Brexit Report No 2

An analysis of the legal aspects of the UK's withdrawal from the European Union under English Constitutional law and EU law

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Introduction

This report is the second in a series monitoring and analysing the Brexit process. It covers the fundamental question of what law prevails in the process of the UK leaving the EU. Is it EU law, or is it the UK's own law and Constitution?

It analyses the Article 50 process, and contrasts it with leaving under English law and Parliamentary sovereignty. It also considers the issue of the unlawfulness of the UK's membership of the EEC/EU since we joined in 1972.

This reports restates the fundamental constitutional principle that the UK Parliament does not have the authority to abandon its own sovereignty. It reaches the conclusion that our membership of the EU was always unlawful, and that Parliament is free to leave the EU by means of repealing the European Communities Act (1972) as a first step in the process of disentangling ourselves from the EU.

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1. Constitutional nature of the UK membership in EU

To understand the legal problems facing the EU and the UK in connection with Brexit, it is necessary first to consider the constitutional nature of the UK's membership in the EU. To be more precise, it is necessary to appreciate the divergence of two views of the *status quo*, respectively, from the UK law standpoint and from the EU law standpoint.

In a very brief summary:

- In legal constitutional terms, the EU considers itself a federal state with a written constitution (even if it is coy about using those politically explosive words in political speech). Naturally, its constitutional Treaty defines the respective powers and rights of the Union and member-states. Among other things, it includes provisions in case one of the member-states decides to withdraw from the Union, as has now happened with

the UK and (from the EU's point of view), legally this means no more and no less than that Article 50 TEU should come into operation.

- The UK's uncodified and partly unwritten, but nonetheless definite Constitution gives virtually unlimited political powers to its sovereign Parliament. That includes such extraordinary powers as (a) to delegate any powers to such other authorities as the Parliament pleases and (b) to incorporate any part of the 'international law' into the UK law. This is what the Parliament did by European Communities Act 1972: incorporated the EU Treaties into UK law, and consequently delegated vast powers to EU institutions. However, by the very constitutional nature of the Parliament and the 1972 Act, the Parliament has the right to repeal the Act at any time, and thus legally destroy the UK's EU membership with all its legal consequences.

These two views are further elaborated below.

1.1.UK membership from the EU law standpoint

The EU law's view of itself is relatively simple. It does not differ significantly from the constitutional fundamentals of any federal state. The Union has its own legal personality, established and defined in what is now the EU Treaty and the 'Treaty on the Functioning of the European Union' (TFEU). Whether or not, and how frequently, the word 'Constitution' is used in political speech may depend on political circumstances; but in legal sense, the Treaty (or the two or more Treaties taken together) is the written constitution of the European Union.

It allocates the legislative, executive and judicial power between different EU institutions such as the Commission, the Council, the Parliament and the Court of Justice. In exactly the same way, it allocates the powers and competences between the Union and its member-states. Among other things, it establishes the legislative procedure for passing the more detailed laws on, inter alia, that allocation of powers; and the judicial procedure for the resolution of any 'demarcation disputes', be they between EU institutions or between the EU and a member-state. Putting aside political sensitivities, a constitutional lawyer would describe this as a typical constitution of a federal state.

As early as in the case of *Partie Ecologiste 'Les Verts' v. Parliament (1986),* the European Court of Justice described the EEC Treaty as the Community's '*basic constitutional charter*'. The EU asserts the undisputed principles of 'supremacy' and 'direct effect' of the 'EU law' throughout the EU. The European Constitution 2005 declared them in so many words; but they had been established from the very early days of the Community. Indeed, from its very beginning, the EEC claimed 'sovereignty' over the member-states. In its early constitutional judgements, most famously in *Costa v ENEL* (1964), the European Court of Justice held:

> *By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.*
>
> *By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.*

1.2. EU membership from the English constitutional standpoint

However, the same reality looks very different, and much more complex, from the point of view of UK law. It is best to consider this under three headings: the English law's view (a) of itself; (b) of the parliamentary sovereignty within the United Kingdom and (c) of UK's membership in the EU.

