

## Studies and Comments

### The United Kingdom withdrawal procedure from the European Union\*

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#### **Abstract**

*This article is about the United Kingdom's withdrawal procedure from the European Union, in the aftermath of the Brexit referendum. It analyses the action of the political institutions involved in the withdrawal agreement negotiations, in particular, the constitutional dispute about the exit deal between the UK Government and the Parliament, as well as the way the European Union acted in the course of the whole procedure. Special attention will be given to the decisions delivered by the UK Supreme Court and by the European Court of Justice regarding the withdrawal procedure. The article aims to offer a new perspective, different from the prevailing accounts on the United Kingdom withdrawal negotiations, one that is based on a critical analysis of the attitudes of the main actors in the exit agreement, trying to apprehend their interaction during the whole process.*

**Keywords:** *European Union; United Kingdom; withdrawal agreement; ratification; separation of powers; Brexit.*

**JEL Classification:** K23, K33

#### **1. Introduction**

The Brexit referendum brought to light a deeply divided country on European Union membership. That cleavage was also to be found within the UK Parliament. The Government resolution to give effect to the popular vote driven therefore a constitutional dispute between the executive and legislative branches throughout the whole withdrawal procedure. The division of powers conflict was to be refereed by the judiciary in different occasions, paving the way for landmark decisions both by the UK Supreme Court and by the European Court of Justice.

On its part, the European Union took a strong stance during the withdrawal agreement negotiations with the British Government, which enabled it to accomplish a valuable deal. However, the UK domestic political struggle also seemed to have played a role in the exit talks, and this added to the high levels of legal and political complexity that marked the first enforcement case of Article 50 TEU.

This text starts by addressing the early steps of the exit procedure, with the political dispute between UK Government and Parliament over the withdrawal

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\* I am indebted to my colleague Professor Ann Henshall for her very helpful linguistic revision of the article.

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notification, which was settled by the Supreme Court. It then analyzes the EU strategy for the negotiations, before focusing on the withdrawal agreement itself. The following section is devoted to the refusal of the agreement by the UK Parliament. The last part is centered on the rise of a new UK Prime Minister, and the reaching of a revised agreement that allowed the United Kingdom to leave the European Union.

The article aims to offer a new perspective that differs from the prevailing accounts on the United Kingdom withdrawal negotiations, which tend to embrace dichotomic paths. Based on a critical appraisal of the attitudes of the main actors in the exit agreement, the article aims to catch the way they interacted during the whole procedure.

## 2. The withdrawal notification and separation of powers

In the 2016 referendum the British people voted for the United Kingdom to exit from the European Union. Withdrawal from the EU is regulated by Article 50 of the Treaty on the European Union, which states that the procedure should start by notifying the European Council. Following the referendum, Prime Minister Theresa May was determined to give effect to the decision of the people, initiating the withdrawal procedure by notifying the European Council.

At the domestic level, however, there was a dispute on whether the notification to leave the European Union was a Government function in the framework of foreign policy, namely, within its treaty-making power or, conversely, whether the notification of withdrawal had to be submitted to the previous approval of Parliament. Beyond the constitutional debate over the legal nature of the notification, the issue was also the object of strong political discussion, in particular, by those that saw in the Parliament the last chance to avert Brexit, taking into account that the majority of MPs voted to remain in the EU in the referendum.

In this context, the pro-European activist Gina Miller and citizens whose right of residence in the United Kingdom stemmed from European law went to court, with a legal procedure against the Secretary of State for Exiting the European Union, on the Government's intent to notify the EU without approval from the Parliament. The United Kingdom Supreme Court delivered a milestone decision on the constitutional evolution of the UK political system.<sup>2</sup> The Supreme Court recalled the historical evolution from the Crown's absolute power system to a model of separation of powers where the legislature is assigned to Parliament, the executive is entrusted to the Government, and the judicial function is exercised by the courts (No. 41).

The Supreme Court stated that the Parliament has the right to make and undo laws, noting that the legislative procedure starts by the laying of a Bill, containing a proposed law – which in most cases has to be approved by both Houses in order to become law, a statute. Parliament lays down the law through statutes, with a rank of primary legislation (No. 43).

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<sup>2</sup> United Kingdom Supreme Court, Judgment *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5, January 24, 2017.

The judiciary identify and apply the law, although in some areas the law had long been developed by judges themselves – that is common law. Common law, however, cannot be inconsistent with the law laid down by Acts of Parliament, due to the principle of Parliamentary sovereignty (No. 42).

In turn, the exercise of administrative powers is for the executive, which is accountable to Parliament. In addition, Government action has to be compatible with legislation and common law. Whenever there is a legislative authorization by the Parliament (statute), the Government has ruling power. However, regulations and all rules adopted by the executive – the so-called secondary or delegated legislation – must always be authorized by Parliament, and their validity depends on the conformity with the original statute (No. 45-46)

Furthermore, Government is in charge of the so-called Royal prerogative – considered as residual powers of the Crown – to be exercised in accordance with Parliamentary legislation. The residual prerogative includes the investiture and dissolution of Parliament, diplomacy, declaration of war and peace, regulation of the armed forces, government of colonial territories, the making of treaties, and the award of honours (n°47). The residual nature of the Royal prerogative implies that the exercise of the legislative power in those areas entails the occupation of the regulatory field – due to Parliamentary sovereignty (no. 48).

