Przegląd Prawa Konstytucyjnego
---------ISSN 2082-1212---------
DOI 10.15804/ppk.2017.01.03
---------Nr 1 (35)/2017---------

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Further Considerations on 'Brexit'[3]

Keywords: BREXIT, royal prerogatives, Article 50 of the EU Treaty, Parliament sovereignty, Supreme Court of the United Kingdom, competences
Słowa kluczowe: BREXIT, prerogatywy królewskie, Artykuł 50 Traktatu o Unii Europejskiej, suwerenność parlamentu, Sąd Najwyższy Zjednoczonego Królestwa, kompetencje

Summary

On June 23rd, 2016, the United Kingdom (UK) held an EU-Referendum which resulted in a vote in favor of withdrawing from the European Union (EU). However, in a post-referendum reality, several constitutional issues have become apparent. On one hand, it is not certain whether the Prime Minister, under the royal prerogatives, can trigger Art. 50 of the EU Treaty. On the other hand, the scope of Westminster's approval must still be determined. It is believed that the judiciary will end up in a constitutional crisis, especially the Supreme Court. At the very least, the suspension of 'Brexit' procedures is causing uncertainty on both sides i.e. UK and EU. This paper will pose some of the essential questions being discussed on the eve of the Supreme Court's decision over 'Brexit' in December of 2016/January of 2017.

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[3] The following paper was written before the Supreme Court of United Kingdom had reached its final verdict related to discussed issues. Per data released on the official website, the first hearing is scheduled for December 5 2016: https://www.supremecourt.uk/news/supreme-court-prepares-for-article-50-appeal.html, (12.12.2016).

Streszczenie

Dalsze rozważania na temat 'Brexitu'

W referendum przeprowadzonym 23 czerwca 2016 r. Brytyjczycy opowiedzieli się za opuszczeniem instytucjonalnych struktur Unii Europejskiej. Jakkolwiek w nieodległym czasie okazało się, że podjęta decyzja skutkować będzie szeregiem wątpliwości o konstytucyjnej proweniencji. Z jednej strony, zastrzeżenia związane są z zakresem kompetencji premiera. Spór prawny odnosi się do oceny dopuszczalności samodzielnej notyfikacji instytucjom europejskim zamiaru wyjścia z UE (art. 50 Traktatu o Unii Europejskiej). Z drugiej strony, ewentualny zakres zgody parlamentu nie jest jasny i wymaga dalszej analizy. Stąd też nieocenioną rolę w tonizowaniu sporu kompetencyjno-konstytucyjnego w Zjednoczonym Królestwie przypisać należy sądownictwu. Dalsze wstrzymanie procedury opuszczenia UE jest, bowiem niekorzystne tak dla Zjednoczonego Królestwa, jak również dla UE. Stąd też w niniejszym artykule dokonano przeglądu pytań i wątpliwości, które wymagają uwagi w przededniu wyroku Sądu Najwyższego w sprawie Brexitu.

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I.

Beyond a doubt 'Brexit' can be described in many different manners, some of them are connected to merely political, legal and macroeconomic analyses of further relations between the United Kingdom (UK) and EU-27; however, listed planes somehow seem to interfere with each other. In fact, the economy[4] is said to be a crucial factor that would determine to a great extent the eventual shape of British substantive law, in the case when considering the matter of subsequent participation by the UK in a Single Market economy ('hard'/'soft' 'Brexit' issue)[5]. Henceforth it is unknown whether there is a legal basis for the further preferential participation in the European Economic Area

[4] See S. Dhingra, G. Ottaviano, T. Sampson, J.V. Reenen, *The consequences of Brexit for UK trade and living standards*, London 2016.

[5] See e.g. *Brexit and Beyond. How the United Kingdom might leave the European Union a report by The UK in a Changing Europe for Political Studies Association of the UK*, p. 4 http://ukandeu.ac.uk/wp-content/uploads/2016/11/Brexit-and-Beyond-how-the-UK-might-leave-the-EU.pdf (12.12.2016); R. Ladrech, *Explainer: what's the difference between 'hard' and 'soft' Brexit?*,

(EEA) by a non-Member State of the European Union (EU)[6]. Furthermore, this issue arose from potential supervision over the British market, meaning it is plausible that EU institutions[7] would prefer to keep its competences in the field of financial and competition law. UK authorities will be obliged, according to international obligations, to maintain[8] to some extent direct effectiveness of EU law regarding domestic systems. In turn the post-referendum legal reality would be affected by EU regulations, directives and other European *fontis iuris*[9].

