DIRITTI COMPARATI
Comparare i diritti fondamentali in Europa

WORKING PAPERS

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Brexit Means Brexit, but What Does the Second Brexit Mean?

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1. Introduction: how we Approached Brexit

On June, this year, the British people voted in a referendum in favor of the exit of the United Kingdom from the European Union. The day after the vote has been hailed as the new Independence Day. Brexit is an event that produces a number of consequences on many fronts, from economy to politics, from social sphere to diplomacy and international relations. We want to discuss the most important implications from the standpoint of constitutional law, and in particular we are going to focus on the Sovereignty plan. The vote in favor of Brexit meant essentially the will of the British people to regain Sovereignty over the tendency towards integration at supranational level, specifically with regard to the European Union, whose path crossed with that of the United Kingdom from 1972. A closer union among the peoples of Europe is something that has always aroused considerable concern in the UK. The prospect of a transfer of Sovereignty in favor of an integrated dimension has always been viewed with great suspicion, and finally sharply rejected. With this work we intend to analyse what were the reasons that, in the perspective of Sovereignty, led to Brexit and what questions this vote has given rise not only in the United Kingdom but more generally in the supranational dimension of European integration. The main goal is to understand how the concept of Sovereignty relates to the participation in a supranational dimension, in a country like the United Kingdom, which for historical and constitutional reasons has always been closely linked to its sovereignty. The point is to try to figure out if Brexit is a tool actually able to ensure the restoration of full and complete national Sovereignty and if the UK can thus continue to be a 'happy island', not only geographically but also politically divided from Europe and the developments that European integration has triggered. Our analysis takes into consideration three different time blocks: we first consider how Britain came to Brexit, how the concept of Sovereignty has been challenged by participation in the European project and how Sovereignty and its implications have led to vote. The second part of the work concerns what will happen actually with the real exit, how the process will be managed from a legal point of view and how the concept of Sovereignty will be involved in this delicate transition. Finally, we analyse the stage after the official separation, taking into account the consequences on both the national and the European level. We consider the consequences on domestic legislation and on the effects that the EU may continue to produce on it, as well as on the future development of two crucial aspects of the European dimension, namely free movement of persons and European citizenship, closely linked since the introduction of the Maastricht Treaty in 1992.

2. How did we get so far?

The first question we need to answer is: what does sovereignty mean? Generally it is the legal status that all states possess when they are recognized by their peers, reflecting their jurisdiction over a territory and the population living there.[1] Nevertheless, this concept

1 R. Niblett, «Britain, the EU and the Sovereignty Myth», *Chatham House The Royal Institute of International Affairs,* 19 May 2016; available at https://www.chathamhouse.org/publication/britain-eu-and-sovereignty-myth.

can be considered more specifically in relation to the UK: according to Dicey, a prominent constitutionalist and lawyer, it "is the cornerstone of UK constitution" and it is based on three principles: the Parliament can make or introduce any law; no Parliament can bind its successors; the Parliament is the supreme legal authority in the UK.[2] It is obvious that this conception of sovereignty derives from the historical background of the considered State. Indeed the UK was the first State in which the monarch was obliged to limit his own power in favor of a council; a council that at the beginning had the task to advise the king, but that then became ever more independent, asking ever more rights and powers. Starting from the concession of the Magna Carta Libertatum in 1215, and again in 1689 with the Bill of Rights, the little council grew up, until it became completely independent and assumed the features of the Parliament as we know it.[3] It is obvious that the British citizens are proud of their own history and of the sovereignty held by the Parliament, nevertheless the situation changed when the UK became part of the EEC in 1972. This decision was taken with many years of delay with respect to the other member States of the Community, which was created as a possible solution to the nationalist movements that caused the WWII. The delay happened for different reasons: the main is the safekeeping of the centuries of sovereignty. Indeed the first concern of the UK was to preserve its overseas connections, particularly those with the Commonwealth, without sharing these advantages with the other nations. It is clear that Britain's biggest fear was to lose sovereignty, because it was directly linked with its economic prosperity and growth. In 1957 the Treaty of Rome was signed, but the UK did not be one of the signatory States. Instead, it tried to propose to the EEC an agreement: it would create a Free Trade Area in industrial goods only, and this institution would be intergovernmental, i.e., it would not require a cession of national sovereignty. However, in 1958 the EEC refused the proposal, with the justification that a State cannot take only the advantages from its position, but it has also to be ready to make concessions, in this case in terms of sovereignty. Nevertheless the situation changed in 1961 when the Britain's Commonwealth trade started to decline, the EEC's trade was growing (Germany's exports for the first time since the interwar period were greater than the Britain's one) and the decolonization reached a point of no return. Some years later, in 1966, more reasons were added to these: there was the Sterling crisis and the relationship between UK and US was critical not only in economical terms but also in political ones due to the Vietnam War. The only possible solution for the UK was to join the Community, even if with mistrust and with the fear of losing its national sovereignty and its historical identity.[4]

However, apart from the pride for their historical sovereignty and independence, and apart from the fact that the United Kingdom was essentially forced to join the Community due to the negative economic circumstances and the other factors seen above, what is the real fear of the British citizens? Why they are so suspicious towards the EEC and then the EU?

2 A.V. Dicey, *Introduction To The Study Of The Law Of The Constitution,* Liberty Fund Inc., 8th Revisted ed., 1982.

3 A. Bardusco, F. Furlan, M. Iacometti, C. Martinelli, G.E. Vigevani and M.P. Viviani Schlein, *Costituzioni Comparate,* Giappichelli Editore, Torino, 2009.

4 J. Allison, «Sovereignty, Brexit and the Reason Britain Joined in the First Place», *Queen Mary University of London,* 17 June 2016; available at http://mei.qmul.ac.uk/news-and-opinion/blog/items/178117.html.

Substantially this happened due to two main reasons both of them strictly linked with the idea of sovereignty: first of all they believe that there is a democratic deficit or a problem of accountability in the EEC; the second reason concerns the so called principle of the primacy of European Union law, also known as doctrine of supremacy. First of all it is important to understand the considered matter, so we will explain these two causes. Secondly, we will try to understand if those fears are realistic or not and why, perhaps, Brexit is not the best solution.

To face the first problem, that is, the problem of the accountability, it is necessary to know the structure of the EU's institutions and how they work: the EU is a treaty-based association of 28 Member States through which those States have created supranational institutions with different powers. Article 10 of the Treaty on European Union declared: "The functioning of the Union shall be founded on representative democracy. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens".[5] As we can see, a double degree of representation is expressed: citizens are represented directly by the European Parliament and indirectly by their national governments in the other institutions that form the European Union. Therefore, there are four institutions that we have to consider in order to analyse the matter of accountability, and each of them is accountable to European citizens in its own way: the first one is the European Council, whose members are the prime ministers or presidents of the 28 Member States. Its task is to decide the strategic agenda of the EU and to appoint, together with the Parliament, the members of the Commission. Since the decisions are made by consensus every member has the opportunity to block a proposal that could be in conflict with the state represented. The members of this institution are directly accountable either to their national parliaments or to their electorates. In the UK the Prime Minister has to report as soon as possible to the House of Commons the decision or the discussion. The second institution is the Council, whose members are Ministers (one for each State) of the Member States. Its duty, together with the Parliament, is to discuss and approve the detailed legislation. The Ministers are accountable to their own Parliament, since they have to ensure that the EU legislation does not damage the State of origin, but the procedures with which the accountability is verified are different from State to State. In the UK there is the system of parliamentary scrutiny, by which the Parliament is informed about the EU legislative proposals but also about their legislative *iter*. The parliament can ask explanation to the Minister that is considered accountable for the entire negotiation. Then, there is the Commission, composed of one member from each Member State; its duties concern the executive functions such as the management of the EU budget, the control of the implementation of EU laws by the Member States and the right to make proposals to the Council and the European Parliament. The President is appointed by the European Council and elected by the Parliament; the European Council, taking in to consideration the nominations made by Member State's government, nominates the members but the consent of the Parliament is necessary. It is accountable to the Parliament, which can adopt a motion of censure of the Commission for various reasons.

5 Treaty on European Union (2008), Article 10; available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:en:PDF.

Finally, there is the European Parliament formed by 751 Members elected directly by the citizens of Member States every five years. Its role is to adopt legislation in agreement with the Council and taking in consideration the Commission's proposals. Moreover, it has to appoint the Commission's members and elect its President. Due to the way in which the members of the European Parliament are elected, they are directly accountable to their voters. As it can be seen, this institution collaborates in the most important operations at the European level, it is the authority that has more tasks and it is also the one that is elected directly.[6] It is clear that the legislative process is not simple, nevertheless the system of accountability seems to be strong and, in addition, we cannot take into consideration how much a mechanism is complex to decide neither if it works nor if there is a democratic deficit. However, the idea of the presence of this deficit is real: according to some European data only 31% of the EU citizens trust the EU and 52% confirmed to understand how it works (almost the same data can be found in the UK: 26% and 50%).[7] Why is there distrust towards the EU? The UK's citizens are sceptical for different reasons: they believe that the Commission has too much power for an unelected body, that the EU continues to decrease the powers of national parliaments, that the UK has little influence in Brussels, and finally that the national parliaments have insufficient influence on EU decisions.