The key area of Royal prerogative concerns foreign affairs, which includes diplomacy, the use of armed forces abroad and the making of treaties (No. 54). Thus, the issue of notification of withdrawal from the EU – and the subsequent drafting of the Treaty – should be raised within the framework of this constitutional evolution.

Yet, in the analysis of the separation of powers concerning the making of treaties, the Supreme Court changed its approach from the evolution of the constitutional system to an appraisal of the special nature of European law in the context of international law. Indeed, the general rule that confers the Government with the power to make or unmake treaties, exercised without legislative authority and not subject to judicial review, would be based on the dualist theory of international law, according to which international law and domestic law operate in separate spheres, and the norms arising from international law would only have effects on the relations between States. As a result, international treaties would not be part of UK domestic law, and its rules could not be invoked before British courts (No. 55). Thus, the dualist system followed by the UK Constitution is a consequence of Parliamentary sovereignty, protecting the supremacy of the legislative power vis-à-vis the role of Government in the area of international relations (No. 57).

However, the Supreme Court recalled that through the European Communities Act in 1972 the Parliament authorized EC law to become a source of UK law, to be applied by national courts, and even prevailing over all domestic sources of law (No. 60). Hence, it was an Act of Parliament that allowed European law to enjoy a preferential status among the United Kingdom sources of law. The withdrawal from the European Union would therefore entail a change in the United Kingdom's domestic law, affecting the scope of British citizens' rights. Thus, the question at stake was whether the Government could make changes to the national legal order without Parliament's previous consent (No. 69).

The Supreme Court recalled that a fundamental role of any constitution is to identify the sources of its law. By conferring the provisions of the EC legal order with the status of UK source of law, the 1972 European Communities Act was constitutional in nature. This situation would cease with the withdrawal from the European Union (No. 80). So, the United Kingdom leaving the EU was to be considered a significant change to its basic law, going beyond the scope of the Royal prerogative that entrusted Government to make and unmake treaties (No. 86). On this basis, the Supreme Court decided that the Government could not give article 50 TEU notice without prior sanction from the UK Parliament (No. 115).

After Parliamentary approval of the Notification of Withdrawal Bill,<sup>3</sup> Prime Minister May reported to the President of the European Council.<sup>4</sup> The letter stated the intention to reach a fair agreement, aiming at an orderly exit from the European Union. Regarding the scope of the negotiations, Mrs. May proposed that the withdrawal agreement should be concluded alongside the terms of the future partnership with the European Union.

With regard to the economic relationship, Mrs. May stated that the United Kingdom did not seek membership of the internal market (p. 4), given the EU's approach on the indivisibility of four freedoms. Indeed, migration had been at the basis of the British malaise that led to the referendum, and the voters' decision,<sup>5</sup> so Mrs. May excluded that a future agreement could include free movement of people with the European Union. Instead, the Prime Minister proposed an ambitious free trade agreement between the UK and the EU, covering crucial sectors for their linked economies, such as financial services and network industries (p. 5).

Concerning the withdrawal agreement, the priority was to safeguard the rights of European citizens living in the United Kingdom, as well as the rights of British citizens in the European Union countries (p. 4). The letter referred to the need to determine a fair settlement of the UK's rights and obligations as a departing member state, and to establish a transitional period for citizens and business to adjust to the new arrangements. Mrs. May also mentioned the commitment to the Northern Ireland peace process and its will to avoid a hard border between the two countries after Brexit (p. 5).

### 3. The 2017 elections

The referendum had exposed a deeply divided country on the European Union, with Brexit prevailing for 52% of citizens, against 48% of voters for remaining. Yet, the cleavage of the popular vote looked less clear within the UK

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<sup>3</sup> Chaltiel, Florence. "Le Brexit, la souveraineté du peuple et le parlementarisme britannique". *Revue de l'Union Européenne* 606 (2017): 129.

<sup>4</sup> The Prime Minister, March 29 (2017), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604079/Prime\\_Ministers\\_letter\\_to\\_European\\_Council\\_President\\_Donald\\_Tusk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf) (consulted on 1.07.2020).

<sup>5</sup> Evans, Geoffrey, Noah Carl and James Dennison. "Brexit: The Causes and Consequences of the UK's Decision to Leave the EU". In *Europe's Crises*, edited by Manuel Castells *et al.* (Cambridge: Polity Press, 2018): 389-94.

