

# THE EFFECT OF BREXIT ON BRITISH INDUSTRIAL RELATIONS LAWS AND ITS COMMERCIAL AND CONSTITUTIONAL CONSEQUENCES

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**ABSTRACT:** Once Article 50 has been triggered the UK has two years to negotiate its exit. The terms of the UK exit have to be agreed by the remaining 27 Member States' Parliaments. EU laws remain applicable in the UK until its membership ceases by the withdrawal agreement. Prior to an evaluation and an analysis taking place on Brexit and its effect it is important, not only to define this word but also to give the background, and the necessary procedures to be followed, to bring Brexit into effect. This will necessitate some discussion on political issues which are unavoidable in a chapter such as this. The thrust of the discussion will however be focused on how the British labour laws, commerce and the British constitution could be affected as a consequence of Brexit.

**RESUMEN:** Una vez iniciado el procedimiento en virtud del artículo 50, el Reino Unido dispone de dos años para negociar su salida. Los términos de la salida del Reino Unido deben consensuarse con los restantes 27 Parlamentos de los Estados miembros. Las leyes de la UE siguen aplicándose en el Reino Unido, hasta que cese su adhesión por el acuerdo de denuncia o retirada. Antes de realizar una evaluación y análisis sobre el Brexit y sus efectos, es importante no solo definir esta palabra, sino también marcar el trasfondo y los procedimientos necesarios que deben seguirse para llevar a efecto el Brexit. Esto exige un debate sobre cuestiones políticas que son insoslayables en un estudio como este. Sin embargo, el eje de la discusión se centra en cómo las leyes laborales británicas, el comercio y la constitución británica podrían verse afectados como consecuencia del Brexit.

**KEY WORDS:** Brexit, consequences of Brexit, British labour laws.

**PALABRAS CLAVE:** Brexit, consecuencias del Brexit, leyes laborales británicas.

## 1. THE BACK CLOTH

Prior to an evaluation and an analysis taking place on Brexit and its effect on industrial relations, commerce and the British constitution it is important, not only to define this word but also to give the background, and the necessary procedures to be followed, to bring Brexit into effect.<sup>1</sup> This will necessitate some discussion on political issues which are unavoidable in a chapter such as this. The thrust of the discussion will however be focused on how the British labour laws, commerce and the British constitution could be affected as a consequence of Brexit.

### 1.1. Shortened Versions for Convenience

This much used novel<sup>2</sup> expression is a shortened version of Britain ceasing to remain a Member State of the European Union. By merging the two key words, namely “**Britain**” and “**exit**” the shortened version spells Brexit. Although this author does not like this commonplace and hackneyed expression, it will nevertheless be used throughout this chapter by reason of it being conveniently short thus saving space. Other expressions will also be shortened for the same reason. Thus the European Union will be referred to as the EU, the United Kingdom will be referred to as the UK, the European Court of Justice and the Court of Justice of the European Union will feature as the ECJ and the CJEU respectively.

### 1.2. The British Referendum

A referendum held on 23<sup>rd</sup> June, 2016 with a 72.2% turnout representing thirty million people of voting age<sup>3</sup> taking part was held to decide whether the United Kingdom should remain in or leave the European Union. The “leave” supporters won overall by 52% while the “remain” supporters obtained 48% of the votes overall.

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1 See Paul Craig “*Brexit: a drama in six acts*” *European Law Review* 2016 41(4) 447-468. See too House of Lords -European Union Committee- 14<sup>th</sup> Report of Session 2016-17 “*Brexit: UK-EU Movement of People*” HL Paper 121. 6<sup>th</sup> Match, 2017.

2 A similar expression was used recently in connection with the possibility of Greece leaving the European Union, namely “Grexit” resulting from that country’s severe financial problems.

3 Namely, 18 years of age and over.

The United Kingdom consisting of four countries, namely England, Wales, Scotland and Northern Ireland, it was in England and Wales that the “leave” supporters won the majority of votes in the referendum. In England the “leave” supporters obtained 53.4% of the votes<sup>4</sup> while the “remain” supporters only achieved 46.6% of the votes.<sup>5</sup> In Wales, the “leave” camp obtained 52.5%<sup>6</sup> while the “remain” camp got 47.5%.<sup>7</sup> In Scotland the “leave” supporters obtained 38% of the votes<sup>8</sup> with the “remain” supporters enjoying 62%.<sup>9</sup> Likewise, in Northern Ireland the “leave” campaigners received 44.2%<sup>10</sup> and the “remain” campaigners 55.8%.<sup>11</sup> The turnout of voters was high in each of the countries which constitute the United Kingdom thus in England it was 73%, in Wales 71.7%, in Scotland 67.2% and in Northern Ireland 62.7%.

It is suggested that, apart from the political ideology of some British political parties such as UKIP and the extreme right back benchers in the Conservative Government, the reasons for such a referendum result include, *inter alia*, (a) the charging of millions of pounds sterling a year in EU membership fees for relatively little return; (b) the fact that far too many EU regulations are imposed on, and thus affecting, businesses; (c) the desire of taking back full control of the UK’s borders and reducing the number of migrants entering the UK to live and work under the fundamental EU freedom of movement of persons principle; (d) the taking back of sovereignty and democracy where laws are made in the British Parliament and not in Brussels; and (e) an objection to an “ever closer union” EU policy between EU Member States and what they see as moves towards the creation of a United States of Europe, all of which are unacceptable and unpalatable to a majority of the British population.

### 1.3. The Effects of the Referendum

Mr. David Cameron resigned as Prime Minister on the day after losing the referendum while leaving behind him a monumental mess to be solved by Mrs Theresa May who was elected Prime Minister soon thereafter.

For the United Kingdom to leave, it has to invoke Article 50 of the Treaty of the European



4 I.e. 15, 188,406 votes.  
5 I.e. 13, 266,996 votes.  
6 I.e. 845,572 votes.  
7 I.e. 772,347 votes.  
8 I.e. 1,018,322 votes.  
9 I.e. 1,661,191 votes.  
10 I.e. 349,442 votes.  
11 I.e. 440,707 votes.

Union<sup>12</sup> which allows two years to agree the terms of the exit.<sup>13</sup> In her speech at the Conservative Party's annual conference in Birmingham on 2<sup>nd</sup> October, 2016 Mrs Theresa May confirmed that Article 50 will be triggered in March, 2017 meaning that the UK will probably leave in the summer of 2019 depending on the negotiations timetable and its progress. The British government will then enact "the Great Repeal Bill" which will end the primacy of EU law over the UK laws. In her Conservative conference speech Mrs May indicated that all European legislation incorporated into British laws will remain intact but that the British government will decide in accordance with its policies, which parts of the European legislation will be retained in British law and which parts will be repealed and/or amended.

Who will be negotiating the UK exit? Mrs Theresa May has set up a new government department headed by Mr. David Davies to be responsible for Brexit. Mr Liam Fox has been given the job of international trade secretary and Mr Boris Johnson was appointed foreign secretary. All three backed the "leave" campaign and will play a central part in negotiations under the watchful eye of the Prime Minister who will have the final say.

The government did not do any emergency planning for Brexit ahead of the referendum and has had to hire a team of skilled negotiators to manage the complex business of negotiating the withdrawal and to ensure that the UK gets the best deal possible.



12 Article 50 which was negotiated under the Lisbon Treaty, 2009 (now included in the Treaty of the European Union) provides that if a member state decides to withdraw from the EU "in accordance with its own constitutional requirements" it should serve a notice of that intention and the treaties which govern the EU "shall cease to apply" to that member state within two years thereafter. See Dora Kostakopoulou "Brexit, voice and loyalty; reflection on Article 50 TEU" *European Law Review* 2016 41(4) 487-489. See too Hannes Hofmeister "Should I Stay or should I Go? A critical analysis of the Right to Withdraw from the EU" *European Law Journal* Vol. 16 No. 5 September 2010 at pp. 589-603, Steve Peers "Article 50 TEU: The Uses and Abuses of the process of withdrawing from the EU" 8th December, 2014 <http://eulawanalysis.blogspot.co.uk/2014/12/article-50-teu-uses-and-abuses-of.html> (Retrieved 30th August, 2016) and House of Commons Library. Briefing Paper No.7551, 16<sup>th</sup> January 2017 "Brexit: How does the Article 50 process work" by Vaughne Miller; Arabella Lang and Jack Simson-Caird.

13 It is interesting to note the crowd-funded initiative of the British People's Challenge on Article 50 to the Government which argued that it is up to the British Parliament to trigger the exit procedure so as "to ensure that parliamentary sovereignty is maintained and is respected by the Government" and that furthermore "the rights of 65 million UK citizens are respected". Without ignoring and respecting the "leave" voters' decision which has voted for the UK to detach itself from the EU, this People's Challenge has dubbed the Government's actions as "constitutional vandalism". It said "By using the Royal Prerogative to trigger Article 50 of the Treaty of Lisbon this Government will be sweeping away rights at a stroke of a pen without the proper scrutiny of a final decision being made by our Sovereign Parliament". The argument of the British Government was that it is "constitutionally impermissible" for the British Parliament to be given the authority to launch the Brexit procedure. Its legal argument was that "it is clearly understood that the government would give effect to the result of the referendum for which the 2015 Act provided, and that was the basis on which the electorate voted in the referendum". The Government thus argued that it is the Prime Minister's prerogative to bring about the exit process because the 2015 Act establishing the referendum of 23<sup>rd</sup> June 2016, imposed no further function by Parliament after the vote. No statutory steps were thus prescribed in the 2015 Act in the event of a "leave" vote. The Government argued furthermore that "treaty-making and withdrawal from treaties is not generally subject to Parliamentary control" and the "appropriate point at which the UK should begin the procedure required by Article 50... is a matter of high, if not the highest policy". However, the Government argued that Parliament would have "a role in ensuring that the Government achieves the best outcome for the UK through negotiations". Nor will devolved legislation such as Scotland, Northern Ireland and Wales be able to override the triggering of the Article 50 exit procedure because devolved legislatures have no competence over foreign policy which includes the EU. (Source: <https://euroserver.com/uk-referendum/135292> ) (Retrieved 29th September, 2016). The "People's Challenge" has taken the Government to court. The hearing of this test case began on 13<sup>th</sup> October, 2016 and concluded on appeal to the Supreme Court on 24<sup>th</sup> January, 2017. A fuller discussion will be found at pp. 39-44 *infra*.

Once Article 50<sup>14</sup> has been triggered the UK has two years to negotiate its exit. The terms of the UK exit have to be agreed by the remaining 27 Member States' Parliaments. EU laws remain applicable in the UK until its membership ceases by the withdrawal agreement.

There are six steps to the withdrawal procedure.<sup>15</sup> The first step which has already occurred is that the UK votes to leave the EU. Step two consists of the UK invoking Article 50 of the Treaty of the European Union. This will occur at the end of March, 2017. The remaining 27 Member States of the EU have met to discuss the UK's withdrawal. The third step consists of negotiations between the UK and the EU Commission. There is a two year time limit for negotiations. The draft negotiations will be put before the European Council's twenty seven leaders acting by a qualified majority. The deal resulting from the negotiations needs the approval of at least twenty EU Member States representing at least 65% of their population.<sup>16</sup> The draft deal also needs the ratification by the European Parliament by a simple majority of MEPs. The two year negotiations can be extended further subject to the twenty seven EU Member States agreeing. Step four is triggered if there is no agreement to extend the negotiations in which case the European Union Treaties automatically cease to apply to the UK. Step five consists of the UK leaving the EU whereby the UK Parliament repeals the European Communities Act, 1972 and replaces it with a British Act of Parliament namely the Great Repeal Bill. Step six relates to the UK's return to the EU. In such an unlikely situation, the UK would have to apply formally like any other country and go through the procedure of satisfying the various chapters required for entry.

Article 50 of the Treaty of the European Union resulted from the Lisbon Treaty negotiations in 2009 and has never been used before because no other EU Member State has left the EU.<sup>17</sup> There are therefore many uncertainties and imponderables in this sphere.

#### 1.4. "Brexit means Brexit"<sup>18</sup>

Mrs May has coined the loud and clear three word message that "Brexit means Brexit". Until her speech at Lancaster House on 17<sup>th</sup> January, 2017<sup>19</sup> this expression was "writ in

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14 See Dr. Philip Syrpis "What next? An analysis of the EU law questions surrounding Article 50 TEU: Part One. Posted 8<sup>th</sup> July 2016. <https://eutopialaw.com/2016/07/08/what-next-an-analysis-of-the-eu-questions-surrounding-article-50-teu-part-one/> (Retrieved 30<sup>th</sup> August, 2016).

15 See too the CEPS publication entitled "Procedural steps towards Brexit" (13<sup>th</sup> July, 2016). <http://www.ceps.eu/publications/procedural-steps-towards-brexit> (Retrieved 30<sup>th</sup> October, 2016) and Catherine Barnard "The practicalities of leaving the EU" *European Law Review*. 2016. 41(4) 484-486.

16 Alternatively by the European Council acting unanimously, followed by ratification of the twenty seven Member States of the terms of the future relationship between the UK and the EU agreed at the same time which in all probability they may not.

17 Greenland which is one of Denmark's overseas territories held a referendum in 1982 and voted by a majority of 52% to 48% to leave the EU which it did after a period of negotiations.

18 For an interesting viewpoint see Gareth Davies "Brexit and the free movement of workers: a plea for national legal assertiveness" *European Law Review*. 2016 41(6), 925-937. See too "Brexit: impact across policy areas" (especially the Employment part). Friday 26<sup>th</sup> August, 2016. House of Commons Library.

19 Made at Lancaster House in London to Ambassadors of the 27 EU Member States and senior politicians.



water” because there was much uncertainty as to what this undefined and unexplained expression meant. Such questions were initially asked as to whether or not the UK would remain a member of the European single market? Will European Union nationals retain the right to live and work in the United Kingdom and vice versa? Will there be free trade agreements with individual Member States of the EU? Will there be a customs union with the EU? Would bilateral agreements be concluded with the EU? Would the UK become a member of the European Economic Area (EEA)? Would the UK become a member of European Free Trade Association? (EFTA). Were the UK to become an EEA member, problems would certainly arise in connection with current British government policies which are the very reason for Brexit! By agreeing to join the EEA after Brexit, the UK would be bound by the very EU laws, policies, decisions and CJEU judgments which it was seeking to avoid by leaving the EU! Were the UK to join EFTA after Brexit, the same “catch 22” situation would arise. The EFTA Court which has jurisdiction over EEA Member States is normally bound to follow the CJEU decisions.<sup>20</sup> Of course, it may well be that the Brexit negotiating team will find inspiration and originality and thus achieve its *deus ex machina*<sup>21</sup> in some novel form of agreement with the EU so far not thought of by anyone!

Since the Prime Minister’s Lancaster House speech, some key details on the negotiating approach have, for the first time since the referendum vote, been revealed.<sup>22</sup> Thus some of the above questions asked have been clarified *to a certain extent* in that a general direction was shown on the UK’s approach to the UK’s negotiations with the EU Commission. Whereas the government had not previously committed itself either way, the Prime Minister confirmed that the UK will not remain a member of the *single market*<sup>23</sup> but would negotiate for a “new comprehensive free trade agreement” which would give the UK “the greatest possible access” to the single market.<sup>24</sup> Furthermore the UK would leave the *customs union*<sup>25</sup> but at the same time the PM wanted the UK to “have a customs union agreement with the EU”.<sup>26</sup> On *immigration* Mrs May’s speech was clear. “Brexit must mean “control of



20 Switzerland enjoys numerous bilateral agreements with Europe but it is bound by both some EU laws as, for example, the working time, the collective redundancy and the transfer of undertakings Directives and the Swiss courts treat CJEU judgements as persuasive. These are the very issues which the UK wishes to rid itself of!

21 In the sense of an unexpected event saving a seemingly hopeless situation. Although a Latin expression it originates from Greek “theosekmechanes” and refers to actors representing gods suspended above the stage of an ancient Greek amphitheatre which intervened in the play’s outcome.

22 It took the Government some seven months to reveal key details regarding the British approach to EU negotiations.

23 The single market allows free movement of goods, workers, capital and services, (namely the four principles) without any tariffs, as if the EU were one country.

24 The negotiations may contain elements of the current arrangement in connection with the financial services and the motor trade. It is suggested that “the greatest possible access,” in the unlikely event of being otherwise negotiated could imply, being bound to a *limited* extent by the principle of freedom of workers and being subject to the CJEU jurisdiction.

25 A customs union may be defined as an agreement or arrangement between countries not to impose tariffs on each other’s goods. In other words, a free trade area. Common external tariffs agreed between the EU countries are imposed on third countries’ goods.

26 In addition to the current 28 EU Member States which are in the customs union, the EU also has *separate* customs agreements with a number of third countries which deal with specific types of goods.

the number of people who come to Britain from Europe”.<sup>27</sup> The issue of EU *citizens living in the UK* and UK citizens living in an EU country is a pressing one. The PM stated that she wished “to guarantee their status... in the UK, but we need reciprocity - we need to have care and concern of UK citizens living in the European Union”. As for the *jurisdiction* of the CJEU, the UK, - subject of what will be said later, on EU case law being persuasive, - will no longer be bound by its decisions after Brexit has come about. Mrs May stated<sup>28</sup> that “We are not leaving only to return to the jurisdiction of the European Court of Justice”. As for *contributions to the EU budget* the PM made it clear that “the days of Britain making vast contributions to the European Union every year will end” after Brexit. The UK would however make an “appropriate contribution” to enable it to be part of various EU schemes. It appears clear that while on-going negotiations with the EU are taking place, all rights and obligations of EU membership will continue. Thus the UK will continue to make contributions to the EU budget and the EU will continue to fund British projects which benefit from EU funding while the UK remains a member of the EU.<sup>29</sup>

A host of further questions need to be asked and answered resulting from the expression coined by the Prime Minister. What would the overall economic impact be on the British<sup>30</sup> and EU economies? How would the highly entwined UK and EU environmental laws fare? What are the implications of Brexit on fisheries? There is much uncertainty on that issue. In agriculture, what are the implications of Brexit? Presumably the UK will cease to be subject to the regulatory regime of the EU Common Agricultural Policy and will thus receive no farm subsidies.<sup>31</sup> Questions also remain unanswered on financial services and business, on the overall economic impact, on trade, climate change and energy, police and justice co-operation, transport, human rights,<sup>32</sup> higher education, health, social se-

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27 There would thus be restrictions on immigration. It is not clear what model of control will be adopted. It could include the introduction of work permits *before* migration to the UK with ministers able to *prioritise* sectors in which labour is required. Alternatively, a points-based system such as is operative in Australia could be chosen or the system which currently exists in the UK for third countries’ (non-EU) nationals. This system introduced in 2008 (to replace a former complicated eighty different types of visa schemes) and inspired by the Australian system includes four tiers, namely high value workers, skilled workers, students and temporary migrant workers.

28 This statement was made at the October 2016 Conservative Party Conference.

29 In August 2016 the Treasury said that it would guarantee EU-funded projects signed before 23<sup>rd</sup> November, 2016 which was the date when the Autumn Statement was made. Furthermore, during the October, 2016 Conservative Party Conference the Chancellor of the Exchequer said that the Treasury would guarantee multi-year EU funded payments secured *before Brexit* takes place and *after* the UK exited the EU.

30 The International Monetary Fund (IMF) Head, Christine Lagarde, holds the opinion that Brexit “will not be positive all along and without pain”. Indeed a number of banks in London have relocated or are about to do so where their *activities are covered specifically by European legislation*. HSBC which has its headquarters in London will relocate about 1,000 employees to Paris, UBS the Swiss bank will relocate a fifth of its 5,000 employees away from [London, a German bank in London will relocate about a thousand personnel to Frankfurt and the Goldman Sachs Group is considering relocating a part of its business away from the City of London. (Source: Euobserver 19<sup>th</sup> January, 2017).

31 It should be noted that EU agricultural funding is guaranteed to continue until 2020, but what would the situation be thereafter?

32 As proposed by the current British Conservative Government in the Queen’s Speech, the Human Rights Act 1998 which commits the British courts to treat the European Court of Human Rights (ECHR) judgements as setting legal precedents for the UK, will be replaced by a Bill of Rights which will boost the powers of courts in England and Wales



curity, consumer affairs, foreign and defence policy, the devolved legislatures of Scotland, Northern Ireland and Wales, all of whom are currently benefiting from EU funds, international development and a host of other or related matters. There is also the possibility of Scotland running an independence referendum in the future and depending upon its results, this could create additional constitutional headaches!