Before analysing these opinions, we want to discuss the second problem, that is, the second important reason due to which UK's citizens could have chosen to leave the EU: we are talking about the doctrine of supremacy. Indeed, before Edward Heath signed the Treaty of Rome in 1972, all laws in the UK were made by the directly elected Parliament. The situation obviously changed after the signing, since the ECC's laws and then the EU's laws started being part of the British system of rules. The British citizens not only do not approve the great amount of these laws, which has grown from year to year (especially if compared with the smaller quantity of internal laws),[8] but they also steadily disagree with the principle at the basis of these laws. This principle is the one that, in case of conflict between the provisions of EU law and the provisions of domestic law of a member state, gives prevalence to the EU law. This doctrine is not contained in any norm neither of the Treaty on European Union nor of any other Treaty, but it was developed by the European Court of Justice, which included in its reasoning also the constitutions of the Member States. This means that according to the ECJ's opinion the EU laws prevail also on the national Constitutions. Nevertheless, many States disagree with this view and confirm that the fundamental articles of their constitutions are "off limits"; among those States there are also Italy and Germany: according to the Italian Constitutional Court, the core of the Italian Constitution, the "off limits articles", are the first 12. The doctrine, as we have seen, was developed by different ECJ's decisions, the first of which was *Costa v. ENEL* case, but the first pronunciation regarding the United Kingdom was in *R. v Secretary of State for Transport, ex p Factortame Ltd* case (1990), when the House of Lords asserted that the courts in the UK

6 Senior European Experts, «Democratic Accountability in the EU», *Regent's University London*; available at http://www.regents.ac.uk/media/2347146/democratic-accountability-in-the-eu.pdf.

7 Eurobarometer survey from Autumn 2014.

8 P. Johnson, «EU: is Britain Still a Sovereign State?», *The Telegraph,* 17 September 2009; available at http://www.telegraph.co.uk/news/worldnews/europe/6198513/EU-is-Britain-still-a-sovereign-state.html.

have the power to cease to apply or set apart acts of Parliament if they are in conflict with EU provisions and in this occasion Lord Bridge said that there is nothing new in affirming that, since the Parliament had accepted voluntary this kind of limitation of its sovereignty when the European Communities Act was signed, even if this limitation was not included and specified in the Treaty of Rome. However, recently the UK Supreme Court wanted to underline that although the presence and acceptance of this principle, there are some parts of the unwritten Constitution that are considered untouchable. In that way it remarked what other States had already said: every Constitution has some fundamental principles, on which no other law can prevail, even if it comes from the European Union. Specifically, the Supreme Court said:

The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognizes certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognized at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorize the abrogation.[9]

It is clear that in both of the underlined issues, the concept of sovereignty is put into play: these are two examples of the consequences caused by the cession and the limitation of sovereignty in favor of the EU. It was inevitable that the signing of the European Communities Act in 1973 would have some consequences and for this reason it could be useful to analyse the entire situation from a different perspective, trying to highlight why perhaps those effects are not at all negative and why the Brexit, seen from a different point of view (that is, sovereignty as a globalized concept), could not be the best solution for the UK. If on one hand it is undeniable that the entry in the ECC caused the cession of part of the sovereignty, above all in some important subjects such as competition rule and state aid, on the other hand the UK benefits from many advantages: first of all being part of the EU means being a member of a union in which all the formal barriers, such as the barriers to trade of goods and services, have been removed and they have been replaced with a single external EU border. Secondly, having common standards and regulations for products and services simplifies many actions and leads to an important harmonization between the different States. Finally, the same harmonization is caused by sharing EU rules on important parts of the economy, such as rules and standards for the single market, competition rules and state aid, migration, fisheries and trade policies. Moreover, there are also some subjects whose sovereignty is split between the UK and the EU, such as the ratification of trade agreements, energy and climate policies, criminal matters, consumer protection, this means, as we will say below, that in any case the UK could express its own opinion. Anyway it is important to know, also to answer to the doubts concerning the problem of

9 *R (on the application of HS2 Action Alliance Limited) (Appellant) v The Secretary of State for Transport and another (Respondents)* [2014], UKSC 3.

the accountability, that for the decisions taken by the Council in these subjects, the UK and the other Member States have to reach an agreement by consensus; but whenever this method fails, they use a qualified majority vote, a mean convenient for the UK, since the weight of every vote is linked to the population size. Considering that the UK has one of the largest populations in Europe it can form a blocking minority with the alliance of other States (to form this block is necessary the alliance between at least four States representing at least 35% of the EU's total population). Moreover, the UK has a relevant power also in the European Parliament, in which it holds 9% of the seats. So, as it can be seen, even if the legislative mechanism is complex and not so clear, the UK had a leading role in the EU and its influence on the decisions was perhaps underestimated. Furthermore, it is important to underline a different aspect: even if some important matters are devolved to the EU, the majority of policies over the issues of greatest concern to British citizens, such as welfare, pensions, monetary policy, health policy and education, are ruled and decided by the UK: indeed, it retained sovereignty over its monetary policy by deciding to stay outside the Eurozone, and partially also over its borders, since it hasn't joined the Schengen zone. The Schengen zone was created to guarantee the free movement of people by eliminating border controls. Furthermore, it implies a partnership between the police of every Member State. It is formed by 26 States; 22 of them are part of the EU and the others are Iceland, Lichtenstein, Switzerland and Norway. Moreover, the UK and Ireland did not take part in it, by using the opt-out clause. So, it is fundamental to understand that in this way the UK can evaluate not only if non-EU citizens can entry, but even if some EU citizens could be considered a threat, in such case the entrance was denied. Finally, it retains sovereignty over the criminal justice system and its foreign and security policy. This means not only that the UK essentially can express its opinion over every subject, since many of them are of its exclusive competence (or anyway of EU's competence but heavily influenced by the UK), but this also means that if in the UK there are problems concerning those policies it is because of mistakes committed by the British government and not by the EU. In addition, on the 19th of February 2016, the UK obtained other advantages beyond the ones that it already has. Indeed, the State in that occasion clarified the will to preserve further its sovereignty avoiding the EU's aim of creating "an ever closer union among peoples of Europe", intended as an extension of the EU's powers. The achieved deal provides also some limits for the European Central Bank: its jurisdiction is now limited to Eurozone institutions, in this way the primacy of the Bank of England is ensured in those areas in which it is responsible for financial supervision. Finally, the deal permits to the UK to deny in-work benefits to EU migrants for a limited period discouraging in this way the EU citizens trying to take up work in the UK. The UK obtained another chance, but it did not take into account this possibility.[10]

So it seems clear that the UK and its citizens are always been jealous and protective of their sovereignty and sceptical towards the EU. Nevertheless, it is also important to know that during the past years they choose to cease their own sovereignty to many different institutions and organizations such as the World Trade Organization and the World Health Organization.

10 See note 1 and also R. Beda, «Brexit, accordo unanime raggiunto al vertice Ue», *Il Sole24ore,* 19 February 2016; available at http://www.ilsole24ore.com/art/mondo/2016-02-19/brexit-accordo-unanime-raggiunto-vertice-ue-220521.shtml?uuid=ACIZreYC.

This happened due to the phenomenon of globalization: indeed, it brought the governments to organize themselves in order to guarantee a better living standard to their citizens. So, the idea was and is still nowadays that a cession of power in favor of supranational institutions is an aware sacrifice, from which can derive many advantages.[11] However, considering again the relationship with the EU, it is obvious that the UK has always maintained and obtained the mentioned advantages in being a member of the EU, and these advantages are often been higher than those received by the other Member States, as its sovereignty and its power in making policies were less limited. Thanks to the participation in the Union, the UK effectively earned back most of its power. Nevertheless, it is obvious that British citizens were not satisfied. Now the decision is taken, and the consequences are not long in coming.

3. Brexit and the Role of Referendum: An Expression of Sovereignty?

After having analysed the concept of sovereignty under a transnational point of view and the implications that the process of globalisation has caused, the discussion will move now to the other possible acceptations of the concept of sovereignty, focusing on the role of the referendum instrument in the British constitutional framework. The United Kingdom lacks a codified constitution and it is suggested that the lack of a critical moment at some point in history such as military defeat, colonial independence or revolution helps explain why the UK does not have a codified constitution.[12] But above all, most interpretations of the un-codified and flexible nature of UK Constitution lie on the assessment of "parliamentary sovereignty". In other worlds the idea that "Parliament can legislate how it chooses and no authority supersedes it, that there is no source of law higher than- i.e. more authoritative than- an Act of Parliament. Parliament may by statute make or unmake any law, including a law that violate international law or that alters a principle of the common law. And the courts are obliged to uphold and enforce it".[13]

This principle seems to represent a barrier to the existence of a codified constitution and moreover it makes the role of the referendum instrument in the British legal order extremely uncertain. Indeed, as a representative democracy, where all legislative powers are vested in Parliament, originally the use of referenda was considered as an abdication of the responsibility of Parliament and so unconstitutional. Although, as we will see, starting from the 1970s it had become an accepted part of the British constitutional framework, still it is arguable that referendum is connected to a principle which appears to be at odds with parliamentary sovereignty: popular sovereignty. The hard core of this doctrine is the belief that the sovereign power is vested

11 ID (note 1).

12 A. Blick «See Codifying – or not codifying – the UK Constitution», *Centre for political and constitutional studies, King's College London,* February 2011, p.3.