1.2.1. English law's view of itself

The starting point in the analysis of English constitutional law is the concept of 'common law'. Its paradox is that it does not need to justify itself by reference to a particular legislator who has created it. On the contrary, it is the 'common law' itself that is the primary source of all

and any state authority, including the authority to legislate. The basis and origins of the common law itself is a matter for various theories of jurisprudence (bordering on metaphysics) and legal history; but ultimately, the validity of the common law itself is the only element of English Constitution accepted without further explanation.

Sir Alfred Denning (as he then was) describes this as follows: "*the law of England was in former times for the most part declared by the judges, who were guided by the precedents of their predecessors. They decided each case as justice demanded and then built up principles from the individual cases. The precedents were collected and reported, and form a body of case-law unique in the history of the world*".[1]

1.2.2. English law's view of parliamentary sovereignty

The next step in the English constitutional construct is this: the common law asserts that there should be a sovereign power over the country. In *Calvin's Case* (1608)[2], Sir Edward Coke CJ and 'all of the judges of England' (meaning, in modern terms, all the 12 Law Lords), held

> *1. That ligeance, or obedience of the subject to the Sovereign, is due by the Law of nature: 2. That this Law of nature is part of the Laws of England: 3. That the Law of nature was before any judicial or municipal Law in the world: 4. That the Law of nature is immutable and cannot be changed…*

By a further discussion over several fundamental principles of natural justice, the common law arrives at a recognition that the Sovereign of the United Kingdom (as it now is) is the Queen in Parliament. Hence is the rule that the Statutes also have the force of law; and the Parliament's practically unlimited powers to legislate. Despite the general philosophical difficulties with the concept of omnipotence, the courts have consistently held the Parliament to be legally omnipotent. That includes the Parliament's powers even (a) to delegate any powers to such other authorities as the Parliament pleases and (b) to incorporate other rules, such as international treaties, into the UK law.

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[1] Sir Alfred Denning. *The Changing law.* London, 1953, p. 5

[2] ((1608) 7 Coke Reports 2a; quoting from: The Selected Writings and Speeches of Sir Edward Coke, ed. Steve Sheppard (Indianapolis: Liberty Fund, 2003). Vol. 1.

1.2.3. European Communities Act 1972

In the European Communities Act 1972, the Parliament tested the legal metaphysics of its omnipotence by purporting to exercise those powers at an unprecedented scale. The 1972 Act (as amended) defined 'the Treaties' as those set out in Schedule 1 attached to it, and then crucially provides in section 2:

> ***2 - General implementation of Treaties.***
>
> *(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or 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; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies.*
>
> *(2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision —*
>
> *(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or*
>
> *(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above; and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as*

aforesaid.

In this subsection "designated Minister or department" means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council.

[…]

(4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council or orders, rules, regulations or schemes.

The first obvious point to make about the most fundamental constitutional provisions of the 1972 Act is that they are totally incomprehensible to laymen and lawyers alike. Their legal meaning caused constant confusion even in the highest UK courts. The complexity results from the inherent difficulty of reconciling the EU law with the UK constitution, where the Parliament is sovereign and cannot abolish its sovereignty. In practice, the lawyers have simply sailed in those muddied waters as best they could, on the vague general assumption that somehow this language does incorporate the 'EU law' into the English law and makes it supreme.

This has been obviously unsatisfactory, undermined the rule of law, and caused a lot of difficulties in the past. As regards the mechanics of Brexit, however, the position is unexpectedly straightforward. The Parliament has enacted the 1972 Act. The Parliament can repeal it at any time. Once the Act is repealed, the UK is no longer a member of the EU. The entire EU law, from its federalist constitutional principles to the Article 50 procedure, becomes inapplicable.

1.3. Consequences of the mismatch

That attempt to reconcile the inherently incompatible fundamental principles of the respective constitutions of the EU and the UK has caused many difficulties whenever its legal coherence was tested. Those difficulties are essentially twofold:

(1) There is a recognised inherent exception to the principle of Parliamentary sovereignty in the sense of legal omnipotence: the Parliament cannot abandon its sovereignty or otherwise 'bind its successors'. Yet, the 1972 Act purports to do precisely that.