Parliament and the political elite. According to available studies, 73% of MPs would have voted to remain in the European Union. Although this trend was more restrained within the Conservative Party, 56% of its MPs voted against leaving the Union on the referendum.<sup>6</sup> Hence, Mrs. May faced a Parliament composed by a majority of pro-European members, to whom she would have to submit the final agreement to leave the European Union. For this reason, but also to strengthen her own political weight during the negotiations, she decided to call general elections. Mrs. May believed in the renewal of the Conservative majority, estimating to benefit from a poor result of the opposition, in view of the lower prospects of Mr. Corbyn.

The Conservative manifesto on Brexit took up the principles set out in the withdrawal notification, promising to comply with the decision taken by the popular vote. As for the terms of the future relationship with the European Union, the manifesto excluded not only the single market membership, but also the customs union.<sup>7</sup> For its part, the Labour manifesto also sustained its commitment to the outcome of the referendum. However, it proposed to implement the popular decision through a closer relationship with the European Union, with single market and customs union membership. It also declared that the agreement should protect jobs, workers' rights and environment, ensuring Parliament's association to withdrawal negotiations.<sup>8</sup>

In the general election, the Conservative Party achieved 42% of the vote, with 317 MPs; against 40% for the Labour Party, with 262 MPs.<sup>9</sup> Thus, the Conservative Party lost the overall majority in Parliament, and had to make a confidence and supply agreement with the Democratic Unionist Party of Northern Ireland. Without a majority, Mrs. May was even more vulnerable to the political tensions on the European Union issue within the Conservative Party, which was divided among hard brexiteers, who defended exiting from the EU without agreement, soft brexiteers who supported a withdrawal agreement, and remainers, with a pro-European commitment.<sup>10</sup>

#### 4. The European Union strategy

The prospect of UK withdrawal was initially understood as a threat by the European Union. Indeed, the success of European integration was due in part to the European Communities' ability to attract new countries. The enlargement process

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<sup>6</sup> Jim Edwards, "This is the size of the majority in the House of Commons against Brexit", *Business Insider*, November 3, 2016, <https://www.businessinsider.com/majority-house-of-commons-against-brexit-2016-11> (consulted on 1.07.2020).

<sup>7</sup> "The Conservative and Unionist Party Manifesto 2017" (2017): 36, <http://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2017/localpdf/Conservatives.pdf> (consulted on 1.07.2020).

<sup>8</sup> "The Labour Party Manifesto 2017" (2017): 24–27, <https://labour.org.uk/wp-content/uploads/2017/10/labour-manifesto-2017.pdf> (consulted on 1.07.2020).

<sup>9</sup> "Results and turnout at the 2017 UK general election", <https://www.electoralcommission.org.uk/our-work/our-research/electoral-data/2017-uk-general-election-results> (consulted on 1.07.2020).

<sup>10</sup> Duffy-Meunier, Aurélie. "Refléxions de nature constitutionnelle sur la loi sur le retrait du Royaume-Uni de l'Union Européenne, L'European Union (Withdrawal) Act 2018". *Revue trimestrielle de droit européen* 4 (2018): 771.

was one of the pillars of the so-called dynamics of integration, initiated in 1972 by the United Kingdom. The UK's exit represented the opposite of the enlargement: a Member State that gives up membership, and negotiates the terms of its withdrawal. For this reason, Brussels feared that the United Kingdom could be a harbinger to reverse the process that had made European integration stronger. If the access of new countries was framed by an enlargement policy, the United Kingdom abandonment could represent the first step towards European disintegration. For those reasons, the Commission approached the United Kingdom withdrawal as an existential problem: it was essential to curb the danger of contagion. The European negotiating strategy should therefore be strong, uniform and demanding so that the severity of exiting the EU would deter the risk of transmission to other Member States.

One of the EU's main differences with Mrs. May's notification concerned the scope of the negotiations. While the United Kingdom wanted the withdrawal agreement to be discussed alongside the terms of the future relationship, the Union requested a separate approach, with the withdrawal agreement negotiated first, and the future relationship to be discussed after formal exit, as a country third.

Regarding the content, the Union confirmed the importance of ensuring an orderly UK departure, safeguarding the status and rights of the EU citizens affected by Brexit.<sup>11</sup> The financial settlement was more demanding, with the intent that the agreement would include the United Kingdom's obligations undertaken before the withdrawal, such as the liabilities arising from the EU budget and from the Multiannual Financial Framework, and covering the costs of relocating the European agencies from UK territory. The idea was taken up that leaving the European Union would entail high financial costs, in line with the intended deterrent effect of the withdrawal agreement. Indeed, at the beginning of the negotiations, the Union envisaged that the UK's exit bill could reach 100 billion euros.<sup>12</sup>

Concerning Ireland, the European Union expressed its commitment to support the peace process, as well as the respect for existing bilateral agreements between States, such as the Common Travel Area. The guidelines mentioned the need for flexible solutions with the aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal order.

