11 Transparency and government accountability in Brexit negotiations[1]

Natalie Fox

11.1 Introduction

On Thursday, 23 June 2016, the United Kingdom (UK) decided to leave the European Union (EU) in a process called 'Brexit'. The in-out referendum on the EU membership was held in accordance with the European Union Referendum Act 2015. The British voters were asked whether the UK should remain in or leave the EU.[2] The referendum result has given rise to the most profound constitutional change in decades. Nevertheless, the exclusively politically binding decision of British society could not naturally result in reversing the processes that had shaped the UK's systems in an evolutionary manner for decades. Holding a referendum was not a constitutional or legal requirement. In accordance with the British constitutional law, the parliament in its sovereignty could have decided to withdraw (or not) without using this form of direct democracy. UK constitutional law scholars (e.g., Barnett 2017, p. 153) emphasise that 'referendums in the UK have always been considered to be "advisory" rather than legally binding'. Nonetheless, this does not mean that the purely advisory character of the referendum is a hindrance in British political practice to the meaningful impact of the majority of voters' unambiguous opinion on the conduct of a given policy. Thus, the UK's withdrawal from the EU was made to depend on the future result of a referendum, which had a purely advisory character in the strict legal sense but was binding in the political sense (Allen 2018, p. 106).

From a legal point of view, before the Brexit negotiations formally commenced, the court was confronted by a legal challenge. As a result, a ruling was issued on the power of the UK Government under the royal prerogative to trigger Article 50 of the Treaty on the European Union (TEU), the first step in the process of the UK's withdrawal from the EU. Thus, the Supreme Court's intervention was necessary in order to define the constitutional role of Westminster in this scope.

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2 See Article 1(4) of the European Union Referendum Act 2015. The result showed 51.89% voting to exit the EU and 48.11% opting to remain (no minimum percentage of the vote was required for a binding decision). In contrast, in the 1975 referendum, two-thirds (67.23%) of UK voters favoured continued European Community membership.

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This chapter provides an analysis of the EU/UK approach to transparency, which was being used as a tactic in the Brexit negotiations and is of particular interest. Taking into account the nature of the issue, it would be rational to expect the EU and UK political parties to adopt a common approach to transparency, which would result in increased responsibility. Openness and transparency are key elements in ensuring accountability in the decision-making process. The UK Government embraced the Brexit talks in a particular way. On the one hand, the UK sought to avoid the scenario called the 'no-deal Brexit'; on the other hand, it consistently exposed a tough line on the issues where it was difficult to reach an agreement, although it would result in the 'hard Brexit'.

Moreover, the UK constitutional structure also influences transparency in the Brexit negotiations through the role of Westminster (and its EU Select Committees). A key component of democratic governance is clarity of responsibility, enabling voters to accurately hold politicians to account for their actions. In this context, an important aspect of the current research is the question of how accountable the divorce process from the EU should be construed. The analysis is complemented by a brief examination of the doctrine of parliamentary sovereignty from political and legal perspectives in the context of the Brexit negotiations. It is widely known that the UK's membership in the EU resulted in a progressive limitation of Westminster sovereignty. In legal terms, it is also questioned whether the decision on the withdrawal from the EU will result in a 'renaissance' of the traditional sovereignty doctrine, per A. V. Dicey (1982). Thus, this chapter links the processes taking place at the international level with those on the domestic plane.

The following research hypotheses were adopted. First, the result of the 2016 EU referendum took on a particular political role because its effect made it impossible for the UK Parliament to disregard the will of the people. Second, the outcome of the so-called Miller I case showed that the courts had been forced again to draw the boundaries of constitutional competence between the executive and the parliament, in the sense that they had consistently backed Westminster. Third, the more open the Brexit process was, the more responsible the government became. Therefore, maintaining control over the dissemination of information, especially regarding disputes among cabinet ministers as to what form Brexit should take and how long it should last, was of paramount importance to the stability of the government. Fourth, in legal terms, the objective of this chapter is to present the argument that the expected results of the process of the UK's withdrawal from the EU will not lead to restoring the traditional doctrine of parliamentary sovereignty but may only apparently result in the revitalisation of the current status quo of individual state institutions.

11.2 The UK's exit from the EU

11.2.1 The conduct of the UK's foreign affairs—a brief outline

In the UK, it is commonly known that the capacity to conclude and denounce treaties is a matter of royal prerogative. However, in practice, the process of

negotiating, signing, and ratifying treaties is conducted by the currently ruling government on behalf of the Crown (see, e.g., Higgins 2009, p. 550). Consequently, the responsibility for concluding and terminating treaties involving the UK lies with the Secretary of State for Foreign, Commonwealth and Development Affairs. In turn, a government department, the Foreign, Commonwealth and Development Office is responsible for all aspects of foreign and EU policies concerning the conclusion of treaties and the decision-making process in formal and procedural issues. In this light, it is obvious that the British system draws a clear demarcation line between the strictly international sphere, which is immanently a part of royal prerogative (Leyland 2016, p. 87; Loveland 2015, p. 93) and implemented by the executive authority with the prime minister at its head, and the domestic plane, which is the internal effectiveness of international obligations (Gillespie and Weare 2015, pp. 94–95).

11.2.2 Triggering of Article 50(2) of the TEU without parliamentary authorisation

The sovereign's will, as expressed in the 2016 EU referendum, became the political basis for the government's decision to withdraw the UK from the EU. However, from the legal point of view, following the events, the main concern of both British scholarship and case law was the triggering of Article 50 of the TEU procedure. The cited provision is the legal basis for such an action because pursuant to the regulations contained therein, 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'.[3] A member state wishing to withdraw from the EU is obliged to formally notify the European Council of its intention to conduct negotiations and conclude a withdrawal agreement.[4] It is important to note that neither the method nor the form of notification has been specified in the EU Treaties' provisions. In this context, the matter of proper procedure should be considered in the case of the UK's withdrawal from the EU structures. In British constitutional practice, two important issues related to this matter emerged. First, owing to the uncodified British Constitution, it was necessary to define unequivocally the British 'constitutional requirements' in this respect. Second, there arose the fundamental question—triggering a discussion both politically and doctrinally and requiring judicial intervention—of whether the government had independent competence to trigger Article 50(2) of the TEU, ergo what role the parliament should play in this respect. Against this backdrop, the decoding of the normative content of Article 50(2) of the TEU, whose provision determines the starting point of the Brexit, is identified with the act of submitting an application (notification of

3 See Article 50(1) of the TEU. As it appears, this formulation is autonomous, while its content should particularly consider the manner of participation of a member state in supranational organisations, especially regarding the form and the manner of terminating international agreements.

4 See Article 50(2) of the TEU.

intention) to withdraw from the EU. Undoubtedly, in accordance with the political tradition of the UK, this competence (on the exercise of prerogative power) in practice is bestowed on the government. However, against this background, there arose the legal question of whether the executive government could use the Crown's prerogative powers to give notice of the withdrawal without parliamentary authorisation.

Initially, the answers to one of the most important questions related to the Brexit process were sought in the scholarship views. For example, Barber et al (2016) argued that prior consent was required in the statutory form to take further necessary steps in the withdrawal procedure (in this context, see also Phillipson and Young 2018). An additional confirmation of this thesis is the role of the parliament established in the literature and practice, measured by its significance for the political system. As pointed out by Bradley and Ewing (2003, p. 77):

> Parliament's importance within British government depends less on absolute legislative power than on its effectiveness as a political forum in expressing public opinion and in exercising control over government.

In this connection, an interesting aspect of the discussed issue was the impact of the results of the referendum of 23 June 2016 on the future decision of Westminster.