On the other hand, 'Brexit' explicitly reflects on British constitutional law and EU law as a part of the British legal system. One could state that the decisions made by the British on the 23rd of June, 2016, during the EU-Referendum created serious consequences for both European and domestic law, especially in terms of human rights and institutional guarantees over substantial areas such as: consumer protection law, environmental law, agricultural and fishery regulations and judicial cooperation. In an academic paper it is impossible to list or discuss each and every legal reflection of 'Brexit'. Hence, only some of these concerns and issues will be analyzed. Simplified research shows that British *ordo iuris* will be divided and uncertainty is to be the optimal term of description for the present situation.

To focus on selected constitutional and competency aspects of 'Brexit', the scope of considerations must be narrowed. For this reason, the issues of the referendum have been excluded. In fact, it is unnecessary to discuss the issue of civil engagement in the UK since there are numerous available publications dealing

"The Conversation" (6 October 2016), https://theconversation.com/explainer-whats-the-difference-between-hard-and-soft-brexit-66524, (12.12.2016).

6 See *'Smart Brexit', British Influence* (28 November 2016) http://influencegroup.org.uk/smartbrexit/(12.12.2016); A. Asthana, J. Rankin, *'Brexit: UK government faces legal challenge over single market*, "Guardian" (28 November 2016), https://www.theguardian.com/politics/2016/nov/28/uk-government-faces-legal-challenge-over-single-market?CMP=Share_iOSApp_Other, (12.12.2016).

7 See D. Chalmers, *Article 50 – five big legal questions*, "The UK in a Changing Europe" (4 November 2016), http://ukandeu.ac.uk/article-50-five-big-legal-questions/, (12.12.2016).

8 Obviously *de lege lata* EU law involve direct effect on British legal system esp. on conditions set by European Communities Act (1972); see e.g. A. Gillespie, *The English Legal System*, Oxford 2015, pp. 129–130.

9 See e.g. L. Eaker, *The Brexit Legal Mess – Falling Into a Black Hole?*, "Jurist" (29 June 2016), http://www.jurist.org/forum/2016/06/larry-eaker-black-hole.php, (12.12.2016).

with this subject. Although two factors connected with the EU-Referendum are relevant for further consideration. These are the advisory character[10] of the referendum and the doctrine of Parliament sovereignty. It is widely accepted that aside from its non-binding character, the referendum affects the role of Parliament in the British legal system[11]. Thus, it is not acceptable[12] from a political point of view to repeal the popular (democratic) vote by Parliament[13]. On the other hand, recognition of direct effectiveness of EU law in British domestic system constrain a supremacy of Parliament. Therefore, neither referendum nor supremacy of European law[14] fulfills the orthodox doctrine of parliament's sovereignty[15]. When considering the purely theoretical[16] aspects of the commented doctrine, subsequent legislation passed by Parliament may ignore[17] the British decision made on the 23rd of June, 2016[18]. After all, a constitutional and competency crisis, which is occurring in the UK now, could lead to a full 'resurrection' of Parliament sovereignty[19].

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[10] See V. Miller and A. Land, *Brexit: how does the Article 50 process work?*, House of Commons Library, 30 June 2016, pp. 10, http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7551 (12.12.2016); *Brexit and Beyond...*, pp. 5.

[11] See P. Mikuli, N. Fox, *Instytucja referendum z Zjednoczonym Królestwie Wielkiej Brytanii i Irlandii Północnej – uwagi wokół ogólnokrajowego referendum z dnia 23 czerwca r.*, [In:] *Aktualne problemy referendum*, eds. B. Tokaj, A. Feja-Paszkiewicz, B. Banaszak, Warszawa 2016, s. 291–292; P. Mikuli, *Zasada podziału władz w ustroju brytyjskim*, Warszawa 2006, p. 62.

[12] See P. Craig, *Brexit: A drama in Six Acts*, p. 33, http://law.indiana.edu/what/advance-knowledge/vibrant-community/assets/craig-brexit.pdf (12.12.2016).

[13] See R. Ekins, *The Legitimacy of the Brexit Referendum*, U.K. Const. L. Blog (29th Jun 2016) https://ukconstitutionallaw.org/2016/06/29/richard-ekins-the-legitimacy-of-the-brexit-referendum/(12.12.2016).

[14] See e.g. A. Gillespie, *The English...*, p. 133–134; I. Loveland, *Britain and Europe*, [In:] *The British Constitution in the Twentieth Century*, ed. V. Bogdanor, Oxford 2003, pp. 676–678.

