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Brexit as a Constitutional Decision

An Interpretation*

INTRODUCTION

This paper aims at better understanding a specific case of globalization and reaction to globalization: the European Union and Brexit. The overall claim is that there is an interaction between Brexit as a legal/political event and the nature of the European Union as a legal/political construct. Leaving the EU is not an ordinary accomplishment: it is a decision of great magnitude. I will approach it as such, namely as a “constitutional decision” aiming at changing the UK constitution. Yet this change does not take place in a vacuum: apprehending the “undoing” of Britain’s adherence to the European Union requires an understanding of the nature of European Union integration and of the incorporation of European Union law at the level of British domestic law.

Brexit reads as a reaction against—or a rejection of—globalism: a reclaiming of national sovereignty against a specific instance of supranational power: the European Union. Law forces actors to frame their political assertions in certain terms so that they become effective. To make Brexit a normative reality, it has to be expressed through certain manifestations of will.

The brutality of the “leave” vote and its accompanying propaganda rests on the assumption that leaving the European Union is easy. The will of the people should be self-executing: it should suffice to sever the links between the United Kingdom and the European Union. After all “Brexit means Brexit.” The ensuing process of implementing the results of the referendum of June 2016 goes some way towards proving that the exact reverse is true: it is murky and unclear. There is a gap between the political intention expressed in the vote of 23 June 2016 and the process of drawing the consequences from this choice. I will suggest that the underlying—and maybe unconscious—constitutional theory of Brexit is one of a “constitutional decision” which is properly accounted for by a (modified) Schmittian theoretical framework. Yet I will also suggest that “decisions don’t work” in general, and especially when it comes to undoing the European Union. This is due to the European Union’s own underlying constitutional theory which I will tentatively depict as a rejection of constituent power: a “decision not to decide.”

* This piece is published as it was delivered on 30 May 2017, with little or no changes except to take into account the progress of the European Union (Withdrawal) Bill in the British Parliament. I wish to express my gratitude to Gregory Bligh for his comments on an earlier draft.

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My argument is made in two parts. In a first part, I will make the claim that the idea of constituent power is helpful in order to make sense of Brexit which, in my view, amounts to a constitutional decision in a (modified) Schmittian sense. In a second part, I will suggest that this “decision” is a reaction to the fact that the making of the European Union was based on a fairly elaborate rejection of the very idea of constituent power: what I would call a “decision not to decide,” i.e. not to give the EC and later the European Union a fully-fledged constitutional settlement. This was not accidental and, as shown by the Brexit process, appears very difficult to overcome.

I. BREXIT AS A (FAILED) CONSTITUENT DECISION

Brexit is an unfolding story, and every narrative is perforce a temporary one. New episodes are constantly added to the chain novel. I will focus for the moment on the “*Miller*” litigation and especially on the UK Supreme Court decision of 24 January 2017.¹ I will not spend too much time on the facts of the case and the procedural history. It is well known that on 23 June 2016 the British electorate voted on a referendum which resulted in a majority of voters choosing to “leave” the European Union. Mrs Miller and other claimants brought an action –first before the High Court and then before the Supreme Court of the United Kingdom (UKSC)– to ask whether the executive government could decide to use its own inherent prerogative (non-statutory) powers in order to give notice of withdrawal on the basis of article 50 of the Lisbon Treaty.

Let me just say that the case boiled down to the question of which “steps” were “required as a matter of UK domestic law before the process of leaving the European Union could be initiated” (§2). Could the executive trigger an article 50 declaration of withdrawal by an act of the Crown’s prerogative? Or did it take an Act of Parliament to authorize this process of withdrawal? The court’s answer is fairly straightforward: an Act of Parliament is necessary to initiate the procedure. What is of interest to me in the case is not so much the UKSC’s rationale for justifying this procedural choice as what the court has to say about constitutional change.

A. Referendum and constitutional change

In his dissenting opinion, Lord Reed states that the *Miller* litigation is not

an appropriate occasion on which to consider the implications for our constitutional law of the developing practice of holding referendums before embarking on major constitutional changes. (§171)

This is technically correct, yet the practice itself matters on a more general plane. There seems to be at least an implication, in the mind of politicians, that

¹ R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union (Appellant), reference by the Attorney General for Northern Ireland – In the matter of an application by Agnew and others for Judicial Review, REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review, [2017] UKSC 5; on appeals from: [2016] EWHC 2768 (Admin) and [2016] NIQB 85 [<https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>].

referenda will lend some degree of legitimacy to a constitutional reform. We can see this at play with the Brexit vote. The magnitude of the “leave” vote cannot be underestimated. Yet it is unclear how it should be interpreted in legal terms.

There are many ways to approach Brexit. It is obviously a political event. A mistake commonly made is to overlook the fact that politics is an intrinsically normative activity, if not directly legally normative. But politics means public choices that can convey a certain degree of political legitimacy, as in the case of the 2016 referendum. The vote had a (politically) normative impact. There remained the question of how to take into account this political normativity in legal terms. The *European Union Referendum Act 2015* authorised the holding of the referendum held on 23 June 2016. However, it did not spell out the legal consequences of the referendum result. An example of an Act spelling out the consequences of a referendum is s. 8 of the *Parliamentary Voting System and Constituencies Act 2011*, enjoining the Executive government (a said minister) to make an order bringing into force certain specified legal provisions should the referendum be passed.