(2) ***Illegality***: the English law does not recognise the validity of criminal acts, including the acts of treason; and there is a strong case to the effect that the UK's purported accession to the EU was illegal and void in the first place.

2. Three views of Brexit

As a result of that constitutional paradox, there can be three very different views as to what Brexit is, and what it requires, in constitutional terms; each of them sound enough on its own assumptions:

(1) The EU federalist constitution does envisage a situation where one member-state decides to withdraw from the Union. Article 50 TEU governs that process. Since the EU Treaty permits Brexit, the requirements of Article 50 (notice, negotiations, and possibly a conclusion of the withdrawal agreement) must now be complied with, following which the UK will legally cease to be a member of the EU.

(2) The UK Parliament can repeal the European Communities Act 1972 at any time. It may or may not enact such transitional provisions as it thinks fit. Whatever the Repeal Act will say will be law. If it says that the EU Treaties cease to apply to the UK on such and such date, that shall be so - whatever the EU's view is.

(3) The European Communities Act 1972 was unconstitutional in the first place. It was the point where the Parliament tried to test the limits of its 'legal omnipotence' and finally hit the wall. It could not abolish its own sovereignty, and therefore, on proper interpretation of the 1972 Act, it did not. This means that the UK membership in the

> EU and now its withdrawal from the EU are no more than matters of international relations and political realities. As a matter of law, we have never been members of the EU's constitutional 'new legal order'. Brexit means no more than a conclusive recognition of that fact.

Any practical course would inevitably be based on a hybrid of these three approaches (and the same constitutional inconsistencies which have haunted UK's membership in the EU are likely to continue haunting the process of Brexit). The real issue is which of the three views are given precedence.

The present government has made it clear that it intends to follows Article 50 procedure; but that would be accompanied by a 'Great Repeal Bill'. It would repeal the 1972 Act, but also repatriate the entire body of EU law into UK national law. It is also inevitable that the debate over the interpretation of the 1972 Act shall continue in the jurisprudence of UK courts, possibly as a debate over the interpretation of the future Great Repeal Act.

Equally, if the repeal of the 1972 Act is made the principal legal tool of UK's withdrawal, it would reverse the 'incorporation' of EU law into UK's law. However, as a paradox of the 'dualist' legal system, the EU Treaties would remain in force *as international treaties* without being any longer part of the law. No part of the EU law will any longer be enforceable in UK courts; but from the Foreign Office point of view, and that of EU member-states, UK would remain participants of the treaties until it negotiates its withdrawal.

If the view is taken that the EU membership was null and void in the first place, the legal position would still need to be clarified both in national law and in international relations. So that also entails (a) legislation and (b) international negotiations.

Nevertheless, it is an issue of critical importance which of those three basic approaches is given the precedence, and how it is combined with the others. Each of them therefore deserves a closer examination below.

2.1. Article 50 procedure

Article 50 provides a procedure for a 'negotiated withdrawal' of any member-state. In theory it takes two years, but that period may be prolonged. Throughout that period, the member-state

remains bound by all the EU Treaties, Regulations and Directives, etc.; but at the same time is excluded from all the EU Council discussions about the terms of its withdrawal. In the end, the EU and its former member-state are supposed to conclude a 'withdrawal agreement' on their future relationship.

Article 50 reads in full:

> 1. *Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
>
> 2. *A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*
>
> 3. *The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*
>
> 4. *For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.*
>
> *A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.*
>
> 5. *If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.*

In theory, the process is supposed to take two years; however, the UK government and the European Council can agree to extend that period, again and again, indefinitely if they decide, without any further referendum.

An eminent German lawyer, Dr Jochum Herbst, wrote a detailed legal analysis of Article 50 (which at that point was still known under its maiden name as Article I-60 of the European Constitution) and what the process of withdrawal might look like in practice; he concluded: "*Bearing the complexity of these issues in mind, I am convinced that the two-year notice period, as a general rule, is far too short for negotiating and concluding a withdrawal implementation agreement in an "average" Member State withdrawal case*".[3]

Throughout that period, UK would still be bound by EU Treaties in accordance with paragraph 3; and by virtue of EU Treaties, it would also be bound by all EU legislation. It will remain inside the EU for all intents and purposes, except that it will be excluded from the EU discussions concerning its future, in accordance with paragraph 4.