13 House Of Commons European Scrutiny Committee, «The EU Bill and Parliamentary Sovereignty», *Tenth Report of Session 2010-2011,* Vol. I, p.11 available at: http://www.publications.parliament.uk.

in the people and that those chosen by election to govern or to represent must conform to the will of the people, who are the source of all political powers. The highest expression of this doctrine has been reached in the United States and we can at least remember the bold phrase of the preamble of the US Constitution: "we the people (...)". But still also in the United Kingdom this concept of sovereignty has raised through the time, with a strong connection especially to the Scottish Claim of Right (1989), in other worlds the emerging idea that people, not parliament, have the final world and that there should be fundamental rules, covering the principles and institutions of government and the rights to citizens that "we the people" make, and by which elected representatives are bound. Hence, the "Queen-in-Parliament" concept and so the supremacy role that historically the British Parliament has vested, not only made the use of referenda extremely rare but it also confined them to be a non-legally binding instrument, moreover a mere consultative or pre legislative tool enabling the electorate to express its opinion before any legislation is introduced. Under a theoretical point of view, the consequence of such a vision is that Parliament is not obliged to fulfil the results of a referendum vote and actually this is what someone has claimed after the Brexit referendum. Indeed, it has been argued that since the referendum has an advisory nature, Parliament can ignore it. The problem, in the context of Brexit, is that the legislative power and the popular willingness appear to be in opposite positions, since the majority of the electorate body has voted to leave the EU and the three main UK Parties officially favoured Remain. And how is it possible to conciliate this divergence with the fact that the basic idea under Brexit is the need to restore powers and sovereignty to Parliament, the same Parliament that actually seems to be unwilling to leave the European Union. It appears to be a paradoxical situation and moreover it underlines the difficulty of the existing relationship between popular and parliamentary sovereignty, but we cannot forget that Parliament, if not from a legal point of view, is in any case under a moral and political obligation to act in conformity with the referendum's result.[14]

However, what is important to underline regarding the Brexit campaign and referendum is that the main idea sustained by the Brexiteers has been the desire to "take back control", or, in other worlds, the attempt to restore a sovereign power that the involvement of the UK to the EU membership had overcome through the time. What whose in favour of Leave complain is that "the membership of the EU stops us being able to choose who makes critical decisions which affect all our lives".[15] Indeed, it appears to be a leap into the past, if we consider that sovereignty, which according to the classical assumption represents the supreme power exercised within a particular territorial unit, belongs to the three classic and legal categories of the statist paradigm that the on-going process of globalisation has eroded and replaced with the concept of subsidiarity. Nevertheless, it can be argued that Brexit is not something completely new and that the relationship between UK and EU has always been focused on the loss of power

14 S. Douglas-Scott, «Brexit, the Referendum and the UK Parliament: Some Questions about Sovereignty», *UK Constitutional Law Association,* available at: https://ukconstitutionallaw.org.

15 M. Gove, «EU Referendum: Why Britain should leave the EU», 20 February 2016, available at: http://www.telegraph.co.uk.

exercised by the British Parliament and as a consequence on the loss of sovereignty. Analysing the historical process through which the UK has passed in order to achieve the European integration, we could observe that the title of Member State has always been characterised by problematic aspects regarding the UK. In 1972, when the UK Parliament adopted the European Communities Act, whereby ' UK was able to join the European Economic Community, a fundamental principle was declared under section 2 (1): All such rights, powers, liabilities, obligations and restrictions (...) created or arising by or under the Treaties, and all such remedies and procedures (...) provided for or by under the Treaties, as in accordance with the Treaties, are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly (...).[16] More simply stated, it provided that provisions of EU law that were directly applicable or have direct effect, were automatically incorporated and binding in national law without the need for a further Act of Parliament and so without the need each time for implementing legislation, as would usually be required for the incorporation of other international obligations by a dualist State, such as UK. Moreover, Section 2 (4) and 3 (1) gave effect to the doctrine of the supremacy of EU law, as interpreted by the ECJ, over national law; indeed, when EU law was in doubt, required UK Courts to refer the question to the ECJ and obliged the courts to disapply legislation which was inconsistent with EU law. In this way, the restriction on sovereignty was consistent but it was not without problems: indeed, since the ECA was adopted through an ordinary piece of legislation, its rank was not as different as primary law. Hence, also the ECA seemed to be subject to the so called "implied repeal" doctrine, according to which when an Act of Parliament conflicts with an earlier one, the later Act takes precedence and the conflicting parts of the earlier Act are repealed. It is noticeable how strictly this principle is connected to the classical idea of sovereignty elaborated by Professor Albert Venn Dicey in his book "The Law of the Constitution" (1885), where he explores the concept of parliamentary sovereignty stating that no Parliament is able to bind its successors by making laws.

Therefore, it is clear that since the beginning the UK membership of the EU was partially influenced by the erosion of the sovereign power's concept as much as only three years after the ECA entered into force, a popular referendum was held in order to decide whether to leave or not the European Economic Community. The 1975 referendum was the first nationwide referendum ever, supported by the Labour party and its leader Harold Wilson; although the reasons hidden behind the referendum were partially different from the 2016 referendum, since the immigration phenomenon was not as prominent as nowadays and since the problems were more connected to the economic sphere, emigration and the re-negotiation of the terms of Britain's membership of the Common Market, still the tool used to decide about a major constitutional change such as leaving the EEC was the same as the one in Brexit, even if at the end the 1975 European referendum resulted in a heavy win for staying in, with 67.2% of votes.

16 European Communities Act (1972), section 2(1).

This rocky constitutional relationship between UK and EU came to a turning point in the *Thoburn v. Sunderland City Council* decision in 2002, a case that marked an important shift away from the traditional constitutional analysis focused on parliamentary sovereignty in the Diceyan sense and represented the beginning of a different approach that recognized legislative authority as a legal concept that, like all other such concepts, was subject to the terms of the constitution, unwritten though it remains. The case, known also as the "Metric Martyrs" case, regarded the prosecution of traders who had been convicted of selling goods using the imperial rather than metric units of weights. Briefly, the question at issue was whether the 1985 Weights and Measures Act, a primary piece of legislation that allowed the use of both systems, would impliedly repeal the 1972 European Communities Act, which allowed secondary legislation to prohibit the use of imperial units. The orthodox approach of parliamentary sovereignty offered a clear answer to the question on which act should take priority; indeed, as the doctrine of implied repeal states, when two acts conflict, the more recent – in this case the 1985 Act- should prevail. However, the Administrative Court rejected this approach and actually elaborated a new concept of constitutional statutes based on the idea that whether a statute has a constitutional rank or not is crucial, because: "Ordinary statutes may be impliedly repealed. Constitutional statutes may not".[17] In particular, Lord Justice Laws identified the so called "highest laws" or a new class of legislative provisions which could not be repealed by mere implication because of their constitutional rank, such as Magna Carta, the Bill of Rights and finally the European Communities Act. The innovation that stood out from this decision was the re-thinking of the sovereignty's concept as a legal and dynamic principle rather than a factual and static one, since it had been realised that legislative authority –i.e. Parliament– was a function of constitutional law and not an historical fact.[18]

Nevertheless, in 2011 the United Kingdom went again backwards to a more conservative outlook with the European Union Act (EUA), an Act of Parliament that outlined two fundamental innovations: the "sovereignty clause" and the scheme of "referendum locks".[19] First of all, it can be noticed that the Bill was introduced before Parliament as a reaction to the European Union Act 2008 whereby the Treaty of Lisbon was implemented into the national legal order without any referendum. The intent is clear: attempt to reduce the influence and the competences of EU by enforcing the Parliamentary power and empowering the British people by giving them the possibility to manifest their expressions through the referendum instrument. More in details, the provision contained in section 18 of the EUA –the sovereignty clause– was ideated to reaffirm the sovereign character of the legislative power although at the end it resulted to be nothing more than a confirmation of the fragile status of EU law by stating that EU law was effective and supreme over domestic legislation only because an Act of Parliament –the European Communities Act of 1972– made it so. But the hard core of the Act actually was the provision stated under sections

17 *Thoburn v. Sunderland City Council [2002],* paragraphs 62 and 63 of the Judgment of LJ Laws.

18 M.Elliott, «United Kingdom: Parliamentary sovereignty under pressure», *International Jnl of Law,* available at: http://icon.oxfordjournals.org.

19 M.Gordon, «The European Union Act 2011», *Uk Constitutional Law,* 12 January 2012, available at: https://ukconstitutionallaw.org.

2,3 and 6 according to which there were some categories of decision that must be subject to a general control and approval from the legislative body. Section 2 required that any amendment of the existing EU Treaties such as the Treaty on European Union or the Treaty on the Functioning of the European Union must be approved by an Act of Parliament; then, a referendum must be held in cases, listed in section 6, where there would be an enlargement of the EU powers or a reduce of safeguards, for example changes in the EU's voting rules.[20] What can be inferred from the European Union Act is that although it empowered parliamentary sovereignty it transformed –as professor Vernon Bogdanor explained– the Parliament into a new kind of "tricameral" legislature that includes the two chambers and the previously ignored electorate body.[21] Hence, what is important to underline considering both the EUA and the Brexit referendum is that they have offered an evidence of the growing importance of referendums in the UK constitution as an expression of a particular type of sovereignty.

4. Art. 50 of the Lisbon Treaty: Genesis, Present and Future Scenarios

As UK High Court has ruled in *Miller* case,[22] Brexit referendum has an advisory effect only. Nonetheless the citizens' decision has a strong political value. Thus it would be likely that UK will follow the popular decision, and hence trigger art. 50. Also Prime Minister Teresa May has said that the citizens' decision will be respected.[23] The triggering of art. 50 of the Lisbon Treaty arises some issues, both political and (mostly) procedural. In this talk the focus will be on art. 50 genesis, on its text vagueness, and on three main problems arising from its own text. In order to have a complete overview on art.50 is necessary a brief introduction on the Treaty of Lisbon genesis. In 2004 there was an attempt to establish a European constitution. This attempt failed for political reasons. Nonetheless the core of the European Constitution's rules has merged into the Treaty of Lisbon. Hence the Treaty of Lisbon is part of a European constitutionalizing process.[24] This is the art. 50 background. This provision provides for a soft withdrawal of a member State from the EU. Indeed, this provision supplies the possibility to reach some agreements between the two parties (EU- withdrawing State).