Two circumstances need consideration here. First, as indicated in the scholarship, despite the non-binding nature of the referendum outcome, overall, the UK Parliament respects the position expressed by the citizens, which results simply from the contemporary realities of political life. Due to its unequivocal character, the outcome of the referendum did not leave any room for a decision in terms of the parliament's reinterpretation of the will of the nation (despite a slight majority of votes). In the public opinion, it was emphasised that the parliament should deem itself bound by the result of the advisory participation of voters.[5] Therefore, in political terms, the result of the 2016 referendum took on a particular role because its effects made it impossible for the parliament to disregard the will of the people. Second, it is impossible not to refer briefly to the method of the implementation of EU legislation within the UK legal system, which was relevant in the Brexit process. It should be emphasised that the principle of dualism existing in the British constitutional law means that in addition to legal acts constituted by national authorities, if international agreements and other international acts (including those established by the authorities of international organisations) would be applied, then in the understanding of the UK doctrine of parliamentary sovereignty, international legal acts require appropriate, separate, and independent 'anchoring' in domestic law. Thus, it is necessary to apply the appropriate procedures to transform the norms of international law into provisions of the

5 As Matthews (2017, pp. 604–607) points out, the increased practice of referenda has consolidated 'the pattern of constitution-by-consent', creating a competitive source of legitimacy and authority.

British legal system. Since foreign affairs in the UK are generally conducted on behalf of the Crown by ministers as part of prerogative power, on this basis, both negotiation and ratification of treaties may take place without any consultation with the UK Parliament, which does not play any direct role in the process of concluding international agreements. However, it is worth noting that international agreements necessitate obtaining the consent of the relevant legislative body in order to enter into force. This means that simply signing and ratifying agreements are not synonymous with their transformation into the domestic structure of British law. Thus, in terms of the British legal system, the significance for the characteristics of the specifics of the process of implementation of EU legislation is that an international agreement subject to ratification (or one that is not subject to ratification) does not become an internal part of the UK law until it first takes on the form of a primary legislation (Barnett 2017, p. 128; Lang 2017; Oliver 2003, pp. 81–82; Feld 1972, p. 251). Thus, without the approval of the legislative branch, the executive branch may not change an applicable law, meaning that on each occasion, it is necessary to issue a special statute incorporating treaty provisions into the national legal system.

In the above context, the Brexit negotiations allowed the discernment of a certain systemic contradiction manifested in two instances. On the one hand, UK constitutional law scholars expressly believed that it was impossible to make the British institution of the referendum binding. On the other hand, the government of Theresa May claimed the right to trigger Article 50(2) of the TEU and thus set the course of the procedure for withdrawing the UK from the EU structures without the parliament's consent. It should therefore be stated that de facto, as a result of the EU referendum, the freedom of parliamentary decision was curtailed and the referendum lost in practice its *strict* consultative nature (e.g., Ewing 2016, p. 293). Thus, the de facto paramount status of popular sovereignty was further emphasised by the conflict over Article 50 of the TEU, which could only be resolved by making a judicial decision.

11.2.2.1 Miller I case judgement

In the case of *R (Miller) v. Secretary of State for Exiting the European Union*,[6] the UK Supreme Court, sitting for the first time en banc on 24 January 2017, answered a legal question for which the constitutional requirements were legally unspecified. The case required a determination on whether the government's triggering of Article 50(2) of the TEU procedure required approval from the parliament. In other words, the main question in this case was whether, under royal prerogative, the Crown (the executive) had the power to initiate the withdrawal process from the EU. The decision was issued, following an appeal against the High Court of Justice judgement of 3 November 2016,[7] which maintained

6 [2017] UKSC 5; hereinafter Miller I case.

7 *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

that the case might be subject to a judicial review and that there was no prerogative power to trigger Article 50(2) of the TEU. The prerogative of either concluding or denouncing treaties, which operates entirely at the international level, cannot be exercised in relation to the EU treaties, particularly if there is no applicable basis in this respect, expressed in the primary legislation. Against this background, the European Union Referendum Act 2015 provided the legal basis for the referendum itself but did not authorise the government to trigger Article 50 of the TEU. The Supreme Court acknowledged that the established constitutional requirements did not authorise the government to initiate the procedure of leaving the EU without conferring this power by the UK Parliament through the adoption of a relevant statute. The key problem in the so-called Miller I case concerned the determination of the extent to which the scope of the prerogative power was subject to a judicial review. The ruling confirmed that the prerogative power might be limited or waived by the primary legislation. The Supreme Court referred to the views of one of the leading lawyers of the 20th century, Sir H. W. R. Wade (1980, p. 47), who wrote that most of the powers that constituted the royal prerogative had just been limited or abolished in this way. He pointed out that a statutory limitation or revocation of a prerogative right might occur by express words or by necessary implication. Since the EU legislation was implemented in the British legal order under the European Community Act 1972, on this basis, any national legislation had to comply with the EU law. Thus, ministers have no power to make any changes to the applicable sources of law, unless they are effectively authorised to do so by the legislator. Then, as a result of the Miller I case judgement, the European Union (Notification of Withdrawal) Act 2017 was adopted on 16 March 2017, containing the statutory consent of the parliament, authorising the prime minister to refer to Article 50(2) of the TEU. Therefore, this series of actions marked the formal and legal start of the Brexit procedure. Thereby, the law enforced the notification to be carried out in accordance with regulations.

11.3 The EU and the UK positions in the Brexit negotiations and the impact of the principle of transparency

On 29 March 2017, Prime Minister Theresa May submitted a document to the president of the European Council, Donald Tusk, notifying him of the UK's intention to withdraw from the EU, as a consequence of invoking Article 50(2) of the TEU, after the passing of the European Union (Notification of Withdrawal) Act 2017, following the UK's EU membership referendum on 23 June 2016. This had a twofold effect. First, the formal process of the Brexit negotiations was given the green light. Brexit talks were conducted in the light of the guidelines provided by the European Council. Second, the goal was to conclude an agreement that would set out the arrangements for the UK's withdrawal, taking into account the framework for its future relation with the EU. That agreement shall

be negotiated in accordance with the procedure set out in Article 218(3) of the Treaty on the Functioning of the European Union (TFEU).

The first aspect of the Brexit negotiations was the timing, which was considered of paramount importance. The withdrawal procedure from the EU stipulates that from the date when the UK Government sends the European Council a formal notification of its intention to withdraw from the EU, the two-year period will start to apply, during which the negotiations will be held in order to reach a formal deal. Thus, the withdrawal was then planned to occur on 29 March 2019 (Exit Day 1), two years after the date of notification, as specified by Article 50(3) of the TEU. Moreover, the normalisation of this in effect also technically allows the extension of the two-year period, but only if the EU-27 agree unanimously. Therefore, on this legal basis, due to a number of emerging problems, the Brexit deadline was initially extended to 12 April 2019, and then again to 31 October 2019 (Exit Day 2). As is well known, the third extension stipulated the Brexit deadline of 31 January 2020. The fact that the UK decided to leave the EU did not automatically mean that the EU institutions, procedures, and regulations already in operation would no longer apply and that it would be possible to defy them. They remained binding for the UK, and their impact on British law was still considerable until the end of the implementation/transition period (on 31 December 2020).

The second important aspect was the representation, which referred to who was able to lead the Brexit negotiation process. Obviously, the UK was represented by its government, notably by Prime Minister Theresa May (and subsequently by Prime Minister Boris Johnson), but an important role was also assigned to David Davis, the UK's Secretary of State for Exiting the European Union. From 14 July 2016 to 31 January 2020, the Department for Exiting the European Union was also appointed, whose main responsibilities were overseeing the negotiations to leave the EU and establishing the future relation between the UK and the EU. However, this issue was more complicated on the EU side. The EU Treaties vest the European Council (i.e., the heads of the member states) with the ultimate negotiation power. The European Council shall issue the EU's negotiation guidelines and nominate the EU negotiator; it also has the authority—subject to the European Parliament's consent—to finally conclude any Brexit agreement on behalf of the EU (Hacke 2017, p. 106). The European Council chose the European Commission as the EU lead negotiator. The European Commission was responsible for the negotiations and was in close contact with the European Council, which provided political leadership and oversight.