In the case of the 2016 Brexit referendum, however, what would happen after the vote was “left to political determination.”² Yet this political determination was subject to constitutional characterization and what had to be done was unclear. In *Miller*, the majority opinion stated that “this case has nothing to do with [...] the wisdom of the decision to withdraw from the European Union” which were characterized as “political issue” (§3). It also went on to say that the court had to decide “issues of law [...] relating to the constitutional arrangements of the UK” (§4).

This is exactly where the Brexit referendum has put Britain. It is self-evident that some sort of political decision has been made. Yet this decision is so self-evident that it is difficult for politicians or observers to spell out its exact consequences. This is the purpose of the inscrutable “Brexit means Brexit” political catchphrase. The legal consequences, for a start, are not incorporated in the political decision. They need to be addressed separately.

Brexit epitomizes the “political vs. legal” divide: it is entirely a political decision which awaits a legal implementation. After the vote, there was no clear constitutional path to exiting the European Union. The reason for this is based in part on the nature of the British constitution, which contains no explicit recognition of popular sovereignty, no written constitution and as such no explicit theory of constituent power and which supports complex normative arrangements in which parliamentary sovereignty is balanced by inherent ministerial powers (prerogative). This clash between a “raw” political decision and a complex, customary, constitutional settlement has brought about the *Miller* litigation and more generally the difficulties for the British executive to clarify its position about Brexit. Yet there is a way to understand Brexit precisely by calling into play the theory of constituent power.

B. The crux of the *Miller* litigation

The *Miller* case begins with a recital of the way in which the United Kingdom has entered the European Union. The narrative insists on the major importance of the “decision of principle to join the European Union Communities” taken at the

² N. ARONEY, “R (*Miller*) v. Secretary of State for Exiting the European Union: Three Competing Syllogisms”, *The Modern Law Review*, no. 80, 2017, p. 726-745 [https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2230.12282].

time. Quotes by major politicians during the debates on what would become the *European Communities Act 1972* (ECA) are conjured in order to insist on the magnitude of the choice being made:

The Prime Minister, Mr Heath, said that he did not think that “any Prime Minister has [...] in time of peace [...] asked the House *to take a positive decision* of such importance as I am asking it to take,” and that he could not “over-emphasise tonight the importance of the vote which is being taken, *the importance of the issue, the scale and quality of the decision* and the impact that it will have equally inside and outside Britain.” In a debate in the House of Commons in January 1972, in which the earlier resolution was effectively re-affirmed, Mr Rippon, the Chancellor of the Duchy of Lancaster, said “we all accept *the unique character of the Treaty of Accession*.”³

The ECA, then, was no ordinary statute. It was later reframed as a “constitutional statute” with the specific, technical (no implied repeal) meaning of that expression given to this expression since *Thoburn*⁴.

In *Thoburn*, Laws LJ said of the ECA that:

It may be there has never been a statute having such profound effects on so many dimensions of our daily lives.⁵

The ECA’s long title was “An Act to make provision in connection with the enlargement of the European Union Communities”, as if the decision to adhere had preceded the Act and its purpose was only to put it into effect.

As Nicholas Aroney has pointed out:

The Act was enacted after Britain *signed* the Treaty of Accession through which it would become a member of the European Union Communities but before Britain *ratified* it. This process recognised the capacity of the Government to sign the treaty in exercise of the Queen’s international prerogatives without parliamentary approval. But the timing also recognised the need to postpone Britain’s ratification of the treaty until after the ECA came into force, to ensure that from the time of ratification Britain would be in compliance with its European Union obligations[.] While the *European Union Communities Act* assumes the existence of the treaties, it does not necessarily mandate their continued existence.⁶

Yet the ECA was anything but a clear-cut constitutional enactment making Britain a part of the EEC, as would later be the case—for instance— of the equivalent clause in article 88-1 of the French Constitution (adopted as a result of the Maastricht Treaty). The main clause in the ECA was section 2 (“general implementation of treaty”) which contained an extraordinarily abstruse piece of legislative drafting:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.

³ §13, my emphases.

⁴ *Thoburn v. Sunderland City Council, Hunt v. London Borough of Hackney, Harman and Dove v. Cornwall County Council, Collins v. London Borough of Sutton*, [2002] 4 All E.R. 156.

⁵ *Thoburn*, p. 62.

⁶ N. ARONEY, “*R (Miller) v. Secretary of State for Exiting the European Union: Three Competing Syllogisms*”, *op. cit.*, p. 735.

This choice of words led to a heated doctrinal debate which has some echoes in the *Miller* litigation. For some, the ECA 1972 was only to be understood as a “conduit pipe” allowing for the conveying of EC law into the British legal system. For others it was a constitutional sea change: not only did it provide that European Union law would apply in the UK as part of its domestic law, but also it “provided for a new constitutional process for making law in the UK” (majority in *Miller*, §61).

1) In the minority, Lord Reed adopted a fairly moderate analysis of the meaning of the ECA. While he expressed some reverence for parliamentary sovereignty, he also insisted on another “principle of the British constitution”, namely that the Crown’s prerogative includes the conduct of foreign affairs and especially treaty-making power. This keys in with the dualistic doctrine of British law regarding international law: “although the Crown can undoubtedly enter into treaties, it cannot, by doing so, alter domestic law”. Treaties do not automatically take effect in the UK domestic legal system. Yet the ECA, while it does precisely that with regard to the EC treaty, is drafted in such a way as to make European Union law’s effect into domestic law “inherently conditional on the application of the European Union treaties to the UK and therefore on the UK’s membership of the European Union” (§177). In other words, the ECA is only a conduit pipe: it gives continuing effect to European Union law while Britain adheres to the European Union. But adhesion and withdrawal are matters for decision under the Crown’s prerogative?

