at the same time.

[10] In September 2016, the commission President commented the result of Brexit referendum as it follows: «If, over 40 years, you are explaining to your general public that European Union is stupid, that there is nothing worth, that you have to leave, that the European Union membership is not bringing any advantages to your populations, you can't be surprised that the day you ask people: 'Do you want to stay or do you want to leave?' that a too high number of British – in the case we are discussing – are expressing the view that it is better to leave», here the link: https://www.theguardian.com/politics/2016/sep/15/brexit-vote-years-of-lies-eu-jean-claude-juncker.

CHAPTER 1

AN HISTORICAL COMPARISON OF THE UK'S NEEDS OF BEING (OR NOT BEING) PART OF THE EUROPEAN UNION

1.1 Once upon a time, the UK wanted to be a member of the EU

Winston Churchill said in 1947 a short but very powerful sentence, which maybe it is still reckoning like a far noise today: «*Great Britain is of but not in Europe*[11]*»*. Nowadays, this is the reality. Why the UK wants to leave, following the result of the Brexit referendum of 23 June 2016[12] and after all the consequences and issues it had faced since the beginning of negotiations of its entrance during the 1960s? The comparison made in this chapter is centred on the difference between UK's desire to be member of the EEC in 1960s and the British decision to dismiss this agreement. On New Year's Eve in 1973, UK became part of the European Economic Community. It became active member of the Treaty of Rome, the starting point of this Community, which set itself the goal of a "Common market[13]". Today, more than forty years later, albeit with many restrictions and limitations (first of all UK was not at all and never be part of Eurozone or Schengen treaty) the UK decided to notice its intention to renounce to its European membership. In line with this, Armstrong's thinking got straight to the point, specifying:

> […] If we are to make sense of EU membership – the forces that give rise to membership, the choices made by aspects of EU policy co-operation; and ultimately the decision to relinquish membership – we must continually pay attention to the relationship between nationalism and internationalism and the domestic structures and actors that interpret what that

[11] As Prime Minister in 1953, Churchill was explicit that Britain should not be part of the arrangement. He told the Commons: "*Where do we stand? We are not members of the European Defence Community, nor do we intend to be merged in a Federal European system. We feel we have a special relation to both. This can be expressed by prepositions, by the preposition 'with' but not 'of' – we are with them, but not of them. We have our own Commonwealth and Empire"*, speech to the House of Commons, 11 May 1953.

[12] Overall of Brexit: 48,1% Remain; 51,9% Leave, However, Norther Ireland and Scotland, were in favour of Remain, instead England and Wales.

[13] Art.2 Treaty of Rome, 1957 «the Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it».

relationship means in the context of membership of an entity like the EU. It requires the maintenance of a kind of social, economic, political and legal equilibrium […][14].

Basically, this reasoning resumes what is the crucial aspect of this unprecedented international window, it is the relationship between a new nationalism and a new internationalism which also underlines Britain's withdrawal from the EU (Brexit). Thus, we have to briefly revisit all fundamental steps the UK has made to obtain the entry in the EU. Starting from 1951, the European integration process began to develop with the Treaty of Paris and formally the ECSC, the European Coal and Steel Community. It was the first international agreement based on the idea of supranationalism against the famous nationalism's era and which would have patched the way for the building of the European Union[15]. In contrast to the idea of Europe, the UK's alternative approach of being part of a cooperation or a sort of union was the establishment of a European Free Trade Association, EFTA[16]. This free trade area allowed tariff-free movement of goods between participating states, but it was also an alternative concept of being cooperative among participating states and non-participating states. Deeply, EFTA provided a degree of international economic liberalism without limiting the borders on national sovereignty which membership of the EEC might have entailed. Again, the importance of sovereignty and the sense of nationalism was the major issue underlying the difference between UK intention of being part of a union of states. The more extensive economic integration in a Common Market was not in line with EFTA promoting model. The latter, was more *intergovernmental* shape of co-operation, to which other six states have agreed in 1960 (there were Switzerland, Norway, Sweden, Austria, Denmark, and Portugal). Afterwards, in 1957 the Treaty of Rome established the European Economic Community (EEC) and the EURATOM next to the ECSC. Meanwhile, UK's economy has been faced a period of collapse, which has evolved more and more in contrast with the prosperity and the growth of a unified European Economic Community. Moreover, United States shelved on the political scenario the North Atlantic Free Trade Area, and this was another point of reflection for the UK, which lead to reconsidering its geopolitical position[17]. Then we arrive to 1961. It is the year of the first British submission for joining the European Economic Community, held by the Conservative PM Harold McMillan. However, the proposal was vetoed by the President of the French Fifth Republic, Charles De Gaulle. Basically, he considered the enlargement of the EEC as a further complication in decision-making process, in achieving a greater

[14] K. A. Armstrong, *Brexit Time. Leaving the EU – Why, how and When?,* Cambridge University Press, 2017, p. 19.
[15] For more information, see the official website: https://europa.eu/european-union/about-eu/eu-in-brief_en
[16] Relating to the present situation, UK does not want to be part of EFTA again. Yet, it has to remember its experience as a member and learn by it for a different agreement it desires. For more information, see the blog: http://blogs.lse.ac.uk/brexit/2017/11/06/although-britain-wont-rejoin-efta-it-can-learn-a-great-deal-from-how-it-works/
[17] Ibidem.

internal political integration and, by consequence, it would have favoured a down turning of a more expansive internationalist external free trade agenda. In addition, he strongly believed that UK's eventual membership would have threatened the reaching of a greater internal political agenda. This worry born also by the failure of another project during the 1950s, the European Defence Community[18]. De Gaulle was a supporter of this plan, proposed by the French politician René Pleven evolved a plan that in 1951 the French foreign minister Robert Schuman would have been put forward at a meeting of the Council of Europe. In other words, the project provided the creation of a European army, with the eventual involvement of German units, to be placed under a single military and political European authority. Although it was accepted by most Western countries, the plan was rejected by the French National Assembly in August 1954[19] and consequently it was abandoned.
The EDC could have been a crucial milestone on the long path towards European integration, something that we are still missing albeit the recent instauration of PESCO. However, the project of defence integration was unsuccessful – yet it paved the way for another solution for the rearmament of Germany, the Western European Union (WEU), as a sub-group of NATO[20], born in 1949. After the infringement of this project which would have seen the strong support of USA against both the USSR power and the possible rearmament of Germany, De Gaulle was scared by the idea of a deeper relationship between the American power and UK. Once the entrance would have been accepted, the British country would have been free to threaten the security of a post-war equilibrium. Furthermore, the 1965 is the year of the Merger Treaty which combined the EEC, EURATOM, and ESCS in one body, the European Community. From this moment until the official entrance, the UK and the EU would have faced several obstacles for finally reach a deal. From De Gaulle speech made in 1967, it is possible to grasp a vision of what was the real situation during the first phases of British membership.

1.2 De Gaulle's European vision

Despite the French veto, in November 1967 the European Commission reopened the negotiations for the joining of the UK in the EU. From the interview of 27 November 1967, De Gaulle explained his reasons why the UK was not ready to be part of the ECC. There were several motivations, perpetuated over the years, for blocking this process. Firstly, De Gaulle underlined the probable relationship between USA and UK, and the English membership collided with the European idea of the French

[18] E. Fursdon, *The European defence community: a history,* Macmillan press, 1980.
[19] Official report of the assembly 1954: https://www.cvce.eu/en/obj/french_national_assembly_rejects_us_plans_for_a_european_army_from_pravda_31_august_1954-en-e23880af-6670-40d4-9018-8c464334e79c.html.
[20] Official website of NATO: https://www.nato.int.

president. Again, in line with Armstrong quote and De Gaulle vision, the English role in the European project was unacceptable. Britain did not move on from nationalism concept. Thus, Britain needed a transformation to be part of European Community, without limitations and reserves. De Gaulle sustained that the UK wanted to enter in the EU only for save its role over the political international scenario. In that interview, he pictured the role and the position of the UK in relation with the international political scenario[21]. Basically, it was actually the evidence that Commonwealth (and so English nationalism) was changing its nature. The historical epoch of the British Empire has significantly influenced how British see the world and all the social aspects of politics, especially the position of their country in Europe. In fact, Britain shaped its history and its power for over three centuries, and all its subordinate territories, even if they became independent states, are in some way symbolically loyal to the Crown. This was the vision that both sides, European countries and Britain, shared about the British membership. In line with De Gaulle sense, this story has a ratio. Remarkably, UK was a member of the EFTA (*la zone de libreé change)* which was starting to creak in those years. However, the new Republican PM Wilson, although he was not a European supporter (his head was with the Common Market but his heart remained with the Commonwealth) answered to these French accuses that negotiations were allowed for entering in a community, especially the European one. This was not a matter of conformity to economic principles, rather a political defence in terms of justification of different perspectives of what was European community (as De Gaulle vision was the *Europe of nations*[22]).

Remarkably, in 1956 Great Britain handled the Suez crisis, which involved on one side France and UK against Egypt, on the other USA, USSR and Canada. This episode has lead the UK to an intense economic and political crisis, combined to the gradual loss of credibility and power of the nation. And this explains De Gaulle's thinking. This feeling was also in line to the sense of what means Europe, because it was not only a matter of economic cooperation, but especially a political one. However, notwithstanding with these reasons and over the French dissent, in 1970 negotiations started between UK and ECC. So as Armstrong discussed in his book[23]: «the calculation made in 1960s and 1970s involved a willingness by the UK governments to accept certain restrictions on national sovereignty provided EEC membership helped the UK to pursue goals of trade liberalisation

[21] […] Le quatrième acte au commencement du gouvernement de Monsieur Wilson fut marqué par le désintéressement de Londres à l'égard du Marché Commun, le maintien autour de la Grande Bretagne des six autres Etats européens formant la zone de libre-échange, et un grand effort déployé pour resserrer les liens intérieurs du Commonwealth […] Le peuple anglais discerne sans doute de plus en plus clairement que dans le grand mouvement qui emporte le monde, devant l'énorme puissance des Etats-Unis, celle grandissante de l'Union Soviétique, celle renaissante des continentaux, celle nouvelle de la Chine, et compte tenu des orientations de plus en plus centrifuges qui se font jour dans le Commonwealth, ces structures et ces habitudes dans ces activités, et même sa personnalité nationale, sont désormais en cause […], *De Gaulle speech to Press Conference, 27 November 1967.*

[22] A. Moravicsik, *De Gaulle and Europe: historical revision and social science theory*, Harvard University, 1998.

[23] K.A. Armstrong. p. 15.

and external influence, albeit in a more restricted regional form: constrained and modest internationalism». Anyway, this entrance has modified some requisites for joining the European Community, in line with De Gaulle previsions.

1.3 The European Communities Act and the role of the UK Parliament

Before explaining what is the content of the European Communities Act 1972[24] (ECA 1972), we have to remind the centre of UK doctrine resides in the Parliamentary sovereignty[25], which was and still is at the core of the country. Nowadays, and especially for this thesis, this is a serious argument because it is undermined by what is going on with Brexit process. We have to consider that all directly applicable European law becomes part of national law, whether it has already been made or is to be made in the future. Basically, it refers to a provision of European law that automatically becomes part of the law of the Member State without them having to enact any further legislation. Therefore, any rights or obligations created by the treaty are to be given legal effect in England without more ado. This goes against the principle of parliamentary sovereignty in the constitution of the United Kingdom as directly applicable European law becomes part of the UK's national law without the need for Parliament to accept or reject the law. This situation is useful to understand what is going on in this context with the Brexit process.

The parliamentary sovereignty is in check since the Brexit referendum, increasing with the tempt of *triggering art.50* of TUE, which states as it follows: «any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218 (3) of the TFEU. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament». Furthermore, «the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council

[24] «The ECA is the conduit for international legal rights rather than a source of domestic legal rights», *J. Simson Caird*, http://secondreading.parliament.uk/brexit/legislation/miller-and-the-great-repeal-bill/, 2016.

[25] For more information, see: https://www.lawteacher.net/free-law-essays/constitutional-law/parliamentary-sovereignty-part-of-uks-constitution.php

representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union. If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49[26]».

Therefore, this is not the first time that parliamentary sovereignty is targeting, indeed it tackled a similar situation with *Factortame* case[27] (*Factortame* v *Secretary of State for Transport*), which has concluded with the sentence of European Court of Justice in 1991. Again, when Britain was considering joining the European Community, there was a great debate on the possibility of the limitations of its membership. Constitutional scholars, in contrast, wondered if these limits were possible. By 1972, it was clear that membership in the Community brought with it the requirement that domestic courts give European Law priority over conflicting rules of national law[28].

Since then, Parliamentary sovereignty started to be in trouble, considering that «if a later statute conflicted with an earlier statute incorporating European Law into English Law[29], Parliamentary sovereignty required that the later statute impliedly repeal the earlier, incorporating statute».[30] This was a direct challenge to Parliamentary sovereignty, an attempt to impose a substantive limit[31] on the effective legislative capacity of subsequent parliaments. The European Court of Justice ruled that under European Law, a national court was obliged to set aside any national rule that restricted its capacity to grant temporary relief. When the case returned to the English Court, the House of Lords interpreted further that the statute's operation would be suspended.

Nick Bamforth[32] proposed a deep reflection on the case of Factortame, identifying a number of possible interpretations of the current relationship between European and English Law. Firstly, the Courts possess a political capacity to influence the fundamental rule of the British constitution, and it was this capacity that they had exercised in Factortame. Secondly, the Court in *Factortame* was attempting to give legal effect to a statute, the ECA 1972. One strand of this reasoning asserts that the limitations applied to Parliament came from this statute; the 1972 act amounts to a conduit through

[26] Official document of TUE: http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-European-union-and-comments/title-6-final-provisions/137-article-50.html.

[27] The case will be analysed also in the next chapter.

[28] Remember: Treaty of Lisbon and Treaty of Rome do not have any effects in English domestic law unless they are given it by virtue of an Act of Parliament, which is the European Communities Act 1972. Thus, when that Act is repealed, neither the Treaties nor anything that arises from them will have any force of law in the UK.

[29] In section 2(4) of the European Communities Act 1972, it is clarified that statutes «shall be construed and shall have effect subject to the foregoing provisions of this section» — that is subject to the incorporation of European Law into the British legal systems.

[30] N.W. Barber, *The afterlife of Parliamentary sovereignty*, https://academic.oup.com/icon/article/9/1/144/902288.

[31] *Factortame* turned on the question of whether an interim injunction could be granted suspending the operation of the Merchant Shipping Act prior to a full hearing on the legality of the statute.

[32] N. Bamforth, *Current Issues in the United Kingdom Constitutionalism: an introduction*, Oxford University Press, 2011; see also N. Bamforth, P. Leyland, *Public Law in a Multi-layered Constitution*, Hart Publishing, 2003.

which European Law flows into the English legal system. Parliament could, it has been argued, repeal this statute and isolate this conduit; however, while the ECA 1972 remains in force, Parliament's law-making power is, to an uncertain extent, curtailed. On both interpretations of Parliamentary sovereignty, one of Sir William Wade a British academic lawyer of the last century, and the manner-and-form schools of sovereignty headed by R.F.V. Heuston, a British legal scholar and politician during XX century which will be explored in Chapter 2—the House of Lords should have concluded that the conflict between European law (incorporated into the English legal system by the 1972 act) and the Merchant Shipping Act 1988 resulted in the 1988 Act taking priority, retracting the ECA1972 so far as was necessary. The only common point of all previous writers is summarized in this sentence: it should have been impossible legally to bring about, under the old rule, the type of substantive constraint found in *Factortame.* The significance of ECA 1972 could be find if the Parliamentary sovereignty will be redefined as a rule which gives legal authority to the Westminster Parliament, something that it was – and it still is - under great dispute on Brexit Process and the drafting of the EU Withdrawal Act 2018. As Lord Bridge[33] in the House of Lords said after the final decision of the Court:

[…] « the jurisdiction of the courts of the member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty, it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be prohibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy» […]

Furthermore, after the conclusion of *Factortame* case, the supremacy of Community law over national law was accepted after some time by the House of Lords. Anyway, the doctrine of Parliamentary sovereignty has been altered and limited by the UK's membership and the approval of the ECA. Here it resides the very sense of parliamentary sovereignty, which is the essence of all UK

[33] [1991] 1 A.C. 603, 658-659.

doctrine. The ECA 1972 was the piece of legislation that brought the UK into the European Union: it gives EU law supremacy over UK national law. This is paramount for the object of the thesis, focused on understanding the role of the UK Parliament in Brexit process. Briefly, the Act relies to itself a large amount of EU law effective in the UK, repealed through the Government's Repeal Bill. The Act started its path as the European Communities Bill, which was introduced into the House of Commons in 1972. Its purpose was to assure parliamentary approval for the Treaty of Accession making the UK part of the European Economic Community, signed in Brussels in 1972[34].

The ECA 1972[35] provides legal authority for EU law to have effect as national law in the UK. It follows two ways to do it. First, it ensures that EU legislation, treaty obligations and regulations have direct effect in the UK's legal system without the UK Parliament having to pass any further legislation. Secondly, it envisages that some types of EU legislation (considering directives and decisions) can be made to apply in the UK either by primary legislation (Act of Parliament) or – much more commonly – by secondary legislation. Like any other Act of Parliament, the ECA 1972 can be removed or repealed by passing another piece of primary legislation.

On 13 July 2017 David Davis, the Secretary of State for Exiting the European Union[36], introduced the Bill to the House of Commons (the first reading was *pro forma,* with the first debate taking place on the second reading in nota). In September 2017 there was the second reading, which has passed with 326 vote. In addition, it was approved a motion passed with 318 to 301 for putting the Bill under eight days of Committee scrutiny. Finally, the Committee stage was originally scheduled to take place after MPs returned to Parliament following the conclusion, in October, to their respective party conferences. However, in October 2016 the Prime Minister Theresa may has promised a EU Withdrawal Agreement, which would substitute the European Communities Act 1972 and reaffirm all ratifications previously in force under EU law. This bill was initially titled Great Repeal Bill, then it has changed its name during the parliamentary *iter* with EU Withdrawal Act 2018. In the end, if the ECA will be repealed, EU legislation that currently applies in UK law by virtue of the Act would cease to have effect.

All the readings will be explored in the next chapter, together with the analysis of the connection between Miller case (which will be explored in the next chapter) and the unsuccessful triggering of

[34] The Act was signed by Edward Heath, the former Conservative Prime Minister who took Britain into Europe and became a symbol of moderate Tory resistance to the excesses of the subsequent Thatcherism.

[35] Where the interpretation of EU law is in doubt, the 1972 Act requires UK courts to refer judgment to the European Court of Justice (*Factortame* was the first example, as we saw ahead). All primary legislation enacted by the UK Parliament after the 1972 Act came into force on 1 January 1973 has effect subject to the requirements of EU law. This means that the courts are obliged to strike down legislation which is inconsistent with EU law.

[36] David Davis resigned at the beginning of July, contemporary to Boris Johnson, the Foreign Ministers' affairs has dismissed too. The motivation was correlated to the wrong behave of May's government, which is struggling to maintain a soft-line Brexit instead of harder one. Both Ministers were not in favor and so after several attempts to fix the political gap, they decided to quit.

art. 50 TEU by May's government. Therefore, after strives and disputes, the UK joined the EU and its Common Market, the same market that it is expected to leave now. And this has meant, and also it means, several considerations, useful to guide our analysis upon the actual Brexit process. First of all, this confirms that the UK was never committed to the concept of "ever closer union", even if this aspect structures the Preamble of the EEC itself and the ECA1972 which has formalised the UK's EEC membership[37]. UK's consent was required, as well as those of any other Member State, for every new treaty that entrusted the EU with new policy competences and for every treaty of accession that enlarged the number of EU Member States. This is directly linked to what we said before about possible changes in the quality of European membership, made with the UK's consent. This involves not only the UK government, but also the role of UK Parliament which is the first actor on the actual political scenario and it has always been.

The need of sovereignty and priority feed the English sense of nation. This is paramount for understand and create a common thread between the previous need to be member and the recent one to dismiss. Renouncing to membership is associated to the relationship between nationalism and internationalism. Furthermore, throughout the domestic structures and actors it is better understood what does it mean in the context of membership of an entity like the EU. It is all a matter of equilibrium in economic, political and legal spheres.

Thus, what did change during forty years of participation? How can the result of referendum be translated by PM Theresa May? We know that was not simple and still it is, with many difficulties and obstacles due to the limits and the legal borders of TEU and British Law. Conscious of the nature of this country and trying to underline its features, its character, considering its hunger of being on the stage, what is behind the UK's desire of quitting the relationship between the supranational authority and its nation power?

1.4 How did we arrive here? Before Brexit Time

Brexit is definitely not a matter concerning only the UK, but it is something bigger and more profound which involves the entire world. It is linked to an old world which does not exist anymore, but still

[37] This Act may be cited as the European Communities Act 1972. (2) In this Act "*the Communities*" means the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community; "the Treaties" or [the EU Treaties] means, subject to subsection (3) below, the pre-accession treaties, that is to say, those described in Part I of Schedule 1 to this Act, taken with— (a) the treaty relating to the accession of the United Kingdom to the European Economic Community and to the European Atomic Energy Community, signed at Brussels on the 22nd January 1972; and (b) the decision, of the same date, of the Council of the European Communities relating to the accession of the United Kingdom to the European Coal and Steel Community […],
source: http://www.wipo.int/edocs/lexdocs/laws/en/gb/gb312en-version2.pdf.

reckoning on the present. Speaking in terms of law, it is a significant upheaval exploded with the referendum of June 2016 which has generated a notable earthquake.

Starting from 2015[38], David Cameron has initiated his political campaign and then he became the British Conservative Prime Minister in May. The majority of Cameron was wider, so there was no coalition government and the European Union Referendum Act was approved. Lacking a codified constitution in UK, there are no provisions for the referendum but an act of parliament is approved anytime the government calls for a referendum. So there is no homogenous legislation on referendums and the bill is approved on a case by case bases. In Great Britain, a referendum can be arranged in a different way depending on the situation and there was already in 1975 a referendum for remaining in the EU, a few years after the accession of UK into the European Community. In that case, the result was in favor of the remaining[39]. So in the European Union referendum act 2015 we can see that it is not clear what is the legal nature of this referendum, namely whether this referendum is binding or not. We can say, it became binding from a political point of view but from a legal point of view the European Union referendum act does is not clear. After the adoption of this Act, the PM Cameron met with the representatives of the European Commission and the European Council to discuss some proposals that were considered by him as the conditions for his campaign in favour of the "*remaining*".

Cameron presented 4 proposals:

- a new agreement at European level possibly, that would have deleted all the references to the symbol of the EU and to the objectives of achieving an ever closer union;
- the possibility for non-Euro countries to counterbalance the decisions taken by the majority (the Eurozone 19 countries);
- a certain threshold of national parliaments should enjoy a veto power on the legislative proposals put forwards by the Commission[40];
- the claiming that the standard of protection of European citizens not enjoying the UK nationality would have been treated in a different way (in terms of conditions of residency for example). Of course these requests were in breach of EU law (freedom of movement of EU

[38] David Cameron has already presented to the President of the European Council, Donald Tusk, a proposals' document explaining how changes were needed and also were important for all the Member States, on the 10th November 2015, see the document below: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf.

[39] The results were 67,23% for Remaining, and 32,77% for Leaving, which corresponded to 17,378,581 people in favour of being part of the European community (The Guardian's daily article, 5 June 1975).

[40] At present, national Parliaments are involved in reviewing the legislative proposals of the EC but don't have veto power, they can just delay the starting of legislative procedure and the EC can decide in some cases to withdraw legislative proposals. There is no power for national Parliaments even a majority of them to block the legislative process alone. PM Cameron wanted to empower national Parliaments as veto players in the European legislative process.

citizens)[41]. The EC discussed them and the President sent a letter to Cameron saying that some of the issues could have been discussed further so he took a sort of commitment in case of favourable vote for the remain in the UK. Cameron considered this as a big result and well enough he campaigned for the remain.

However, Cameron was defeated by referendum result: the whole majority was in favour of leaving the EU with some regional differences in the results: Wales and England are pro leaving, whereas Scotland and Northern Ireland are pro remaining. Thus, Cameron resigned and in June 2016 Theresa May became the new Conservative PM. Elections would have taken place just if the two of the conditions of the Fixed Parliament Act[42] would have applied: to vote a motion of confidence (which was of course not feasible because the PM had already resigned) and with the self-dissolution of UK House of Common by 2/3 majority.

Anyway, there was no time for election immediately after the referendum so despite some other contestants in the conservative party, Theresa May won this competition within the party itself and not as a consequence of elections. A point of strength was that she was passively campaigning for the referendum, because she was not really convinced and she has occupied her position on Brexit was unclear, because she has always repeated that "*Brexit means Brexit*" so the content of the negotiations appeared cloudy.

In the letter of notification, Theresa May sent to the President of the European Council some concrete proposals outlined because of the decision of the UK Supreme Court, the Parliament and in particular the House of Commons have to be involved in the process of notification (because the will of the government was to avoid a parliamentary vote on the issue). However, the letter contains a view of understanding the relationship between national government and the devolved administration: *"*we the UK, we negotiate the withdrawal as one UK", this sentence mainly means without giving any negotiating power to Scotland, Wales, Northern Ireland. But the regions are consulted so Theresa May affirmed that a process of consultation has started for the inclusion of the regions in the discussions even if they don't have the power to negotiate directly with the EU. Also the way in which she is portraying the withdrawal is the guarantee of an increase of powers for the devolved administration because the powers once exercised by the EU will be given to the devolved legislatures[43]. Notwithstanding, a deeper analysis of the role devolved legislatures are performing is held in the next chapters. And it is not so easy and good as it seems. By the way, the main result of

[41] Jean Claude Piris, the former Director General of the EU's Legal Service, said Britain should have read Article 218 of the Lisbon Treaty, which states the future relationship between the U.K. and the EU can only be negotiated once Britain returns to a third country status. In line with the requests held by Cameron, Piris affirmed that only the one concerning the UK nationality was in contrast with EU law.

[42] Fixed Parliament Act 2011: http://www.legislation.gov.uk/ukpga/2011/14/pdfs/ukpga_20110014_en.pdf.

[43] P. Leyland, *The Constitution of the United Kingdom: a contextual analysis*, Oxford, Hart, 2016, p.243-296.

the UK Supreme Court decision in the Miller Case, was to make as a requirement the adoption of a parliamentary act for the notification of withdrawal. So the Royal Assent on this act was given on March 2017 because of the *vacatio legis* and then the letter was sent[44]. The House of Lords tried to amend this bill but eventually the Lords renounced to vote in favour. Remarkably, the PM has the power to notify to the EU the intentions to withdraw and this is a derogation of the ECA of 1972 which is the legal groundwork for UK for its participation in the EU.
As a result, the Bill entered into force despite the attempt of the Lords to amend it because they enjoy the same powers of the House of Commons as far as EU matters and international treaties are concerned[45]. Recently, on 28 February 2018, it was presented the European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community[46].

1.5 What is going to happen now? The consequences of the present and past decisions

In conclusion, if we have to make a comparison between the 1975 Referendum and the Brexit Referendum, what was, then, to determine a different result (and so, different needs of UK)? The reasons are multiple, but there is certainly an element to hold in consideration: in 1975 the country for European Union was characterized by a strong idealism. The choice for the adhesion to the European union was not motivated only from economic or institutional factors, it was a choice for the peace, to definitely leave idealism to the shoulders the memory of the war conflicts, a vote for that great ideal of union and pacific collaboration that countersigned the same idea of EU.
This was absent in 2016. However, we can affirm that Brexit is linked to regain sovereignty, UK independence, and possibly to improve democracy, according to its supporters. Secession and withdrawal are two sides of the same coin, and there is a delicate equilibrium – and an irony – in the two issues. Keeping the union with Scotland face several obstacles, lastly in 2014 with the last Scottish referendum for independence. In fact, Brexit means a choice, a powerful and difficult decision, a new statement, edit of laws and political agreements. Losing influence and sovereignty is directly linked to the choice of renounce. In the next chapters, the thesis will cover the legal aspects of the Brexit process, the focus then shifts to the process of withdrawing from the EU. The principal default line is between the withdrawal agreement, which would be concluded pursuant to Article 50 TEU, and the agreement(s) governing the future relationship between the UK and the EU, which is

[44] For more information, see the next chapters.
[45] In other words, an international agreement signed by UK must be approved by both the House of Lords and House of Commons.
[46] *European Commission Draft Withdrawal Agreement,* published in February 2018: source: https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf

going to be very hard to reach. In the next chapter, the outlining of what is parliamentary sovereignty and how its importance has been undermined help to understand the effective role of Westminster Parliament in the procedure. Furthermore, it will be considered also what kind of powers it has, and what is the role of British Government. In the end, the analysis will be directed to the EU Withdrawal Act 2018, how the Miller case has patched the way to this new Act in the British doctrine and which is the relevance of the case for all the institutions involved.

CHAPTER 2

PARLIAMENTARY SOVEREIGNTY DURING THE BREXIT PROCESS: CONSTRAINED OR REVAMPED?

2.1 Parliamentary sovereignty: challenges and development

The immense political, economic and legal upheaval which is being caused by Brexit has created several constitutional difficulties that are still going on. Everything started with the tempt by May's Government to trigger art.50 TEU, which also meant overstepping parliamentary approval. Basically, the UK doctrine follows a specific path that we have to keep in mind to understand why the famous episode about *triggering article 50*[47] has generated a series of constitutional troubles. Once PM May was appointed, she manifested her intention to proceed with the notification without parliamentary involvement, appealing to the Royal Prerogative, also called Henry VIII clause[48]. Mainly, these clauses are provisions sometimes included in bills which consent ministers to make amendments not only to secondary legislation, but also to Acts of Parliament (primary legislation), without having to go through full process. The powers deriving from royal privileges were born thanks to *The Statute of Proclamations* in 1539, in which Henry VIII gained – or better created - the right for amending or removing laws, overriding the Parliament.

By then, this turned in a constitutional convention through which the Government may negotiate at international level without the involvement of the Parliament. By declaring of being in a situation of international negotiations, the Government assumed to have the faculty of acting alone without the need to ask the authorization of the Parliament. However, as stated by Supreme Court thanks to the judgement - in this particular case - the Royal Prerogative cannot be applied, for several motivations. Mainly, UK citizens' rights as EU citizens are directly affected, and thus Parliament is sovereign and

[47] UK and the EU, *Is a delay triggering in Brexit counter-productive?, 2018*: http://ukandeu.ac.uk/is-a-delay-in-triggering-brexit-counter-productive/.

[48] «However, Royal Prerogative powers were an essential part of the UK's unwritten constitution and could therefore legitimately be used to trigger article 50. Wright said that the EU referendum had been conducted «with the universal expectation that the government would implement the result», https://www.theguardian.com/politics/2016/dec/05/supreme-court-brexit-case-whose-prerogative-is-it-anyway.

it has to be involved. Standing on the regulation made in the European Community Act 1972 (ECA), the participation of UK in the EU is regulated by an Act of Parliament hence it is not possible for the Government alone through a unilateral act to supersede the will of the Parliament. Therefore, considering the future Brexit, several pieces of legislation cannot simply be directly converted into domestic law and it would be also a big problem of time consisting to reprise all of them to the scrutiny of Parliament.

Repealing the ECA 1972 with the EU Withdrawal Agreement is linked to this last point. In order to keep a connection with the previous chapter, we can make the point reasoning on these questions: how much is important the parliamentary role and its sovereignty? ; what are the roles of Government and Parliament? ; how institutional bodies may influence in authorizing the notification of the withdrawal?

According to N.W. Barber[3], the 1991 is «the year when Parliamentary sovereignty ceased to be a feature of the United Kingdom's Constitution», due to the *Factortame case*[49]. Barber assumed that the original consideration of parliamentary sovereignty is a legal rule which has been transformed by years. It is up to the Court the interpretation of these legal rules, albeit it appears unable to announce that a statute was beyond the power of Parliament (no institution within the Constitution has the capacity to declare that a statute is beyond the power of Parliament). There were numerous debates around this, the main one is between the orthodox leaded by Sir William Wade and the manner-and-form schools of sovereignty headed by R.F.V. Heuston. The dispute was around the consideration on "the capacity of the legislature to effectively limit its future incarnations by redefining the entity that courts should treat as constituting Parliament[50]". Heuston contended that Parliament could specify what would, in future, count as "Parliament." It could introduce manner-and-form restrictions (for example, asking for a different majority vote for the House of Commons for a specific amendment). By the way, even if Wade believed that although the manner-and-form model could exist within a legal order, it was not found within the UK one, Parliament is defined as something more than just a majority vote in the Commons and Lords and combined with the final Royal Assent.

However, the legislative power of Parliament was established by the common law, containing further rules that defined Parliament and could not be altered by the legislature itself[51]. If Parliament pursued

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[49] See Ch.1.

[50] N. W. Barber, *The Afterlife of Parliamentary Sovereignty,* Oxford University Press, 2011, p.145; *The Principles of Constitutionalism,* Oxford University Press, 2018.

[51] «The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament», A. W. Dicey, *The Law of the Constitution*, Liberty Classic, 1885, pp 39-40.

[48] Relating to what Dicey pointed out, Parliament has unlimited legal power to enact legislation; and the courts must recognise and enforce any legislation enacted by Parliament. That uncompromising statement of the legal powers of Parliament and the constitutional relationship between Parliament and the courts in the United Kingdom has long been

to redefine itself, this supposed redefinition would be repealed the next time legislation was passed on the very same matter. The courts, following the common law rules of identification, would see through the earlier statute that purported to redefine the legislature and finally the supposed manner-and-form restriction of the earlier act would be dismantled without impediment. Notwithstanding, the key area of debate was the status of the Parliament Acts 1911 and 1949[52] due to different interpretations these two schools of thinking provided. Supporters of the manner-and-form model of sovereignty argued that this was a clear instance of Parliament altering the rules under which the courts identified legislation. In contrast, the orthodox way believed that the Parliament Act 1911 created a mechanism through which delegate - or subordinate- legislation could be produced. Rarely, there was a payoff to this debate. If the legislation produced under the 1911 Act was subordinate legislation and if the orthodox school was correct, the courts could check that these enactments lay within the scope of the power granted by the 1911 Act.

Furthermore, it was argued that the legislative power conferred by the 1911 Act did not include the power to alter the same statute. In other words, the delegated law-making power found the 1911 Act could not be used to expand the scope of the power delegated. If this was correct, the Parliament Act 1949 was *ultra vires* and it - and the statutes passed under it - was invalid for excess of powers. However, if the Act 1949 cease out, there are others pieces of legislation that have to be under investigation and Lords seemed to have endorsed the manner-and-form view for what concerns the possibility by Parliament to redefine what is considered primary legislation. Notwithstanding, prior to 1991, the "self-embracing model"[53] of sovereignty was not supported by case law or by writers on the British constitution. According to the pre-1991 views of sovereignty, there was broad consensus that Parliament could not place substantive limits on its law-making power. Once Parliament—however defined—had legislated, the legal duty of the courts was to apply that law.