Third, the complexity of the Brexit talks mainly entailed developing the legal framework of the Withdrawal Agreement and determining the terms of the UK's future relation with the EU. This involved the adoption of appropriate negotiating techniques on the sides of both the UK and the EU. In this connection, it is essential to portray how the Brexit negotiations were held and what negotiation strategy was adopted during this process.

11.3.1 Brexit negotiation strategy

Owing to the fact that the UK remained a full member of the EU until its actual withdrawal from the latter (which took place on 31 January 2020), the aim of the Brexit negotiations was a proper and suitable preparation for the formal withdrawal. However, the initial reaction of the British government was Prime Minister May's refusal of a 'running commentary' on the Brexit negotiations. In the first place, it was triggered by the fear of revealing the British negotiating position prematurely and the necessity to gain time in order to determine a particular approach. In turn, the EU was the first party to start publishing documents delineating the adopted negotiating position, which somewhat forced the UK to react appropriately and promptly. Hence, the UK could not keep postponing the publication of the necessary documents and the presentation of its negotiating position, including the withdrawal agreement and the post-Brexit settlement. Moreover, it soon became evident that the British government did not intend to issue any information on the withdrawal negotiation plan, as it simply lacked one. It was argued that the decision made in the EU referendum came as a surprise, as the government headed by the then Prime Minister David Cameron did not expect such a result. As a consequence, the later approach to the negotiations of Prime Minister May, who became responsible for managing the government and obliged it to withdraw the country from the EU, began to be challenged. It was particularly problematic that a conservative manifesto from 2015 obliged the party to respect the outcome of the referendum, and the campaign was conducted in this spirit, and the Cameron government (to which May then belonged) quickly adopted the electorate's decision. Despite campaigning to remain in the EU, when she became prime minister, May had to fulfil her promise of respecting the will of the people, emphasising that 'Brexit means Brexit'. It could be observed that in the initial period of her term in office, the prime minister demonstrated caution, but at the same time, she strenuously and incessantly strived for the withdrawal. She consistently tried to ensure that her government and party (Conservative) had the sense of taking the proper direction in the tumultuous aftermath of the referendum and managed to overcome the initial challenge of putting its outcome into effect.

The information on the intentions of the British government in the context of the negotiations was provided in a fragmentary but controlled manner and presented in a notification letter sent to the President of the European Council. Moreover, the Government White Paper provided the parliament and the country with a clear vision of what the government was seeking to achieve in negotiating Brexit and the new partnership with the EU. Prime Minister May set out the government's approach to the discussions, clearly emphasising the fact that the UK would strive for the deep and special partnership that takes in both economic and security cooperation. Additionally, it was clearly stressed that the Brexit process should be used in such a way that the objectives were achieved in a fair and orderly manner and with as little disruption as possible on each side. It was also strongly underlined that although the UK was leaving the EU, but not Europe, it wanted

to remain committed partners and allies of the UK's friends across the continent at the same time. In the opinion of Prime Minister May, the cessation of the accession to the EU structures was not intended to weaken the EU's position. The EU referendum of 2016 was a vote to restore national self-determination, and the notification of the intention to act was to give effect to the democratic decision of the people of the UK. Hence, the priority goal was to agree on the terms of a future partnership alongside those of the withdrawal from the EU.

The UK Government proposed principles that could help shape forthcoming discussions. First of all, from the outset, it was declared constructively and respectfully, in the spirit of sincere cooperation. The government wanted to achieve the best possible result of leaving the EU and build a new ambitious and special future partnership between the UK and the EU. Agreeing on a high-level approach to the issues arising from the UK's withdrawal was an early priority. Government officials realised the challenge to reach such a comprehensive agreement within the two-year period set out for withdrawal discussions in the TEU. At the early stage of the negotiations, an important aspect was the setting of the implementation period in order to adjust to the new arrangements in a smooth and orderly manner. The deep and special partnership was supposed to contribute towards the prosperity, security, and global power of the European continent. Most of all, the UK did not want to lose the regulatory alignment, the trust in one another's institutions, and the spirit of cooperation stretching back for decades. Moreover, from the beginning of the negotiations, it was realised that the Article 50 exit procedure was intended to put member states (in this case, the UK) at a disadvantage when leaving the EU. Therefore, even before a formal notification was given, other EU governments were called upon to indicate which demands could be accepted in order to avoid their rejection at the formal start of the withdrawal procedure. However, the EU's position in the Brexit negotiations was based on the largely united approach of the four freedoms of the single market (goods, capital, services, and labour), which are indivisible in nature and cannot be 'cherry picking' (Taylor 2017). The EU representatives repeated the claim of indivisibility and that the best cannot be chosen among the four freedoms. Moreover, it was assumed that the UK's leaving the EU would have consequences, such as losing its influence on rules, which in turn would affect the European economy. Thus, in the face of the upcoming exit talks on the withdrawal, the EU has adopted a tough line, refusing 'pre-negotiations'.

It cannot be denied that the most desired and expected solution would be the so-called soft Brexit, in which the UK would remain a participant in the European Economic Area and the single market. Nonetheless, what was feared the most was that if talks would break down or the UK would leave the EU without having completed an agreement, then there would be the so-called hard Brexit, which was the scenario that seemed the most likely from the beginning of the Brexit talks. It is true that both politicians and EU officials are used to the conservative and traditional mindset. However, the real reason for the adopted position in the negotiations should be viewed as out of the fears that if the UK would achieve a 'special status' and negotiate an agreement based on its own institutional solutions,

then other countries—inside or outside the EU—might ask for equivalent deals. This would entail a weakening of the institutional structures of the EU and could even lead to its disintegration. Therefore, undoubtedly, when analysing the Brexit negotiations, it can be concluded that they were mainly based on preventing the collapse of the EU so that other member states would not start moving towards the British withdrawal decision. Thus, the UK's withdrawal from the EU had to be an example of demonstrating that making such a decision must entail significant ramifications. Officially, in March 2017, the European Council authorised the opening of the Brexit negotiations and adopted the negotiating guidelines. From then on, the EU required the members of the European Parliament to approve both the Withdrawal Agreement (negotiated under Article 50 of the TEU) and a free trade agreement regulating future relations between the UK and the EU.

11.3.2 The EU/UK approach to transparency in the Brexit negotiations

The Brexit negotiations represented a striking example of the rising importance of the concept of transparency. The credibility of the EU and the British government depended on the transparency of their negotiation activities. It constituted an important component to signal to the public and external entities that the information offered by the EU/UK was indeed reliable. Transparency is perceived as a factor that reinforces cooperation between states and contributes to solving collective action problems. It is also a key feature of democracy, which is the government's constant response to the preferences of its citizens (Grigorescu 2003, pp. 644–646). Transparency is understood as comprising the features of public and disclosed activities, where their condition and course are available to anyone interested; therefore, nothing is hidden, uncertain, unclear, or doubtful. Thus, it is used in relation to various aspects related to information flow. Informing the public opinion about the undertaken activities and intentions is meant to increase the public confidence of citizens. It should be stated that the emphasis on transparency was evident in the narrative around Brexit; however, it is necessary to analyse how this system was implemented in practice. To this end, it requires ascertaining the EU/UK approach to transparency in the Brexit negotiations.