2) The majority in *Miller* took the first of those two views:

Although the 1972 Act gives effect to European Union law, it is not itself the originating source of that law. It is, as was said on behalf of the Secretary of State echoing the illuminating analysis of Professor Finnis, the “conduit pipe” by which European Union law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute European Union law an independent and overriding source of domestic law. (§65)

Yet at the same time it held that, by the ECA 1972, “Parliament endorsed and gave effect to the UK membership of [the European Union] under the European Union treaties” (§77). The key word here, for the sake of the present discussion, is “endorsed.” The UKSC came to the conclusion that Parliament, and Parliament only –as opposed to the executive by way of its prerogative– was the “relevant constitutional body” as what was to be effected was a “fundamental change in the constitutional arrangements of the UK” (§78). And the court went on to say that “far from indicating that ministers have the power to withdraw from the European Union treaties” the provisions of the ECA 1972 “support the contrary view” (§87).

To sum up, the majority and minority in *Miller* have parted ways on the issue of the legal import of the vote in the Brexit referendum. For the majority, the impact is such that it requires the closest possible substitute to an entrenched constitution: namely an Act of Parliament. For Lord Reed, there is no such implication: the existing constitutional arrangement allows for prerogative, in lack of an explicit will of Parliament expressed in the ECA, to trigger art. 50 without previous legislative authorisation. As I said previously, the majority opinion differs from the minority in the sense that, while not disapproving of the “conduit pipe” theory, it holds that the ECA had a “constitutional character,” not only in the *Thoburn* sense (§67) but also, maybe more importantly, in the sense that it “constitutes European Union law as an entirely new, independent and overriding source of *domestic law*” (§80). This was in essence a constitutional matter as “one of the most fundamental functions of the constitution of any state is to identify the sources of its law” (§80).

The problem with that position seems to be that it confuses two different things. On one hand, adhesion and its legal vehicle (a treaty). On the other, the authority of European Union law and its mode of implementation, which was the purpose of the ECA 1972. In other words: the majority merges the “conduit pipe” theory and the issue of the “constitutional” nature of the ECA. This does not seem to stand examination. It would seem that one cannot hold the “conduit pipe” theory and the “no withdrawal without act of Parliament” theory at the same time. Or at least — as courts can do whatever they like— in order to do so, one needs to emphasize, in the court’s words, “the major constitutional change which withdrawal from the European Union will involve, and therefore the constitutional propriety of prior parliamentary sanction for the process” (§99).

The court is thus stuck in a difficult position: it has to acknowledge that this is emphatically a constitutional matter. Yet the locus of the constitutional decision (in terms of source or *instrumentum*) and the very content, in precise legal terms, of what was decided is hugely vague. And as a result so are, in the words of the court, “the constitutional implications of withdrawal from the European Union” (§80) and the “significant [...] constitutional change” required to undo what was done in 1972 (§81).

This involves a framing of the “conduit pipe” theory in terms of legal sources and the collateral idea that sources are inherently a constitutional matter. The majority goes on to say that “the consequential loss of a source of law is a fundamental legal change which justifies the conclusion that prerogative powers cannot be invoked to withdraw from the European Union treaties” (§83).

As a matter of fact, in order to change the constitution (in the sense of the existing repository of legal pedigrees or “sources”), it takes nothing less than an Act of Parliament. Parliament is the ultimate “source-maker”:

Parliament was and remains sovereign: so no new source of law could come into existence without Parliamentary sanction. (§61)

Sovereignty is approached here in terms of the ability to create sources, in the exact sense of framing pedigrees for new sources. The sovereign is a “pedigree-maker.” In the words of Aroney:

The majority’s decision in the Brexit case seems to have turned this on its head in subtle ways. For in their reasoning, when the UK enacted the ECA it brought European Union law-making *into* UK domestic law, not only at the level of the specific rules and remedies of European Union law, but at a constitutional level as well.⁷

It seems difficult to come closer to using the vocabulary of constituent power without actually doing so. If, however, on the brink of entering the theoretical territory of constituent power, the court does not cross the Rubicon, it is for serious reasons. The overarching principle is parliamentary sovereignty (§61: “Parliament was and remains sovereign”). This cardinal principle stands as an obstacle to a continental-style constituent power. As we shall see, the sovereign is not only a source-maker, but also the authority which has legitimacy to make a constitutional decision.

⁷ *Ibid.*, p. 745.

C. The meaning of the Brexit referendum: a constitutional decision?

Let us set aside for a moment the fact that referendums in Britain are triggered by legislation and that the 2016 Brexit referendum did not have a binding effect on Parliament. What matters in fact is that the vote has an inherent importance, a normative authority which is not adequately captured by just apprehending the fact that, on the face of it, it was not legally binding on Parliament. There was obviously something more to it and there still is. The 2016 referendum has changed the face of the British constitution, although we don't know exactly how so far. A way to capture its constitutional meaning, I would submit, is to read it as a Schmittian constitutional decision. Referendums stand at the crossroads between political normativity and legal normativity. In legal terms, the "legal constitution" would deny any effect whatsoever to the 2016 referendum. Parliament or the executive are not bound to take any action. Yet the "political constitution" delivers exactly the opposite answer.

A decision that says what?