In this sense, we can say that even if it is under pressure and undermined, sovereignty is directly connected to Parliament[54]. The Parliament Act 1911 created a mechanism whereby statutes could be passed without the consent of the House of Lords. The Act effectively removed—in most

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debated among commentators. One aspect of that debate has centred on the *Parliament Act 1911* (UK) which provides that in certain circumstances Parliamentary legislation can be enacted without the consent of the House of Lords, and on the status of legislation enacted under the 1911 Act, particularly following its amendment by the *Parliament Act 1949* (UK), see the document: https://ir.canterbury.ac.nz/bitstream/handle/10092/3315/12620482_Gravells_The%20United%20Kingdom%20Parliament%20Acts.pdf;sequence=1.

[53]Alison Young and Peter Oliver drawing on the work of H. L. A. Hart, have pointed to a further possible division. They distinguished between the "continuing" models of Parliamentary sovereignty and the "self-embracing" sovereignty, a form in which the legislature possesses the capacity to place substantive limits on its future incarnations

[54] For more details, see the link: https://www.parliament.uk/about/living-heritage/evolutionofparliament/houseoflords/house-of-lords-reform/from-the-collections/from-the-parliamentary-collections-the-parliament-act/parliament-act-1911/.

circumstances—the House of Lords' power to reject bills that had the support of the Commons. The Lords were able to delay bills for two years spread over three sessions, but if the Commons persevered, the bill would become a law. It was a way growing value to the Commons as to the Lords. In 1947, some changes were applied and the Commons required further limit to the power of the Lords, concerning the power of delay bills - the limit was reduced from two years to one year, organised in two sessions rather than three. The House of Lords refused to approve it and, in the end, the adoption—which became the Parliament Act 1949 - was passed under the power created by the 1911 Act. Hence, if we can talk about pre and after 1991 for debating on Parliamentary sovereignty, we can also speak about pre and after Brexit to gather together in one word all these considerations. Because Brexit and *Factortame* and so the EU Withdrawal Act 2018 share a simple but key feature which generated variation, conflict and reflection on British legislature: uniqueness.

2.1.1 The Miller Case patched the way of EU Withdrawal Act 2018

The relation between this process and the Miller case has resulted paramount for the Supreme Court's verdict: far from applying the power of an unelected judiciary[55], the main confirmation held by the court was based in the fundamental democratic principle, that is the relationship between Government and Parliament, as representative of the citizens.

After the Brexit referendum, the interpretation – and so the application - of art.50 TEU has created confusion in domestic politics. Therefore, Gina Miller, a British businesswoman, native South-America, presented in October 2016 an appeal to the High Court of England against May's decision to appeal article 50 TEU without Parliamentary scrutiny. The accuse was two-fold: in the first place, she complained that the Government sustained of not needing the support of Parliament, invoking the Royal prerogative[56].

As briefly explained above, this prerogative consists in a set of powers that gives the Prime Minister and the Government the possibility of taking decisions without hearing from the Parliament. For example, the powers refer to the appointment and dismissal of ministers, civil service officers, the granting of honours and the commissioning of armed forces officers. In particular, the Prime Minister can also use the prerogative to dissolve Parliament and call elections (last in April 2017 with Theresa

[55] Before the Second Reading of the House of Commons had place, there were exchanges between Lord Carnwarth, the Supreme Court of Justice, and James Eadie QC, First Treasury Counsel representing the Government, during the first day of proceedings.

[56] G. Barrett, M. Everett, *The Royal Prerogative*, published August 2017: «The scope of the Royal prerogative power is notoriously difficult to determine. It is clear that the existence and extent of the power is a matter of common law, making the courts the final arbiter of whether or not a particular type of prerogative power exists. The difficulty is that there are many prerogative powers for which there is no recent judicial authority and sometimes no judicial authority at all».

May), declare war and recognise foreign states[57]. By the way, this solution was unviable and, especially, unlawful: exiting the EU without involving the Parliament would be a violation of ECA 1972. If Government can sign an international treaty in force of the Royal prerogative, it is also possible that Parliament must ratify it in order to become national law.

In the second place, Gina Miller contended that if the main intention of Brexit referendum was to restore parliamentary sovereignty, how could be possible to do it through this procedure proposed by May, which overstepped Parliament itself? We do know that the unwritten constitution[58] of UK is very strict type, the parliamentary sovereignty is the groundwork of its existence, as much as the consent of both Chambers for passing a law by the Crown, is supreme. In light of these facts, the Government appealed to the Supreme Court against the High Court decision that in November 2016 had accepted Miller's submission claiming the uncertain mechanism of the EU Withdrawal Act, which will remove the rights protected by the ECA 1972. The procedure is not straightforward. In addition, the ECA 1972 is an Act which should be treated as the others, which means that these rights cannot be removed using prerogative powers, based on a general principle of resolution of antinomies among norms. The Government reacted by assuming that the ECA 1972 is the canal for international legal rights rather than the source of domestic legal rights and also an independent and overriding source of domestic law. Brexit needed the Westminster Parliamentary Act in order to be legally recognized and applied. The Government can make - and withdraw from - treaties, but this does not mean that it can change domestic law. To get this, Government must always seek the word of Parliament and indeed the appeal of the May's legislative has fallen down.

Concluded the Miller Case, the adoption of a parliamentary act for the notification of withdrawal was made compulsory by the Supreme Court[59], as a prerequisite to proceed with any process. «The Supreme Court considers that the terms of the ECA 1972, which gave effect to the UK's membership of the EU, are inconsistent with the exercise by ministers of any power to withdraw from the EU Treaties without authorisation by a prior Act of Parliament[60]». However, the problem resided in what would have been the provisions in the case of withdrawing and the main arguments and findings by the Supreme Court were the following:

1. All the rights and participation duty in the UK derives from the ECA which is an ordinary piece of legislation that enjoys a constitutional value. Despite the ECA 1972 can be repealed by means

[57]P. Leyland, *The Constitution of United Kingdom: A contextual analysis,* Hart publishing, 2016; see also the link here referring to Fixed-term Parliament Act 2011: https://www.businessinsider.com/heres-why-the-prime-minister-of-the-uk-has-the-power-to-call-a-snap-election-2017-4?IR=T.

[58] In Chapter 4 there is a paragraph exploring the problematic around the question.

[59] On January 2017, justices have ruled, by a majority of eight to three, that Prime Minister Theresa May cannot lawfully bypass MPs and peers by using the royal prerogative to trigger Article 50 of the Lisbon Treaty and start the two-year process of negotiating the UK's divorce from its EU partners.

[60] From the original text of final sentence: https://www.supremecourt.uk/cases/docs/uksc-2016-0196-press-summary.pdf.

of ordinary legislation, the substance is of paramount importance for the constitutional system of UK;

2. The rights adopted in compliance with Parliament and European communities have been conferred trough legislation. It follows that the rights of the citizens cannot be altered by means of unilateral acts of the Government which has no the same rank as legislation. There should be correspondence between the act conferring rights and the act withdrawing those rights (again in line with the need of communication among the institutions);
3. For sure the Government enjoys the Royal Prerogative to negotiate international agreements without delegation of the Parliament which is involved as well. But a very important principle of constitutional law is affirmed here «in case of contrast between Royal Prerogative and statutory law it is statutory law that prevails[61]». Hence, in the event of a contrast between a convention such as the Royal Prerogative and a statutory rule as those contained in the ECA 1972, it is the statute that prevails as the UK is based on the principle of parliamentary sovereignty;
4. Without the consent of an Act of Parliament, to withdraw or to limit the rights of citizens acquired through the ECA 1972 is unlawful. So the Government would act *ultra vires* if not asking the legislative authorization to the Parliament in order to trigger art. 50: here the Supreme Court was very clear, underlining that the UK legislation needs the consent by the Parliament in order to notify the legality of withdrawing. The reason resides in the meaning of what is a *notification*, which does not entail negotiation of an international agreement, rather it is a just notification to the EU institutions which should happen - as article 50(1) states – "in compliance with national constitutional requirements".

Subsequently, in February 2017 the Government of Theresa May published and transmitted to the Parliament the so called *The United Kingdom's Exit from, and New Partnership with, the European Union*. The aim was to assure which would have been the steps and the purposes of the Government, both to citizens and MPs, in terms of negotiating the agreement, a kind of roadmap. The House of Commons accepted all the instances[62], while the House of Lords proposed two important amendments

[61]Where there is a conflict between the prerogative and statute, statute prevails. Statute law cannot be altered by use of the prerogative; use of the prerogative remains subject to the common law duties of fairness and reason. It is therefore possible to challenge use of the prerogative by judicial review in most cases. While the prerogative can be abolished or abrogated by statute, it can never be broadened. However, Parliament could create powers by statute that are similar to prerogative powers in their nature.

[62]The first reading healed the 8 February 2017 has ended with 494 votes in favour and 122 against, approval without modification even if there were several amendments in particular proposed by Labourist wing, trying to strengthen the role of involvement of the Parliament on the development of negotiations; the second reading ended the 7th of March 2017 with two new amendments approved (citizens right leaving in the EU, 358 in favour against 256; the duty of submission to both Chambers of any agreement before the consultation of European Parliament, 366 in favour against 268). The bill was approved with 366 votes in favour against 268.

- protection of citizens residing in the EU and the obligation to submit every negotiated agreement to both Chambers before it would have been analysed by the European Parliament. Afterwards, David Davis, the Secretary of State for Exiting the EU, illustrated to the House of Lords all the points[63] of the document expressed by May's Government.

On 29th March 2017, Theresa May wrote a letter to President Tusk, - in line with what we indicated before as *notification* - reaffirming what was people's will during the Brexit referendum, «a vote of restoring the British self-determination»[64]. May expressed the feeling of UK's citizens sentencing: «we should engage with one another constructively and respectfully, in a spirit of sincere cooperation or we should always put our citizens first», or«we must pay attention to the UK's unique relationship with the Republic of Ireland and the importance of the peace process in Norther Ireland»[65]. The letter contained a view of understanding and remarking the relationship between national government and the devolved administration[66] «*we* the UK, *we* negotiate the withdrawal as one UK» give the impression that any negotiating power to Scotland, Wales, Northern Ireland are conceded.

In her defence, Theresa May affirmed that a process of consultation has started for the inclusion of the regions in the discussions even if they do not have the power to negotiate directly with the EU. Also the way in which she has portrayed the withdrawal is translated as the guarantee of an increase of powers for the devolved administration because the powers once exercised by the EU will be given to the legislatures[67]. Another problem that arose at the time of the process for notifying the withdrawal met the demonstrations on streets occurred to contest the decision of the High Court in the first step of the Miller judgment. The motivation is investigated. Firstly, blaming on the way the media depicted the decision and secondly in considering an unlawful intrusion of the Courts in something decided by the people (which means the referendum). It was not asked to the judicial system if Brexit was lawful or not, simply the only issue they were asked to decide was what are the procedural requirement for us to trigger art. 50. The Court was not checking the validity of the referendum, even if it remarked it was a non-binding referendum, rather it is up to the Government and Parliament to decide, it was not interfering with Brexit itself. Along the line of the Supreme Court's decisions, the most important results of Miller judgement were the re-confirmation of the principle of absolute

[63]For more details, see the pdf: http://www.senato.it/service/PDF/PDFServer/BGT/01008326.pdf.

[64]«I am writing to give effect to the democratic decision of the people of the United Kingdom […] to withdraw from the EU. In addition, in accordance with the same Article 50(2) as applied by Article 106a of the Treaty of Establishing the European Atomic Energy Community, I hereby notify the European Council of the United Kingdom's intention to withdraw from the European Atomic Energy Community» […], from the official letter of Theresa May to Donald Tusk, 29 March 2017.

[65] This argument will be explored in the next two chapters. Here in the context, Theresa May affirmed how important was to assure a *not-hard-border* between Norther Ireland and Ireland, to not jeopardise the Belfast Agreement and to maintain the Common Travel Area safe with UK, something that nowadays is still developing.

[66] See Ch.3.

[67]Ibidem.

parliamentary sovereignty meaning that no other authority could impair this principle. And this value is so important in the UK because it is instrumental to protect citizens' rights, that is one of the main aspects of the EU Withdrawal Act 2018.

All around this statement, it was already guaranteed to the Parliament to oversee ongoing process of negotiations led by the Government. Indeed, independently from EU mechanism, Westminster Parliament manages an effective system of European scrutiny based on select committees able to hold the UK Government to account for its actions in EU decision-making. The main purpose of the scrutiny system is to ensure that the House of Commons, and through the House other organisations and individuals, has opportunities to seek to influence UK Ministers on EU proposals and most important, to hold UK Ministers to account for their activities in the Council of Ministers[68]. It is only up to UK Ministers who are directly accountable to the House; none of the European Union institutions (even, collectively, the Council of Ministers) is answerable to any national Parliament.

The scrutiny system may also have influence in other ways. It provides an additional source of analysis and opinion about EU legislative proposals, and can highlight any laws in them. Through the use of scrutiny reserves and otherwise it can encourage better organisation of business by the institutions and greater transparency, especially in the Council. Through the "subsidiarity early-warning mechanism" national parliaments and their scrutiny systems have a direct role in policing the principle of subsidiarity, peculiarity of EU law. The scrutiny system enhancements, but does not replace, the usual opportunities members have to examine and question government's policies, such as parliamentary questions and Select Committee inquiries. Furthermore, what would have been problematic is the situation in which the Parliament would have refused to vote on the notification of withdrawal because it would have run contrast to the will of the people as expressed in the referendum. From a legal point of view under the UK uncodified constitution, that would have not entailed violation, but from political perspective that would have been a tragedy.

After the introduction of the document by David Davis in July 2017 to the House of Commons[69], the first reading and debate ended and passed by a margin of 326 to 290. Afterwards, in October 2017, during the Select Committee on EU centred on scrutiny of Brexit Negotiations[70] and chaired by Lord Jay of Ewelme, Davis affirmed to the assembly that UK were reaching – still it is – the "*agreement*"

[68]the Committees work is based on the explanatory memorandum that the UK government submits, setting out its position on the EU documents. In the transition period is not clear whether the UK government will receive documents from the EU institutions as it does now as a member state.

[69]The first debate taking place on the second reading which began on 7th September 2017.

[70]Michael Barnier is the European responsible for Brexit negotiations (citizen rights; Northern Ireland, money and so-called separation issues). Both sides, European one
and British one, expect to conclude negotiations by October 2018, so that the European Parliament would vote on it in December 2018 or January 2019 (following the normal procedures of voting through a Committee, whereas coming straight back to the Parliament and put it on the vote straightway.

rather than a "*framework*" or a "*scoping*" with European Parliament. He blamed the European side to not be able to accelerate the negotiations in order to end the process quickly[71], affirming to be in short of time. These are also the premises for having an "healthy" outcome as Davis called it, considering also the political size and value the negotiations have, more than legal one.

During the second reading debate many MPs, from all sides of the House of Commons, raised concerns that the powers provided by Henry VIII clauses for ministers would undermine parliamentary role, with some MPs referring to the proposals during the debate as creating an 'elective dictatorship' by placing significant legislative powers in the hands of ministers. Then, House of Commons' leader Andrea Leadsom announced on 26th October 2017 that the Committee stage[72] required by a motion passed with 318 to 301, was to begin on 14th November and it was like this, concluding on 20th December 2017. The Third Reading in the House of Commons had place on 17th January 2018, passed with 324 to 295. Although the Bill finally passed, it will not come into force until exit day, 29th March 2019 at 11.00 p.m.

In conclusion, demonstrated there are several issue surrounding the role of Parliamentary sovereignty, the importance and supremacy of EU law and the final decision of the Supreme Court, what does it last concretely? The role of Parliament, even if a cornerstone, even if the main representative actor, even if also John Locke[73] glorified its importance as the main centre of power, is in doubt. In some extent, when we talk about Parliament and the will of people, there is always a reason for disputing, and times have changed as much as needs and citizens' awareness of society, rights and duties.

2.2 Before and after the Royal assent of EU Withdrawal Act 2018 and the effects of EU Withdrawal Agreement

If we want to provide a definition of EU Withdrawal Bill – now Act - we can say it is «the means by which the UK Parliament is moving all law-making powers back to the UK from the EU». And if we can shortly resume what are its main functions we can say that «first, it removes the UK legislation, the ECA 1972 that grants the EU powers to make laws that apply in the UK. Second, it copies the

[71] "On the European side, the assertion was that this was our legal responsibility, that we owed them (the EU) the money. Actually, Mr Barnier talks about *debts*. If you look at the whole sweep of it, it was contingent liabilities; it was even unfunded personal liabilities" […], *from the debate on Scrutiny of Brexit negotiations*, 31 October 2017.

[72]There was a total of 40 divisions during Committee Stage, proposed amendments that were not passed. For example, an amendment to exclude the section of the Bill which states that the Charter of Fundamental Rights of the European Union will not be part of domestic law after exit day, was defeated by 311 votes to 301. On 5thDecember, the Government had published an analysis setting out how each article of the charter will be reflected in UK law after Brexit. Another one aims to allow the UK to remain in the EU Customs Union was defeated by 320 votes to 114, something that it is still under discussion and considering as an unviable solution. Lastly, an amendment was proposed to hold a referendum on whether to accept the final exit deal agreed with the EU or remain in the EU and it was defeated by 319 votes to 23.

[73] J. Locke, *Two treaties on Government,*1689, http://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf.

entirety of EU law into UK law so that once the UK leaves the EU there is continuity in the UK's legal framework»[74]. The official document which is entrenched of giving legal space to the future EU Withdrawal Agreement, got the Royal Assent at the end of June 2018, and it is the EU Withdrawal Act 2018. It became law and now it is waiting for the EU and after the UK Parliament the approval of EU Withdrawal Agreement.

On 19 March 2018, the UK and the EU have published a draft Withdrawal agreement[75] (WA) which provides for a 21-months transition period starting from Brexit on 29 march 2019 till 21 December 2020. In that period, the UK would essentially remain within the EU legal order and subject to the authority of EU institutions.

Along the period of drafting, there were several issues which required attention and will be analysed in this section. First of all, what about the *acquis* of EU law in domestic ruling[76]? We already know that the most important element in this drafting was the incorporation of EU rules into UK law: what will be their effect now? How they will have been considered? Would they be retained? Secondly, what will be the future relationships[77] with EU? The EU Withdrawal Act began its law itinerary with three main purposes: repeal the ECA 1972, correct EU law once it is part of UK law and convert all EU law into national law. Repeal in the sense that the bill will have the effect of removing the supremacy of EU law over UK law, including the principle of direct effect. Convert in the sense that the bill will convert the whole body of EU law into UK law. However, this has been as crucial as complicated. We can assume that the question which gathers all the implication of this process is: how much things will be the same or different after 29th March 2019? It is useful to analyse both roles of Government and Parliament, their relationship and their acting on the scene, in order to make final considerations, try to figure out what the Act is going to rule. In the end, even once the negotiation is completed, Brexit results as an international process – and we have to remember that the European Parliament has a veto on it. As time passes MEPs will be more tempted to use it, the EP legally binding vote.

Provided Parliament assents both national and European, the Government will then bring forward a new statute to give the withdrawal agreement effect in UK law. Again David Davis has said that "if the original motion is put but not passed, the deal falls – full stop; in *toto*".

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[74] UK and the EU*, What Is the EU Withdrawal Bill:* http://ukandeu.ac.uk/fact-figures/what-is-the-eu-withdrawal-bill/.

[75]Even if on April 2018 there was a stop from the House of Lords to the EU Withdrawal Agreement for the decision of exiting the Common Market.

[76] «To give domestic legal effect to the UK's membership of the EU, section 2(1) of the ECA 1972 ensured that rights and obligations created by the EU treaties, would be given legal effect in the UK law. Once the UK leaves the EU the source of these rights will be cut off», K.A. Armstrong, p.182.

[77]Although these final considerations will be given in the last chapter, they must be keep in mind for follow this challenging analysis.

In order to achieve the best result available, Government needs a plan to manage these risks and parliamentarians need to understand the consequences of possible interventions for the overall Brexit timetable (renegotiation is in the hand of Parliament). To respond to the first question held in the initial paragraph, we can say that Parliament is the main element of British doctrine, even if the value of its sovereignty was put under pressure over the years - and still it is.

The role of the legislative growing in two directions. One concerns the power over when and how to introduce bills, although it could be a situation in which more important matters instead of others should arguably be considered by Parliament. The Government can balance the importance of bills. The second issue relates to the content of legislation, the allowing of widespread delegated powers including Henry VIII powers, and application of the innovative and constitutionally problematic 'made affirmative' procedure. Remarkably, in the current parliamentary session – notably the EU Withdrawal Act has required upon 300 hours - Parliament has had relatively legislative work to do. Notwithstanding, we do know that since the beginning of this history, the British Government has sought to guarantee consistency between the pre-Brexit and post-Brexit position. In this sense, the Government also asked for a distinction between these two positions in terms of case law. The former should continue to be binding on the UK courts - domestic courts will be able to consider post-Brexit decisions by the ECJ. The latter announces a prospective with implications for Parliament, because it will require the intervention of the legislature.

Mainly, Parliament continued monitoring EU developments, scrutiny and accountability of the UK Government in EU affairs, oversight of the UK-EU Withdrawal Agreement Joint Committee, adjusting scrutiny of UK Brexit awareness to a longer timeframe, and legislating for transition. In November 2017, Government has announced its intention to bring forward a Withdrawal Agreement and Implementation Bill (WAIB), a piece of primary legislation to safeguard the EU Withdrawal Act. Now, it is an Act of Parliament – and also to implement the EU Withdrawal Agreement and any '*implementation'* (transition) period. The objective of the Bill is to express reference to the Agreement and incorporate the citizens' rights Part into UK law. Once this Bill will be adopted, the provisions of the citizens' rights part will have effect in primary legislation and will prevail over inconsistent or incompatible legislation, unless Parliament expressly repeals this Act in future.

There are important clauses in the Act - particularly clause 7,8 and 9 – which give some powers to the Government. They make it able to form secondary legislation for specific purposes in order to prepare for Brexit. Clause 9 enables the Government[78] to use secondary legislation to implement any

[78]«The UK Government will bring forward a Bill, the Withdrawal Agreement & Implementation Bill, specifically to implement the Agreement. This Bill will make express reference to the Agreement and will fully incorporate the citizens' rights Part into UK law. Once this Bill has been adopted, the provisions of the citizens' rights Part will have effect in primary legislation and will prevail over inconsistent or incompatible legislature […]», from the Joint Report from the

withdrawal agreement under art.50(2) TEU. We have to make a distinction[79] between primary and secondary legislation. Secondary legislation is used to add more information or make variations to an existing act of Parliament, which is primary legislation. This device permits the Government to make a small change to the law without having to introduce an entirely new Bill to Parliament. There are the so-called *Statutory Instruments* (SI) which are important instruments for do this procedure in the simplest way possible. However, the Government has not yet explained how the use of clause 9 will be coordinated with either the proposed WAIB, or with the promised vote, on a motion both Houses of Parliament, on the substance of a withdrawal agreement. It has however indicated that clause 9 could be used if the negotiations will be concluded late in the two-year period. This could mean that clause 9 might only be used if there was not enough parliamentary time to implement[80] the withdrawal agreement through primary legislation.

The deadline has been fixed - announced in November 2017 - by the Commission to the EU Council for October 2018. The EU Withdrawal Agreement needs to be approved by UK after obtaining consent of the European Parliament and before 29 March 2019.

As Jack Simson Caird discussed in his paper, «this planned vote on a resolution will enable Parliament to give its view on the substance of the long-term relationship between the UK and the EU, which is expected to come into force after the end of the transitional period. If Parliament did not pass either the resolution approving the agreements […] it is possible that on 29 March 2019 the UK could leave the EU with no withdrawal agreement»[81].

Indeed, David Davis proposed that the process of approving the withdrawal agreement will take the form of a resolution in both Houses of Parliament[82]. This resolution will cover «both the Withdrawal Agreement and the terms for our future relationship». Then, there will be two agreements detained through the art. 50 process: Withdrawal Agreement itself (which will contain detailed provisions on citizens' rights, transition, the exit bill and Ireland) and a framework for the future relationship. If the resolution on the withdrawal agreements is passed in both Houses, there will then be a series of important procedures for Parliament.

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negotiators of the EU and the UK Government Phase 1, 8 November 2017, see the link: https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf.

[79] For more details, see the link: http://www.legislation.gov.uk/pdfs/GuideToRevisedLegislation_Jan_2012.pdf.

[80] In December 2017 David Davis announced to the HoC that the approval process is separate from the process of implementing the agreement through primary and secondary legislation. Notwithstanding, it is already to understand the relationship between approving and implementing the withdrawal agreement and the role that Parliament will play once the negotiations are concluded.

[81] For more details, see the link: https://ukconstitutionallaw.org/2018/02/09/jack-simson-caird-parliament-and-the-withdrawal-agreement-the-meaningful-vote/.

[82] For more details, see the link: https://commonslibrary.parliament.uk/brexit/legislation/parliaments-right-to-a-meaningful-vote-amendments-to-the-eu-withdrawal-bill/.

Moreover, either Houses could also use the Constitutional Reform and Governance Act 2010[83] (CRAG) to object to ratification of the agreement. Basically, the procedure set out in CRAG allows the House of Commons, by passing resolutions, to indefinitely block the ratification of a treaty and David Davis considers the procedure valid. The Withdrawal Agreement could be stopped by CRAG procedure. However, this proposed parliamentary approval process diverges from the procedure specified by the CRAG. Without going in details, the main thing to apprehend is that Parliament will have the possibility to express its vision about the future relationship between the UK and the EU and, more important, its vote is fundamental to have the agreement at the end of the period.

The implication is that MPs will not be able to object to the Government's plans on the UK's future trading relationship with the EU without wrecking the deal on citizens' rights and a transition period. MPs are able to amend the motion, even if Parliament is not able to amend the content of the Withdrawal Agreement.

Parliamentarians need an opportunity to scrutinize the Withdrawal Agreement. A more pertinent precedent may be the motion approving the Government's decision to join the European Communities in October 1971, argument discussed already in Chapter 1. Parliament debated this for five days before voting. There was a further day of debate in January 1972 thanks to an opposition motion. In the end, the institute for Government previously argued that the withdrawal agreement should be implemented through primary legislation, not by statutory instrument as the Government formerly planned. So it need an Act of Parliament. It is welcomed, therefore, that the Government will bring forward the WAIB. This cannot give legal effect to transition in the UK, for instance, without keeping in force or effectively replicating the European Communities Act 1972 for the duration of that transition. Four tasks that the Government need to complete:

- Task 1: pass a motion asserting in principle to the withdrawal agreement and the future framework;
- Task 2: pass the withdrawal agreement and implementation bill;
- Task 3: pass any secondary legislation needed to implement the withdrawal agreement, using powers created in the EU Withdrawal Bill;
- Task 4: ratify the withdrawal agreement as a treaty.

Both institutional bodies are preparing for transition but there is continued uncertainty and contingency. It remains to be seen whether Parliament would take the transition as definite when its two Houses pass motions approving the WA, when the EP does so, or only the WAIB receives Royal Assent.

[83]Specifically, Ch.2 Part 2, subsections 3, 4b for more details see the document at link: http://www.legislation.gov.uk/ukpga/2010/25/pdfs/ukpga_20100025_en.pdf.

The Government is likely to leave Parliament's opportunity to vote on the deal as late as possible to put pressure on, particularly Remain, MPs. But the problem is that May's legislature is already looking for a stable majority which is going to vote for the EU Withdrawal Agreement, and Brexiteer resistance is fighting to stop this difficult purpose.

After only 6 months from Brexit Referendum, there were different interpretations and considerations about the decision of withdrawing, wondering if there would have been a constitutional reading or an international law one, or something mixed, averting the possibility of a divergence between UK legal order of EU directives. Dialogue and negotiations are – were and will – central for any kind of international problem, especially a withdrawal. Basically, a pure misunderstanding which is the real situation. Indeed, «unilateral withdrawal would eventually place the UK in breach of EU law, thus immediately raising concerns about further litigation. An international-law based interpretation of withdrawal would have to meet EU constitutional requirements in full in order to be compatible with EU law[84]». Finally, with the words of Matt Bevington: «There is also no willingness to reopen already agreed issues, although the language in the Political Declaration could be altered, but only if there is a positive and feasible UK decision on a new long-term direction. No deal by default implies the most chaotic and harmful Brexit by March 2019. Can it be avoided? The UK seems trapped in its domestic political processes, with the Government hanging on from week to week»[85].

2.3 The EU Withdrawal Act 2018: the new relation between Parliament and Government

This paragraph aims to understand and verify in which sectors after the approval of the EU Withdrawal Act 2018 the role of the Parliament can change. This will happen due to the repeal effect of European legislation, the sense of the entire process that purposes to give back sovereignty to the legislative body. We have analysed the Henry VIII clause's powers, how much their use can affect Parliamentary power instead of increasing the Government moves.

If we want to make a resume of what we already described in the previous chapter, the ECA has challenged the traditional notion of parliamentary sovereignty in the domestic sphere, especially in relation to conflict between EU and UK law. Since triggering Article 50, the relationship between Parliament and Government has become complicated. In addition, in June 2017, the Conservative Government lost its parliamentary majority, making the process of delivering Brexit even more challenging. One consequence which hit Parliament, coming from the election, has been the

[84] For more details, see the link: https://www.ucl.ac.uk/european-institute/brexit-article-50.pdf.

[85] UK and the EU, *The UK-EU relationship: the political consequence of mutual misunderstanding, 2017,* Matt Bevington did a very interesting reflection, arguing on a political misunderstanding between UK and EU. For more details, see the link: http://ukandeu.ac.uk/the-uk-eu-relationship-the-political-consequences-of-mutual-misunderstanding/.

increasing of MPs' encouragement, who proposed nearly 500 amendments to the EU Withdrawal Bill. Though only defeated once – on the amendment for a 'meaningful vote[86]' for Parliament on the final Brexit deal – the Government was mindful of the impact of losing key votes which would create an impression of a Government losing control of the Brexit process.

The terms of the ECA 1972 are crucial to the analysis of the EU legal order, especially now that there is the EU Withdrawal Act 2018. Section 2(4) of the Act, titled *General Provisions for repeal and amendment* and Section 3(1) *Decisions on, and proof of, Treaties and EU instruments*, are very important. The former provides that all statutes whether already enacted or yet to be enacted must be read and given effect to consistently with enforceable principles of EU law. The latter promotes decisions of the ECJ as binding precedents for all UK courts and tribunals. However, the practical difficulties of repeal are considered in the next paragraph. Considering that the sovereignty of Parliament – or sovereignty in general – has been threatened by European treaties[87], in first place Maastricht Treaty (1992)[88], Amsterdam Treaty (1997)[89] and finally Lisbon Treaty (2009)[90] - which is the TFEU - all of these devices can provoke the decrease of parliamentary supremacy, because they feed the areas of intervention of the EU. With *Factortame,* as Lord Bridge said during the process, «it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law». Clearly, as long as the UK remains in the EU law enjoys primacy over UK law.

There was another case[91] were Courts would be obliged to apply domestic instead of European law, but it failed to find approval because it didn't take into account how EU integration grew up. With *Thoburn v Sunderland City Council (2002)* there was introduced a list of "constitutional statutes"[92]

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[86] The Government cannot now ratify the deal until Parliament has approved it. A meaningful vote - Davis claimed - is one that allows people to say whether they want or do not want the deal. This means that parliamentarians can affect, if they desire, the result of negotiations and they have to do this in the less time possible: on the contrary, they can only generate more uncertainty. For more details, see the link: https://www.instituteforgovernment.org.uk/explainers/what-has-changed-parliaments-meaningful-vote.

[87] For more details, see the link: https://www.lawteacher.net/free-law-essays/public-law/european-union-weakens-parliamentary-supremacy-law-essay.php.

[88] Maastricht Treaty 1992: https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf.

[89] Amsterdam Treaty 1997: http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf.

[90] Lisbon Treaty 2009: http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.5.pdf.

[91] The case is *McCarthys v Smith* (1979), where Smith claimed that she was entitled to equal pay to a man doing the same job as her, asking if EC law should have prevailed over Westminster's Equal Pay Act 1970, in other words it established that domestic law ought been interpreted in light of EC law, with EC law prevailing in the event of conflict. Smith succeeded, albeit Westminster Law would be supreme if it explicitly repealed EC law (Lord Denning's interpretation).

[92] Prior of Henry VIII clause and powers, Thoburn (and others) defending their recent arrests, have claimed that it was legal to trade primarily in imperial measurements as the Secretary of State's amendments to the Weights and Measures Act 1985 in 1994 to comply with an EU directive was ineffective: the 1985 Act had impliedly repealed the EC Act 1972, removing the Secretary of State's power to amend the Act to attain EU compliance. It was ruled that there is a hierarchy of statutes: there are regular statutes, which can be impliedly repealed; and "constitutional statutes" which can only be expressly repealed.

which can only be expressly repealed, among others, the ECA 1972. Considered the judgement as a way of preserving the parliamentary sovereignty, this innovation gave a new "status" to the Act. Therefore, the ECA 1972 is – was – not capable of being repealed by simple majority, and so with this, recalling Wade's theory, parliamentary supremacy can be assumed as a "political fact". However, opposing to this assumption, Allan instead talked about "legislative supremacy", which means that Parliament is the supreme law-making body within the UK legal order[93]: basically, he tried to intend that the English legal order has remained the same.

The result is that parliamentary supremacy has to be considered – and indeed it is - supreme than EU law but only in terms of UK legal ground. However, if we compare the power it has at EU level, it failed to be the first one. With the ECA 1972 repealed by the EU Withdrawal Act 2018, changes are assured. It could be possible that parliamentary sovereignty, and so the relationship between Parliament and Government – due to Henry VIII clause – is going to change and the area of intervention of the Westminster Parliament may increase thanks to the repeal of European legislation. Therefore, the new White Paper of May's Government[94] was published in July 2018, it has five priorities to respond: economy, free movement of people, national unity, democracy and UK's position in the world. However, it has immediately been defined as a weak agreement, undermined also because the sudden resignations from the Government of David Davis, that had followed the negotiations till this new publication, and of the Minister of Foreign Affairs Boris Johnson. Both of them sustained as this line does not represent at all an acceptable compromise, with no manifestation of "Hard Brexit" as they followed since the beginning, rather the son of a transformation they did not understand and share.

This will be an open match until October 2018 when it has been fixed as the dead line for the response of European Parliament on the new approved Act. The core of the act is to remove the mechanism for the automatic flow of EU law into UK law[95] which has reduced the space of acting for British doctrine, and removing the power to implement EU obligations[96]. Since then, the possible evolution for Parliament and Government turns around delegated powers which will derived from this repeal act - that is another aspect really important to put under valuation, in chapter 3 and 4. Even if there are many EU laws – by converting or removing in UK law - which will continue to be in force even

[93] For more details, see the link https://www.lawteacher.net/free-law-essays/public-law/european-union-weakens-parliamentary-supremacy-law-essay.php.

[94] For more details, see the link: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728757/6.4737_Cm9674_Legislating_for_the_withdrawl_agreement_FINAL_230718_v3a_WEB_PM.pdf

[95] Section 2(1) ECA 1972.