Originally, the principle of transparency was not entrenched in the founding treaties; however, it was developed in the case law of the European Court of Justice (ECJ). Eventually, transparency was enshrined in Article 1(2) of the TEU, which makes openness one of the defending characteristics of the EU, opening a 'new stage in the process of creating an ever-closer union among the people of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen'.[8] In sequence, Article 15 in the third subparagraph of the TFEU provides that

8 Declaration No. 17 on the right of access to information, annexed to the Final Act of the TEU, signed in Maastricht on 7 February 1992, recommended steps to improve public access to information in order to accomplish transparency in decision-making processes.

> each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.[9]

Therefore, the principle of transparency was implemented within the EU, the main piece of legislation being Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to the European Parliament, Council, and Commission documents.[10] Article 2(4) of the Transparency regulation creates a baseline of the right to access the documents of the institutions. Moreover, in implementing the transparency policy, the EU negotiator acts within the limits of the EU law and respects the European Commission's legal obligations regarding the protection of information as defined in Article 4(1) of the Transparency regulation. Consequently, the transparency regime at the EU level foresees a number of exceptions to the default position, as highlighted in the case law, which is of openness, although subject to a strict proportionality test in relation to the aim sought.[11] This was recognised in Article 4(1)(a) of the Transparency regulation, which establishes an absolute exception from the transparency system, inter alia, in international relations. Against this background, the political importance of the negotiations determines the scope of the freedom to disclose documents and sometimes leads to a different level of transparency, consisting of keeping a certain degree of secrecy in external (international) relations. The main argument for this is the need to leave the parties some room for manoeuvre in diplomatic and political negotiations. Additionally, maintaining a strong and well-functioning government more often than not leads to limited information disclosure.

In the course of the negotiations, both the EU and the UK published a considerable number of documents outlining the details of the negotiating positions taken. It is important that the party that publishes first (in this case, the EU) and the most is in some way better prepared and as such, has a higher likelihood of achieving a more favourable outcome in the negotiations. While trying to suppress the growing criticism in the initial phase of Brexit (and not decreasing later; Elgot and Asthana 2017) and following the EU's example, the UK Government began to publish various pieces of information with some delay (e.g., published position papers, in particular by the newly created Department for Exiting the European Union), issued statements, and made speeches and announcements. All European Commission negotiating documents made available to the EU member states, the European Council, the European Parliament, the Council of

9 The right of access to documents is placed among the treaty provisions that have general application (Article 15(3) of the TFEU) as a principle of good governance, and it is regarded as a fundamental right, guaranteed under Article 6 of the TEU and in Articles 41 and 42 of the Charter of Fundamental Rights of the EU (CFREU).

10 31 May 2001 OJ L 145/44; hereinafter the Transparency regulation.

11 Case C-353/99 P *Council v. Hautala* [2001] ECR I-9565, para. 28.

the European Union, national parliaments, and the UK were also released to the public. The EU published a number of negotiating documents, including agendas for negotiating rounds, EU position papers, non-papers, EU text proposals, and regularly updated factsheets. The transparency policy was regularly reviewed to ensure that it fulfilled its objective and had no negative impact on the integrity of the negotiations.

As the EU negotiator, the European Commission was committed to ensuring the maximum level of transparency as a response to the unprecedented situation of the UK's withdrawal from the EU. In the Brexit negotiation process, a tailor-made approach to transparency was embraced. Transparency is also the EU's core principle applicable in the Brexit negotiations, according to the European Council's guidelines adopted on 29 April 2017. Generally, the EU approach to openness in this process was crucial. Additionally, it is an indispensable principle in achieving the EU's constitutional goals of ensuring the accountability of decision makers, supporting legal certainty, and strengthening the rule of law (Art. 2 of the TEU) and the general principle of equality. In fact, transparency ensures a more effective management system, which is also more accountable to citizens, facilitating participation in public activities, providing access to information and resources, and enabling participation in the management process (Kendrick and Sangiuolo 2017, p. 4).

Additionally, the Terms of Reference (ToR) adopted on 19 June 2017 by negotiators in both the EU and the UK, which provide the negotiations' structure, dates and priorities, include an entire section on transparency. However, these provisions are concise and not very transparent. They stipulate the duty of the two parties to cooperate to ensure that the 'default position of transparency' is followed, but they also allow both parties to treat the negotiation documents in accordance with their respective laws. They grant each party the power to apply restrictions on the distribution of documents but impose the obligation to consult the other party in advance before disclosing them.[12] They also exclude public participation in actual negotiations between the EU and the UK, stating that each round of negotiations should only involve public officials from both sides.[13] The default position on transparency agreed in the ToR was tactically implemented by both negotiating parties and effectively relieved the UK from the legal consequences of transparency obligations under EU law.

In the Brexit negotiations, the UK Government adopted an alternative strategy befitting its own constitutional requirements. Initially, the negotiations led to distrust among the general British public as they were conducted in a rather vague manner. Although the EU referendum was a factor that legitimised the government's approach to the negotiations, the referendum question did not include a description of the importance of Brexit. First of all, in an unprecedented manner, the Miller I case (2017) questioned the government's power to assign a

12 See paragraphs 11 to 14 of the ToR.
13 See paragraph 5 of the ToR.

prior role in the negotiation process. Second, the authority of the May Government was challenged on many occasions, which particularly resulted from the inability to reach an agreement by working out a compromise solution on the Withdrawal Agreement, which in turn led to the pursuit of the so-called hard Brexit. This resulted particularly in undermining the UK's position in the Brexit negotiations on the international arena and on the domestic plane. It was believed that the government was divided and did not know what it actually wanted to achieve as a result of the ongoing negotiations. This led to the belief that the executive may not have sufficient constitutional power to agree on the terms of the UK's withdrawal from the EU. Hence, there was the need to approve any withdrawal agreement that would be settled with the EU, and there was even the idea of holding a second withdrawal referendum (Bogdanor 2017). Thereby, the divisions and disagreements in the cabinet regarding the direction of the Brexit negotiations hindered the adoption of a transparent approach. Third, the public narrative around Brexit was largely shaped by the media. On the one hand, the government's initial reluctance to publish its positions in a manner similar to that adopted by the EU was received by the media with an element of hostility, which placed the EU in a more favourable position in shaping public opinion. On the other hand, after the High Court in the Miller case ruled on 3 November 2016 that the government needed parliamentary approval to trigger Article 50(2) of the TEU, the three judges who expressed their opposition (Lord Reed, Lord Carnwath, and Lord Hughes) were verbally attacked by some people who believed that the decision to withdraw had already been made in a referendum. Grossly misleading press articles in such newspapers as the *Daily Mail, Daily Express*, and *Daily Telegraph*, which campaigned for the UK to leave the EU, described the judges as 'having blocked Brexit' and as 'enemies of the people'.[14] The negotiations were also complicated by the fact that instead of trying to dispel the various rumours that appeared solely through the publication of documents presenting a uniform (common) position, there were many occasions of alleged 'leaks' to the press from several cabinet ministers.