There is reason to think that the result of the referendum reads as a constitutional decision in the sense Carl Schmitt gave to that expression: "a political will" regarding "a global concrete decision on the type and form of political existence" which determines "the existence of the political unity as a whole." It is not dependent on a pre-existing norm. Rather, it determines the content of the "constitutional law," the formal constitution as such.⁸ It is a decision about the political nature of the State: it protects says Schmitt "its existence, integrity and security." It is an "existential notion" regarding "independent political existence."

This seems very much in line with the intentions of the proponents of the "leave" vote. I am not certain that the UKIP leaders or the activists in the "Brexit" camp as a whole have read Schmitt. But the Schmittian political philosophy seems to fit well with their own—less articulate, to say the least—ideology. Especially the Schmittian constitutional decision is based on the notion that there are "existential" choices that are predicated upon a conception of politics as based on the friend/enemy distinction. It insists on the ability of a political community to decide on its political form as an independent entity. If the Brexit referendum is to be read in this light, it would amount to a decision to undo adhesion to European Union.

Of course, the Schmittian framework is not an exact fit. For one thing, it is not adjusted to the case of an unwritten constitution. In Schmitt's constitutional theory, the decision *precedes* the formal constitution. In the UK, there is no formal constitution and the referendum takes place in the course of a long constitutional process of which it is only an episode. Also, the "leave" vote is not a conscious constitutional decision, while Schmitt insists that a constitutional decision is "a conscious act" which "gives shape to political unity." But I would submit that the Brexit referendum is seen by its proponents—and now by the British government—as a constitutional decision. The "raw" quality of the vote—the fact that it had no automatic legal effect—reinforces this rather than it weakens it. Constituent power, even in the non-decisionist versions, always has such a raw quality. C. 18th thinkers would have related this to the "state of nature" in which constituent power

⁸ C. SCHMITT, *Théorie de la constitution*, Paris, PUF, 1993, p. 212. I am aware that I translate into English, not from the original German, but from the French translation and I beg my readers to forgive this (temporary, I hope) breach of the rules of scientific translation.

takes place. In modern times, this is often related to the inherently “illegal” nature of the making of a new constitution, the fact that it breaks with past constitutional arrangements.

As far as the future is concerned, the aim of Brexit seems to be the consolidation of a constitutional identity that was unclear and *transforms* the electorate into a “demos”, the bearer of a constituent power. It aims at clarifying and “protecting”—in the words of Schmitt—that constitutional identity by severing the ties with the greatest transnational entity to which the UK belonged: the European Union. Yet I am far from claiming that the leave vote, or any other significant act of will following it, is actually a constitutional decision, for reasons I will explain now. Hence the fact that I have called it so far a “failed” constitutional decision or a “so-called decision.”

Some doubts about constitutional decisions

Many of Schmitt’s theoretical stances have the flavour of theoretical hard drugs: they are apparently persuasive and seem to convey a political truth of some kind. Yet they come with a certain delusional effect and, for some, an addictive and destructive effect. The truth in them is overstated. It is exaggerated in such a way as to make that kernel of truth serve an extremely elaborate ideological manipulation. Schmitt is the grand master of intellectual *mauvaise foi*. His arguments are made with an undeniable dose of bad faith. This is the case with the “decisionist” theory of the constitution. It seems pretty clear that Schmitt invented that theory in order to justify a revolutionary change in the political order of the kind evidenced by Bolshevism in 1917 Russia or (more to the point) the shift to Nazism in Germany. This is not to say that there is not—as in many things about Schmitt—an inkling of truth to the idea. This truth lays, in my view, in the idea that there is an underlying political will—which I would rather call a constitutional *intention* than a decision—at the core of every constitution. It does not have to take the shape of a decision. Schmitt is right to detect a core political choice in constitutions and to say that this core choice is what makes a constitution. But he is wrong in saying that this *choice* takes the form of a *decision*. More often than not, what is there to be found is a recognition, an acknowledgement—often by representatives—that the choice has been made. This is why constituent power can be reconciled with representation. There is no need to summon the “people” as such, if such a thing does exist at all. Representatives are there to express a “will” which is in fact an underlying intention or a consensus.

Also, there is a theatrical, or “grandstanding”, quality to the decisionist theory in constitutional law: it is meant to be to constitutional law what the big bang theory is to cosmological expansion: nothing exists before it, and everything happens as a result of it. Rather, a constitutional intention can be incorporated in an ongoing process of constitutional change, albeit—as maybe in the case of Brexit—with a serious swerving effect.

The delusional quality of Brexit

In the UK, there was obviously something delusional about the “leave” vote, which has paraded as an “existential” constitutional decision. This delusional aspect has been frequently emphasized: for one thing, promises made to the electorate were highly dubious, not to say that some of them (such as the famous £350 millions/week funding pledge for the NHS) were all-out lies. More generally, as there is something structural about the vote which goes beyond conjuncture and

uncertainty, the decision to leave the European Union and more diffusely –to reject legal globalism and reclaim sovereignty– may just have been an impossible one. Secondly, in the case of the UK, some local cultural features make it even more unlikely: there is no place in British constitutional law for a constitutional “decision.” Brexit appears as some kind of desperate attempt to “play the system” –or turn it upside down– by forcing a decision in a “non-decisionist” structure such as the British constitution. The attempts to transform Brexit into a constitutional decision are hindered by the fact that certain major constitutional concepts are missing in the UK context: the people, the general will, and even constituent power as such. Finally, there is a reason for this delusional dimension of Brexit which lays not at the national (UK) plane, but is due to the European Union itself. I would read Brexit as a political reaction to something deeper, an underlying structure of the European Union which reads as a “decision not to decide” what should be the political nature of the Union. This decision amounts to a deliberate choice *to not have a constitution*. This brings me to the second part of my paper.