[96] Ibidem.

after Brexit day, there are however many retained EU law[97]. These laws will be unable to function because the UK will be no longer a member of the EU and they are a new type of UK legislation. Thus, the Act furnishes power which enables ministers to adjust possible problems arising from withdrawal by way of making regulations by statutory instruments. Once the UK leaves the EU, there will also be areas of law where policy no longer operates as intended. One element of EU law is the reciprocal arrangements between states including reciprocal rights of citizens. As a matter of international law, those obligations will fall away at the point where the UK leaves the EU. At the same point, EU states' obligations under EU law to the UK and its citizens will also fall away. Any such obligations beyond that time will only exist if they are covered in the EU Withdrawal Agreement, it seems to be like this.

Though, without a correction, the UK's law would still include recognition of EU citizens' rights. The power to deal with deficiencies can therefore modify, limit or remove the rights which domestic law presently grants to EU nationals, in circumstances where there has been no agreement and EU member states are providing no such rights to UK nationals. Furthermore, the Government's approach is to provide as much certainty as possible as we move through the process of exiting the European Union.

In general, the EU Withdrawal Act 2018 translates directly applicable EU law (e.g. EU regulations) into UK law; it preserves all the laws which have been made in the UK to implement EU obligations (e.g. in EU directives); it incorporates any other rights which are available in domestic law by virtue of section 2(1) of the ECA, including the rights contained in the EU treaties, that can currently be relied on directly in national law without the need for specific implementing measures; and it provides that pre-exit case law of the Court of Justice of the European Union (CJEU) be given the same binding, or precedent, status in UK courts as decisions of the Supreme Court in Scotland[98]. Finally, the final objective of all the amendments and in general of the Act, also requires Parliament to surrender the parliamentary approval to the use of Henry VIII powers by ministers to make '*corrections'* to the Act. The Government has faced intense pressure from all sides of the Commons to guarantee the famous 'meaningful vote' for Parliament on the terms of the final Brexit withdrawal agreement the UK concludes with the EU. It was on this issue and on the question of the use of Henry VIII powers to implement the final withdrawal agreement that the Government suffered its only defeat. Constitutionally, this amendment to the Bill is significant. Not only does it provide for a formal

[97]For example, the Competition and Markets Authority and UK courts would continue to be required to decide UK antitrust cases in line with the decisions of the European Courts on competition matters on corresponding questions, and to have regard to relevant decisions or statements by the European Commission as well.

[98] For more details, see the link: http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpgaen_20180016_en.pdf.

vote by Parliament on the withdrawal agreement, but it also preserves in law a parliamentary right of democratic oversight over the Brexit withdrawal agreement.
To this extent, Parliament seems to come back to the control. In the British system of parliamentary democracy, where the Government is expected to command a majority in the House of Commons, such a defeat is significant.

2.3.1 Power to deal with defects arising from withdrawal

The power to correct problems arising from withdrawal is capable of being used to transfer to public authorities in the UK functions that are currently exercised by EU authorities. These powers will be available from Royal Assent until the end of the period of two years beginning with exit day. There will be laws that need an implementation once UK leaves the EU, for example they may require the UK to obtain an opinion from the European Commission on a given issue and thus they will need to be corrected to continue to work[99].
Upon exit, the Commission will no longer provide such opinions to the UK. In this instance the power to correct the law would allow the Government to amend UK domestic legislation to either replace the reference to the Commission with a UK body or remove this requirement completely. Similar issues also exist in legislation that is the responsibility of the devolved administrations, namely Scotland, Wales and Northern Ireland, such as that made under the ECA 1972. The Act therefore also gives devolved ministers a power to amend devolved legislation to correct any problems in retained EU law, in line with the power held by UK ministers. They must not legislate or act in a way that is contrary to EU law or in reserved matters. In addition, the Act provides the Government with a limited power to implement a Withdrawal Agreement reached with the EU into UK law, in preparation for that agreement coming into force on the exit day.
This is a separate process from that by which the Government will ask Parliament to approve the agreement and from the ratification of that agreement. The use of the power is subject to the enactment of a statute approving the final terms of withdrawal of the UK from the EU. This power will expire on exit day and is therefore restricted to implementation of things required for day one. For example, if there was relevant provision in the withdrawal agreement, the power could be used to clarify the situation in relation to regulatory approvals for UK products that were pending at the point of exit. Clause 9's implications is another issue to keep in consideration.
In order to be in a position to implement the EU Withdrawal Agreement domestically – which will be necessary – the Government will need to seek Parliament's consent. Indeed, the bill made it

[99] For more details, see the link: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en03.htm.

through the House of Commons relatively unharmed, with MPs approving only one amendment designed to empower Parliament. That amendment made the delegation of powers to the Government to implement the EU-UK withdrawal agreement in Clause 9[100] of the Bill.

At the same time, a refusal by Parliament to approve the EU Withdrawal Agreement would not bind the government to seek an extension of the Article 50 deadline and renegotiate. The Government could instead choose to crash out of the EU without a deal.

We already know that Clause 7 of the Bill gives the power to the Government of dealing with so-called '*deficiencies'* in existing law where the executive considers that is possible to do this[101]. Yet, Henry VIII powers are controversial because they are exceptionally widespread and consent the Government to amend both statutory instruments (SIs) – or secondary law – and Acts of Parliament - primary law - thus, according to the Lords' Constitution Committee[102], giving 'ministers far greater latitude than is constitutionally acceptable'. Clause 7 and Section (2) correspond to the correcting power that enables UK ministers or devolved authorities to make corrections to law, through Parliament's consent, to make it work appropriately after the UK has left the EU. Power is conferred on: Minister of the Crown; a devolved authority; a Minister of the Crown acting jointly with one or more devolved authorities. In short, power exercised by regulations made by statutory instrument Parliamentary Procedures could be negative or affirmative[103]. The Lords Delegated Powers and Regulatory Reform Committee pays particular attention to any proposal in a bill to use a Henry VIII clause because of the way it transfers power to the executive. In addition, the procedure is differentiated between the two Houses, even if the process of SIs follows both procedures cited above. The House of Lords, however, has also a Delegated Powers and Regulatory Reform Committee. The ECA does not specify whether EU-related SIs should be adopted under the negative or the affirmative procedure. This means that regulations under Section 2(2) ECA can be combined with regulations made under powers in other enabling Acts. When we talk about "*retained EU law*" we refer to converted legislation – EU legislation, so EU regulations, EU decisions, EU tertiary legislation – and preserved legislation, which comprehend regulations listed under section 2(2). Section 7 makes provision about the status of retained EU law.

[100] This clause does not technically restrict the ability of the government to conclude the withdrawal agreement, though the negotiation of an unacceptable agreement might mean that it could not be implemented.

[101]The upper house will want to see some major concessions: certainly over devolution and the deficiencies provision in Clause 7 and they might also want further clarity over the obligations on the judiciary to take into account decisions of the Court of Justice. The Withdrawal Bill currently allows judges to take such decisions into account when they consider it 'appropriate to do so'.

[102]For more details, see the link: https://www.parliament.uk/business/committees/committees-archive/lords-constitution-committee/.

[103]For more details, see the link: https://www.parliament.uk/about/how/laws/secondary-legislation/statutory-instruments-lords/#jump-link-4.

Subsection (1) clarifies that EU-derived domestic legislation which is saved by section 2 will continue as legislation of the same type as it was before exit day. In the end, we include also other rights which are available in domestic law through Section 2 (1) ECA (effective rights contained in the EU treaties). From the parliamentary reports, it came out the difference between normal delegated powers, which cannot be used to amend primary legislation, and Henry VIII powers which have this ability. In short, the distinction between Henry VIII and other delegated powers should not be taken by Parliament to be such. In other words: «Parliament must not assume that, simply because a particular delegated power would only affect a piece of secondary legislation or an element of what is currently directly effective EU law, the delegation of power requires less scrutiny than a delegation of power that happens to affect an element of EU law that is currently embodied in primary legislation - and would thus have to take the form of a Henry VIII power -. In short, the distinction between Henry VIII and other delegated powers is not in this exceptional context a reliable guide to the constitutional significance of such powers, and should not be taken by Parliament to be such»[104].

2.3.2 A textual and contextual analysis of the EU Withdrawal Acts' provisions

Since the ECA 1972 gave effect to EU law over UK domestic law, EU Withdrawal Act 2018 is the primary legislation passed by the UK Parliament which the main effects of repealing are to end this European supremacy in domestic law and to delete the function which enabled the flow of new EU law into UK law.

This is the argument of Section 1, *Repeal of the European Communities Act 1972.* After the UK leaves the EU, existing domestic legislation which implements EU law obligations (EU-derived domestic legislation, also referred to in these notes as 'preserved legislation') will do remain on the domestic statute book. Generally, «secondary legislation lapses automatically when the primary legislation under which it is made (for instance, section 2(2) ECA 1972[105]) ceases to have effect, unless saved expressly»[106]. There remains doubts on whether legislation which includes membership of the EU would work if the UK is not a member of the EU, same applications is made for legislation referring to the EEA.

This is Section 2, *Saving for EU-derived domestic legislation,* which makes clear that these categories of legislation fall within retained EU law. This means that the powers allowed by the Act can be used

[104] From the official report of Parliament: https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/19/1906.htm.
[105] ECA 1972 section 2 (2): https://www.legislation.gov.uk/ukpga/1972/68/section/2.
[106] From *Explanatory notes on EU Withdrawal Ac 2018t*: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf.

to guarantee their function also after exit from the EU[107]. Furthermore, Subsection (2) defines the types of legislation which will form part of this *'EU-derived domestic legislation'*. The Act ensures that EU legislation, where it is appropriated, continues to be in force in the UK legal system and Section 3, *Incorporation of direct EU legislation,* answers this issue consenting the conversion of direct EU legislation into domestic law.

Under section 3, direct EU legislation is only converted and incorporated into domestic law «so far as operative immediately before exit day[108]». This means that, provided it is not expressly stated to apply from a date falling on or after exit day, EU legislation which is in force before exit day will be converted even if it has some effect which crystallises after exit day. EU rights and obligations which do not fall within sections 2 and 3 continue to be recognised and available in domestic law after exit.

Section 4, *Saving for rights etc. under section 2(1) of the ECA,* includes, for example, *directly effective rights* contained within EU treaties, which «those provisions of EU treaties which are sufficiently clear, precise and unconditional as to confer rights directly on individuals and which can be relied on in national law without the need for implementing measures[109]». Where directly effective rights are retained under this section, it is the right which is retained, not the text of the Article itself. For example, the Government considers that the following TFEU articles - for example, Article 346[110] may be regarded as containing a restriction whose effect is retained by Section 4 - cover directly effective rights which would be transformed into domestic law as a result of this section. In addition, directly effective rights may also arise under other treaties which are brought into domestic law by virtue of the ECA 1972, such as the EEA Agreement and EURATOM. These include international agreements made by the EU with *third* countries, as well as certain multilateral agreements to which either or both of the EU and UK are a party.

Any directly effective rights retained in domestic law as a result of this section would be subject to amendment or repeal via statutory instrument made under section 8. For example, statutory

[107] Subsection (1) provides that EU-derived domestic legislation will remain in place and continue to have effect on and after exit day, as it has effect before exit day. However, the subsection will include both legislation that has been passed or made but is not yet in force and amendments to EU-derived domestic legislation made under the ECA. Thus, it is in contrast to section 3: only direct EU legislation is effective immediately before exit day that is converted.

[108] From *Explanatory notes on EU Withdrawal Act*, Section 3: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf.

[109] From *Explanatory notes on EU Withdrawal Act*, Section 4*:* https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf

[110] Article 346 TFEU, «The provisions of the Treaties shall not preclude the application of the following rules: (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security; (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes. 2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply».

instruments can be brought forward to repeal or amend the provisions without affecting whether the treaty right or other thing is retained under section 4 in the first place. However, the section presents some exceptions to the conversion, listed in subsection of the section. *Exceptions to savings and incorporation* is the argument of Section 5, which sets out two exceptions to the saving and incorporation of EU law provided for under sections 2, 3 and 4. The former is the famous principle of supremacy of EU law, where in UK the court must misapply an Act of Parliament, or a rule of the common law, or strike down UK secondary legislation even if the domestic law was made after the relevant EU law. So, for example, if an Act of Parliament is passed on or after exit day, inconsistent with EU law, preserved or converted by the Act – speaking about the mentioned retained EU regulation - that new Act of Parliament takes precedence.

Therefore, a conflict arises between pre-exit domestic legislation and retained EU law, subsection (2) allows that the principle of the supremacy of EU law will continue to apply as it did before exit. So, for example, a retained EU regulation would take precedence over pre-exit domestic legislation that is inconsistent with it.

Finally, subsection (3) sets out that the principle of supremacy can continue to apply to pre- exit law which is amended on or after exit day where that accords with the intention of the modifications. Another important exception is the Charter of Fundamental Rights, albeit the UK has always retained a position of opt-out in intergovernmental conference. The Charter did not create new rights, but rather reaffirmed rights and principles which already existed in EU law. On 23 April 2018, some peers of House of Lords have backed a cross-party amendment in favour of retaining the EU Charter of Fundamental Rights by a majority of 71, with 316 supporting the motion and 245 opposing it. By converting the EU *acquis* into UK law, those underlying rights and principles will also be converted into UK law, as provided for in this Act.

References to the Charter in the domestic and CJEU case law which is being retained, are to be read as if they referred to the corresponding fundamental rights[111].Ministers have insisted retaining the Charter of Fundamental Rights is unnecessary and that the protections it offers will be included away. This has received several claims. Given that the Charter did not create any new rights, subsection (5) makes clear that, whilst the Charter will not form part of domestic law after exit, this does not remove any underlying fundamental rights or principles which exist, and EU law which is converted will continue to be interpreted in light of those underlying rights and principles. Subsection (6) provides that further limited exceptions to the preservation and conversion of EU law have effect, as set out in Schedule 1. *Interpretation of retained EU law* is discussed in Section 6. It also regulates with

[111]Independent.com, *House of Lords defeat Government plans,* 2018: https://www.independent.co.uk/news/uk/politics/brexit-latest-eu-rights-charter-uk-government-house-of-lords-withdrawal-bill-a8318731.html.

subsections (1) and (2) the relationship between the CJEU and domestic courts and tribunals after exit. These subsections provide that: decisions of the CJEU made after exit day will not be binding on domestic (UK) courts and tribunals; domestic courts cannot refer cases to the CJEU on or after exit day; and domestic courts and tribunals are able to have regard to actions of the EU taken post-exit, including CJEU decisions, where they are relevant to any matter the court or tribunal is considering. This ability is, however, limited by the other provisions in this section - so, for example, although a court may have regard to post-exit CJEU decisions, it cannot have regard to such an extent it considers itself bound by them (as this is ruled out by subsection (1).

The possibility of having to make secondary legislation to deal with deficiencies that would arise on exit in retained EU law is given to ministers of Crown and it is regulated under Section 8 *Dealing with deficiencies arising from withdrawal*. This includes the law which is preserved and converted by sections 2, 3 and 4 (i.e. both domestic law and directly applicable EU law). These problems, or deficiencies, must arise from the UK's withdrawal from the EU[112]. If there is a failure of retained EU law, we can talk about a *deficiency*. Failure is translated as the law doesn't operate effectively whereas deficiency covers a wider range of cases where it does not function appropriately or sensibly. For example, if the UK has implemented a directive but has not employed the provisions in the directive which provide for the Commission or EU agency to carry out a function, the absence of this function in retained EU law could be a deficiency in the implementing legislation after the UK leaves the EU. The correcting power could be used to recreate the function[113].

Section 9, *Implementing the withdrawal agreement,* gives ministers of the Crown a power to make secondary legislation to implement the withdrawal agreement (as defined in section 20(1)) agreed between the UK and the EU under Article 50(2) of the TEU - or that Article as applied by the EURATOM Treaty. Under subsection (1), regulations created using to make legislative changes which they consider appropriate for the purposes of implementing the withdrawal agreement are restricted to implementing only those measures that should be in place for exit day and this power is not intended to be used for post-exit modifications. The use of the power is in the hand of ministers of Crown, and it is subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the UK from the EU. The peculiarity of this Section resides in Subsection (2), where secondary legislation made under this power can provide anything an Act of Parliament can do.

[112] This includes the consequence that the UK will cease to participate in the EEA Agreement. The law is not deficient merely because a minister considers that EU law was flawed prior to exit. A minister is able to take action.

[113] Subsection (3) also provides that deficiencies not on the list but which are "of a similar kind" to those on the list in subsection (2) are within the scope of the correcting power. In the end, the parliamentary scrutiny procedures for the exercise of the power in subsection (1) are set out in Part 1 of Schedule 7.

However, restrictions are placed in subsection (3). In the end, the power expires on exit day meaning that no regulations can be made after this time[114].

Finally, Section 13 regards *Parliamentary approval of the outcome of negotiations with the European Union.* The Section sets out Parliament's oversight of the outcome of the UK Government's negotiations with the EU under Article 50(2) of the TEU. The withdrawal agreement may be ratified if a number of conditions are met, this is a result obtained with amendments by House of Lords. New subsection (10) sets out that the provisions in subsections (3) to (8) do not apply (the consent process does not apply) for the purposes of revoking regulations made under the power in subsection (1). In short, Section 13 contains a set of mandatory procedures for Parliament's approval depending to the possible outcome of government's negotiations with the EU. One could be that there will be an agreement between the UK and EU under Article 50 TEU. Alternatively, subsection (10) says that if by Monday 21 January 2019, there is no agreement in principle in the negotiations on the substance of the withdrawal arrangements and the framework for the future relationship between the EU and the UK, the Government must publish a statement setting out how the government proposes to proceed, and must arrange for debate about that in Parliament within days. New subsection (11) provides that the 40 day-period in subsection (3) begins when the draft regulations are provided to the Scottish Ministers and does not include any period where the Scottish Parliament is dissolved, or in recess for more than four days. «A Minister of the Crown has laid before each House of Parliament a statement that political agreement has been reached, a copy of negotiated withdrawal agreement, and a copy of the framework for the future relationship[115]»; the negotiated Withdrawal Agreement and the framework for the future relationship have been approved by a resolution of the House of Commons; a motion for the House of Lords to take note of the negotiated withdrawal agreement and the framework for the future relationship has been tabled in the House of Lords by a Minister of the Crown and: the House of Lords has debated the motion, or the House of Lords has not concluded a debate on the motion before the end of the period of five Lords sitting days (defined in subsection (16)) beginning with the first Lords sitting day after the day on which the House of Commons passes the resolution mentioned in subsection in paragraph (b) of this subsection (outlined in the bullet point above); and, an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

With the words of Richard Bekins: «Parliament has a vital but bounded role to play in securing the UK's exit from the EU. It is not free simply to call the whole thing off; Parliament cannot legislate to cancel Brexit» and again«it is the duty of Parliament to assert itself and move to block withdrawal

[114] The scrutiny procedures for this power are set out in Part 2 of Schedule 7.
[115] Subsection (15) and (16).

from the EU, whether by rejecting any agreement the Government negotiates with the EU or by legislating for a second referendum[116]». Notwithstanding, according to Paragraph 61 of the White Paper, the ECA 1972 shall be repealed on exit day, but the Withdrawal Agreement Bill will save the effects of the 1972 Act and adjust the new UK's relationship with the EU. Thus, the transition period seems to be prolonged.

The White Paper provides for an implementation period running from exit day to 31 December 2020, where EU law shall continue to apply in the same way as under the ECA 1972. This means that the Withdrawal Agreement Bill should amend the EU Withdrawal Act 2018 and save the ECA 1972 for the time of the implementation period, whereas the domestication of EU law regime would not come into force before the 21 months of the implementation period[117]. Again, the domestication of EU law[118] shall also include the law provided during the Agreement's implementation period, which means that the Henry VIII powers of the Government to deal with deficiencies under the EU Withdrawal Act 2018 shall cover the deficiencies arising from both withdrawal (as is provided by the EU Withdrawal Act 2018) and the end of the implementation period.

2.4 The reach and importance of parliamentary report on Brexit

In general, we can say that the work from both chambers and committees is really hard. Since the beginning of this unprecedented history, every single man from its role has made something to implement, arrest or encourage the process of Brexit. Notwithstanding, it was predictable that the problem arising from it would have been which body has more influence or not on the procedure and in which extent. And here again it resides the core of the thesis, how much the Parliament is involved and considered in administrating Brexit time. Prior to Henry VIII powers which we have explored in the precedent paragraphs, the need of give back supremacy to the executive body is at the first place of the concern. Also the Select Committees of both Chambers are central in the procedure. They released several reports on parliamentary scrutiny and approval of the Withdrawal Agreement and negotiations on a future relationship, we arrived at the 8th report in July 2018.

From the 6th report, what came up from it was that the Committee's scrutiny of the deal is important to the "meaningful vote". In order to ensure that there is the opportunity to report to the House, as

[116] For more details, see the link: https://briefingsforbrexit.com/parliaments-role-in-brexit-vital-but-bounded/.

[117] See Para 69 of White paper: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728757/6.4737_Cm9674_Legislating_for_the_withdrawl_agreement_FINAL_230718_v3a_WEB_PM.pdf.

[118] See Para 71 of White paper: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728757/6.4737_Cm9674_Legislating_for_the_withdrawl_agreement_FINAL_230718_v3a_WEB_PM.pdf.

appropriate, on the final deal, they declared that "the debate on the motion for approval of the Withdrawal Agreement and Political Declaration will be one of the most significant parliamentary debates in a generation[119]".

It is important to explain what is intended as "meaningful vote", and what is the Political Declaration. The former gave in the Commons' hands, is more than a simple choice between *deal* or *no deal*. It should be an opportunity for Parliament to insist that the Government return to the negotiations, to secure substantive changes to the Withdrawal Agreement before entering in UK law effectively. If the Commons decides not to approve the Withdrawal Agreement and the Political Declaration after the fixed deadline for deciding the lines of final agreement, the Government could make a second attempt to get them approved. The Political Declaration is, as the name suggests, a political agreement and not a treaty, which will be negotiated, approved and implemented after exit day. However, the UK Parliament's role in that process continues to be unclear. In the eventuality that Commons approves the Withdrawal Agreement and the Political Declaration without amendments, MPs may still try to induce Government to change its approach to Brexit. They could try to secure concessions from the Government as a price for agreeing to vote for the government's motion, such as the guarantee of a meaningful vote on the Treaty on the Future Relationship[120]. Once the Withdrawal Agreement and the Political Declaration are published, it will begin a hard period of parliamentary scrutiny and debate, which could create further challenges for the Government. What it is clear is that Parliament will vote on the Withdrawal Agreement and the future relationship as one package. It will be presented to Parliament (as a motion) after it has been agreed with the EU in October 2018[121].

Furthermore, another report, for example, was centred on UK citizens in the EU and EU citizens in the UK, an argument which got them really busy since the 5th report held in May[122].However, this Select Committee investigate and follow up specific government departments. The House of Lords Select Committee members are specialized in several subjects to committee work. They are drawn from different political parties; no any one party has a majority. Committees meet to explore and report on important issues by gathering evidence form witnesses including experts, government and the public. They then will use this information to make comments. Mainly, the House of Commons and the House of Lords use similar methods of scrutiny, although the procedures vary. The principal methods are questioning government ministers, debating and take advices from the investigative work

[119]Publication of Parliament UK: https://publications.parliament.uk/pa/cm201719/cmselect/cmexeu/1240/124003.htm#_idTextAnchor000.

[120] UK and the EU, *A guide to the parliamentary process,* published in September 2018, http://ukandeu.ac.uk/wp-content/uploads/2018/09/Brexit-endgame-A-guide-to-the-parliamentary-process.pdf.

[121] UK and the EU*, The Brexit Endgame: new findings*, September 2018, http://ukandeu.ac.uk/brexit-complex-and-lengthy-process-lies-ahead-new-report-finds/.

[119] EU Select Committee: https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/.

of Committees. Government can publicly respond to explain and justify policies and decisions. For what concerns EU Committee reports - which represents the House of Lords[119] in its dealings with the EU institutions and other Member States - there are eighteen documents since July 2017. Several reports are focused on parliamentary sovereignty, identifying at each stage the opportunities for its engagement, and the challenges Parliament would face. Others are focused on negotiations between the UK and the EU. These few lines are essential and connected to what we discussed before, the role of Parliament and Government in this procedure: "Within this middle ground, Parliament, while respecting the Government's need to retain room for manoeuvre, should be able both to monitor the Government's conduct of the negotiations, and to comment on the substance of the Government's negotiating objectives as they develop. Only if these principles are accepted will Parliament be able to play a constructive part in helping the Government to secure the best outcome for the United Kingdom. Such scrutiny will also contribute to a greater sense of parliamentary ownership of the process, strengthening the Government's negotiating position and increasing the likelihood that the final agreement will enjoy parliamentary and public support"[123]. Therefore, the EU Committee of the House of Lords is keen in scrutinize and has examined 140 EU documents and legislative proposals in detail. The Committee has an important role to play in scrutinizing the ongoing Brexit negotiations. Achieving a successful outcome is vital to the United Kingdom's long-term prosperity and its future place in the world. In order to get this, Parliament has to be an active contributor to the process, and therefore it is important to seek to cast light upon the negotiations, questioning and holding the Government to account throughout.

In addition, the Commons Select Committee also is working hard on the procedure. They have made different reports, last one on the free movement of citizens of UK in the EU and vice versa, exposed in the first part of this chapter. They collect also some responses to the reports. The Committee claimed that both sets of negotiators had failed to make it clear whether ongoing free movement rights for UK citizens in the EU would form part of negotiations and the future relationship between the EU and the UK. Thus, there would be a period of uncertainty, requiring UK Government to intervene and raise the matter again in the negotiations before the Withdrawal Agreement is analysed.

In brief, the Commons Committee is looking for a written agreement of political importance, where these rights are protected and supported. There is also another report concerning on the future relationship between EU and UK, released last June, underlining the importance of a prompt approval of Political Declaration[124] and Withdrawal Agreement without made any step back and, especially,

[123] European Union Committee, Brexit: parliamentary scrutiny (4th Report, Session 2016–17, HL Paper 50), para 19.
[124] Publication of Parliament, Para 48: https://publications.parliament.uk/pa/cm201719/cmselect/cmexeu/1240/124006.htm.

without any deal[125]. Again, the Committee sustains that «it is possible that a renegotiation may be required in the event of either the UK Parliament or the European Parliament rejecting the Withdrawal Agreement or Political Declaration. However, the terms of Article 50 mean that, without an extension of Article 50 negotiations by the UK and the EU27, the UK is due to exit the EU on 29 March 2019 with or without an agreement[126]». Finally, what we can assume from this short comparison is that both committees are working for obtain the same results, for a safe outcome for their country. They both do not want a future relationship without any deal, and they do really want a safe and clear agreement which sustain the English choice of leaving without too much grievances. Moreover, they do really want the role of Parliament prevented and valued as it deserves. As we said in previous paragraph, Parliament will have the possibility to express its vision about the future relationship between the UK and the EU and, more important, its vote is fundamental to have the agreement at the end of the period. These are the common interests of both sides of Parliament.

[125] «We do not accept that a refusal by the House of Commons to approve the Withdrawal Agreement and the Political Declaration would mean that the Withdrawal Agreement would fall and that the UK would therefore leave the EU on 29 March 2019 without a deal», Exiting the European Union Committee, 6th Report 20172-2019, Conclusions, para 43.
[126] Publication of Parliament, *Exiting the European Union Committee*, 6th Report 20172-2019, Conclusions, para 44: https://publications.parliament.uk/pa/cm201719/cmselect/cmexeu/1240/1240.pdf

CHAPTER 3

THE ROLE OF DEVOLVED LEGISLATURES

"Is it legitimate for the Scotland and Northern Ireland to be taken out of the EU against the wishes of and on terms not expressly supported by the majority of those who voted in the referendum?[127]*"*

3.1 Background on devolved legislatures

Following the devolution settlements that have developed incrementally and asymmetrically since 1997, overlapping and shared legislative competences for the devolved assemblies have been introduced. The achievement by the devolved legislatures and administrations of substantial new powers, once exercised in Brussels, could deeply disrupt the UK's constitutional settlement.

Mainly, EU law is intertwined with the devolution settlements and in the absence of changes to them, responsibility for policy areas that are already devolved, but are in practice exercised largely at the EU level (for example, agriculture and environment and maybe migration[128] could represent a new devolved competence) will fall unavoidably to the devolved jurisdictions at the moment of Brexit[129]. This will lead to a very hard situation. There will also be the potential for regulatory divergence, for instance in environmental standards, creating intra-UK barriers to trade.

Indeed, the EU Withdrawal Act 2018 appears as a constitutional challenge also – and we can say especially - for devolved legislatures. Its impact on the UK's devolution settlements is technically

[127] D. Phinnemore, L. McGowan, *After the EU Referendum: Establishing the best outcome for Northern Ireland*, www.eudebateni.org, pag.16, 2017.

[128] «Our inquiry has also underlined the significant reliance of the devolved jurisdictions upon EU migration, to meet labor market needs and demographic challenges. We call on the UK Government, in its forthcoming *Immigration Bill*, to look for opportunities to enhance the role of the devolved institutions in managing EU migration in ways that meet their specific needs», Introduction, 4th Report of Session 2017-19, published 19 July 2017, HL Paper 9.

[129] «It is important to emphasise that the division of competences between the UK Parliament and the devolved legislatures is already set out in full in successive Acts of Parliament. Thus a statutory framework exists, which will automatically apply at the date of Brexit unless the Westminster Parliament in the meantime enacts further legislation», Ch.6, *4th Report of Session 2017-19*, published 19 July 2017, HL Paper 9.

complex over that politically contentious. There are three main areas of reasoning and issues: budget payments, involvement in EU programs and the rights of UK/EU citizens. Not only: the delay correlated to the UK Government triggering article 50 is linked to other three main reasons, and here we will explore the one concerning the different interests of devolved legislatures, focusing on Scotland and Northern Ireland. In relation to this, it is unclear – or better, it seems to be and thus it is unfair – whether the Withdrawal Agreement will need to be approved with a positive vote in the devolved assemblies. And this can be regarded as the fourth main reason of the postponement in the internal process of transition leading to Brexit. The future relationship between UK and EU will require not only the approval of European Parliament, but especially the one of EU27. Of course this will take years[130].

Devolved legislatures are wondering what powers need to be and should be devolved in this context. In order to answer these questions, it is important to put into context the history of devolution, clarifying their political positions and roles.

Generally, the devolution legislation conferred several degrees of decision-making authority on Scotland, Wales and Northern Ireland. In 1997 the Labour Party was the first party with a manifesto commitment to introduce devolution for Scotland and Wales, promising a directly elected Mayor and Assembly also for London. Legislation was approved straightway in the form of the Scotland Act (SA) 1998[131], the Government of Wales Act (GWA) 1998[132], and the Northern Ireland Act (NIA) 1998[133]. These acts established the three devolved legislatures, which would have granted some powers previously held at Westminster - further powers have been devolved since these original acts, recently uploaded with the Scotland Act 2016[134].

Clearly, devolution in the UK created a regional Parliament in Scotland[135], a National Assembly in Wales and a National Assembly in Northern Ireland. The process conferred, and continues to confer, changing levels of power from the UK Parliament to the UK's regions - but kept authority over the devolved institutions in the UK Parliament itself. Notwithstanding, devolved powers are always available to Westminster Parliament, sovereign in apply the law. Thus conventions, such as Sewel, are very important. This innovation consists not only in a new set of democratically elected bodies, but also in a new constitutional balance between central government and regions. It also confers substantial powers on devolved legislatures and executives. The reason lies in the unequal treatment of England, which prompted the Westminster Government to first (unsuccessful) attempt

[130] See Ch.2, last paragraph.
[131] Scotland Act 1998: https://www.legislation.gov.uk/ukpga/1998/46/pdfs/ukpga_19980046_en.pdf.
[132] Wales Act 1998: https://www.legislation.gov.uk/ukpga/1998/38/pdfs/ukpga_19980038_en.pdf.
[133] Northern Ireland Act 1998: https://www.legislation.gov.uk/ukpga/1998/47/pdfs/ukpga_19980047_en.pdf.
[134] See point 3: http://www.legislation.gov.uk/ukpga/2016/11/notes/division/2/index.htm.
[135] Scotland had a Parliament which was abolished since Act of Union 1707.

to introduce a form of English regional government[136] in 2004 and recently to impose restrictions on the voting rights of non-English MPs[137]. Thus, there is further work to do.

Indeed, another signal confirms dissatisfaction of devolved legislatures, reported in the Independence Referendum 2014 in Scotland[138]. However, despite the long-standing thesis of the EU "regional blindness" – it is in fact an old criticism, discussed by Ipsen in 1966, for a greater recognition on sub-state territorial powers - the TEU can be considered as having far reaching significance in encouraging decentralisation and regionalism, as mentioned by Article 5.3: «under the principle of subsidiarity in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states, either at central level or at regional level and local level, but can rather, in reason of the scale or effect of the proposed action, be better achieved at Union level[139]». Subsidiarity has further legitimised claims for decentralisation in Europe.

Local government[140] operates under powers granted by Parliament under statute. Legislation has been introduced by both Conservative and Labour governments to constrain the activities of local authorities and to rein back their spending powers. The aim was to concentrate power at the centre and accordingly to preserve the Nation-state as the major actor in the international scenario. This sounds to be in line with the Westphalian order[141], a state-centric system born in Europe in the 17th century stated with the Peace of Westphalia in 1648. Sovereign states or territorial entities shaped the modern history[142]. Intergovernmental relations and relations with the EU have been regulated by

[136] It is the *North East English devolution referendum* 2004. It was an attempt to whether or not to establish an elected assembly for the region. The total number of people voting against the plans to set up or not an elected regional assembly was 696,519 (78%), while 197,310 (22%) voted in favour. See also: http://www.legislation.gov.uk/uksi/2004/1961/pdfs/uksi_20041961_en.pdf.

[137] It was 2013 when this discussion took place, reasoning on the fact how productive are the non-English MPs at Westminster parliament. Widely, it is investigated how much devolution grew up in earlier years. See the link: https://www.theguardian.com/news/datablog/2013/mar/27/how-productive-non-english-mps.

[138] The Scottish Independence Referendum Act 2013, setting out the arrangements for the referendum, was passed by the Scottish Parliament in November 2013, following an agreement between the devolved Scottish government and the Government of the United Kingdom. The question was *"Should Scotland be an independent country?"* whose results were 55.30% "No", 44,70% "Yes".

[139] Official document: http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-european-union-and-comments/title-1-common-provisions/9-article-5.html.

[140] There are differences between local and regional government, even if EU considers them equal. Local government has not legislative powers. Here there is the official document of *Legislative Government Act 1972*: http://www.legislation.gov.uk/ukpga/1972/70/contents.

[141] M. Telò, *International Relations: A European perspective,* Routledge*,* 2016; A. Milward, *The European Rescue of nation-states,* Routledge, 1992.