The above list of uncertainties,- in spite of the 17<sup>th</sup> January, 2017 Lancaster House speech of the PM which shows a possible direction on the negotiations,- constitute a formidable array of issues brought about by Brexit and are mentioned in this text merely to illustrate the enormity of the Brexit problems which need to be resolved.

This research is more modest in that it does not intend to address the above problems in any detail: It will only attempt a *tentative* and *speculative* answers to what future changes are *likely* to take place as a result of Brexit in the European social laws currently incorporated into, and applicable to, British labour laws. Also to feature later on in this chapter will be important and fundamental commercial and constitutional issues which *could* have an important bearing on how labour laws will develop in the future.

## 2. WHAT ARE THE ANTICIPATED IMPLICATIONS AND RISKS OF BREXIT<sup>33</sup> ON BRITISH LABOUR LAWS?

### 2.1. Some preliminary general remarks prior to evaluating and analysing the implications of Brexit on British labour laws

Granted that British workers and employees<sup>34</sup> enjoy common law<sup>35</sup> and statutory law<sup>36</sup>

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to over-rule judgements handed down by the ECHR. The consequences could mean that the ECHR in Strasbourg which affords workers some protection in their working lives could diminish. It should be noticed that the ECHR is part of the Council of Europe which has forty seven member states and is a separate body or entity from the EU.

33 The reader who wishes to examine the *wider consequences* of Brexit for both the UK and the EU is recommended to consult Steven Brockmans and Michael Emerson “*Brexit Consequences for the UK - and the EU*” 6<sup>th</sup> June, 2016. <https://www.ceps.eu/publications/brexit-consequences-uk---and-eu> (Retrieved 18<sup>th</sup> June, 2016).

34 For a scholarly study of the distinction between the status of employee and worker see Jo Carby-Hall “*New Frontiers of Labour Law: Dependent and Autonomous Workers*” in “*Du Travail Salarié au Travail Indépendent: Permanences et Mutations*” (Professors Bruno Veneziani and Umberto Carabelli (Eds)) European SOCRATES Programme. Vol. 3.(2003) Cacucci Editore. at pp. 163-287 and particularly pp. 246-282.

35 For example, the common law duty of care owed to the employee by the employer. Such duty comprises the provision of competent staff, safe work premises, a safe working system and safe machinery. See p. 22 *infra* for further details.

36 An example, amongst many, is the right of the employee not to be unfairly dismissed. See Jo Carby-Hall “*Unfair Dismissal*” Managerial Law. (1998) Vol.30.No.4 MCB university press. Others include the right of an employee to claim a redundancy payment (for an evaluation and analysis see Jo Carby-Hall “*Redundancy in the United Kingdom*” in “*I licenziamenti per riduzione di personale in Europa*” (Professors Bruno Veneziani e Umberto Carabelli (Eds)) European SOCRATES Programme. Vol. 2.(2001) Cacucci Editore (Italy) at pp. 387-537) or pay and deductions from wages.

rights emanating purely from UK laws, it is thanks to an important input by European social legislation that UK workers and employees are given significant additional rights.<sup>37</sup> A substantial component of UK labour law during the recent years thus derives from EU law<sup>38</sup> which often imposes a *minimum minimorum* below which domestic labour law must not fall.

In some cases the EU has entrenched at an international level provisions which already exist in UK laws, examples include some maternity rights and sexual and racial discrimination. In other cases, new categories of employment rights have been incorporated into British laws to comply with emerging EU policies creating obligations on Member States' labour laws. Some of these were even contested by various British Governments, the most flamboyant examples being the *opting out* of the working time limitations<sup>39</sup> under the Working Time Directive and the rights given to agency workers.<sup>40</sup>

The result of the Referendum of 23<sup>rd</sup> June 2016 showed that the majority (albeit a small one) of the UK population favoured leaving the European Union. At the Conservative Party Conference held in Birmingham in October 2016 Mrs May, the Prime Minister, stated that in order to get some preparation in place Article 50 would not be triggered before the end of March, 2017. This would provide a "smoother process of negotiation" and when the UK leaves there would be "a smoother transition from the EU". The UK Parliament will be kept informed of progress while the negotiations are taking place but "the negotiators will not set out all the cards in our negotiation because, as anybody will know... if you do that up front, or if you give a running commentary, you don't get the right deal".<sup>41</sup>

The "Great Repeal Bill" will repeal the European Communities Act, 1972 which brought the UK into membership of the EU and which gave *direct effect* of EU laws. At the same time the Brussels laws will be converted into domestic laws which will give the British

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37 The Collective Redundancies - Staff Information and Consultation Directive 1998 Council Directive 98/59/EC (OJ L 255) imposing a duty on the employer to inform and consult the workforce prior to redundancies taking place is one example. Other examples include the social dialogue and the little used in the UK collective consultation rights such as those relating to works councils and transnational works councils and particularly the unpopular Working Time Directive 2003 with its numerous British opt-outs.

38 See Astra Emir and Stephen Taylor "*Worker protection - does it come from the UK or the EU?*" <http://blog.oup.com/2016/06/worker-protection-employment-law/>.

39 For a detailed analysis on opting out of the working time laws see Jo Carby-Hall "*Opt outs and variations in working time - British style*". in "*Le Travail Humain au Correfour du Droit et de la Sociologie*" - Hommage au Professeur Nikitas Aliprantis -(Professors Christian Mestre, Corinne Sachs-Durand, Michel Storck (Eds)) (2014) Presses Universitaires de Strasbourg at pp. 53-71.

40 The British government enacted the Agency Workers Regulations, 2010 (S.I. 2010/93) which require, - subject to certain limitations, - equal pay and other rights granted to agency employees compared to employees in the same business who perform the same work. These regulations implement the EU Temporary Agency Work Directive 2008 (2008/104/EC) agreed in November, 2008. The Directive itself was subject to resistance by respective British governments.

41 Source: <http://www.msn.com/en-gb/news/uknews/britain-will-trigger-article-50-before-the-en>. (Retrieved on 3<sup>rd</sup> October, 2016). See too what the Transport Secretary Mr Chris Grayling said on this issue. He said "What nobody would expect is for us to set out in detail before any negotiation exactly what the end point should be, because by definition that would make the negotiation something that was irrelevant". Does the White Paper (see pp. 46-48 *infra*) not contradict this statement?

Parliament the ability “to unpick the laws it wants to keep, remove or amend at a later date”. This policy is designed to give “certainty to businesses and protection of workers’ rights” which form part of EU transposed laws. The Great Repeal Bill will be brought forward in the next parliamentary session (2017-2018) and will not pre-empt the two year process<sup>42</sup> of leaving the EU which will begin in March 2017. On exit day the EU law will be transposed into domestic law wherever practical. The repeal Bill once it becomes an Act, will end the primacy of EU law meaning that the judgments of the Court of Justice of the European Union (CJEU) will no longer apply to the UK.

To conclude, the Prime Minister gave little detail on the Great Repeal Bill itself. There was no hint of what it would consist, how it would work and how the Prime Minister will deliver Brexit while protecting businesses and workers. The Prime Minister has pledged that the UK will become a fully independent, sovereign country which will decide how to control immigration, which will no longer form part of the political union with supranational institutions which are enabled to override national parliaments and courts and that there would be no opt outs for Scotland and Northern Ireland in which its citizens have voted to stay in the EU.<sup>43</sup> All this spells a hard Brexit<sup>44</sup> which, in the opinion of this author, could prove a disaster to British businesses, to the economy and to jobs.<sup>45</sup> Furthermore as indicated by the Prime Minister (and Home Secretary) in their respective speeches at the October 2016 Conservative party conference, if these policies are to be put into effect,

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42 Mr Ken Clarke a blunt Tory pro EU politician and a very respected, experienced and wise former Chancellor of the Exchequer and Conservative Cabinet Minister whose judgment is invariably sound predicts that it would take eight years to complete the UK’s EU exit. Furthermore he predicts “that Tory Eurosceptics would try to push May towards taking an unrealistic position, saying that they would see as a “betrayal” any deal which fell “short of a tribute in gold being presented to the Queen once a year by the EU”. Source: Andrew Rettman “UK to start ‘hard’ EU talks in March”. Mr Clarke also said that nobody in the government has a first idea of what they’re going to do,” that Theresa May has no policies nor “first idea” what to do about Brexit,” that “she would struggle to put together a coherent policy which a united cabinet would present to Parliament and public because nobody has the foggiest notion of what they want us to do” and that “May was a bloody difficult woman” during the Conservative leadership contest, in spite of the fact that he backed her! (Source: Jack Sommers. Huffington Post 29<sup>th</sup> September, 2016).

43 Source: Andrew Rettman “UK to start ‘hard’ EU talks in March” at <https://euobserver.com/uk-referendum/135330> (Retrieved 1st November, 2016).

44 The words “hard” and “soft” Brexit have been increasingly used of late. What do they mean? There is no official definition of either of those words which are used as the debate develops and focuses on the *terms* of the UK’s departure from the EU. These words are used to illustrate the *closeness or otherwise* of the UK’s relationship with the EU post Brexit. A *hard Brexit* implies the refusal of the UK to compromise in the negotiations on such matters as free movement of persons, or being subject to the CJEU decisions, in order to have access to the EU single market. A *soft Brexit* on the other hand would allow for compromises to be made by the British Government during negotiations on fundamental EU legislative principles such as the path taken by Norway which is a member of the single market and which has to accept the fundamental EU concept of freedom of persons as a result. Euro-sceptics would favour a *hard Brexit* while others who favour a *soft Brexit* hold more moderate views and are prepared to negotiate in that spirit and therefore compromise.

45 According to an Independent Communications and Marketing (ICM Unlimited) survey, 54% of those surveyed favoured a *soft Brexit*. Were a satisfactory agreement not be concluded during the negotiation period those surveyed suggested extending the negotiation period. Were such extension to prove unsuccessful then a referendum was suggested to ascertain public opinion. Only 35% of the British public favoured a *hard Brexit* resulting in the UK departing the EU without an agreement and falling back on World Trade Organisation (WTO) tariffs which would create catastrophic and ruinous problems to the British economy. (Source: <https://www.theguardian.com/politics/2017/feb/11/theresa-may-hard-brexit-public-backla...>).

they will create a severe risk of fragmentation of the United Kingdom. British and Scottish leaders have already “locked horns” on Brexit and have drifted apart in their respective visions of Brexit.<sup>46</sup>

During this two year (or more likely a longer<sup>47</sup>) *gestation* period starting from the triggering of Article 50 in March 2017, the UK remains a Member State of the EU and is subject both to its current and any future EU legislation enacted during that gestation period. It is also subject to the Court of Justice of the European Union judgements. The referendum result has created no legal change whatsoever. Once Brexit has come about and depending upon what new relationship (if any) the UK has with the EU and discounting possible membership of the EEA and/or EFTA, there could be a metamorphosis in British labour laws and working practices which, depending on circumstances at the time, could have the effect of either keeping the *status quo* of current labour laws and practices, which is most likely to be the case or possibly changing them or re-writing them which could happen in the long term.<sup>48</sup>

## 2.2. An evaluation and analysis of European social laws transposed into British laws

There being a significant number of EU Directives implemented in British labour law,<sup>49</sup> each of those transposed laws is to a higher or lesser degree vulnerable to change post Brexit. It is proposed to group these in three different categories. The first category will treat current laws which are most likely to be either heavily amended or repealed after Brexit, while the second category proposes to deal with European laws translated into British laws which are likely to need either minor amendments or remain intact. The third category will discuss a law which is very likely to be repealed. An explanation as to why this uncertainty exists in this third category will be attempted.

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46 Mrs Nicola Sturgeon, Scotland’s first minister, did not mince her words when she uttered the following statements, namely “We have woken up with a Ukip government. Depressing doesn’t begin to cover it”. “It is a vision the Scottish government want no part of and one which we will never subscribe to” and “do everything in our power to shape Scotland” in being a more tolerant society. Mrs Sturgeon talked of the Conservative government’s “arrogance” being “breath-taking”. Prime Minister May was “going out of her way to say Scotland’s voice and interests don’t matter” and that it was a “strange approach from someone who wants to keep [the] UK together”. All this could well mean that Scotland could call for a second referendum on Scottish independence if the UK and EU settlement threatened Scotland’s interests. Furthermore, Mrs Sturgeon signed a joint statement with the leaders of the Green Party in England and Wales and of Plaid Cymru, the Welsh Nationalist party in which they condemned the “toxic and divisive rhetoric” of May’s party. (Source: Eric Maurice Euobserver 5<sup>th</sup> October, 2016).

47 Many have suggested that Brexit negotiations would take longer than two years. Mr Philip Hammond, Chancellor of the Exchequer suggested that it would take six years for the UK to complete exit negotiations while Sir Ivan Rogers in his thinly veiled criticism of the UK Government on 3<sup>rd</sup> January, 2017 was of the opinion that a new deal with the EU could take up to ten years. (Source: <https://euobserver.com/uk-referendum/136436>) (Retrieved 4th January, 2017).

48 For an enlightened, legally informative, well-reasoned and complete text on Brexit, the reader is strongly recommended to peruse “*Workers’ Rights from Europe: The Impact of Brexit*” which is the advice given to the TUC by Mr. Michael Ford Q. C.

49 These Directives also bind EEA countries’ labour laws.



Prior to analysing those three categories, five matters need to be stressed at the outset. First, that the analysis and evaluation will only deal with European social laws which have been *implemented* into British labour law since it is those laws which are more likely to be targeted for repeal, adjustment or amendment and therefore affected by Brexit. It would be irrelevant to consider laws which originate from the Westminster Parliament. If changes or repeals were to be made to those latter laws they would not *normally* be made by reason of Brexit. Secondly, the *speculative element* in this chapter needs to be stressed. Not knowing how Brexit will affect those implemented laws, much of what will be said will be based on speculation;<sup>50</sup> such speculation being explained, as far as is possible, by concrete evidence being given as to why such speculation features. In the third instance it is important to remind the reader how the implementation of European laws into British law is made. One way of implementing EU law into British law is through *primary legislation*, namely by an Act,<sup>51</sup> or part<sup>52</sup> of an Act, of the Westminster Parliament. Under the provisions of the European Communities Act, 1972, implementation of an EU law may also be made by *secondary legislation*, namely through ministerial regulations, statutory instruments or orders.<sup>53</sup> What is important in those two expressions, namely *primary* and *secondary* legislation is that this terminology applies to British law. It should not be confused with the identical terminology used by some European law learned authors.<sup>54</sup> Fourthly, having voted for Brexit implies that the UK will be under no obligation post Brexit to implement future EU Directives into British legislation and will be free to *repeal* or *amend* laws emanating from the EU some of which have proved to be controversial or thorny. Finally, the

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50 At the time of writing (1<sup>st</sup> March 2017) it is impossible to predict what the relationship between the UK and the EU will be after Brexit. There will be many turbulent waters to navigate through, many mountains to climb and much rocky territory to cross. It is *most unlikely* that the UK will become part of the EEA, when it would have to adopt fundamental EU legislation on the freedom of movement principle and be subject to the judgements of the CJEU. Mrs May has been emphatic that the UK will not follow that course and that she will be seeking a “hard Brexit”. Nevertheless the unpredictability resulting from the negotiations should not be underestimated or ignored!

51 The Equal Treatment Directive 2000 (2000/43) is implemented into British law by the Equality Act, 2010. Another very obvious example of primary legislation is the very Act of Parliament which, as a result of the Accession Treaty of the UK, brought the UK into the EU, namely the European Communities Act, 1972. (1972 c.68). This Act is an obvious candidate for repeal at the time Brexit takes place. In those latter circumstances, the British government would need to be very careful that the Regulations made under the 1972 legislation are *not automatically* repealed, - in the words of Macduff in Shakespeare’s Macbeth (1605) - “At one fell swoop”. It is thought that the British government will be diligent enough to exclude the repeal of those Regulations until further consideration is given to them with regard to their maintenance, change or repeal.

52 Implementation of Council Directive 1998 (98/59 EC 20<sup>th</sup> July 1998) relating to Collective Redundancies which requires collective consultations is implemented in *part* of the Trade Union and Labour Relations (Consolidation) Act, 1992.

53 The Working Time Regulations, 1998, implement the European Parliament and Council Working Time Directive 2003 (2003/88); the Council Directive on the Transfers of Undertakings 2002 (002/23) which safeguards employees in company transfers is implemented by the Transfer of Undertakings (Protection of Employment) Regulations, 2006 (SI 2006/246) and the Temporary Agency Workers’ Directive which protects agency workers was implemented in the UK by the Agency Workers Regulations. 2010. (SI 2010/93).

54 Such as Nigel Foster in “Blackstone’s EU Treaties and Legislation 2015-2016” Oxford University Press at pp. 153-154 who classifies primary legislation to include Treaties, Protocols, Declarations, additional legislation and agreements affecting institutions and the European Court of Justice (*Costa v ENEL* 15<sup>th</sup> July 1964 Case 6/641) and secondary legislation as including Directives, Notices and Regulations.



reader should bear in mind the importance of the *colour*, - namely, its ideology, policies, imperatives, views and imminent practicalities, - of the British Government at the time of amendment, repeal, substitution, adjustment and so on of European laws translated into British laws. This will be a long term process. A Labour Government is more likely to maintain or re-introduce (if those rights had been removed by a previous Government) the current *status quo* and thus enable workers to enjoy the European law rights originally granted to them. A Conservative Government such as the present one on the other hand whose policy and ideology rests on a flexible and deregulated<sup>55</sup> labour market is more likely to amend, adjust or repeal what it considers, and what employers consider, as “thorny” laws emanating from the European Union. Workers in such circumstances would be deprived of their current rights and as such would enjoy the bare minimum of rights at the expense of further deregulation to satisfy a policy of competitive advantage. A Coalition Government such as that of the Conservative and Liberal Democrat Government in 2010 to 2015 would be tampered down from extreme policies through internal negotiations and agreements between the two Government political parties.<sup>56</sup>

### 2.3. Category 1. Current laws which are likely to be heavily amended or repealed after Brexit

#### a) Agency Workers, Part Time Workers and Fixed Term Workers

It is suggested that the *Agency Workers Regulations*, 2010<sup>57</sup> is an obvious candidate for a complete repeal or for severe amendment. These Regulations derive purely from the Temporary Agency Workers Directive 2008<sup>58</sup> which confers upon agency workers certain basic rights which are enjoyed by permanent employees. Furthermore there is a requirement for employers to keep records. An agency worker is one who has a contract with an agency<sup>59</sup> but works temporarily for a hirer. Such workers may be employed on an employment con-



55 For example the Red Tape Challenge and the October 2011 BIS consultation document entitled “*Flexible, Effective, Fair: Promoting Economic Growth through a Strong and Flexible Work Market*” URN 11/1308. The British Conservative Government’s “Red Tape Challenge” is a euphemistic expression treating, *inter alia*, employment rights. The most costly labour legislation is the Working Time Directive (costing the British Government £4.2 billion *per annum*) it is followed by the Temporary Agency Workers’ Directive (costing £ 2.1 billion annually). The costs of the Red Tape Challenge would not disappear overnight however if hypothetically the UK were to opt for the Norway model and thus remain in the EEA. In those unlikely circumstances most of the EU derived labour laws adopted by the UK would remain intact.

56 A classic example was the Beecroft Report on Employment Law of 24<sup>th</sup> October, 2011 which suggested extreme measures in some legal domains and which were not adopted by reason of strong opposition by the Liberal Democrats.

57 (SI 2010 No. 93).

58 2008/104/EC (OJ L 327/9). See too N. Countouris “*The Temporary Agency Work Directive - Another Broken Promise*”. 2009 ILJ 329.

59 Which can include recruitment agencies, temporary agencies, entertainment or modelling agencies.

tract, a fixed term contract and so on. From the day an agency worker starts work he/she has the same rights as permanent employees to use shared facilities and services provided by the employer.<sup>60</sup> After twelve weeks<sup>61</sup> in employment the agency worker qualifies for the same rights as a permanent employee. These rights include, equal pay to permanent employees doing the same job, automatic pension enrolment, paid annual leave, statutory maternity pay but not statutory maternity leave. It is illegal to discriminate on grounds of pregnancy, giving birth in the past six months and breastfeeding. It is also discrimination if the agency refuses to place a person for a job, or the employer refuses to hire the person, or the job is terminated by reason of pregnancy *etc...* The hirer has the responsibility of making reasonable adjustments for the job and if that is not possible the agency must find alternative work. Paid ante natal care<sup>62</sup> also kicks in after twelve weeks in the job if she cannot arrange this outside working hours. There is litigation with respect to the status of the agency worker which, this research has found, is creating widespread confusion among UK employers. Agency workers are usually considered as employees of the agency and therefore paid by the agency which employs them. The company which hires an agency worker pays a fee to the agency for their work. However, could the agency worker be an employee of the company and not an employee of the agency? There is some important case law on this issue<sup>63</sup> but, to quote Bean J. in the EAT in the case of *Craigie v London Borough of Haringey*<sup>64</sup> “The state of the law regarding the status of long term agency workers is... far from satisfactory but it will need legislation to change it”.