It should be noted that British members of the European institutions urged the EU to negotiate firmly, suggesting that an agreement that set strict conditions would never obtain the approval of the UK Parliament. It is true that in Brussels there was still an expectation of a Brexit reversal, similar to what had happened in other member states with referenda on European issues. This illusion would last through most of the negotiating procedure.

### **5. The withdrawal agreement**

The negotiations started in mid-2017 and proceeded according to the roadmap set by the European Union. At the end of the year, the parties reached an

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<sup>11</sup> European Council, EUCO XT 20004/17, *Special Meeting*, April 29 (2017), <https://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf>. (consulted on 1.07.2020).

<sup>12</sup> Jim Brunsten, "Barnier says UK must accept principle of Brexit bill", *Financial Times*, July 12, 2017, <https://www.ft.com/content/f149365a-66f8-11e7-9a66-93fb352ba1fe>. (consulted on 1.07.2020).

understanding on the central issues for withdrawal from the European Union, adopting a progress report of the first phase.<sup>13</sup> While stressing that nothing is agreed until everything is agreed, the joint report referred to the commitment on the rights of European citizens living in the United Kingdom, as well as that of British citizens in EU countries – ensuring the right to permanent residence, and equal treatment.

Regarding the so-called exit bill, there was a consensus on the methodology for fixing the financial costs to be supported by the United Kingdom due to the withdrawal from the EU, as well as a set of principles for calculating the value. Issues concerning methodology and payment schedule were relegated to the second phase of the negotiations.

As for the relations between the Republic of Ireland and Northern Ireland, the report reaffirmed the commitment to the peace process and the 1998 agreements, as well as the intention to maintain north-south cooperative relations and to avoid a physical border between the two countries, taking into account the political and historical context. Notwithstanding this, it said that in the absence of the agreed solutions, the United Kingdom would maintain full alignment with the rules of the internal market and the customs union, which was considered as the backbone of north-south cooperation and of the peace agreements (No 49).

In view of the progress made, the EU Council adopted the guidelines for the second phase of the negotiations. These guidelines concerned the transition period and the setting of the final text.<sup>14</sup> The Union declared that the transitional period would expire at the end of 2020. During that period the United Kingdom would fully implement the *acquis communautaire*, would be part of the single market and the customs union, as well as the EU's common commercial policy, yet be able to conclude trade agreements with third countries.<sup>15</sup> Moreover, the United Kingdom would no longer participate in the EU institutions and in its decision-making during the transition period.

With the reopening of negotiations, the question of the Irish border would soon be the trigger for difficulties in the United Kingdom. The plan to prevent a physical frontier had been conditioned by the joint report. Mr. Barnier claimed that as long the agreement on the future relation was not achieved, Northern Ireland should remain in the internal market. The UK Government argued that an alternative would be for a customs solution based on new technology to avoid controls. Not convinced with the existent technologies, the Commission required a safeguard clause to be included in the withdrawal agreement in order to prevent the return of the physical frontier, the so-called backstop plan. The safeguard clause provided that in case the future relationship could not be agreed upon by the end of the transitional

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<sup>13</sup> “Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1”, December 8 (2017), [https://ec.europa.eu/commission/sites/beta-political/files/joint\\_report.pdf](https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf), (consulted on 1.07.2020).

<sup>14</sup> Council of the European Union, XT 21004/18 ADD 1 REV 2, January 29 (2018), <https://www.consilium.europa.eu/media/32504/xt21004-ad01re02en18.pdf>, (consulted on 1.07.2020).

<sup>15</sup> Larik, Joris. “Brexit, the Withdrawal Agreement, and Global Treaty (Re)Negotiations”. *American Journal of International Law* (2020): 25.

period, the United Kingdom would remain in the customs union to avoid a hard border, and Northern Ireland would continue aligned with single market rules.<sup>16</sup>

The fears raised by the backstop clause in UK politics were mainly due to the application timeline: as it could not be revoked unilaterally, nor did it contain a deadline, it was considered in Parliament as a legal device to retain the country in the customs union for a long period of time. Moreover, it was also supposed to serve as a starting point in the negotiations on the future economic relationship.<sup>17</sup> Hence, it would favor the United Kingdom to have a permanent link with the EU customs union.

The final draft of the withdrawal agreement was reached in late 2018, in line with the interim reports.<sup>18</sup> In addition to the backstop clause on the Irish border, the final agreement confirmed the commitment to citizens' rights. As regards the financial costs, the amount of the UK exit bill were to be found using the methodology and quantitative principles fixed by the agreement. According to the UK Government, the estimated global financial burden for leaving the Union would be between 40 and 45 billion euros (£35-39 billion)<sup>19</sup>, which was less than the Commission's initial claims.

The approval of the withdrawal agreement by the Cabinet led to a split in the UK Government, with some Eurosceptic members leaving. The Brexit Secretary stated that the negotiations had produced an acceptable agreement, with the exception of the safeguard clause. Mr. Dominic Raab considered that the terms of the backstop gave the European Union a veto on keeping the United Kingdom in the customs union that could go on indefinitely, a subject that had to be renegotiated.