[142] It was based on three main principles: *rex in regno suo est imperator* which means there is no superior entity above the king*; cuius regio eius religio* due to the principle of non-interference in domestic affairs of other states*; balance of power* in order to avoid the creation of a hegemonic state. The Westphalian order was adopted for centuries, until the beginning of WWII when the re-establishment of nation-states was followed by the birth of the European Union. Since then, different regional entities were created, like ECOWAS in 1975, EFTA in 1960, EEC in 1957, MERCOSUR in 1991 (in Latin America), ASEAN in 1967 (in Asia) and so on. Notwithstanding, even if there are many interregional, regional groupings, nation-states are no longer to collapse; rather, they maintain their leading role in the political and international

means of a series of informal agreements, termed concordats, and a general Memorandum of Understanding (MOU)[143] setting out the principles underlying the relations between the devolved administrations and the central government. However, it is not intended that these agreements should be legally binding[144]. The MOU provides for a Joint Ministerial Committee[145] (JMC), which is the subject of a separate agreement covered in Part II of the MOU. It is also necessary for the JMC to become more effective[146]. It needs to have more regular meetings and synchronized negotiations in order to influence the UK Government and EU work. In addition to the JMC agreement, three separate overarching Concordats apply broadly uniform arrangements across the Government to the handling of: the co-ordination of EU policy and implementation; financial assistance to industry; and international relations touching on the responsibilities of the devolved administrations. The purpose of this set of agreements is to reinforce an unequal partnership that tends to allow domination from the centre.

What does it mean "*devolved*" and "*not devolved*" competence? As the MOU states[147]: «devolved means in the Scottish context any function not reserved to the UK Government or Parliament under Schedule 5[148] of the Scotland Act 1998 or transferred to the Scottish Ministers under other legislation; and in the Northern Ireland context any matter which is not an excepted or reserved matter under Schedules 2[149] and 3 to the Northern Ireland Act 1998. Non-devolved means anything else». Furthermore, as regards the job of policing the limits of the devolution legislation, it is up to the Supreme Court. Moreover, that laws of Westminster Parliament cannot be declared invalid and this is the essence of asymmetry[150].

During parliamentary debates, one point that attracted discussion was the choice of the Judicial Committee of the Privy Council to deal with 'devolution issues'—not the Appellate Committee of

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scenario. It may be argued that we live in a post-Westphalian world with its shadow above, with an ever-growing globalization and the on-going process of regionalization at the multipolar level.

[143] Devolution Memorandum of Understanding, official website: https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement.

[144] «This Memorandum is a statement of political intent, and should not be interpreted as a binding agreement. It does not create legal obligations between the parties. Nothing in this Memorandum should be construed as conflicting with the Belfast Agreement», Introduction part 2, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238423/7864.pdf.

[145] The administrations agree to participate in a Joint Ministerial Committee (JMC) consisting of UK Government, Scottish, Welsh and Northern Ireland Ministers in order to give central co-ordination to the relationship.

[146] Publication of Parliament, *The Future of the Union*, published in 2017: https://publications.parliament.uk/pa/cm201617/cmselect/cmpubadm/839/83908.htm.

[147] See for more details: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238423/7864.pdf.

[148] Scotland Act 1998, Schedule 5: https://www.legislation.gov.uk/ukpga/1998/46/schedule/5.

[149] Northern Ireland Act 1998, Schedule 2: https://www.legislation.gov.uk/ukpga/1998/47/schedule/2; Schedule 3: https://www.legislation.gov.uk/ukpga/1998/47/schedule/3.

[150] Publication of Parliament, *Brexit: Devolution*, published July 2017, https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/9/9.pdf.

the House of Lords, which otherwise was the UK's highest court for all three of the UK's legal jurisdictions. The choice was unusual as the Judicial Committee had a small and decreasing jurisdiction.

For what concerns the role of the UK Supreme Court, each of the devolved legislatures, if they are within competence, can follow two ways through which they can refer to the Supreme Court. In the first place, a reference to the Court can be made by either the UK Law officers (the Attorney General) or the chief law officers of each of the devolved governments. In the second place, they can make a statutory reference or appeal of a "devolution issue". There are three main types of "devolution issues" cases, which are listed respectively in Schedule 6[151] for the Scotland Act 1998, Schedule 8 for Wales Act 1998[152] and Schedule 10 for Northern Ireland 1998[153]. The legality of the acts of devolved institutions, including both the legislative and executive branch, can be challenged for acting beyond the limitations of the subject-matter competences conferred by the devolution acts, in a way which is incompatible with the European Convention on Human Rights[154] and contrary to EU Law.

The majority of the "devolution issues" cases that have reached the Supreme Court have concerned challenges and in 2017 with the Miller case, as we have already seen in Chapter 2, it has been ruled that the devolved legislatures had «no legal veto on the United Kingdom's withdrawal from the European Union[155]». Then, the discussion submitted to the attention of the Court through an appeal against a decision of the High Court of Justice of Northern Ireland, was centred on whether or not the UK Parliament must consult devolved legislatures to proceed with the withdrawal in accordance to art.50 TEU. In the end, judges of the Supreme Court unanimously affirmed that, despite the constitutive acts of the devolution have been emanated by Westminster Parliament, they did not absolutely foresee an obligation to confirm the affiliation to the Union. Besides, the relationships with the European Union, as foreign politics, constitutes in general a subject of competence of the Westminster Parliament. Therefore, devolved legislatures do not have the same level of action as the central Government.

Without the prior agreement of the devolved legislatures in whose constitutional space they are legislating, the UK Parliament will not normally legislate with regard to devolved matters.

[151] Schedule 6: Here the list: https://www.legislation.gov.uk/ukpga/1998/46/schedule/6.
[152] Schedule 8: Here the list: http://www.legislation.gov.uk/ukpga/1998/38/schedule/8.
[153] Schedule 10: Here the list: https://www.legislation.gov.uk/ukpga/1998/47/schedule/10.
[154] See the link: https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[155] Lord Neuberger, ex-President of the Supreme Court, said the Sewel Convention, which requires the devolved legislatures to vote on any new laws that affect devolved matters, operates as a political restraint on the activity of the UK Parliament. While it plays an important role in the operation of the constitution, however, the policing of its scope and operation is not within the constitutional remit of the courts. Therefore, the devolved legislatures do not have a veto on the UK's decision to withdraw from the EU.

Parliament's self-denying ordinance, known as the Sewel Convention[156], the convention that finally disciplines the relationship among UK Parliament and devolved ones in the exercise of the legislative functions, has the status of a constitutional convention and is not legally enforceable in the courts. The terms of this self-denying ordinance were first enunciated by Lord Sewel, the Minister responsible for steering the Scotland Bill 1997-98[157] through the House of Lords. He said: «we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament[158]». A devolved legislature signifies its legislative consent to a Bill of the UK Parliament by passing a "legislative consent motion"[159]. The legislative consent of the devolved assemblies restrains in principle the law-making powers of the UK Parliament – albeit the Westminster Parliament can rule otherwise, because it will not be considered a violation of convention. It is connected to the Sewel Convention meaning. Where a devolved legislature has the power to make laws, this does not diminish the law-making power of the UK Parliament in those areas. However, the UK Parliament has developed a self-disciplined ordinance, supported by the working practices of the UK Government. Parliament undertakes that, normally, it will only legislate with regard to devolved matters when it has the consent of the devolved legislature[160]. The Court has excluded the applicability of it in the jurisdictional seat affirming exclusively its political nature. In conclusion, the Court affirms the lack for the devolved legislations of a right of veto recognized by law, but this does not exclude in absolute terms the political opportunity to consult such organs appealing to the convention, which assures a harmonious relationship among Westminster and devolved legislatures. Thus, Sewel Convention could not be invoked: EU matters and negotiations of international treaties are reserved matters for Westminster. Courts are required to oversee the limits of the powers conferred as part of the devolution arrangements[161]. Indeed, the convention does not provide a legal veto power for devolved legislatures. However, it has a strong political influence.

Certainly, also as a consequence of the claims of the devolved legislatures, the Joint Ministerial Committee on EU negotiations has met on regularly basis to discuss the implications of Brexit on devolved administration, albeit there is no way to reach a common position agreed by all (regions

[156] Sewel Convention 2005: http://researchbriefings.files.parliament.uk/documents/SN02084/SN02084.pdf.
[157] For more details, see the link: https://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP98-2.
[158] Lord Sewel, HL Deb 21 July 1998 Vol 592 c791
[159] This happens in accordance with its own Standing Orders and after the relevant devolved administration has expressed its view on the legislation by way of a legislative consent "memorandum". Thus, the Supreme Court claimed that the British Parliament cannot normally legislate in subjects object of devolution, without the consent of the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly, demonstrating in the form of a Legislative Consent Motion.
[160] Report: *Brexit: devolution and legislative consent*, published by the House of Commons, 29 March 2018.
[161] SA 1998 for example gives the Scottish Parliament the right to pass a form of primary legislation over the areas falling under its competence. Placed in law with Scotland Act 2016 and Wales Act 2017 (which present several new sub-sections) these acts "identify" the convention, which is not enough for formally limit the power of the UK Parliament.

and central government) on Brexit. Scotland and Northern Ireland are still against Brexit (specifically against a "Hard Brexit") and it seems that the ongoing consultation does not present any possibility of intervention, even if EU Withdrawal Act has provided preventions for them – we will analyse this issue in last chapter.

We can think about an idealistic new union[162] between Scotland, Ireland and Northern Ireland on one side, and England and Wales on the other, guided by the Brexit referendum results. Britain has got itself into with Brexit, Northern Ireland is to remain a *de facto* member of the EU - or at least the EEA - Scotland and London do want to remain. Scotland could become Britain's land border with the EU, creating a border-line across England at about that part at which support for leaving the EU is strong, «say from the River Dee to The Wash[163]». Below the line, there is the Remain side, along with Scotland and Northern Ireland, while those who voted to leave, could leave.

Devolution brings a number of implications for England, «it has already been stated that the main powers of local authorities are defined by legislation, and section 101 of the Local Government Act 1972, provides that many decision-making powers can be delegated by an authority to council committees, sub-committees or officer of the authority[164]».

From another point of view, devolution has produced an inequality of political representation at Westminster that has been felt also during the Brexit debate in Parliament, an issue sometimes referred to as the "West Lothian Question", raising problems about the role of non-English MPs as members of the Westminster Parliament. The West Lothian question's importance is found in the fact that it reflects the asymmetry shared with British constitutional arrangements. Specifically, Tam Dalyell, member of Scottish Labour party, during the debates leading up to the 1979 devolution referenda in Scotland and Wales, claimed the anomaly of Scottish MPs being able to vote on legislation on, for example, health and education policy in England, when they could not vote on health and education laws affecting their own constituents in Scotland because these would be determined by the Scottish Parliament. At that time, devolution was not already in force. Basically, he put the attention on the fact that he would decide on laws to be applied in West Sussex but not on those in West Lothian (by which the name of the Question)[165]. Thus, the appointment of Scottish MPs

[162] Irish Times, «The people of three of the five parts of These Islands (Scotland, Northern Ireland and Ireland) now see their relations with the rest of the world in one way while those of the other two (England and Wales) see them very differently». For more details, see the link: https://www.irishtimes.com/opinion/fintan-o-toole-three-state-union-may-be-answer-to-brexit-1.273404.

[163] Independent.com, *Scotland and Northern Ireland should break free and form a Confederation of the Gaelic States*: https://www.independent.co.uk/voices/letters/northern-ireland-brexit-dup-scotland-second-referendum-theresa-may-a8092906.html.

[164] P. Leyland, *The Constitution of the United Kingdom: A Contextual Analysis,* p. 271.

[165] The question was first posed in the nineteenth century as part of the controversy over Home Rule for Ireland (1870-1918), and the phenomenon actually existed throughout the life of the Government and Parliament of Northern Ireland from 1921 until they were abolished in 1972. Northern Ireland MPs at Westminster, although reduced in number, were

as ministers in departments dealing wholly or mainly with England and the practical and legal relationships between one or more devolved legislatures or assemblies and Westminster. However, the question has no answer yet[166]. With the introduction of a Scottish Parliament and Executive together with Wales' and Northern Ireland's Assembly, all with considerable powers, the previously accepted notion of representative government in the United Kingdom is undermined. Scottish, Welsh and Northern Irish MPs at Westminster hold the right to vote on domestic policy for the rest of the United Kingdom. What we can assume from this little mirror on the general situation it that the UK, Scottish and Welsh Governments, and, if it is formed, all parts of the Northern Ireland Executive, need to find consent from each part in order to have a durable situation.

Brexit will be a major constitutional change for the United Kingdom, and potentially the instrument to generate more instability in this agreement between Westminster Parliament and devolved legislatures. Therefore, the existing statutory balance of competences between them should be unchanged in the limits. The House of Lords Constitution Committee[167] has claimed that before «there has been no guiding strategy or framework of principles to ensure that devolution develops in a coherent or consistent manner». Therefore, all of these challenges are made up by the current political climate. In Northern Ireland, the failure to form an executive since January 2017, the fact that no nationalist MPs have taken up their seats in the actual Westminster Parliament could lead to increase instability and the corrosion of cross-community support. As for Scotland, although the immediate prospect of another independence referendum has diminished, relations between the Scottish and UK Governments are highly strained. We will explore all the internal implications of Brexit for devolved assemblies and the challenges which the procedure provoked in Northern Ireland (case one) and Scotland (case two), since the beginning of devolution and especially after Brexit Referendum 2016.

free to vote on legislation applying to Great Britain on a wide range of subjects which were devolved to the Northern Ireland Parliament.

[166] Publication of Parliament, 2016, […] «it is new legislative stage, which is termed in this report the "consent stage", would be inserted between the current Report stage of a Bill and its Third Reading and would involve a new procedural vehicle which is given the title of a "legislative grand committee" »[…] *"English vote for English laws"* Standing Orders report 2015-2016: https://publications.parliament.uk/pa/cm201516/cmselect/cmproced/410/410.pdf.

[167] Publication of Parliament, *A new devolution settlement?, ch.6,* :https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/9/909.htm.

3.2 Between North and South: The Good Friday Agreement

Unionists and Republicans have always been the two faces of Irish population. Even if Ireland became finally independent in 1921, it faced several civil wars and internal issues until late 1990s, due to the Government of Ireland Act, which became law in May 1921. Indeed, at the heart of the troubles is the division in Northern Irish society. The majority of the population in Northern Ireland – the unionist community – identify as British and want Northern Ireland to remain part of the United Kingdom. The minority community – the nationalists – wants Northern Ireland to be reunited with the rest of Ireland, in an independent Irish Republic. However, the conflict was a consequence of the competing national identities and aspirations of the two communities occupying Northern Ireland. In April 1998 the Good Friday Agreement (GFA) was signed, giving end to all these insurgents. It is the top of the hill of Peace Process[168] and was definitely recognised by the people on both parts of the island, ending thirty years of armed conflict. It comprises two treaties: a Multi-Party agreement involving most of the political parties in Northern Ireland and the British-Irish agreement, the international accord between the governments of the UK and Ireland. In Article 2 of the British-Irish Agreement, the two governments "affirm their solemn commitment to support, and where appropriate, to implement the provisions of the Multi-Party Agreement". The article goes on to initiate the establishment of a North/South Ministerial Council and the implementation bodies referred to in paragraph 9 (ii) of the section entitled "Strand two[169]" of the Multi-Party Agreement. Here reside the EU membership references, the common UK-Irish membership of the EU and the sharing part of institutional necessities. Moreover, the GFA provides for interlocking political institutions which reflects the totality of the relationships on the islands. In addition to devolved government in Northern Ireland, these institutions ensure cooperation[170] between both parts of the island[171], including the North South Ministerial Council[172] and the North South bodies, and between Ireland and Britain. The key element of the GFA is its recognition of the identities, intents and aims

[168] The Irish Peace Process concerns the series of attempts to end the civil conflict and a political settlement for the differences that divide the community in Northern Ireland. The peace process picked up momentum in 1993. John Major, the British PM, and Albert Reynolds, the Irish Taoiseach have worked together on a joint declaration that was hoped would form the basis of a peace initiative. This resulted in the Downing Street Declaration of 15 December 1993.
[169] Strand Two is the all-island dimension of the Multi-Party Agreement. It establishes a real Irish dimension where the North/South Ministerial Council is responsible to increase cooperation between both parts. In total, GFA has three strands.
[170] These areas are agriculture, environment, education, health, tourism and public transport.
[171] North South Ministerial council, «We are committed to partnership, equality and mutual respect as the basis of relationships within Northern Ireland, between North and South, and between these islands», from the official document of GFA 1998.
[172] It was established under the Good Friday Agreement to develop consultation, co-operation and action within the island of Ireland. Here the homepage: https://www.northsouthministerialcouncil.org.

of two communities in Northern Ireland, and a commitment by the relevant sovereign government to treat both on the basis of equality.

However, in order to avoid direct rule from Westminster, the Government of Ireland Act 1920 set up the Stormont – it is the name of the location area in Belfast, the capital - Parliamentary system. Stormont was suspended in 1972 during the upsurge, "the Troubles" of the 1970s and 1980s, and Northern Ireland was governed directly from Westminster. During this period, the great majority of Northern Ireland's primary legislation was brought into effect by means of Orders in Council[173] and direct rule renewed annually by Order. Orders in Council were laid before Parliament under the affirmative procedure under Schedule 1 to the Northern Ireland Act 1974 (repealed on December 1999). Moreover, it contained an integrated programme for regional government, North–South (on the island of Ireland) cooperation and increasing integration, and a programme of demilitarization, human rights, and equality. By time, it seems that many issues were substantially achieved. Subsequently, Northern Ireland Act 1998 was designed to restore devolved government[174], and it is «an Act to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland[175]». The Act implemented provisions of the GFA. One hundred and eight Members were elected from the 18 existing Westminster constituencies. It first met on 1 July 1998 but had no legislative powers prior to devolution on 2 December 1999.

Following devolution, legislative power in most areas was transferred from Westminster to the Assembly and executive power to its power sharing Executive. The Northern Ireland Act 1998 provided for a First Minister, Deputy First Minister and ten ministers appointed under the d'Hondt procedure[176]. However, because of difficulties in implementing the Good Friday Agreement, no ministers were appointed until 29 November 1999. Powers were finally transferred on 2 December 1999. The Assembly has competence of exercising legislative authority over those matters falling under the responsibility of the shared office of First and Deputy First Minister and the 12 Northern Ireland government departments[177]. In order to accommodate Nationalist aspirations for a united

[173] They are issued "by and with the advice of Her Majesty's Privy Council" and are usually classified as secondary legislation, although some can be primary legislation. Orders in Council were often preceded by a proposal for a draft Order in Council, which were sometimes accompanied by an explanatory document. Furthermore, Orders in Council can be made for certain reserved matters under section 85 of the Northern Ireland Act 1998.

[174] C. McCrudden, *"Northern Ireland, the Belfast Agreement and the British Constitution"* in J Jowell and D Oliver (eds), *the Changing constitution,* Oxford University press, 2007

[175] Here the original document: https://www.legislation.gov.uk/ukpga/1998/47/introduction.

[176] It was introduced in 1870s by a Belgian lawyer. The basic idea is that a party's vote total is divided by a certain figure which increases as it wins more seats. As the divisor becomes bigger, the party's total in succeeding rounds gets smaller, allowing parties with lower initial totals to win seats. In short, this formula translates votes proportionally into whole seats. For more details: http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2016)580901.

[177] They are Agricultural and Rural, Arts and Leisure, Education, Finance and Personnel, health, social services and public safety, regional development and Social Development.

Ireland, the system of government is linked to that of the Irish Republic. This is anyway decided through GFA instructions, if the majority of Northern Ireland and Republic of Ireland will decide like that, it would be possible have the two sides reunited, after referendum. Again, between 1999 and 2007 devolution was repeatedly suspended in NI and the direct rule of the UK government restored. A final attempt to resolve the conflict was jointly initiated by the Prime Ministers of the United Kingdom and the Irish Republic in 2006 which culminated in the St Andrews Agreement Act 2006, « an Act to make provision for preparations for the restoration of devolved government in Northern Ireland in accordance with the St Andrews Agreement; to make provision as to the consequences of compliance, or non-compliance, with the St Andrews Agreement timetable; to amend the Northern Ireland Act 1998; to make provision about district policing partnerships; to amend the Education (Northern Ireland) Orders 1997 and 2006; and for connected purposes[178]». Despite the fact that devolution was interrupted for well over 5 years, power sharing has worked. Nevertheless, some dissident Republican groups in NI still refuse to accept devolution. Irish citizens, as EU citizens, currently living in Northern Ireland, have full voting and citizenship rights that they have enjoyed under the common travel area, including the right to vote in a referendum. This right may be limited post-Brexit. At the same time, any UK citizen would continue to have the right to vote in a referendum on the future of Ireland, even if they had lived in Britain for many years.

3.2.1 The role of Northern Ireland Assembly

In the context of devolution for Northern Ireland rather than the others, the Stormont Assembly is able to rule upon all the devolved matters, in harmony with European Law and conventional laws. These matters are those derived residually from "excepted" (for example immigration or international relations) and "reserved" (for example civil aviation). It is important to underline that reference to international relations comprises the relations with European Union but not exactly on the respect and application of duties deriving from European law, which is an explicated devolved competence from Schedule 2 par.3 (c) of Northern Ireland Act 1998. Those difference upon the Stormont Assembly rather than those of the others devolved legislatures can really influence also post-Brexit situation, in relation to the fact that in the White Paper of March 2017, there were already the legal basis for insert in the EU Withdrawal Act planes for the incorporation through conversion or transposition of the majority of EU law in domestic (English) one. there was again great attention upon those devolved competences, more than other on those for Northern Ireland. The Northern Irish

[178] St Andrews Agreement Act 2006, original pdf: https://www.legislation.gov.uk/ukpga/2006/53/pdfs/ukpga_20060053_en.pdf.

devolution, similar to Scottish one, is built on an agreement of international law[179], that means contractual regime between two sovereign states. In fact, the Republic of Ireland legitimizes the existence of Northern Ireland, recognizing its political and constitutional status.

Almost in the totality, it is possible to say that the GFA determines a confederal asset for the relations between Northern Ireland and the UK, which can be compared to the semi-confederal relation between Scotland and UK. British institutions and so also Westminster Parliament are not capable to exercise powers in Northern Ireland if these are in contrast with GFA itself. Indeed, Northern Ireland can strengthen its natural confederal thread with UK until to decide unilaterally of leaving the Kingdom by exercising secession right (or self-determination) that is really different from the one Scotland tried to do for gaining independence. Albeit Northern Ireland did not want to leave UK, since Brexit will be a disaster in all terms for the country, Sinn Féin has called for a referendum for reunification of Ireland immediately after Brexit results. Therefore, with the election in March 2017, the question of secession has been intensified also because DUP has lost consensus[180]. According to Schedule 1 of the Northern Ireland Act 1998, such a referendum can only be organized if 'it appears likely to [the UK Secretary of State] that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.' The Schedule in question is a provision of constitutional statute that explicitly recognizes the right of secession of a region and it is also a matter contained in the GFA[181], and in TEU[182].

Actually, the situation in Northern Ireland is really complicated because political parties cannot reach a deal for forming new Government, so it is almost 2 years that Northern Ireland has not its executive body. Brexit concurs in generate this stalemate. Today, even if June 2017 was the deadline for the formation of Government – and UK can in such case invoke the "*home rule*", as stated in GFA, re-obtaining the right to announce new election and form the new Parliament in devolved soil, something

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[179] This international law's agreement has the finality to sustain the national self-determination of Ireland and the constitutional conventions of the UK. The clause founded on this assumption, is the one to which the constitutional statute of Northern Ireland can be modified only if the majority of the entire population in Ireland, agree on do it.

[180] Elections of MLA were held in March 2017, where the DUP lost 1,5% votes, while Sinn Féin got 3,9%.

[181] UK Government publication, *Annex: agreement between the Government of United Kingdom of Great Britain and Northern Ireland, and the Government of Ireland: Constitutional Issue: «* […] The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo- Irish Agreement, they will:

(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;
(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland […] », see the link: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf.

[182] In fact, the secession of Northern Ireland will not mean the creation of a new (Member-)State. Instead, it will *trigger* the territorial expansion of an EU Member State to which EU law already applies in accordance with Article 52 TEU.

which has already happened in 2001 -, Northern Ireland does not have its own Government. The problem is that the DUP and Sinn Féin must find a deal in order to communicate and create this new Government, because of they share more or less the same percentage of consensus from nation, and also because in Northern Ireland there is the *cross-community support*[183], a vote on a legislative procedure which requires the majority of all deputies. In line with this, at the eve of the deadline, Sinn Féin conceded [184]its aid to DUP as friends in politics. However, the situation is not going to change, rather to get worse.

Another hole in the system can be found in devolution own rules, which constrain the Government of Northern Ireland to be forged by the Assembly in involve all the four major parties without a common view. That means having a Government of coalition without a coalition agreement. In addition, there is the Joint Ministerial Committee (JMC) presided by the Prime Minister of UK, which gathers the leader of the devolved administrations of Scotland, Wales and Northern Ireland, JMC gathers in plenary, domestic and European session as ruled by MoU, "*the leaders of the devolved administrations of Scotland, Wales and Northern Ireland*[185]". In conclusion, this poor way of "power sharing" within the internal political system of Northern Ireland, together with the substantial control of London on this devolved Assembly and the limit of an effective participation of European institutions on Northern Irish territory, are all undermining the issue.

Nowadays, the proposed withdrawal of the UK from the EU is weakening the conditions which maintain stable the political system of Northern Ireland. Assumed that GFA and NIA 1998 are the foundation for the settlement in the Irish country, active measures to protect them and the institutions after the UK departure from the EU will be required, considering also the need – or better, the duty - to ensure that any proposed solutions will be in line with Ireland's obligations, interests and rights as a Member state of the EU. However, Northern Ireland has no autonomy over Brexit. Basically, Brexit Referendum did not possess any formal powers regarding prevention of the triggering of article 50 TEU. The UK Supreme Court has stated categorically that the consent of the Northern Ireland Assembly is not required for the UK government to withdraw from the EU. The UK's relationship with the EU (and its termination) is an excepted power, retained by the UK government.

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[183] The threshold to ask the cross-community support, in fact, is established to 30 parliamentary since the Good Friday Agreement, that introduces the "community vote." This type of vote can be asked to the Speaker of the meeting through a "petition of concern", which needs to be introduced from at least 30 parliamentary. The *2014 Stormont House Agreement* establishes, par.57, that this least threshold cannot even vary in consequence of the reduction of the number of the components of the legislative meeting. The *2015 Fresh Start Agreement* states, however, that the use of the petition of concern is limited to "exceptional circumstances."

[184] Anphoblacht.com, *A new, generous unionist approach*: http://www.anphoblacht.com/contents/26806.

[185] E. Stradella, *L'Irlanda del nord: lo specchio del centralismo britannico dalla repressione alla Brexit, attraverso la devolution "intermittente,* 14 June 2017: http://www.sipotra.it/wp-content/uploads/2017/06/L'Irlanda-del-Nord-lo-specchio-del-centralismo-britannico-dalla-repressione-alla-Brexit-attraverso-la-devolution-"intermittente".pdf.

The Assembly has the right to pass laws but only in devolved policy areas and does not affect the power of the UK Parliament to make laws for Northern Ireland. The proposed withdrawal has created a set of conditions for Northern Ireland that will weaken the capacity of the political system to maintain peace and to build economic development. The result of the referendum's vote[186] indicated that the internal political divisions in Northern Ireland are being reinforced by the changed relationship of the UK to the EU. In other words, a large part of Irish nationalists voted to remain in the EU, while the Ulster unionist's intention is to leave. They did so because it is in their best interests politically and economically.

Not only: European Convention on Human Rights (ECHR), although not a EU body, is an integral part of the framework of the Good Friday Agreement. The agreement explicitly limits the devolved Assembly's powers with the ECHR—saying any legislation passed by the Assembly would be 'null and void' if found to be in breach of the ECHR[187]. The agreement between the two governments also clarifies who is entitled to vote in a future Irish unity referendum. The British and Irish Governments declare that it is their joint understanding that the term '*the people of Northern Ireland*' in paragraph 6 of Article 1 of this Agreement means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence. Following Brexit there may be restrictions on EU citizens, including Irish citizens, on the right to reside in Northern Ireland; in these circumstances the meaning, as understood at the time of signing of this clause, will have been retrospectively altered. The UK government will now be able to restrict those 'entitled to reside in Northern Ireland' in a way that was not envisaged in 1998. This could weaken the rights of Irish citizens, potentially even influencing the result of a future referendum.

Concerns have been expressed that, post-Brexit, the ECHR will come under further attack, from those in the British Conservative Party opposed to any supra-national authority, hence if the UK government does not want to assume its responsibility for the ECHR, then it would weaken this provision of the agreement. «We are firmly focused on winning the argument and on getting the best deal for Ireland. This will require skill, creativity, and imagination. We will have to demonstrate toughness, patience and resilience. We will remain at the heart of the European Union and open to the world. We will protect the peace process. We will implement our comprehensive Economic Plan.

[186] Leave 44,2%; Remain 55,8%. In the referendum campaign the two major Irish nationalist parties, Sinn Féin and the Social Democratic and Labour Party (SDLP), along with the leadership of the Ulster Unionist Party (UUP) and the moderate pro-union Alliance Party supported the '*Remain'* position, while the largest unionist party the Democratic Unionist Party (DUP) supported Brexit.

[187] Good Friday Agreement 1998, *Rights, safeguards and equality of opportunity*: https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf.

We will be resolute and determined. The next two years will require a supreme national effort. But we are optimistic. We will succeed[188]». With these words of hope and determination, the then Taoiseach (Prime Minister in English) of Republic of Ireland Enda Kenny tried to motivate the Irish Government to handle the issues of Brexit in a pro-active way, concerted and especially strategic. We have to remember that all the negotiations for Ireland are held from a position of strength as part of the EU 27. However, Ireland has a unique position, recognized by Michael Barnier himself as a central element of the EU's overall negotiating objectives. The North being forced to leave the EU against the expressed wishes of its people will represent a major set-back for the political process in the north, and directly challenge the integrity of the GFA and would have huge consequences for guarantees contained within it. It also fundamentally undermines the principle of consent. Under the terms of the GFA there is an inherent right for those born on this island to Irish citizenship, and by virtue of that right, citizenship of the European Union as well. There is an urgent need and indeed an opportunity for new thinking. A special status relationship outside of the EU would do little to deal with the massive political, social and economic challenges thrown up by Brexit. Sinn Féin believes that the only credible approach is for the North to be designated a special status within the EU and for the whole island of Ireland to remain within the EU together.

When the British Government was indicating that it intended to repeal the European Communities Act leaving all EU legislation on the statute books - so that the Westminster Parliament can decide what is to be kept, amended or deleted – it was already the prelude of a serious catastrophe. In these circumstances, a Legislative Consent Motion should be required to be passed in the Stormont Assembly in order to prevent any changes to the Northern Ireland Act 1998. Sinn Féin should welcome any upcoming negotiations to defend the democratic mandate of the people to remain within the EU and will act in Ireland's national interest. The nightmare of a restoration of hard border in Ireland has brought the issue of Irish re-unification at the top of the list. The two major party, DUP and Sinn Féin, albeit the former campaigned for Leave and the second for Remain, agree on the same shared interest without it is not possible for Ireland to have the final deal on Brexit: the unavoidable border between Northern Ireland and the Republic of Ireland.

Back in time, after Brexit referendum was held, the Supreme Court pointed out that the formal consent of the Stormont Assembly was required because the process would have regarded Northern Ireland and the Irish Republic. Lawyers from Belfast and Edinburgh argued that even Parliament on its own cannot trigger article 50 TEU. There were in fact some submissions by Northern Ireland and Scotland, which introduced an extra dimension of political and legal complexity into Theresa May's objective.

[188] Finegael.ie, *Address by the Taoiseach on Ireland at the heart of a changing European Union*, 15 February 2017. See the entire document here: https://www.finegael.ie/address-taoiseach-ireland-heart-changing-european-union/.

In theory, these submissions had the aim to force the Government to obtain the support not only of MPs and peers at Westminster, but also the approval of the devolved legislatures.

In the meeting of 5 October 2016, the First Minister Arlene Foster and deputy First Minister Martin McGuinness (DUP) have made clear that they intend to guarantee a full and active voice in shaping the terms of the UK's negotiations and the arrangements for exit. At a ministerial level, it seems likely that the discussions between the UK Government and the devolved Administrations will be through the Joint Ministerial Committee (JMC) machinery. At the apex of that, the Joint Ministerial Committee (Plenary) (JMCP), and it is due to meet on 24 October. The expectation for Northern Ireland is that the First Minister and deputy First Minister will represent the Executive at those negotiations[189].

Moreover, Sinn Féin believed that separation has been a failure in every sector. During the period between the referendum and the invocation of article 50[190] there were significant developments with a view on further negotiation as for Ireland, EU partners and EU institutions. In July 2016, a new Cabinet Committee[191] on Brexit, chaired by the Taoiseach, was established to co-ordinate the Government's preparations on the issues. Also in July, an extraordinary summit of the British-Irish Council took place in Cardiff to discuss the outcome of the referendum. This meeting was attended by the Irish and British governments and representatives of the devolved institutions in Northern Ireland, Scotland and Wales. Domestic political engagement has remained strong since the referendum took place. There have been a number of dedicated debates in both Houses of the Irish Oireachtas[192], the Irish bicameral Parliament. On 18 November 2016, a plenary meeting of the North-South Ministerial Council[193], met and focused on Brexit related issues, in order to identify the possible impacts, risks, opportunities and contingencies which may arise[194] following the UK's intentions of withdrawal from the EU. The First Minister and deputy First Minister chaired the meeting. The Irish Government was led by the Taoiseach, Enda Kenny TD. Mainly, the three main areas affecting the future of Irish people were discussed: border question, free movement of citizens

[189] See also the link: http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=19256&eveID=10854.

[190] It is referring when Theresa May wrote the letter to Donald Tusk, 29th March 2017. See Ch.2.

[191] The Cabinet Committee meets regularly to discuss the economic impact of Brexit, planning for the EU-UK negotiations and on the programme of engagement on Brexit with EU partners, the EU institutions, and the British Government and the Northern Ireland Executive or, in its absence, the political parties of Northern Ireland. https://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Cabinet_Committees/Cabinet_Committees_of_the_31st_Government.html.

[192] It is the Irish name of Parliament.

[193] For more details on the official report, see the link: https://www.northsouthministerialcouncil.org/sites/northsouthministerialcouncil.org/files/publications/Paper%20NSMC%20P2%20%2816%29%20JC%20-%20Joint%20Communiqué%2018%20Nov%202016_0.pdf.

[194] See also: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf.

and goods and peace funds. In some extent, this was a method for testing the level of cooperation between the Government and the Northern Ireland Executive.

On 15 February 2017, the Taoiseach delivered "*Ireland at the heart of a Changing European Union*" which set out Ireland's strategic approach to the UK's decisions to withdraw from the EU. With the words of the Taoiseach: «The Government's plan for Brexit combines these three essential elements. Ireland at the Heart of Europe, to succeed as an open economy and a welcoming society, we must remain at the heart of Europe; the foundation of Ireland's prosperity and the bedrock of our modern society, is our membership of the European Union. That will not change[195]». Subsequently, the Seanad Special Select Committee[196] on the Withdrawal of the UK from the European Union was established. It met several times in 2017, with the same objective: understanding the issues and implications of the withdrawal for Ireland. It strongly worked considering the impact of Brexit on several areas, such as agriculture, fisheries, health and especially economics, taking into account that the trade relationship between the EU and the UK would fall back to WTO rules[197].