It will be recalled that the Part-Time Work and Fixed-Term Work Directives, both implement the Framework Agreements agreed by the European social partners. Both these have been implemented by British Regulations. The Fixed-Term Employees (Protection of Less Favourable Treatment) Regulations 2002<sup>65</sup> and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000<sup>66</sup> lead to important improvements in terms and conditions of employment, including wages, with better access to occupational pensions with regard to temporary employees and in particular those workers in the educational sector. Temporary workers enjoy a degree of increased job security with the possibility of improved access to permanent employment. Furthermore, the Regulations

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60 These rights can include a canteen, food and drinks machine, a workroom crèche for mother and baby room, car parking or transport services as for example, transport between sites or local pick-up service.

61 Not counting days on sick leave or a break but counting time off for pregnancy, paternity or adoption.

62 Antenatal care includes antenatal classes, appointments and parental classes if recommended by a doctor or midwife.

63 See *Ducas v Brook Street Bureau* [2004] EWCA Civ.217 and *cf. James v Greenwich Council* [2008] EWCA Civ. 35; *Muschett v H. M. Prison Service* [2010] EWCA 25; *Heatherwood and Wrexham Park Hospitals NHSTrust v Kurlubowila et al.* [2007] UKEAT/0633/06/LA and *Smith v Carillion (J. M.) Ltd. et al.* [2015] EWCA Civ. 209.

64 [2007] EAT 0556/06.

65 (SI 2002 No.2034) putting into effect the Fixed Term Directive 1999/70/EC. (OJ L 175).

66 (SI 2000 No. 1551) putting into effect the Part-Time Work Directive 1997/81/EC. (OJ L 14).

prevent employers from requiring their employees to waive their right to claim unfair dismissal. It is important to note that although both Framework Directives allow for more favourable treatment, they do not allow for less favourable treatment.

It is an established fact, by reason of numerous British and CJEU court judgments, that most part-time workers are female. As such they enjoy additional protection under the discrimination laws which, if treated less favourably than full-time workers, would be indirectly discriminated against. The aim of the legislation is to promote equal treatment unless unequal treatment can be objectively justified.<sup>67</sup>

Fixed-term workers have a right not to be treated less favourably than their full-time colleagues working in comparable employment unless the difficult test of “objective justification” can be shown. Such “objective justification” include, as stated above, precise concrete factors based on objective and transparent criteria. Furthermore, so as to prevent the abuse of a succession of fixed-term contracts being used by unscrupulous employers, such succession of contracts is prohibited.

With the complexity of all the above workers’ rights and problems, no wonder that the theme of agency workers as well as that of part-time and fixed-term workers spells unpopularity among employers by reason of being immensely burdensome, incurring additional costs and lacking flexibility and therefore being less attractive for many companies. The employer lobby could have the effect of influencing a Conservative Government to repeal this legislation in its entirety or to substantially reform it. Furthermore, the Regulations have not yet been properly integrated in the British industrial relations system to make them *politically* difficult to repeal. Bearing in mind the Conservative Government’s deregulatory agenda, each of those three Regulations constitute a thorn in its policy.

### b) Working Time

It is tentatively submitted that another obvious candidate for repeal (and/or possibly severe amendment) is the *working time legislation*. The Working Time Directive which provides for a 48 hour average working week, paid annual leave, night work, periods of rest and so on has proved controversial from its inception.<sup>68</sup> It has subsequently been implemented

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67 Objective justification is difficult to prove. See *Kutz-Bauer* [2003] IRLR 368 and *Bilka-Kaufhaus* [1987] ICR 110 where the strict test of objective justification was given. In the interesting case of *O’Brien v Ministry of Justice* [2013] ICR 499 the British Supreme Court, - after referring the case to the CJEU, - held that fee-paid judges are classed as “workers” under the Directive’s provisions although under British law it is a well-known and well established fact that judges are not considered to be “employees”. As such unequal treatment is justified by the use of “precise concrete factors” namely “on the basis of objective and transparent criteria”. Fee-paid judges being paid less than full-time judges was not sufficient justification for “the fundamental principles of equal treatment cannot depend on how much money... [is] available”.

68 See *UK v Council (Working Time)* Case C-84/94 [1996] ECR I-5755 (ECJ). See too L. Waddington “Towards a Healthier and More Secure European Social Policy” (1997) *Maastricht Journal of European and Comparative Law*, 83.

by the Working Time Regulations, 1998<sup>69</sup> but the opt-out clause therein has since earned itself the reputation of being a flamboyant exception to the working time rules. The UK, much to the chagrin and displeasure of the EU, has maximised significantly the opt-out clause in those Regulations.<sup>70</sup>

This research shows that the British employers' lobby would appear to want a repeal of the 48 hour average working week and rid themselves of the legal obligation imposed on them where workers on long-term sick leave accrue and either take or carry over paid annual leave. They would also want some coherence in the calculation of holiday pay and in addition would wish to review the "on call" time which has *per se* proved problematic. The employer lobby would also wish to reverse some CJEU decisions on holiday pay calculations whereby both *overtime pay* and *commission* have to be included in the holiday pay. In *British Gas Trading Ltd. v Z. J. Lock and Secretary of State for Business, Innovation and Skills*,<sup>71</sup> a case referred to the ECJ which concluded that because Mr Lock's *commission* was linked directly to the work carried out by him, it must be taken into account when calculating holiday pay.<sup>72</sup> The EAT, being bound by the ECJ decision, held that that approach should be applied in this case. Likewise in the Scottish case of *Bear Scotland v Fulton*<sup>73</sup> the EAT held that UK law must be interpreted in a way which conforms to EU law by requiring employers to take into account non-guaranteed overtime payments when calculating holiday pay.

Dave Prentice the General Secretary of the UNISON trade union said "This case will have implications on thousands of workers in the UK and in Europe who for years have been denied a fair deal. The commission and overtime, both guaranteed and non-guaranteed, (where the worker is obliged to work overtime if required), will have to be included in holiday pay".

Each of these issues means additional expense for employers, and could prove sufficient ground for the repeal of the British working time legislation. The long running conundrum around holiday pay while on sick leave, and the paid overtime and commission cases do nothing to advance the cause for retaining those Regulations. A Conservative Government would almost certainly either abolish them or make substantial reforms and leave it to the market economy to dictate entitlements.



69 (SI 1998 No. 1833) See Joseph R. Carby-Hall "Working Time: The British Experience" in "Regnare, Gubernare, Administrare" (Professors Stanisław Grodziski and Andrzej Dziadzio (Eds)) (2012) Oficyna Wydawnicza AFM. at pp. 367-395 for a more detailed evaluation of the Regulations.

70 For a detailed analysis on this phenomenon see Jo Carby-Hall "Opt outs and Variations in Working time -British Style" in "Le Travail Humain au Carrefour du Droit et de la Sociologie" (Professors Christian Mestre, Corinne Sachs-Durand and Michel Storck (Eds)) (2014) Presses Universitaires de Strasbourg at pp. 53-71.

71 UKEAT/1089/15/BA.

72 The ECJ held that it is for the national courts to assess the method of calculating the commission to which the worker is entitled.

73 UKEATS/0047/13.BI; UKEAT/0160/14.SM; and UKEAT/0161/14/SM.

It will be recalled that the Working Time Regulations are more generous than the Directive in some respects. In this instance one may say that they are “gold plated”.<sup>74</sup> Whereas the Directive provides for an annual four week paid holiday, the Regulations are more generous in that they increase the annual paid holiday to 5.6 weeks which includes bank holidays. It is possible that, being gold plated, Brexit will not change that latter number of weeks’ holidays enjoyed by British workers.

*c) Collective Redundancy Consultations*<sup>75</sup>

The Trade Union and Labour Relations (Consolidation) Act, 1992 (Amendment) Order 2013<sup>76</sup> made important changes to the 1992 Act provisions on collective redundancies. These changes are threesome. In the first instance it reduced the original 90 day minimum period of consultation where a hundred or more redundancies are to be made to 45 days. Secondly, it made an equivalent change to the requirement to notify the Secretary of State in advance of the first dismissal taking effect. This period was also thus reduced from 90 days to 45 days. The third change was that the Order removed fixed-term contracts which have reached their agreed termination point from the obligation to consult the individuals affected.

The provisions of the 1992 Act<sup>77</sup> implement those of the Directive on Collective Redundancies 1998.<sup>78</sup> However, none of those amendments infringe the provisions of the Directive. Thus the 90 day minimum period looks lengthy compared to other countries in Europe and elsewhere in the world. The Directive does not mandate a definite period. The Conservative Government carried out a call for evidence in 2011 on the collective redundancy laws. The results were that (a) employers were concerned that the rules delayed their ability to respond to challenges and opportunities. (b) On fixed term contracts of employees, the consultation identified confusion. The Directive allows for exclusions of fixed-term contracts.

The reductions stipulated by the 2013 Order to the redundancy consultations obligation make that obligation not particularly onerous. It is therefore difficult to know what

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74 “Gold plating” is a term used to characterise the process whereby an EU Directive is given additional powers when it is transposed into national laws of Member States. The EU Commission defines “gold plating” as “an excess of norms, guidelines and procedures accumulated at national, regional and local levels, which interfere with the expected policy goals to be achieved by such regulation”.

75 For a detailed evaluation on both individual redundancies (emanating from UK law) and collective redundancies (originating from EU law) see Jo Carby-Hall “Redundancies in the United Kingdom” in “*I Licenziamenti per Riduzione di Personale in Europa*” (Professors Bruno Veneziani and Umberto Carabelli (Eds)) European SOCRATES Programme Vol. 2 (2001) Cacucci Editore, Italy at pp. 387 -537.

76 12<sup>th</sup> March 2013 Volume 744.

77 Trade Union and Labour Relations Consolidation Act 1992 ss. 188-198 as amended to remove “by (SI. 2013/763) gold plating”.

78 Council Directive 98/59/EC of 20<sup>th</sup> July 1998 on the approximation of laws of the Member States relating to collective redundancies.[O. J. 1998 L225/16]. Successive amendments have been incorporated into the original text. The Directive is a codified version of Directives 75/129/EEC and 92/56/EEC both of which have been repealed).



would happen to collective redundancy consultations after Brexit. Were proposals to be made to eliminate the consultation obligation altogether such proposals would certainly not be palatable to trade unions and would be severely disputed. Furthermore any such elimination of the obligation to consult could damage, -through industrial action<sup>79</sup> being taken, -the British industrial relations system.

It will be seen later<sup>80</sup> that consultation rights, - which may include consultations in respect of redundancies, - through works councils and transnational works councils are provided for by the Directive. In the UK and unlike Germany, France and some other EU countries' industrial relations systems, works councils do not form an integral part of the British collective bargaining system. Although some such works councils do exist in the UK, they are far and few between as they are scarcely used in that country. It is likely that these provisions will be repealed as a result of Brexit. Any impact of their repeal would proveto be minimal for most companies.

Taking all the above matters into consideration it is suggested that the wholesale repeal of this legislation is most unlikely. What may happen after Brexit is to make cosmetic changes to this legislation by clarifying when consultation is” proposed” for the purpose of triggering the collective consultation obligations. The CJEU judgments<sup>81</sup> have confused rather than clarified this very issue! Another area where there could be changes resulting from Brexit is todo with the threshold number of redundancies, namely 50 and over and 100 and over which would trigger consultation. These thresholds could be reduced. The British Conservative Government's policy of keeping people in work rather than on social security benefits would discourage the repeal or major amendments being made to the current redundancy laws.

## **2.4. Category 2. Laws which will require either minor amendments or remain unchanged**

### *a) TUPE*

The Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2006<sup>82</sup> as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) Amendment) Regulations, 2014, (2014 No. 16) known as *TUPE*<sup>83</sup>

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79 Such as strikes, go-slows, work to rule and so on.

80 See the discussion at pp. 24-25 *infra*.

81 See *United States of America v Nolan* CJEU Case C-583/10 and [2015] UKSC 63; *USDAW v Woolworth* CJEU CaseC-80/14 (1<sup>st</sup> May 2015). See too *USDAW et al v Ethel Austin et al* [2014] EWCA Civ.142 and *Renfrewshire Council v The Educational Institute of Scotland* [2012] UKEATS/0018/12/BI..

82 (SI 2006 No. 246).

83 For a detailed study of the original TUPE Regulations see Jo Carby-Hall “*Transfer of Undertakings in the*

owes its existence to the Acquired Rights Directive.<sup>84</sup> TUPE Regulations apply to companies of all sizes and protect employees' rights<sup>85</sup> when an organisation or service they work for transfers to a new employer.<sup>86</sup> On 31<sup>st</sup> January 2014 new Regulations on TUPE came into force which updated the 2006 Regulations. Transfers within the public sector are not usually covered by TUPE though some transfers from the public sector into the private sector are indeed covered.<sup>87</sup>

There are two situations in which TUPE Regulations may apply namely, business transfers and service provision transfers. In business transfers TUPE Regulations apply if a business or part<sup>88</sup> thereof moves to a new owner or merges with another business to create a new company. The 2006 Regulations introduced the *service provision* addition which went beyond the requirements of the Directive and which was therefore "gold plated" in the UK. In-service provision transfers were introduced in the following three situations, namely (a) a contractor takes over certain activities from the client, known as *outsourcing*;<sup>89</sup> (b) a new contractor takes over activities from another contractor, known as *re-tendering*; and (c) a client takes over activities from a contractor, known as *in sourcing*.

In a 2011 to 2014 Government consultation and review on the effectiveness of TUPE, most companies were generally favourable to the retention of the service provision addition because it formed part of their business models and also provided an element of flexibility and certainty.<sup>90</sup> This being the case, it is suggested that TUPE will not be affected by Brexit and that therefore its provisions will remain intact.<sup>91</sup>



United Kingdom" in "La Transmisión de Empresas en Europa" (Professors Bruno Veneziani and Umberto Carabelli (Eds)) European SOCRATES Programme. Vol. 1. (1999) Cacucci Editore, Italy at pp. 187-263.

84 77/187 consolidated in Directive 2001/23/EC.

85 Employees' employment terms and conditions are transferred to the new company and continuity of employment is maintained. There exist exceptions if the employee is made redundant. <http://www.gov.uk/staff-redundant> or in certain cases when the company is insolvent <http://www.gov.uk/transfers-takeovers/insolvent-business> (Retrieved 10<sup>th</sup> October, 2016).

86 The business may have its head office in another country but the part of the business which is transferring ownership must be in the UK.

87 It should be noticed that public sector employees receive similar protection. See the Code of Practice at <http://www.civilservice.gov.uk/about/resources/employment-practice/codes-of-practice> (Retrieved 10<sup>th</sup> October, 2016) for further information.

88 A part of a business may consist of the logistic, legal, security, car parking, catering, gardening, *etc...* function of a larger company.

89 For example, cleaning, catering, security, car parking, *etc...* in the workplace.

90 To be noted is the fact that the employers' desire is based on *certainty* rather than the wish to improve the employees' basic employment rights which is what TUPE and the Directive aim to achieve.

91 But see the opinion of Mr Michael Ford Q. C. who, on sound legal grounds, disagrees entirely with this author's view. He states "I do not share the view of some that businesses will be supportive of it. I think that many businesses would welcome the repeal of or radical changes to TUPE, especially those large corporations which are dominant in contracting-out exercises... Potential targets include, I think, collective consultation, rules restricting harmonisation of terms post-transfer and even the liabilities for transfer-related dismissals... Brexit offers a real possibility, highly detrimental to many precarious workers, of a return to the position of which transfers terminated employment *tout court*, with no more than the low level of redundancy pay payable to those with sufficient continuity, or in which an employer can readily adjust terms downwards post-transfer by the simple device of dismissal and re-engagement". Source: "Workers' Rights from Europe: The Impact of Brexit". Advice given by Michael Ford Q. C. to the TUC. 10<sup>th</sup> March, 2016.

There is however one problematic issue which may be affected by Brexit where amendments to TUPE may be desirable to take into account a few of the Directive's provisions (albeit minor ones) in TUPE. These are the prevention by employers to *harmonise* terms and conditions of employment *after* the transfer takes place and the difficulty faced by the employer to *dismiss* employees particularly *prior* to the transfer. Some of the Directive's provisions impose constraints on businesses in situations of transfers relating to outsourcing, acquisitions and disposals. Both these provisions, namely harmonisation and dismissals may be watered down and be made more flexible. Brexit may lead to the loosening of restrictions on changing terms and conditions of employment. They therefore do not imply any *fundamental* changes being made. It is suggested that this legislation will not be repealed as a result of Brexit because it is an established concept<sup>92</sup> with businesses and provides them with some certainty especially in the outsourcing field. Furthermore its provisions go beyond the minimum employee protection requirements provided for by the Directive for the service provision change is a UK initiative which is not provided for by the Directive.

#### *b) Compensation and Other Issues Resulting from Discrimination*

Prior to the enactment of any European law on discrimination, the UK had legislation in place on sex and race discrimination.<sup>93</sup> Such legislation predated the UK's EU membership. Subsequent to joining the EU it was the UK which first introduced disability discrimination.<sup>94</sup> Equal pay and marital status discrimination<sup>95</sup> also originate from UK laws. In the year 2000 however, the EU Framework Equal Treatment Directive<sup>96</sup> introduced discrimination by reason of age, religion or belief, and sexual orientation. The case of *P v Sand Cornwall County Council*<sup>97</sup> heard in the ECJ held that gender reassignment is included for it constitutes a form of sex discrimination.

The definitions given by the EU discrimination legislation on direct, indirect and harassment discrimination has been such as to widen the scope for challenging discrimina-

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92 In that companies are accustomed to its existence and have contracted on the assumption that TUPE will continue to apply.

93 Sex Discrimination Act, 1975 c. 65 and Race Discrimination Act 1965 c. 73 (originally replaced in 1976 c. 74 both of which have been repealed by the Equality Act 2010 c. 15, Schedule 27.

94 See the repealed Disability Act, 1995, (except for Northern Ireland where that Act still applies) replaced by the Equality Act, 2010. See also Jo Carby-Hall "*Discrimination in Employment Arising from Disability*" published as an e-book consisting of European research papers edited by Professor Carla Spinelli (University of Bari, Italy) in *Derecho Social y Empresa, Cátedra UNESCO, Fundación Sagardoy* (2014).

95 The original Equal Pay Act, 1970 c. 41 was repealed and replaced by the Equality Act, 2010 c. 15 s. 216(3) Schedule 27 Part 1 and marriage and civil partnership discrimination was enacted by the Equality Act 2010 s. 8.

96 Council Directive 2000/78/EC Art 1.

97 European Law Reports 1996 I-02143 ECJ case 13/94 reference from the Truro Industrial Tribunal on the dismissal of a transsexual.

tory practices. Thus in *Coleman v Attridge and Stephen Law*<sup>98</sup> it was held that direct discrimination includes less favourable treatment because of the association with someone with a “protected characteristic”.<sup>99</sup>

Apart from adding new forms of discrimination to the discrimination list, the Framework Directive generally improved the British domestic laws. Recognising how difficult it can be to prove discrimination, the burden of proof in discrimination cases was reversed.<sup>100</sup>

Recognising the harm which discrimination can cause to a victim, EU law imposes no upper limit to a compensation award made by a court or tribunal. Under the Conservative and Liberal Coalition government<sup>101</sup> the Beecroft Report<sup>102</sup> made a recommendation that the amount of compensation to be awarded by courts and tribunals should be capped. The reason why this recommendation was not put into effect was because of the EU legislation provisions.

The Race Equality Directive 2000<sup>103</sup> provides that EU Member States should set up an equality organisation which *promotes, monitors* and *provides support to victims* of discrimination. The British organisation which fulfils that role is the Equality and Human Rights Commission.