II. THE EUROPEAN UNION’S “DECISION NOT TO DECIDE”

A. Twelve years after the constitutional treaty: why not a European constitution?

In 2005, Miguel Maduro expressed the view that:

though it may be argued that the constitutional treaty still does not represent an exercise of constituent power [...] it may also be the case that the treaty’s change of regime both presuppose and require an extension of the authority of constitutionalism in the European Union.⁹

Drawing from Joseph Weiler’s classic piece on the “transformation of Europe,”¹⁰ he also expressed the view that European Union would from then on “lay claim to the normative and political authority expressed in the doctrines of supremacy and direct effect and leading to [its] emergence as a community of open and indeterminate political goals.” The new Treaty, therefore, may, despite the absence of constituent power, “further extend the authority of constitutionalism.”¹¹

With the benefit of hindsight, and for various reasons, it is fair to say that none of this has happened. There has been no “Constitution for Europe” after the Treaty was rejected. The reality of the constitutionalisation of the European Union is very much subject to doubt. Who could seriously affirm that significant steps have been taken towards the “ever closer union” referred to in the preamble to the Maastricht Treaty? It takes an immense amount of wishful thinking to believe that this is the case, and also to think that this has led to the establishment of a “constitution.” The interesting question then becomes “why”? Maduro’s view was based on a refined

⁹ M.P. MADURO, “The importance of being called a constitution: Constitutional authority and the authority of constitutionalism”, *International Journal of Constitutional Law*, vol. 3, nos. 2-3, 1 May 2005, p. 332–356.

¹⁰ J.H. WEILER, “The Transformation of Europe”, *Yale Law Journal*, vol. 100, no. 8, June 1991, p. 2403-2483.

¹¹ M.P. MADURO, “The importance of being called a constitution: Constitutional authority and the authority of constitutionalism”, *op. cit.*, p. 333-334.

analytical distinction between “normative supremacy” generating its own “instrumental constitutionalism” and “constitutional authority in the sense of a constituent power.” According to Maduro, there has taken place a move from “low intensity constitutionalism” to a “polity-building capacity” aiming at a “constitutional authority” leaving “the question of final authority open.”¹² While the Treaty did not produce a “true constituent power” it enshrined the European Union’s “normative authority” though the entrenchment of primacy and direct effect. The somewhat utopian conclusion drawn from this point is that, in due course, the Treaty would bring about a chain of positive effects: a “legitimizing effect,” a “mobilizing effect” that would “generalize the use of constitutionalism as the language of political and legal claims in the European Union,”¹³ a “discursive effect”: “[the] European Union’s constitutional discourse will no longer be the exclusive domain of the law and lawyers.” Then again, this did not happen. Why?

A great deal of what was written about the constitutionalisation in European Union amounts to an acknowledgement that it is highly implausible that the making of European Union was triggered by a constitutional decision of the Schmittian type and that claim seems so implausible that to my knowledge it has never been made. As a matter of fact, the strategy of the founding fathers of European Union (Spaak, Monnet) has been described as a “design” to “take grand political questions off the table.”¹⁴

European Union constitutionalism has been recently described as “a dynamic category that is shaped by institutional practices rather than some *a priori* blueprint in light of which institutions are designed.”¹⁵ The same phenomenon has been also described as the result of “a liberal apprehension towards the masses” which produced “a highly constrained form of democracy, deeply imprinted with a distrust of popular sovereignty” and “parliamentary sovereignty”. A distrust of popular sovereignty has been apprehended as the reason for the lack of a constituent power. A distrust of parliamentary sovereignty led to the weakness of the European Assembly, and later the European Parliament. More generally, this has brought about a “constitutional *ethos*” empowering “institutions at arm-length from majoritarian influence » and a bias in favour of «administrative over democratic mechanisms.”¹⁶ Yet, there may be more to it than this mere “constitutionalism without a constituent power.” The negation of constituent power from the political and constitutional theory of the European Union deserves a closer look. What took place at the “founding” of the European Union and ever since could be framed as a “decision not to decide” or a counter-decision.

A structural “choice”

Under the light of classical constitutional theory, the European Union reads as the offspring of a “counter” constitutional decision: a “decision not to decide” on the constitution of Europe, and even a decision to make any such decision impos-

¹² *Ibid.*, p. 347.

¹³ *Ibid.*, p. 354.

¹⁴ T. ISIKSEL, *European Union’s Functional Constitution*, Oxford, Oxford University Press, 2016, p. 13.

¹⁵ *Ibid.*, p. 9.

¹⁶ J.W. MULLER, quoted in T. ISIKSEL, *op. cit.*, p. 11.

sible. This is a rerun of a time-worn conservative strategy: what has not been created cannot be suppressed, because it stands beyond will. This “de-constituent” effect is what makes the European Union so hateful to a certain portion of the member-states’ public opinions. What has been created is not the creature of a “We the People” in the American sense and indeed it cannot be. Being not the result of a proper constituent power, it cannot be an engine of self-government.