20 European Union Act (2011), Section 2 and Section 6.

21 M.Elliott, «Some Intersting LSA working papers: prisoners voting and the EU Act 2011», 13 February 2013, *Public Law For Everyone,* available at: https://publiclawforeveryone.com.

22 R (Miller) -v- Secretary of State, [2016] UKHC, Case No. CO/3809/2016 and CO/3281/2016, 3 November 2016.

23 S. Swinford, «Theresa May to tell EU leaders that there will be no second referendum», *The Telegraph*, 20 october 2016.

24 P.Sypris, « What next? An analysis of the EU law questions surrounding Article 50 TEU: Part One», *Eutiopia Law, 8 july 2016, available at https://eutopialaw.com/2016/07/08/what-next-an-analysis-of-the-eu-law-questions-surrounding-article-50-teu-part-one/*

This provision could be a paradox: it allows a member State to unilaterally withdrawn but it provides for an engagement between this State and the EU. The purpose is to protect the legal position of both individuals and companies.

Still Art. 50 hasn't been yet triggered so far. Hence there is no case law about it. Moreover art. 50 is vague in its text. Nonetheless this vagueness would imply some flexibility for the triggering procedure, and this flexibility would be consistent to the rationale of art.50. However, it is for the ECJ to decide about the interpretation of this provision. Related to Brexit case, an important example of vagueness of art. 50 is whether the notice of art.50 triggering could be withdrawn or not. It will be discussed later about the implications arising from *Miller* judgment appeal around this point. Now the focus is only on the text art.50 and its literal interpretation about the notice of art.50. In the text nothing is said about whether the notice of the triggering of the procedure cloud be retired or not. Nor is anything said about the legal form of notification. Could the notice under art.50 be withdrawn or not? Both the positions could be correct. By a legal perspective it can be argued that the notice could be withdrawn. Indeed, the withdrawing State still remains an EU member until the deadline of two years after the notification has been expired. In addition to that a former member State pursuant art. 50(5) could ask for a re-joining of the Union. Furthermore, the Treaty of Lisbon rationale aims to an integration process. Thus it would be well arguable that the notification, once given, should be withdrawn in order to remain in the EU. On the other hand, we have to consider a political perspective on this point. EU needs a fast resolution of the Brexit affair, in order to plan its own future. It would be unlikely to start the procedure and start to negotiate, and then to take a step back. Hence, it would be also a matter of politics. As mentioned before vagueness could mean flexibility, thus it leaves open field to political manoeuvrings.

Article 50 provides that a Member State may withdraw from EU, but precisely because of its vagueness, there are three main points arising from art.50:

1) The procedure pursuant art. 50 must be in compliance with the "constitutional requirements" of the withdrawing State.

2) Notification: two problems about this point. First shall the notification of triggering art.50 be withdrawn? Second: since the notification has been given, it begins an expiry of two years. During this time the UK should try to reach some agreements, in order to replace the Treaties. Otherwise there will be a total break: no agreements and no treaties with the EU.

3) The Agreements under art. 50 are Community acts. Hence they must be in compliance with the community fundamental rights.

The first issue arising from art 50(1) text concerns the national procedure.

The first paragraph of art.50 prescribes that "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements". It has been written before in this paper that UK has an unwritten Constitution. Hence, there is not a solid legal base for internal procedure concerning the triggering of art. 50 procedure, even because neither the Referendum Act 2015 provided for procedural rulings about the leaving scenario. The main doubt is whether authority to trigger art. 50 TEU relies on parliament or it relies on government. In this talk the will be taken in account two official positions: The House of Lords' Constitutional Committee's report and the UK High Court decision in *Miller judgment*.

The Constitutional Committee report was given just few weeks after the referendum, so it is prior to the UK High Court decision in Miller judgement. In its report, the Committee firstly has accepted the referendum result and the fact that it must be implemented. What is interesting of this report with regard to the internal procedure is that it offers some advice about which internal mechanism should be adopted in order to pursue Brexit. Regarding the role of the parliament and the role of the government in activating art.50 TEU, the report says that the former should be involved in this process. The Committee reasoning is that triggering art. 50 would imply a repeal of the ECA 1972, then this would afflict citizens' rights. Hence UK government can't activate art.50 by the mean of the Royal prerogative. This position is quite similar to the High Court position. Then, regarding the possible internal solution for activating art. 50, the Committee has suggested two options in order to establish a legal procedure involving the parliament. Parliament could be involved by the mean of an enactment of legislation or by the mean of the passing of a resolution. Both of them would enable parliament to have an important constitutional role in enacting art. 50. Anyhow the Committee observes that it would be desirable a balance between parliament and government's role: too much parliament involvement would "hobbling the government ability to negotiate".[25]

Then, recently the UK High Court gave its judgment in Miller about the question whether legal power of giving notice of triggering art. 50 should reside on parliament or government.[26] The Court specified that without regards to the political issue, they dealt only with a legal question; These are the constitutional principles on which relies the reasoning of the Court:

- In UK constitutional law on parliament resides the power to make and change primary legislation, which is the superior form of law in that system. Only parliament could make provisions in order to allow to other form of law to be superior than primary law: this is the case of EU law, by the mean of ECA 1972. This statute -together with other statutes- gives direct effect to EU law in UK domestic legal system. Nevertheless, Parliament -because of its sovereignty- still has the power to remove this authority from that law. Hence only Parliament has the power to repeal ECA 1972 act, which is primary legislation.

25 M.Elliot, S.Terney, « The House of Lords Constitution Committee Reports on Article 50», UK Const. L. Blog, 13 september 2016, available at https://ukconstitutionallaw.org/2016/09/13/mark-elliott-and-stephen-tierney-the-house-of-lords-constitution-committee-reports-on-article-50/

26 See note 1

- The other constitutional principle is that the Crown cannot repeal primary legislation by the mean of its prerogative power; this is the rule of law core, the Crown subordination to law. It cannot neither confer rights to individuals nor depriving them of rights by the mean of prerogative power without parliamentary approval.

On the other hand, the power of making and unmaking treaties is a Royal's prerogative, i.e. withdrawing from international treaties relies on government authority. In the Miller case the Government has accepted those constitutional principles. Hence taking into account those principles, the core problem relies on the notice's effects: since the notice has been given, for both the Court and the parties, it is unconditional and would imply the UK withdrawal from EU and from relevant Treaties. It will directly affect EU rights, introduced in UK legislation by the mean of ECA Act 1972. Among theme there are also rights enjoyed by UK citizens in other EU member states. If the government would give notice under art.50 TEU, it "*will pre-empt the parliament ability to decide on whether statutory rights could be changed*". Two would be possible scenarios following the notice. Both of them would afflict EU rights. First scenario: a total breach from EU, without having any agreement as substitute to the Treaties to be reached. Second scenario: even though UK government would reach some agreements in order to preserve some of those rights, nonetheless acting in this way it would have repealed primary legislation. The executive would decide which EU rights should be preserved. It would be the government's actions to change the primary legislation. So the government submission was that the authority to withdraw from EU doesn't reside in constitutional law but in the ECA 1972 text: when it has been enacted, from the language used by parliament would stem that the Parliament has left the Crown with its prerogative power to give notice under art.50; and thereby the government should have had the power to decide whether would the EU law cease to have effects in domestic law. Finally, the High Court anyhow hasn't accepted the government's position: the government doesn't have power to give notice pursuant to art 50 of the TEU. Its entitlement to give notice under art.50 doesn't stem neither from the ECA 1972 act nor from the Constitutional principle. Hence the parliament must be involved in the activities for triggering art. 50.

But this judgment may be overturned. This is the second main point of this talk stemming from art. Indeed, the core of the reasoning is based on the irrevocability of notification. Both the parties to the proceedings agreed about this point. Neither the High Court syndicated about it. As it has been said before, there are no legal requirements in the text of art.50 for the notification. Art.50 provision doesn't say anything about a possible withdrawal of notification. However, the interpretation of EU law -in our case about art 50- is up to the European Court of Justice. Then the UK High Court should have raised a preliminary question before the ECJ about this point. Pursuant art. 267 TEU "Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court". So now it will be for the Supreme Court to ask for a preliminary question before the ECJ, since it is the final court in UK, and the Government had appealed the *Miller* judgement.

But the Supreme Court could not follow the art.267 TEU provision. In this scenario, even though it would lack a dialogue between the Supreme Court and Luxemburg, however then according to ECJ Köbler judgment,[27] there would be a preliminary ruling by the ECJ. Indeed, individuals could ask for damages before a lower national court if the final court get wrong interpretation of EU law without having raised a preliminary question before the ECJ. In this proceeding the lower court could ask for clarifications to Luxemburg, ordering the government to delay notification of triggering art.50 in the meantime.[28] This scenario would be unlikely to happen: it would require too much time. Nevertheless, both the mechanisms would imply a possible reversal of Miller judgment.