The Equality Act, 2010 which puts into effect EU laws forms part of the UK’s primary legislation. It is unlikely that the British part of the 2010 Act will be changed but post Brexit important parts of the EU legislation included in that Act could be amended or repealed. What has to be borne in mind is that the Equality Act 2010 is *primary legislation*. As such, it will remain in force even though the European Communities Act, 1972 which allows the incorporation of EU law is repealed. It is submitted that any post-Brexit changes made to the 2010 Act by repealing or amending therein laws originating from the EU would prove very unpopular, particularly since the underlining principles and protections of discrimination laws predate EU law making. The repeal or fundamental amendment of the current discrimination law could result in a national and international outcry. Discrimination rights are considered to be fundamental to the structure of any developed society. As such, it is thought that post Brexit British governments would not wish to tamper with the current laws on discrimination.<sup>104</sup>



98 ECJ case C-303/06 (disability rights).

99 Under British labour law it is unlawful to discriminate against a person by reason of one of the “protected characteristics” namely sex, race, disability, sexual orientation, religion or belief, marriage and civil partnership, gender reassignment and age.

100 All the claimant has to do is to provide sufficient evidence to show that discrimination could have taken place. The employer has to prove that discrimination did not occur.

101 Which governed the UK from 2010 to 2015.

102 Adrian Beecroft “Report on Employment Law” Ref, 12/825.

103 2000/43 EC (OJ L 180) implements the principle of equal treatment between persons irrespective of racial or ethnic origin. Art. 7 (1) provides for a “judicial and/or administrative procedure for the enforcement of obligations” and Art. 7 (2) talks of associations, organisations or other legal entities” to be set up to see “that the provisions of the Directive are complied with”.

104 It is however possible (although remotely so) that *limitations* may be placed post Brexit on classes of persons,

It will be recalled<sup>105</sup> that EU law does not impose an upper limit on compensation awarded to victims in cases of discrimination. Nor does discrimination require a qualifying period prior to taking legal action.<sup>106</sup> The Beecroft Report recommendation to cap awards for compensation in discrimination cases was not put into effect for the very reason that it would infringe EU law. There being no restraints post Brexit, it is suggested that the Government of the day may decide to put a cap<sup>107</sup> on such compensation for reasons<sup>108</sup> which are irrelevant to discuss in detail in this context.

The EU laws do not appear to include discrimination in cases of *under-represented groups* in society. It is suggested that post-Brexit British Governments may consider adding to the discrimination list such vulnerable groups.

The right to equal pay for equal work between males and females is a fundamental right provided for by the EU Treaty<sup>109</sup> and directly enforceable in the UK. The Equal Pay Act 1970 predated the joining of the UK into the European Communities (as it was then known). The 1970 Act had a glaring *lacuna* because it did not cover equal pay for work of equal value. This phraseology is now included in British law as a result of the EU Treaty obligation. Furthermore equal pay rulings by the ECJ have proved more expansive than those of the domestic courts. The ECJ held in the first instance that paying part time staff who are mainly women a lower hourly rate than full time staff amounted to indirect sex discrimination. Secondly, it held that excluding them from an occupational pension scheme also amounted to indirect sex discrimination.<sup>110</sup>



in special situations where such limitations do not amount to discrimination. Arguably, allowing flexibility on the employer to offer different benefits to male and female employees who enjoy family leave or the flexibility on the employer to treat employees differently on grounds of age. The word “arguably” above is used judiciously, for on the facts of the case, a tribunal may not accept such pleadings, thus concluding that in the above examples the employer’s conduct amounted to sex and age discrimination respectively.

105 See *supra*.

106 It should be noted that, (unlike unfair dismissal and redundancy payments which impose a two year qualifying period) there exists no qualifying period to enable an employee to make a claim for discrimination. The discrimination laws apply from the first day of employment.

107 Currently, because of the EU law provisions, compensation in cases of discrimination in the UK is uncapped. If it were to be capped post Brexit, it is thought that it would be similar, though not necessarily identical to, the statutory cap imposed on compensation awards in cases of unfair dismissal. *Solatium* (i.e. injury to feelings) in compensation claims could be capped in the same or similar manner as in cases of unfair dismissal.

108 Namely, claimants having unrealistic expectations on what they could be awarded by a court by way of compensation and furthermore early settlements are made in practice more difficult which will result in additional burdens on the tribunal and court system. This decision has been incorporated in the Equality Act 2010 and defined as “unfavourable treatment because of pregnancy and maternity leave” with no need for any comparison with a non-pregnant employee.

109 Article 157 of the Consolidated Version of the Treaty on European Union 2010 (OJ 2010 C83/01).

110 Part-time women in the UK gained equal access to occupational pension schemes (see the *Preston Group* cases i.e. *Preston et al. v Wolverhampton Healthcare et al.* and 2<sup>nd</sup> appeal and *Fletcher et al. v Midland Bank Plc.* (Conjoined appeals) 5<sup>th</sup> February, 1998 (H. L.)) and agency female teachers in the public sector gained access to the teachers’ statutory occupational scheme (see *Debra Allonby v Accrington and Rosendale College et al.* Case 256/01 - reference for a preliminary ruling from the Court of Appeal). Furthermore, it is thanks to the ECJ that assisted to extend the limit on back pay compensation for women who had experienced over a period of unequal pay from two to six years. (see *B. S. Levez v T. H. Jennings (Harlow Pools) Ltd.* Case c-326/96 reference for a preliminary ruling from the Employment Appeal Tribunal). See too Professor Sandra Fredman who explains how a collective redress mechanism could be re-introduced in the UK that would meet the requirements of art. 157 of the Treaty. <http://ilj.oxfordjournals.org/content/37/3/193.abstract>



This formidable array of rights consists of an amalgam of EU Directives and a Treaty, CJEU decisions and British laws as well as British court cases. It is suggested that it is very unlikely that a future British Government would wish to disassociate itself from the anti-discrimination legislation and family-friendly rights which offer benefits and protection to some 30 million workers. This mammoth string of protections is seen as an important and fundamental safeguard in the workplace. Indeed the British Government is currently proposing the extension of parental leave to working grandparents! The right to shared parental leave is entirely of British origin. It will be recalled that this was supported by the previous British coalition Government as well as the labour opposition. The right to request flexible working established in 2014 is also of pure British origin and maternity leave in the UK is more generous than the EU requirements. It is therefore hardly likely that changes in those established and important fields would result from Brexit. There is also another dimension which needs to be taken into account. The Government, - which is at the time of writing is focused on how Brexit will come about and develop, through negotiations which will take place after Article 50 is triggered in March 2017, - would not wish to be seen as responsible for dismantling family friendly rights and anti-discrimination legislation. A general election is due in 2020 and the May government should not wish to “rock the boat” by cutting away rights some of which have been fought for decades. It is thus submitted that caution will be used post-Brexit and that any changes made in these fields will be cosmetic, cautious and balanced.

### *c) Family Friendly Legislation*

Rights to maternity, parental leave, paternity, shared paternity and pay are an amalgam of rights deriving originally from both British laws and EU laws while new and expectant mothers’ laws originate from the EU.<sup>111</sup> The EU Pregnant Workers Directive 1992 led to important improvements in the health and safety protection for expectant and new mothers in the workplace. Women enjoy paid time off for antenatal appointments. The 1992 Directive imposed duties on employers to assess risks and make the necessary adjustments in working conditions such as the transfer of a pregnant or breastfeeding employee to suitable alternative employment or suspend her on paid leave where some harmful danger has occurred or is anticipated.

While the maternity leave entitlement in the UK exceeded the EU minimum of 14 weeks when the Directive was implemented, the ECJ (now CJEU) case law has had a positive impact in tackling the disadvantage and discrimination which many women faced in the



111 Pregnant Workers Directive, 1992 (92/85/EEC) incorporated into English law by the Equality Act 2010.

workplace when they gave birth to their offspring. *Dekker and Webb*<sup>112</sup> established that treating a woman unfavourably because of pregnancy and maternity leave, amounts to direct sex discrimination. Furthermore the cases held that it is not necessary to identify a non-pregnant comparator to prove discrimination.<sup>113</sup> Such protection from dismissal by reason of pregnancy or maternity leave was extended to fixed term workers.<sup>114</sup> Furthermore, women on additional maternity leave enjoy the same contractual rights as women on ordinary maternity leave thanks to EU case law.<sup>115</sup>

#### *d) Rights to Parental Leave and work-life balance*

The Parental Leave Directive, 2010<sup>116</sup> grants working parents the right to take unpaid leave to care for the child. The number of days' unpaid leave was increased from 13 weeks to 18 weeks for each child. The UK implemented that Directive in 2013<sup>117</sup> and in 2015 the UK raised the upper age limit from 5 to 18 year old children which would include more parents enjoying this right. That Directive also grants employees the right to time off work for urgent family reasons.<sup>118</sup>

The EU launched a new European social partner consultation on how to improve the work-life balance<sup>119</sup> and reduce obstacles to the participation of women in the labour market and for parents.<sup>120</sup> Thus to quote a TUC report, the objective being to “achieve a better work-life balance for parents; new initiatives for fathers to take leave, including the possibility of a new EU right to paternity leave; the introduction of a right to carers' leave; and

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112 See *Dekker v Stichting Vormingsecentrum Voor Jong Volwassenen* (ECJ) C-177/88 [1990] ECR 13941 and *Carole Louise Webb v EMO Air Cargo Ltd.* (ECJ) C-32/93 [1993] ICR 175 (pregnancy discrimination) and [1993] 1 WLR 49. (House of Lords reference for a preliminary ruling), (pregnancy dismissal amounted to sex discrimination).

113 This case ended a succession of cases where women in past years lost their cases because the employer argued that they would have treated a man who had to take a substantial period away from the workplace in a similar way. See too *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] IRLR 327.

114 See *Maria Luisa Jiménez Melgar v Ayuntamiento de los Barrios and Tele Danmark A/S* ECJ case C-438/99 (OJ L 288/32).

115 Employers are compelled to make contributions into occupational pension schemes for longer than the first 26 weeks of leave. See *Sass* and the subsequent EOC judicial review case against the UK Government.

116 2010/18/EU (Implementing the revised Framework Agreement between the European social partners on parental leave).

117 See the Maternity and Parental Leave Regulations, 1999 (SI. 1999 No. 3312) as amended by the Parental Leave (EU Directive) Regulations, 2013 (SI. 2013 No.0000) implementing the agreement reached by the European social partners to improve the previous Directive provisions, these being the provisions of Council Directive 96/34/EC which was repealed. Parental leave should not be confused with *shared parental leave* applicable to parents of children due (or adopted children) on, or after, 15<sup>th</sup> April 2015.

118 For example, to take a sick child or sick dependant such as a parent, to a hospital or a doctor's surgery. Research carried out by BIS in 2012 shows that one fifth of UK employees have used that right each year.

119 For a study on work-life balance see Jo Carby-Hall “*Work-Life Balance in the United Kingdom*” in “*Conciliación de la Vida Laboral y Familiar y Crisis Económica - Estudios desde el Derecho internacional y Comparado*” (Professor Lourdes Méndez (Directora)) (2015) Delta Publications. Madrid at pp. 321-378.

120 It will be recalled that, because of the deadlock which occurred over numerous years between the European Parliament and the Council, the EU Commission withdrew its proposal in July 2015 for an improved Pregnant Workers' Directive.

better protection for dismissal for new and expectant mothers and new rights for breastfeeding mothers on return to work”.<sup>121</sup>

*e) Written Particulars of Terms and Conditions of Employment*

Although the British law on particulars of employment<sup>122</sup> predated<sup>123</sup> the Written Statement Directive, 1991<sup>124</sup> which gives employees the important features of the contract of employment, the Directive requires employers to give their employees within 28 days of their starting their employment certain particulars of their employment contracts which include the business name, the employee’s name, job title or work description, start date, continuous work (where applicable) wages, holiday pay, working hours, overtime and shifts (if applicable), manner of payment, in the case of temporary work how long that work will last, dates of fixed term contracts, notice periods, pensions, collective agreements, grievance and disciplinary procedures, *etc...*

The Commission is currently consulting on changes to be made to the Directive bearing in mind the new and atypical forms of employment which have developed globally during the past twenty years.<sup>125</sup> Thus workers on zero-hour contracts lose out on their basic workplace rights for a number of reasons. One of these is that they are seen by employers to have the status of workers as opposed to employees<sup>126</sup> another is that the employer regards them as short-term workers. As such zero-hour workers are not entitled to particulars of employment. Resulting from the consultation the Commission may well decide that zero-hour workers (as well as agency workers) are entitled to receive written particulars of employment setting out their wage rates and hours of work.

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121 Source: “United Kingdom Employment Rights and the European Union. - Assessment of the impact of membership of the EU on employment rights in the UK” TUC. Publication.

122 The particulars of employment are NOT under British law considered to be the contract of employment. This latter (whether in writing or not, or through custom and practice) gives the full terms and conditions of employment to the employee. The particulars of employment only give the salient and important features of the contract of employment. To be valid, a contract of employment under British law need not be in writing. It may be by word of mouth, by e-mail, by reference to a collective agreement (if incorporated into the contract of employment), by fax and so on. Under British law employees do not have a right to have a written contract of employment but do have a right to receive the particulars of employment within two months of the start of employment.

123 Contracts of Employment Act 1963 s. 4 (1) (now Employment Relations Act, 1999. (c.26) ss. 1 and 2). See too J. R. Carby-Hall “Principles of Industrial Law” (1<sup>st</sup> Edn) (1969) Charles Knight (London) at pp. 11-13.

124 Council Directive 91/533/EEC.

125 For an evaluation and analysis on these relatively new types of employment see Jo Carby-Hall’s chapter entitled “Novel Formsof Employment. Quid Juris?” to be published in “Nuevas Tecnologías y Nuevas Maneras de Trabajar en el Derecho Español y Comparado” “Renovarse o morir” (Professor Lourdes Mella Méndez (Ed)) to be published in the Spring of 2017 and, specifically on telework in particular, Jo Carby-Hall “Telework in the United Kingdom as a Model of Flexibility, Consensus, Voluntarism and Productivity” in “Trabajo a Distancia I Teletrabajo” (Professors Lourdes Mella Méndez (Editora) and Alicia Villalba Sánchez (Coordinadora)) (2015) Thomson Reuters at pp. 285-315.

126 124 For the distinction between a “worker” and an “employee” under the British common law see the analysis in Jo Carby-Hall “New Frontiers of Labour Law - Dependent and Autonomous Workers” in “Du travail Salarié au Travail Indépendent: Permanences et Mutations”. (Professors Bruno Veneziani and Umberto Carabelli (Eds)). European SOCRATES Programme (Vol 3) (2003) Cacucci Editore, Italy at pp.163-308.

Given the predating of the Directive, it is unlikely that after Brexit the British written particulars law will be repealed but it is likely that atypical contracts (such as zero-hour contracts or some others if included in European law as a result of the consultation) would almost probably be repealed.

*f) Health and Safety at Work*

The UK enjoys a long pedigree of health and safety legislation dating back to the industrial revolution of the nineteenth century<sup>127</sup> culminating in the Health and Safety at Work Act 1974 (as amended)<sup>128</sup> The common law duty of care owed by the employer to the employee which is a *single* duty consisting of the (a) the recruitment of competent staff to perform the specified job of the employee, (b) the provision by the employer of safe premises at work, (c) the provision of a safe system of work and (d) the provision of safe machinery is well established. Such duty which does not constitute strict or absolute liability when an employee is injured or killed is based on the tort of negligence.<sup>129</sup>

The Health and Safety Framework Directive of 1989<sup>130</sup> extended the 1974 Act by adding broad based obligations upon employers to *evaluate, avoid* and *reduce* risks at the workplace. The Directive was primarily implemented in the UK by including those additional Directive provisions into the 1974 Act provisions and by the Safety Representatives and Safety Committees Regulations, 1977.<sup>131</sup> Furthermore, a number of modifications had to be made to meet the Directive's requirements on consultations through such Regulations as the Health and Safety (Consultation with Employees) Regulations 1996.<sup>132</sup> Numerous other Health and Safety Directives which cover specific risks at the workplace such as noise, musculoskeletal disorders, machinery safety and the protection of vulnerable groups<sup>133</sup> have been implemented through British legislation.

Specific EU laws, all of which have been implemented in the UK cover certain types of work such as construction and off-shore work and materials such as asbestos and chemicals. Forty one out of sixty five new health and safety EU laws were introduced between 1997 and 2009.<sup>134</sup>

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127 See J. R. Carby-Hall "*Principles of Industrial Law*" *op cit.* for an examination of both the common law and statute on this topic at pp. 234-244 (factories); pp. 245-269 (safety); pp. 270-279 (health and safety); pp. 280-289 (employment of women and young persons); pp. 290-309 (administration of the Factories Act); pp. 310-326 (shops); and pp. 327-340 (offices and shops); pp. 341-351 (women, young persons, children).

128 See J. R. Carby-Hall "*Health, Safety and Welfare at Work*" *Managerial Law* (1989) Vol. 31 Nos 1 and 2 pp. 36-44.

129 *Ibid.* at pp. 5-9 (common law duty of care) and pp. 9-13. (employer's vicarious liability for the acts of the employee and defences of *volenti non fit injuria* and contributory negligence).

130 89/391/EEC.

131 (SI 1977 No. 500) Regulation 4A.

132 (SI 1996 No. 1513) Providing for consultations with employees or their representatives where employees are not represented by a recognised trade union.

133 As, for example, pregnant women, maternity, young workers and temporary workers.

134 Independent reviews appear to conclude that the EU regulatory health and safety framework is maintaining

In addition British trade unions have been active in making complaints to the Commission to gain changes to UK legislation which is inconsistent with EU legislation, asbestos and construction being some of them.

After Brexit it is suggested that the British health and safety laws will remain in place and that only a few cosmetic changes may take place especially since the transposition of these EU laws into UK laws have experienced very few problems and that the evidence shows that these Regulations have not been burdensome on employers. There is also the ethical aspect which has to be considered as well as the reputation of the employer. Risk factors which lead to deaths, ill-health and injury at the workplace are undesirable from an employer's point of view.<sup>135</sup>

### *g) Data Protection at Work*

The Data Protection Act 1998<sup>136</sup> was enacted to conform to the provisions of the Data Protection Directive<sup>137</sup> which is general in nature and therefore not specific to labour law alone. So as to keep within the parameters of labour law it is proposed to keep this topic, namely data protection, in that context only.

The 1998 Act aims at protecting by the employer the personal data of employees and other workers through the monitoring of the workers' communications at work or subject to access requests. Such personal data could include general or sensitive information such as intimate materials, health problems, personal political issues, freedom of association issues and so on. The Information Commissioner's Code of Practice<sup>138</sup> made under the Act<sup>139</sup> gives guidance on the 1998 Act provisions.<sup>140</sup>

With the increasing collation, storage and use and misuse of personal data within the workplace it is very unlikely that because of Brexit there will be any changes made to the current data protection framework much to the chagrin of both employers (through monitoring employees) and aggrieved workers (through being monitored) although some small changes could be made post-Brexit to appease employers' concerns.



a good standard. See the Professor Ragnar Löfsted Review (CM 8219) entitled "*Reclaiming health and safety for all: An independent review of health and safety legislation*" (November, 2011) and Mr. Kim Archer's review entitled "*Appraisal of the HSE's approach to negotiating and implementing European legislation*". (2014).

135 See Michael O'Sullivan "*Shall we stay or shall we go? The Potential implications of 'Brexit' on Health and Safety Regulations in the UK*" 20<sup>th</sup> June 2016. <http://blog.rrc.co.uk/2016/06/20/shall-we-stay-or-shall-we-go-the-potential-implications-of-brexit-onhs-regulation-in-the-UK/> (Retrieved 4<sup>th</sup> November, 2016).

136 It should be noted that there was a previous Act, namely the Data Protection Act 1984.

137 95/46/EC of the European Parliament and the Council.

138 A Code of Practice under British law is not a legally binding document but is taken into account by a tribunal or court in legal proceedings. Such Code gives advice and guidance on specified matters.

139 Data Protection Act, 1998 s. 51 (3).

140 See the Report of the Scottish Affairs Committee of the House of Commons of 16<sup>th</sup> April 2013 (HC 156-1) entitled "*Blacklisting in Employment: Interim Report*" at pp. 12-13 on blacklisted workers in the construction industry.