[15] As H. Thompson stated: '[a]s EU membership was always hard to reconcile with the constitutional principle of parliamentary sovereignty without putting that membership to the test of exit'; see H. Thompson, *Haven't we been here before?*, "The UK in a Changing Europe" (28 November 2016), http://ukandeu.ac.uk/havent-we-been-here-before/(12.12.2016).

[16] See R. Gordon QC, *Constitutional Change and Parliamentary Sovereignty – the Impossible Dialectic*, [In:] *The British Constitution. Continuity and Change. A festschrift for Vernon Bogdanor*, ed. M. Qvortrup, Bloomsbury 2015, pp. 153–154.

[17] See opp. P. Mikuli, *Zasada podziału...*, p. 60.

[18] See *Brexit and Beyond...*, p. 5.

[19] Political statements made by some of the MPs show that the outcome of potential voting over 'Brexit' issue in Parliament is unclear; see e.g. C. Lucas, *Why I will vote against triggering article*

II.

The process of the UK withdrawing from the UE is complex and could lead to a constitutional crisis in terms of institutional and competency uncertainty, meaning there are several doubts and questions connected with the personal competence to trigger the notification under Art. 50 of the Treaty[20]. The 'Brexit' process is the most complicated case by default and by the reason of characteristic. At this point the main factor is that the so-called 'Brexit' is composed of several individual stages[21]. Therefore, research on the state's withdrawal from the EU must be divided into the four following time-stages:

- Internal decision made by the Member State over withdrawal from EU (pre-notification, domestic stage).
- Formal initiation of the withdrawal process by triggering Art. 50 of the Treaty.
- Bilateral (Member State – UE authorities) negotiations[22] over the terms of the withdrawal.
- Post-treaty modifications of domestic law.

At this moment the UK is considering the first step, without any proper solution for moving forward, yet to some extent the lack of clarity of Art. 50 has further complicated the withdrawal process. The wording of following provisions suggest that there are two separate and autonomous factors of withdrawal proceedings stated. Article 50 sets up the right to withdraw from the EU, however, the Treaty provisions are rather simplified, outlining that pre-notification proceedings were to be grounded by domestic law[23], reiterating that it is a matter of domestic legislation to determine whether there is sufficient reason for the initiation of the process governed by Art. 50 of the Treaty. It is a matter of internal constitutional law of the Member State to set out

50, "Guardian" (27 November 2016), https://www.theguardian.com/commentisfree/2016/nov/27/vote-against-triggering-article-50-brexit-reckless (12.12.2016).

[20] Treaty on European Union, Official Journal of the European Union, C 202/13.

[21] See E. Suwara, 'Wyzwania prawno-proceduralne dla Unii Europejskiej związane z BREXIT-em', 'Europejski Przegląd Sądowy' 2016, nr 9, pp. 11.

[22] See A. Łazowski, 'How to withdraw from the European Union. Confronting hard reality', CEPS Commentary (16 January 2013), pp. 2 https://www.ceps.eu/publications/how-withdraw-european-union-confronting-hard-reality; 'Brexit and Beyond'..., pp. 7.

[23] 'in accordance with its [Member State] own constitutional requirements.'.

conditions which must be fulfilled before a formal process may occur (stage no. 2), justifying the binding referendum, Parliamentary control or judicial review. There are several doubts in accordance with the literal interpretation of Art. 50, some of which on the grounds of the admissibility of accepting the will of the Member State to withdraw from the EU, which is an unconditional[24] character of notification[25]. It is sufficient issue to determine whether one's submitted notification under Art. 50 of the Treaty could have been withdrawn. Unless the procedure of 'Brexit' is ultimate, one could set different arguments over the scope of governmental competencies, specifically royal prerogatives, to operate in relation with the EU institutions in this field. However, issues centering around the Treaty's interpretation are held by a Court of Justice of the European Union (CJUE)[26], in fact the interpretation at this point does not fulfill the *acte clair* doctrine[27], therefore, raising doubts in the proceedings before British courts over the meaning of EU law should be referred[28] to the CJUE. Obviously, the Supreme Court of the United Kingdom is not likely to bring the interpretation matter to the European jurisdiction, especially in the case of 'Brexit'. Finally, further interpretation of the Treaty is irrelevant to the UK's 'constitutional requirements' as mentioned in Art. 50.