The dispute over the backstop was magnified by the Attorney-General's opinion on the withdrawal agreement. He expressed that by not allowing for a unilateral untying of the United Kingdom, or providing for a deadline on its application, the safeguard clause could serve as a political device to bind the country in a permanent customs union with the European Union.<sup>20</sup>

## 6. Parliamentary ratification

The Parliament had to ratify the agreement negotiated by the Government. In case of refusal, the United Kingdom would leave the EU at the end of March 2019,

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<sup>16</sup> de Mars, Sylvia *et al*, "The Protocol on Ireland/Northern Ireland (EU-UK Draft Withdrawal Agreement)" (2018): 4, <http://dx.doi.org/10.2139/ssrn.3287729>.

<sup>17</sup> "Brussels seeks permanent post-Brexit customs union", *Politico*, November 13, 2018, <https://www.politico.eu/pro/brussels-wants-permanent-post-brexit-customs-union/> (consulted on 1.07.2020).

<sup>18</sup> *Official Journal of the European Union*, C 66 I, February 19 (2019).

<sup>19</sup> HM Government, "Explainer for the agreement on the withdrawal from the European Union", November 14 (2018): 30, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/759020/14\\_November\\_Explainer\\_for\\_the\\_agreement\\_on\\_the\\_withdrawal\\_of\\_the\\_United\\_Kingdom\\_of\\_Great\\_Britain\\_and\\_Northern\\_Ireland\\_from\\_the\\_European\\_Union.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759020/14_November_Explainer_for_the_agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union.pdf) (consulted on 1.07.2020).

<sup>20</sup> UK Parliament - Houses of Commons, December 3 (2018), <https://hansard.parliament.uk/commons/2018-12-03/debates/67B4BC40-0578-417D-9467-F737BDD5079C/WithdrawalAgreementLegalPosition> (consulted on 1.07.2020).



two years after the notification of withdrawal, unless the Member States agreed to extend the deadline. Thus, the option for MPs would be between leaving the European Union in an orderly fashion, or exiting the EU without agreement, which would occur by default.

However, the most adamant remainers had not ceased trying to avoid the announced outcome. In fact, members of the UK, European and Scottish Parliaments filed a petition in a national court on how the UK withdrawal notification could be unilaterally revoked, and, if so, whether the country would maintain the EU membership. They wanted the court to refer the question to the European Court of Justice for a preliminary ruling.

The European Commission tried to preclude the ECJ from delivering its decision, stressing the hypothetical nature of the question referred. However, the Court of Justice noted that one of the petitioners was a member of the UK Parliament, which had to vote on the withdrawal agreement. He would thus have an interest in the question referred, since it would clarify the options available (No. 29).

For the Court of Justice,<sup>21</sup> Article 50 TEU enshrines the sovereign right of a Member State to leave the European Union (No. 56). Although it does not refer to the revocation of the withdrawal notification, the Court stated that it reflects the sovereign decision by that State to retain its status of EU Member State, without being affected by the withdrawal notification (No. 59). As a prerogative arising from sovereignty, the revocation of the withdrawal notification would not depend on the consent of the Member States, as was argued by the Council and the Commission.<sup>22</sup>

Thus, the Court of Justice declared a Member State has the right to revoke that notification unilaterally, until the last moment of European Union membership (No. 73). By widening the range of choices available to the British MPs,<sup>23</sup> the Court of Justice entered the arena of political conflict over the UK's withdrawal from the European Union. Albeit its sound legal reasoning, the ECJ delivered a decision of dubious opportunity, insofar as it allowed for the judicialization of a political dispute.<sup>24</sup>

At the EU level, the withdrawal agreement was approved by the European Council. Its decision was confirmed at the end of the year when the European Council declared "that the backstop is intended as an insurance policy to prevent a hard border on the island of Ireland and ensure the integrity of the Single Market", adding that "it is not open for renegotiation."<sup>25</sup> The scope of the safeguard clause was clarified at the request of Mrs. May, who was trying to secure additional reassurances.

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<sup>21</sup> European Court of Justice, *Andy Wightman and others v. Secretary of State for Exiting the European Union*, case C-621/18, December 10 (2018).

<sup>22</sup> Armstrong, Kenneth. "The right to revoke an EU withdrawal notification: putting the bullet back in the article 50 chamber?". *The Cambridge Law Journal* 78, no. 1 (2019): 37.

<sup>23</sup> Koutrakos, Panos. "The European Court of Justice and the Politics of Brexit". *European Law Review* 44, no.1 (2019): 1.

<sup>24</sup> Gomes, Conceição. "A formação de magistrados como instrumento de transformação da justiça". *Revista Crítica de Ciências Sociais*, Número especial, (2018): 238.

<sup>25</sup> European Council, EUCO XT 20022/18, Special Meeting, December 13 (2018), <https://data.consilium.europa.eu/doc/document/XT-20022-2018-INIT/en/pdf> (consulted on 1.07.2020).