Whatever you might think of Brexiteers or French “*souverainistes*,” their political ideology reads as an attempt to reclaim “self-government,” i.e. political autonomy. In this sense, there is a *prima facie* argument in favour of their legitimacy. They cannot be easily dismissed by theories of constitutional law that claim to be democratic in the modern sense. A modern constitution is an instrument of self-government. If self-government disappears or is significantly hindered, the constitutional nature of the whole mechanism of power lies open to challenge. In this sense, the challenge to both the European Union and moderate constitutionalism coming from populist movements and populist governments is not to be taken lightly or dismissed as simply illegitimate. It is dangerous in the measure of its appeal to core values of modern politics, although one can certainly think at the same time that this kind of challenge distorts these values. That populist and nationalist —anti-globalization— projects do not appear (so far) as being successful beyond their electoral success in some countries may be evidence that they set the autonomy claim at the wrong level. They seem to underestimate the fact that “going it alone,” i.e. autonomy only at a national level, has simply become impossible. Yet the seriousness of such anti-globalization challenges raises important questions about the theories of globalization, and in our case, of those theories that claim that the EU has a constitutional nature.

“Telos” vs “Demos”

In the formative process of the European Union, one may be tempted to identify something close to the formation of what Schmitt had called the “bourgeois state”: one which “aims at suppressing politics, restrict by way of a series of norms all the expressions of life in the state, and transform all state activity into competences, that is rigorously circumscribed [...] power.”¹⁷ With a little bit of exaggeration, this would seem a fairly good account of the spirit of European Law. The European Union meets to various degrees all of these criteria: a permanent temptation to set aside politics at the advantage (and by the means) of law, a welfarist *telos* which tends to predate the ambition to unite Europe politically (the federal project), and at a technical level, the insistence on granting *competences* to EU institutions in order to bypass or overcome national sovereignties. Of course, there are also counterforces. For instance, there is of course some politics taking place in the European institutions. Yet the exaggeration has the advantage of showing some structural features otherwise less visible.

Especially, the history of the Union shows a clear path towards favouring a “*telos*” (a goal to be achieved) over a “*demos*,” i.e. a constituent power exercised by an (elusive) European Union people —be it a “we the people” or a “we the peoples.” How should this *telos* be expressed? I can only be schematic here. There are obviously two candidates: economic growth and welfarism on one side; human rights

¹⁷ C. SCHMITT, *Théorie de la constitution*, *op. cit.*, p. 172.

on the other side. The welfarist aim has not probably been the dominant one in the case of the EU. It has coexisted with a technocratic approach to government, rather than a “*laissez faire*” one. Human Rights have taken second place only, as was shown in the 2007 *Viking*¹⁸ and *Laval*¹⁹ ECJ cases. But, be that as it may, what was left behind was a “*finalité politique*.” This can be summed up as the triumph of *telos* over *demos*: no institutionalised people to whom the founding moment would be ascribed; no identification of a political goal defined in terms of a certain political identity. In other words: no decision-maker, no decision. This is not to say, however, that I adhere to the “no-*demos*” theory of European Union law holding that:

The European Union cannot be considered a constitutional system in its own right because constitutional authority properly so-called must be traceable to the will of a self-governing *demos*.²⁰

I do not refute it either. But it seems to me that this absence of a *demos* is only a by-product of a deeper phenomenon: if the EU could have no *demos*, it is because the building of a “we the people” or of a “we the peoples” (the EU as a “nonunitary entity” in the words of Joseph Weiler) was hindered by an inaugural “decision not to decide” —or maybe “a decision to make a constitutional decision impossible.” It is of the essence of a welfarist technocracy to be anti-decisionist: the only possible (scientific) goal is welfare maximisation, and only experts and judges —not elected representatives— are required to promote it. The essence of a legal-technocratic order is to thwart political decision:

The European Union’s legal system has been configured to constrain the ability of member states to revise their commitments” in the sense that it has “frozen certain specific goals by shielding them from political redefinition.”²¹

The meaning of EU constitutionalism: is “a community of law” the same as “a constitution”?

Joseph Weiler in his classical 1991 piece on the “transformation of the EU” has interpreted this as meaning that European Union had been “constitutionalised” and had become “an entity whose closest structural model is no longer an international organization but a denser, yet non-unitary polity.”²² This is how, generally, the key formula of the “*Les Verts*” case of 1986²³ is interpreted: treaties have become “the basic constitutional charter” of the community.

Ever since “*Les Verts*,” the main claim in defence of the constitutionalisation thesis relies on the notion that the European Union is a legal community of a higher order. This assimilation is very clear in the “*Les Verts*” case at §23:

The European Economic Community is a community based on the rule of law, inasmuch as neither its member-states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.

¹⁸ *International Transport Workers Federation v. Viking Line ABP* (2007) C-438/05.

¹⁹ *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*. C-341/05.

²⁰ T. ISIKSEL, *European Union’s Functional Constitution*, *op. cit.*, p. 67.

²¹ *Ibid.*, p. 85-86, quoting Bartolini.

²² J.H. WEILER, “The Transformation of Europe”, *op. cit.*, p. 2407.

²³ Case n°294/83 (23 April 1986).

Les Verts only brought to fruition a reasoning that was already apparent since *Van Gend en Loos*, 20 years before. What was lacking in 1963 was the awareness that the “new legal order” based on primacy and direct effect deserved to be elevated to the rank of a constitution. The use of the “constitutional” idiom seemed to bring to completion a move from a “contractual” understanding of the EC treaty to an “objective” one, or even to the claim that what was initially a treaty had “muted” into a “charter” of a constitutional kind:

The constitutional thesis claims that in critical aspects the community has evolved and behaves as if its founding instrument were not a treaty governed by international law but «a constitutional charter governed by a form of constitutional law.²⁴

For instance, in *Van Gend En Loos* (1963), the ECJ stated that

The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only the member states but also their nationals[.]