*h) Consultation under the European Works Council Directive<sup>141</sup>*

The original European Works Council Directive of 1994<sup>142</sup> and the current 2009 Directive<sup>143</sup> provides for information and consultation in undertakings with a thousand employees or over or one hundred and fifty employees in two European Community Member States. The Transnational Information and Consultation Regulations 1999<sup>144</sup> which implement the Directive's provisions are not very onerous upon employers and basically require a dialogue and an exchange of views between the parties.<sup>145</sup> There is a further requirement in that the European Works Council has to have a yearly meeting with the central management. It is not thought that Brexit would necessitate changes (if any) to the current provisions.

*i) Information and Consultation*

The Information and Consultation Directive, 2002<sup>146</sup> has been implemented in the UK by the Information and Consultation of Employees Regulations, 2004.<sup>147</sup> The Directive applies to establishments employing twenty or more employees or undertakings employing fifty or more employees in a Member State of the European Union which is not applicable to the UK.

The consultation required is minimal. Information and consultation is required on specific issues regarding the undertaking and their effects on employees. These include the giving of information and consultation on possible future developments relating to the undertaking and their possible effects, - such as redundancies, additional staffing, lay-offs, overtime, etc... - on employees. Information and consultation should also take place where there is a possibility of changing the working organisation of an undertaking, such as night shifts, voluntary part-time work or weekend work which would necessitate changes in contracts of employment. Under the British Regulations<sup>148</sup> such information and con-

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141 The European Works Council Directive and the Information and Consultation Directive form part of the European Social Dialogue which constitutes a much wider concept. For an appreciation of its meaning in the UK see Jo Carby-Hall "The Social Dialogue in the United Kingdom and its Effectiveness" in "Przyszłość Prawa Pracy" *Liber Amicorum* in honour of Professor Michał Seweryński (Professors Zbigniew Hajn and Dagmara Kupień (Eds)) (2015) Wydawnictwo Uniwersytetu Łódzkiego at pp. 601-643.

142 94/45/EC.

143 2009/38/EC.

144 (S.I. 1999/3323) also referred to as TICE. The 1994 Directive was extended to cover the UK in 1997 and implemented in the UK by the Transnational Information and Consultation of Employees Regulations 1999. A new European Works Council Directive was agreed in May 2009 which made some important changes, but retained the structure and overall approach of the 1994 Directive. The Transnational Information and Consultation of Employees (Amendment) Regulations 2010 (S.I. 2010 No. 1088) implement the new Directive.

145 Article 2 (1) (g).

146 2002/14/EC.

147 (S.I. 2004 No. 3426) also referred to as ICE.

148 *Ibid.* Regulation 14.

sultation need not take place with trade unions or with elected representatives of employees where a trade union is not recognised in the workplace.

Trade unions and workers have dubbed this European legislation as generally ineffective and weak in that hardly any changes have taken place as a result of the information and consultation requirements, in that trade unions are not normally involved in managerial decisions and that little notice is taken by management resulting from consultations.

Indeed the Directives<sup>149</sup> do not require any collective bargaining to be generated, despite the fact that consultation needs to take place “in good time and with a view to reaching an agreement”.<sup>150</sup> These perceived weaknesses are not in fact weaknesses for the Directives require that information should be given and consultation should take place, *simpliciter* in the spirit of good industrial relations. Should the parties wish to go further and start collective negotiations as a result of the information being given and consultation taking place, the social partners are not prevented from doing so.<sup>151</sup>

The message to be conveyed in the case of the European Works Council and Information and Consultation Directives is that they do not impose much constraint on British laws, which as such would not be affected by Brexit. Of course, the British Government of the day may decide to repeal these information and consultation laws by the very reason of their ineffectiveness!<sup>152</sup>

## 2.5. Category 3. A Law which appears fit for repeal following Brexit

### a) Capital Requirements Directive (CRD) IV<sup>153</sup>

Resulting from the 2008/09 financial crisis the EU took steps to restore financial stability and rebuild public faith in the financial market. One of these steps was to cap bankers' bonuses at 100% of the fixed component for material risk takers which includes, *inter alia*, senior management. The bonus can be raised to 200% of fixed remuneration with shareholder approval.<sup>154</sup> The British Government opposed this move on the grounds that it constrains

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149 Namely the European Works Council Directive, 2009 (2009/38/EC) and the Information and Consultation Directive, 2002. (2002/14/EC).

150 But see *Junk v Kuhne* [2005] All ER 264(C-188/03 CURIA) where the ECJ held that an obligation to negotiate was meant by this provision. In this author's opinion “with a view to reaching agreement” does not necessarily imply negotiation. See too Employment Law Brief 16 November 2007 “*Consulting on closures*”.

151 See e.g. the Acquired Rights Directive, art. 8; the Collective Redundancies Directive, art. 8; the European Works Council Directive, art. 12 (2) and (5); the Information and Consultation Directive, art.4 (1) and (9) and the Health and Safety Directive, art.1 (1).

152 Which would put information and consultation in category 3 of this chapter.

153 The European Council Capital Requirement Directive was published in the Official Journal of the EU on 27<sup>th</sup> June, 2013.

154 I.e. if a *quorum* of shareholders representing 50% of share participants in the vote and a 66% majority of them supports the measure. If the *quorum* cannot be reached, the measure can also be approved if it is supported by 75% of shareholders present.

the freedom of banks to determine pay which causes disadvantages when hiring top staff compared with banks in the Far East and the USA. Concerns were also expressed that banks would offer higher fixed salaries which would not be recoverable if senior staff did not perform adequately. The British Government instituted legal proceedings in the CJEU which sought to annul the CRD IV provisions. Following the hearing of the case in 2014 the Advocate General was of the opinion that the British Government's arguments should be rejected and that the case should be dismissed. The British Government decided to withdraw this case because it had no chances of success. With Brexit in contemplation, the UK no longer has a voice in the current deliberations on whether to repeal or amend CRD IV. As a Regulation CRD IV is directly applicable to the UK; as a Directive CRD IV has been implemented into UK law which means that the UK is currently bound by its provisions.

It is most likely that after Brexit the UK will not be bound by the provisions of CRD IV if, - depending on negotiations after Article 50 is triggered,- the UK does not remain in the EEA.<sup>155</sup>

## 2.6. The Interpretation of European laws and the Judgements of the European Court

Brexit would not only have implications on European laws, it will also have implications on how those laws are *interpreted* by the British courts and tribunals. Upon Brexit occurring, the British courts and tribunals would no longer have to interpret British laws in accordance with decisions of the Court of Justice of the European Union (CJEU) or formerly the European Court of Justice (ECJ) to give a purposive European construction to their judgements. British judges would therefore have more flexibility to interpret decisions in accordance with British, rather than European, laws. It is however suggested that decisions of the CJEU (and those of the ECJ) would have a significant "persuasive" authority in the British courts and tribunals.

An important feature of the British common law system is *judicial precedent*.<sup>156</sup> As such the process is a slow one and it may take many years before these British court decisions "percolate" as they go through the appellate<sup>157</sup> court procedure.

It will be recalled that European laws which have been incorporated into British laws through *secondary legislation*, namely British Regulations, Ministerial Orders, *etc.* under

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155 The reader who wishes to pursue this issue further is advised to consult the CFA Institute - CRD (CRD) IV Issue Brief and the analysis by Thomas J. Reid, Davis Polk & Wardwell LLP "*Law and Brexit III*" 15<sup>th</sup> August, 2016. <https://corpgov.law.harvard.edu/2016/08/15/the-law-and-brexit-iii/> (Retrieved on 11<sup>th</sup> October, 2016).

156 The doctrine of judicial precedent or *stare decisis* (to stand upon decisions) means that judges can refer back to previous court decisions to assist in deciding similar cases where the law and facts are alike. For further reading see A. W. Brian Simpson "*Leading Cases in the Common Law*" (2013) OUP and Kent Greenawalt "*Statutory and Common Law Interpretation*" (1996) OUP.

157 Namely, in labour law cases, from the Employment Tribunal, (ET) the Employment Appeal Tribunal, (EAT), the Court of Appeal and the Supreme Court.

the European Communities Act 1972 as indeed most of them are,<sup>158</sup> can be repealed or amended at any time *after* the repeal of the 1972 Act which constitutes its legislative framework. In the case of *primary legislation* however where European law has been translated into British law by an Act of Parliament, as for example the Data Protection Act 1998 and the Equality Act 2010, such Act will remain in force unless and until it is specifically repealed by an Act of the British Parliament.

The reader will also recall that there is much legislation which is not of European origin and emanates from British law.<sup>159</sup> Legislation originating from the UK may be amended at any time.

### 3. WHAT ARE THE ANTICIPATED EFFECTS OF BREXIT ON BRITISH LABOUR LAWS AND COMMERCE? NAVIGATING INTO UNKNOWN, ROCKY AND PERILOUS WATERS DROWNED IN FIERCE POLITICS!

As has been shown above, a significant proportion of the UK's employment laws originate from the EU. Generally speaking and in principle the British Government can, if it wishes, repeal or re-write any of the laws after Brexit has come about.<sup>160</sup> This however is unlikely to happen for the reasons analysed in part 2 of this chapter (above). Granted that some laws which originate from the EU may be repealed, it is more likely that the majority of these will either suffer minor or perhaps major modifications, - to make them more acceptable to British businesses, - or remain intact. It is thus suggested that the British labour law landscape will not metamorphose overnight in any fundamental manner, in the short term at least. It should also be borne in mind that such modifications will depend on the political landscape and colour of the Government which is in power at the time of Brexit and/or thereafter. A Labour Government is more likely to make no changes to the current social laws because of all the rights enjoyed by workers, whereas a Conservative Government may make some changes in the respective laws to please businesses, as illustrated in

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158 As for example, Regulations such as those relating to TUPE, working time, collective redundancies consultations, agency workers, and so on.

159 For example, the common law duty of care owed by the employer to the employee, the right to a redundancy payment, the right not to be unfairly dismissed, the minimum wage legislation, pay and deduction of wages, the issue of vicarious liability and so on.

160 The reason is that the British Parliament will regain, what is known in British law as, the concept of parliamentary sovereignty once Brexit occurs. The British Parliament will no longer be subject to EU Directives, Regulations and policies.

part 2 above. A Coalition Government may act in accordance with policy decisions taken resulting from inter-party political bargaining.

What is certain is that within at least<sup>161</sup> the two years following the triggering of Article 50<sup>162</sup> the current social laws are *unlikely* to change. Furthermore, citizens of EU Member States will continue to enjoy the automatic and unrestricted *right to work* throughout the EU<sup>163</sup> and the right not to be *discriminated* against.<sup>164</sup> The UK citizens, at the time of writing,<sup>165</sup> are enjoying both these rights.<sup>166</sup> Thereafter, however we shall be navigating into the unknown!

### 3.1. Uncertainty and Speculation as to Models and Labour Law

It is not known what the UK's relationship with the EU will be after Brexit. If there is to be a relationship with the EU it is not known what model will be chosen by the UK. At this stage one can only speculate.

On the economic front two models were initially suggested as a possibility. One of these was the Norwegian model. Norway is not a member of the EU but it is part of the European Economic Area (EEA). As such Norway is bound by most of the EU employment laws as well as by the decisions of the CJEU as a condition to securing access to a trading platform on the European single market. Although it would minimise the trade costs of Brexit, the UK would also have to pay as much as it currently does into the EU budget to be part of the single market. Nor would the UK have a say at the policy negotiating table.

An alternative is for the UK was to adopt the Swiss model by negotiating bilateral agreements with the EU. However there exist therein inconveniences. Switzerland is subject to the EU regulations and has no say in EU law making. That country is also required to pay the EU for access to the single market in goods. Unlike the UK which is a major exporter in services, there is no agreement between Switzerland and the EU on free trade in services.

Beyond the EU, a further economic model was the UK becoming a member of the World Trade Organisation (WTO). Although the UK would enjoy more independence it would suffer economically by reason of a smaller amount of trade and a consequent fall in income.

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161 For it is suggested by some that the Brexit negotiations could last for a decade and even longer.

162 Of the Treaty of the European Union which provides for the legal basis and procedure to be followed by an EU Member State upon leaving the EU.

163 Consolidated Version of the Treaty of the European Union 2010 (OJ. 2010 C83/01) Article 45 (1) fleshed out by Directive 2004/38/EC of the European Parliament and the Council. (OJ.2004. L.158/77).

164 *Ibid.* Article 45 (2) fleshed out by Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5<sup>th</sup> April, 2011 on freedom of movement for workers in the Union. (OJ. 2011 L141/1).

165 1<sup>st</sup> March, 2017.

166 It is thought that there are some three million EU nationals working in the UK supplementing the British labour force mainly in the agricultural and the construction industries. [There are approximately two million British citizens living in the EU.] Resolving this issue after Brexit could constitute an enormous headache for employers and it is anticipated that the negotiated major changes which would take place may probably not resemble the current EU work and discrimination rights structure and framework.



Furthermore the British Parliament would have to give up some of its sovereignty in each of the first two above models, namely the Norwegian and Swiss models, because each of these requires the UK to be bound by the European employment legislation and respect the CJEU decisions both of which offend strongly against the British Government's policy of "taking control of our own statute book and bring to an end the jurisdiction of the CJEU" in the UK.<sup>167</sup>

### 3.2. Uncertainty and Speculation in the Political Arena, Commerce and Labour laws

Many statements have been made by the British Prime Minister, Mrs Theresa May, at the Conservative party conference<sup>168</sup> as to what her policy would be, following the Brexit vote. There is, of course, no certainty that this policy will be followed for much will depend on the results of negotiations once Article 50 has been triggered at the end of March 2017.<sup>169</sup> Some key phrases will be quoted to illustrate the political direction in which the UK would wish to go. "We have voted to leave the European Union and become a fully independent sovereign country. We will do what independent sovereign countries do. We will decide for ourselves how we control immigration. And we will be free to pass our own laws... Let me be clear: We are not leaving the European Union only to give up control of immigration again".

On the negotiation tactics few details were given by the Prime Minister but she did say that negotiators would seek "the best possible deal" for companies which wish to trade in the EU but stressed that there would be no "opt-outs" for Scotland and Northern Ireland both of whom voted to remain in the EU.<sup>170</sup> She said "Britain's success is all possible because we are one United Kingdom: England, Scotland, Wales and Northern Ireland. I will never let divisive nationalists drive us apart". She initially stressed the fact that there would be no parliamentary vote on whether to go ahead with Brexit but had to make a "u turn" as a result of British parliamentary pressures<sup>171</sup> placed on her and the decision of the Supreme Court on parliamentary approval prior to triggering Article 50.<sup>172</sup>

The Prime Minister called the Brexit vote<sup>173</sup> "a quiet revolution" where people "stood up

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167 Source: White Paper entitled "*The United Kingdom's exit from and new partnership with the European Union*" Com. 9417 2<sup>nd</sup> February, 2017 at p. 13.

168 Held in Birmingham on 5<sup>th</sup> October, 2016.

169 Source: Euobserver 3<sup>rd</sup> October, 2016 <https://euobserver.com/uk-referendum/135330> (Retrieved on 3<sup>rd</sup> October, 2016).

170 But see the fierce political reaction by Scotland's and Northern Ireland leaders in the Euobserver of 14<sup>th</sup> and 17<sup>th</sup> October, 2016 <https://euobserver.com/uk-referendum/135496> and <https://euobserver.com/uk-referendum/135515> respectively (Retrieved on 14<sup>th</sup> and 17<sup>th</sup> October respectively).

171 See pp. 46-48 *infra*.

172 See pp. 42-44 *infra* for a more detailed discussion.

173 On 5<sup>th</sup> October at the Conservative Party's conference. <http://euobserver.com/uk-referendum/135376> (Retrieved on 6<sup>th</sup> October, 2016).

and said they are not prepared to be ignored anymore” adding that she wanted to retain the maximum possible access to the EU single market, but wanted full control of immigration. She said “I want [Brexit] to give British companies the maximum freedom to trade and operate within the single market... Our laws made not in Brussels but in Westminster... The authority of EU law in this country ended forever”.

Mr. David Davies who is Secretary of State for Brexit told the Conservative conference that he wanted to “maintain the freest possible trade” with the EU but that if he did not get what he wanted, he would abandon EU perks. He said “The clear message from the referendum is this: We must be able to control immigration”. Mr. Liam Fox who is the British trade secretary told the conference that the UK can survive on its own. He said “Most businesses in the world are outside the European Union. The United States is outside the European Union - it doesn’t seem to be seriously hampered in doing business with Europe because it’s not in the customs union”.

The response to Mrs May’s statements by the leader of the pro-European Liberal Party was that the Prime Minister’s remarks amounted to a declaration of “a hard Brexit” which spelt “a disaster for British jobs, businesses and our economy”. The Centre for European Reform<sup>174</sup> commented that the Prime Minister “is trying to square a circle and none of us knows how she plans to do it, but British companies will not be in a single market if she limits immigration and spurns or rejects ECJ rulings”.

The EU Council leader, Mr Donald Tusk, retorted that there would be no informal talks, as suggested by Mrs May, prior to Article 50 being triggered while the Maltese Prime Minister whose country held the EU Presidency said that EU freedom of movement “cannot be decoupled” from single market access. The EU thus insists that the link between access to the single market and the freedom of movement of workers could not be cut. If the UK wanted to have access it had to agree to some level of freedom of movement. Thus some of the labour laws which originate from the EU would need to be maintained.<sup>175</sup>

### **3.3. Uncertainty and Speculation in the Field of British Unity, its Constitution and Labour laws**

It will be recalled<sup>176</sup> that Mrs May stated that the UK would negotiate Brexit “as one United Kingdom” warning against “divisive nationalists” attempting to “undermine” and “drive apart” the UK thus appearing to deny Scotland a say in the preparation of the UK Brexit

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174 Which is a think tank based in London.

175 See too John Usherwood “*Article 50 TEU: The linchpin of EU-UK relations*” October, 2016. <https://go.microsoft.com/fwlink/?LinkID=550986> (Windows 10) (Retrieved 24<sup>th</sup> December, 2016).

176 See p. 29 *supra*.

negotiating position.<sup>177</sup> Mrs May and Mrs Sturgeon the first minister of Scotland, agreed in July 2016 that the British government would trigger Article 50 only after all the British entities agree on a common position. Mrs Sturgeon said at the 2016 Scottish National Party conference held in Glasgow that “I am determined that Scotland will have the ability to reconsider the question of independence - and to do so before the UK leaves the EU - if that is necessary to protect our country’s interests... The case for independence will have to be made and won”.

Talks for independence were revived by the referendum of 23<sup>rd</sup> June, 2016 when 62% of Scottish voters voted to remain in the EU. Mrs Sturgeon said to Mrs May “Scotland didn’t choose to be in this position,<sup>178</sup> your party put us there” adding that “In 2014 you told us Scotland was an equal partner in the UK. Well, the moment has come to prove it”. Referring to “hard Brexit” suggested by Mrs May, Mrs Sturgeon said “a UK out of the single market - isolated, inward looking, haemorrhaging jobs, investment and opportunities will not be the same country that Scotland voted to stay part of in 2014”. As a consequence, a Consultation on a Draft Referendum Bill for Scotland was published. In the words of Mrs Sturgeon,<sup>179</sup> “Scotland is now faced with one of the specific scenarios in which this government pledged that the Scottish parliament should have the right to hold an independence referendum... if it became clear that was the only or best way of protecting those interests... The UK Government’s recent statements on its approach to leaving the EU raise serious concerns for the Scottish Government. We face unacceptable risks to our democratic, economic and social interests and to the right of the Scottish Parliament to have its say. Indeed those statements contradict the assurances given before the independence referendum of 2014 that Scotland is an equal partner within the UK and that a vote against independence would secure our EU membership... We must have every option available to do this and it is for that reason we are now publishing the draft referendum bill for consultation”.

Northern Ireland<sup>180</sup> which also voted by a majority to stay in the EU whose concerns are access to the single market, trade borders with Eire<sup>181</sup> and maintaining peace<sup>182</sup> in

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177 Source: “*Scotland rattles sabre on independence*” Euobserver, 13<sup>th</sup> October, 2016 (Retrieved 13<sup>th</sup> October, 2016).

178 Comma added by the author.

179 Source: Foreword to the Consultation on a Draft Referendum Bill 21<sup>st</sup> October 2016 of the Scottish government.

180 Source: “*British unity shaken by talk of ‘hard Brexit’*” Euobserver 17<sup>th</sup> October, 2016 (Retrieved on 17<sup>th</sup> October, 2016).