The Prime Minister delayed the Parliament vote on the withdrawal agreement for 2019, fearing its rejection by hard brexiteers and Irish Unionists MPs, along with the opposition.<sup>26</sup> However, the deferral of the vote did not prevent Mrs. May from suffering a weighty defeat, with the withdrawal agreement rejected by 432 MPs – a historical difference of 230 votes.

Mrs. May tried once more to get concessions from the European Union on the backstop, in order to seek the approval of the UK Parliament. In response, the European Union reiterated that there was only one withdrawal agreement, the negotiations of which had been concluded, so that its content could not be reopened.

The UK Government organized another vote on the agreement, before the deadline for EU withdrawal. However, Parliament again denied to ratify the agreement in March, with a gap of 149 MPs. Mrs. May's efforts nonetheless allowed dozens of votes to be taken among Conservatives MPs.

In view of the refusal to ratify, the UK Parliament was called upon to express preference over alternative proposals to Mrs. May's Brexit deal, through indicative votes that could pave the way for a new approach. The votes ranged from reversing the withdrawal notification to leaving the European Union without agreement; from holding a confirmatory referendum on the agreement to remaining in the customs union; from re-entering EFTA – and remaining in the single market – to concluding a free trade agreement with the EU. Still, all alternatives were rejected by Parliament, worsening the impasse created over the exit from the European Union.

Mrs. May used also a stratagem to flank procedural hurdles that precluded the vote on a proposal that had been rejected twice: she would only present the withdrawal agreement, separated from the political declaration on the future relationship. This would not, however, prevent Parliament from rejecting the agreement for the third time, by a difference of 58 votes.

The continuous rejection of the withdrawal agreement, as well as the refusal of any alternative proposal by the House of Commons votes, showed the UK Parliament's troubles in dealing with Brexit.<sup>27</sup> Indeed, as noted by the *Financial Times*, “the discomfort of a majority of MPs with the 2016 vote to leave the EU is a root cause of today's political paralysis”.<sup>28</sup>

Even if the majority of MPs understood that the decision to leave the EU, due to its technical and political complexity, should have been taken by the representative institution alone, the point is that the political imbroglio generated by the behavior of its members did not make clear the comparative advantages of a decision by Parliament.

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<sup>26</sup> Heinkelmann-Wild, Tim *et al.* “Divided they fail: the politics of wedge issues and Brexit”. *Journal of European Public Policy* 27, no.5 (2020): 732.

<sup>27</sup> Stockemer, Daniel. “The Brexit negotiations: If anywhere, where are we heading? “It is complicated”. *European Political Science* 18 (2019): 116.

<sup>28</sup> Editorial Board, “The Conservative leadership election is a badly flawed exercise”, *Financial Times*, June 26, 2019, <https://www.ft.com/content/6ba2367a-9822-11e9-9573-ee5cbb98ed36>. (consulted on 1.07.2020).

Mrs. May made a late attempt to approve the agreement, seeking a cross-party deal with the opposition Labour Party. Considering the latter's claims about the future relationship with the EU – the customs union – and the will to submit the agreement to a confirmatory popular vote, the Government passed a draft understanding. In addition to the cold response from the opposition, the plan would unleash the fury of Conservative Eurosceptics, who considered the possibility of a new referendum as a betrayal. Caught up in the avalanche of protest in the Party, plus the Labour refusal and the criticism from the Irish Unionists, Mrs. May resigned as Prime Minister.

### 7. The new UK Government

The continual rejection of the agreement produced a delay in exiting from the European Union, which led to the UK having to take part in the 2019 European elections. In fact, having not accomplished the withdrawal, the United Kingdom remained a member state of the European Union.

The European Parliament elections overlapped the turmoil in British politics, with deep splits about Brexit. Considering the UK Parliament's failure to reach a consensus for the approval of the withdrawal agreement, Nigel Farage saw the opportunity to restore his leading role in EP elections. Taking advantage of a new political group – the Brexit Party – which clamored for the immediate withdrawal from the European Union, the populist speech attracted the vote of the citizens frustrated with the EU exit story.<sup>29</sup> In fact, the Brexit Party won the European elections, with 30.7% of the votes and 29 MEPs, in contrast with the Conservative Party, reduced to 8.8%, and only four MEPs. For its part, the Labour Party ranked third, with 13.7% and ten MEPs.<sup>30</sup>

The outcome of the European elections was a barometer of citizens' behavior: the Brexit Party succeeded in emptying the support of the Conservative Party, which ranked fifth.<sup>31</sup> Hence, Conservative voters had shown a clear preference for leaving the European Union, unlike the erratic attitudes of its MPs. As a result, the bleeding of votes in the Conservative Party in the European elections would contribute to radicalize the race for the leadership, concerning the European Union withdrawal.