Substantially, for what concerns the legal position of Northern Ireland Assembly in relation to UK Government, the former do not possess any formal powers regarding prevention of the triggering of article 50 TEU and it is also sustained by the Supreme Court. The only vote afforded to Northern Ireland elected representatives will be to the region's MPs who sit in the UK Parliament (18 in total, although the 4 Sinn Féin MPs do not take their seats). Generally speaking, the Northern Ireland Assembly has the power to make laws for Northern Ireland. A proposal for legislation is referred to as a "Bill" until it is passed by the Assembly and given Royal Assent. Only at this stage, it is converted in an Act of the Assembly. Ministers, Committees and individual Members can propose to introduce a Bill to the Assembly.

As noted above, devolved legislatures needs a Legislative Consent motion from the assembly/devolved government since Westminster Parliament needs to seek the approval. Notably, Section 75 of the NIA 1998 requires that an equality assessment be undertaken on the impact of any legislation and this has not been undertaken regarding article 50. One of the challengers contended that the GFA had created a substantive legitimate expectation that there would be no change in the constitutional status of Northern Ireland without the consent of the people of Northern Ireland. Withdrawal from the EU, it was argued, clearly changed Northern Ireland's constitutional status

[195] Official document released in Dublin the 15th February 2017: https://www.iiea.com/ftp/Transcripts/2017/Enda_Kenny_IIEA_February_2017.pdf.

[196] The work of the Seanad Special Select Committee was greatly assisted by previously completed and ongoing work by several Joint Committees of the Oireachtas, which have (and are) looking in depth at the impact on the sectors and areas within their remits. See the entire text here: https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/seanad_special_committee_on_the_withdrawal_of_the_united_kingdom_from_the_european_union/reports/2017/2017-07-04_brexit-implications-and-potential-solutions_en.pdf.

[197] WTO home page: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

against the will of the majority in Northern Ireland. The Belfast High Court and the Supreme Court rejected all of the challenges to Brexit in relation to Northern Ireland. Between them, the two courts asserted that the devolved legislatures "do not have a parallel legislative competence in relation to withdrawal from the EU[198]". In other words, Brexit is not a devolved issue for the Northern Ireland Assembly and indeed the Supreme Court concluded that «the consent of the Northern Ireland Assembly is not legal requirement before an Act of the UK Parliament is passed[199]». So it is valid also for EU Withdrawal Act and EU Withdrawal Agreement. Section 5 of the Northern Ireland Agreement empowers the Northern Ireland Assembly to make laws but subsection 6 states that this does not affect the power of the Parliament of the UK to make laws for Northern Ireland.

Finally, Section 10 of the EU Withdrawal 2018 Act makes two new duties for Crown Ministers: that they must not act incompatibly with the Northern Ireland Act 1998, and must have "due regard to the joint report from the negotiators of the EU and the United Kingdom Government on progress during phase 1 of negotiations under Article 50[200]". Mainly, it underlines how important North-South cooperation is, how much the United Kingdom's departure from the European Union rises substantial challenges to the maintenance and development of North-South cooperation, and how important is that, in the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement. The purpose is to provide a solution yet even if «The *spectre*[201] of a no-deal Brexit has moreover not been put to rest. In the event of no deal being reached between the UK and the EU, specifically concerning a solution to the Irish border, the legal and constitutional consequences are (for lack of a better term) interesting to consider[202]».

In the end, ongoing political atmosphere among parties continue to be nervous. Recently, in august 2018, Ms Chambers, the party's spokeswoman on Brexit, accused both DUP and Sinn Féin parties of "abdication of responsibility" in collapsing the Stormont institutions since the beginning of negotiations on Brexit. She also blamed a lack of interests regarding Northern Ireland politicians on Brexit, underlining that the only representatives of the country in Westminster are the DUP who are pro-Brexit. And this goes opposite to the will expressed by northern citizens in the referendum. Thus,

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[198] Supreme Court Final sentence Miller case 2016: https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf.

[199] Ibidem.

[200] Section 10 1(b), http://www.legislation.gov.uk/ukpga/2018/16/section/10/enacted.

[201] Independent.com, *No deal treaty* (as Theresa May called it): https://www.independent.co.uk/news/uk/politics/brexit-latest-theresa-may-no-deal-threat-bluff-liam-fox-eu-boris-johnson-david-davis-a8413021.html.

[202] A. Deb, *The Inquiet Irish border problem: the implications in the aftermath of the withdrawal act,* U.K. Const. L. Blog (5th Jul. 2018), https://ukconstitutionallaw.org/2018/07/05/anurag-deb-the-unquiet-irish-border-problem-implications-in-the-aftermath-of-the-withdrawal-act/.

it seems reality what DUP is doing, namely «Stormont institutions are kept suspended because it suits the party's agenda at Westminster and - she said - Sinn Féin was playing into its hands with its abstentionist policy[203]». We can resume these declarations as a discontent over people and parties because the prolonged lack of Northern Irish Government.

Case 2: The Scotland and its Parliament

3.3 Scotland history

Scotland has been united with England since the Act of Union 1707[204], and it has always been considered very strong in terms of economics. Not only: Scotland retained its own legal system including its own laws and courts. Indeed, Scots law comes from a variety of sources with complicated history that goes back as far as the Roman times. Scotland's system is a hybrid between common law and civil law. This is important for modern law in Scotland because it explains a lot about some of the legal principles Scottish own today. Roman law principles were used to develop Scots law. In England, law was developed using the decisions of judges in specific cases, thus it is part of common law. However, much of the law in Scotland and England today is similar[205]. As well as the laws that are debated and made by the Westminster and Scottish Parliaments, the courts can also change and make the law. When lawyers talk about 'the common law', they just mean decisions made by the courts that are binding in the future. The courts in Scotland have lots of powers to edit the existing law and make new laws as well. They can clarify what the law says through a redefinition, expand the effect or the areas in which law has power, and most importantly they can make important statements about the law that other courts have to follow. However, what really counts is the decisions taken by higher courts, such as the Court of Session in Edinburgh.

For what concerns the legislative power, Scottish Parliament has an important role not only on its ground, but also in Westminster seat. The Scottish Parliament has the power to make its own laws that affect Scotland. Laws affecting Scotland can either be made in the Westminster parliament in

[203] Irish Times, *DUP and Sinn Féin accused of "abdication of federation" over Brexit*: https://www.irishtimes.com/news/politics/dup-and-sinn-féin-accused-of-abdication-of-responsibility-over-brexit-1.3598778.

[204] « […] That the Two Kingdoms of Scotland and England shall upon the first day of May next ensuing the date hereof and forever after be United into One Kingdom by the Name of Great Britain […] », art.1 Act of Union, 1707.

[205] Scotland.org, *The difference between the English and Scottish law*: http://www.ltscotland.org.uk/the-differences-between-the-english-and-scottish-law/.

London or the Scottish Parliament in Edinburgh, depending on the subject-matter concerned. People living in Scotland must comply to laws made by both parliaments and both are equally valid. As well as this, the Scotland Act 1998 says that the Scottish Parliament has to make sure that all laws it passes comply with the ECHR. As already argued in the previous paragraph, the Sewel Convention applies when the UK Parliament legislates on a matter, in particular which is devolved to the Scottish Parliament[206]. It holds that this will happen only if the Scottish Parliament has given its consent. The Convention has attracted a measure of criticism, on various grounds: that it has been used more frequently than was anticipated when it was introduced; that it has become a procedure between the Scottish Executive and the UK Government, rather than between the two Parliaments; that it is a "soft" practice, not enshrined in statute nor parliamentary orders; and that it reduces the scope for informed scrutiny of legislation.

Indeed, in November 2005 the Scottish Parliament made changes to its Standing Orders[207], following recommendations by its Procedures Committee, to entrench the procedures through which it gives its consent.

Despite the level of acting of courts is wider enough, and the importance of Scotland institutions is not undervalued, Scottish Parliament only exists[208] because of a law passed by the UK parliament, the Scotland Act 1998 (together with the Scottish Executive). This means that the UK Parliament has ultimate control of the Scottish Parliament, including the power to dismantle it. It's also important to be aware that Scotland is not 'devolved' or separate from the rest of the UK - some legislative powers have simply been devolved to the Scottish Parliament. The UK parliament still makes lots of laws that affect Scotland. Notwithstanding, devolved governments cannot turn to the courts to enforce the legislative consent convention, as it was ruled by the Supreme Court in 2017[209]. What it can be learnt from this is that since Sewel remains just a political convention, its powers does not influence the constitutional remit of the judiciary. In other words, the Convention has a strong political influence instead of providing a legal veto powers to devolved institutions. Notwithstanding, since the birth of devolved bodies, it represents the main part which regulates the interaction between UK and devolution legislatures. Keeping the focus on Scottish institutions, after the positive result of the

[206] Publication of Parliament, 8th Report House of Commons, *Devolution and Exiting the EU: reconciling differences and building strong relationship,* 24 July 2018, «In the case of the European Union (Withdrawal) Bill, the Government chose to interpret the Sewel Convention in such a way that legislative consent from the Scottish Parliament was deemed unnecessary because of the very particular circumstances of the Bill. at interpretation of the Sewel Convention was contested by the Scottish and Wales Governments», https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1485/1485.pdf.

[207] See the link for more details: https://www.parliament.nz/resource/en-nz/00HOHPBReferenceStOrders1/f404a3279e37b8d2348affc95c212a41e9bec458.

[208] In 1999, a new Scottish Parliament was set up for the first time in hundreds of years. The Act also created the Scottish Executive, now called the Scottish Government.

[209] Here the final sentence: https://www.supremecourt.uk/cases/uksc-2016-0196.html.

Scottish devolution referendum, the Consultative Steering Group on the Scottish Parliament[210] has adopted some principles applicable to the institutions. First of all, Parliament should be accessible, open and responsive and produce a participative approach to the development, consideration and scrutiny of policy and legislation. Secondly, the Scottish Government should be accountable to the Parliament, hence both should be accountable to the Scottish people. Thirdly, Parliament should embody and reflect the sharing of power between the people of Scotland, the legislators and the Scottish Government. Starting from the legal basis, Scotland has all the right credentials to work in a positive and stable atmosphere.

Moreover, Scottish parliament has three kind of committees[211], which do different works and have the possibility of supervise or intervene when it is possible. They can scrutinise the work of the Scottish Government, deliberate on legislative proposals and conduct enquiries and publish reports. They can also make their own proposals for legislation in the form of committee bills. Moving on Scottish Government, since 1999 the Scottish Government (formerly the 'Scottish Executive') exercised the power to introduce Bills, administer laws on devolved matters[212], and propose how the Scottish Budget is allocated. The activity of the Scottish Government is most easily monitored by its own media releases and statements; its calls for consultation; and its publications[213].

The Scottish system of devolved government has a single-chamber Parliament of 129 members (MSPs) that normally meets for a four-year term. Following an election of the Scottish Parliament, a government is formed after Parliament has nominated a Scottish First Minister[214]. The First Minister and Scottish Executive are directly accountable to the Scottish Parliament for the policies pursued by the devolved administration. In comparison with the NI 1998, SA 1998 conferred more powers than the other original devolution statutes. Scotland acquired a Parliament rather than an Assembly that was empowered to pass primary laws but this power was limited to matters within the scope of its

[210] The Consultative Steering Group on the Scottish Parliament (CSG) was set up by the Secretary of State for Scotland in November 1997, following the positive outcome of the Scottish devolution referendum, and met for the first time in January 1998. Its membership included representatives of all four major Scottish political parties, as well as of a wide range of civic groups and interests; and our remit was both straightforward and daunting.

[211] Mandatory committees (including Equal Opportunities; European and External Relations; Finance; Public Audit; Public Petitions; Standards; Procedures and Public Appointments, and Subordinate Legislation; Subject committees (including Economy, Energy & Tourism; Education & Culture; Health & Sport; Infrastructure & Capital Investment; Justice; Local Government & Regeneration; and Rural Affairs, Climate Change & Environment); Ad hoc committees considering particular issues or legislation – for example the Referendum (Scotland) Bill Committee.

[212] Devolved matters include: health; education and training; local government; social work; housing; planning; tourism, economic development and financial assistance to industry; some aspects of transport, including the Scottish road network, bus policy and ports and harbours; law and home affairs, including most aspects of criminal and civil law, the prosecution system and the courts; the Police and Fire services; the environment; natural and built heritage; agriculture, forestry and fishing; sport and the arts; statistics, public registers and records.

[213] Pubblica Affairs Reference Guide: Scottish Parliament and Devolution: https://www.abdn.ac.uk/staffnet/content-images/Public_Affairs_Reference_Guide_Scottish_Parliament_and_Devolution.pdf.

[214] SA 1998, subsections 45 and 46.

legislative competence. In addition, Scottish parliament will have autonomy in determining the structure and value of existing benefits or of any new benefits which might replace them.

3.4 Scottish Parliament role: are the powers of this body effective or not?

The role of Scottish Parliament, but in general of Scottish institutions, has always been really active and vivid. In this perspective, relationship between Scotland and EU are increased recently in terms of economic agreements, and devolvement governments have an important role in implementing and so applying EU law. That is another reason why Scotland accuses to be in a very weak position because the intention of UK is also to abandon both EU Single Market and Customs Union, while Scotland has interests in remaining. The reserved matters to which Scottish Parliament is not authorized to intervene are listed in section 29(2)(b) of SA 1998 and include constitution, immigration, defence, employment, foreign policy[215].

After Brexit referendum 2016, the Scottish Government have supported overwhelmingly the will to remain in the European Union, retaining its membership since 1973. It strongly believed that the UK should remain within both the European Single Market and a Customs Union and this is also in line with the content of the letter cited above. The cause of nationalism has been further reinforced by UK membership of the EU. The Kilbrandon Commission, which reported in 1973, recognized that the system of government was over centralised and recommended an elected assembly for Scotland. Nationalism is referred also and especially when we talk about the early 1990s, when the Scotland National Party's[216] (SNP) vision of independence was already intended as independence in Europe. Indeed, there has always been a minority of the party's supporters who appeared to take the view that there was little point in gaining power back from London only then to hand sovereignty over to Brussels. After the failed Scotland independence referendum 2014[217], and especially Brexit 2016, the outcome of the EU referendum potentially threatened the stability of the support base of the SNP. Scottish nationalists lost half of the seats in the Westminster Parliament. Anyway, some few encouraging signals were seen one month after the Brexit referendum, when the consultations for the Scottish Parliament had place. In that case there was an exploit of the Tories driven by Ruth Davidson when there was the first structural collapse of the party of Sturgeon, even if she succeeded in maintaining the majority but lost six deputies.

[215] It may be some changes since 10 September 2018: https://www.legislation.gov.uk/ukpga/1998/46/schedule/5.
[216] Indeed, there has always been a minority of the party's supporters who appeared to take the view that there was little point in gaining power back from London only then to hand sovereignty over to Brussels.
[217] "Yes" 44,70%; "No" 55,30%.

Brexit has, perhaps, turned out to be more of a problem for the First Minister than an opportunity. First Minister Nicola Sturgeon, leader of Social Nationalist Party (SDP) wrote a letter to Theresa May in February 2018[218], asking for a "more inclusion" for Scotland on the procedure of Brexit, trying to fix some points important for her and remarking Scottish view. As Parliament, Scottish Government does not want to be behind the stage in this procedure, because it wants to remain in the EU, in the Union of UK.

Again, the leader of SDP has re-announced in May 2018[219], - after the rejection of Brexit Bill explained in the next paragraph - that if Brexit is going to proceed, there will be another independence referendum. However, she is not able to tell the key features yet, maybe because she is hoping for some changes in the withdrawal intention. Thus, UK Government has entered into direct negotiations with the Scottish Government on the holding of such a referendum. Sturgeon's intention is driven by the uncertainty that Brexit continues to feed. Scotland is waiting for October 2018, the final date in which there must be a final agreement on the future of Brexit and UK-EU relationship. Indeed, the right to call a binding referendum on independence lays with the Westminster Government. In fact, UK Government believes that Westminster Parliament has to pass a law before a referendum can legally be held. The Scottish Parliament's powers to pass laws are limited when it comes to, among other things, "the Union of the Kingdoms of Scotland and England". This has been disputed by some legal academics, who argue that the Scottish Parliament might have the power to call a referendum. Only the courts can ultimately decide who's right, as the House of Lords Constitution Committee noted in 2012 (although it agreed with the UK government). The courts did not need to get involved last time around, because the UK and Scottish Governments agreed to put the legal situation beyond doubt. This was achieved by a 'section 30 order' included in the Scotland Act 1998, that temporarily lifted any restriction on the Scottish Parliament's power to arrange a referendum. In the end, the order was approved by Westminster and Edinburgh institutions[220]. In other words, the consent of the UK Government to the holding of referendum is essential in order for any electoral

[218] Scottish Government, *Call for more engagement on Brexit,* 2018 « […] it is in the best interest of Scotland and UK to remain in the European Single Market and customs union […] », https://beta.gov.scot/news/call-for-more-engagement-on-brexit/.

[219] The Guardian, *Theresa May rejects Scottish referendum demand*, 2017. She has already declared in 2017 the intention of a new referendum. https://www.theguardian.com/politics/2017/mar/16/theresa-may-rejects-nicola-sturgeons-scottish-referendum-demand.

[220] However, if the Scottish Parliament can't hold a legal referendum, it could still opt for an "advisory" or "consultative" referendum with moral rather than legal force. But this is to confuse the legality of holding a referendum with the legal force of the result.

approval to Scottish secession to be legally valid[221]. There was an episode on this issue happened in 2011 with David Cameron[222].

Deeply, three main objects of attention were provided by the Brexit procedure, and it is important to maintain them even after the withdrawal: single market membership, the return back of powers from Bruxelles, and the independence issue. Mainly, Scotland position is stable, blaming the UK of lack of credibility and realism, due to the unreachable solution for the Northern Ireland border issue. Furthermore, what Nicola Sturgeon is hoping to see very soon are some steps further because, as the Constitutional Relations Secretary Michael Russell has said, Scotland is facing a *'no deal Brexit nightmare*[223]*'*, in relation to the likelihood that after 29 March 2019 there will be no deal[224] and so no transition period. Additionally, and differently from Wales and Northern Ireland, Scotland Parliament wants veto power on every decision on Brexit taken by the UK.

Furthermore, in May 2018, the Scottish Parliament has rejected the draft of EU Withdrawal Agreement, with an overwhelming majority of 93 votes to 30[225]. The main reason of the refusal is found on the lack of interest in considering the needs of Scotland in remain in the *Union*. The refusal happened because Scotland revenges to be fit in a broader context than other devolved legislation. *Union* for Scotland is not only related to UK, but especially for European Union. Because they strongly believe that the only way to remain in the EU is to remain also in the UK. This credence has been shaped on a promise which took place in 2014[226]. In line with this, it is important to remember that Scotland tried to require a double-majority threshold in 2015, at the eve of the EU Referendum Act 2015[227] in order to verify which nation wanted to remain or not in the UK before it announced to withdraw from the EU. We can affirm that Scotland really believe in the idea of devolution and it tried as it can to prevent an abuse of power by Westminster Parliament through this device.

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[221] P. Leyland, *The Scottish referendum, the funding of territorial governments in UK and the legislative role of Westminster Parliament,:*https://www.regione.emilia-romagna.it/affari_ist/Rivista_4_2014/Leyland.pdf.

[222] «David Cameron has the law on his side if he wants to stage-manage a Scottish referendum on independence. The Scotland Act 1998 that established Holyrood also dictates clear limits to devolution: constitutional matters remain in Westminster, the SNP can't stage a binding referendum without Westminster's say-so and even an indicative poll to test the public opinion could be open to legal challenge», https://www.theguardian.com/politics/reality-check-with-polly-curtis/2012/jan/09/scottish-independence-legality.

[223] See the link: https://www.scotsman.com/news/politics/scotland-faces-brexit-nightmare-warns-mike-russell-1-4788671.

[224] Publications of Parliament. It has already been discussed in a report from the House of Commons at the end of 2017, considering all the possibility of having or not having a deal. Here the official document: https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/46/46.pdf.

[225] For more details, see the link: https://www.theguardian.com/politics/2018/may/15/scottish-parliament-decisively-reject-eu-withdrawal-bill-brexit.

[226] Publication of Parliament. There were promised other power to devolved Scottish parliament, signed by an agreement between Prime Minister of UK David Cameron and Scottish Government, in exchange of voting NO to the referendum for independence. Here you can find the agreement arisen from Smith Commission 2014: https://publications.parliament.uk/pa/cm201415/cmselect/cmscotaf/835/835.pdf.

[227] It did not set a condition of a quadruple lock threshold, so it does not require a single vote for every nation, without counting a majority of voters as whole and a majority in a majority of states. That was an attempt for avoid a UK wide approach to the vote, which took place in that occasion

Therefore, we talked about "Reverse Greenland" in Northern Ireland's analysis, based on article 48 TEU, it could be possible that EU treaties might be similarly amended. In this way, Scotland may be able to remain a member of the EU despite the withdrawal of UK takes place. In aid of this possibility, it comes article 29 of Vienna Convention on the Law of Treaties[228], which provides that a treaty is binding upon each party in respect of its entire territory, unless a different intention appears from the treaty or is otherwise established. This means that a new amendment treaty is possible to redefine which parts of UK territory are touched by the purpose of EU law[229].

We can say that the leading institutional role in the procedure is made by Scottish Government rather than Scottish Parliament which, in short words, have not so many competences to intervene. Anyway, the liveliness of legislative Scottish body has made Edinburgh[230] Parliament the same in turn, making its voice stronger and higher. For example, in relation to the Northern Ireland border, the Scottish Government remains absolutely committed to upholding the Good Friday Agreement, and the Scottish Parliament too. This one published a series of report for answering to the massive problems arose from the procedure. But as we have made clear previously, if it is possible for Northern Ireland to effectively remain in the Single Market or Customs Union, the case for Scotland also doing so becomes a practical necessity. Anything else would put Scotland at a huge competitive disadvantage when it comes to attracting jobs and investments (and it is already like this).

What it was required concerns that the UK Government concedes that Westminster cannot impose new constraints on the exercise of devolved powers without Scottish agreement, which can also be translated, from Scottish point of view, as the attempt to boost its voice. The UK Government has so far refused to accept this, fearing the potential for post-Brexit regulatory indecision for business. Albeit the Royal Consent arrived in June 2018, there is still disagreement about what role the Scottish Government and Parliament should play in preparing the UK for exit day and transition period standing on the EU Withdrawal Act 2018. In fact, the Scottish Government claimed that the act will shrink, both constitutionally and politically, the role of devolved institutions in making key decisions about and scrutinising Brexit. The UK Government has answered that this block of EU powers is necessary to prevent regulatory divergences in areas of common strategic interest throughout the UK. It has proposed to reconstruct through "*common frameworks*" the same approaches currently present in the EU, but on a UK-wide basis. However, both Scottish Parliament and Government are continuing object to this approach. Although they agree that those common frameworks are needed

[228] VCLT 1969, «Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory», art. 29 *Vienna Convention on the law of treaties,* published in 1969, https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf.

[229] Another example is Gibraltar, which has no possibility to delete its membership from the EU separately from UK, even if it declared its desire to remain in the Union.

[230] Edinburgh is the capital of Scotland, where the Scottish Parliament is located.

and that, in some cases, regulatory alignment within the UK will be desirable, they maintain that restrictions on the Parliament's competence should only come with explicit devolved consent and on a case-by-case basis, rather than by secondary legislation.

Moving the attention from another point of analysis**,** is the UK Supreme Court going to rule on the question of devolved consent for Brexit? In order to answer to this question, we have to consider the European Union Legal Continuity Bill[231]. It is a bill for an Act of the Scottish Parliament in order to make provisions for Scotland and it is in parallel with the withdrawal of UK from EU. In addition, it makes detailed provision, *inter alia,* for the devolution aspects of that maintenance. This bill was introduced by the Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney MSP, on 27 February 2018. The Bill passed Stage 3 – every bill needs 3 stages and finally the Royal Assent to become law - on 21st March 2018. The Scottish Government argues that this legislation, rather than the EU Withdrawal Act 2018, should be the primary vehicle for implementing Brexit in Scotland legislations. In addition, Part 5 of the Bill relates to the EU Charter of Fundamental Rights. In order to inform MSPs consideration of the Bill, the Committee held two oral evidence sessions on issues within relating to the EU Charter of Fundamental Rights. Mainly, the purpose of the Bill is the day after exit, Scottish laws continue to be on the stage. In order «to achieve this, the Bill does three main things, which may increase the role of Scottish Parliament in the future role:

- it retains in Scottish law EU law currently operating in devolved areas
- it gives the Scottish Ministers the powers needed to ensure that devolved law continues to operate effectively after UK withdrawal
- it gives the Scottish Ministers the power to, where appropriate, ensure that Scotland's devolved laws keeps pace after UK withdrawal with developments in EU law"[232].

Therefore, the UK Government referred this bill to the Supreme Court to determine whether it falls within the powers of the Scottish Parliament. The final judgement arrived on 25 July 2018[233], affirming that the nature of the Bill is to make provisions in relation to the continued effect in Scotland of provisions of EU law upon the withdrawal of the UK from the EU. What is important to report is that the Presiding Officer made a detailed reasoned statement explaining that he had concluded that

[231] Similar bill passed also by Wales to the Supreme Court, but following the recent UK-Welsh agreement, Welsh ministers are expected to withdraw their bill. In conclusion, the purpose is to safe Scottish law and make stronger the power of devolved legislatures.

[232] Publication of Parliament, *Scottish Bill,*: https://digitalpublications.parliament.scot/ResearchBriefings/Report/2018/3/6/UK-Withdrawal-from-the-European-Union--Legal-Continuity---Scotland--Bill.

[233] UK Government, *Case for Her Majesty's Attorney General And Her Majesty's Advocate General For Scotland:* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728147/Applicants__Written_Case.pdf.

certain provisions of the Scottish Bill would not be within legislative competence. He took the view that the purported competence delay mechanisms in the Scottish Bill could not have the effect of altering how competence is to be assessed[234].

The truth is that Scotland has always had a different view of the constitution, both in law and politics. From this perspective, the UK is an asymmetrical, plurinational union without one people or shared visions (end point or purpose); the union is continuously negotiated and subject to multiple interpretations across its component parts. Sovereignty is not unitary, but divided and shared. This is in line with the nature of Europe. And this is also the reason behind the desire of Scotland for the UK to remain both in EU and Single Market. This reflects also the cause of the Brexit Referendum vote of Scotland in 2016, driven by union desire rather than conflict one versus London.

Thus, Scotland is thinking about a second independence referendum, to remain in the Union and be coherent with its vision, albeit it is not the safer and auspicial option to take (next chapter will explain why). Hence, when the EU Withdrawal Act proposed that competences currently shared between the devolved legislatures and the EU should initially come back to Westminster, this was seen as a matter of principle in Scotland. Devolved legislature must retain their powers and so Scotland is going to maintain a high profile with the EU where its devolved powers are still fully in place. We have to wait for October 2018 to see which will be the final move both of May and Sturgeon and if, at the end, these two political women will find a final safe agreement.

In conclusion, with the words of Michael Keating, «while the UK Government's position remains that there will not be territorial differences in the application of Brexit, Scotland is likely to remain politically closer to Europe than England for the foreseeable future[235]». Anyway, the UK Government provided a facility which would prevent the Scottish Parliament from modifying retained EU law in devolved policy areas, with only two exceptions: if the legal instrument was of a kind they could modify before exit day; if the UK Government were to "release" elements of retained EU law from the protection by Order in Council at an undefined later date. In the end, both Scottish Government's proposals have been rejected by the UK Government, which keep the focus on leaving the European Single Market and the Customs Union at the end of a transition period[236].

[234] Section 28(1), 29(1)(2)(3), 30(1) and 4 of SA 1998 present all the reserved matters of competence.

[235] UK and the EU, *Brexit: Local and Devolved Government*: http://ukandeu.ac.uk/wp-content/uploads/2018/03/Brexit-and-local-and-devolved-government-.pdf.

[236] In the May's Lancaster House speech on 17 January 2017, it was affirmed that remaining in the single market is incompatible with the government's position on ending Free Movement of People, and also since full membership of the customs union would entail agreeing to enforce the Common External Tariff, it resulted also unacceptable.

CHAPTER 4

CONCLUSIONS: THE PLACE OF PARLIAMENTS ACCORDING TO THE "HARD" OR "SOFT" BREXIT PERSPECTIVE

4.1 What's the meaning of "Hard Brexit" and "Soft Brexit"?

There is not a definitive explanation of "Hard Brexit" or "Soft Brexit" and most of all, we cannot say certainly what will be the future background of UK-EU relationship, until there will be the EU summit of October 2018. This summit assumes to be the most likely opportunity for a final agreement on the UK divorce from the bloc and a statement on future relations. Furthermore, we should outline the three clue elements involved in the terminology: Single Market, Customs Union and Free Trade. Basically, the meaning of these two terminologies are directly connected to the significance of having or not having a deal for the UK.

Single Market means having access to free movement of people, goods, capitals and services and leaving all of these elements will mean to renounce to "freedom" in this sense. On the other side of the coin, UK would have a greater control over their borders[237] and over migration[238] (that will be the major benefit of no deal result). "Hard Brexit" will result also in the UK leaving the Customs Union[239] and in a Free Trade agreement with the EU. Free Trade means that members do not place tariffs and duties on each other's' goods. Members sell and buy without imposing taxes to each other. They all

[237] Art. 77 TEU: http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-v-area-of-freedom-security-and-justice/chapter-2-policies-on-border-checks-asylum-and-immigration/345-article-77.html.

[238] Final report made by Migration Advisory Committee in September 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/741926/Final_EEA_report.PDF; and also the briefing paper, published in June 2017: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/636286/2017_08_08_MAC_Briefing_paper.pdf.

[239] Remember that with the White Paper published in July 2018, Theresa May proposed to remain in the custom union until the end of transition period, fixed for the end of December 2020. That is another point of discussion for the more intransigent side of Parliament which wants to fulfil completely the will of people. «Anti-EU voices insist a hard Brexit must be met to satisfy the wishes of the Brexit referendum vote» https://www.thesun.co.uk/news/3786705/soft-brexit-hard-uk-eu-negotiations-talks-deal-theresa-may/.

charge the same taxes on goods coming in from the rest of the world. Customs Union means that customs' members have the same trade deals with external nations which means that members of the EU Customs Union share the same trade deals with such as the US. Renouncing to these two essential elements, comports directly to create a new own trade deal with UK and foreign countries (that is another explanation of the term *third* previously used). They will not more be forced to have common tariffs with the rest of the EU. This however means have more fine-grained control and allowing UK to better protect their own industries (different tariffs for different types of goods). However, negotiation could get difficult without the opinion of EU 27.

"Hard Brexit" and *no deal* scenario are almost the same thing, where an immediate crash out of EU with any transition period – even if we saw it can be prolonged[240] - using standard international trading rules[241] is the most applicable solution. But, *no deal* implies the exit without any sort of agreement, albeit "Hard Brexit" would almost certainly involve the immediate imposition of tariffs[242] across a range of sectors. For what concerns law, the EU Withdrawal Agreement is waiting for the approval of European Parliament. Leaving without a deal will mean huge changes in legislation in certain industries, same for customs agreement and crossing borders. Yet, the term *hard,* would also lead to the UK's gaining of greater sovereignty, because UK will no longer be subject to EU law and to the judgements of ECJ.

This is as we know the effect that EU Withdrawal Act will have after the exit, that is the repeal of EU law[243] in UK doctrine. In one sentence, "Hard Brexit" corresponds to the status of being completely out of the EU, a definitive split from the European bloc and a broader freedom for Government to set its own rules.

On the other hand, with a "Soft Brexit" Britain may get a special access[244] to the Single Market, but the country may get not easier EU's immigrants to walk inside its borders and vice versa, for UK citizens. UK may try to stay within Customs Union, that would allow only free movement of goods, but not free movement of people. Part of the EU internal market law will still apply to the UK then.

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[240] See Ch.2.

[241] The most noteworthy impact will be on the UK's ability to trade once the UK leaves the EU, the agreement will be void and UK will begin to trade with EU under WTO rules.

[242] Between 2% till 40%, making trade almost impossible. Also, the big issue for the UK financial sector would be the loss of passport in rights.

[243] However, May's Government suggested another possibility for EU law repealing, that is the Tory Manifesto 2017. Basically, the manifesto was against doing this drastic modification, rather to keep EU law applying and concede in the future Parliament to amend repeal and improve EU laws.

[244] Financial Times, *Michael Barnier quashes UK hopes of special access to EU markets,* published in April 2018, «the EU would never accept British prime minister Theresa May's plan for a special access regime based around a broad commitment to adopt financial rules that have the same effect as those in the EU», https://www.ft.com/content/ad96d948-4975-11e8-8ee8-cae73aab7ccb.

This option mainly sees much more alignment between the UK and the EU. The softer the Brexit, the fewer things will change. This will obviously have the opposite effect to a "Hard Brexit".
"Soft Brexit" will also mean no tariffs imposed and minimal disruption, for example in plane manufacture. But on the other side, many British companies will face continuing competition from European rivals. Another aspect of softer Brexit would mean the UK misses out on the ability to make new trade deals on its own. This assumption is made upon the real situation lived by Norway[245] and Switzerland[246], which are not in the EU but they are inside the Single Market in a "special way" (the former through an EEA agreement, the latter with bilateral trade agreements). Both had to accept some EU rules without any possibility of discussion.
In sum, "Soft Brexit" concedes to have access to the Single Market, while being able to make deals without the rest of the EU, remaining within EU Customs Union, and accepting the "four freedoms" of movement of goods, services, capital and people.
However, the problem turns around a single issue: it is not possible having free movement of goods without free movement of people that is the request, in short, of May's Government. These two factors are interdependent for EU institutions and there is no possibility to renounce to either of them. Notwithstanding, the only sure thing is that for the UK a *no deal* would be better of "Hard Brexit" scenario.

4.2 The day after Brexit: regaining stability

Once Brexit will be in operation, each devolved parliament/assembly will consider to substitute EU law with its own measures for matters within its competence and develop its own legislation and policies, although this could result instability and uncertainty the legal landscape of the UK. Mainly, we have to look up devolved acts in Scotland and Northern Ireland to understand how they may variate if UK leaves the EU.
The EU Withdrawal Act 2018 indeed delineates the extent to which the devolved administrations may legislate to amend retained EU-derived laws within their competence. This is the focus of the work, understand how the role of parliaments involved in the procedure is affected by and how it can retain EU law in its domestic doctrine. Before going in depth, we have to outline that post-Brexit, the

[245] Norway trade relations with EU are normally administrated through EEA agreement: http://ec.europa.eu/trade/policy/countries-and-regions/countries/norway/; http://www.efta.int/Legal-Text/EEA-Agreement-1327.
[246] Switzerland's economic and trade relations with the EU are mainly governed through a series of bilateral agreements where Switzerland has agreed to take over certain aspects of EU legislation in exchange for accessing part of the EU's Single Market, http://ec.europa.eu/trade/policy/countries-and-regions/countries/switzerland/.

devolved administrations cannot legislate to amend retained EU-derived laws, unless the laws in question would have been within the competence of the devolved administration prior to the UK's departure from the EU. The Bill aids to reflect this position proposing a number of consequential amendments to existing devolution legislation.