181 I.e. the Republic of Ireland.

182 Namely the Good Friday 1998 peace agreement in the Irish island with the possible re-introduction of immigration and customs checks between Northern Ireland and Eire (Republic of Ireland). The 1998 agreement ended many years of sectarian violence between Catholics who wanted reunification with Eire and Protestants who favoured British rule. The peace agreement did away with border controls with a guaranteed freedom of movement across the boundaries of both countries. The Eire government opposes a hard Brexit and Mr Enda Kelly said that this was “a matter of vital national interest” and that without the EU and freedom of movement “there could have

the province suggested special rules for Northern Ireland. The deputy first minister Mr Martin Mc Guinness said “Theresa May says ‘Brexit means Brexit’ but so far as we are concerned Brexit means disaster for the people of Ireland... May says she is negotiating on behalf of the United Kingdom, but there is absolutely nothing united about a so called United Kingdom. We don’t agree. We see our future in Europe. Scotland sees its future in Europe”. On the *stability* of Northern Ireland and its relations with the Republic of Ireland, Mr Peter Sheriden<sup>183</sup> had this to say regarding Brexit “I don’t want to overstate it but there is a danger that ultimately this could lead to some civil unrest particularly in relation to the border”. A lawsuit has been brought in the Northern Ireland High Court claiming that that country’s legislature needs to be consulted prior to the British Government triggering Article 50. Paul Maguire J. held that the UK Parliament “has retained to itself the ability to legislate for Northern Ireland without the need to resort to any special procedure”. Thus, the 1998 Good Friday Agreement could not be used to grant that country an exemption from the UK’s policy to leave the EU. Furthermore Paul Maguire J. considered that “the prerogative power is still operative and can be used for the purpose of the executive giving notification for the purpose of Article 50. This, however, is said without prejudice to the issues which have been stayed and which are under consideration in the English courts”.

A panel of three senior judges in the England and Wales High Court were also considering a parallel case<sup>184</sup> as to whether the UK Parliament should vote before Article 50 is triggered at the end of March 2017.<sup>185</sup> Both cases were ultimately appealed to the UK Supreme Court for an authoritative decision.<sup>186</sup>

Thus both the Scottish and Northern Irish leaders suggested that they would seek a special deal with the EU because they felt that the tough negotiating stance of the United Kingdom Government on leaving the EU could harm their respective countries’ interests. Should a “special deal” come about, it will have untold implications on labour laws, yet unknown, in each of those countries.

Although most unlikely, there could be a possibility that Scotland will leave the UK. Mrs Sturgeon did say that it is “highly likely” that Scotland will depart from the United Kingdom in the near future. She posited<sup>187</sup> “I have never doubted that Scotland will one day become an independent country and I believe it today more strongly than I ever have before”. She also said that “if the Tory government rejects these efforts, if it insists on taking

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been no Good Friday Agreement”. (15<sup>th</sup> February, 2017).

183 Head of the peace-building charity “Cooperation Ireland”.

184 In November, 2016.

185 See the analysis of this case at pp. 39-41 *infra*.

186 The Supreme Court judgement is discussed at pp. 42-44 *infra*.

187 Scottish National Party (SNP) Sunday 16<sup>th</sup> October, 2016.

Scotland down a path that hurts our economy, costs jobs, lowers our living standards and damages our reputation as an open, welcoming, diverse country, then be it in no doubt... Scotland must have the ability to choose a better future and I will make sure that Scotland gets that chance". In October, 2016 the SNP presented a consultation<sup>188</sup> Bill for a referendum on independence<sup>189</sup> to the Scottish Parliament which will be pursued should all other options fail. Were, hypothetically Scotland to achieve independence and were hypothetically Scotland to be accepted to membership by the EU as an independent country, it is suggested that, for obvious reasons, very little will change from Scotland's current labour laws.<sup>190</sup> As for Wales, the Welsh leader, Mr Carwyn Jones said that the Welsh Assembly should vote on Brexit prior to Article 50 being triggered. Furthermore, he would not accept any agreement which included EU tariffs on goods made in Wales.

It is clear that the June 2016 referendum had the result of creating a constitutional crisis, namely of threatening the break -up of the UK thus resulting on the respective diversification of labour laws in each of the four countries which compose the UK.

The British prime minister having been put in a corner by the devolved governments was quick to react in an attempt to avert a full-blown constitutional crisis resulting from a serious breakdown of relations between the four devolved governments. A parliamentary sub-committee named the Joint Ministerial Committee (EU Negotiations)" chaired by David Davis, the Brexit minister, was set up in October 2016 with a view to meet in November, 2016, before Christmas 2016 as well as prior to Article 50 being triggered at the end of March 2017. The Prime Minister issued a statement which said that "The great union between us has been the cornerstone of our prosperity in the past and it is absolutely vital to our success in the future". This committee aims at giving the devolved governments a direct line to David Davis so as to "shape the UK's EU strategy".

#### 4. AN EPITOME

This epitome is divided into four parts, each treating a different, though related, topic. The first part deals with rights at work. The second part focuses on the link between access to the single market and its relation to the concepts of freedom of movement of workers, the customs union and the binding nature of the CJEU judgements *versus* a clean break from the EU. The third part treats the British Government's Brexit strategy *versus*



188 The referendum Bill was open for public consultation until January 2017.

189 Asking the question "Should Scotland be(*sic*) an independent country?"

190 It should be noted that, subject to some special and specific legislative provisions to take into account Scots law and Northern Ireland law, the UK labour laws apply to each of the four countries which comprise the UK.



the Westminster Parliament *versus* the civil service, while the fourth part focuses on a general conclusion.

#### 4.1. Rights at Work

The reader would have noticed that EU legislation had given British workers a significant conglomeration of rights at work; rights which would not have been granted by national legislation had it not been for the UK's membership of the EU. Upon Brexit occurring, some of those rights will be at risk.

As has already been pointed out, those EU derived rights include<sup>191</sup> a right to 20 days' paid annual leave; a right not to be forced to work more than 48 hours a week on average; a right to paid time off for ante-natal appointments and protection for pregnant women and new mothers; a right to a maximum 18 weeks' parental leave per child and time off for urgent family reasons; a right to equal pay for work of equal value between males and females; right to equal treatment for part-time, fixed-term and agency workers compared to full time employees; a right to information and consultation with employee representatives where significant changes are likely and which would affect jobs; a right to high standards of health and safety at work; a right to protection of workers where outsourcing or business transfers take place; a right to workplace non-discrimination on grounds of sexual orientation, gender reassignment, religion or belief and age.<sup>192</sup>

With Brexit it is difficult to foresee what would happen to each of those rights, because decisions on which rights to keep and which to amend or repeal would be left to the Government when reviewing UK laws linked to EU legislation. This could spell employers cutting the benefits and protections currently granted to UK workers.

Frances O'Grady, the TUC General Secretary considered that<sup>193</sup> "Working people have a huge stake in the referendum because workers' rights are on the line. It's the EU that guarantees workers their rights to paid holidays, parental leave, equal treatment for part-time workers and much more. These rights cannot be taken for granted. There are no guarantees that any government will keep them [when] the UK leaves the EU. And without

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191 Source: <https://www.tuc.org.uk/sites/default/files/UK%20employment%20rights%20and%20the%20EU.pdf> (Retrieved 10<sup>th</sup> November, 2016) TUC publication entitled "UK Employment Rights and the EU: an assessment of the impact of membership of the European Union on employment rights in the UK (February 2016).

192 Millions of British workers have benefitted from EU derived workplace rights. The TUC report states that six million workers gained new and enhanced rights to paid holidays (2 million of whom had no paid annual leave previously. Four hundred thousand part-time workers (most of them women) gained improved pay and conditions of employment when equal treatment rights were introduced. Some agency workers received a pay rise and improved holiday entitlements and many fixed-term workers enjoyed greater job security resulting from EU legislation. Furthermore landmark cases heard in the Court of Justice of the European Union were won by women challenging equal pay in the workplace.

193 Source: <https://www.tuc.org.uk/international-issues/europe/employment-and-social-policy/eu-> (Retrieved 14th October, 2016).

the back up of EU laws, unscrupulous employers will have free range to cut many of their workers' hard -won benefits and protections. The question for anyone who works for a living is this: Can you risk a leap into the unknown on workplace rights?"

In 2012 the Government sought to diminish workers' rights derived from British laws by reviewing the qualifying period in which an employee may bring a claim for unfair dismissal in an Employment Tribunal from one to two years. A maximum claim for compensation was also imposed. In 2013 very high fees were imposed on employees seeking to enforce their rights in Employment Tribunals.

While European Union led employment has recently been more limited than in the past, it is understood that the overall contribution of EU employment rights to the UK workforce has been both significant and impressive. Brexit puts those wide-ranging protections in the balance.<sup>194</sup>

Following Brexit, it is suggested that the UK will maintain the *status quo*, but that over time, and depending on the colour of the Government, - whether Labour, Conservative or a Coalition, - particular laws, as suggested herein this chapter, could be amended, adjusted or repealed. Furthermore the British courts would treat judgements of the ECJ and CJEU as *persuasive* though not legally binding when ruling upon EU inspired legislation. Thus ECJ and CJEU judgements would continue to have some effect, albeit a limited and weaker one upon judgements of the British courts.

#### 4.2. Link between Access to the Single Market and the Concepts of Freedom of Movement of Workers,<sup>195</sup> the customs union and the binding nature of the European Court Decisions or simply a clean break?<sup>196</sup>

Prior to Mrs Theresa May's Lancaster House speech of 17<sup>th</sup> January 2017 announcing a clean break by stating that the UK cannot remain a member of the single market or of the customs union and cannot be bound by the jurisdiction of the CJEU after the UK leaves the EU, numerous views were expressed on the link between access to the single market, the customs union and the binding jurisdiction of the CJEU.

It should be borne in mind that the link between access to the European single market, and freedom of movement of workers and remaining within the jurisdiction of the Court

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194 See too CIPD "*The real impact of the EU on UK employment law*" by Rachel Suff, Public Policy Adviser (Employment Relations) <https://www.cipd.co.uk/hr-resources/voice/04/real-impact-eu-uk-employment.aspx> (Retrieved 14<sup>th</sup> October, 2016).

195 See the CEPS publication entitled "*Brexit will deepen the fault lines within the EU over mobility*" (12<sup>th</sup> July, 2016). Source: <https://www.ceps.eu/publications/brexit-will-deepen-fault-lines-within-eu-over-mobility> (Retrieved 8<sup>th</sup> August, 2016).

196 See Michael Emerson "*Which model for Brexit*" CEPS Special Report No. 147/October 2016. <https://www.ceps.eu/system/files/SR147%20OME%20Which%20model%20for%20Brexit.pdf> (Retrieved 20<sup>th</sup> December, 2016).

of Justice of the European Union (CJEU) cannot be cut. If, as Mrs May has stated, the UK wishes “to give British companies the maximum freedom to trade with and operate within the single market” which allows tariff-free trade, some level of free movement and being subject to the CJEU decisions has to be agreed. This statement is inconsistent with the notion of a clean break! Mr Tusk the EU Council President warned the UK not to expect much manoeuvring room on the four freedoms of the EU. The UK should therefore not count on untangling the principle of free movement from access to the single market. “There is no compromise on this regard” he said.<sup>197</sup>

On the other hand, Mrs May stated that London would opt for a clean break from the EU, thus valuing control over migration, over and above access to the single market.<sup>198</sup>

The former Governor of the Bank of England, Lord King indicated that the UK will be more “self-confident” were it to leave the EU altogether as it will have “more opportunities” for economic reform, and furthermore would be economically better off. He said<sup>199</sup> “I don’t think it makes sense for us to pretend we should remain in the single market and I think there are real question marks about whether it makes sense to remain in the customs union. Clearly if we do that we cannot make our own trade deals with other countries”.

Some seventy Conservative MPs hold the opinion, - unrealistically in this author’s opinion,- that a trade agreement can be negotiated with the EU *without* the UK making any concessions whatsoever thus saving ten billion euros per annum of the net budget contribution, exercising tight immigration controls and the UK not being subjected to the CJEU decisions. Failing that, Brexit means to them, leaving the single market.

Lord Lawson, a former Chancellor of the Exchequer, expressed the view that if the UK does not wish to have freedom of movement and the EU insists that without that freedom, the UK would not be able to have access to the single market, the UK should end any “uncertainty” by going ahead with Brexit and stop trying to negotiate a special deal and thus not “waste time”.

The wise words of the Chancellor of the Exchequer, Mr Philip Hammond bring much food for thought “you can’t go into any negotiation expecting to get every single objective that you set out with and concede nothing along the way”.<sup>200</sup>

A more realistic and conciliatory picture over negotiations is that painted by the Brexit

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197 Source: <https://euobserver.com/uk-referendum/135499> (Retrieved 14th October, 2016). Switzerland and Norway which do not form part of the EU enjoy trade agreements with the EU which involve adherence to a substantial amount of EU derived employment law, including freedom of movement of workers.

198 Source: <https://euobserver.com/uk-referendum/135499> (Retrieved 14th October, 2016). What is interesting is that control of immigration by the UK is considered more important than its economic self-interest, namely economic growth. The policies of successive British governments have invariably been the opposite, namely that priority has been given to economic growth! There has therefore been an important change of policy made by the May Government.

199 Source: <http://www.bbc.co.uk/news/business-38421769> (Retrieved 22<sup>nd</sup> December, 2016).

200 Source: <https://euobserver.com/opinion/136131> (Retrieved 1st January, 2017).

Secretary of State, Mr David Davis who talks of compromises in the negotiations which will take place after March 2017. He suggested that the British Government would *consider* making contributions to the EU budget so as to have access for goods and services to the single market. If paying a contribution “is included... then, of course, we would consider it”. He further stated that controls on immigration would not be pursued at the expense of “the national and economic interest”. These statements show that the UK wishes to remain in the customs union. Indeed in Mrs May’s Lancaster House speech she spoke of a *customs agreement*<sup>201</sup> with the EU as one of the UK’s priorities in the Brexit negotiations. She stated that the relationship with the EU’s customs union would change because she did not wish the UK “to be bound” by the shared external tariffs. The UK would instead strike its “own comprehensive trade agreements with other countries”. The UK could therefore become an “associated member” of the customs union signing up to some parts only of the agreement. Alternatively the UK could negotiate a “completely new agreement”.

In fact both the UK and the EU wish trade to continue after Brexit. The UK is seeking a positive outcome for those, like the City of London, who wish to trade in goods and services. The challenge is for the UK during the negotiations to compromise enough and tackle immigration concerns while at the same time obtaining the best possible trade agreements with the EU. Mrs May did talk in her Lancaster House speech of a “new, comprehensive, bold and ambitious free trade agreement” with “the greatest possible access” to the single market with perhaps “elements” of the current arrangements because “it makes no sense to start again from scratch when Britain and the remaining member states have adhered to the same rules for so many years”. Mrs May said “This agreement should allow for the freest possible trade in goods and services between Britain and the EU’s member states. It should give British companies the maximum possible freedom to trade with and operate within the European markets and let European businesses do the same in Britain. But I want to be clear: What I am proposing cannot mean membership of the single market” because “It would, to all intents and purposes, mean not leaving the EU at all. That is why both sides in the referendum campaign made it clear that a vote to leave the EU would be a vote to leave the single market”. Furthermore, the UK will enter into new trade agreements with countries outside the EU.

Although the EU chief negotiator Mr Michel Barnier is of the opinion that Brexit negotiations would have to be finalised by October, 2018 for ratification to be completed in the time set out by the Lisbon Treaty, it is suggested that the period of some eighteen months to complete negotiations is clearly<sup>202</sup> not sufficient to finalise negotiations and that there



201 Members of the customs union do not impose tariffs on each other’s goods. Furthermore they impose the same tariffs on goods from outside the EU.

202 It appears clear that Brexit *trade negotiations* will constitute the most complex part of the general negotiations agenda because (a) they need the approval of a minimum of thirty national and regional parliaments within the EU States, some of which may wish to hold *referenda*; (b) it is not an easy task to unpick the forty three years of Brit-

should be an extended period to kick-in after the officially prescribed negotiation period ended. There appears to be a desire from various sources that a *transitional period* be agreed in the most likely event that negotiations will not be completed by the end of the officially prescribed period. The Chancellor of the Exchequer, Mr Philip Hammond considered that there is support for such a transitional period and talked of "...an emerging view among businesses, among regulators, among thoughtful politicians, as well as a universal view among civil servants on both sides of the English channel that having a longer period to manage the adjustment between where we are now as full members of the EU and where we get to in the future as a result of negotiations would be generally helpful".<sup>203</sup> Such a transitional period would not only be beneficial to the UK but also be in the interests of the twenty seven remaining EU Member States and Mr Barnier did not rule out a transitional period after the UK decided what form of relationship it wanted with the EU.<sup>204</sup> Mrs May in her Lancaster House speech of 17<sup>th</sup> January, 2017 did not appear to favour a transitional deal. She talked of no "unlimited transitional status" which could leave the UK negotiations somewhat *in media re* until a final agreement had been reached. That would leave the UK "in some kind of political purgatory".<sup>205</sup> What she did suggest however was a "phased process of implementation" which would allow parts of a negotiated agreement to be brought in an orderly manner over an agreed period of time.

On the freedom of movement issue, Mr Hammond could not "conceive of any circumstance in which we would use that system to choke off the supply of highly skilled, highly paid workers" thus suggesting that if the UK chose the EU single market route there would, at least be some "give" on freedom of movement.<sup>206</sup> In her Lancaster House speech of 17<sup>th</sup> January, 2017 Mrs May stated that "We will continue to attract the brightest and the best to work or study in Britain - indeed, openness to international talent must remain one of this country's most distinctive assets - but that process must be managed properly so that our immigration system serves the national interest. So we will get control of the number of people coming to Britain from the EU". The UK had always been "profoundly internationalist" and would continue to remain so.



ish membership of the EU and the consequent volume of European legislation and treaties covering thousands of issues, including social laws which are currently applicable to the UK; and (c) it is the first time that Article 50 has been triggered by any EU Member State resulting in teething problems presenting themselves, thus causing delays which would take time to solve. Furthermore, (d) it should be borne in mind that The Netherlands, Germany and France will be holding elections in March, September and May 2017 respectively which could mean possible different policies of the incoming governments towards Brexit. Such policies may need more than a year to be negotiated thus necessitating an agreement for a transitional period.

203 Source: House of Commons Treasury Committee hearing 13<sup>th</sup> December, 2016.

204 Source: <https://euobserver.com.uk-referendum/136245> (Retrieved 23<sup>rd</sup> December, 2016).

205 A very appropriate (indeed Jesuitical) expression coming from the mouth of an Anglican parson's daughter!

206 Source: *Ibid.* Mr David Davis would not entertain a transitional period and would only do so if it would "be kind" (thus showing political altruism and good will!) to the EU. (Source: Financial Times 12<sup>th</sup> December, 2016). It is obvious that there are disagreements among the Prime Minister's Cabinet members.



Resulting from the brief discussion above, it is obvious that there are many imponderables and uncertainties over negotiations once Article 50 is triggered. One cannot prophesise as to what the outcome of the negotiations will be. It is only after the end of March 2017 when Article 50 has been triggered and when negotiations have started officially that some clarity will emerge on the kind of deal the UK will be seeking whether it be on limited trade with the internal market and/or limited immigration or simply making a clean break, as has been stated by Mrs May in her speech of 27<sup>th</sup> January, 2017 by leaving the single market and seeking markets globally. As matters stand at the time of writing<sup>207</sup> the British policy, as expressed in Mrs May's words, is crystal clear and epitomised in three short and precise sentences, namely. (a) "We seek a new and equal partnership between an independent, self-governing, global Britain and our friends and allies in the EU" (b) "Not partial membership of the European Union, or anything that leaves us half-in, half-out" and (c) "We do not seek to adopt a model already enjoyed by other countries."<sup>208</sup> We do not seek to hold on to bits of membership as we leave. The United Kingdom is leaving<sup>209</sup> the European Union. My job is to get the right deal for Britain as we do."<sup>210</sup>

#### 4.2.1. Warnings prior to the start of negotiations

Although the aspirations of the UK are to "continue to be reliable partners, willing allies and close friends" and "We want to buy your goods, sell ours, trade with you as freely as possible and work with one another to make sure we are all safer, more secure and more prosperous through continued friendship" in her 17<sup>th</sup> January, 2017 speech, Mrs May warned the EU negotiators well in advance of triggering Article 50 that "a punitive deal which punishes Britain" would constitute "an act of calamitous self-harm for the countries of Europe" which would "not be the act of a friend". Thus "no deal for Britain is better than a bad deal for Britain."<sup>211</sup> An EU "punitive deal" implies a tax and trade war against EU Member States.