Aside from the aforementioned issues listed above, there are several constitutional uncertainties arising from 'Brexit'. At the pre-notification stage, it is crucial to determine whether the competence to trigger the Art. 50 does encompass the scope of royal prerogatives. In other words, is it acceptable, in terms of constitutional law that the Prime Minister, without previous West-

[24] High Court of Justice Queen's Bench Division Divisional Court, case *Gina Miller & Deir Tozetti Dos Santos v. Secretary of State for Exiting the European Union,* stated that the result of giving notice under Article 50 is unenviably and it will cause the complete withdrawal from EU.

[25] See P. Craig, 'Brexit'..., pp 28; 'Brexit: how does'..., pp. 15–16. However, research on pre-referendum negotiation between UK and EU shows that from EU institutional point of view 'Brexit' seems to be irreversible; see e.g. J. Barcz, 'Unia Europejska a Wielka Brytania – prawne aspekty porozumienia nakierowanego na zapobiegnięcie Brexitowi', Europejski Przegląd Sądowy 2016 (4).

[26] See A. Gillespie, *The English...*, pp. 137–139.

[27] See e.g. Judgment of the Court (First Chamber) of 15 September 2005 Intermodal Transports BV v Staatssecretaris van Financiën, C-495/03, Curia.

[28] See about status of UK's judges in face of European law order M. Arden, *An English Judge in Europe,* [In:] M. Arden, *Human Rights and European Law: Building New Legal Orders*, Published to Oxford Scholarship Online: March 2015, DOI: 10.1093/acprof:oso/9780198728573.001.0001.

minster approval, could formally initiate the 'Brexit' process (stage no 2)? Due to academic research and judicial decisions there are several[29] answers at this point, some stating that government is entitled to give notice of withdrawal without any prior parliamentary decision[30] since prerogative to conduct foreign affairs is exercised solely by government, and primarily by the Prime Minister under untrammeled prerogative powers[31].

Nevertheless, this argumentation is key considering the following reasons. Firstly, if it is accepted that foreign affairs and transactions between the independent states are royal prerogatives[32], this proves to be the case unless the exercised powers affect the plane of domestic law[33]. Due to the abovementioned direct effectiveness of EU law the formal initiation of the withdrawal process has a significant impact[34] on domestic law, especially regarding human rights. Furthermore, the government will operate in the field of prior statutory regulation (ECA), in fact, those arguments were crucial in the *Gina Miller & Deir Tozetti Dos Santos v. Secretary of State for Exiting the European Union* case[35].

Secondly, the scope of prerogative powers can be altered by a constitutional convention or legal constraints such as statutory approval[36], thus British

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[29] P. Craig argued that there are three different models considering this issue; see P. Craig, *'Brexit'...*, p. 29.

[30] See V. Miller, A. Lang, *'Brexit'...*, pp. 11–12; *Gina Miller & Deir Tozetti Dos Santos v. Secretary of State* [76]. See also D. Chalmers who stated that considering the human right issue lead us to the conclusion that approval and activity of Parliament is required after withdrawal notification is given by Parliament; D. Chalmers, op.cit.

[31] This approach does fulfill with Blackstone's doctrine of prerogative powers; see about the distinction between Blackstone and Dicey's sight on royal prerogatives L. Maer, O. Gay, *The Royal Prerogative,* House of Commons Library, (30 December 2009), p. 3 http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/784/78403.htm (12.12.2016).

[32] See I. Loveland, *Constitutional Law, Administrative Law, and Human Rights. A Critical Introduction*, Oxford 2015, p. 93; P. Leyland, *The Constitution of the United Kingdom. A Contextual Analysis*, Bloomsbury 2016, p. 87; A.W. Bradley, K.D. Ewing, *Constitutional And Administrative Law*, Pearson 2003, p. 309.

[33] See about two planes of international agreements A. Gillespie, *The English...*, pp. 94–95.

[34] See about distinction between international relations and EU membership J. Hunt, *A ruling in Belfast make the high court's Brexit decision even more complicated than you think*, "The Conversation" (4 November 2016), https://theconversation.com/a-ruling-in-belfast-makes-the-high-courts-brexit-decision-even-more-complicated-than-you-think-68247 (12.12.2016).

[35] Detailed analysis of this case is set in further research.

[36] P. Craig, *'Brexit'...*, pp. 30–31.

constitutional law creates[37] a mechanism of control over the scope and exercise of prerogatives[38] both political and legal. Legal aspects relate to the acceptance of judicial review over governmental activity[39] and in this case, acts made by courts are protecting the power of Parliament[40]. The political[41] control, on the other hand, relates to previous approval of Parliament in government actions[42]. Due to the importance of conducted matters it is necessary to set out authorization in statutes by the Parliament.