The choice of Head of Government would be made in new way: the Prime Minister would result not only from the choice of MPs,<sup>32</sup> but also from the Party members' vote. In the first stage, Boris Johnson was the favorite among Eurosceptic runners, which saw him the best contender to end the electoral bleeding. In turn, Jeremy Hunt was the candidate supported by moderate MPs. In the second stage Boris Johnson conquered two thirds of the Party membership vote.

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<sup>29</sup> Mény, Yves. *Democracias Imperfeitas. Frustrações Populares e Vagas Populistas* (Lisboa: Imprensa de Ciências Sociais, 2020), 163.

<sup>30</sup> European Parliament, "2019 European elections results" (2019), <https://election-results.eu/national-results/united-kingdom/2019-2024/>, (consulted on 1.07.2020).

<sup>31</sup> Heinkelmann-Wild, *et al.*, "Divided they fail: the politics of wedge issues and Brexit", 735.

<sup>32</sup> Levitsky, Steven and Ziblatt, Daniel, *Como Morrem as Democracias* (Lisboa: Vogais, 2018), 115.

It should be noted that during Mrs. May's selection as leader of the Conservative Party, Boris Johnson was disregarded by MPs in the early ballots, for his supposed lack of profile to become Prime minister. Three years later, however, he was able to gather wide support both from MPs and from Party members. The European Union's stubbornness dealing with Mrs. May's requests to renegotiate the Northern Ireland backstop would have contributed to the change of mind about the UK Government leadership.

Mr. Johnson soon proved a strong leader, in line with suspected illiberal democracies:<sup>33</sup> having started by discharging Conservative MPs who had voted the law that prevented leaving the EU without a deal<sup>34</sup> – in British politics, 'withdrawing the whip' – he then declared the suspension of Parliament until mid-October, using the so-called Prorogation power. Bearing in mind that the exit day was scheduled for the end of the month, the suspension would pave the way for leaving the EU without an agreement, frustrating the role of the Parliament.

The decision to suspend Parliament was received as a constitutional coup not only by the opposition, but also by Conservative MPs who supported an orderly exit from the EU. Like Mrs. May's withdrawal notification, the prorogation was to be ruled by the judiciary.

Some British courts saw the suspension of Parliament as a political decision that should not be resolved by the judicial power, on the grounds that the issue was not justiciable. However, the Supreme Court claimed competence on the subject, to ensure that the Government was not using the prorogation power unlawfully with the effect of preventing Parliament from carrying out its proper functions (No. 34).<sup>35</sup>

For the Supreme Court, the extent of prorogation used by Mr. Johnson violated the principle of Parliamentary sovereignty, as well as the constitutional principle of the Government's accountability to Parliament, insofar as it prevented the latter from overseeing the executive and from exercising its legislative authority (No. 40-52). Since the reasons for Parliamentary suspension were rejected on the basis of evidence provided, the Supreme Court declared prorogation null and of no effect, adding that it was outside the powers of the Prime Minister to give it (No. 69).

## 8. A new withdrawal agreement

If Mr. Johnson's leadership approach could be taken for granted, the European Union's approach towards the impasse over the withdrawal agreement witnessed a surprising turnaround, with President Juncker agreeing to discuss the Irish border issue, should the United Kingdom offer a viable alternative.

In the background there was a report on Alternative Arrangements to the backstop, prepared by a group of Conservative MPs at the request of the UK

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<sup>33</sup> Mény, *Democracias Imperfeitas. Frustrações Populares e Vagas Populistas*, 143.

<sup>34</sup> Ispas, Gabriel Liviu. "The Brexit consequences on the European single market". *Juridical Tribune - Tribuna Juridica*, vol. 10, issue 1 (2020): 123.

<sup>35</sup> United Kingdom Supreme Court, *R (on the application of Miller) (Appellant) v. The Prime Minister (Respondent)*, [2019] UKSC 41, September 24, 2019.

Parliament.<sup>36</sup> The document presented a comparative analysis of some border cases linked with special economic relations, as well as the regime applicable in island regions. Its aim was to find established mechanisms that could assist in the Northern Ireland frontier. The study of the borders of Norway with Sweden, Switzerland with EU countries, Canada with the United States, or Australia with New Zealand, displayed a set of procedures that would allow controls to be carried out in the north-south trade of goods across the island, without the return of a physical border between the two Irelands.

The European Union's argument that the backstop plan was non-negotiable because it alone made it possible to prevent the restoration of a hard border in Northern Ireland and thus protect the integrity of the internal market was deflated by the diversity of solutions revealed in the report. This situation would have allowed for some leeway in the European rigidity regarding the backstop.

The joint effect of the Alternative Arrangements report and the UK Prime Minister's impetuous style favored the conclusion of a new withdrawal agreement within a few weeks. Reproducing the agreement negotiated by Mrs. May – namely with regard to citizens' rights, the UK's exit bill and the transition period – the deal reached by Mr. Johnson would still pull a few concessions from the European Union.