The third main point of this talk concerns the arrangements pursuant art.50. These arrangements are bilateral (EU-UK). It means that these arrangements are community measures. Hence the Court of Justice has jurisdiction on these agreements and will check their compliance with community fundamental rights.[29] This has been ruled by the Court in two main jurisprudential cases. The first is the *Kadi* judgment.[30] In this case the Court reviewed the EU regulations implementing some UN Security Council resolution. In this judgement the Court has stated that: "*the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.*" Hence these regulations (community measures), have to be in compliance with the EC Treaty fundamental rights, even though adopted in order to implement international law obligations. The second jurisprudential case is the *Opinion 2/13* given by the Court.[31] In this opinion the Court rejected the Draft Agreement on accession of EU to ECHR, since it was inconsistent with EU fundamental rights (it didn't respect the powers of the ECJ). Hence pursuant art. 218(11) TFEU:" *A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised".*

This is the paradox and the main problem surrounding Brexit. On the one hand UK will try to leave European Union and to escape its legal constraints and to reach a better economic situation. On the other hand, UK needs to reach some agreements with EU in order to avoid a worse economic situation. But these agreements have to be consistent with those constraints which UK is trying to

27 Case C-224/01 Gerhard Köbler v Republik Österreich [2003] ECR I-10239

28 S.Peers, « Brexit: can the ECJ get involved?», *EU Law Analysis,* 3 november 2016, available at http://eulawanalysis.blogspot.it/2016/11/brexit-can-ecj-get-involved.html

29 R. Mccrea, 'Can a Brexit Deal Provide a Clean Break with the Court of Justice and EU Fundamental Rights Norms?', *U.K. Const. L. Blog*, 3 October 2016, available at https://ukconstitutionallaw.org/

30 Case C–402/05 P and C–415/05, P. Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I–6351.

31 Case c-2/13, Opinion 2/13 of the Court (full court) [2014]

escape from, such as the European fundamental rights of free movement of workers. We can see that even though a State has freedom to withdraw from an international organization, nonetheless this State is still bound to that one. It follows that in our historical phase a globalized system is strongly binding on States and thus it has definitely substituted the model of the autonomous

5. Great Repeal Bill: Restoring Sovereignty to Parliament

In October, Theresa May announced the March 2017 deadline for triggering Article 50. In the same interview, she promised a Great Repeal Bill. The Prime Minister is set to include the Bill in the next Queen's Speech, but it will not have effect until Britain actually leaves the European Union.

The Great Repeal Bill is intended to have two main functions. First, the Great Repeal Bill would repeal the European Communities Act 1972. Second, it would ensure that EU law that has not already been implemented in national law remains in force from the date of withdrawal.[32] The primary object of the Great Repeal Bill is to repeal the European Communities Act. The European Communities Act is the instrument through which the U.K. joined the European Economic Community and which gives effect and priority to EU law within the U.K. legal system. Such Act ensures that some types of EU legislation -including treaty obligations and EU regulations - have direct effect in the U.K. legal system, without the Parliament having to pass any further legislation. In addition to this, the European Communities Act gives EU law supremacy over UK national law.

To be precise, under Section 2(1) of the European Communities Act, provisions of EU law that are directly applicable or have direct effect, such as EU Regulations or certain articles of the EU Treaties, are automatically '*without further enactment*'[33] incorporated in national law and binding. As a consequence, when a Regulation enters into force, it automatically becomes part of national law, without the need for implementing legislation, as would normally be required for obligations assumed under international law in the UK.[34] Section 2(2) applies to measures of EU law that are neither directly applicable nor have direct effect. The provision makes it possible to give effect in national law to such measures by secondary or delegated legislation, such as statutory instruments. Secondary legislation can amend an Act of Parliament, since the delegated legislative power includes the power to make such provision as might be made by Act of Parliament. Section 2(4) concerns the question of primacy. It provides that "*any enactment passed or to be passed [...] shall be construed and have effect subject to the foregoing provisions of this section*".[35]

32 M. Elliott, «Theresa May's "Great Repeal Bill": Some preliminary thoughts», *Public Law for Everyone,* available at publiclawforeveryone.com.

33 European Communities Act (1972), s. 2(1).

34 European Communities Act (1972), legislation.gov.uk.

35 European Communities Act (1972), s. 2(4).

In other words, it provides that all UK legislation, including primary legislation (i.e. acts of Parliament) have effect "subject to" directly applicable EU law. This provision has been the object of much academic and judicial debate. In particular, it is controversial whether it gives rise to a "strong rule of construction, whereby domestic law must be read as consistent with EU provisions whenever possible",[36] or to a rule of priority. Anyway, Section 2(4) has been interpreted by UK courts as granting EU law supremacy over UK domestic legislation. In the *Factortame case*, the House of Lords has interpreted section 2(4) as inserting an implied clause into all UK statutes that they shall not apply if they conflict with EU law.

This could be regarded as a departure from the British constitutional doctrine of parliamentary sovereignty. In particular, the principle of supremacy of EU law, as first enunciated by the CJEU in *Costa v ENEL*[37], seems to be in conflict with the principle of Parliamentary sovereignty. On the one hand "*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 recognized by the law of England as having the right to override or set aside the legislation of Parliament*".[38] On the other hand, under the doctrine of supremacy of EU law, in case of a conflict between a provision of national law and EU law, the latter prevails, irrespective of which law is the later in time. In the Simmenthal case, the Court said:

[…] every national court must, in a case within its jurisdiction, apply [Union] law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the [Union] rule.[39]

This principle was confirmed by the UK courts in the case *The queen v. Secretary of State for Transport,* in which the Court held that:

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.[40]

Clearly, there is a tension between the doctrine of Parliamentary sovereignty and the

36 Ex multis*:* P. Craig, Sovereignty of the United Kingdom Parliament after Factortame; W. WADE, Sovereignty: Revolution or Evolution?; T. Allan, Parliamentary Sovereignty: Law, Politics and Revolution.

37 Case *Costa v Enel (1964)* ECR 585 6/64.

38 A.V. Dicey,«Introduction to the Study of the Law of the Constitution», 1885.

39 Case 106/77 Simmenthal II [1978] ECR 629.

40 The Queen v Secretary of State for Transport, ex parte Factortame.

doctrine of supremacy of EU law. However, this does not mean that the two doctrines are irreconcilable. As the European Court of Justice has often explained, by joining the European Union, Member States transferred some of their sovereign powers and rights to the EU institutions. As a consequence, Member States gave EU institutions the ability to create law and to bind States and individual within States. Thus, as the UK decided to join the European Union, Parliament voluntarily gave up some of its sovereign powers to the European Union. However, from a constitutional point of view, Parliament remained sovereign since it had the possibility to repeal Section 2 of the European Communities Act 1972.

And indeed, this would be the primary function of the Great Repeal Bill. The Great Repeal Bill is intended to restore sovereignty to Parliament, by repealing the Act, which gives effect and priority to EU law within the UK legal system.

The Repeal of the European Communities Act would have several effects. The first consequence would be that, on the date of withdrawal, EU legislation that currently applies in the U.K. by virtue of the 1972 Act would cease to have effect. Nevertheless, the Great Repeal Bill would not repeal the entire body of EU law as it applies in the UK. In fact, its purpose would be to preserve and carry over into UK law the full body of EU law not already implemented in national law. Otherwise, given the many EU provisions applicable in the UK, there would be a risk of huge gaps in the UK legal order. In order to prevent it, and to promote continuity, the body of EU law will be converted into UK national law.

First, there are directly applicable EU laws, such as EU Regulations and parts of the EU treaties that have effect as part of the national law of the U.K. without the need for implementing legislation, by virtue of Section 2(1) of the European Communities Act. These directly applicable laws and treaty provisions would cease to be part of the law within the UK legal system from the date of withdrawal. In some cases, it would be "*either harmless or positively desirable*"[41] for such directly applicable provisions to cease to apply. In other cases, would not be acceptable to leave a gap in the law and, as a consequence, it would be necessary to adopt new domestic legislation in place to cover the subject matter. Second, there are Acts of Parliament that implement EU directives or other EU obligations. As acts of Parliament, these acts would automatically remain in force, unless and until Parliament decides to repeal them or to amend them. Third, there are UK regulations or other kinds of statutory instruments that have been made under Section 2(2) of the European Communities Act 1972 in order to implement directives and other EU obligations. It would be necessary to take into account them, and decide to revoke, amend or keep them, case by case.

In addition to this, the Great Repeal Bill would remove priority of EU law over national law. By repealing Section 2(4) of the European Communities Act, EU legislation would cease to have supremacy and the doctrine of primacy of EU law, as enunciated by the Court of Justice of the European Union in Costa v ENEL[42], would be expunged. Theresa May said "*Our laws will be made not in Brussels but in Westminster. The judges interpreting those laws*

41 Lawyers for Britain, lawyerforBritain.org.
42 Case Costa v Enel (1964) ECR 585 6/64.

will sit not in Luxembourg but in courts in this country. The authority of EU law in Britain will end."[43] The Great Repeal Bill will make the UK legal system sovereign and independent of the EU. As explained by Mr Davis, the Bill will "*end the authority of (EU) law*" and "*return sovereignty to the institutions of this United Kingdom*".[44]

Brexit was supposed to return parliamentary sovereignty. Instead, some scholars argue that, on the contrary, it would weaken Parliament. In particular, according to Jo Murkens it would bring about "*the most submissive, disempowered Parliament in modern history."*[45] The Great Repeal Bill would "*collapse the distinction between EU and national law, creating powers never expressly granted by Parliament."* In addition to this, it would probably also enable the government to "*amend primary legislation without a parliamentary vote."*[46] The Great Repeal Bill is intended to restore sovereignty to Parliament.[47] In particular, it would entail the freedom of Parliament 'to amend, repeal and improve any law it chooses'[48]. However, the Bill would have three effects. First, it would submerge the entire UK legal system within EU law. Second, it would subject the entire UK legal system to enhanced judicial powers. Third, it would empower government, not just Parliament, to amend that newly incorporated EU law.