These considerations lead to the contrary approach where triggering, under the royal prerogative, Art. 50 of the Treaty without prior parliamentary control and approval is inadmissible. The arguments based on the Parliament's sovereignty doctrine[43] and relevant impact of EU law on the British legal system set a pre-triggering legal condition, which is the acceptance of the decision of 'Brexit' by the Parliament. Enacting statutes empowering the government would also determine the time factors of the process[44], meaning that British 'constitutional requirements' in the first stage are divided between Parliament and govern-

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[37] See about British and American experiences on the judiciary control over the executive actions A. Glendon, A. Schubert Jr., *Judicial Review of Royal Proclamations and Order-in-Council*, "The University of Toronto Law Journal" 1951, Vol. 9, No. 1, p. 70.

[38] See about legal control of prerogatives T. Poole, *United Kingdom: The royal prerogativ*, "International Journal of Constitutional Law" 2010, No. 8, p. 148, http://icon.oxfordjournals.org/content/8/1/146.extract (12.12.2016).

[39] See I. Loveland, *Constitutional Law...*, p. 94. However British constitutional law recognizes difference between judicial review on existence of prerogative power and its use; see esp. CCSU v Minister for Civil Service [1985] 1 AC 374. One could state that appropriate use of prerogative powers (executive actions) does not fulfill with scope of judicial review.

[40] See S. Fredman, *The Least Dangerous Branch: Whose Role is it to Protect Parliamentary Sovereignty? Miller and the Human Rights Implications of 'Brexit'*, "Oxford Human Right Hub" (7 November 2016), http://ohrh.law.ox.ac.uk/the-least-dangerous-branch-whose-role-is-it-to-protect-parliamentary-sovereignty-miller-and-the-human-rights-implications-of-brexit/ (12.12.2016).

[41] Parliamentary approval generally, on the field of foreign affairs, is not needed before government action, yet ministers are responsible to Parliament for their decisions; see A.W. Bradley, K.D. Ewing, *Constitutiona*l..., p. 309.

[42] See I. Loveland, *Constitutional Law...*, p. 94.

[43] See P. Mikuli, N. Fox, op.cit., p. 291.

[44] See N. Baber, T. Hickman, J. King, *Pulling the Article 50 'Trigger': Parliament's Indispensable Role*, I-CONnect (28 June 2016), http://www.iconnectblog.com/2016/06/pulling-the-article-50-trigger-parliaments-indispensable-role/(12.12.2016).

ment competencies. However, government is solely exercising the will of British people and their mandate in legislature and until Westminster passes the proper legislation, the Prime Minister unable to enact such change, *prima facie*, fulfilling the royal prerogative. Relevant arguments in favor of this approach were set by the Court in *Gina Miller & Deir Tozetti Dos Santos v. Secretary of State*. It is worthwhile to point out two of them, which can be found as controversial:

- Since the withdrawal process is inevitable it will directly affect the domestic legal system[45].
- Exercise of government's prerogative may lead to nullification of human rights set up by EU law[46].

The first of the listed arguments is partially correct, it refers to *per se* obvious conclusions considering the effects of withdrawal on the British legal system, since Art. 50 of the Treaty is 'the only way'[47] to leave the EU, the effects of government's subsequent conduct are evident. Henceforth the theoretical outcome of the proceedings set by the Lisbon Treaty and repealing ECA are equal[48] in terms of domestic law. However, this thesis is rather simplified because the repealing of the ECA and bypassing the Treaty procedure would *per se* violate the UK international obligations[49] and as such is unacceptable. Nevertheless, it is coherent with doctrine of Parliament supremacy in the British constitutional system[50]. Unduly the Parliament has exclusive power to determine the time-period and extent of the EU law transposition into the domestic legal system. Court judgment and argumentation related to the inevitability of the 'Brexit' process is to some extend *a priori*, as aforementioned, an unconditional factor of notice given under Art. 50, is not certain and it is purely a matter of EU law, therefore, the Court should not have laid down its decision on such justifications.

We believe that sufficient arguments in favor of the Parliament's competence on the 'Brexit' case arise from two constitutional issues; supremacy of Parlia-

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45 See [11]–[14].