First of all, Schedule 2[247] of EU Withdrawal Act 2018 provides powers to devolved authorities[248]to make regulations to deal with any failure of retained EU law. Notwithstanding, the Act establishes Westminster control over laws[249] which are within the constitutional jurisdiction of devolved executives, enabling the UK Government to amend, change, or alter law as it considers appropriate with relatively limited reference to Parliament and without the requirement for the consent of the devolved administrations. This is the crucial point which makes devolved authorities weaker than the Westminster institutions. Indeed, there is still in place a reference made by the Scottish Government – remember that Scotland Government has already made a Bill, the Legal Continuity Bill[250], in which addressing the retention of EU law as it applies to devolved issues - about such 'power grab[251]': it means that after Brexit will be in place, the legislation as it is drafted in the Act will consent that all the powers repatriated from Brussels go to Westminster, even those in devolved areas.

From this extent, we have studied how effectively the retained EU law will be change or not the devolved acts for Scotland and Northern Ireland, once Brexit happened. Another important report was published by the European Union Committee in July 2017. Furthermore, the report considers the impact of Brexit on Northern Ireland, Wales and Scotland. For Northern Ireland, the Committee «restates its previous conclusion that the unique circumstances of Northern Ireland will require unique, *flexible and imaginative solutions*[252]». For Scotland, it concludes that «any Brexit deal should accommodate Scotland's particular needs, including its reliance upon EU migration to meet both labour market and demographic needs[253]».

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[247] EU Withdrawal Act 2018, Section 2: «EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day. (2)In this section "EU-derived domestic legislation" means any enactment so far as— (a)made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972, (b)passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act, (c)relating to anything— (i)which falls within paragraph (a) or (b), or (ii)to which section 3(1) or 4(1) applies, or (d)relating otherwise to the EU or the EEA, but does not include any enactment contained in the European Communities Act 1972», http://www.legislation.gov.uk/ukpga/2018/16/section/2/enacted.

[248] Remember that such powers are subject to restrictions ensuring devolved authorities cannot legislate beyond existing limits on devolved powers, that means Westminster Parliament remains superior.

[249] Westminster can override this refusal but, as acknowledged by the Supreme Court in the *Miller* judgment (Ch.2) there will be significant political consequences to undermining the Sewel convention.

[250] See Ch.3.

[251] Michael Russell and Nicola Sturgeon confirmed this *power grab* goes against a fundamental principle of the 1997 devolution settlements, that "powers not reserved are automatically devolved".

[252] Ibidem.

[253] Ibidem.

Mainly, the report resumed that on the day of Brexit, «all powers currently exercised by the EU will *by default*, be exercised in accordance with pre-existing statutory provisions[254]». Brexit will remove the foundation of the devolution settlement because it is based on the UK membership of the EU. As the same report resumes, it seems that with the recession and the application of Brexit, there is a presumption that the devolved legislatures may legislate on any matter not formally reserved to Westminster. In other words, this seems to imply a binary relationship between each of the devolved legislatures and the Westminster Parliament. This is true but not complete. The definition of this relationship has to consider also two main aspects: the first is that devolved legislatures reflect the supremacy of EU law in their framework and, by status, they cannot legislate against EU law. The second factor refers to the more shared and overlapping competences that devolved legislature are able to possess. Thus, there are explained the section in which both devolved acts (Scottish and Northern Irish) are safeguarded by EU Withdrawal Act provisions.

More recently, in February 2018 the Cabinet Office minister David Lidington made statement by that differences in the rules among the four UK nations would lead to an 'unnecessary disruption' to domestic trade and undermine our future ability to make deals for the whole of the country[255]. It also would indicate that the government may even be preparing the ground to override the Sewel convention. Remember that the Sewel Convention provides that although parliamentary sovereignty allows the UK Government to repeal or amend legislation, changes to legislation affecting devolved powers are normally subject to the passing of a legislative consent motion by the parliament concerned. In other words, although it has power to do so, the UK Parliament will not normally legislate on devolved matters without the consent of the devolved authority.

4.2.2 The effect of withdrawal on devolved acts: better "hard" or "soft" Brexit?

Both devolved acts of Scotland and Northern Ireland have a section called "Restriction relating to retained EU law" – retained is intended as we have already discussed in Chapter 2 and 3.

Specifically, section 29(2)(d)[256] of the Scotland Act 1998 and section 6(2)(d)[257] of the Northern Ireland Act 1998 express the concessions and the restrictions for the Scottish Parliament and Stormont

[254]Publication of Parliament, *Brexit: devolution*, published in July 2017, Ch. 2, https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/9/9.pdf.

[255] This will confirm the view that the UK government has in reality moved little from its original position in respect of devolved powers and the need for consent.

[256] UK Government, «An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. (2) A provision is outside that competence so far as any of the following paragraphs apply — (d)it is incompatible with any of the Convention rights or with [EU] law», https://www.legislation.gov.uk/ukpga/1998/46/part/I/crossheading/legislation.

[257] UK Government, «A provision is outside that competence if any of the following paragraphs apply—(d)it is incompatible with **[**EU**]** law», https://www.legislation.gov.uk/ukpga/1998/47/section/6.

Assembly to legislate incompatibly with EU law[258]. Moreover, what can we affirm of these two sections is the re-affirmation of the role of Parliament as vital and central. A Minister of the Crown[259] who wants to propose a draft has to follow some instructions and especially "must not lay for approval before each House of the Parliament of the United Kingdom a draft of a statutory instrument containing regulations" provided by subsection(3). He has also wait for a consent decision made by Scottish Parliament or Northern Ireland Assembly in relation to the laying of the draft, meaning that a Minister of the Crown must publish a written statement explaining the effect of any instrument made under these powers before it can be laid before Parliament. This gives strength and authority also to devolved legislations together with Westminster Parliament. However, after the transition period, "no regulations may be made under this section after the end of the period of two years beginning with exit day".

Before Royal Assent has arrived, the lack of approval of the bill would have required concession from UK Government about what Westminster Parliament cannot impose any constraints on the act of devolved powers, without Scottish agreement. It was required that the UK Government conceded that Westminster cannot impose new constraints on the exercise of devolved powers without Scottish agreement. The Government has so far refused to accept this, fearing the potential for post-Brexit regulatory uncertainty for business. This was an important point of arrival in the extent of the requests expressed by Edinburgh institutions. However, even if the deal would have not been reached, the UK Government would might decide to press ahead with legislation against the declared position of the Scottish Parliament and this is almost legally possible. But the Royal Assent arrived, so UK Parliament gave the approval to the EU Withdrawal Bill, and so the consideration of Scottish Parliament has come to nothing.

Explanatory notes have been made on EU Withdrawal Act 2018, mainly a section which describes the effect of the withdrawing on the current devolution settlements. Powers involving devolved authorities corresponding to sections 8 and 9 of EU withdrawal Act. In those areas, the relevant devolved institution cannot legislate or otherwise act in a way that is incompatible with EU law – as we already explained above. Hence, the EU Withdrawal Act 2018 amends each of the devolution statutes so as to remove the necessities that the devolved legislatures and the devolved administrations

[258] For "*with EU law*" substitute "in breach of the restriction in section 30A (1) for Scotland and 6A (1) for Northern Ireland, with "*Restriction relating to retained EU law"*.

[259]As explained in the section dedicated in EU Withdrawal Act 2018: «(9)A or Minister of the Crown may by regulations— (a)repeal any of the following provisions (i)section 30A or 57(4) to (15) of the Scotland Act 1998, (ii)section 80(8) to (8L) or 109A of the Government of Wales Act 2006, or (iii)section 6A or 24(3) to (15) of the Northern Ireland Act 1998, or (b)modify any enactment in consequence of any such repeal. (10) Until all of the provisions mentioned in subsection (9)(a) have been repealed, a Minister of the Crown must, after the end of each review period, consider whether it is appropriate— (a)to repeal each of those provisions so far as it has not been repealed, or (b)to revoke any regulations made under any of those provisions so far as they have not been revoked» https://www.legislation.gov.uk/ukpga/2018/16/section/12/enacted/data.xht?view=snippet&wrap=true.

can only legislate or otherwise act in ways that are compatible with EU law. However, there are some areas in which legislative and executive competences will be maintained[260].

Mainly, « […] the amendments deal with a variety of issues and how these need to be reflected in the devolution legislation, including the repeal of the ECA by section 1, the preservation and conversion of existing EU law into UK domestic law on and after exit day by sections 2, 3 and 4 and the approach to legislative and executive competence taken by section 12 and Part 1 of Schedule 3[261]».

With the word "*amendments*", this document has set out by «sub-paragraph (1) of paragraph 41 that the amendments made to the devolution legislation by section 12 and Part 1 of Schedule 3 do not affect the validity of devolved primary legislation receiving Royal Assent before exit day». Furthermore, «sub-paragraphs (3) to (5) of paragraph 41 disapply the current EU law limits on devolved competence so that primary legislation can be made validly before exit day in relation to an area that is not specified in any regulations made under the powers inserted by section 12(2), 12(4) or 12(6) or Schedule 3 Part 1 as subject to a limit on competence[262]».

We can draw up the conclusion that EU Withdrawal Act 2018 provided assurances and preventions for devolved legislations and it is able to answer to different worries came out from all devolved assemblies. Otherwise, Brexit is going to favour more Westminster institutions rather the others in the country, in particular in regaining sovereignty to Parliament.

In the next paragraphs, indeed, starting from this analysis, we will try to make some predictions on three main aspects revolving around parliaments in the UK and connected to Brexit effects. The first aspect will be the redefinition of the notion of parliamentary sovereignty, especially what may be the future consideration of this constitutional principle in relation to the position that Westminster is going to occupy. The second will focus on the role of the devolved assemblies. The third will look at the concrete hypothesis circulating at institutional level and in the public opinion about the possibility of a second Brexit referendum, due to the last updates and problems European Withdrawal Agreement is not addressing.

For sure, devolved legislatures hope to see a softer Brexit in place rather than harder one. However, both scenarios will imply the loss of something for all the single nation of UK, from being in Single Market or having a total Free Trade area, rather than being active in the Custom Union. What it seems

[260] The powers will expire two years after exit day (although they can be repealed earlier under the power in section 12(9)) and the regulations themselves will expire five years after they come into force (if not revoked earlier). http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpgaen_20180016_en.pdf.

[261] Explanatory notes on EU withdrawal Agreement: http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpgaen_20180016_en.pdf.

[262] «Legislation covered by these sub-paragraphs (other than powers to make, confirm or approve subordinate legislation) must come into force on or after exit day in order to benefit from the disapplication of the EU law limit on competence», http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpgaen_20180016_en.pdf.

to be clear is that Scotland, Northern Ireland and also Wales are not running for a *no deal* scenario in which, it is common opinion except for UK Government, it will be a serious disaster.

4.3 Parliamentary sovereignty and the possibility of a codified constitution

Reprising the definition done by Barber[263], prior to 1991 "parliamentary sovereignty was only a legal rule which changed through years" especially with Factortame case which can be considered the moment of "death" of principle. Nowadays, we are assisting to unprecedented constitutional changes in the UK, thus the assumption may fade or remain as it is. Things, however, can change, especially in such context as international relations and politics.

Also, after the analysis made on which are the effects of "retained EU law" for devolved acts, we can also understand that this is connected to parliamentary sovereignty conquest.

Regarding the perspectives for "Soft" of "Hard Brexit", the last White Paper published by May's Government provides some insights but it does not resolve two major issues, one of this is the lack of a prompt answer to the link between customs controls and regulatory controls which is fundamental for EU[264]. In other words, as Michael Barnier pointed out, there is no existence of a preservation of integrity of Single Market also because there is no obvious alternative to the "Canada option" (it is called CETA and it is the new trade deal which regulates Canada and EU trade since 2017, it removes tariffs of trade in industrial goods between the parts of a relatively clean break). There is also "Norway plus": Norway is joining the EEA and it has almost the same level of tariff- and barrier-free trade with EU countries as we have now, plus the ability to strike our own trade deals with non-EU countries. There was an amendment proposed by House of Lords to the Government's Brexit bill in May 2018, and it passed with a majority of 245 to 218. That means, in short, a lower level of access and regulation in line with the Canadian solution, rather than the higher protection consistently with the Norwegian proposal – and with this last option, it also means accepting the four freedoms of Single Market[265].

Therefore, the UK and the EU do want an agreement, maybe the EU more than the withdrawing side (it is seeking for the famous Political Declaration cited in the previous chapter). In this perspective, it is questionable how would third country status change lives of UK citizens and what would be the consequences for the Westminster Parliament. The former question takes us to the day after the no

[263] See Ch.2 para 1.

[264] White Paper published by May's Government in July 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf.

[265] These two proposals are not fitting UK's interests, hence it is necessary to meet a middle way in the future deal, hopefully.

deal - a *'no deal'* scenario is one where the UK leaves the EU and becomes a *third* country without a Withdrawal Agreement and defined framework for a future relationship - Brexit, when Britons will cease to be EU citizens and the rights that they currently have in other Member States by virtue of their EU citizenship, will therefore be thrown in to question[266]. For example, the issue of citizen rights is not yet answered and immediately after the exit, if no deal will be in place, there may be a kind of water flow of people from the UK in a while[267]. However, there might be coordinated as well as essentially unilateral actions on all sides to guarantee that the *status quo* is well-preserved as far as possible. In this perspective, there will be a reciprocal respect of existing rights of each other's citizens both the UK and where necessary the EU27 and Member States would take emergency legislative action to ensure this[268].

What can be said is that parliamentary sovereignty at national level will be restored for sure. UK Parliament will be considered as a *third* Parliament for being outside the European member states' borders[269]. The issue of the primacy of EU law on domestic one has been underlined and re-discussed thanks to Factortame case. In July 2018, Britain issued a policy document on legislation declaring the need of implementing the terms of any final exit deal negotiated between London and Brussels – remember that Parliament has to approve it before, and this is another important element confirming the importance of parliamentary sovereignty. this can be considered as another factor to aid the post deal future – if it will be an agreement – and how Government will conduct the relationship between Britain and the EU till the end of implementation period in December 2020[270].

However, devolved legislatures may be weakened by this reinforced perception, that will have for sure a direct effect at domestic level more than at international one. As we have already explored, Scotland and Northern Ireland voted "Remain" in June 2016. They did – still do – really believe in their EU membership hence they do not want to leave the Union. Notwithstanding, if October's meetings will end with the deal, the UK withdraws EU and together devolved legislatures (however, devolution will stand on anyway) and hence it will be only Westminster Parliament the institution taking affairs with the EU. Maybe for this reason, parliamentary sovereignty will face difficulties

[266] If, like the UK, countries have laws, relating to immigration and residence that give special status to EEA nationals, after Brexit date these will automatically cease to apply to UK nationals, because the UK would no longer be part of the EU or EEA.

[267] From this, the probable situation will see the rights for EU citizens to leave the UK for long periods restricted after Brexit. See the report of EU on citizens' rights: https://ec.europa.eu/unitedkingdom/services/your-rights/Brexit_en.

[268] UK and the EU*, What a no deal Brexit would mean for EU citizens here and Brits in Europe:* http://ukandeu.ac.uk/what-a-no-deal-brexit-would-mean-for-eu-citizens-here-and-brits-in-europe/.

[269] This assumption is better explained through the Supreme Court sentence in Miller case: « […] by making and unmaking treaties the Crown creates legal effects on the plane of international law, but in doing so it does not and cannot change domestic law. It cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights […] »

[8] *Britain to keep EU laws during Brexit transition:* https://www.reuters.com/article/uk-britain-eu-laws/britain-to-keep-eu-laws-during-brexit-transition-idUSKBN1KE1O4.

even if its authority will be fully "re-established". In addition, leaving the EU will concern also the loss of all the seats in the European Parliament for the UK - and this is another issue taken under consideration in the short paragraph about European Parliament.

A central motivation of the vote for Brexit has been the desire to regain the full sovereignty of Westminster Parliament and the national courts towards both the community law and the European Court of Justice. A proof that Parliament has taken back control, could be verified if negotiations result successful, but then Parliament will not give its approval, and this can be also possible because the increasing loss of consensus to May's Government within its Conservative Party due to the "soft" conduct of negotiations. Surely, the stop from Parliament would be the most surprising of these two years of discussions and political and legal heat. «And the effect which this move could provoke are twofold: it can mitigate the impacts of no deal; or perhaps it can increase time of implementation of the Article 50 process, even for brief duration[271]». We can conclude saying that the probable prospects can be or the draft Withdrawal Agreement and a chaotic political moment, or a chaotic no deal scenario which can lead to unpredictable results.

Another crucial point to go on with our analysis is the Miller case[272]. We must consider its effects on the British doctrine in relation to parliamentary sovereignty. In fact, the Miller case has emphasized the UK's constitutional legacy, particularly its devotion to the rule of law and parliamentary sovereignty, giving to this one the – or better re-affirming – its importance. The Supreme Court, besides the case in particular, gave a clear establishment on the relationship between the executive and the legislature and this result is really important. Indeed, the UK Government did not enjoy a prerogative power to withdraw from the European Union and this conclusion acknowledged the sovereignty of Parliament over the executive.

We can say that without the Miller case, maybe, the actual situation would have been totally different or rather inexistent. The triggering would have taken place anyway, but procedure would have followed a safer way. Moreover, the Supreme Court confirmed the primacy of directly effective EU law, and the extent to which the UK constitution evolved to reconcile this primacy with the sovereignty of the UK Parliament. The Supreme Court in Miller case focused on applying the law, not politics. Reasoning on the possibility to correct other manifest shortcomings in current UK constitutional arrangements, the answer for some is to introduce a written constitution. The requested clarity by all parts involved in Brexit procedure, especially devolved legislatures, would find more answers, through wider and deeper dispersal of power, with a new set of principles and rules more

[271] UK and the EU*, Cost of No Deal revisited,* published in September 2018: http://ukandeu.ac.uk/research-papers/cost-of-no-deal-revisited/.

[272] See ch.1 and 2.

enforceable than before through an entrenched Constitution[273]. In relation with this principle, questioning on codifying or not a UK constitution is on the table of discussion since its entrance in EU.

Indeed, there are already some proposals around this idea. Richard Gordon has gone to the trouble of setting out in impressive detail a written constitution founded on principles of representative democracy and based on popular sovereignty[274]. He also considers the parliamentary sovereignty the real barrier to the existence of a codified constitution. The problem is that either such rights come to be regarded as no more than non-justiciable directives of state policy, or alternatively, the Supreme Court, or any other court having responsibility for the interpretation of the consultation, is called upon as the mechanism for achieving delivery. Professor Adam Tomkins sets out prior to Brexit Referendum what he called "Our Republican Constitution". In order to achieve popular sovereignty, it is crucial to start at the bottom with the people and not with the monarchy. The objective is to encourage self-government through processes of informed, public spirited deliberation. In practice, any attempt at constitutional codification is unlikely to bear advantage, because it presupposes a consensus can be reached between disparate political groups on institutional design and other rights and values to incorporate in a new constitution. Nevertheless, the trend towards progressively codifying key aspects of the constitution may redefine the relationship between Parliament, the executive, and the courts, patching the way for a new era with the Brexit deal and codified constitution.

We can conclude saying that challenges of Brexit reveal the constitution's 21st century weaknesses. Such an event as a British withdrawal from the EU requires strong and principled constitutional law as a guide. The United Kingdom does not have it at the moment, at least in a unique and entrenched constitutional document. As the late Lord Bingham put it, commenting on the UK's lack of a codified constitution: «constitutionally speaking, we now find ourselves in a trackless desert without map or compass[275]».

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[273] Dr Andrew Brick, *Codifying or not codifying the UK Constitution: a literature review,* 2011: « […] most of the proposed constitutions see codification as intertwined with substantial change to the nature of the UK settlement; possibly suggesting that such a dynamic might apply to an actual codification of the UK constitution. There is a tendency to assert the concept of popular sovereignty. Most of those who propose codified UK constitutions appear to envisage constitutional supremacy as supplanting Parliament; with judges able to rule acts of Parliament incompatible with the constitution and strike them down […] », https://www.parliament.uk/pagefiles/56954/CPCS%20Literature%20Review%20%284%29.pdf.

[274] R. Gordon, *Repairing British Politics: A Blueprint for Constitutional Change*, Hart Publishing, 2010.

[275] A. McHarg, T. Mullen, A. Page, N. Walker, *The Scottish Independence Referendum: Constitutional and Political Implications*, Oxford University press, 2016, p.345.

4.4 The European Parliament: the importance of its role related to devolved assemblies

Article 50 TEU is "the start of everything", and it is not fair for the right conduct of the work to not make any references to the role of European Parliament (EP), which is directly taken on the stage from such article. Any agreement to leave, indeed, do require the European Parliament's consent[276]. Furthermore, the importance and the reason why a section is devoted to a "sort of comparison" between the role of EP[277] and that of devolved legislatures. Besides devolved assemblies will be affected by whatever result obtained, also the European Parliament (EP) will be re-shaped after Brexit. EP indeed has no formal role within Brexit negotiations' process before it is asked to give its consent to a final withdrawal deal other than the right to receive regular information on its progress. With this regard, Theresa May promised that the role of UK Parliament could have been compared to the one of EP in terms of quality and timing of the information through the process and negotiations[278]. However, the role of EP cannot be considered like this also because it is the main body which represents European citizens, and to not listen to its voice may be one of the element undermining the EU democratic standard. Maybe this is the key element able to ensure May's Government on keeping attention also in requirements inserted in the draft agreement.
In line with this consideration, UK is one of the most populous member states of EU so the composition of the EP will really suffer for this. It will be needed some institutional aids. According to Article 14(2) TEU[279], in fact, the EP shall be composed by maximum 750 members, plus the President. The actual EP composition has been set in a European Council's decision adopted in June

[276] As a confirmation, the EP has drafted and passed several reports on Brexit, one really important in April 2017 setting out the so-called "red lines" for negotiations. http://www.europarl.europa.eu/news/en/press-room/20170329IPR69054/red-lines-on-brexit-negotiations.
[277] In the case of the European Parliament, its formal powers are defined by Art. 50 TEU: it must give its consent to the final agreement for the agreement to take effect. The European Parliament used this formal power to clarify at an early stage of the negotiations that it did not intend to simply vote once at the end of the negotiations, but that it also expected to be regularly briefed and consulted during the negotiations.
[278] This reference is both from K. Armstrong's book and Miller case process.
[279] «The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be digressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats. The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph».

2013[280]. Following the departure of the UK, the European Council and the EP have agreed[281] on the reallocation of 27 EU seats[282] of UK -the ruling of the reallocation's seats are found in art.14 TEU[283]. Yet, it is clear that the withdrawal of the UK creates space for major new demands by several member states, and potentially for a heavy reshuffling of seats. Considering that the new decision will involve all European institutions (it has to be proposed by the EP, approved unanimously by the European Council, sanctioned by the EP – and then de facto ratified domestically by all member states since national legislation will have to be put in place to regulate the specific modalities for electing the number of MEPs assigned to each member state by the EU decision) it is clear that much will be at risk during the negotiations.

As Federico Fabbrini pointed out: «In sum, the need to adopt a new decision on the composition of the EP after Brexit seems to create another window of opportunity for significant updates and revisions to the EU institutional set-up. As amending this European Council decision is – in terms of complexity – almost equivalent to a treaty revision, it cannot be excluded that the opportunity will be exploited to call for a more fully-fledged change to the EU institutional architecture, or at least to some other specific amendments to EU primary law, which may be part of a package-deal on how to assign seats among the various member states within the EP[284]». Thus, it seems clear that without the UK the other member states and the EU institutions will need to engage and make a new equilibrium of bargains, both to reallocate seats and to re-think the revenues and expenditures of the EU for a post-Brexit era. In this context, continuing to involve UK Parliament in inter-parliamentary bodies (like EP itself or the Parliamentary Assembly of the Council of Europe) could be a way to increase political cooperation also after British seats will not be in the EP anymore.

There are several procedures that the EP may use to influence Brexit process, albeit in these years they have not worked so much. It can make other resolutions, as it has already done. Among these, we can remember resolution of 5 April 2017 («[…] acknowledges the notification by the United Kingdom Government to the European Council which formalises the United Kingdom's decision to

[280] European Council Decision , *Establishing the composition of the European Parliament*, 28 June 2013: https://eur-lex.europa.eu/eli/dec/2013/312/oj.

[281] These are useful links reporting the new list after Brexit and the decision of how reallocating the seat; http://www.europarl.europa.eu/news/en/press-room/20180202IPR97025/size-of-parliament-to-shrink-after-brexit; http://www.europarl.europa.eu/RegData/etudes/ATAG/2018/623533/EPRS_ATA(2018)623533_EN.pdf.

[282] C. McCarthy, *The Reallocation of the UK's European Parliament seats: a Brexit dividend for Ireland :* «On 29 June 2018, the European Council adopted a decision which will redistribute the seats in Parliament that will be vacated upon the withdrawal of the United Kingdom, in advance of the May 2019 European Elections. is measure was initially approved by the European Parliament on 7 February 2018 by 431 votes to 182, with 62 abstentions». See the link for more information: https://www.iiea.com/publication/a-brexit-dividend-for-ireland/.

[283] Art.14 TEU: http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-european-union-and-comments/title-3-provisions-on-the-institutions/89-article-14.html.

[284] F. Fabbrini, *The Law and politics of Brexit,* Oxford, 2017, p. 276.

withdraw from the European Union […][285]»), completed by the following on 3 October 2017 on citizen rights (« […] emphasises that the withdrawal agreement must incorporate the full set of rights citizens currently enjoy, such that there is no material change in their position […][286]»), the one on 13 December 2017 (« […] welcomes the joint progress report presented by the EU and UK negotiators, which concludes that sufficient progress has been achieved in negotiations for the Withdrawal Agreement, and congratulates the Union's negotiator on the conduct of the negotiations so far […][287]») and the last one on 14 March 2018. In this final resolution, EP has affirmed that «[…] an association agreement negotiated and agreed between the EU and the UK following the latter's withdrawal pursuant to Article 8 TEU and Article 217 TFEU could provide an appropriate framework for the future relationship, and secure a consistent governance framework […] [288]».

In September there will be an appointment of EU leaders for discuss about the withdrawal agreement that has to find a deal by October 2018. Afterwards, if *no deal* is reached, there will be several EU summits in order to fix the problem as soon as possible. In line with this possibility of delay, the EP can be indeed valued as a bad cop because it received some accuses to be not fair in negotiations towards UK's intentions, especially after the scrutiny of first phase of Brexit in December 2017[289].

4.5 Possible scenarios: the regain of ground by devolved legislatures

Even if we have understood that devolved legislatures cannot perform a leading role in this Brexit show, they had done something in terms of preventions, possibilities and suppositions on what is

[285] EP Resolution, *negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union*, 5 April 2017: http://www.epgencms.europarl.europa.eu/cmsdata/upload/b9a0c645-21c2-4117-b933-04689cf7cb46/European_Parliament_Resolution_5_April.pdf.

[286] EP Resolution, *The state of play of negotiations*, 3 October 2017: http://www.epgencms.europarl.europa.eu/cmsdata/upload/cd4c389a-cfd7-4703-bbf8-be07f0272cd7/European_Parliament_Resolution_3_October.pdf.

[287] EP Resolution *State of Play,* 13 December 2017: http://www.epgencms.europarl.europa.eu/cmsdata/upload/e845eb9c-8326-44b6-b70e-461d5602d0a9/EP_REsolution_13_December_2017_State_of_Play.pdf.

[288] EP Resolution, *The framework of the future EU-UK relationship*, 14 March 2018, http://www.epgencms.europarl.europa.eu/cmsdata/upload/e9270809-8891-4d5d-bea4-1a764178e282/European_Parliament_resolution_on_the_framework_of_the_future_EU-UK_relationship_14_March.pdf.

[289] The EP affirmed that negotiations can only progress during the second phase if the UK government fully respects those commitments and if they are fully translated into the draft withdrawal agreement. In the same report, «whereas comments such as those made by David Davis, calling the outcome of phase 1 of the negotiations a mere 'statement of intent', risk undermining the good faith that has been built during the negotiations». That means EP has not to get negotiations more complicated. From the resolution made by European Parliament, 13 December 2017, on the state of play of negotiations with the United Kingdom. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT%2BTA%2BP8-TA-2017-0490%2B0%2BDOC%2BXML%2BV0//EN.

going to happen now and their visions on what must be included within final deal in order to have – or avoid – an "Hard Brexit" or a "Soft Brexit".

The new settlement of Northern Ireland's and Scotland's doctrine after Brexit in relation to the influence of the EU (and ECHR) will not only take decades, rather it may be unfeasible. Although devolution has been conceded under Act of Parliament - and so authority -, their institutions are – and they will - still remaining behind the shadow of Westminster Parliament. That is due to the regaining sovereignty we talked about. Thus, it can be considered as an aspect for both devolved legislations of "Hard Brexit". And maybe this can be seen as another element confirming the hypothesis that this unique new relationship between UK and EU is going to influence significantly both the normal EU governance framework and the devolved institutions. In other words, when we talk about English institutions, we will go to have difficulty in consider the role of Irish, Scottish and Welsh institutions in the context, albeit there were the preventions made by EU Withdrawal Act 2018 as explained before.

Speaking in constitutional terms and only after twenty years from devolution's birth, the existence of these devolved assemblies is going to be hint more than during the riots' periods in last decades, simply because in the event deal is reached, Westminster will play the leading role.

Maybe this is not a surprise in terms of constitutional order and British doctrine. However, devolved legislatures still have the lucky possibility that their desire of remaining in the Union will be met, meaning to have a "Soft Brexit" result. Besides these wishes, we can observe that negotiations become compromises at end, as each side plays its own strategy in order to extract further concessions. There are many possibilities as Akash Paun predicted in February 2018, which result still valid. Assuming that «the devolved governments will settle on a shorter list of areas where the will of Westminster should prevail[290]» it can be considered that, maybe, «the UK Government will - as we have previously suggested - set out legally binding rights for devolved ministers to be involved in the detail of future frameworks, with stronger and more transparent intergovernmental machinery to facilitate agreement and resolve disputes[291]». From this point of view, the UK Government's offer is not unreasonable. It proposed to devolve by default[292], through the retention of powers at Westminster only where necessary for defined economic and diplomatic purposes. Otherwise, the

[290] Institute for Government UK, *Scotland and Wales reject government latest Brexit offer:* https://www.instituteforgovernment.org.uk/blog/scotland-and-wales-reject-government-latest-brexit-offer-what-next.

[291] Ibidem.

[292] Publication of Parliament, *Devolution and Exiting the EU: reconciling differences and building strong relationships*, published 31 July 2018, «Since April 2018, all three devolved institutions have operated on a reserved powers model (with a slight variation in the case of Northern Ireland). However, preparations for leaving the EU have exposed inconsistencies in the UK Government's conceptualisation of the devolution settlements. We urge the Government to make clear its understanding that the reserved powers model of devolution means that powers devolve by default to the devolved institutions and are not conferred by the UK Parliament», https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1485/148503.htm.

problem is that this position has been arrived far too late since the publication of White paper without a proper consultation of devolved legislatures – and we will see how this involves directly the Scottish Parliament's role. This can be considered another element which has undermined mutual trust between parties without offering any prospective of compromise[293].

In the end, in 19 July 2018, the European Commission showed two main scenarios after UK departure from EU:

« […] if the Withdrawal Agreement is ratified before 30 March 2019, so that it can enter into force on that date, EU law will cease to apply to and in the United Kingdom on 1 January 2021. after a transition period of 21 months, the terms of which are set out in the Withdrawal Agreement. ; In the absence of an agreement on a withdrawal agreement, or if the Withdrawal Agreement is not ratified in time by both parties, there will be no transition period and EU law will cease to apply to and in the United Kingdom as of 30 March 2019 (also referred to as the 'no deal' or 'cliff-edge' scenario)[294][…]»

We will have to therefore wait for what is going to happen and in how much time. Meanwhile, Scotland and Northern Ireland perspectives remain uncertain too, and it is not possible to drawn up a certain scenario for both legislatures. We can make an analysis of the two nation's position and keep in mind the definition given on "Hard" and "Soft Brexit".

4.5.1 The Scotland's perspective

The Scottish Government has published "*Scotland's Place in Europe*[295]" in December 2016, in order to find a "common ground with the UK Government around a solution that would protect Scotland's place in the European Single Market from within the UK[296]". The paper set out its policy position for what it believed the UK's future relationship with the European Union should be. It sustained that UK should remain within the European Union's Single Market and its Customs Union. Two years later, Scottish Government still believes that the UK's continued membership of the European Single Market – through the EEA Agreement – and the EU Customs Union are both feasible and desirable, reasoning on the assumption that all of those who voted to leave the EU in 2016 do not automatically want to exit the European Single Market. Scotland is among those who wanted to remain in.

The scenario in which Scotland remains member of Single Market will require three legal changes. First, EFTA and EEA have to make a change. Scotland owns the role of region or sub-state which at

[293] UK and the EU*, Cost of No Deal revisited,* published in September 2018: http://ukandeu.ac.uk/research-papers/cost-of-no-deal-revisited/.

[294]EC, *Communication preparing withdrawal Brexit preparedness*: https://ec.europa.eu/info/sites/info/files/communication-preparing-withdrawal-brexit-preparedness.pdf.

[295] Scotland Government publication, *Scotland's Place in Europe*, published in December 2016*:* https://www.gov.scot/Resource/0051/00512073.pdf.

[296] Ibidem, Nicola Sturgeon's letter of introduction.

international level is not a formal category as state is. So it lacks the external competence to enter into treaties autonomously, additionally it will need to have legal personality. In the second instance, this appeal has to be inserted in the UK withdrawal treaty because UK government is the one which has to negotiate this. Lastly, "there would need to be a wider-ranging devolution of powers to Scotland to enable it to comply with Single Market's rules […] such a transfer of power […] would require separate UK primary legislation, devolving powers to Scotland and providing it with legal personality […]"[297]. Then, Section 29 of Scotland Act 1998 needs to be amended. Furthermore, the Henry VIII clauses, albeit they are very useful in terms of time because enable primary legislation to be amended or repealed by secondary legislation, create some issues for Scotland. Basically, in this way UK can legislate in those areas devolved to Scotland without seeking the consent of the Scottish Parliament in relation to subordinate legislation altering the effects of EU law in the devolved areas. It would mine hence the Scottish Parliament control over UK law-making[298] in devolved areas. In this extent, Scottish Parliament will lose another "piece" of power, and there is nothing to do.

As we have already seen, the push for Scottish independence[299] was not inevitable in the Brexit context. Likewise, what appears to be a shift from a demand to continue Scotland's EU membership to a less ambitions focus on maintaining Single Market membership indicate a willingness to take pragmatic steps, and compromise if necessary.