From the start, the European Union repeatedly refused to grant the reopening of the previous agreement with the revision of the protocol on the Northern Ireland border and the removal of the backstop, despite the insistent requests by the time of Prime Minister May. Indeed, Mr. Johnson's agreement provided for border controls to be carried out in the Irish Sea, with Northern Ireland being subject to a mixed customs regime: it would integrate the customs area of the United Kingdom but must follow the EU rules on goods.<sup>37</sup>

As a result, it would be up to the UK authorities to enforce customs procedures for British products destined for the Republic of Ireland, as well as to carry out health checks on the import of animals. In this way, the inspection of the entrance of goods into the EU customs union would be carried out by a third country, despite the concern with the integrity of the internal market, which implied the existence of rigorous controls at the EU's external borders, according to Mr. Barnier.

In addition to the United Kingdom having regained the power to conclude trade agreements with third countries at the end of the transitional period, the new withdrawal agreement would give Northern Ireland the possibility to break free from the mixed customs regime after four years, through a vote of consent by its Assembly.

For its part, the Political Declaration on the future relationship only mentioned the achievement of a free trade agreement with the European Union, reducing the ambition of the commitment envisaged by Mrs. May. In addition, the EU's requests on the so-called level playing field were removed from the legally-binding withdrawal agreement provisions to the content of the Political Declaration, which is not binding.

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<sup>36</sup> Prosperity UK Alternative Arrangements Commission, "Alternative Arrangements for the Irish Border. Report & Protocols" (2019), <https://www.prosperity-uk.com/wp-content/uploads/sites/43/2019/07/AAC-Final-Report-and-Protocols-18-07-2019.pdf> (consulted on 1.07.2020).

<sup>37</sup> Larik, "Brexit, the Withdrawal Agreement, and Global Treaty (Re)Negotiations", 28.

Although the revised withdrawal agreement was purged of the subject that prevented its approval by the time of Mrs. May's Government, the UK Parliament still raised procedural obstacles to its ratification, causing another delay to the exit day. The Parliament's failure to ratify the withdrawal agreement led to a further dissolution of Parliament and a call for general elections in late 2019.

With a political campaign based on 'Get Brexit Done', as opposed to the Labour Party's dubious positioning, the Conservatives achieved a resounding victory, with the election of one hundred and sixty more MPs than the rival party.<sup>38</sup> As a result, with the House of Commons composed of a majority of members aligned with the 2016 referendum outcome, the Parliament ratified the EU withdrawal agreement. In January 2020, the United Kingdom exited from the European Union.

## 9. Conclusions

The negotiations for leaving the European Union highlighted several points of interest for the work of contemporary democracies, as well as the risks they face. From the start, there was lasting tension between representative institutions and mechanisms of direct democracy. It would be necessary to hold early elections twice for the UK Parliament to achieve a majority of MPs that would sanction the exit from the EU, which had been decided in a referendum. The process unveiled the weakening of representation.

Indeed, although Prime Minister May dissolved the House of Commons on account of the fact that the majority of its MPs voted for remaining, the withdrawal agreement negotiated by her Government was rejected on three occasions by the renewed Parliament. In addition, Parliament would still hinder the approval of a reformed withdrawal agreement, concluded by Mr. Johnson, a situation that would lead to further early elections.

Beyond the divisions in Parliament and within the party system on the European issue, British politics went through a long constitutional dispute between, on the one hand, the executive that wanted to give effect to the decision taken by the citizens and, on the other hand, a series of votes and delaying schemes by the Parliament that hindered the popular vote.

Both the UK Supreme Court and the European Court of Justice were called upon to rule on the political dispute between Government and Parliament, regarding the withdrawal from the European Union. As a result, the exit procedure also provided for the judicialization of the political conflict between the executive and legislative branches.

For its part, the European Union took the Brexit procedure with great care. Fearing an existential threat to the European project, the Union mobilized its Member States to a uniform action throughout the negotiations, in order to achieve a position of strength vis-à-vis the United Kingdom. Cohesion among all States also allowed the EU to lead the negotiations, having achieved an advantageous

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<sup>38</sup> "Report overview: 2019 UK Parliamentary general election" (2020), <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/uk-general-elections/report-overview-2019-uk-parliamentary-general-election> (consulted on 1.07.2020).

agreement. In fact, the EU was able to impose its requests to the United Kingdom, building on the idea that a hard approach would be the best way to prevent the hazard of disintegration.

Yet, the rigidity of Prime Minister May's demands to amend the agreement disclosed the haughty stance taken by the EU in the negotiations. The approach would also reflect a misunderstanding within the European institutions, which presumed that an agreement fixing severe conditions would never achieve support from the UK Parliament.

The idea that European firmness could reverse Brexit proved to be unwise for the Union's own interests. Not only did it not prevent the referendum's decision from taking place, but it also favored the appointment of an Eurosceptic Conservative leader, with whom the EU would have to agree the future economic relationship. Mr. Johnson's tough political stance ultimately pushed the European Union to compromise with a withdrawal agreement amendment that released the backstop clause on the Irish border.

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