46 See [37], [43], [57]-[66].

47 See e.g. V. Miller, A. Lang, *'Brexit'...*, pp. 7–9.

48 See to some degree opt. P. Craig, *'Brexit'...*, pp. 32–33.

49 See e.g. A. Gillespie, *The English...*, pp. 133–134.

50 See e.g. A.L. Young, *Parliamentary Sovereignty and the Human Rights*, Portland 2009, pp. 162 ff.

ment and statutory alteration of the scope of royal prerogatives. The second of the listed issues was also taken into consideration by the Court and is so justified in the court's final decision which argued that in fact the royal prerogative is excluded since the same legal field already operates within the statute[51]. In regards to the second argument the supremacy of Parliament obviously has its limits. Nonetheless since the ECA came into force, within its prospective effects, Parliament by its own decision constrained the supremacy rule, hence the decision over regaining limitless legislation power should also be made by Parliament[52].

Regarding the court argumentation on interfering between human rights set up by EU law and bringing the notification under Art. 50 of the Treaty one could say that it is misleading in several aspects. Primarily the essential elements[53] of human rights in the UK was set up in the Human Rights Act[54] yet the Treaty and subsequent legislation grounded in additional, so called EU citizens' rights, is in direct participation in the European Parliament and the main issue at this point is to determine whether merely triggering Art. 50 will affect those rights. Some stated that the EU is rooted in human rights derived from the ECA, not the European law itself and consequently, if the ECA is not repealed the rights will be exercised and guaranteed by the UK's authorities[55]; the recognition of such EU rights, as statutory law, is challenged by some commentators[56]. What is in common with these two approaches? Both arguments refer purely to the post-treaty modifications (stage no 4) rather than to the withdrawal process itself. Therefore, as long as the UK remains a Member State of the EU, the rights set up by the European legislation will stay unchanged, which is to say that the

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[51] See *Gina Miller & Deir Tozetti Dos Santos v. Secretary of State* [77 ff]; Also, about mentioned seizure of royal prerogatives see e.g. I. Loveland, *Constitutional...*, pp. 101–101.

[52] See similar argumentation on this issue by N. Baber, T. Hickman, J. King, op.cit.

[53] See A. Zięba, *Brytyjska koncepcja praw i wolności obywatelskich w dobie reformy ustroju państwa*, [In:] *Ustroje, tradycje i porównania. Księga jubileuszowa dedykowana prof. dr hab. Marianowi Grzybowskiemu w siedemdziesiątą rocznicę urodzin*, eds. P. Mikuli, A. Kulig, J. Karp, G. Kuca, Warszawa 2015, p. 352; R. Costigan, P.A. Thomas, *The Human Rights Act: A View From Below*, "Journal of Law and Society" 2005, Vol. 32, No 1, p. 51: "The Human Right Act was described as having 'the potential of being one of the most fundamental constitutional enactments since the Bill of Rights over 300 ago"; A. Gallespie, op.cit., pp. 42–46, 172.

[54] Human Rights Act 1998 (9 November 1998).

[55] See similar argumentation D. Chalmers, op.cit.

[56] See E. Bjorge, *EU Rights as British Rights*, "Oxford Human Rights Hub" (14 November 2016), http://ohrh.law.ox.ac.uk/eu-rights-as-british-rights/(12.12.2016).

scope of future citizens' rights would be subject to negotiations (stage no 3) and future treaties. So it is a matter of Parliamentary legislation in terms of repealing the ECA and adopting new provisions, for example, the Great Repeal Bill.

Aside from the recognition of Parliament's competency another question may be posed. Since the 'Brexit ladder' has been expanded, further considerations must be given. Authorization for government actions fulfill only pre-notification requirements, yet it is not clear what legal impact would be given. It is a matter of both British constitutional law and EU law whether the act enacted by Westminster is binding for the government (both in stage no. 2 and no. 3)[57]. Not only is this the case in the formal initiation of the withdrawal process (stage no. 2), yet also in the merits of future agreements between the UE-27 and the UK, especially whether Parliament could determine an approval statute for the issue of future participation in a Single Market (EEA, 'hard'/'soft' 'Brexit'). One could say that considering an open formula of negations[58], the potential outcome of it is unpredictable, henceforth further provisions related to the merits and wordings of future treaties are solely political and irrelevant. Beyond any doubt, the role of Parliament would be crucial to the closure of negotiations[59]and the future treaty must be established in Westminster before it is ratified[60] therefore it is Parliament[61] which will determine whether the negotiated deal is coherent with previous conditions and indications given in approval of such an act, thus Parliament may refuse to ratify the new agreement on future relations between the UK and the EU in a post-'Brexit' reality; finally however legally non-binding, the 'Brexit approval legislation' will affect the outcome of the negotiations between the UK and the EU on the terms of withdrawal.

III.