On many occasions in the UK, it was also noticeable that the choice of information to be released depended largely on the public interest, and the government did not always keep the parliament informed of its intentions when it seemed desirable to achieve an effective negotiation result. It cannot be denied that the constitutional foundations of the British system conditioned the government's behaviour. Thus, under the UK's constitutional arrangements, it was up to the government, specifically the cabinet, to determine the outcome that the UK wanted to achieve from the Brexit negotiations. Nonetheless, some constitutional conventions and practices in the UK Constitution promote the principle of transparency. First, since the outcome of the negotiations was essentially a question of a national political compromise, conducted under the convention of

14 See "We Must Get Out of the EU' (*Daily Express*, 4 November 2016); 'Enemies of the People' (*Daily Mail*, 4 November 2016); 'The Judges versus the People' (*Daily Telegraph*, 4 November 2016).

collective ministerial responsibility, which requires uniform public involvement of ministers, misunderstandings should be resolved confidentially, as it was advisable to keep all objections private. Second, an important role was played by the parliament's informing function, assigned by Bagehot (1981, p. 101), and in practice exercised by the UK's Select Committees. The British Constitution places the control of the information related to the Brexit negotiations in the hands of the government. However, the extent to which the government will succeed in controlling this information depends on its majority in the House of Commons. After the general election on 8 June 2017, the government (and the Conservative Party) lost its parliamentary majority. This required cooperation with opposition parties to work out a compromise, but they did not necessarily share similar views on the importance of Brexit and the shape that the Withdrawal Agreement should take.

Undoubtedly, Brexit talks were chaotic. They did not proceed smoothly and were characterised by a rather constant source of uncertainty for British politics, the economy, and the entire British law. This was largely due to the fact that the British side did not immediately present a coherent plan of what it would like to achieve when the negotiations started. Some political pundits also argued that in view of the fact that the government was unprepared for Brexit, the negotiation process was performed disastrously (Powell 2020). Such a view is not surprising, since from the very beginning, before the formal start of the Brexit negotiation process, it had sparked basic constitutional dilemmas. It was not clear how this process should be shaped according to the British constitutional requirements, since it was difficult to anticipate the outcome of the EU referendum. A dispute over triggering Article 50 of the TEU arose, resulting in a fight against the background of scholars, but above all, the political views between the Brexiteers and those who were planning to stay, that is, the Remainers, ultimately resulting in a judicial intervention in the Miller I case, where the judiciary had no option but to discipline the executive branch. Then, the Brexit negotiations focused only on establishing the conditions for the withdrawal and led to reaching a consensus on the so-called Withdrawal Agreement, which would outline the future shape of British constitutional law by setting out the terms of the UK's exit and the Political Declaration on the framework for the future EU–UK relation.

11.4 The Brexit negotiations and the UK Government's accountability

The constitutional objectives in the Brexit negotiations could only be accomplished by ensuring accountability in the decision-making process by the government. The parliament has an obligation to monitor and control the negotiation process as a matter of accountability. However, to be effective, the negotiations should be held in an atmosphere of mutual trust, which naturally requires, first, secrecy and second, minimum public or parliamentary scrutiny to maximise the chances of their success. Against this background, what needs to be determined is how accountability in the divorce process from the EU should be construed.

Taking into account the meaning of the concept in question, constitutional scholars emphasise that accountability is 'a complex and chameleon-like term' (Mulgan 2000, p. 555). A classic scholar of British constitutional thought is A. V. Dicey; while writing about a 'balanced constitution', he presented the idealised concept of the rule of law, claiming two pillars—the political responsibility of ministers to the parliament and the personal legal liability of all public officials before the ordinary courts of the land (1982, pp. 115–116). The distinction between these two forms of responsibility is crucial. Furthermore, when delving into the classic British constitutional theory, this chapter's author originally came across the term 'responsibility', which means 'the relations between Ministers of the Crown with, on the one hand, their departments and, on the other one, Parliament' (Harlow 2002, p. 6). In turn, the concept of 'accountability' gained importance relatively recently, although it was already ingrained in the classic British constitutional theory. It was delineated as

> a framework for the exercise of state power in a liberal-democratic system, within which public bodies are forced to seek to promote the public interest and compelled to justify their actions in those terms or in other constitutionally acceptable terms (justice, humanity, equity); to modify policies if they should turn out to have been ill conceived; and to make amends if mistakes and errors of judgment have been made.
>
> (Oliver 1991, p. 28)

Eventually, Mulgan (2000, p. 555) observed:

> A word which a few decades ago was used only rarely and with relatively restricted meaning (and which, interestingly, has no obvious equivalent in other European languages) now crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of democratic 'governance'.

There is no doubt that the doctrine has a considerable variety of conceptual definitions of accountability relating to various aspects of its functioning (Oliver 2003; Pyper 1996). However, in the context of Brexit negotiations, attention will be paid only to the effects that government transparency may have on accountability. The literature indicates that transparency has been considered an important factor contributing to the accountability of a democratic government (Grigorescu 2003, p. 644). In the context of the negotiations on the UK's withdrawal from the EU, a greater level of transparency resulted in increased responsibility. Openness and transparency are key elements in ensuring accountability in the decision-making process. The more open the Brexit process was, the more responsible the government became. Therefore, maintaining control over the dissemination of information, especially regarding disputes among the cabinet ministers on what form Brexit should take and how long it should last, was of paramount importance to the stability of the government.

In the British Constitution, the actions of the government (ministers and their departments) are mostly regulated by constitutional conventions (see, e.g., Leyland 2016, pp. 25–43; Ellis 2004; Marshall 1987); that is, the repeated and followed rules of established structural practice that define the way that the government operates and the exercise of royal prerogatives, as well as regulate the manner of incurring responsibility.[15] When thinking about accountability, one should distinguish between political and legal accountability. The UK model of the constitution takes as the paradigm form of accountability the practice that ministers are answerable to the parliament. In this context, the ultimate form of political accountability in British constitutional law is a general election, prompted either by timing (one must be held every five years)[16] or by the cabinet's loss of the support of the majority of the members of parliament (MPs) in the House of Commons. The legislative and executive branches can maintain their independent existence through the two ways in which an election can be triggered before the end of the five-year term: (1) if a motion for an early general election is agreed on, either by at least two-thirds of the house or without a division; and (2) if a motion of no confidence is passed by a simple majority and no alternative government is found. Between elections, it is important that the central government be called on to explain its actions, inactions, and failures in several different ways (e.g., discussion of the annual Queen's/throne speech, budget exposé, debate on a specific goal of a government policy in the House of Commons, or the inquiry procedure *questions*). Therefore, against this background, a key role in the political responsibility of the government is played, on the one hand, by the will of the people, and on the other hand, by the principle of responsible government, manifested in the principle of the convention of collective ministerial responsibility, or the position of the constitutional system of the head of government, regulated only by way of conventions. Ministers before the parliament are only responsible for the way in which they carry out their functions in terms of efficiency and the overall course of action. The government is required to have a substantially united front. Therefore, disputes have to be discussed in confidential meetings of the cabinet. Thus, public statements represent a collective stance, while the government's policy is defended, irrespective of any different opinions expressed by the ministers (Kendrick and Sangiuolo 2017, p. 10). This convention is designed to ensure the government's stability and its ability to inspire confidence in the House of Commons. Generally, during the Brexit negotiations, it was of utmost importance that the government (and the majority Conservative Party) maintained the confidence of the House of Commons at all costs. However, the manner in which the referendum campaign was

15 A. V. Dicey understood conventions of the constitution as 'maxims or practices which, though they regulate the ordinary conduct of the Crown, of ministers, and of other persons under the constitution, are not in strictness laws at all'. They are characterised by a non-legal and informal character, regulating systemic issues belonging to the area of constitutional matters (1982, pp. 70, 277).

16 See Article 1(3) of the Fixed-Term Parliaments Act 2011.

conducted or the two early general elections held at that time (2017, 2019) only revealed different views in the cabinet.