Some European Union lawyers have interpreted this statement as establishing that “the ECJ founded the direct effect and supremacy of community law on a direct relation between community norms and the peoples of European Union,” and “a political link authorizing a claim of independent normative authority.”²⁵

According to this approach, “Constitutionalization” refers in fact to the rise and continuing consolidation of certain *legal* characteristics of the Union: the core principles of supremacy and direct effect; and also the definition of the European Union as “a complete system of legal remedies and procedures designed to enable the court of justice to review the legality of acts of the institutions.”²⁶ This might be “constitutional” in a certain sense. But using the idiom of constitutional law comes at a cost: the excoriation of the political import of the word “constitution.”

Yet, as Turkuler Isiksel has pointed out, “the *Les Verts* decision made constitutional language all but unavoidable in discussions concerning the nature” of the European Union as a “supranational polity.” In subsequent decisions “the court has continued to use constitutional terminology.”²⁷

A good example of this shift is to be found in the Opinion of the Court of 6 December 2001 on the *Cartagena Protocol*:

On questions concerning the division between the Community and the Member States of competence to conclude a given agreement with non-member countries. The choice of the appropriate legal basis has constitutional significance. Since the Community has conferred powers only, it must tie an international agreement to a Treaty provision which empowers it to approve such a measure. To proceed on an incorrect legal basis is therefore liable to invalidate the act concluding the agreement and so vitiate the Community’s consent to be bound by the agreement it has signed.²⁸

²⁴ J.H. WEILER, quoted in M.P. MADURO, “The importance of being called a constitution: Constitutional authority and the authority of constitutionalism”, *op. cit.*, p. 336.

²⁵ M.P. MADURO, *op. cit.*, p. 337.

²⁶ T. ISIKSEL, *European Union’s Functional Constitution*, *op. cit.*, p. 61.

²⁷ *Ibid.*, p. 62.

²⁸ CJCE, 6 December 2001, Protocole de Cartagena, 2/00, Rec. p. 9713, esp. pt. 5.

But when the court has done so, there has remained an ambiguity between a super-legal order and a “proper” constitution, because the latter —as an instrument of self-government— has both a legal and a political dimension. To claim that a “super” legal order amounts to a constitution is to miss the second dimension and to mistake access to court and legal regulation for political autonomy. This ambiguity is apparent in the ECJ’s 2014 opinion on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms:

The European Union has a new kind of legal order, the nature of which is peculiar to the European Union, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR.²⁹

B. Anything but a great repeal: British law and European Union law after Brexit

Entrenched contradictions

The gist of the argument made by the proponents of “European Union constitutionalism” can be summed up in this idea of the European Union as a “super-legal order” of a higher nature. At the same time, there was something deeply detrimental about it, from the very point of view of European integration. That negative effect has been at play in the case of the failure of the Giscard convention and the so-called constitutional treaty for Europe. But the negative effect also takes place at the level of member-states: the incorporation of European Union law was an extremely ambiguous process.

It is not enough to affirm that “national constitutions themselves have been constitutionalized.”³⁰ As a matter of fact, the inaugural “non-decision” of the EC treaties has been replicated in a series of ambiguous, self-contradicting, enactments in domestic constitutions. In France, this has led to the unhappy cohabitation between art. 3 and art. 88-1 of the 1958 constitution. In the UK, the majority in *Miller* expressed the view that the principles of European Union law as expressed in *Costa v. Enel* and *Van Gend en Loos* were such that “rules which would [...] normally be incompatible with UK constitutional principles, became part of our constitutional arrangements as a result of the 1972 Act and the 1972 accession treaty.”³¹

In other words: adhesion to the European Union has forced some national constitutions, such as France’s, to what I would call “entrenched contradictions,” as they asserted both their national sovereignty and their adhesion to the European political entity. In France: between national sovereignty (art. 3) and adhesion to European Union (art. 88-1). In the UK, between parliamentary sovereignty and primacy and direct effect of European Union law. As I will try to show now, Brexit cannot be understood apart from the way in which the European Union has been created and institutionalized.

²⁹ 18 December 2014. ECLI:European Union:C:2014:2454

³⁰ M.P. MADURO, “The importance of being called a constitution: Constitutional authority and the authority of constitutionalism”, *op. cit.*, p. 339.

³¹ R (Miller) v. Secretary of State for Exiting the European Union, *op. cit.*, §68.

The European Union's structural closure

The European Union is not meant to work in reverse gear. This was quite apparent in doctrinal literature before the inclusion of article 50 TFUE by the Lisbon Treaty. In “The Transformation of European Union,” Joseph Weiler drew a distinction between “total exit” and “selective exit.” Total exit meant unilateral withdrawal. Before the Lisbon Treaty, many European Union lawyers were keen to say that unilateral withdrawal was illegal. Robert Lecourt had stated this very openly:

*Les traités ne prévoient aucun mécanisme d'aller et de retour [...] on a parfois parlé d'Europe à plusieurs vitesses, mais jamais d'un droit communautaire à marche arrière.*³²