It seems likely that the Bill will include a 'Henry VIII' clause, which would enable the government, rather than Parliament, to amend and repeal primary legislation through subordinate legislation. The use of 'Henry VIII' clauses gives rise to risk of executive abuse of power. Sidonaidh Douglas-Scott emblematically indicated that their use would be 'profoundly unparliamentarily and undemocratic', and 'particularly repugnant'.[49] Thus it is likely that the future would not be sovereignty. On the contrary, it would probably be "subjugation to judicial decisions and to executive powers". "While it promises democracy, all Brexit will deliver will be a lawyers', technocrats', and bureaucrats' paradise operating beyond the reach of Parliament. That looks very much like the world from which they kept insisting they were liberating us".[50]

43 Theresa May - her full Brexit speech to Conservative Conference, independent.co.uk.

44 Mr David - to the Commons, 10 October 2016.

45 J. Murkens, «British sovereignty post-Brexit: Why the Great 'Repeal' Act will actually weaken Parliament», *Blog London School of Economics and Political Science,* blog.lse.ac.uk

46 ID.

47 J. Murkens, «The Great 'Repeal' Act will leave Parliament sidelined and disempowered», *Blog London School of Economics and Political Science,* blog.lse.ac.uk

48 Theresa May -her full Brexit speech to Conservative Conference, independent.co.uk.

49 S. Douglas-Scott, «The Great Repeal Bill: Constitutional Chaos and Constitutional Crisis?» *UK Constitutional Blog,* U.K. constitutional law.org.

50 J. Murkens, «British sovereignty post-Brexit: Why the Great 'Repeal' Act will actually weaken Parliament», *Blog London School of Economics and Political Science,* blog.lse.ac.uk

6. Post Brexit

6.1 Free Movement of Persons: Possible Scenarios after Brexit

One of the greatest concerns about the impact Brexit may have is related to the free movement of persons, which is the right of EU citizens to freely live and work across the EU. Free movement of persons is built up by freedom of movement for workers (art. 45-48 TFEU) and freedom of establishment (art. 49-55 TFEU) and is a central pillar of EU membership, ensuring to EU citizens and their families the right to live or work in any other Member State. The free movement of persons is one of the four fundamental freedoms of EU law, along with free movement of goods, services and capital, and can be considered the cornerstone of Single Market and European integration.[51]

The concept of free movement of persons has considerably changed since its introduction.[52]In 1951, Belgium, France, Italy, Luxembourg, the Netherlands and West Germany decided to pool the production of coal and steel, first step towards the creation of the Common Market in 1957 within the European Economic Community. Through the free movement of persons, the Treaty of Rome aimed at removing the obstacles to economic integration, leading to regional redistribution of workforce. Indeed, although Article 3(c) of the Treaty of Rome sanctioned that the Community was directed to the 'abolition of obstacles to freedom of movement for…persons', a general right of free movement was not recognized. Thus, free movement was conditioned by specific qualification: the individual or company had to be a national of a Member State, and to be engaged in an economic activity as a worker, a self-employed, a provider or receiver of service. This focus was due to the economic scope of the European Community. According to this perspective, workers, self-employed and service providers were originally considered as a 'factor of production'. In the EEC Treaty there was only a little reference to fundamental rights of the individual, and the focus was more on economic goals, such as the creation of common market as a tool functional in improving the standard of living. Protection of rights was left to the Member States and to their national constitutions and statutes.[53]

Thus, in the beginning the concept of freedom of movement was conceived as closely related to the economically active employee, but step by step was then extended up to encompass any EU citizen, regardless of the exercise of a working activity.[54] From Maastricht onwards, all nationals of an EU Member State are also *citizens* of the EU, and the notion of citizenship, introduced in order to achieve 'a positive contribution to the legitimacy of the

51 For an overview see G. Thusing, *European Labour Law, Back, 2013.*

52 C. Barnard, «Brexit briefing: free movement and the single market», *ILPA, 2016; available* https://www.freemovement.org.uk/series/brexit-briefings-by-ilpa/.

53 E. F. Defeis, *Human Rights and the European Court of Justice: An Appraisal,* Fordham International Law Journal, 2007.

54 It is important to keep in mind the distinction "between the image of the Community worker as a mobile unit of production, contributing to the creation of a single market and to the economic prosperity of Europe" and the "image of the worker as a human being, exercising a personal right to live in another state and to take up employment there without discrimination, to improve the standard of living of his or her family", P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials*, 3rd edition, OUP, 2003, p. 701.

European Union which an active and participatory concept of social citizenship may make' is now related with a double wire binding to the rights to move and reside freely in the EU.[55]

The point is that free movement is a very sensitive field, much more than the other freedoms of the Single Market. This suggests the reason why originally the Treaties granted such rights only to the economically active subjects, which were a potential source of wealth and development for the country of destination by virtue of their consolidated skills and were able to financially support themselves.[56] Also for this reason, free movement of persons has been harshly questioned in recent years, since the consequences of the continuing economic crisis has mobbed political parties and public opinion within several states, and particularly within the UK, to condemn certain basic achievements of free movement. Indeed, immigration has been one of the most controversial issues in the referendum debate. Those who have campaigned for Brexit pointed an accusing finger against the right of EU citizens to travel and work freely in the UK, arguing that cannot be sustainable due to the surge of migrations. Economic uncertainty, high unemployment and deterioration of social policies have aroused grave concerns about the pressure over welfare systems, job market and social security. Strong tensions are emerging between the advantages of free movement on the one hand and the sovereign State's prerogative to control the borders and discriminate the access to the State's territory. Brexit has been accompanied by a strong narrative insisting that Sovereignty is under threat because of migration, as a strong link is highlighted between migration provisions and the notion of Sovereignty: controls over migration is interpreted as being somehow ingrained and deeply rooted in the concept of Nation and 'Stateness'.[57]

After Brexit, in theory, the new structure of relations between UK and EU will not be characterized by a general freedom of movement of persons and workers. Citizens of other Member States would no longer enjoy an automatic right to travel to and work in the UK. Likewise, UK citizens would no longer enjoy EU citizenship rights of freedom of movement in the EU. However, reality is much more complicated and the topic would be discussed in negotiations defining the rules of future relations between UK and EU. Notwithstanding the referendum, Britain is not immediately left out from the EU system: there would be an 'interreign' period during which all norms that have been introduced while implementing the EU legislation would be preserved. Most likely, this stage of negotiations and agreements will be characterized by keeping the status quo. It is noteworthy that EU is not subject to any obligation of dealing alternatives to full membership, but of course the UK will try to get a renewed arrangement. The UK has to deal with a difficult task: it is called upon to identify a path allowing him to reach a compromise between protection of the UK economy on the one hand, and a resolute stance with respect to the growing demand for reinforcement of immigration controls on the other. But almost likely UK is facing

55 P. Stasinopoulos, «Eu Citizenship as a battle of the concepts: travailleur v citoyen», *European Journal of Legal Studies, 2011, Vol 4, N.2.*

56 C. Barnard, *The Substantive Law of the EU: The Four Freedoms, OUP, 2010.*

57 C. Dauvergne, *Challenges to sovereignty: migration laws for the 21 st century,* New issues in Refugee research, Working paper no. 92, UNHCR Evaluation and Policy Analysis Unit, 2003.

a trade-off and it could prove extremely difficult to get the best of both worlds.[58] Since the EU regards free movement as a cornerstone of the Single Market, it is not obvious that the UK can obtain from EU full access to the Single Market without renouncing to controls on EU immigration. What it will happen is still unclear and open fronts are many. Hence, it is particularly interesting to assess the main scenarios for a post-Brexit settlement with reference to trade agreements and future relations of exchange and circulation.

1) A plausible solution could be to maintain free movement with the EU in its current form. In this case, the rules currently in force between EU and the UK about free movement of citizens are not going to be dismissed. This means that EU citizens will be still free to live, work and study in the UK. This outcome could be based on a Norway-style relationship within the European Economic Area. The EEA was created in 1994 to allow European countries, which were not part of the EU to enjoy the Single Market. Nowadays, three of the four member states of the European Free Trade Agreement are members of the EEA, and therefore are enforcing free movement of goods, persons, services, and capital. Because of this participation Norway, Iceland and Liechtenstein have to comply to EU legislation concerning the Single market, for instance regarding employment, social policy, consumer protection, environment and competition law. Non-EU members of the EEA have to conform to rules similar to those introduced in the EU, recognizing legislation of the Single Market, without having any part in deciding it, excepting for a preliminary phase in which their contribution to the rule-making is involved. If the UK decides to go this route, remaining part of the Single Market, then it could not assert its interests in the EU legislative process. Giving up its influence over the EU decision-making, the UK would be in a situation known as "fax democracy". Moreover, members of the EEA are subject to the control of the "Court of Justice of the European Free Trade Association States" (EFTA Court), a supranational judicial body set up on the model of the ECJ, and more or less with the same functions[59]. In addition, there is the EFTA Surveillance Authority that can be regarded as a parallel body of the Commission with regard to the activities of the EEA. The EEA provide its members the ability to activate safeguards when serious economic, societal or environmental difficulties occur. In this way, a Member State of EEA could introduce restrictions on the free movement of persons. However, resorting to these means would imply triggering a negotiation between the partners, and the safeguard measures are also conditioned by systematic evaluation after their adoption. It is not without significance that Norway has never activated the safeguard clause. Indeed, in case of malfunction of the

58 M. Morris, «Beyond free movement? Six possible futures for the UK's EU migration policy», *IPPR, 2016.*

59 Indeed, the EFTA Court has fixed principles similar to those of supremacy and direct effect of EU law. Between the various tasks, EFTA Court has to advisory opinion on the interpretation of the EEA Agreement upon a request of a national court of an EEA/EFTA State, and to decide of actions brought by the EFTA Surveillance Authority against an EFTA State for infringement of the EEA Agreement or the Surveillance and Court Agreement; see C. Baudenbacher, «The Judicial Dimension of the European Neighbourhood Policy», *College of Europe, Department of EU International Relations and Diplomacy Studies*, EU Diplomacy Papers 8/2013.

single market, it falls within the powers of EU to retaliate with proportionate rebalancing measures.[60] For example, EU could introduce restrictions on the import of goods and services from the country.