The specificity of British constitutional law also influenced the transparency of the Brexit negotiations through the role of the parliament. As already emphasised, the legitimacy of the government's actions in the Brexit negotiations resulted from the referendum (Bogdanor 2016, p. 314). Thus, in political terms, the result of the 2016 referendum took on a particularly political role because its effects made it impossible for the parliament to disregard the will of the people. Moreover, from the initial stage, the role of Westminster was significantly reduced in the Brexit procedure, which had already been demonstrated in the context of the lack of statutory consent to trigger Article 50(2) of the TEU, which was eventually decided in the Miller I ruling. Furthermore, in relation to the Brexit negotiations, special attention should be paid to the role played in this process by the EU Select Committees functioning in the parliament and exercising control over the implementation of the provisions of the laws by the government. Although the parliament is not responsible for implementing legislation, in a post-legislative scrutiny, its special committees can investigate how well an act (e.g., in such case the European Union (Withdrawal Agreement) Act 2020 or the European Union (Future Relationship) Act, and other statutes associated with the process of exiting the EU) is being implemented by the government and the effect that the new law is having.

11.4.1 The role of the UK's Select Committees in influencing the EU decision-making process

One important issue of European integration has been the requirement to establish appropriate parliamentary bodies and procedures to ensure that the national legislative bodies of the member states have a real voice in the EU decision-making process. Thus, the intensification of integration processes has resulted in the need to strengthen the UK parliamentary scrutiny in the areas under EU competence (see, e.g., Oliver 2003, pp. 85–87). The UK membership in the EU structures and the Brexit process had increased the importance of the parliamentary EU Select Committees as a link between EU legislation and the UK Parliament. The two houses of the parliament developed individual scrutiny procedures. The core subject of scrutiny was the process by which, in accordance with the agreed ToR, legislative proposals and other EU documents had been analysed and the financial, administrative, legal, and political consequences that might have arisen for the UK, as a result of the adoption of the submitted legislative proposals, had been taken into account (Cygan 2017). Undoubtedly, the obligation to inform Westminster about European affairs has helped enable the UK Parliament to scrutinise the legislative processes undertaken at the EU level.

In 1974, EU Select Committees were set up in both houses of the UK Parliament for the purpose of scrutinising draft legislative acts at the initial stage of the EU legislative process. In the House of Commons, three EU Select Committees had been set up, called European Committees, with their formal and legal basis

for operation laid down in Section 119 of the Standing Orders of the House of Commons 2018. Informing the parliament or its houses of the political and legal significance of individual EU documents and deciding which of those would require further examination were the tasks of the European Scrutiny Committee, whose remit is defined in detail in Section 143 of the Standing Orders of the House of Commons. The committee analysed draft EU legislation and reported to the house on the legal and political importance of each document. Its tasks also included monitoring and analysing government positions within the Council of Ministers and drawing up appropriate reports (Ryan 2019, p. 362). During the transition period, the European Scrutiny Committee analysed how the EU regulations and policies could still exert an influence on the UK after its exit from the EU and what changes would be required in the current control system, which has largely remained unaltered since the accession. Key issues that the European Scrutiny Committee addresses in its inquiry include (a) how the UK's exit from the EU will affect the current system for scrutinising EU laws and policies and what changes might be needed; (b) whether and how EU laws and policies might affect the UK after Brexit; (c) what the purpose of the scrutiny of EU laws and policies should be in a post-exit world; (d) what action the government should take to support and facilitate a strong parliamentary scrutiny process post-exit; and (e) what form of scrutiny should be taken to maximise its effectiveness.

The other two European Committees in the House of Commons are responsible for matters relating to the decision to withdraw the UK from the EU. The European Statutory Instruments Committee is tasked with the selection ('sifting') of the proposed negative statutory instruments resulting from the European Union (Withdrawal) Act 2018 amended by the European Union (Withdrawal Agreement) 2020, which empowers the ministers to issue regulations on 'deficiencies in retained EU law'. In turn, the Exiting the European Union Committee was responsible for examining the expenditure, administration, and policy of the Department of Exiting the European Union, established in 2016 (by Prime Minister May), and evaluated as well as monitored its work (including the established office of the Secretary of State for Exiting the European Union). This department was disbanded with the official completion of Brexit at the end of January 2020. In turn, in the beginning of March 2020, the Exiting the European Union Committee was transformed into the Committee on the Future Relationship with the European Union, responsible—as the name suggests—for negotiating and determining future British relations with the EU.

In turn, in the upper house of the parliament, the EU Select Committee was established by virtue of Section 64 of the Standing Orders of the House of Lords 2016, which coordinates the policies and actions of the British government in relation to the EU and considers EU documents submitted to the House of Lords by ministers and other matters concerning the EU (Ryan 2019, p. 362). The EU Select Committee assisted the house in the procedure for the submission of 'reasoned opinions' and represented the house in the interparliamentary cooperation within the EU as appropriate (it was responsible for the proper representation of the House of Lords in contacts with the EU institutions and EU-27).

Both houses of the parliament used similar parliamentary methods to scrutinise legislation and other EU affairs. The main methods of operation included (1) hearings of government ministers, (2) debates, and (3) investigative work by the EU Select Committees. In each house, reports were made by the committees on selected issues, and government ministers might be called on to respond to the findings and to provide explanations regarding the conduct of the negotiations in the European Council and on the legislative proposals made. The model of scrutiny exercised by the committees was based on documentary analysis. The work of the EU Select Committees covered both legislative proposals and non-legislative documents. The types of documents that were subject to scrutiny (to be 'deposited') were agreed between the two houses of parliament and the government and included all legislative proposals, together with a number of other documents published by the EU institutions.

One of the effective instruments for the parliamentary scrutiny of EU legislation was the so-called parliamentary scrutiny reserves. The parliament had certain powers to review and express opinions on EU draft legislative acts and any other documents falling within the remit of the EU Select Committees of both houses of parliament. The government supported the principle of effective scrutiny of European legislation, and both houses adopted appropriate resolutions on scrutiny reserve, which were published together with the Standing Orders (of the House of Commons or the House of Lords). On this basis, no minister of the Crown should agree to the adoption of EU legislation that had not yet been approved by the European Scrutiny Committee of the House of Commons or by the EU Select Committee of the House of Lords. In general, these were acts or documents for which the scrutiny process had not yet been completed, as they were referred to the committee for debate. Thus, until the parliamentary scrutiny by the houses was completed, it was not possible for the government to accept the legislative proposals or other documents presented by the EU that had not been recommended by the EU Select Committees.

The scrutiny process formally started when the government deposited an EU document in the UK Parliament; that is, it was sent to the relevant EU Select Committee in the House of Commons or the House of Lords for further scrutiny. The government then drew up an Explanatory Memorandum (EM) on each document submitted within 10 working days, in the course of which it analysed the legal basis and the political consequences that might result from its adoption. After the committee received the EM from the government, the committee chair (with the support of legal advisers) decided which documents should be subject to more detailed scrutiny (Rogers and Walters 2015, pp. 351–352). It was then up to the committee to decide on the angle of review of the document, selecting one of four possible solutions. First, the committee might refrain from undertaking further scrutiny of the document, thus 'clearing the document from scrutiny'. Second, the committee might ask the government to forward a document for review to the competent minister, requesting further information in writing. Third, there was the possibility to hold evidence sessions or seminars with the stakeholders. The committee should have organised one or two meetings to hear the views of

witnesses or stakeholders before requesting clarification from the government. Fourth, with regard to particularly important proposals, the committee might launch a full investigation, after which a report would be published, to which the government was required to respond within two months, and which was then discussed in the house. In the third and the fourth cases described, correspondence between the committee and the government was continued until the committee was 'satisfied'. The final stage of the scrutiny procedure by the committee should be included in the decision stating that the EU document was officially cleared from scrutiny. This was possible once the government had fully explained its position and the document itself was 'approaching' its adoption. It should then take the form of a legislative act acceptable to the UK Parliament; otherwise, it was definitively rejected. However, when a document had been the subject of a full investigation, it should automatically be cleared from scrutiny when the final report presented by the committee was discussed in a house session.