Realistically, the "withdrawal agreement" would probably establish fairly close relations between the UK and the EU, a 'halfway house' between full membership and full independence, not radically different from the present position of Norway or Switzerland. Indeed, it may mean no more than a slight adjustment of the present system of UK's opt ins and opt outs of various aspects of the EU.

Further, the withdrawal agreement may set any date, however remote, for its coming into force. It is also likely provide for a transitional period of any length, throughout which UK would still be bound by EU law and whatever transitional provisions the agreement would include.

2.2. Repeal of the EEC Act 1972

In common with the majority of developed democracies, the United Kingdom is a 'dualist jurisdiction'. This means that its international treaties are, as such, completely separate matter from its law. International treaties do not become part of UK law unless expressly 'incorporated' by an Act of Parliament. Traditionally that principle has been considered as an

[3] Jochum Herbst, "Observations on the Right to Withdraw from the European Union: Who are the 'Masters of the Treaties'?", *German Law Journal* (6:2005), p1755

important safeguard of democracy, and of democratic separation of powers. Like the rest of foreign policy, international treaties are made by the Executive; while the law can only be made or changed by the Legislature. Neither of these branches can be allowed to usurp the functions of the other.

This principle came to the forefront in the recent case *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, but had been firmly enshrined in UK case-law long before that:

As the House of Lords judgement in the case of *Rayner v Department of Trade and Industry* [1990] 2 AC 418 explains:

> *The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty.*
>
> *A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties.* ***A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom by means of legislation.*** *Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.* [Emphasis added]

The Courts have consistently applied this principle to all sorts of international treaties, including of course the EEC/EU Treaties. After the government signed the Treaty of Rome in 1972, Norris McWhirter challenged that decision in Court as a breach of the Bill of Rights 1689 (*McWhirter v Attorney-General* [1972] C.M.L.R. 882). Lord Denning, Master of the Rolls, held in the Court of Appeal:

> *"Even though the Treaty of Rome has been signed, it has no effect, so far as these Courts are concerned, until it is made an Act of Parliament. Once it is*

> *implemented by an Act of Parliament, these Courts must go by the Act of Parliament. Until that day comes, we take no notice of it. I would recall what Lord Atkin said in Attorney-General for Canada v. Attorney-General for Ontario:*
>
> > *'… the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes'."*

Lord Justice Phillimore agreed, and added that the Treaty of Brussels (on UK's accession to the EC treaties) "*is to be ratified by the end of this year and to enter into force on 1 January 1973. Whether it is ratified or not depends, so far as this country is concerned, upon the present Bill before Parliament; it is that Bill which will or will not alter the law of this country; and unless and until that Bill becomes law this Court is not concerned with the provisions of the Treaty of Brussels.*"

Therefore, what makes the EU Treaties part of UK law is the European Communities Act 1972 alone. It is the statute which 'incorporates' all those treaties and all "rights, powers, liabilities, obligations and restrictions" arising out of EU law into the UK law. It follows that, whatever a treaty may say about withdrawal, Parliament can always remove that treaty from the body of our domestic law simply by repealing the European Economic Communities Act 1972. From that moment the treaty becomes a purely foreign affair.

In *Thoburn v Sunderland City Council* [2003] QB 151, Eleanor Sharpston QC (as she then was) argued that the supremacy of EU law over English law was (to quote from the judgement, para 56) "*subject only… to the possibility of withdrawal from the EU by express repeal of the 1972 [EEC] Act. And, if that were to be contemplated,* ***Parliament's hand would not be free. There would have to be consultations and negotiations first."***

However this argument was rejected by the High Court. Lord Justice Laws (with whom Mr. Justice Crane agreed) ruled:

> *Since we are dealing here with the strict legal position, and not with the realpolitik of the thing, I am not entirely sure why Miss Sharpston does not go the further mile*