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207 Namely 1<sup>st</sup> March, 2017.

208 This suggests that the Norwegian model of access to the single market where contributions to the EU have to be made and the Swiss model are ruled out.

209 Which means giving up membership of the single market which demands the acceptance of the four freedoms, namely of goods, capital, services and workers. The Prime Minister explained that "Being out of the EU but a member of the single market would mean complying with the EU's rules and regulations that implement those freedoms, without having a vote on what those rules and regulations are". Furthermore, "Brexit must mean control of the number of people who come to Britain from Europe" Brexit also implies non-acceptance of the jurisdiction of the CJEU.

210 Source: Lancaster House speech given the Prime Minister on 17<sup>th</sup> January, 2017.

211 This statement was described by some British newspapers as confrontational. The Guardian described it as a "threat to Europe" and the Times talked of a "fair deal or you'll be crushed" whereas the Maltese Prime Minister whose country held the six monthly rotating presidency did not think that it constituted "a declaration of war" and the Head of the EU Commission considered that negotiations would be "very, very difficult" but that the EU would not be "in a hostile mood" towards the UK.

#### 4.2.2. “Our laws made not in Brussels but in Westminster”. Labour Laws - Political Talk or True Fact?

It should be noted that the UK enjoys more employment law flexibility than do other EU Member States. In terms of employment protection the UK is the third most lightly regulated country in the OECD. Recalling Mrs May’s words that “Our laws made not in Brussels but in Westminster,”<sup>212</sup> what will Brexit result in when the British Government starts making minor or major changes or repealing British laws based on EU legislation?

What is encouraging is that Mrs May had ordered in October 2016 a review of employment practices headed by Mr Matthew Taylor<sup>213</sup> suggesting that she wished to ensure that workers’ rights are protected under (a) changing business models, (b) a growing trend towards flexible employment or (c) self-employment. She said “We are building a new centre ground in British politics, improving the security and rights of ordinary working people is a key part of building a country and an economy that works for everyone, not just the privileged few”.

The protection of workers’ rights was repeated in point seven of her twelve<sup>214</sup> points at her Lancaster House speech of 17<sup>th</sup> January, 2017. She said “as we translate the body of European law into our domestic regulations, we will ensure that workers’ rights are fully protected and maintained... not only will the government protect the rights of workers set out in European legislation we will build on them... and will make sure legal protection for workers keeps pace with the changing labour market”. Are those two statements political talk or reality? Time only will tell!

#### 4.2.3. A British Constitutional Crisis. Scotland

It will be recalled that resulting from the current political attitude of the Prime Minister Theresa May<sup>215</sup> towards a hard Brexit, the Scottish Government has published a Consultation on a Draft Referendum Bill to give Scotland the ability to reconsider the

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212 Adding Edinburgh, Cardiff and Belfast in her 27<sup>th</sup> January, 2017 Lancaster House speech thus fully engaging the devolved administrations to avoid the political risk of an independence referendum in Scotland and the problems relating to the Good Friday peace agreement in Northern Ireland with finding a practical solution which “allows the maintenance of the common travel area” between Eire and the UK “for nobody wants to return to the borders of the past”. (Source: The P. M.’s Lancaster House speech of 17<sup>th</sup> January, 2017).

213 Source: The Daily Telegraph <https://www.msn.com/en-gb/news/uknews/theresa-may-orders-review-of-employment> (Retrieved 1st October, 2016).

214 Namely the provision of certainty and clarity; taking control of British laws; strengthening the Union; the UK strengthening ties with Eire and maintaining the common travel area; controlling immigration; securing rights of British nationals in the EU and EU nationals in the UK; protecting workers’ rights; securing trade agreements with other countries; ensuring free trade with European markets; ensuring the UK remains the best place for science and innovation; co-operating in the fight against crime and terrorism; and delivering a smooth and orderly exit from the EU.

215 As at the time of writing on 1<sup>st</sup> March, 2017.

independence issue *before* the UK exits from the EU. For the avoidance of any doubt the reader must not take this Scottish policy stance as a “*fait accompli*” that Scotland *will* or *may* become an independent country. The Bill serves as a prophylactic should Scotland’s interests not be “properly or fully protected within a UK context”.<sup>216</sup> Scottish independence will be one of the options open to it and the Scots “must have the right to consider it”. It is still too early to know what the outcome of this situation will be, because it will depend on the negotiation results between not only Mrs Sturgeon, First Minister for Scotland and Mrs May, Prime Minister of the UK but also the negotiations between the UK and the EU. Mrs Sturgeon’s priorities are clear, namely to do “everything we can to protect Scotland’s interests”. She went on to say “The damage to jobs and Scotland’s economy that will be caused by Brexit - especially a hard Brexit - is now plain to see” and the Scottish Government “will continue to work UK wide to seek to avert a hard Brexit”. The Scottish government “remains willing to work with the UK Government to negotiate a future relationship with Europe that is in line with the views of the overwhelming majority of the Scottish people and which works for the UK as a whole. We will put forward constructive proposals that will both protect Scotland’s interests and give an opportunity for the UK Government to demonstrate that Scotland is indeed an equal partner. But if it becomes clear that it is only through independence that Scotland’s interests can be protected, then the people of Scotland must have the ability to reconsider that question”.<sup>217</sup> In the unlikely event that this would happen, and generate to Northern Ireland and possibly Wales, this will be the breakdown of the UK resulting in a full-blown constitutional crisis and with labour laws being *possibly* different in England, Wales, Scotland and Northern Ireland.

#### 4.2.4. *The Northern Ireland High Court Action taken on Brexit and a Constitutional Issue*

A challenge was made in the Belfast High Court by four political parties, namely Sinn Féin, the Social Democratic and Labour Party, the Alliance Party and the Green Party arguing that the UK Government could not trigger Article 50 without first having a parliamentary vote in the Westminster Parliament or the Northern Ireland Assembly. A further challenge was made by Mr. McCord who campaigns for Northern Ireland’s victims of violence during the Irish troubles, on the grounds that the EU funding for peace initiatives could possibly cease as a result of Brexit. It was furthermore argued in the Belfast High Court

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216 Source: Euobserver 21<sup>st</sup> October, 2016 <https://euobserver.com/uk-referendum/135580>. (Retrieved 21<sup>st</sup> October, 2016).

217 “*Consultation on a Draft Referendum Bill*” October, 2016. Scottish Government.

that the Good Friday Peace Agreement gave sovereignty to Northern Ireland and that the British Government could not make Northern Ireland leave the EU.

Not agreeing with any of those arguments, Paul McGuire J. held (a) that there was nothing in the Good Friday Peace Agreement to prevent the Government from triggering Article 50. The Good Friday Peace Agreement was only relevant from a constitutional law point of view "...in the particular context of whether Northern Ireland should remain as part of the UK or united with Ireland". Triggering Article 50 was simply the beginning of the legislative process but that legislation by the Westminster Parliament would follow. The learned judge posited "...the actual communication does not, in itself, alter the law of the United Kingdom... it is the beginning of a process". Once laws need to be changed, the Westminster Parliament will be involved. (b) that the Royal Prerogative could be used to trigger Article 50 and (c) that the Good Friday Peace Agreement did not give sovereignty to Northern Ireland and that the Westminster Parliament could make Northern Ireland leave the EU.

Paul Maguire J.'s decision in the Belfast High Court is, of course, not the end of the matter for it is ultimately the Supreme Court which will decide on those issues. Both the Belfast High Court case and that of the High Court of England and Wales in London<sup>218</sup> went on appeal to the Supreme Court.

The Government of the Republic of Ireland (Eire) wishes the Brexit negotiations to include a commitment that if Northern Ireland and Eire were to unite, Northern Ireland would quickly gain access to the EU. The Good Friday Peace Agreement allows for a *potential* future Referendum seeking Irish unification.<sup>219</sup> Otherwise Northern Ireland, as part of the UK, will leave the EU.

#### *4.2.5. A High Court of England and Wales Challenge on Brexit. London*

There is yet another dimension and twist to this constitutional saga! Gina Millar and investment manager and others<sup>220</sup> brought an action against the British Government in the High Court of England and Wales, questioning the Government's right to trigger the formal process of leaving the EU without there being a vote in Parliament.

On 3<sup>rd</sup> November, 2016 the High Court of England and Wales held that the Government does not have the power to trigger Article 50 without parliamentary approval and a vote by MPs in the House of Commons and Peers in the House of Lords. The High Court's

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218 See *infra.* at pp. 40-42.

219 Source: Liadh Ni Riada MEP of the Sinn Féin Party "*Brexit vote highlights need for Irish reunification*" The Irish Times, 28<sup>th</sup> November, 2016.

220 Calling itself "*The People's Challenge*" which had raised well over £160,000 to fund its legal costs.

judgement implies legislation being passed by Parliament but the Government has appealed to the Supreme Court against the High Court's judgement.

The issue in the High Court of England and Wales was whether the Government could undo statute law by use of the Royal Prerogative.<sup>221</sup> The Lord Chief Justice, Lord Thomas said<sup>222</sup> "The sole question... is whether, as the matter of the constitutional law of the United Kingdom, the Crown, - acting under the executive government of the day, - is entitled to use its prerogative powers to give notice under Article 50 for the United Kingdom to cease to be a member of the European Union". This was a "pure question of law" with "no bearing" on the merits of the UK withdrawing from the EU. The High Court of England and Wales held that the Government cannot use executive powers, namely the Royal Prerogative, to override legislation.

Thus, when can ministers use prerogative powers? It is part of British law that prerogative powers can be used in international relations and the making and unmaking of international treaties. That is permissible, because generally exercising those powers in this arena has *no effect on domestic law*, so there is no collision with parliamentary legislation and *parliamentary sovereignty is not affected*.

The Government argued in court that using prerogative powers to trigger Article 50 was "a classic example of the royal prerogative" and that if Parliament had not wanted it, it would have said so in the European Union Referendum Act, 2015.

The British Government accepted fully that triggering Article 50 by using its prerogative powers would have the effect of changing domestic law, labour law being very much part of it and playing an important role therein.

By enacting the European Communities Act, 1972 which took the UK in what was then the European Economic Community, - now called the European Union, - the British Parliament made the EU law, including labour laws, part of the British law. Rights enjoyed by British workers were written, - as mentioned above, - in British law through the 1972 British legislation.

The British Government argued in the High Court that the Westminster Parliament must have *intended* that ministers would keep the prerogative power to withdraw from



221 The Crown's Prerogative Powers are a collection of executive powers derived from the Crown from medieval times. Once exercised by all-powerful kings and queens, they have been dramatically reduced over the centuries and the residue is now vested in the hands of ministers. Exercising the Royal Prerogative is controversial because it bypasses the UK's supreme Parliament. Lord Thomas said in this case "An important aspect of the fundamental principle of Parliamentary sovereignty is that primary legislation is not subject to displacement by the Crown through the exercise of prerogative powers". Thus prerogative powers are strictly limited and in the relationship between them and Parliament it is Parliament that very firmly has the upper hand, because "...This subordination of the Crown (i.e. the executive government) to law is the foundation of the rule of law in the United Kingdom".

222 Source: <http://www.bbc.co.uk/news/uk-37873493> (Retrieved 6th November, 2016) and the transcript of the judgement in the case of *R. (G. Miller et al.) v Secretary of State for Exiting the European Union* 3<sup>rd</sup> November, 2016 - Case No CO/1309/2016 and CO/3281/2016.



EU Treaties and so continue to have the power to choose whether EU law - including the rights given to the Government under it - should continue to have effect in domestic law.

The High court categorically disagreed with the Government's argument. Lord Thomas concluded that<sup>223</sup> "Parliament intended European Union rights" including labour law rights, "to have effect in domestic law and that this effect should not be capable of being undone or overridden by action taken by the Crown in the exercise of its prerogative powers". The Crown cannot, through the exercise of its prerogative powers, alter the domestic law of the United Kingdom and modify rights acquired in domestic law under the European Communities Act 1972... We agree with the claimants that, on this further basis the Crown cannot give notice under Article 50 (2)".

The judgement did not specifically state that an Act of Parliament is needed to give ministers the authority to trigger Article 50. The judges, by no so doing, wished (a) to keep some constitutional distance and (b) not be seen to be telling Parliament precisely how to exercise its sovereignty. This being the case it is difficult to see how Parliament could give authority to the minister to trigger Article 50, other<sup>224</sup> than by voting for primary legislation to be passed, namely an Act of Parliament.

Mr Clive Coleman, the BBC legal correspondent called this case law "an epic legal battle... arguably the great constitutional clash of the time". The Government could get its way and was therefore "stopped in its tracks" by independent judges through the British system of *judicial review* should politicians' proposals be unlawful.

This High Court decision was decided on a point of law but it also has significant political and constitutional consequences. The British Government has appealed this decision to the Supreme Court where eleven judges, including those from Scotland and Northern Ireland have been sitting underlining the importance of this constitutional case.<sup>225</sup> It will be recalled<sup>226</sup> that there was another appeal pending to the Supreme Court against the



223 Sitting with the Master of the Rolls, Sir Thomas Etherton and Lord Justice Sales (both concurring with Lord Thomas).

224 The High Court of England and Wales held that the EU referendum was *advisory* (and not mandatory). "The basic constitutional principles of parliamentary sovereignty and representative parliamentary democracy led to the conclusion that a referendum on any topic can only be advisory for the lawmakers in Parliament unless very clear language to the contrary is used in the referendum legislation. No such language is used in the 2015 Referendum Act" *per* Lord Thomas.

225 What are the implications of the High Court's decision for the devolved administrations? Ever since 1999 when devolution to Scotland, Northern Ireland and Wales, the Westminster Parliament in London *normally* (but see pp. 29-30 *ante* on consultation with Scotland's First Minister) seeks the agreement of the devolved assemblies or parliaments if it were to legislate on important devolution matters such as the interests of Scotland and Northern Ireland who (unlike England and Wales) voted in the June 2016 referendum to remain in the EU. While the Westminster Parliament debates a Bill, *legislative consent motions* are passed to Scotland's Parliament and Northern Ireland's and Wales' Assemblies. Political and constitutional issues could well arise should they choose to vote on legislative consent motions relating to a Bill to enact Article 50.

226 See pp. 39-40 *ante*.

decision of the Belfast High Court which held that the British Government is entitled to trigger Article 50 and therefore launch Brexit negotiations on its own.

Were hypothetically the London High Court decision to have been overruled by the Supreme Court, (which it was not) the British Government would have gone ahead and triggered Article 50 in March 2017 as planned under its Royal Prerogative powers. Were hypothetically the appeal to have been upheld, (which was the case) the Government would have needed to pass legislation which would give it authority to trigger Article 50. This does not mean that there would be delays in triggering Article 50 in March 2017 as planned. In those latter circumstances a short Act of Parliament could be brought forward to go through the House of Commons and the House of Lords. It is believed that the go-ahead would *ultimately* be given by both Houses because most MPs have said that they would respect the Referendum result.<sup>227</sup>

#### 4.2.6. *Judgement of the Supreme Court*<sup>228</sup>

The Supreme Court which heard the appeals in December 2016 delivered its judgement on 24<sup>th</sup> January, 2017.<sup>229</sup> Lord Neuberger, the President of the Supreme Court, announced that by a majority of eight to three,<sup>230</sup> “the Supreme Court ruled that the government cannot trigger Article 50 without an Act of Parliament to do so”. Because of its importance it is proposed to highlight, albeit in a skeletal manner, the majority decision of the Supreme Court’s reasoning in reaching its verdict.<sup>231</sup>

First, The European Communities Act, 1972 which brought the UK into, what was then the European Economic Community, allowed for EU laws to become a source of British domestic laws upon their implementation and take precedence over all domestic sources

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227 On 7<sup>th</sup> December, 2016 MPs approved the non-binding motion by 448 votes to 75 (a relatively small proportion voted to block the vote) because Parliament “should respect the wishes as expressed in the referendum on June 23<sup>rd</sup>” when 52% voted to leave the EU. Upon promising to give more detail on the Government’s negotiation strategy and objectives, this was the first time that Parliament voted to endorse the Prime Minister’s promise to trigger Article 50. A Conservative MP namely Anne Soubry who is a “remain” supporter said “The government need have no fear - we will vote to leave the EU because we have accepted the result of the referendum”.

228 For an analysis of the Supreme Court’s Judgement the reader is referred to Professor Mark Elliott’s “*Public Law for Everyone, 1,000 words. The Supreme Court’s Judgment in Miller*” <https://publiclawforeveryone.com/2017/01/25/1000-words-the-supreme-courts-jugment-in-miller/> 27<sup>th</sup> January, 2017 and “*Analysis. The Supreme Court’s Judgment in Miller*” 27<sup>th</sup> January, 2017 <https://publiclawforeveryone.com/2017/01/25/analysis-in-the-supreme-courts-judgment-in-miller/>.

229 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

230 Those who rejected the Government’s appeal to the Supreme Court were Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge. Those who decided in favour of the Government’s appeal were Lord Carnworth, Lord Hughes and Lord Reed.

231 In order to save space it is not proposed to analyse the reasoning in the *dissenting* judgements suffice to say that Lord Carnworth’s opinion was that “the Government will be accountable to Parliament for those negotiations and the process cannot be completed without the enactment by Parliament of primary legislation in some form”. Lord Reed (with whom Lord Carnworth and Lord Hughes agreed) were of the opinion that “the Crown’s exercise of prerogative powers in respect of UK membership” were not affected.

of UK law, including statutes.<sup>232</sup> Second, the very fact that the 1972 Act is currently in force means that EU law is “an independent and overriding source” of the British legal system. As such, EU laws must predominate until the Westminster Parliament decides otherwise. Third, leaving the EU will create a fundamental change in the current British constitutional system by reason of the fact that EU laws, including judgements of the CJEU, will no longer provide a source of law in the UK.<sup>233</sup> Fourth, a fundamental constitutional change of such a magnitude, namely leaving the EU, demands the consent, authorisation and backing of the Westminster Parliament prior to triggering Article 50. Thus such significant changes to the UK’s constitutional arrangements “require... to be authorised by an Act of Parliament”. Lord Neuberger stressed that “The change in the law required to implement the referendum’s outcome must be made in the only way permitted by the UK constitution, namely by legislation. To proceed otherwise would be a breach of settled constitutional principles stretching back many centuries”.<sup>234</sup> Fifth, withdrawal from the EU would have the effect of removing EU acquired rights of British citizens<sup>235</sup> and in particular rights given to British workers.<sup>236</sup> It is therefore inconceivable for the British Government to withdraw from the EU Treaties without having prior parliamentary authority. Sixth, it is for the British Government to decide what form of legislation will be required. Seventh, after triggering Article 50, to quote Lord Neuberger “relations with the EU are a matter for the UK government”. Eighth, although the Government lost its challenge, the justices were *unanimous* in ruling that there was no legal obligation on the Government to consult with the devolved administrations, namely Scotland, Wales and Northern Ireland. The President of the Supreme Court had this to say “relations with the EU and other foreign affairs matters are reserved to the UK government and parliament, not to the devolved institutions”.<sup>237</sup> As for the application of the Sewell Convention<sup>238</sup> regarding the decision to withdraw from the EU, the Supreme Court considered that it operates as a political constraint on the activity of the UK Parliament and therefore plays an important role in the operation of the UK constitution, nevertheless “the policing of its scope and operation



232 Source: Para. 65 of the judgement. “It operates as a partial transfer of law-making powers, an assignment of legislative competences, by Parliament to EU institutions, unless and until Parliament decides otherwise”. (Paras 67-68).

233 Source: Paras. 78-80 of the judgement.

234 Source: Para. 82 of the judgement.

235 Source: Para. 83 of the judgement.

236 The UNITE Union General Secretary Len McCluskey praised the Supreme Court’s judgement. He said “There has been scant detail in the PM’s statement to date. What she has said on workers’ rights has been ambiguous and her declaration that the country would not seek access to the single market is shocking. It is now for our MPs to hold the government to account. They must defend workers’ rights, both now and from future Conservative Party threats”.