2) Another scenario that deserves to be taken into consideration is that of a stripped-down version of the Single Market, based only on the free movement of workers, such as it was with the Treaty of Rome of 1957. However, it is almost likely impossible to achieve this result within the EEA, since it is based mainly on freedom of movement of EU citizens, which is a subsequent conquest and a wider outcome compared to the original ECC provisions. A possible way out could be following the example of Switzerland, which is not a member of the EU or the EEA, participating only to the EFTA. Switzerland has arranged a number of bilateral agreements with which it governs its external relations with the EU.[61] According to these treaties, Switzerland can participate to the policy areas, which is interested in. Through the bilateral agreement approach, Switzerland is able to deal flexibly with the EU initiatives. Although the UK could in theory try to position itself in a similar relationship with the Union, most likely it would still not be easy to obtain the maximum benefit in terms of the trade-off outlined above. The Swiss case clearly highlights this difficulty. As Switzerland has signed an agreement on freedom of movement, the deal with EU is not limited to workers, providing residency rights to EU citizens, including jobseekers.[62] Moreover, the bilateral agreements between the EU and Switzerland do not encompass an arrangement on free movement of services. This lead us to consider that the achievements provided by the Swiss model would not be as advantageous as those provided by single market access through EU membership or adhering to EEA. Similarly to the EEA scenario, the option for bilateral agreements entails for the UK a significant loss of influence over the decision-making proceedings, the results of which are after all binding. Finally, Switzerland's recent referendum decision to impose quotas on EU migrants has led to a phase of uncertainty, jeopardizing a number of their other bilateral trade deals and expressing the trade-off (according to an 'all-or-nothing' logic) between controls on EU flows and single market access.[63]

As these two hypothetical scenarios and their effects on trade should have demonstrated, the proper inquiry should be whether Brexit can be a solution to the perceived problem of mass migration to the UK. In theory, Brexit would lead to a harder control over British immigration system, but in practice a successful outcome is not so easily predictable. Control over immigration would remain limited. There are substantial doubts on the capacity of an open economy like that of the UK to close its borders. Indeed, the intricate trade-off between access to the Single Market and controls on migration cannot be regarded as a Gordian Knot that can be solved in the manner of Alexander, with a clean cut. The UK should weigh whether after Brexit it is likely to protect the interests of the British

60 J. Szymańska, «The Future of the Free Movement of People after the Brexit Referendum», *PISM Bulletin N. 65 (915) 2016.*

61 T. Burri, «Free Movement of Persons and Brexit – some Swiss experience from which the United Kingdom could benefit», 2016; available at http://ssrn.com/author=1310040.

62 S. Dhingra and T. Sampson, «Life after Brexit: What are the UK's options outside the European Union?*», London School of Economics, Center for Economic Performance, 2016.*

63 A. Bobić and J. Van Zeben, «Negotiating Brexit: Can the UK Have Its Cake and Eat It?«, *U.K. Const. L. Blog, 2016; available at* https://ukconstitutionallaw.org/.

economy and to achieve a greater autonomy in political choices at the same time, namely in the case of migrations control and more generally with regard to trade legislation applicable to the Single Market. While the EU would prefer the UK remaining within the Single Market by means of the EEA, it is to be excluded that it would permit to raise more stringent border controls. That does not mean that some kind of restriction on the free movement could not be implemented, but the EU would respond foreclosing the UK from fully enjoying the Single Market. It would not be a negligible aftereffect, as the UK has to take into account its economic, social and geopolitical interests, and undoubtedly this would be a frustration for the popular will expressed in the referendum vote. As a matter of fact, integration could be more pervasive than is generally believed.

More in general, this bears to consider how the rise of globalization and supranational dynamics forces us to rethink the relationship between migration control and national Sovereignty in an economically integrated system. Indeed, sovereignty is extensively involved in this developing scenery, since it is challenged, among the other things, precisely by the actual mobility of EU citizens. What is therefore the destiny of the traditional territorially based sovereignty that accompanied the rise of the Nation-state? The capacity to act independently seems to have been restricted by the deepening of transnational economic and political relations and by the need to make certain decisions, which must take into account the international economic system. The growing interdependence on multiple levels and the need to be part of an economically integrated dimension are affecting the way we are accustomed to conceive of Sovereignty, making the traditional conception no longer suitable to describe the current reality. Indeed, "*the principle of the sovereign equality of selfish and self-contained states with each asserting exclusive jurisdiction over activities within its territory (…) fails to acknowledge the toll that economic integration has taken upon the state's ability to control activities within its territory*"[64]. With respect to this process, the State is less and less able to act independently, and its decisions cannot help but relate to the integrated environment in which they are taken. In the European framework, the EU is a significant example of economic and political integration. It has developed an internal market based on the four freedoms of movement of goods, persons services and capital, through a process that begins with the economic integration then moving to a broader perspective of political integration. By and large, European institutions are pursuing the realization of the Single Market using two complementary approaches: it is necessary on the one hand to avoid national legislation hindering cross-border trade ('negative' or 'deregulatory' approach) but it is also pivotal on the other hand to implement a positive integration harmonizing national legislation. In such supranational legal order, the dynamics of relations require that Member States waive part of their sovereignty, since certain decisions in certain areas are the result of the legislative process that takes place at the supranational level. This loss of Sovereignty, however, is often mistakenly conceived in a quantitative rather than qualitative way. The correct perspective should be that "S*overeignty, viewed as an allocation of power and responsibility, is never lost, but only*

64 S. HAINSWORTH, «Sovereignty, Economic Integration, and the World Trade Organization*», Osgo-ode Hall Law Journal 33.3, 1995.*

reallocated"[65]. What we should ask is not merely whether Sovereignty has been lost and how, but also what is received in exchange. In other words, States should make a cost-benefits analysis with reference to this pooling of Sovereignty. This analysis has to assess whether States, transferring Sovereignty, can strengthen their ability to influence counterparts of their external relations.

Coming back to the post-Brexit scenario in the UK, depending on which kind of relationship might be arranged with the EU, many of these Single Market rules would still apply together with freedom of movement, as a prerequisite for market access.

The attempt to preserve as much as possible the benefits of the Single Market would serve to protect the UK economy from the Brexit split, but conversely it would entail keeping free movement and continuing compliance to EU legislation, and the UK, unlike what is the case today, would be excluded from the process of EU rule-writing. It has been observed that Sovereignty in international affairs in the 21st century is about securing outcomes, not about preserving autonomy[66]. From this point of view, it may be true that EU policy implies a limitation to the UK self-determination about access controls. However, leaving the EU could mean losing an effective leverage when important decisions are taken, and above all losing Sovereignty rather than regain it.

6.2 Brexit and Citizenship: How the Rights of the Citizens Will Be Impacted After a Withdrawal by the UK

We now turn to consider the costs of taking back control, with specific regard to the issue of Post-Brexit citizenship. The effect on citizenship, ostensibly, will be impacted by the terms of the withdrawal that was negotiated within the two-year period, be it hard of soft. A hard, and possibly hostile, separation may mean that the EU and UK citizens be treated as third country citizens by each other. A hard separation would necessarily suggest a fuller withdrawal, removing most of the ties that bind both parties in a bid towards regaining sovereignty. On the other end of the spectrum, a softer separation entails the citizens of both parties be given a status that is noticeably more rights than the citizens of a third country. This would be due to the long and shared history, economic co-dependence and geo-political link, stemming from the heavy integration and interconnectedness between both parties that can already be easily observed. Although this is trite law, it must be remembered that citizenship is ultimately a bundle of rights that are traditionally tied to a territory. Naturally, it is almost inevitable that there will be a significant dip in citizenship rights for a withdrawing state, which is a situation applicable to any withdrawal of a country and not unique to the UK. A key conclusion is that there will be an obvious loss of an overwhelming amount of rights by the citizens of a withdrawing state, unless otherwise negotiated. For better or worse, Article 50 TEU ultimately leaves the precise conditions of the withdrawal to the negotiations.[67]

65 J. P. Trachtman, «Reflections on the Nature of the State: Sovereignty, Power and Responsibility», *20 Can.-U.S. L.J. 399, 1994.*

66 See note 1; see also J.P. Trachtman, op cit.: "*the attractiveness of a reallocation of sovereignty should be measured by reference to whether it allows social goals to be achieved more effectively*".