How Scotland will face this challenge remains to be seen. Scotland wants to continue to gain the substantial economic and social benefits from membership of the European Single Market, remarking that this position is also safer for the UK itself, a position of "Soft Brexit". For what concern citizens' right, the Scottish Government's view continues to be at an egalitarian level: it wants the same provisions which apply to EU citizens and their families' resident in the UK before exit to be extended to those who arrive during the transition. It also affirmed that:

«In the event that the UK Government does not pursue the option of retaining membership of the EEA, the Scottish Government is committed to exploring with the UK Government, in the first instance, the mechanisms whereby Scotland can remain within the EEA and the European Single Market even if the rest of the UK chooses to leave. This is essential if we are to ensure Scotland can continue to realise the substantial economic and social benefits from membership of the European Single Market and the "four freedoms" that lie at its core. However, as we set out later, we also consider that the proposal we put forward in this chapter could have benefits, not just for Scotland, but for the UK as a whole and for our European partners[300]».

[297] F. Fabbrini, p.124.
[298] Section 28 (7) SA 1998.
[299] This can also be confirmed by the trend has changed for independence which decrease since 2017 election where the SNP lost 21 seats in Parliament. In addition to this, it is not the right time to choose to leave the UK with the amount of uncertainty already in place.
[300] Scottish Government, *Scotland's Place in Europe*, December 2016, para 107.

4.5.2 The Northern Ireland's perspective

Prior to the Brexit period, the relationship of cooperation[301] between Irish and UK Government was stronger and more operative than ever, supported by shared EU membership. Across a soft land border, it could be possible to preserve this bond. However, it is not that simple and even if this would be the best reachable outcome for Northern Ireland, we have to consider all the possible solutions to the problem, albeit it is sure that border's issue is at the top of the list, and maybe it is the common thread keeping all the other together and interconnected.

We know that over the past two decades the island of Ireland has been transformed as a result of the Irish peace process, where the country has emerged from decades of political conflict and towards a more prosperous, peaceful and democratic society, of which the Good Friday Agreement 1998 is the milestone. The agreement represents the institutional, constitutional and legal framework which defines the new relationships that now exist within and between Ireland and Britain. The reach of peace on the island not only ended a crucial period of riots and violence; rather it brought a grade of normalisation, prosperity and growth between the British and Irish Governments, among communities in Northern Ireland and, especially, between North South. In fact, the Good Friday Agreement accepted that all of the institutional and constitutional arrangements are interlocking and interdependent.

During the campaign of Brexit referendum, Sinn Féin has focused on the threat of restricted mobility across the border; the negative economic impact; the loss of civil rights; and the undermining of the peace process. Namely, albeit Brexit will weaken the text of the Good Friday Agreement, it is the re-imposition of a hard land border that has the potential to set up a negative dynamic that will undermine the progress that has been achieved since 1998. For what concerns the actual idea of political parties, Sinn Féin believes that Brexit and the insistence of the British Government to drag the North of Ireland out of the EU with it, will undermine the institutional, constitutional and legal integrity and status of the Good Friday Agreement. In this extent, Sinn Féin has demanded a change in the EU, albeit it believes in remaining in the EU.

During the Brexit negotiations divisions on the scope became more pronounced, from the EU/UK border and the right of Northern Ireland, as part of a future United Ireland, to automatic membership of the EU[302]. As the European Council's negotiating guidelines stated in 2017, «the Union has

[301] DFA.ie, *Irish-UK's relations: past, present and future*, published in November 2016, https://*www.dfa.ie*/irish-embassy/great-britain/about-us/ambassador/ambassadors-blog-2016/november-2016/irish-uk-relations-past-present-future/.

[302] For more details, see the link: http://www.oxfordscholarship.com/view/10.1093/oso/9780198811763.001.0001/oso-9780198811763-chapter-7#oso-9780198811763-chapter-7-note-432.

consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance[303]». That is the reason-why the fear of having again border-line injects so much panic. Furthermore, Article 2[304] and 3[305] of the Irish Constitution were passed as part of the agreement, which allows for the possibility of a change in the constitutional status of Northern Ireland, to become part of a united Ireland rather than remain as part of the UK. The principle of consent is fundamental to the peace settlement of the Good Friday Agreement. As settled by the European Council on 29 April 2017[306], the possibility of such a constitutional change in the future, which would result in Northern Ireland's being in the EU as part of a united Ireland, has been acknowledged in the framework of the arrangements relating to the UK's exit from the EU. The withdrawal agreement should create no impediment to the free movement of the people on the island and should create no circumstance where the normalisation of people's lives that has come with the Peace Process is undermined. Indeed, the Northern Irish Executive – even if it is not in place since January 2017 - which is divided on Brexit vision[307], faces two immediate challenges: firstly, identifying options and agreeing a single Northern Ireland's position on what "Brexit means"; secondly, ensuring that it can have its opinions voiced by the UK Government. In the end, we can wonder how Northern Ireland will reach as much clarity it can in these negotiation, albeit it seems that it is occupying the most unevaluated position in the procedure. Its role in approving or not negotiations should be approved because Brexit will affect the scope and terms of devolution until the end. The principles of consultation and consent need to be upheld so that Northern Ireland is sure its voice is heard.

As a matter of fact, when we talk about Irish border we include economy, politics, human rights and citizens' issue. The nature and shape of the perimeter between Northern Ireland and the Republic of

[303] EU guidelines, *Guiding principles Ireland and Northern Ireland,* published 20 April 2017, https://ec.europa.eu/unitedkingdom/news/european-commission-publishes-guiding-principles-ireland-and-northern-ireland_en.

[304] […] «the British and Irish Government recognise the birth right of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, and they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland».

[305] «It is the firm will of the Irish Nation […] to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island» […].

[306] The statement approved by the European Council acknowledged that the GFA expressly provides for an agreed mechanism whereby a united Ireland may be brought about through peaceful and democratic means and in this regard the European Council acknowledges that, in accordance with international law, the entire territory of such a united Ireland would thus be part of the European Union.

[307] The DUP campaigned for Leave with the First Minister Arlene Foster and meanwhile Martin McGuinness, whose Sinn Fein campaigned for a Remain vote.

Ireland in the imminent post-Brexit scenario will be an increasingly soft border or will it become - as the external border of the EU - increasingly toughened thanks to the withdrawal?

If nothing works, there will be used regulatory alignments, which means maintaining the rules without really having a border. Besides, hard border will be in place because it is impossible to find a solution good enough for both sides. Meanwhile, on Northern Ireland, the EU27 are willing to compromise on drafting and public presentation – but, as yet, not on the basic principle that Northern Ireland, and only Northern Ireland, must remain in the EU's regulatory and customs ambit for goods until and unless an alternative is mutually agreed, which all sides implicitly accept is not likely to be anytime soon. This, in turn, would be very hard for the UK Government – and, indeed, Parliament – to accept. Hence, how the border on the island of Ireland will be - and how it is now – managed in terms of custom controls remains the centre of the problem. Therefore, cooperation on Ireland became more crucial now with Brexit, albeit the North-South Ministerial Council (NSMC) has managed in the past year to identify impacts, risks and opportunities for the island ascending from the UK's departure from the EU. Mainly, the Irish border issue is contemplated within the framework of the future trade and economic relationship[308] (although the government's initial paper from August 2017 was vague on how to manage the border, should it remain open in the future), and the EU has insisted that Northern Ireland was a key issue for an orderly UK withdrawal[309].

In the EU's view, it was UK's responsibility to recommend solutions to the challenges arising from its departure from the EU, the Customs Union and the internal market, including the avoidance of a hard border. Despite disagreements, the overarching objectives of talks on Northern Ireland were:

- the protection for the gains achieved through the peace process and of the Good Friday Agreement in all its parts;
- the maintenance of existing bilateral agreements and arrangements between the UK and Ireland, including the common travel area; avoiding a hard border between Ireland and Northern Ireland, while preserving the integrity of the internal market;
- other specific issues deriving from the unique situation of Northern Ireland. It was agreed that the commitments on Northern Ireland made in the first phase will be upheld in all circumstances and will not pre-determine discussions on the framework of future EU-UK relations.

We can conclude noting that Ireland owns significant instruments which, with the EU support, succeeds in protecting both North and South interests. However, the issue of Northern Ireland is now

[308] UK Government, *Northern Ireland and Ireland: position paper*, 16 August 2017.

[309] Guiding principles transmitted to EU27 for the Dialogue on Ireland/Northern Ireland, European Commission, 7 September 2017.

considered the biggest challenge to agreeing to a withdrawal agreement, and thus to the establishment of a transitional period after Brexit which, as we already said, is going to be prolonged.
In conclusion, in relation to the Northern Ireland's border, the Scottish Government remains absolutely committed to upholding the Good Friday Agreement. But as we have made clear previously, if it is possible for Northern Ireland to effectively remain in the Single Market or Customs Union, the case for Scotland also doing so becomes a practical necessity. Anything else would put Scotland at a huge competitive disadvantage when it comes to attracting jobs and investments.

4.5.3 Final resume

Many options are in place for maintaining the desire of both Scotland and Northern Ireland to remain in the EU. The "Reverse Greenland model[310]" could be a choice, giving the possibility to remain to those who want to. Following the granting of greater autonomy to Greenland in 1979, the island's government took the decision to withdraw from the EEC[311]. Thanks to Denmark, which entered with Greenland in 1973, the island maintains some links with the EU. Hence, with this model we could see Northern Ireland opting to stay and England and Wales leave. But if Northern Ireland stays within the EU Customs Union and Single Market while Britain withdraws from them, a new economic frontier will be created in the middle of the Irish Sea. Soft border outcome is the only acceptable one of any eventual Brexit settlement. Furthermore, there is also another option, contained in The Dalriada Document, published in 2016 which describes «how Northern Ireland and Scotland should and could stay within the European Union while remaining inside the United Kingdom; why this proposal need not prevent and may in fact facilitate England and Wales in leaving the EU[312]». However, this option could lead to a hard border situation, a customs border between the Irish Sea and between England and Scotland. Notwithstanding, it is the only measure respecting the votes of all parts. Another scenario would see an existing option for outside the EU. The main one is the European Economic Area (EEA) that regulates the relations between the EU and Iceland, Liechtenstein and Norway[313]. On the same line, there is also the Canada option and the recently

[310] When Greenland left the EEC, there was no Article 50 in the European treaties. Nor would such an article have been relevant, since what was taking place was not the exit of a member state. Rather what happened was that parts of the territory of a member state were exempted from membership. This was not a unilateral decision; it was formalised in a protocol to the treaties, known as 'The Greenland Treaty', signed by all member states.
[311] N. Skoutaris, *Report on a Special Designated Status for Northern Ireland Post-Brexit*, https://poseidon01.ssrn.com/delivery.php?ID=255100081087114090121118113008002023016039060039010087100115109070068088029103066022019117103061008030027113124019096098088072043075078051054006005111028099087114105003079016087008090026100025122091000118006002104080081014092120086124102080127081003027&EXT=pdf.
[312] The Dalriada Document, published 16 June 2016: https://www.centreonconstitutionalchange.ac.uk/sites/default/files/papers/The%20Dalriada%20Document.pdf.
[313] For more details, see the link: http://www.efta.int/eea/eea-agreement.

negotiated Comprehensive Economic and Trade Agreement (CETA). This one is in force in provisory application since September 2017. It needs to be voted by EU 27, regional and national parliaments. Future relationship could run a "*no*" in the end, but not the withdrawal. Each country has to see its future relations with UK (national parliaments). Northern Ireland leaving the UK after Brexit is not impossible.

We can conclude that Northern Ireland may be left in the Customs Union, and borders tightened surrounding the rest of the UK, stopping land border[314] from being an issue. Both of these solutions, however, are not easily to achieve and are in contrast with the Good Friday Agreement and that is the reason-why most of its citizens are thinking about becoming part of the Republic of Ireland as the only affordable option[315]. Scotland, before Brexit, feared leaving the UK as it would result in losing the EU membership.

Nowadays, things have changed and above all, the uncertainty of the end of the history has made the independence question[316] not more available for Scotland too. Leaving the UK may have a greater impact on Scotland than Brexit. When it voted for independence in 2014, UK was a member of the EU so the benefits for staying in the UK are fallen for many Scots. Applying for the EU membership will get some time but maybe it would be the main way Scotland is going to take after the unstoppable possibility of leaving with UK in 2019. These are the meanings of the term "Hard Brexit": leaving of Single Market, Customs Union and Free Trade area, but having greater sovereignty in the end. And it seems that it would be like this, albeit the most probable scenario will be explored in the next paragraph: a second Brexit referendum.

4.6 The likelihood of a second referendum: can be insert in "Hard" or "Soft Brexit"?

A recent paper published by Alison Young underlined clearly how «referendums continue to be *ad hoc*, taking place when, and under conditions determined by, whichever government initiates and successfully enacts legislation to hold a referendum on a particular issue[317] ». Yet, all of these consideration has created a tension between popular and parliamentary sovereignty, Brexit at first place. Nowadays, the situation remains unresolved. Before get into the analysis, it is important to

[314] Theresa May said she wants the Northern Ireland borders remain "frictionless", however this seems impossible. UK cannot leave Customs Union and continuing having borders with the EU without putting in place new customs checks, which are requirements under EU law.

[315] This will be possible only in the case of a second referendum positive in the end.

[316] However, for all 2018 year, Nicola Sturgeon has promoted the will of Scotland to seek for anew independence referendum invoking Section 30 of Scotland Act 1998. If Scotland vote to leave the UK is still would not be easy to get back in the EU. Notwithstanding, an independent Scotland could emerge in the next future.

[317] Hansard Society, *Will Brexit change the UK constitution?* published on July 2018, : https://www.hansardsociety.org.uk/blog/will-brexit-change-the-uk-constitution.html.

mention which are the elements necessary for holding a referendum in UK[318]. There are needed four components[319]: legislation; question testing held by the Electoral Commission[320]; preparation for the poll itself; regulated referendum period. Mainly, primary legislation is required to provide the legal basis for a referendum. One possibility is clearly that Government could change its mind, perhaps as a result of a large shift in public opinion, and introduce a referendum bill. At present, this looks unlikely: Theresa May has firmly ruled out a second referendum, but it seems to be the most probable future appointment for UK citizens and also it could be a "gross betrayal of British democracy[321]" if it is not considered as option. If a majority in Parliament favoured a second referendum, would be for Parliament to force Government's hand.[322] Calling a referendum requires a majority in Parliament, and whether such a majority exists will depend on political and circumstantial factors. If no such agreement is ratified before 29 March 2019, the UK will leave with no deal, unless the Article 50 period is extended.

If a deal is reached, there are three steps[323] in order to trigger a second Brexit referendum:

1. Parliament must approve the deal. The EU Withdrawal Act 2018 requires the House of Commons to pass a motion[324], often referred to as the 'meaningful vote', the famous amendment which can make the Parliament able to use it on the final deal with Brussels for the withdrawal, approving it and also the framework for the future relationship;
2. The European Union (Withdrawal Agreement) Bill must be passed and after this, the Government will need to pass primary legislation in order to provide the withdrawal agreement domestic effect[325];

[318] *The Cambridge guide to the UK's EU referendum*: https://www.cambridge.org/us/academic/cambridge-guide-uks-eu-referendum.

[319] Constitution Unit, *How long would it take to hold a second referendum on Brexit,* 2018: https://constitution-unit.com/2018/08/30/how-long-would-it-take-to-hold-a-second-referendum-on-brexit/.

[320] It is an independent body set up by UK in 2001. Here the official page: https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums.

[321] Independent.com, *No Theresa May, Brexit without the option of a second referendum would be a gross betrayal of British democracy,* 9 September 2018: https://www.independent.co.uk/voices/editorials/theresa-may-brexit-second-referendum-british-democracy-a8519451.html.

[322] There is a precedent for parliamentarians to impose a referendum as a condition for passing a government bill: the 1979 devolution referendums. For more details, see the report here: https://www.bennettinstitute.cam.ac.uk/blog/brexit-peoples-vote-lessons-1970s/.

[323] Constitution Unit, *How could a second Brexit referendum be triggered,* published on 7 September 2018: https://constitution-unit.com/2018/09/07/how-could-a-second-brexit-referendum-be-triggered/.

[324] There are two main possibilities, albeit this motion is expected to be amendable. If the motion is passed, the Government can proceed to the next step. If the motion is not passed, the Government must then set out how it intends to proceed. The Commons is then due to consider the plan through a motion in 'neutral terms', which may well not be amendable. «Under the Standing Orders of the House of Commons it will be for the Speaker to determine whether a motion when it is introduced by the Government under the European Union (Withdrawal) Bill is or is not in fact cast in neutral terms and hence whether the motion is or is not amendable», https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-06-21/HCWS781/.

[325] The Government cannot ratify the deal until this is done.

3. The Constitutional Reform and Governance Act 2010 (CRAG) procedure[326]. The withdrawal agreement will also be subject to the usual procedure applied to treaties, which can happen concurrently with the steps above.

Hence, the Government must lay the treaty before Parliament, which then has 21 days to object to ratification. That will be a big proof of both parliamentary sovereignty (Parliament), and way to re-acquire credibility and trust from citizens (Government). In the end, if the Commons objects, Government is able to delay ratification indeterminately. In the aftermath of second referendum or no deal scenario, these can be the main possible options:

1. If no withdrawal agreement is reached by 21 January 2019 the Government must lay a statement before Parliament outlining how it intends to proceed (and then it is certainly contemplated the possibility of a motion);
2. If a deal is reached, the 'meaningful vote' motion will be Parliament's first opportunity to vote on it. The Government needs the Commons to approve the deal in order to progress onto the next step – which clearly gives MPs important leverage. If a second referendum has enough support, the Commons could make its approval of the deal conditional on a referendum. Either the motion could be amended, or dissenters could agree to support the deal in exchange for a Government commitment to call a referendum[327];
3. If no withdrawal agreement is reached between the UK and the EU, or if Parliament refuses to approve the deal, the EU (Withdrawal) Act 2018 requires the House of Commons to consider a motion in 'neutral terms'. Either way, there is no legal requirement for such a motion to be passed before Brexit, so it could be a poor vehicle for extracting concessions via amendment. MPs can otherwise propose an opposition motion, getting the situation harder than ever for the Government.

Even if two years have gone by, rich of amendments, delays, discussions, considerations, negotiations, votes, rules, approvals, changes, rethinking, there is nothing sure in this procedure

[326] See ch.2 and 3.
[327] Constitution Unit, *How long would it take to hold a second referendum on Brexit,* 2018*:* «The Lords will debate the agreement too, but only on a 'take note' motion that will not permit amendments. If the Commons refused to approve the deal, procedural considerations could provide an incentive for ministers to propose a referendum. Parliamentary procedure prevents a motion on a question that has already been decided from being brought forward in the same parliamentary session. Hence, if the Government fails to get support for the 'meaningful vote' motion in the first instance, and wants to make a second attempt in order to proceed with the deal, a subsequent motion would need to be substantively different. Making the deal subject to approval in a referendum could be one way of fulfilling this requirement, as well as of avoid dissenters»: https://constitution-unit.com/2018/08/30/how-long-would-it-take-to-hold-a-second-referendum-on-brexit/.

except the incredible event we are living. Because Brexit is more than its announcement, it has universal profile involving EU and in general the world. The path to Brexit is highly unpredictable, and another public vote remains possible together with all the scenarios mentioned above.

4.7 Conclusion

We have reasoned on what kind of Brexit should British have[328] and if the UK will fall apart after Brexit. The hardest form of Brexit is without any EU deal between parts and trade agreements. Softer than this one, there will be a situation in which UK leaves the EU while remaining in Single Market and Customs Union, but we know that is not completely welcomed by UK Government. Moreover, citizens are not so satisfied by Government's work, especially those who have voted to leave in 2016 (10%). Only 14% of British citizens are confident in reaching a good Brexit deal. Hence, one of the possible solutions to this discontent of population may be a second referendum.

This time, there will be three options to choose, answering to the question "*Should UK remain a member of EU or leave the EU?"* and with UK we have to intend all the nations.

This time the options of future situation are:

- accept the Government's deal;
- leave without a deal;
- remain in the EU

The aim is to get information from citizens which makes sense. However, part of people do not believe in this second referendum because they claimed to have already voted and it is up to professional politicians[329] to transform the will of people in reality. The House of Commons and House of Lords perform a leading role because without their consent, *no deal* may be in place. Hence, it is also really difficult to make this option available for time lapsing.

Parliament has to authorize the holding of a referendum and people need time to understand what deal is meaning for them. In addition, May's Government has recently pointed out that second referendum is not going to happen in any circumstances[330], remarking that it would be undemocratic

[328] Constitution Unit, *How long would it take to hold a second referendum on Brexit*, 2018: «If there is no deal reached between the UK and EU, a straightforward choice between no deal and remain would be logical. If a deal is reached, many referendum proponents would favour a deal vs. remain vote; but this could cause protests, the extent of which may depend on the content of the deal itself. If there is concern that excluding a viable option would be too controversial, a single multi-option referendum may be advisable, between the deal, 'no deal' and remain», https://constitution-unit.com/2018/09/13/if-theres-a-second-referendum-on-brexit-what-question-should-might-be-put-to-voters/.

[329] This is at the base of democratic principle.

[330] BBC.com, since after Royal Assent, there have been declarations by May on the impossibility of second referendum. Here there are some articles on it: https://www.bbc.com/news/uk-politics-45385421; https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwieu_r3pMndAhXGjywKHSBHArgQFjAAegQICRAB&url=https%3A%2F%2Fwww.independent.co.uk%2Fvoices%2Feditorials%2Ftheresa-may-brexit-second-referendum-british-democracy-a8519451.html&usg=AOvVaw0uRLuk8n4p9M93aJV-

going against the will of people. In some way, it is the same core argument written in the famous letter in March 2017[331].

In short, there is no single, simple way to make a collective choice in a referendum when there are more than two serious options. If such a vote proceeds, particularly if three options remain on the table, Parliament will have some complex and important decisions to take in a very short time. And this conclusion brings us to the main scope of this thesis: understand if and how the Parliament is losing or re-gaining powers thanks to this process and what could be done to safeguard a milestone like parliamentary sovereignty of UK.

However, in September 2018, it occurred another possible ending for Brexit procedure. We can call this scenario "the revocation of the triggering of article 50 TEU". Since January 2018, the possibility of a unilaterally revocation of article 50 has been under discussion. Professor Stephen Weatherill made an interesting analysis after the publication by the EU Commission of the report "*The (ir)revocability of the withdrawal notification under article 50*[332]*",* confirming that it is unbearable to revoke the intention unilaterally, mainly for the huge costs of the re-thinking decision. In line with this, also the negation of this possibility for any EU member state which wants to leave, may be considered as undemocratic.

With his words, «Article 50 provides only for notification of an 'intention' to withdraw. An intention, it may be argued, can change. So can a Member State set aside its notification of an intention to withdraw on the basis that subsequently it has changed its mind and so no longer has that intention?[333]».

In fact, Andy Wightman MSP and others[334] reclaim a motion against the UK Secretary of State for exiting EU. Scotland's Court of Session agreed to refer to the European court of justice the question

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fwvQ;
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&cad=rja&uact=8&ved=2ahUKEwieu_r3pMndAhXGjywKHSBHArgQFjAKegQIARAB&url=https%3A%2F%2Fwww.economist.com%2Fbritain%2F2018%2F07%2F18%2Fa-second-brexit-referendum-is-back-in-play&usg=AOvVaw25-WzzBL8G4lM2BJojxpWw.

[331] See Ch. 2.

[332] EP, VCLT 1969. It has been made also an analysis to demonstrate the impossibility of the unilateral revocation with the Vienna Convention of the Law and Treaty, sustaining that « the VCLT provisions on revocation as well as on the interpretation of the treaties allow the UK to, freely and unilaterally, revoke its decision to withdraw before the withdrawal process is concluded» and for the particular case of UK's request of withdrawing, «it is very difficult to relate these conditions to the specific situation of the UK – or, more generally, to the situation described in Article 50: the decision to withdraw was neither linked to a defect in the UK's consent to the EU Treaties». The nit is concluded that « This is true in the case of the withdrawal of a Member State: Article 50 provides for the entire withdrawal process and, therefore, recourse to international law is redundant. Thus, the relevant VCLT articles on withdrawal cannot and should not be applied because Article 50 TEU cannot be considered as a *lex specialis* to be supplemented by the relevant VCLT provisions as *lex generalis*», http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/596820/IPOL_IDA(2018)596820_EN.pdf.

[333] S. Peers, *Can an Article 50 notice of withdrawal from the EU be unilaterally revoked,* 2018: http://eulawanalysis.blogspot.com/2018/01/can-article-50-notice-of-withdrawal.html.

[334] These others are politicians including Scottish Green MSPs Ross Greer, Labour MEPs David Martin and Catherine Stihler and SNP MEP Alyn Smith, who proclaim that Brexit is "not inevitable" and hope that "there is still time to change course".

of whether if the proposal of withdrawing can be revoked or not. The opinion has been made by Lord Carloway, the Lord President. The request must be analysed by ECJ because it is a legal question of huge importance[335]. Then, before delivering a final decision, the Court of Session will consider its preliminary ruling. What the judges ask[336] is if there is a possibility for a Member State of EU, even it has already notified the European Council the intention of withdrawing, to revoke such intention by notification unilaterally. If this will be considered possible, the judges question which are conditions and with what effect relative to the Member State remaining within the EU. In other words, it has been proposed another alternative which is considered a key way to protect national interests of those who want and voted to remain[337]. This is another element confirming the core of the thesis, that means how much parliaments or better members of national Parliaments can affect the process of Brexit. Indeed, the request is from MSPs, so Scottish – devolved – members of Edinburgh Parliament. This episode is so important because it will be a possibility in the hand of ECJ to strongly sustain the role of devolved legislatures.

Day-by-day things get worse, and the possibility proposed by Scottish High Court will be held by the ECJ. Mainly, the request is based on the possible scenario in which "at the expiry of the two-year period, there may or may not be an agreement[338]". Notwithstanding, we already said that "if there is an agreement, Parliament will have to decide whether to approve it[339]" but "if it is not approved, and nothing further occurs, the treaties will cease to apply to the UK on 29 March 2019[340]". Another choice, hence, with several consequences, on one view, that the UK would remain in the EU".

The issue however is that, if the Court rules in favour of the petitioners, UK should now effectively be allowed to change its mind on Brexit, without needing the permission of EU27. Even if this legal occasion may strengthen both Scottish devolved assembly and the "remain" side of Westminster Parliament, how can the other member states react to this kind of attempt of overstepping consensus – even it will be legal? In other words, the problem can arise because it would give Parliament the authority to unilaterally[341] stop Brexit if it feels any final deal - also no deal - is unacceptable, even if the Government wants to leave regardless[342].

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[335] Members of the Scottish, UK and EP Parliaments required under a judicial review a further clarification on whether and how the UK's notification to leave the EU under article 50 of the TFEU could be "*unilaterally revoked*" before the two-year Brexit deadline on 29 March 2019, with the effect that the UK would remain in the EU.

[336] Irish Legal, *Scotland Court of session rules Brexit revocation question can be referred to European Court of justice:* https://www.irishlegal.com/article/scotland-court-of-session-rules-brexit-revocation-question-can-be-referred-to-european-court-of-justice.

[337] This request may be seen as an occasion also for UK itself, a way to retract its steps, and remain in the end a member state of the EU.

[338] Scotland Courts report, *Andy Wightman and others vs Secretary of state for exiting* EU, 21 September 2018: http://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018csih62.pdf?sfvrsn=0.

[339] Ibidem.

[340] Ibidem.

[341] In the sense of art.50 "mechanism of unilateral and voluntary recess".

[342] C. Barnard, S. Pierce, *European Union Law,* Oxford university press, 2017.

And that will be another element which May can value as a further attack to her Government, which strongly continues to underline how much is important to fulfil what UK's citizens have expressed in the Brexit referendum. Above all these considerations and analysis, we have to wait for the ruling to see what is going to happen[343], because the two-years countdown is getting over and EU27 have to vote the transition period – or maybe they will not. The process of scrutinising treaties through implementing legislation is far from ideal in most circumstances. In this context, it is likely to be especially problematic for three reasons: the complexity of the Withdrawal Agreement and the condensed timetable for scrutiny; the relationship between the EU Withdrawal Agreement Bill and the EU Withdrawal Act 2018; and the relationship between the Withdrawal Agreement and the Treaty on the Future Relationship[344]». But it may not be possible for the EU Withdrawal Agreement Bill to be published until after the subsection (1)(b)[345] - meaningful vote resolution - is settled by the Commons. Nevertheless, even if in theory the EU Withdrawal Agreement Bill represents an opportunity for Parliament to influence the Brexit process, the reality could be that there is little chance for anything other than approving the legislation in the form in which it is introduced[346]. Once October 2018 summit will be ended, maybe we can better understand and outline the future scenario of UK and EU relationship, and we can also see if there will be approval on the EU Withdrawal Agreement[347] and the Political Declaration. This will shape surely the future of a new UK after a unique event like Brexit, which has characterized not only these last two years, but it will re-definite the future of EU relationship.

And we can conclude the work as we have begun: Brexit means Brexit.

[343] Scotland Courts reports, «The appeal judges noted that matters had since moved on, with the passing of the European Union (Withdrawal) Act 2018. Section 13 of the 2018 Act sets out how parliamentary approval is to be sought once the negotiations between the UK Government and the EU Council conclude. The withdrawal agreement can only be ratified if it has been approved by a resolution of the House of Commons and been debated in the House of Lords. If no approval is forthcoming, the Government must state how they propose to proceed with negotiations», http://www.scotland-judiciary.org.uk/9/2060/Andy-Wightman-MSP-and-others-v-Secretary-of-State-for-Exiting-the-EU.

[344] UK and the EU*, The Brexit endgame: a guide to the parliamentary process of withdrawal the EU*, September 2018, http://ukandeu.ac.uk/wp-content/uploads/2018/09/Brexit-endgame-A-guide-to-the-parliamentary-process.pdf.

[345] Subsection 1(b) Section 13 EU Withdrawal Act 2018, «[…] the negotiated withdrawal agreement and the framework for the future relationship have been approved by a resolution of the House of Commons on a motion moved by a Minister of the Crown […] », http://www.legislation.gov.uk/ukpga/2018/16/section/13/enacted.

[346] J.S. Caird, S. de Mars, V. Miller, *Brexit: Parliament's role in approving and implementing agreements with the European Union*, May 2018: https://%3A%2F%2Fresearchbriefings.files.parliament.uk%2Fdocuments%2FCBP-8321%2FCBP-8321.pdf&usg=AOvVaw2NYHgn7gC7y8kCJubcqxMa.

[347] The UK unwritten constitution requires that international treaties – as it will be the UK-EU one – must be implemented through legislation if they are to create legal rights that can be enforced in domestic courts. This secures Parliament's right to scrutinise the domestic legal consequences of an international treaty. The EU Withdrawal Agreement, hence, was always going to require a dedicated Act of Parliament (EU Withdrawal Act 2018) to be passed before it could take effect in the UK.

SUMMARY

Chapter 1: An historical comparison of the UK's needs of being (or not being) part of the European Union

The first chapter is centred on the difference between the request of the UK to join the EU in the late 1960s and the current British desire to withdraw from the union in 2016. Before its entry, the UK's alternative approach of being part of a cooperation or a sort of union was the establishment of a European Free Trade Association, EFTA[348]. At the same time, it was the beginning for the EU of a period of great prosperity and development, a situation totally opposite that of the UK's economic sphere. Thus, thanks to the prosperity and the growth of a unified European Economic Community in 1961, the UK was lead to reconsider its geopolitical position.

Initially, the British proposal was rejected by the French veto, directly represented by the President of the French Republic Charles De Gaulle, who strongly believed that the UK's membership would have threatened the ability to reach a greater internal political agenda[349]. In De Gaulle's vision[350], the problem of the UK's membership bid to join the EU, was two-fold: firstly, the French President underlined the potential relationship between the USA and the UK which wasn't in line with the European idea of its political role. Secondly, he saw the British role in the European project as unacceptable because Britain was still anchored to the concept of nationalism, in the sense that the British Empire had significantly influenced how the British see the world and all the social aspects of politics, especially the position of their country within Europe. In addition, the chapter gives an initial constitutional analysis introducing the EU Withdrawal Act 2018[351] and examines a previous

[348] Relating to the present situation, UK does not want to be part of EFTA again. Yet, it has to remember its experience as a member and learn by it for a different agreement it desires. For more information, see the blog: http://blogs.lse.ac.uk/brexit/2017/11/06/although-britain-wont-rejoin-efta-it-can-learn-a-great-deal-from-how-it-works/; here the official homepage of EEA: http://www.efta.int/eea/eea-agreement/eea-basic-features.

[349] Official *De Gaulle speech to Press Conference,* 27 November 1967[…] Le peuple anglais discerne sans doute de plus en plus clairement que dans le grand mouvement qui emporte le monde, devant l'énorme puissance des Etats-Unis, celle grandissante de l'Union Soviétique, celle renaissante des continentaux, celle nouvelle de la Chine, et compte tenu des orientations de plus en plus centrifuges qui se font jour dans le Commonwealth, ces structures et ces habitudes dans ces activités, et même sa personnalité nationale, sont désormais en cause […].

[350] A. Moravicsik, *De Gaulle and Europe: historical revision and social science theory*, Harvard University, 1998.

[351] EU Withdrawal Act 2018, published in June 2018: http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted.

outline of how Westminster Parliament and May's Government, after the Brexit referendum[352], are making their moves within the limits of their powers. To sustain the analysis, the chapter examines the Factortame Case 1991[353], which examines the evidence of targeting parliamentary sovereignty. In fact, when Britain was considering joining the European Community, there was a heated debate on the possibility of the limitations of its membership. It can be understood that the sense of Brexit for Britain can also be found in the context of the of the fear of losing its leading role by Parliament. In fact, the Brexit procedure put the issue clearly on the table *vis a vis* the causes that have driven UK to this crucial decision of withdrawing. The Court in Factortame was attempting to give legal status to a statute, the ECA 1972[354]. This act is the one which was signed after the UK joined the EU and is a conduit for international legal rights rather than a source of domestic legal rights; moreover, the act amounts to a channel through which European Law merges with the British legal system. Basically, the limitations applied to Parliament came from this status. In fact, Government tried to circumvent the approval of Parliament and thus parliamentary sovereignty is in check.

Since then, parliamentary sovereignty became strained, considering that «if a later statute conflicted with an earlier statute incorporating European Law into English Law, parliamentary sovereignty required that the later statute impliedly repeal the earlier, incorporating statute[355]». Thanks to an analysis made by Nick Bamforth[356], it was possible to identify a number of possible interpretations of the current relationship between European and English Law. Firstly, the Courts possess a political capacity to influence the fundamental rule of the British constitution and secondly, the Court in Factortame was attempting to give legal effect to a statute, the ECA1972. Indeed, the ECA 1972 is the legal device through which European Law merges with the English legal system. The significance of ECA1972 could be to determine if the Parliamentary sovereignty will be redefined as the rule which gives legal authority to Westminster Parliament, something that it was – and it still is - under great dispute regarding the Brexit Process and the drafting of the EU Withdrawal Act 2018.