Joseph Weiler was more careful and stated that the question was not a legal one: if total exit was “foreclosed” it was because of the “high enmeshment of the member states and the potential [...] for political and economic losses.”³³ There followed an analysis of the core mechanisms of European Union law: direct effect, supremacy, human rights, judicial review. Weiler called these mechanisms “constitutional” while—apart from human rights—I would rather call them “super-legal.” But, be that as it may, Weiler then concluded that “the closure of Exit [...] means that Community obligations, community law and community policies were ‘for real.’ Once adopted [...] Member States found it difficult to avoid community obligations.”³⁴

Taking onboard European Union law

The Brexit process as we see it unfolding provides ample evidence of this irreversible nature of EU law. It is enough for the time being to point to the main piece of legislation designed with a view to implementing Britain's withdrawal from the European Union: the European Union (Withdrawal) Bill, also known as the “great repeal” Bill.³⁵ This other, more informal denomination, is also rather misleading. As a matter of fact, as it now stands, what the Bill actually repeals is “merely” the ECA 1972. Or rather, Parliament decides that the ECA 1972 will be repealed “on exit day” (s. 1), which should be 29th March 2019, at least if the declarations of the current Prime Minister are any indication.³⁶ But as far as existing European Union law is concerned, it certainly does not repeal it in a wholesale fashion. There is no “great repeal,” but rather a “retention” of European Union law in two ways,³⁷ depending on the way in which European Union law has been implemented. 1) Some European Union law has been implemented through the means of British law: it is “European Union-derived,” in the Bill's terms. In other words, domestic legislation has been enacted in order for the UK to comply with the supremacy of European Union law

³² R. LECOURT, *L'Europe des juges*, Brussels, Bruylant, 2008 [1976], quoted by T. ISIKSEL, *European Union's Functional Constitution*, *op. cit.*, p. 1.

³³ J.H. WEILER, “The Transformation of Europe”, *op. cit.*, p. 2904

³⁴ *Ibid.*

³⁵ When this paper was written, the Great Repeal bill was going through the stages of parliamentary approval. It has now been enacted as the “European Union (withdrawal) Act 2018. The bill has received royal assent on 26 June 2018.

³⁶ This date was announced by Theresa May in her speech in Florence on 22 September 2017.

³⁷ This section draws largely from K. ARMSTRONG, J. BELL, P. DALY and M. ELLIOTT, “Implementing Transition: How Would it Work?”, *CELS-CPL Working Paper*, no. 57/2017, University of Cambridge, Faculty of law, October 2017 [<http://dx.doi.org/10.2139/ssrn.3052328>].

since 1972. This has been done for the most part under the authority of section 2(2) of the ECA 1972 by way of delegated legislation. With regard to this body of law, s. 2 of the Bill contains a saving clause:

European Union-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.

2) In accordance with the other paramount European Union law principle of direct effect, the second category of European Union related law consists of measures which did not need to be transposed by British norms as they have applied directly (with “direct effect”) in British law from the time of their birth. They will not to be set aside or abrogated. Rather, they are firmly incorporated in domestic law by s. 3:

Direct European Union legislation, so far as operative immediately before exit day, *forms part of domestic law* on and after exit day.

The “conduit pipe”—the ECA 1972—is removed. But the norms that have been funnelled through that “pipe” from 1972 to the date when the European Union Withdrawal Bill comes into force will stay a part of domestic law. The implications of this fact are wide-ranging and go beyond the purview of the present article. But a central such implication is that the ties between this new category of “retained European Union law” (as it is to be known) and are not severed. Especially, the Bill provides that:

the principle of the supremacy of European Union law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day. (s. 5)

In other words, the removal of the conduit pipe and the end of primacy are for the future only. As a result, exit day, if and when it happens at all, will not bring about the doomsday of European Union law in Britain. In any case, the normative legacy of thirty-five years of British adhesion to the EC and the European Union will remain massive. The backlog of European Union law will be there for a long time.³⁸

CONCLUSION

This article has tried to present Brexit as a constitutional decision, albeit a defective one, and the European Union as an institutional structure relying on a “decision not to decide,” or in other words a decision to entrench the absence of an ultimate constitutional choice. This face off explains why, whatever may happen in the future, Brexit cannot be a full success. The UK does not have an ordinary constitutional structure. It is a customary constitution, rather than an unwritten one: institutions thrust their roots into the past, dependent upon underlying constitutional conventions, relying on assumptions about the legal sovereignty of Parliament and the political sovereignty of the people. The Brexit referendum has had a disruptive effect on this framework, which is apparent in the tabloid headlines about judges being “enemies of the people” and skeptical or pro-leave parliamentarians as traitors plotting to thwart the will of the people. A somewhat similar

³⁸ I will not discuss here the very broad ministerial powers granted by the Bill’s “Henry VIII” clauses.

reasoning could be conducted about the EU: it is obviously not an ordinary constitutional system. This article has tried to confront the orthodox argument about EU constitutionalism, which, to my mind, is deeply flawed and even misleading. There is no EU constitution and there will not be one in the foreseeable future. To think in terms of a constituent “decision not to decide” in the formative period of the European Communities may help explain why this is the case.

This being said, my main purpose in this article, has been to show that one cannot understand Brexit without a new theory of constituent power –better explained as a (modified) Schmittian “decision” than by any other existing theory– and without acknowledging the “non-decisional” nature of the European Union, which does not lend itself to “brutal” one-off decisions to just move away and go it alone. It may be the case that the UK leaves the “political” union, but this will have a massive impact on the domestic constitution. And it is likely that the “legal” side of the Union, the body of EU law already incorporated in British domestic law will never go away. Britain can decide to leave Europe, but Europe will not leave Britain anytime soon.

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