British constitutional law in the face of 'Brexit' is in a constitutional and competency crisis and as discussed above, selected issues are neither comprehensive nor ultimate answers for questions which will arise. Seemingly, another

57 See N. Baber, T. Hickman, J. King, op.cit.

58 See P. Craig, *Brexit...*, p. 37; V. Miller, A. Lang, op.cit., p. 17; *Brexit and...*, p. 7 ff.

59 See *Brexit and...*, pp. 20–21.

60 See P. Craig, *Brexit...*, pp. 38–40.

61 See e.g. A.W. Bradley, K.D. Ewing, *Constitutional...*, pp. 309–310.

constitutional issue is stemming from the pre-withdrawal legality discussion, which relates to the process of devolution[62], since the EU law has a serious impact on local government legislation and the scope of their competencies[63]. Several questions of law can be posed, firstly, whether British constitutional law requires approval to be given by devolved legislatures on triggering Art. 50 (stage no. 1–2)[64]. Secondly, whether devolved legislation on 'Brexit' would be binding for the government. Thirdly, since the broad spectrum of EU-law matters filled with devolved competencies[65] what is the optimal way after withdrawal to divide regained powers between Westminster, Scotland, Wales and Northern Ireland[66]? Nonetheless a post-treaty stage is needed for further consideration on whether there is a necessity to hold another referendum on the final 'Brexit' agreement[67].

The essential factor which must be solved is the recognition of British 'constitutional requirements'. In other words, judiciary is the last hope for overcoming the uncertainty under constitutional law. Only one fact is certain at this point that there is a strong argumentation in favor of Parliament's competencies over all stages of 'Brexit'. This is to say Westminster's approval is needed under Art. 50 and one could say that the merits of such an act of Parliament will also affect the negotiations between the UK's government and the EU-27. Furthermore, Parliament's approval is needed for the 'Brexit' deal ratification, meaning that Westminster, in terms of scrutiny, would determine whether the new treaty is beneficial for UK. In a post-treaty reality, the Parliament is obligated to guarantee proper rights for UK citizens, market par-

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[62] About devolution process see e.g. B.H. Toszek, E. Kużelewska, *Od wizji do rzeczywistości. Dziesięć lat dewolucji w Walii*, Warszawa 2011, pp. 13 ff.

[63] See P. Leyland, *The Constitution*..., pp. 267–268; V. Miller, A. Lang, *Brexit*..., pp. 9, 37–38.

[64] See decision of High Court of Justice in Northern Ireland McCord's (Raymond) Application NIQB 85; J. Hunt, *op.cit*; *Gina Miller & Deir Tozetti Dos Santos v. Secretary of State* [103]-[104].

[65] See e.g. S. Douglas-Scott, *Removing references to EU law from the devolution legislation would require the consent of the devolved assemblies*, "The Constitution Unit" (13 June 2016), https://constitution-unit.com/2016/06/13/removing-references-to-eu-law-from-the-devolution-legislation-would-invoke-the-sewel-convention/(12.12.2016).

[66] Scotland and Wales' s governments will intervene in hearings before Supreme Court scheduled for December; see *UK Supreme Court allows Scotland and Wales to enter Brexit lawsuit*, "Jurist" (19 November 2016), http://www.jurist.org/paperchase/2016/11/uk-supreme-court-allows-scotland-and-wales-to-enter-brexit-lawsuit.php (12.12.2016).

[67] See D. Chalmers, *Article 50*...

ticipants and other relevant areas previously governed by EU law. This is especially the case due to abovementioned issues between Scotland, Wales and Northern Ireland.

One might say that this paper is speculative and purely theoretical, yet this is not the case. Because daily new issues connected with the UK's membership in the EU are occurring the academic debate is lack of certainty. One could not foresee what the decision of the Supreme Courts will be neither it is possible to determine the scope and merits of future negotiations or deals between the UK and the EU-27. In Summary, the role of the academic community is to list the potential problems without any proper answers.

Literature

UK Supreme Court allows Scotland and Wales to enter Brexit lawsuit, "Jurist" (19 November 2016).

Arden M., *An English Judge in Europe*, [In:] M. Arden, *Human Rights and European Law: Building New Legal Orders*, Published to Oxford Scholarship Online: March 2015.

Asthana A., Rankin J., *Brexit: UK government faces legal challenge over single market*, "Guardian" (28 November 2016).

Baber N., Hickman T., King J., *Pulling the Article 50 'Trigger': Parliament's Indispensable Role*, I-CONnect (28 June 2016).

Barcz J., *Unia Europejska a Wielka Brytania – prawne aspekty porozumienia nakierowanego na zapobiegnięcie Brexitowi*, „Europejski Przegląd Sądowy" 2016, nr 4.