> *and submit that Parliament **could not** legislate tomorrow to withdraw from the EU **at all**. Such a state of affairs might be said to be vouchsafed by the reasoning* [of the European Court of Justice] *in* Costa v ENEL *("permanent limitation of their sovereign rights") […] At all events, her argument appears to me to entail the proposition that the legislative and judicial institutions of the EU may set limits to the power of Parliament to make laws which regulate the legal relationship between the EU and the United Kingdom.*
>
> *Thus baldly stated, that proposition is in my judgment false. […] Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the 1972 Act. It cannot stipulate as to the manner and form of any subsequent legislation. […] Thus there is nothing in the 1972 Act which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it.*
>
> ***That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty.***

The same approach is broadly followed in the most recent historic judgement of the Supreme Court in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, which is discussed in a separate research paper. All its other controversies aside, the judgement leaves no room for doubt that the Parliament preserves its power to repeal the 1972 Act at any time, and that the EU law will cease to apply to the UK as a consequence of that, unless the Repeal Act expressly provides otherwise.

2.3. Anschluss Null und Nichtig?

As mentioned above, there are legal grounds for an argument that in enacting the 1972 Act, the Parliament reached the inherent limits of its constitutional power. That would mean that the Act had been misinterpreted, and the assumption that it really made the UK a member of the EU was fundamentally misguided. As a matter of law, on a true construction of the Act, UK's membership in the EU had been null and void in the first place.

That approach is not without precedents in history. At the end of the Second World War, the Allies liberated Austria and established a provisional government. The first thing that provisional government did was to declare that the country's Union with Germany had been unlawful and void from day one: '*Anschluss Null und Nichtig'* ('Union null and void'). The withdrawal of many former Soviet republics from their own 'Union' took place on a similar basis.

In summary, the illegality of 'EU membership' under UK law can be asserted on the following grounds:

- EU membership purports to 'transfer' Sovereignty to the EU, or 'share' it with the EU, in breach of the English Constitution whereby Sovereignty is immutably vested in the Queen in Parliament (see *Calvin's* Case (1608) 7 Coke Reports 2a).

- The Treaty on European Union purports to make HM the Queen a 'citizen' of the EU, and "*subject to the duties imposed thereby*".[4] Similarly, all the Queen's subjects are made 'EU citizens' without their consent.

- A fundamental principle of the English Constitution is that '*no Parliament can bind its successors*'; yet the EEC Act 1973 purports to bind future Parliaments to legislate within the limits imposed by EU law.

- EU law is being made without the consent of the English people: that contravenes the fundamental constitutional doctrine of government by consent, enshrined in Magna Carta, recognised and developed in the key constitutional judgements of the 17th century such as the *Case of Proclamations* [1610] EWHC KB J22

- By signing the EU Treaties, the responsible Ministers committed High Treason, and breached the Privy Council oath of allegiance, to "*assist and defend all Jurisdictions, Pre-eminences, and Authorities, granted to Her Majesty, and annexed to the Crown… against all Foreign Princes, Persons, Prelates, States, or Potentates"*. Their acts were criminal, and therefore void in law.

[4] Article 8, 2 of the Treaty on European Union, 1992

3. Problems of transition

3.1. Vested rights

The real difficulty of Brexit is not constitutional, but practical: how will it affect the rights and obligations of millions of people and institutions which have arisen during the period of UK's membership in the EU? That is obviously a matter for a comprehensive and detailed review and political choices, some of them quite painful. However, who will have the power to make those decisions depends on the constitutional dimension.

A pre-Brexit House of Commons research paper[5] explains:

> *Many provisions of EU law create individual rights which are directly enforceable in national courts (either horizontally between private individuals, or vertically by an individual against the state). These cover areas such as free movement of workers, free movement of goods and freedom of establishment. If any EU rights can be enforced after withdrawal, it is likely to include these.*

3.1.1. 'Legal heritage' of the 'new legal order'

Indeed, under the EU Treaties, UK owes countless legal obligations not merely to 27 foreign states, but also to 500 million EU citizens. As the European Court of Justice put it as long ago as in 1963 in the case of ***van Gend & Loos****:*

> *"the Community constitutes a new legal order […] the subjects of which comprise not only Member States but also their nationals. […] Independently of the legislation of Member States, community law [...] not only imposes obligations on individuals but also intended to confer upon them rights which become part of their legal heritage."*[6]

3.1.2. EU citizenship rights

[5] P. 14

[6] Case C-26/62, van Gend & Loos, 1963 E.C.R. 1.