It should be noted that it was also possible for the ministers to altogether repeal the scrutiny reserve resolutions adopted by the committees when there were specific reasons for doing so. In such a case, at the first possible opportunity, the government representatives should explain to the committee the reasons for this course of action. Most of the repeals occurred in situations of dynamically evolving yet sensitive policy areas, such as the decision to impose sanctions or when exceptional policy measures were required. However, it should be emphasised that the resolutions adopted by the houses regarding parliamentary reservation for the duration of the review were not in fact intended, after the audit process had been completed, to prevent the ministers from giving their consent to the adoption of new EU commitments, even when the select committees in both houses had expressed reservations about the proposed directives, regulations, or decisions. Nevertheless, there was considerable political pressure on the ministers who should take the reports presented by the committees into account, as they were responsible for the decisions made before the parliament. The formal scrutiny of EU draft legislation primarily served a constitutional function by strengthening the parliamentary accountability of the executive branch of government. Its aim at the restriction of scrutiny thus carried out, together with the opinion expressed by the UK Parliament, should restrict the activity of the ministers exercising their legislative role in the Council of the European Union. Against this backdrop, the EU Select Committees undoubtedly served a crucial function for Westminster, which did not play a direct role in the EU legislative process, and thanks to their work, had the ability to exercise a scrutiny function towards the government by its commitment to explain and justify its actions and expenditures in the EU.

However, as a result, the EU Select Committees only seemingly formed an effective mechanism to ensure that the UK Parliament could influence the EU decision-making and scrutinise government actions on the international stage. Notably, their twofold role was to act as subsidiary bodies of the British Parliament, focused primarily on providing opinions and scrutinising government actions regarding European affairs and to grant the national legislature influence on the EU decision-making process by providing access to information on

legislative proposals. However, it would be a mistake to claim that the scrutiny of EU legislative proposals was fully complete and did not raise any particular doubts. Although it was a part of British constitutional law, the EU law was not created by the national legislator but was the result of a legislative and political process over which Westminster had no direct control. Therefore, the scrutiny of EU legislative proposals and other documents in both houses of parliament provided two potential opportunities for the UK to influence the decision-making process of the EU. The first possibility had the direct effect of influencing the ministers themselves through pre-legislative scrutiny. On this basis, one of the objectives of the scrutiny was to hold the UK ministers accountable, resulting in the possibility to ensure that Westminster's position was fully taken into account before negotiations in the European Council. The second possibility of parliamentary influence on the EU legislation was ensured by the institution of parliamentary reservation for the period of review; within this framework, it was possible to issue reasoned opinions, expressed directly by the houses, on the legitimacy of adopting the proposed EU legislation. However, unlike the scrutiny of the executive branch, the latter form of scrutiny was less precise in terms of its importance, due in practice to the lack of a clear consensus between the two houses regarding the number of positions to be taken on the issuance of reasoned opinions (Cygan 2017). Scrutiny reserve resolutions were perceived as tools to ensure that sufficient time was available to obtain information on EU legislative projects, but they were not intended to change the views of the cabinet members. The MPs in the UK had an important tool in their hands, but they did not use it to become political players. Detailed information regarding the negotiation process allowed the MPs to inform the government at an early stage about potential problems in its negotiating position. Furthermore, the relevant literature (Auel et al. 2012, pp. 5–6) indicates that the system of parliamentary reservations was the result of a debate in the legal discourse on the consequences of the UK's membership in the EU, arising from the doctrine of sovereignty of the parliament. It is noted that this system can be perceived as a form of compensation for the restrictions imposed on Westminster as a result of its participation in EU structures. However, parliamentary reservations could contribute to the development of informal cooperation between the parliament and the government at both political and administrative levels (Cygan 2007). Moreover, the interparliamentary dialogue in the negotiations with the EU was necessary to try to break the Brexit impasse.

11.4.2 The process of constitutional change in 'regaining' the UK Parliament's sovereignty

As a matter of the constitutional law of the UK, the institutional embodiment of legal accountability is judges, who also define the scope and limits of the powers of the government branches, including the executive. Judicial review of the lawfulness of the ministers' actions is an exclusive competence of the courts in this respect. The practice of judicial control of executive power, including ministers' illegal actions, was developed from common law and case law. The development

of judicial activism in the second half of the 20th century was due to the stronger political position of the executive branch and its dominance over the parliament (mainly owing to the UK's membership in the EU). This led to a certain activation of the courts as a factor guaranteeing balance in the constitutional system of the UK. The courts took full responsibility for verifying the legality of the executive branch's actions after the impeachment procedure was discontinued. In the case of *M. v. Home Office and Another*,[17] Lord Donaldson drew attention to the obligation of the executive authority to respect the courts' powers to adjudicate on illegal activities of ministers, referring to the principle of separation of powers. In this context, the Miller I case judgement described above was an important aspect of legal liability in the Brexit procedure. The outcome of this case demonstrated that the courts had been forced again to draw the boundaries of constitutional competence between the executive branch and the parliament, in the sense that they had consistently backed the parliament. The main argument of the pro-Brexit campaign was to 'take back control' and consequently, regain sovereignty. This was due to the fact that the British constitutional scholars have long referred to certain legal and political arguments concerning the constraint on the doctrine of parliamentary sovereignty since the accession to the European Community (currently the European Union).

Against this backdrop, the conceptualisation of the doctrine of sovereignty of the British Parliament and the clarification of its constitutional significance require a distinction between legal and political sovereignty. It is often not an easy task to distinguish its forms, since the lack of a clear distinction between politics and law is largely due to the unwritten nature of the British Constitution. More specifically, the difference between political and legal sovereignty is that the issue of political sovereignty refers to the highest political power in the state, which belongs to a collective entity—the people. It is related to a representative and accountable government whose members, based on their mandate, can exercise power and implement their election promises. In contrast, legal sovereignty refers to the highest legislative authority in the country, whose subject is the monarch in the parliament. Formally speaking, therefore, it means that the parliament can make norms with no limits in terms of their substance. Undoubtedly, the classic definition of sovereignty, borrowed from constitutional law and not derived from a judicial perspective, is the one presented by Dicey (1982), that is, it is necessary to separate political and legal issues and to recognise that in the current situation, legal sovereignty rests with the parliament, although there may be political constraints that effectively limit the exercise of these powers. From this perspective, it can be observed that the theoretical approach to the principle in question is currently limited by its practical application (Allan 2013, p. 72).

Indeed, one of the manifestations of the modification of the doctrine of parliamentary sovereignty was the EU law. It was caused by the impossibility of enacting provisions inconsistent with the directly effective European

17 [1992] QB 270, 314.

Community law (as a result of the enactment of two implementing statutes, i.e., European Community Act 1972 and European Union Act 2011). The reasons behind this are observed first and foremost in the process of the harmonisation of legislations and the inclusion of the UK territory under the jurisdiction of the EU institutions. Both the principle of direct effectiveness and efficiency of the EU law and the quasi-binding nature of the referendum do not adhere to the fundamental principles of the British political system and the principle of parliamentary sovereignty.[18] Pointing to the reason for such a state of affairs, in the *Factortame* case,[19] Lord Bridge rightly stated that the reduced sovereignty resulting from the EU membership was not a consequence of the court decisions issued but the result of political decisions with the UK's accession to the European Community's structures. In the first place, the courts expressly accepted the primacy of the EU law and the modification of the approach to the traditional (orthodox) doctrine of sovereignty presented by Dicey (1982), which meant (among others) the inability to apply the doctrine of implied repeal to constitutional statutes.[20] Second, the UK courts kept existing constitutional law in line with actual constitutional practice. In this respect, the principle of sovereignty should also be analysed in connection to the existing relation between the parliament and the judiciary. This particular boundary between the two branches of government, as well as the notion that the courts may be forced to deviate from the strict doctrine of supremacy in the face of threats to the fundamental principles of democracy, has been the subject of the ongoing debate.