Bjorge E., *EU Rights as British Rights*, "Oxford Human Rights Hub" (14 November 2016).

Bradley A.W., Ewing K.D., *Constitutional And Administrative Law*, Pearson 2003.

Chalmers D., *Article 50 – five big legal questions*, "The UK in a Changing Europe" (4 November 2016).

Costigan R., Thomas P.A., *The Human Rights Act: A View From Below*, "Journal of Law and Society" 2005, Vol. 32, No 1.

Craig P., 'Brexit: A drama in Six Acts'.

Dhingra S., Ottaviano G., Sampson T., Reenen J.V., *The consequences of Brexit for UK trade and living standards*, London School of Economics and Political Science 2016.

Douglas-Scott S., *Removing references to EU law from the devolution legislation would require the consent of the devolved assemblies*, "The Constitution Unit" (13 June 2016).

Eaker L., *The Brexit Legal Mess – Falling Into a Black Hole?*, "Jurist" (29 June 2016).

Ekins R., *The Legitimacy of the Brexit Referendum*, "U.K. Const. L. Blog" (29th Jun 2016).

Fredman S., *The Least Dangerous Branch: Whose Role is it to Protect Parliamentary Sovereignty? Miller and the Human Rights Implications of 'Brexit'*, "Oxford Human Right Hub" (7 November 2016).

Gillespie A., *The English Legal System*, Oxford 2005.

Glendon A., Schubert A. Jr., *Judicial Review of Royal Proclamations and Order-in-Council*, "The University of Toronto Law Journal" 1951, Vol. 9, No. 1.

Gordon R. QC, *Constitutional Change and Parliamentary Sovereignty – the Impossible Dialectic*, [In:] *The British Constitution. Continuity and Change. A festschrift for Vernon Bogdanor*, ed. M. Qvortrup, Bloomsbury 2015.

Hunt J., *A ruling in Belfast make the high court's Brexit decision even more complicated than you think*, "The Conversation" (4 November 2016).

Ladrech R., *Explainer: what's the difference between 'hard' and 'soft' Brexit?*, "The Conversation" (6 October 2016).

Łazowski A., *How to withdraw from the European Union. Confronting hard reality*, "CEPS Commentary" (16 January 2013).

Leyland P., *The Constitution of the United Kingdom. A Contextual Analysis*, Bloomsbury 2016.

Loveland I., *Britain and Europe*, [In:] *The British Constitution in the Twentieth Century*, ed. V. Bogdanor, Oxford 2003.

Loveland I., *Constitutional Law, Administrative Law, and Human Rights. A Critical Introduction*, Oxford 2015.

Lucas C., *Why I will vote against triggering Article 50*, "Guardian" (27 November 2016).

Maer L., Gay O., *The Royal Prerogative*, "House of Commons Library" (30 December 2009).

Mikuli P., *Zasada podziału władz w ustroju brytyjskim*, Warszawa 2006.

Mikuli P., Fox N., *Instytucja referendum z Zjednoczonym Królestwie Wielkiej Brytanii i Irlandii Północnej – uwagi wokół ogólnokrajowego referendum z dnia 23 czerwca r.*, [In:] *Aktualne problemy referendum*, eds. B. Tokaj, A. Feja-Paszkiewicz, B. Banaszak, Warszawa 2016.

Miller V., Land A., *Brexit: how does the Article 50 process work?*, "House of Commons Library", 30 June 2016.

Poole T., *United Kingdom: The royal prerogative*, "International Journal of Constitutional Law" 2010, No. 8.

Suwara E., *Wyzwania prawno-proceduralne dla Unii Europejskiej związane z BREXIT-em*, „Europejski Przegląd Sądowy" 2016, nr 9.

Thompson H., *Haven't we been here before?*, "The UK in a Changing Europe" (28 November 2016).

Toszek B.H., Kużelewska E., *Od wizji do rzeczywistości. Dziesięć lat dewolucji w Walii*, Warszawa 2011.

Young A.L., *Parliamentary Sovereignty and the Human Rights*, Portland 2009.

Zięba A., *Brytyjska koncepcja praw i wolności obywatelskich w dobie reformy ustroju państwa*, [In:] *Ustroje, tradycje i porównania. Księga jubileuszowa dedykowana prof. dr hab. Marianowi Grzybowskiemu w siedemdziesiątą rocznicę urodzin*, eds. P. Mikuli, A. Kulig, J. Karp, G. Kuca, Warszawa 2015.