In the end, if the ECA 1972 is repealed, EU legislation that is currently applied in UK law by virtue of the Act, will cease to have effect. The implications of this repeal are another important aspect of the thesis. Theresa May, triggered article 50[357] of TUE in March 2017, announcing the intention of

[352] Overall of Brexit: 48,1% Remain; 51,9% Leave, However, Norther Ireland and Scotland, were in favour of Remain, instead England and Wales.

[353] *R (Factortame Ltd) v Secretary of State for Transport*, 1991: https://eur-lex.europa.eu/legal-content/GA/ALL/?uri=CELEX%3A61989CJ0221.

[354] J. Simson Caird, *Miller and the Great Repeal Bill*, 2016: «The ECA is the conduit for international legal rights rather than a source of domestic legal rights», http://secondreading.parliament.uk/brexit/legislation/miller-and-the-great-repeal-bill/, 2016.

[355] N.W. Barber, *The afterlife of Parliamentary sovereignty*, https://academic.oup.com/icon/article/9/1/144/902288

[356] N. Bamforth, *Current Issues in the United Kingdom Constitutionalism: an introduction*, Oxford University Press, 2011; see also N. Bamforth, P. Leyland, *Public Law in a Multi-layered Constitution*, Hart Publishing, 2003.

[357] Art.50 TEU: « (1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements; (2) A Member State which decides to withdraw shall notify the European Council of its intention. In the

the UK to withdraw. We can agree on the assumption that Brexit is a significant upheaval which came to a head with the referendum in June 2016. In conclusion, the choice for the adhesion to the bloc was not only motivated by economic and institutional factors, but also for a desire to maintain peace, to definitely leave the memory of war in the past. It was a vote for that great ideal of union and pacific collaboration that was the hallmark of the same idea of EU. Nowadays, these ideals and atmosphere have decreased also due to the ongoing European crisis. However, we can affirm that Brexit is linked to the idea of regaining parliamentary sovereignty, even if the procedure itself can be considered as a sort of threat for the constitutional equilibrium[358].

Chapter 2: Parliamentary Sovereignty during the Brexit process: constrained or revamped?

After presenting a past and present historical background of the country in chapter 1, the work scrutinises several aspects regarding the constitutional sphere of the country. To this extent, by 1972, it was clear that membership in the Community brought with it the requirement that domestic courts give European Law priority over conflicting rules of national law. This was a direct challenge to parliamentary sovereignty, an attempt to impose a substantive limit on the effective legislative capacity of subsequent parliaments.

To this extent, the second chapter delineates what parliamentary sovereignty is and how this principle may be undermined by the Brexit procedure. The starting point was the attempt by May's Government to trigger art.50 TEU, which also meant overstepping parliamentary approval. Once PM May was appointed, she manifested her intention to proceed with the notification without parliamentary involvement, appealing to the Royal Prerogative, also called Henry VIII clause[359]. Mainly, these clauses are provisions, sometimes included in bills, which allow ministers to make amendments not only to secondary legislation, but also to Acts of Parliament (primary legislation), without having to go through full process. By considering that the country was in a situation of international negotiations, the Government asserted that it had the right to act alone without the need to ask for the authorization of the Parliament. Based on this assumption, Gina Miller, a business

light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament», http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-European-union-and-comments/title-6-final-provisions/137-article-50.html.

[358] Brexit aims to restore UK independence too, and possibly to improve and maintain democracy, according to its supporters, with all member states. In other words, even if the position of the UK in relation to the EU has changed in only 40 years of membership, the country and the EU are working to find a final agreement good for everyone.

[359] The powers deriving from royal privileges were born thanks to *The Statute of Proclamations* in 1539, in which Henry VIII gained – or better created - the right for amending or removing laws, overriding the Parliament.

woman, decided to appeal to the Supreme Court in October 2016, arguing that if the main intention of the Brexit referendum was to restore parliamentary sovereignty, how could it be possible to do this through the procedure proposed by May, which circumvented Parliament itself?

The accusation was two-fold: in the first place, she argued against the Government's claim of not needing the support of Parliament by invoking the Royal prerogative[360]. To this end, the Henry VIII clauses were used as a tool by the Government to circumvent Parliament approval. In so doing, leaving the EU without involving the Parliament would be a violation of ECA 1972. If Government can sign an international treaty thanks to the Royal prerogative, it is also possible that Parliament must ratify it in order for it to become national law. In the end, with the final judgement of the Supreme Court[361], Miller won the appeal. The court pointed out that the ECA 1972 is an Act which should be treated as all the others, which means that these rights cannot be dismissed by using prerogative powers. All the rights and duties in the UK derives from the ECA 1972 which is an ordinary piece of legislation that enjoys a constitutional value. Thus it follows that the rights of the citizens cannot be altered by means of unilateral acts of the Government which does not have the same rank as legislation.

Moreover, a crucial principle of constitutional law is affirmed here «in case of contrast between Royal Prerogative and statutory law, it is statutory law that prevails[362]». Hence, in the event of a contrast between a convention such as the Royal Prerogative and a statutory rule such as those contained in the ECA 1972, it is the statute that prevails as the UK is based on the principle of parliamentary sovereignty. Without the consent of an Act of Parliament, to withdraw or to limit the rights of citizens (such as the bid to leave the EU acquired through the ECA 1972) is unlawful. Subsequently, the Government would be acting *ultra vires* if not asking Parliament for the legislative authorization to trigger art. 50: here the Supreme Court was very clear, underlining the fact that the UK legislation needs the consent from the Parliament in order to justify the legality of withdrawing. In its defence, the Government reacted by assuming that the ECA 1972 is the channel for international legal rights rather than the source of domestic legal rights and also an independent and overriding source of domestic law. The attempt of May's legislative faded. The Government can make - and withdraw from - treaties, but this does not mean that it can change domestic law. Hence, Brexit needed the Westminster Parliamentary Act in order to be legally recognized and applied.

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[360] G. Barrett, M. Everett, *The Royal Prerogative*, published August 2017: «The scope of the Royal prerogative power is notoriously difficult to determine. It is clear that the existence and extent of the power is a matter of common law, making the courts the final arbiter of whether or not a particular type of prerogative power exists. The difficulty is that there are many prerogative powers for which there is no recent judicial authority and sometimes no judicial authority at all».

[361] On January 2017, justices have ruled, by a majority of eight to three, that Prime Minister Theresa May cannot lawfully bypass MPs and peers by using the royal prerogative to trigger Article 50 of the Lisbon Treaty and start the two-year process of negotiating the UK's divorce from its EU partners.

[362] Ibidem.

In March 2017, Theresa May notified through a letter[363] to the President of the EU Council Donald Tusk, the intention of the UK to withdraw from the EU. In the aftermath, what proved to be problematic was the situation in which the Parliament could have refused to vote on the notification of withdrawal, because it would have run contrary to the will of the people as expressed in the referendum. From a legal point of view under the UK's uncodified constitution, that would have not entailed violation, but from a political perspective that would have been a tragedy.
Another important aspect which is independent from any EU mechanism, is that the English constitutional system offers an effective organisation of European scrutiny based on Select Committees able to hold the UK Government to account for its actions in EU decision-making. However, the EU Withdrawal Bill became an Act in June 2018, and we can define it as the means which the UK Parliament is moving all law-making powers back to the UK from the EU. This is also the Act which will regulate, if it obtains approval, the EU Withdrawal Agreement and the Political Declaration, analysed in chapter 3.

Reconsidering the Henry VIII clauses, the concerns turned around the issue that the powers conceded by clauses for ministers would undermine parliamentary role. In line with this, there are important clauses[364] in the EU Withdrawal Act 2018 which give selected powers to the Government. These make it possible to form secondary legislation for specific purposes in order to prepare for Brexit. Secondary legislation is used to add more information or to make variations to an existing act of Parliament, which is primary legislation. This device permits the Government to make a small change to the law without having to introduce an entirely new Bill to Parliament. There are the so-called *Statutory Instruments* (SI)[365] which are important instruments to enact this procedure in a simple way. After a thorough analysis regarding the clauses and sections within the EU Withdrawal Act 2018, the result is that parliamentary supremacy must be considered – and indeed it is - as overriding any EU law but only in terms of UK legal ground. However, if we compare the power it has at the EU level, it was not the primary one. With the ECA 1972 repealed by the EU Withdrawal Act 2018, changes are assured. It could be possible that parliamentary sovereignty, and as a consequence, the relationship between Parliament and Government – due to the Henry VIII clauses – will change and the area of intervention of the Westminster Parliament may increase thanks to the repeal of European legislation. Even if there are many EU laws, – by converting or removing them from UK law - which

[363] For more details, see the pdf: http://www.senato.it/service/PDF/PDFServer/BGT/01008326.pdf.
[364] Clause 7, 8, 9 in particular.
[365] *Statutory Instruments*, 2008: «Statutory Instruments (SIs) are a form of legislation which allow the provisions of an Act of Parliament to be subsequently brought into force or altered without Parliament having to pass a new Act. They are also referred to as secondary, delegated or subordinate legislation», https://www.parliament.uk/documents/commons-information-office/l07.pdf.

will continue to be in force even after Brexit day, many retained EU laws will cease to be valid because the UK will be no longer be a member of the EU and we will see new type of UK legislation.

The chapter, in the end, makes a textual and contextual analysis of the EU Withdrawal Acts' provisions. It gives importance also to the official reports made by Parliament during these last two years. It tries, lastly, to give an overview of the guidelines which the Act has offered for the future – new – regulation in UK system.

Chapter 3: The role of devolved legislatures

In this chapter, the aim is to identify the role of devolved legislatures in the process. Following the devolution settlements that have developed incrementally and asymmetrically since 1997[366], overlapping and shared legislative competencies for the devolved assemblies have been introduced. The achievement by the devolved legislatures and administrations of substantial new powers, once exercised in Brussels, could deeply dislocate the UK's constitutional settlement.

Principally, EU law is intertwined with the devolution settlements and in the absence of changes to them, responsibility for policy areas that are already devolved, but are in practice exercised largely at the EU level will fall unavoidably to the devolved jurisdictions at the moment of Brexit[367].Legislation was approved straight away in the form of the Scotland Act (SA) 1998[368], the Government of Wales Act (GWA) 1998[369], and the Northern Ireland Act (NIA) 1998[370]. These acts established the three devolved legislatures, which would have granted some powers previously held at Westminster - further powers have been devolved since these original acts, recently uploaded with the Scotland Act 2016[371]. Clearly, devolution in the UK created a regional Parliament in Scotland[372], a National Assembly in Wales and a National Assembly in Northern Ireland. Mainly, Scotland and Northern Ireland are the two cases of analysis, due to their position regarding the Brexit referendum (both of them voted to remain in the EU). To this purpose, the two devolved acts, Scotland Act 1998 and

[366] The devolution legislation conferred several degrees of decision-making authority on Scotland, Wales and Northern Ireland. In 1997 the Labour Party was the first party with a manifesto commitment to introduce devolution for Scotland and Wales, promising a directly elected Mayor and Assembly also for London.
[367] 4th Report of Session 2017-19, Ch.6, published 19 July 2017, HL Paper 9: «It is important to emphasise that the division of competences between the UK Parliament and the devolved legislatures is already set out in full in successive Acts of Parliament. Thus a statutory framework exists, which will automatically apply at the date of Brexit unless the Westminster Parliament in the meantime enacts further legislation»,
[368] Scotland Act 1998: https://www.legislation.gov.uk/ukpga/1998/46/pdfs/ukpga_19980046_en.pdf.
[369] Wales Act 1998: https://www.legislation.gov.uk/ukpga/1998/38/pdfs/ukpga_19980038_en.pdf.
[370] Northern Ireland Act 1998: https://www.legislation.gov.uk/ukpga/1998/47/pdfs/ukpga_19980047_en.pdf.
[371] See point 3: http://www.legislation.gov.uk/ukpga/2016/11/notes/division/2/index.htm.
[372] Scotland had a previous Parliament, abolished since Act of Union in 1707.

Northern Ireland Act 1998 are the legal and constitutional guidelines for the tie between devolution and Westminster.

The letter of the intention of withdrawal cited in the previous chapter contains a view of understanding the relationship between Westminster and the devolved administration, «we the UK, we negotiate the withdrawal as one UK». This sentence essentially means without giving any negotiating power to Scotland, Wales, Northern Ireland. But Theresa May affirmed that a process of consultation has started for the inclusion of devolved assemblies in the discussions even if they do not have the power to negotiate directly with the EU.

Moreover, a general Memorandum of Understanding (MOU)[373] sets out the principles underlying relations between the devolved administrations and the central government. However, it is not intended that these agreements should be legally binding[374]. The MOU provides for a Joint Ministerial Committee[375] (JMC), which is the subject of a separate agreement covered in Part II of the MOU. The legality of the acts of devolved institutions, including both the legislative and executive branches, can be challenged as acting beyond the limitations of the subject-matter competencies conferred by the devolution acts, in a way which is incompatible with the European Convention on Human Rights[376] and contrary to EU Law. The relevant aspect of these "devolution issues" cases[377], is that the Supreme Court have concerned challenges in their regards and in 2017 with the Miller case it has been ruled that the devolved legislatures had «no legal veto on the United Kingdom's withdrawal from the European Union[378]». Consequently, the discussion submitted to the attention of the Court through an appeal regarding a decision of the High Court of Justice of Northern Ireland, was centred on whether or not the UK Parliament must consult devolved legislatures to proceed with the withdrawal in accordance to art.50 TEU. Judges of the Supreme Court unanimously affirmed that, despite the fact that the constitutive acts of the devolution have been emanated by Westminster Parliament, they did not absolutely foresee an obligation to confirm the affiliation to the Union. In

[373] MoU, Official website: https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement.

[374] «This Memorandum is a statement of political intent, and should not be interpreted as a binding agreement. It does not create legal obligations between the parties. Nothing in this Memorandum should be construed as conflicting with the Belfast Agreement», Introduction part 2, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238423/7864.pdf.

[375] The administrations agree to participate in a Joint Ministerial Committee (JMC) consisting of UK Government, Scottish, Welsh and Northern Ireland Ministers in order to give central co-ordination to the relationship.

[376] ECHR: https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[377] Respectively in Schedule 6 for the Scotland Act 1998, Schedule 8 for Wales Act 1998 and Schedule 10 for Northern Ireland 1998.

[378] Lord Neuberger, ex-President of the Supreme Court, said the Sewel Convention, which requires the devolved legislatures to vote on any new laws that affect devolved matters, operates as a political restraint on the activity of the UK Parliament. While it plays an important role in the operation of the constitution, however, the policing of its scope and operation is not within the constitutional remit of the courts. Therefore, the devolved legislatures do not have a veto on the UK's decision to withdraw from the EU.

addition, relations with the European Union, such as foreign policy, constitutes in general, a subject of competence of the Westminster Parliament. Therefore, devolved legislatures do not have the same level of action as the central institutions. In this context, the importance of the Sewel Convention[379], which disciplines the relationship between the UK Parliament and the devolved ones in the exercise of the legislative functions is also evident - albeit it has the status of a constitutional convention and is not legally enforceable in the courts.

Where a devolved legislature has the power to make laws, this does not reduce the law-making power of the UK Parliament in those areas. Yet, Westminster Parliament has developed a self-disciplined ordinance, supported by the working practices of the UK Government. Parliament determines that, normally, it will only legislate with regard to devolved matters when it has the consent of the devolved legislature[380]. The Court has excluded the applicability of it in the jurisdictional seat affirming exclusively its political nature, instead it affirms the lack of the devolved legislations' right of veto recognized by law. However, this does not exclude in absolute terms the political opportunity to consult such organs appealing to the convention, which assures a harmonious relationship between Westminster and the devolved legislatures. Therefore, the Sewel Convention could not be invoked: EU matters and negotiations of international treaties are reserved matters for Westminster. Although the convention does not provide legal veto power for devolved legislatures, it retains a strong political influence.

The Stormont Assembly, the devolved assembly of Northern Ireland, is able to rule upon all the devolved matters, in harmony with European Law and conventional laws. These matters are those derived residually from "excepted" (for example immigration or international relations) and "reserved" (for example civil aviation). Much attention is place upon devolved competencies for Northern Ireland based on an agreement of international law[381], which means this is a contractual regime between two sovereign states. In fact, the Republic of Ireland legitimizes the existence of Northern Ireland, recognizing its political and constitutional status. Almost in totality, it is possible to say that the Good Friday Agreement 1998[382], which legitimizes the legal basis of Northern Ireland Act 1998, determines a confederal asset for the relations between Northern Ireland and the UK as well. Indeed, Northern Ireland can strengthen its natural confederal thread with the UK until deciding unilaterally to leave the Kingdom by exercising the right of secession (or self-determination) that is

[379] Sewel Convention, 2005: http://researchbriefings.files.parliament.uk/documents/SN02084/SN02084.pdf

[380] Report: *Brexit: devolution and legislative consent*, published by the House of Commons, 29 March 2018.

[381] This international law's agreement has the finality to sustain the national self-determination of Ireland and the constitutional conventions of the UK. The clause founded on this assumption, is the one to which the constitutional statute of Northern Ireland can be modified only if the majority of the entire population in Ireland, agree on do it.

[382] The Belfast Agreement 1998: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf.

really different from the one Scotland tried to enact to gain independence. The Schedule in question is a provision of constitutional statute that explicitly recognizes the right of secession of a region and it is also a matter contained in the GFA[383], and in TEU[384].In addition, there is the Joint Ministerial Committee (JMC) presided over by the Prime Minister of UK, which, together with the leader of the devolved administrations of Scotland, Wales and Northern Ireland, the JMC gathers in plenary, domestic and European session as ruled by MoU, "*the leaders of the devolved administrations of Scotland, Wales and Northern Ireland*[385]". Currently, the proposed withdrawal of the UK from the EU is weakening the conditions which maintain the political system of Northern Ireland stable. Northern Ireland has no autonomy over Brexit. Essentially, the Brexit Referendum did not contain any formal powers regarding the prevention of the triggering of article 50 TEU. The UK Supreme Court has stated categorically that the consent of the Northern Ireland Assembly is not required for the UK government to withdraw from the EU. The UK's relationship with the EU (and its termination) is an excepted power retained by the UK government. The Assembly has the right to pass laws but only in devolved policy areas and does not affect the power of the UK Parliament to make laws for Northern Ireland. DUP and Sinn Féin, the main parties in Northern Ireland, despite having voted oppositely on the Brexit referendum 2016, agree on the same shared interest without which it is not possible for Ireland to have the final deal on Brexit: the unavoidable border between Northern Ireland and the Republic of Ireland. Withdrawal from the EU, as the chapter makes clear, will surely change Northern Ireland's constitutional status against the will of the majority in Northern Ireland.

Turning our attention to Scotland, the Scottish Parliament and in general Scottish institutions, have always been quite active and vocal. Scotland laments the fact that it is in a very weak position because the intention of the UK is to abandon both the EU Single Market and Customs Union, whereas the Scottish people voted to remain. The reserved matters to which Scottish Parliament is not authorized

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[383] UK Government, *Annex: agreement between the Government of United Kingdom of Great Britain and Northern Ireland, and the Government of Ireland: Constitutional Issue*: *«* […] The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo- Irish Agreement, they will: (i) recognize the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland; (ii) recognize that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland […] », see the link: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf.

[384] In fact, the secession of Northern Ireland will not mean the creation of a new (Member-)State. Instead, it will *trigger* the territorial expansion of an EU Member State to which EU law already applies in accordance with Article 52 TEU.

[385] E. Stradella, *L'Irlanda del nord: lo specchio del centralismo britannico dalla repressione alla Brexit, attraverso la devolution "intermittente,* 14 June 2017: http://www.sipotra.it/wp-content/uploads/2017/06/L'Irlanda-del-Nord-lo-specchio-del-centralismo-britannico-dalla-repressione-alla-Brexit-attraverso-la-devolution-"intermittente".pdf.

to intervene are listed in section 29(2)(b) of SA 1998 and include constitution, immigration, defence, employment, foreign policy. First Minister Nicola Sturgeon, the leader of Social Democratic Party (SDP), wrote a letter to Theresa May in February 2018[386], asking for a "more inclusion" for Scotland on the procedure of Brexit, trying to fix some points reflecting the Scottish views which were important for her. The intention of Scotland was to have another independence referendum (the first one was in 2014 and it failed). Consequently, the UK Government entered into direct negotiations with the Scottish Government on the holding of such a referendum. Sturgeon's intention is driven by the uncertainty that Brexit continues to fuel. Scotland is waiting for October 2018, the final date in which there must be a final agreement on the future of Brexit and UK-EU relationship. The right to call a binding referendum on independence lays with the Westminster Government. The UK Government believes that Westminster Parliament needs to pass a law before a referendum can legally be held. In other words, the consent of the UK Government to the holding of a referendum is essential in order for any electoral approval regarding Scottish secession to be legally valid[387]. Moreover, the refusal of the draft of the EU Withdrawal Agreement by Scottish Parliament reflected Scotland's demands to be granted a broader context than other devolved legislation. *Union* for Scotland is not only related to UK, but especially for European Union. Because they strongly believe that the only way to remain in the EU is to remain also in the UK. This belief is shaped on a promise which took place in 2014[388].

To conclude, this chapter argues that Scotland truly believes in the idea of devolution and it tried as best it could to prevent the abuse of power by Westminster Parliament through this device. We can also say that the leading institutional role in the procedure is undertaken by the Scottish Government rather than the Scottish Parliament which didn't have the competencies to intervene. The truth is that Scotland has always had a different view of the constitution, both in law and politics. From this perspective, the UK is an asymmetrical, plurinational union without one people or shared visions (end point or purpose); the union is continuously negotiated and subject to multiple interpretations across its component parts. Sovereignty is not unitary, but divided and shared. This is in line with the nature of Europe. And this is also the reason behind the desire of Scotland for the UK to remain both in EU and Single Market. In conclusion, this is the reason why Scotland is thinking about a second

[386] Scotland Government, *Call for more engagement on Brexit,* 2017:« […] it is in the best interest of Scotland and UK to remain in the European Single Market and customs union […] », https://beta.gov.scot/news/call-for-more-engagement-on-brexit/.

[387] P. Leyland, *The Scottish referendum, the funding of territorial governments in UK and the legislative role of Westminster Parliament,:*https://www.regione.emilia-romagna.it/affari_ist/Rivista_4_2014/Leyland.pdf.

[388] There were promised other power to devolved Scottish parliament, signed by an agreement between Prime Minister of UK David Cameron and Scottish Government, in exchange of voting NO to the referendum for independence. Here you can find the agreement arisen from Smith Commission 2014: https://publications.parliament.uk/pa/cm201415/cmselect/cmscotaf/835/835.pdf.

independence referendum, to remain in the Union and be coherent with its vision, although it is not the most prudent option to take (the following chapter will explain why).

Chapter 4 - Conclusions: the place of Parliaments according to the "Hard" or "Soft" Brexit perspective

There is not a definitive explanation of "Hard Brexit" or "Soft Brexit" and most of all, we cannot say certainly what the future background of UK-EU relationship will be, until there is the EU summit in October 2018[389]. Furthermore, we should outline the three key elements involved in the terminology: Single Market, Customs Union and Free Trade. The meaning of these two terminologies are directly connected to the significance of having or not having a deal for the UK. Leaving without a deal will mean huge changes in legislation in certain industries, the same for customs agreements and border crossing. Yet, the term *hard* would also lead to the UK's gaining of greater sovereignty, because the UK will no longer be subject to EU law and to the jurisdiction of the ECJ. On the other hand, with a "Soft Brexit" Britain may get special access[390] to the Single Market and the movement of the immigrants from the EU would become more difficult as it would for UK citizens to enter the EU. The UK may try to stay within the Customs Union, which would only allow the free movement of goods, but not the free movement of people. Part of the EU internal market law would then still apply to the UK. This option mainly sees much more alignment between the UK and the EU. The softer the Brexit, the fewer things will change. This will obviously have the opposite effect of a "Hard Brexit". The term "Hard Brexit" implies the leaving Single Market, Customs Union and Free Trade area, but retaining greater sovereignty in the end. The only sure thing is that for the UK a *no deal* would be better than a "Hard Brexit" scenario.

Furthermore, in this chapter I also discuss how parliamentary sovereignty, in the end, will be affected by the final agreement. The UK Parliament will be considered as a *third* Parliament which lies outside the European member states' borders[391]. The issue of the primacy of EU law on domestic ones has been underlined and re-discussed thanks to the Factortame case. More proof that Parliament has taken

[389] This summit assumes to be the most likely opportunity for a final agreement on the UK divorce from the bloc and a statement on future relations.

[390] *Michael Barnier quashes UK hopes of special access to EU markets,* published in April 2018, «the EU would never accept British prime minister Theresa May's plan for a special access regime based around a broad commitment to adopt financial rules that have the same effect as those in the EU», https://www.ft.com/content/ad96d948-4975-11e8-8ee8-cae73aab7ccb.

[391] This assumption is better explained through the Supreme Court sentence in Miller case: « […] by making and unmaking treaties the Crown creates legal effects on the plane of international law, but in doing so it does not and cannot change domestic law. It cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights […] »

back control could be verified if negotiations are successful, but then Parliament will not give its approval, and which could also be possible due to the increasing loss of consensus to May's Government within its Conservative Party because of the "soft" conduct of negotiations[392]. Surely, the stop from Parliament would be the most surprising of these two years of discussions and political and legal heat. «And the effect which this move could provoke are twofold: it can mitigate the impacts of no deal; or perhaps it can increase time of implementation of the Article 50 process, even for brief duration[393]». Also in relation to the Miller case[394], the analysis finds some conclusions. We can say that without the Miller case, maybe, the current situation would have been totally different or rather inexistent. The triggering would have taken place anyway, but procedure would have followed a safer path. Moreover, the Supreme Court confirmed the primacy of directly effective EU law, and the extent to which the UK constitution evolved to reconcile this primacy with the sovereignty of the UK Parliament. Shifting to devolved legislatures, they may be weakened by this reinforced perception, which will surely have a direct effect at a domestic level more than at an international one. Besides, devolved assemblies will be affected by whatever result is obtained. Also the European Parliament (EP) will be re-shaped after Brexit. A brief paragraph in the chapter also highlights this important argument. The EP has no formal role within the Brexit negotiations' process before it is asked to give its consent to a final withdrawal deal other than the right to receive regular information on its progress. The EP shall be composed by maximum 750 members, plus the President. The actual EP composition has been set in a European Council's decision adopted in June 2013[395].

In this perspective, there are many options for maintaining the desire of both Scotland and Northern Ireland to remain in the EU. The "Reverse Greenland model[396]" could be a choice, giving the possibility to remain to those who want to. Another option is contained in The Dalriada Document, published in 2016 which describes «how Northern Ireland and Scotland should and could stay within the European Union while remaining inside the United Kingdom; why this proposal need not prevent and may in fact facilitate England and Wales in leaving the EU[397]». However, this option could lead

[392] The change of conduit by Government in Brexit negotiations has taken to dismissal of David Davis, who resigned at the beginning of July, contemporary to Boris Johnson, the Foreign Ministers' affairs. The motivation was correlated to the wrong behave of May's Government, which is struggling to maintain a soft-line Brexit instead of harder one. Both Ministers were not in favour and so after several attempts to fix the political gap, they decided to quit.

[393] UK and the EU*, Cost of No Deal revisited,* published in September 2018: http://ukandeu.ac.uk/research-papers/cost-of-no-deal-revisited/.

[394] See ch.1 and 2.

[395] European Council Decision of 28 June 2013 establishing the composition of the European Parliament, https://eur-lex.europa.eu/eli/dec/2013/312/oj.

[396] When Greenland left the EEC, there was no Article 50 in the European treaties. Nor would such an article have been relevant, since what was taking place was not the exit of a member state. Rather what happened was that parts of the territory of a member state were exempted from membership. This was not a unilateral decision; it was formalized in a protocol to the treaties, known as 'The Greenland Treaty', signed by all member states.

[397]The Dalriada Document, published 16 June 2016: https://www.centreonconstitutionalchange.ac.uk/sites/default/files/papers/The%20Dalriada%20Document.pdf.

to a hard border situation, a customs border between the Irish Sea and between England and Scotland. Notwithstanding, it is the only measure respecting the votes of all parties.

We can conclude that Northern Ireland may be left in the Customs Union, and borders tightened surrounding the rest of the UK, stopping land border[398] from being an issue. Both of these solutions, however, are not easy to achieve and are in contrast with the Good Friday Agreement and which is the reason-why most of its citizens are thinking about becoming part of the Republic of Ireland as the only affordable option[399]. The issue of Northern Ireland is now considered the biggest challenge to agreeing to a withdrawal agreement, and thus to the establishment of a transitional period after Brexit which, as already stated, is going to be prolonged. Scotland, before Brexit, feared leaving the UK as it would result in losing EU membership. Nowadays, things have changed and above all, the uncertainty of the end of these events has made the independence question[400] no longer viable for Scotland. Leaving the UK may have a greater impact on Scotland than Brexit. When it voted for independence in 2014, the UK was a member of the EU so the benefits of staying in the UK have decreased for many Scots. Applying for EU membership will take some time but it may be the choice Scotland will make after the unstoppable possibility of leaving along with the UK in 2019.

Finally, the chapter gives a final reasoning on what kind of Brexit the British should have[401] and if the UK will indeed fall apart after Brexit. With the possibility of a second referendum, there will be three options to choose from by answering the question: "*Should the UK remain a member of the EU or leave the EU?"* by "the UK" we mean all the 4 countries of the Union Jack. The options are: accept the Government deal; leave without a deal; remain in the EU[402]. What is sure is that Parliament has to authorize the holding of a referendum and the people need time to understand what the deal means for them. In addition, May's Government has recently pointed out that a second referendum

[398] Theresa May said she wants the Northern Ireland borders remain "frictionless", however this seems impossible. UK cannot leave Customs Union and continuing having borders with the EU without putting in place new customs checks, which are requirements under EU law.

[399] This will be possible only in the case of a second referendum positive in the end.

[400] However, for all 2018 year, Nicola Sturgeon has promoted the will of Scotland to seek for anew independence referendum invoking Section 30 of Scotland Act 1998. If Scotland vote to leave the UK is still would not be easy to get back in the EU. Notwithstanding, an independent Scotland could emerge in the next future.

[401] «If there is no deal reached between the UK and EU, a straightforward choice between no deal and remain would be logical. If a deal is reached, many referendum proponents would favor a deal vs. remain vote; but this could cause protests, the extent of which may depend on the content of the deal itself. If there is concern that excluding a viable option would be too controversial, a single multi-option referendum may be advisable, between the deal, 'no deal' and remain», https://constitution-unit.com/2018/09/13/if-theres-a-second-referendum-on-brexit-what-question-should-might-be-put-to-voters/.

[402] The aim is to get information from citizens which makes sense because now reducing to be in or out. However, part of people does not believe in this second referendum because they have already voted and it is up to professional politicians to transform the will of people in reality. The House of Commons and House of Lords perform a leading role because without their consent, *no deal* may be in place. Hence, it is also really difficult to make this option available for time lapsing.

is not going to happen in any circumstances[403], remarking that it would be undemocratic going against the will of people. Another possible ending for the Brexit procedure is the revocation of the triggering of article 50 TEU[404]. What the judges ask is to check if there is a possibility for a Member State of EU, even if it has already notified the European Council of the intention of withdrawing, to revoke such intention by notification unilaterally. In the case of an affirmative response, the judges question what the conditions are and what the effect is relative to the Member State remaining within the EU. In other words, another alternative has been proposed which is considered a key way to protect the national interests of those who want and voted to remain[405]. This is another element confirming the core of the thesis, which is just how much regional parliaments can affect the process of Brexit.

There is another consideration made in the chapter, turning around a prospect of codified constitution, which, as Richard Gordon[406] said, can deeply affect parliamentary sovereignty. In practice, any attempt at constitutional codification is unlikely to bring any advantage because it presupposes a consensus can be reached between disparate political groups on institutional design and other rights and values to incorporate in a new constitution. Nevertheless, the trend towards progressively codifying key aspects of the constitution may redefine the relationship between Parliament, the executive, and the courts, paving the way for a new era with the Brexit deal and codified constitution.

Even if two years have gone by, full of amendments, delays, discussions, considerations, negotiations, votes, rules, approvals, changes and rethinking, there is nothing sure in this procedure except the completely new event we are experiencing. As Brexit is more than its announcement, it has universal profile involving EU and in general, the world. The path to Brexit is highly unpredictable, and another public vote remains possible together with all the scenarios mentioned above.

Once the October 2018 summit has been held, maybe we can better understand and outline the future scenario of the UK and EU relationship, and we can also see if there may be approval of the EU

[403] From BBC.com, since after Royal Assent, there have been declarations by May on the impossibility of second referendum. Here there are some articles on it: https://www.bbc.com/news/uk-politics-45385421; https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwieu_r3pMndAhXGjywKHSBHArgQFjAAegQICRAB&url=https%3A%2F%2Fwww.independent.co.uk%2Fvoices%2Feditorials%2Ftheresa-may-brexit-second-referendum-british-democracy-a8519451.html&usg=AOvVaw0uRLuk8n4p9M93aJV-fwvQ;https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&cad=rja&uact=8&ved=2ahUKEwieu_r3pMndAhXGjywKHSBHArgQFjAKegQIARAB&url=https%3A%2F%2Fwww.economist.com%2Fbritain%2F2018%2F07%2F18%2Fa-second-brexit-referendum-is-back-in-play&usg=AOvVaw25-WzzBL8G4lM2BJojxpWw.

[404] Irish Legal, *Scotland Court of session rules Brexit revocation question can be referred to European Court of justice:* The question has been reclaimed with a motion against the UK Secretary of State for exiting EU in September 2018 by Andy Wightman MSP and others. They are MPs of Scotland. Scotland's Court of Session agreed to refer to the European Court of Justice the question of whether if the proposal of withdrawing can be revoked or not. https://www.irishlegal.com/article/scotland-court-of-session-rules-brexit-revocation-question-can-be-referred-to-european-court-of-justice.

[405] This request may be seen as an occasion also for UK itself, a way to retract its steps, and remain in the end a member state of the EU.

[406] R. Gordon, *Repairing British Politics: A Blueprint for Constitutional Change*, Hart Publishing, 2010.

Withdrawal Agreement[407] and the Political Declaration. This will surely define the future parliaments' area of intervention and influence over the process. The essence of the unprecedented event we are experiencing can , in the end, be summarized by this sentence: «Brexit means Brexit[408]».

[407] The UK unwritten constitution requires that international treaties – as it will be the UK-EU one – must be implemented through legislation if they are to create legal rights that can be enforced in domestic courts. This secures Parliament's right to scrutinize the domestic legal consequences of an international treaty. The EU Withdrawal Agreement, hence, was always going to require a dedicated Act of Parliament (EU Withdrawal Act 2018) to be passed before it could take effect in the UK.

[408] Independent.com, *Theresa May said Brexit Means Brexit*, 2016: https://www.independent.co.uk/news/uk/politics/theresa-may-brexit-means-brexit-conservative-leadership-no-attempt-remain-inside-eu-leave-europe-a7130596.html.

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