In this respect, the literature on the subject portrays two distinct approaches to the above issue. The first is based on the assumption that the sovereignty of the parliament was permanently changed through the UK's membership in the EU structures; the UK's withdrawal from the EU will not change this at all and will not restore the traditional doctrine presented by Dicey (1982). Brexit will not remove the judicial threat to parliamentary sovereignty caused by the so-called judicial activism; on the contrary, it will actually further deepen its erosion (Gee and Young 2016, pp. 146–147; Gordon 2016a, pp. 409ff.; Gordon 2016b, p. 335; Bogdanor 2012, pp. 179ff.). The second position emphasises that one of the arguments for Brexit was that leaving the EU would reinvigorate Britain's centuries-old parliament, strengthening its position towards a doctrinal interpretation of the principle of sovereignty (Ewing 2017, pp. 713, 725–772; Bellamy 2011, pp. 93ff.; Goldsworthy 2010, pp. 12ff.).

18 On the lack of coherence between the above-mentioned phenomena and the principle of supremacy of the British Parliament, see Loveland (2003, pp. 676–678). According to Dicey, a referendum is essentially a form of limiting the principle of sovereignty (1982, p. 138).

19 *R v. Secretary of State for Transport, ex parte Factortame Ltd (No. 2)* [1991] 1 AC 603, per Lord Bridge.

20 However, in practical terms, it is obvious that certain statutes are of special constitutional significance, for example, ECA 1972, EUA 2011, or the Human Rights Act 1998 (see especially *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin)).

The flexible formula of the British Constitution results in a relative openness to external influences. Prima facie, therefore, the decision to withdraw from the EU should result in a 'renaissance' of the doctrine of Westminster sovereignty, per Dicey (1982). However, the continued validity of the European Convention on Human Rights (incorporated based on Human Rights Act 1998) and the irreversible consequences of the devolution of competences in the UK for Wales, Scotland, and Northern Ireland are factors that hinder the possible restoration of such sovereignty. Thus, it is not entirely possible to reverse the effects of the 'soft' modification of the foundations of the UK's system, which has often occurred in the sphere of the practical implementation of the competences of particular branches of government. It is widely known that the UK's membership in the EU structures resulted in a progressive limitation of the UK Parliament's sovereignty, and the significant modification of the relation between the judiciary and the parliament strengthened the role of the courts. In the case of the UK's membership in the EU, a political necessity has brought about the situation, recognised by the UK judiciary, in which European Community law prevails over inconsistent national legislation (see the *Factortame* litigation). Now the UK's return to the Diceyan traditional (orthodox) doctrine of parliamentary sovereignty—as emphasised by Bradley and Ewing (2003, p. 77)—would scarcely compensate for the disadvantages of an isolationist policy within Europe. In legal terms, the expected results of the process of the UK's withdrawal from the EU will not lead to the restoration of the traditional doctrine of parliamentary sovereignty but may only apparently result in the revitalisation of the current status quo of individual state institutions. Although that doctrine has been modified (see, e.g., Gordon 2017, p. 151)—which is not in doubt at present—it should be stressed that it remains a key constitutional foundation that continues to shape the public law superstructure that it supports (Irvine 2003, p. 184). In the current legal and political reality, it is too early to unequivocally determine *pro futuro* the post-Brexit situation in this regard.

11.5 Conclusion

The process of the UK's withdrawal from the EU has resulted in some modifications at both legal and political levels. The 2016 EU referendum and its aftermath have exposed the extent to which the foundations of the British Constitution have been eviscerated. While some scholars perceived the decision to hold a referendum on EU membership as triggering a severe constitutional crisis, others argued that the political and democratic dilemmas arising from Brexit were symptoms of a broader and constitutionally complex issue, with roots reaching far beyond the 2016 EU referendum. On the one hand, controversy was stirred by the simple fact that the British people made the decision in favour of Brexit, as Prime Minister Cameron had counted on referendum voters' rejection of the proposal for withdrawal, which did not in fact happen. On the other hand, in

legal circles, there emerged a rekindled interest in the topic of a newer and still fragile constitutional convention, stating that

> decisions of fundamental importance bearing on the constitution of the UK should be preceded by holding a referendum, regional or national, before legislation is introduced and passed into law by the national Parliament.
>
> (Lord Windlesham 2007, p. 103)

As a form of direct rather than parliamentary democracy, a referendum on questions of exceptional national or regional significance has not been typical in British constitutional practice. However, in recent years, new uses have been made of this process, which is increasingly becoming a more frequently applied systemic solution classified as a form of direct democracy, which significantly affects the British legal order.

The 'unprecedented nature' and implications of the UK's withdrawal from the EU have required an assortment of unequalled measures. International negotiations are based on diplomatic methods of operation and the pursuit of a compromise to reach the necessary agreement. In the Brexit negotiations, the high level of unity between the EU-27 and the EU institutions was a consequence of the strong negotiating position presented by the EU, which adopted a maximum level of transparency as a core principle. The UK Government embraced the Brexit talks in a particular way. On the one hand, the UK sought to avoid the scenario called the 'no-deal' Brexit. On the other hand, it consistently and accordingly exposed a tough line on the issues where it was difficult to reach an agreement, although it would result in the 'hard Brexit'. In this context, the analysis presented in this chapter allowed the formulation of three important conclusions. First, transparency as a public audit tool was a key element in enhancing democratic legitimacy. The arguments in favour of openness were the demonstration of unity and strength by each side to increase awareness and create bonds with the society. Second, Brexit as a hybrid phenomenon, that is, both legal and political, is the next stage in the debate on the place and the role of the EU. Third, the use of the principle of transparency as a negotiating technique has increased the level of accountability of the government.

As emphasised in this chapter, the UK Parliament had an obligation to monitor and control the negotiation process as a matter of accountability. This procedure required democratic scrutiny of the executive branch's actions to ensure that the conditions under which political power would be exercised would not be subject to unlimited discretion. In Brexit talks, this was the only way to bring about government accountability and, consequently, for the legislature to fulfil its fundamental constitutional obligation. After all, without maximum access to government information on how the Brexit decisions were being made, there was no effective way to monitor the exercise of the government's power and hold it accountable. Subsequently, it also contributed to the partial revision of the parliament's position in relation to the executive branch, which was confirmed in the

Miller I case. So far, national courts had tended to yield to the executive branch regarding international affairs, trying to keep themselves out of a field they perceived as unsuitable for judicial decision-making. Moreover, in the case of the UK, the analysis of the impact of its withdrawal from the EU had to be correlated with the issue of great importance for British constitutionalism: the doctrine of parliamentary sovereignty. Undoubtedly, this principle affects the essence of the functioning of the branches of government in the UK and determines their legal nature. As demonstrated by the expected result of the process of the UK's withdrawal from the EU, it will not lead to the restoration of the traditional (orthodox) doctrine of parliamentary sovereignty presented by Dicey (1982).

The Brexit process has been the most protracted issue in recent years. However, it should be stressed that the entire political class in Britain is characterised by a certain cautiousness and restraint concerning rapid changes and the respect for tradition; as a result, there is also no social consent for radical actions to be taken. The Brexit negotiations had such a chaotic and unpredictable character that sometimes, speculations about what could happen in the near future as a result of the withdrawal seemed pointless. The situation was changing very dynamically, and it was not certain until the end whether this process would draw to a close and when. At this moment of the history of the UK, the Brexit process is done. On 31 January 2020, the UK left the EU, 47 years after its accession.

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