After the formal introduction of 'EU citizenship' in the Maastricht Treaty, that doctrine was significantly expanded and strengthened. A more recent leading decision of the European Court of Justice which illustrates that is the case of *Ruiz Zambrano* (2011) C-34/09.

Mr. and Mrs. Zambrano were Colombian nationals who unsuccessfully claimed asylum in Belgium. While their asylum claim slowly progressed through the Belgian system of appeals, they had two children. Under the then Belgian law, it was possible to acquire Belgian citizenship for their children by virtue of the fact that they were born on Belgian soil. Their parents did so, and of course, by becoming Belgian citizens these children automatically became EU citizens as well. Their parents then re-applied for Belgian residence on the basis of being parents of Belgian citizens.

Meanwhile Mr Zambrano was working illegally for a Belgian company. Eventually, that was discovered by the authorities, he lost his job, and applied for unemployment benefit. That was refused: he would only be entitled to benefits after being in lawful employment for at least 468 days, and his employment had been unlawful. The Belgian Court referred the case to the European Court of Justice, which then held that:

1. as EU citizens, Mr Zambrano's children had a right under the EU Treaties to reside in Belgium (or any other EU member-state);

2. as EU citizens, those children were further entitled to a number of other rights, including in particular all those guaranteed by the EU's Charter of Fundamental Rights;

3. the children would not be able to enjoy (a) their right to residence in Belgium and (b) their right to respect for their family life under the Charter of Fundamental Rights unless their parents were also allowed to live and work in Belgium;

4. consequently, Mr. Zambrano should have been granted a work permit; therefore his former employment was lawful under the EU law; therefore he was now entitled to an unemployment benefit.

Not only the Belgian government, but also the governments of Denmark, Germany, Ireland, Greece, the Netherlands, Austria and Poland, as well as the European Commission, all opposed that argument as intervening parties before the European Court of Justice.

Much of the judgement, and particularly the more detailed underlying opinion of the EU Advocate General (Eleanor Sharpston QC), is devoted to the legal distinction between the right to a 'free movement of people' in the EU on one hand, and the EU citizenship on the other.

The '*free movement of people*' means only that any national of one EU member-state is entitled to move to, and then reside in, in any other member-state. The EU law only comes into play after that person takes advantage of the EU Treaty to go from one member-state to another. It is only then that his right becomes 'vested'. On this basis, which was recognised in EU law before Maastricht, EU law would be of no avail to Mr Zambrano and his family.

But EU *citizenship* is different; by design, it is "*destined to become the fundamental status of nationals of the member states*"; and all sorts of rights and obligations are inherent in that status. It no longer matters whether an EU citizen has 'executed' his right to a 'free movement': the EU law protects his rights anyway, against his own or any other member state.

Zambrano judgement has significant implications not simply for freedom of movement, but for the whole range of rights legally associated with EU citizenship including, but not limited to, those set out in the Charter of Fundamental Rights.

3.1.3. Implications for Brexit

Let us consider the implications of that principle for the problem of UK's withdrawal from the EU. Not only will the existing EU immigrants preserve their 'vested right' to stay in the UK; if that principle is applied consistently, all EU citizens born before Brexit with have their right to come and live in the UK already vested in them, simply by virtue of their citizenship. If we continue to recognise EU law as law, we may well discover that we have no power to take that right away from them.

Immigration is by no means the only issue on which the recognition of 'vested rights' in a 'withdrawal agreement' may become unacceptable to the UK, while anything other than that would be unacceptable to the European Union. Almost half a century of being governed by the EU law has left similar 'legal heritage' in many other areas.