237 Source: paras. 129-130 of the judgement.

238 Which provides that the UK Parliament will not normally exercise its right to legislate with regard to devolved matters without the agreement of the devolved legislature.

is not within the remit of the courts. The devolved legislatures do not have a veto on the UK's decision to withdraw from the EU".<sup>239</sup> Although there is no legal obligation to consult, it would be a politically courteous gesture to do so and indeed Mrs May stated that she intends to consult the devolved administrations. With regard to Scotland the Supreme Court judges were unanimous to reject the Scottish government's argument that Holyrood<sup>240</sup> should have a say in the triggering of Article 50. The Scottish government intervened during the hearing in the Supreme Court with the Lord Advocate James Wolffe argued that MSPs<sup>241</sup> should also be consulted before Article 50 is invoked. The Supreme Court made it clear that devolved administrations should not have a say. With regard to Northern Ireland the Supreme Court held that "this important provision which arose out of the Belfast agreement gave the people of Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland. It neither regulated any other change in the constitutional status of Northern Ireland nor required the consent of the majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union".<sup>242</sup> As for Wales, the Supreme Court held that the Welsh Assembly members do not have to be fully consulted on the article 50 Brexit process. Finally, when the European Communities Act, 1972 was enacted it would have been open for Parliament to authorise ministers to withdraw from the EU Treaties but clear words to that effect would have been required. No such words exist therein and the provisions of that Act indicate that ministers do not enjoy such power to withdraw from the EU.<sup>243</sup>

The implications of this judgement are fivefold. In the first instance the Government cannot, on the strength of the referendum<sup>244</sup> only, commence Brexit talks with the EU negotiators without Parliament giving its backing; this implies closer parliamentary scrutiny of the negotiations. This case defines the limits of the executive power between ministers exercising the ancient power of royal prerogative on the one hand and parliamentary sovereignty on the other. Secondly, a White Paper<sup>245</sup> has been issued by the Government

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239 Source: Paras. 136-151 of the judgement.

240 Namely the Scottish Parliament.

241 I.e. Members of the Scottish Parliament.

242 Source: Paras. 133-135 of the judgement. See Northern Ireland Act 1998 c. 47. The decision to withdraw from the EU is not included in the functions of Secretary of State for Northern Ireland and s. 1 (1) (2) does not regulate any matter other than remaining part of the UK or become part of a united Ireland.

243 Source: Paras. 87-88 of the judgement.

244 The referendum held on 23rd June 2016 was authorised by the European Union Referendum Act, 2015 c. 36. That referendum was of important political significance. Its legal significance however was determined by the contents of the 2015 Act authorising the referendum. Apart from that Act authorising the referendum to be held there was nothing said regarding its consequences. The referendum result necessitated a change in the law of the UK to implement its outcome. The British constitution only permits an Act of Parliament to do so.

245 A White Paper is a government policy document which often precedes the publication of a parliamentary Bill. It states in some depth and detail the Government's proposals for future legislation, - in this case its plans to leave the EU - for scrutiny by Parliament. The White Paper was entitled "The United Kingdom exit from and new partnership with the European Union. Cm. 9417, 2<sup>nd</sup> February, 2017.

for a full discussion on its contents to take place in Parliament. Thirdly, a short Bill<sup>246</sup> has been drafted. Priority will be given to that Bill during its passage through the Commons and the Lords to enable the Government to trigger Article 50 by the end of March, 2017.<sup>247</sup> In the fourth instance, the judgement confirms the important constitutional concept of supremacy of Parliament. Only Parliament can grant and take away citizens' (including workers') rights even though these originate from EU laws. Thus ministers are answerable to Parliament. Finally, resulting from the Supreme Court's judgement it may be said that the referendum itself is an important document which expresses citizens' opinions but, for the Government to proceed with triggering Article 50 without the consent and vote of the Westminster Parliament<sup>248</sup> would constitute a serious breach on an entrenched democratic constitutional principle. Furthermore, it should also be noted, in the words of Justice Neuberger that "The referendum is of great political significance but the act of parliament which established it did not say what would happen as a result".

This case defines the limits of executive powers between ministers on the one hand and Parliament on the other. The Supreme Court did not accept the Government's argument to the effect that Article 50 may be triggered through its prerogative powers relating to an international Treaty. It followed the High Court's ruling and held that the government's executive powers to sign international Treaties, inherited through the royal prerogative do not extend to uprooting parliamentary legislation such as the European Community Act, 1972 which gave specific rights to British citizens. The Supreme Court has restated the fundamental principles of the British constitution, namely, the rule of law, the separation of powers and the independence of the judiciary all of which were challenged in this important case.

### *Referral of Construction of Article 50 to CJEU?*

Some commentators have suggested the possibility of the British Supreme Court referring the matter of the construction of Article 50 to the Court of Justice of the European Union.



246 Namely the European Union (Notification) of Withdrawal Bill 2016-17. Bill 132 2016-17. The Bill confers power on the Prime Minister to notify Article 50 (2) of the Treaty of the European Union, the United Kingdom's intention to withdraw from the European Union.

247 It is not anticipated that there will be much opposition to that Bill. The Labour Opposition said that it would not veto the Bill but that it will seek amendments to prevent the UK from becoming a tax haven and to maintain social rights acquired by workers granted by EU legislation, as well as environmental regulations. Even in the Conservative Government there would be a few who would vote against. The Bill enjoyed a speedy passage through the House of Commons in early February 2017 by reason of the Government having a 16 seat majority. That Bill is intended to be enacted by the end of March, 2017 but its passage could be delayed in the House of Lords which is more EU friendly. Once the Bill has gone through the first and second readings, the committee stage and the third reading in both Houses of Parliament, consideration of the amendments during its passage through Parliament and received the royal assent, it becomes an Act of Parliament, which will empower the UK Government to notify the EU formally of its intention to withdraw from the EU. As for Scotland, the possibility of a referendum on independence has again surfaced!

248 To be noted, the Welsh and Northern Ireland Assemblies and the Scottish Parliament are not included.



In the opinion of this author, such a move would have been unrealistic and irrelevant for a number of reasons, the most important of which is the fact that this is purely a British problem relating to the sovereignty of Parliament concept and particularly the right of the Government to trigger the exit procedure by the use of Article 50. Lord Neuberger made this absolutely clear when he said that the Supreme Court's judgement is not about departing from or staying in, the EU but about the *right of the British Government to trigger the exit procedure*. Such a problem needs to be solved "internally" and not by the CJEU which arguably has no jurisdiction over such British matters.

#### 4.2.7. *The British Government's Brexit strategy versus the Westminster Parliament versus the Civil Service*

Whereas the British Government initially used smoke screens, delaying tactics, was secretive, kept its cards close to its chest and silent on its Brexit strategy, (if indeed it had one<sup>249</sup>), under the guise that such "a running commentary" would damage the UK's negotiating position, it has since climbed down from its original stance and agreed to being more open by giving Parliament more detail on its strategy. Parliament stated categorically that it had the right to scrutinise properly Government policies and demanded that it submitted a negotiating plan<sup>250</sup> in early 2017 and before triggering Article 50 with the proviso that there would be no disclosure of material which could damage the UK's negotiating position. There would thus be more transparency. Publishing a plan does not equate to a "running commentary" for therein that plan, the Government is free to give as much or as little detail as it deems fit. Indeed, Mrs Theresa May did reveal some important details regarding her approach to the negotiations with the EU in her Lancaster House speech of 17<sup>th</sup> January, 2017 and she made the point in stressing that "I shall put the final deal that is agreed between the UK and the EU to a vote in both Houses of Parliament before it comes into force".

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249 See the repeated statements made to that effect, *inter alia*, by the opposition Labour party and the resignation letter of the UK's Ambassador to the EU Sir Ivan Rogers by reason of "muddled thinking" and "ill-founded arguments" of the Theresa May Government. In his letter of resignation some six months after the referendum results were published and three months prior to triggering Article 50, Sir Ivan says "We do not yet know what the government will set as negotiating objectives for the UK's relationship with the EU after exit". Giving advice to his staff in Brussels Sir Ivan tells them "Senior ministers who will decide on our positions, issue by issue, also need from you detailed, unvarnished - even when this is uncomfortable - nuanced understanding of the views, interests and incentives of the other 27" Member States. He goes on to advise "I hope that you will continue to challenge ill-founded arguments and muddled thinking and that you will never be afraid to speak the truth to those in power".

250 See the House of Commons Exiting the European Union Committee "*The process of exiting the European Union and the Government's negotiating objectives*" First Report of Session 2016 -7. H. C. 815. 14<sup>th</sup> January 2017. Mr. Ken Clarke MP remained sceptical regarding the "plan" and in his characteristic blunt manner said that the word "plan" was "extremely vague" whereupon Mr. David Davis MP responded by saying that he would make available "as much information as possible... without prejudicing our negotiating position".

The Supreme Court had given its decision on the High Court judgement<sup>251</sup> and the Government lost its legal challenge over triggering Article 50. The Government was thus compelled to consult Parliament *before* commencing negotiations.

### *Approval by Parliament*

Resulting from the Supreme Court judgement, Brexit could not be launched without the approval of both Houses of Parliament. The European Union (Notification of Withdrawal) Bill 2017<sup>252</sup> was thus forced upon the Government. On 1<sup>st</sup> February, 2017 the House of Commons voted to allow the Prime Minister to trigger Article 50 and thus to start formally the process of leaving the EU by informing the Council President, Donald Tusk, of the UK's intention to invoke Article 50 of the Treaty of the European Union. Triggering Article 50 was backed by 498 to 114 Members of Parliament.<sup>253</sup>

During its passage through the House of Commons 287 amendments were made by opposition MPs some of which were aimed at keeping alive the unlikely prospect of the UK remaining in the EU. Furthermore attempts by opposition MPs to ensure that Parliament obtained an effective vote were defeated. However MPs will have a vote on any deal struck with EU negotiators during the Article 50 process; such vote to take place before any Brexit agreement is voted by the European Parliament. Although many political machinations featured during the parliamentary debates, these will not be subject to discussion suffice to point out that on 8<sup>th</sup> February, 2017 the House approved<sup>254</sup> the Bill authorising the Government to trigger Article 50.

The House of Lords consisting of 805 Conservative<sup>255</sup> Labour, Liberal Democrat and Independent peers voted for Brexit thus avoiding a possible constitutional crisis. Two amendments were however made by the House of Lords. The first was to guarantee the rights of EU citizens in the UK within three months of Article 50 being triggered even if Britons living in the Continent lose their protection. 358 peers voted in favour of amending the Brexit Bill to 256. The second amendment was to force the Government to give both Houses of Parliament a “meaningful vote” on the final Brexit deal before the UK withdraws from the EU. 366 peers voted for the amendment while 268 voted against.

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251 See pp. 42-45 *ante* and especially the last paragraph on pp. 45.

252 Bill 132 2016-17.

253 The Scottish National Party and 33 Labour MPs formed the bulk of the dissenting votes. Other dissenters included Plaid Cymru and seven out of the nine Liberal Democratic Party members and the Conservative MP, Mr Ken Clarke.

254 Such approval was by a majority of 494 votes to 122. The Scottish Parliament rejected outright the decision to trigger Article 50. It had the support of the Scottish Nationalist Party, the Liberal Democratic Party, the Green Party and the majority of the Labour party MSPs. It will be recalled (see p. 43 *ante*) that the devolved Scottish Parliament and Northern Ireland and Welsh Assemblies have no power to delay or prevent the Brexit process.

255 The Conservatives are in the minority with 253 peers.

The Bill returned to the House of Commons which overturned the House of Lords' two amendments with the Government increasing its majority on the first amendment by 335 to 287 votes and on the second amendment by 331 to 286 votes. The House of Lords backed down with opposition Labour refusing to put up a fight with MPs arguing that there was no chance to overturn the opinion of the Commons. The Brexit Bill was passed on 13<sup>th</sup> March, 2017 was met and the Royal Assent was received on 14<sup>th</sup> March, 2017.

*White Paper in response to House of Commons pressure*

The long-awaited White Paper entitled "*The United Kingdom's exit from and new partnership with the European Union*"<sup>256</sup> was the Government's response to pressures from MPs across the House of Commons to provide the themes of the Government's negotiation outcomes. Its contents set out the Government's twelve priorities<sup>257</sup> and the *broad strategy* "that unites them in forging a new strategic partnership" between the UK and the EU. These priorities include, *inter alia*, (a) the bringing to an end the jurisdiction in the UK of the CJEU. Furthermore, EU laws and policies<sup>258</sup> will no longer be binding on the UK and UK laws will be made in London, Edinburgh, Cardiff and Belfast and "based on the specific values of the UK". Thus the Great Repeal Bill will ensure that the British legislature and courts will be the final decision makers. There will therefore be the restoration of the fundamental UK constitutional concept of sovereignty of Parliament.<sup>259</sup> (b) Ensuring an equitable implementation of the new EU and UK relationship will require negotiations to include the provision of a dispute resolution system.<sup>260</sup> (c) The Government, through the Joint Ministerial Committee proposes to reach a good deal with the devolved administrations, - namely Scotland, Northern Ireland, Wales and England - which works for all parts of the UK while maintaining the strong and historic ties with Eire and the Common Travel Area (CTA) consisting of a special travel zone between the UK, Eire, the Isle of Man and the Channel Islands. (d) Controlling immigration is not possible where there is an unlimited freedom of movement of people to the UK from the EU. After Brexit the free movement of people principle will no longer apply and the migration of EU nationals will be subject to UK law. Unlike previous British Governments' policies, the UK has chosen

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256 CM. 9417. 2<sup>nd</sup> February, 2017.

257 These twelve principles are listed in footnote 211 *supra* of this chapter, reiterating a longer version of Mrs Theresa Mays' speech at Lancaster House on 17<sup>th</sup> January, 2017.

258 I.e. Directives, Regulations, Decisions, Recommendations, EU Commission delegated acts, Commission Communications, Reports and Opinions submitted the EU Council, Court of Auditors' Reports, and so on.

259 A fuller explanation of this concept will be found in Jo Carby-Hall "*Parliamentary Supremacy: A British Perspective*" in "*European Constitutions and National Constitutions*" Professor Zbigniew Maciag (Ed) (2009) Krakow Society for Education - AFM Publishing House at pp. 319-333.

260 Such systems are common in EU and third country agreements, e.g. North American Free Trade Agreement (NAFTA) and numerous others to be found in Appendix A of the White Paper at pp. 69-72.

not to make the economy a priority. The “batting order” of the May Government is to end the principle of freedom of movement, thus giving that policy priority over that of the economy. Recognising the valuable contribution economic migrants make to the UK by reason of their high skills, knowledge and expertise the UK will be open to international talent and thus continue to welcome not only migrants from the EU and from third countries to fill skill shortages but also genuine students and academics at the UK’s world class universities. (e) In some cases UK employment laws are gold plated which thus enhances the rights of workers granted to them by EU legislation. The Great Repeal Bill will maintain the protections and standards emanating from the EU which benefit workers and in addition, will enhance them. (f) Ensuring free trade of goods and services between the EU and the UK through a strategic partnership including a free trade agreement and new customs agreement. The UK will not be seeking membership of the single market. (g) After leaving the EU the UK needs to negotiate its own preferential agreements worldwide. The UK will thus not be bound by the EU’s Common External Tariff or participate in the Common Commercial Policy. The UK nevertheless wishes to negotiate on cross-border trade with the EU which will constitute its future EU customs arrangements. The UK will also need to establish schedules covering trade in goods and services at the World Trade Organisation (WTO).<sup>261</sup> (h) The Government intends to secure an agreement with the EU Member States “at the earliest opportunity” on the rights of EU nationals in the UK and those of the UK nationals in the EU. (i) Once the UK leaves the EU, decisions on how taxpayers’ money will be spent will be made in the UK. “As we will no longer be members of the Single Market we will not be required to make contributions to the EU budget. There might be other programmes in which we might want to participate. If so... we should make an appropriate contribution. But that will be a decision for the UK as we negotiate the new arrangements”.<sup>262</sup> (j) The EU Treaties will cease to apply when the “withdrawal agreement enters into force or failing that, two years from the day of submission of notification unless there is a unanimous agreement with the other 27 Member States to extend the process. To avoid a cliff edge for business... as we change from our existing relationship with the EU we want to have reached an agreement about our future partnership by the time the two year Article 50 process has concluded”.<sup>263</sup>

The White Paper states that the Government intends to “keep our positions closely held and will need at times to be careful about the commentary we make public” with Parliament being offered a vote on the final deal.



261 Other negotiation priorities include ensuring that the UK remains the best place for science and innovation; co-operation with the EU in the fight against crime and terrorism and delivering a smooth orderly exit from the EU.

262 Source: White Paper 2<sup>nd</sup> February 2017 *op. cit.* at p. 49.

263 Source: White Paper 2<sup>nd</sup> February 2017 *op. cit.* at p. 65.

“The UK will leave the EU and will seek an ambitious future relationship with the EU which works for all the people of the UK and which allows the UK to fulfil its aspirations for a truly global UK”.<sup>264</sup>

### *Civil Service*

A more worrying issue from the British Government’s point of view appears to be what the former Ambassador to the EU, Sir Ivan Rogers described in his letter of resignation as “Serious multilateral negotiating experience is in short supply in Whitehall” whereas “that is not the case in the Commission or the Council”. He talked about the British Government’s lack of negotiating expertise, know-how and feel and stressed the role of those who have “the best experience we have - a large proportion of which is concentrated in UKREP - and negotiates resolutely”. Stating that Sir Ivan’s resignation was a “serious loss” Lord Mandelson<sup>265</sup> added that “everyone knows that civil servants are being increasingly inhibited in offering objective opinion and advice to ministers” and that “Our negotiation as a whole will go nowhere if ministers are going to delude themselves about the immense difficulty and challenges Britain faces in implementing the referendum decision”.<sup>266</sup> Similar comments have been made by other important figures.<sup>267</sup>

### 4.3. To Conclude

In both Northern Ireland and Scotland where there was a majority in the June, 2016 Referendum to remain in the EU, Brexit could result in fuelling tension amongst both those countries’ separatist movements. Scotland has already taken steps towards independence if its interests are affected by Brexit and the Northern Ireland Good Friday Peace Agreement would well be affected. In spite of those risks it is thought and hoped that reason



264 Source: White Paper 2<sup>nd</sup> February 2017 *op. cit.* at p. 67.

265 Who was a former EU Commissioner for Trade.

266 Other commentators reiterated this very opinion. See the comment made by the Director of the Centre for European Reform Think Tank, Mr Chares Grant who described Sir Ivan as one of the few British civil servants who understood the functioning of the EU with his resignation making “a good deal on Brexit less likely”. Source: <https://euroobserver.com/uk-referendum/136436> (Retrieved 4<sup>th</sup> January, 2017).

267 Lord Ricketts said “If Ivan feels he didn’t have back- up from ministers - and he didn’t - that’s a bad sign”. Sir Simon Fraser suggested that “We know that the government did not have a clear plan for Brexit after the referendum ; we know that the government has been through a process of gathering information across Whitehall in order to put a negotiating position together and we know that that is taking quite a lot of time. So that is a matter for concern”. Lord Kerslake, in praising the civil service said “I have no doubt about the underlying commitment and skills of the civil service to serve the government well on Brexit. But to do this they need to be clearly led, resourced properly to do the job and listened to even when their advice is not welcome”. Sir Stephen Wall stated that “What most civil servants actually want is clear political direction... The sense I get is that at the moment that isn’t there. Civil servants know that the options are, but there is no policy option available that is palatable”. (Source: The Times 5<sup>th</sup> January, 2017 pp. 1-2).



will prevail, and that a political agreement will be reached to make, what is at the time of writing,<sup>268</sup> a “Disunited Kingdom” back into a “United Kingdom”.

The only certainty following each of the various aspects of Brexit discussed in this chapter spells *uncertainty*.<sup>269</sup> Brexit brought about by the June 2016 Referendum resulting in a “leave” majority vote has generated an unbelievable deluge of important challenges in, *inter alia*, the labour law, constitutional law and political fields<sup>270</sup> as well as a divided country in its wake to be solved by the Government of Mrs Theresa May. Mr David Cameron could well have uttered the words of Louis XV himself (in a different context, of course) “*Après moi le déluge*”.<sup>271</sup>

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268 Namely 1<sup>st</sup> March, 2017.

269 See Editorial by JS entitled “*Brexit: the age of uncertainty*” in the *European Law Review* 2016 41(4) 445 -446.

270 The law, administrative and political events are stated as at 1<sup>st</sup> March, 2017.

271 <sup>271</sup> Stated by the French King, Louis XV (1710-1774). That much rehearsed phrase is also attributed to Madame de Pompadour, lover of the Louis XV, who apparently repeated it.