67 P. Athanassiou and S. L. Shaelou, *EU Citizenship and Its Relevance for EU Exit and Secession*,

The political pressure towards a harder separation is palpable. Based on the referendum, most "Leave" voters are likely to have had a harder separation in mind. Nonetheless, a "full" withdrawal from a harder separation would put the citizens of UK into a poorer position than the citizens of a third-country that may be benefitting from non-discrimination clauses embedded within their agreements with the EU. Sadly, that means that UK citizens would have an inferior legal position compared to others.[68] Additionally, this includes forfeiting all the primary benefits of EU citizenship. The very reasons that make EU citizenship valuable, such as Free movement within EU territory and non-discrimination based on nationality, would have to be given up. Ultimately, there would be a reduction of fundamental rights that are unquestionably connected to the status of EU citizenship.[69] The quality and value of UK's citizenship would experience an astronomical decline from losing the loss of free movement rights in the 27 Member States of the EU.[70] As such, prior to leaving the EU it goes without saying that any arrangement in terms of citizenship rights, which would either be bilateral with Individual Member States of the EU or EU-oriented, resembling the current framework of free movement of persons with Switzerland of the EEA must be negotiated. Otherwise, it would certainly will result in an almost free fall in the value of UK Citizenship that would render the UK's withdrawal a Pyrrhic victory.[71] The way forward may be through negotiating a post-Brexit bilateral free-movement arrangement with select Member States but this runs contrary to the fundamental principles of non-discrimination and unity within the EU. Firstly, we must pay more heed to substance rather than labels. The emphasis on rights is crucial in this regard, since the name of the legal status bringing the key rights would necessarily shed the label of citizenship, given the political logic of withdrawal under Article 50 TEU. Instead, core EU Citizenship rights can perhaps still be easily provided without the label of citizenship, with the Switzerland's and EEA Countries' relations with the EU proving to be a feasible alternative. To that end, the dramatic consequences of a shrinking scale of rights can be mitigated by shedding the label of citizenship in favor of a reduced but nonetheless largely preserved position. Through negotiations, the political agenda behind withdrawals can be met by a clear demarcation of citizenship and sovereignty but does not need to upset and throw the lives of those who relied on the pre-secession entitlements guaranteed by Part II TFEU into upheaval. Thus, a delicate balance must be struck. The political undercurrent behind the withdrawal by the UK cannot be understated. Perhaps the essence of democracy is a very primal right to decide who governs you. Whether a dramatic loss of rights by the citizens on both sides will be made inevitable following the UK's withdrawal depends heavily on the possibility that some legal-political mechanism be found to avert such an unsavory outcome.

in D. Kochenov (ed.), EU Citizenship and Federalism: The Role of Rights, Cambridge, CUP, 2016.

68 Such as the Russians and Moroccans, where the case of *Case C-265/03 Igor Simutenkov [2005] ECLI: EU:C:2005:213* showing that these clauses have a direct.

69 See Part II TFEU

70 D Kochenov (ed.), The Henley & Partners- Kochenov Quality of Nationality Index (1st ed.), Zurich: Ideos, 2016 (www.nationalityindex.org).

71 G. Palombella, «Whose Europe? After the Constitution: A Goal-Based Citizenship»3, *International Journal of Constitutional Law,* 2005, n. 357, III.

Yet, any arrangement granting any form of citizenship of the EU to the UK citizens, and perhaps most importantly vice versa, will result in being fundamentally contrary to the prime reasons behind the withdrawal. The determination of amount of real and tangible rights of the UK's citizens, which must be forfeit to achieve the goals of the withdrawals is no easy task. Fortunately, EU legal history offers a wide spectrum of examples of extensive flexibility that was adopted by the system. These include the terms of organizing both the territorial and substantive reach of its law, including within and outside the territory of the Member States. A bilateral approach, rather than the multilateral approach, may be the solution to stem the bleeding of rights that would be needlessly lost. While a bilateral approach implies a potentially significant fragmentation of the space for free movement, it may be the best meeting of the minds. This would translate to maintaining fully free movement arrangements bilaterally, only with member states where most the expats of the UK reside and the most economically successful member states of the EU. Thus, it could be achieved by dropping all but a handful of the member states. For those promised a full withdrawal by the UK, such an approach may be more palatable in terms of settlement and work opportunities.

Given the monochromatic flows of free movement of labour in EU, it is clearly not the UK citizens who are migrating to Romania or Hungary. The reverse is instead true, and dropping free movement arrangements with these member states could be a reasonable way forward to strike at the balance between the political goal of secession and the need to make sure that the UK's secession comes at the heavy cost of substantially losing core rights. Naturally, the consequences of doing so would be drastic for such Eastern European citizens. Not surprisingly, to prefer a strictly multilateral approach and built-in guarantees in the final arrangement against such bilateral moves in the future would be the likely response.[72] Further, this would be an uphill challenge to achieve given the natural political reaction of solidarity by the EU to close ranks in wake of a withdrawal by the UK.

Nonetheless, there are many permutations of statehood among member states of the EU, which are not as exceptional and rare as the literature sometimes tend to assume. The EU, surprising as this may seem, has always been overwhelmingly flexible at its core. This flexibility is highlighted in the wording of Article 50 TEU, where the terms of the withdrawal are not yet written in stone. The withdrawal negotiations, no doubt, would manifest such flexibility.[73] Anything is possible, from the preservations of EEA-like free movement regime between the EU and the UK to the bilateral arrangements between UK and member states of its choice following the withdrawal. Cutting any forms of free movements is extreme, and thus not a politically feasible option. Instead, allowing for a broad margin of appreciation is particularly sound, given the general context of flexibility of citizenship, nationality, territory and rights arrangements that the EU must offer in the context of constitutional change which must, necessarily, include its own.

72 D. Kukovec, *Europe's Justice Deficit?*, Dimitry Kochenov, Grainne de Burca and Andrew Williams ed., 2015, p.319.

73 D. Kochenov and M. Van Den Brink, «Secessions from EU Member States: The Imperative of Union's Neutrality», *Edinburgh School of Law Research,* 2016, n. 6.

7. Conclusion

In many ways, it is helpful to remember that a secession by the UK is now simultaneously making a precedent but ultimately not a unique occurrence. Sovereignty, or at least our notions of it, have changed and transformed in this increasingly globalized world. In a world anchored around supranational integration, to be truly sovereign in the traditional sense is not possible simply because it is not feasible. The withdrawal of the UK from the EU underscores the importance and the very expression of an attempt to regain and preserve sovereignty and autonomy. Unfortunately for the voters who were inclined to "Leave", truly taking back control is far easier said than done in the interconnected legal-political arena we live in. The invocation and operation of Article 50 TEU especially highlights the underlying tensions and problems behind such withdrawals. The scope and operation of the Great Repeal Bill to combat the legal lacuna left in wake of Brexit is the subject of ferocious legal debate. The powers required to trigger Article 50, considering the recent High Court decision, insinuates a deeper problem of a potential conflict between popular sovereignty and parliamentary sovereignty that cannot be easily resolved. However, the impact of Brexit on Citizenship may ultimately be dramatically exaggerated. A newly reformed EU would march on, with or without the UK's membership. The UK, similarly, existed long before joining the ECC and would, for better or for worse, continue to do so. Amidst the hype and fracas flowing from the potential withdrawal, it is crucial to not inflate the consequences of such withdrawals. Nonetheless, it is pertinent to note that the biggest threat that Brexit poses to citizenship may instead arise internally rather than in the international sphere. On the contrary, while the rights of the citizens may remain largely unscathed, a bigger problem looms within the domestic sphere. For the UK, the 2015 referendum itself highlighted a deeply divided demographic. Independentism in the UK has found leverage on the bargaining table, where much of Scotland and Ireland had voted in preference for remaining in the UK. A deeper division lies in age, where the younger voters may have to live in a post-Brexit UK that the older majority of the populace have chosen. From a political perspective, the government is trapped in an unsavory conundrum where regardless of the outcome it is bound to leave many dissatisfied. Likewise, the dangers of the UK's potential withdrawal lie not in the UK's secession itself. The cogs of the newly reformed EU will doubtlessly continue to turn after this brief hiccup. The true problem lies within the deeply rooted structural issues with the EU. The fracturing and fragmentation of the EU poses a real risk that the disenfranchised member states may follow the UK's example and elect to move away from the pack. While the world will spin on after Brexit, the terms of such a separation must be properly and rationally negotiated. The four fundamental rights must be preserved, or at the very least left largely intact, if the UK and EU are to have effective and cordial relations. The UK, somewhat ironically, is not an island onto its own and still have deep geo-political and socio-economic ties to the rest of the EU. Citizenship, or at least its cumbersome label, needs to be discarded. Yet, the core rights of citizens from either side ought to be preserved as best as possibly could. A fundamental conundrum to this withdrawal would be that it would run contrary to the deeper reasons behind the Brexit movement. Fortunately, the EU has a long history of flexibility and different permutations of statehood. Bilateral, rather than multilateral, arrangements may prove to be a more acceptable middle ground. When the dust settles, a withdrawal by the UK would certainly not be one of

overwhelming and dramatic consequences on the global scale. The real danger, and perhaps an important agenda to focus on during and post-withdrawal, would be the domestic and structural problems that need to be addressed. Unless efforts are made to reconcile deep domestic demographic divisions, and remedy the structural tensions and dissatisfactions that made the Brexit movement possible, the UK and EU face a real risk of allowing a trickle to become a flood. At the end of the day, internal fracturing and subsequent withdrawals pose a much graver threat than the international concerns that are potentially a paper tiger.

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