If (as is evidently the present government's approach) the Article 50 process leading to a withdrawal agreement is given precedence as the legal means of UK's withdrawal from the

EU, the natural tendency would be towards the retention of vested rights. Indeed, the EU Council, which would be in charge of negotiating the 'withdrawal agreement', would have a legal obligation to protect the 'vested rights' of all 'EU citizens'. From the EU's point of view, this issue is non-negotiable. Furthermore, the fundamental premise of any negotiations under Article 50 would be that such rights as 'free movement of people' are law; and therefore, it cannot be changed retrospectively to the detriment of EU citizens. A likely outcome is that, unable to square this circle, the government would simply accept a withdrawal agreement which preserves the right to 'free movement' of EU citizens into the UK indefinitely, on a similar basis to Norway; and probably other vested rights.

A withdrawal based primarily on the repeal of the 1972 Act would give the UK Parliament greater flexibility. Ultimately, the resolution of the 'vested rights' problem would depend on the exact terms of the Repeal Act. Any provisions aimed at repatriation of EU law, or any parts of it, into the body of the national law, should be worded with that issue well in mind.

3.2. The future of *aquis communitaire*

EU law comes into the UK law (though the 'conduit pipe' of S. 2 of the EEC Act 1972) in the forms of (1) Treaties, (2) Regulations, (3) Directives and (4) Decisions. By virtue of the European Communities Act 1972, Treaties and Regulations are taken to apply automatically in the UK as if they were law. The Directives and Decisions mostly do not: they merely oblige the government to 'transpose' them into UK law by enacting separate national legislation.

Therefore, most of the *acquis communitaire*, in the form of Directives and Decisions, is now on the UK statute book and not merely on EU statute book. The repeal of the European Communities Act will not remove it automatically; that legislation will have to be reviewed and repealed (possibly with some exceptions) separately by Parliament. On the other hand, all EU Treaties and Regulations stand or fall by the European Communities Act; once the Act is repealed, the default position is that no EU Treaty or Regulation is any longer in force. However, the intention of the present government is for the Great Repeal Act to 'repatriate' the entire body of EU law into the national law. That approach is not without precedent. For example India, on leaving the British Empire, 'repatriated' the entire body of its law by Article 372 of its Constitution, which provided that all previous laws remained in force until amended or repealed.

As regards the EU Directives and Decisions 'transposed' into UK law, that legislation will not disappear with the repeal of the European Communities Act. Unlike the provisions of Treaties and Regulations, which will be repealed automatically unless expressly preserved in the Repeal Act, the 'transposed' directives and decisions will remain in force until and unless expressly repealed. So, the withdrawal may have to be followed by no less than a complete review of all UK legislation for nearly 40 years.

The government's present stated intention is to introduce the 'Great Repeal Bill' which, contrary to its name, would in fact repatriate the EU law into UK law in its entirety. There seems to be no intention of a focused comprehensive review of the legislation enacted in the period of EU membership. However, it is possible that a future government would undertake such a review; indeed that may prove to be an attractive political agenda for some of the opposition parties.

The approach based on the hypothesis of illegality of the 'EU membership' would be the most radical one: at least the secondary legislation which transposed the EU law under s. 2 of the 1972 Act would be called into question. The position would also need to be clarified in an Act of Parliament.

All in all, it appears that in all scenarios, the starting point will be a repatriation of most of the EU law (possibly with the exception of specific, and most controversial, provisions), which may or may not then be followed by a more or less comprehensive review and replacement. However, that would only be possible if the withdrawal agreement does not preclude that.

A likely outcome of focusing on Article 50 negotiations may be very disappointing to the pro-Brexit majority of the country's population. The withdrawal agreement may simply replace the present EU Treaties in the existing constitutional structure, possibly adding an extra layer to the already cumbersome structure. The 'Great Repeal Act' would replace the EEC Act 1972 as the statute incorporating the EU law into the UK law. It may be that the terms of incorporation will be qualified by the terms of the withdrawal agreement. If so, the constitutional problems which arose out of the UK's membership in the EU would be preserved, if not aggravated, by a negotiated compromise form of what may be called 'semi-membership'. At any rate, the experiences of Norway and especially Switzerland are hardly encouraging in this respect.

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