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# A multilevel constitutional perspective on Brexit: From local to global

*a cura di*

**Cristina Fasone e Claudio Martinelli**



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## Foreword

by *Paul Craig*

It is a pleasure to write the foreword to this stimulating set of essays concerning Brexit. There are multiple different perspectives on Brexit, as attested to by the wealth of literature that the topic has generated. The literature has emanated from all disciplines within the social sciences, including law, politics and economics. It has included contributions that are primarily empirical, analytical, conceptual and normative, with many articles that cross these intellectual boundaries.

The set of essays edited by Cristina Fasone and Claudio Martinelli constitutes a valuable addition to this body of scholarship. The overarching theme is the idea of a multilevel constitutional perspective, wherein the different levels range from the local to the global. The title accurately captures the essays in this volume. The richness of the chapters attests to the salience of the theme around which the book has been constructed. The constitutional perspective informs the narrative of each author, and the plethora of different such perspectives speaks to the valuable intellectual lessons to be learned through this focus. The division between the two parts of the book provides a natural architecture for the discussion within the respective parts.

Thus, there are a plethora of issues that are interesting and difficult in equal measure concerning the implications of Brexit for the constitutional arrangements within the UK. It is refreshing to see these issues addressed not simply from a Westminster perspective. The chapters reveal the different constitutional implications that Brexit has had in different parts of the UK, and the discussion in each instance is insightful and revealing. The constitutional dimensions of the Northern Ireland Protocol continue to reverberate in Westminster, Belfast, Dub-

lin and Brussels. Brexit refuelled aspirations for Scottish independence, given that Scotland voted to remain, and given also the way in which Scottish concerns were largely ignored in the aftermath of the Brexit referendum, when the Withdrawal Agreement was being negotiated. The constitutional implications of this continue to reverberate, with constitutional issues raised before the UK Supreme Court as to whether Scotland can hold any kind of referendum without approval from Westminster.

There are equally important issues concerning the implications of Brexit that are dealt with in the second half of the book, where the focus shifts to the EU and international level. The EU institutions performed well under the strain of the Brexit negotiations. The President of the European Council and the President of the Commission operated in tandem to good effect, belying fears that a dual Presidency for the EU would generate tension and division. There are, nonetheless, a host of more particular constitutional issues that require consideration in the light of Brexit. A number of these are skilfully analysed in the chapters in part two of the book. They include the future of the EU viewed horizontally and vertically, the implications of Brexit for the making of external agreements, the way in which cooperation on matters of security and criminal justice will operate in a post-Brexit world, and the very nature of the trade deal struck between the EU and the UK.

This book is a valuable contribution to the literature on Brexit, which sheds light on the topic from multiple constitutional perspectives.

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# Introduction – Brexit as a Multilevel Constitutional Challenge

by *Cristina Fasone* and *Claudio Martinelli*

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## Contents

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1. Multilevel Constitutionalism at the Test Bench. – 2. Investigating Brexit in a Multilevel Constitutional Context. – 3. Overview of the Volume.

### 1. *Multilevel Constitutionalism at the Test Bench*

Ever since the theory of multilevel constitutionalism was developed<sup>1</sup> there has never been a process in place with such a level of complexity and unpredictability as Brexit. The withdrawal of the United Kingdom (UK) from the European Union (EU) represents an unprecedented challenge to the operation and functioning of legal systems whose “Constitutions” (written and unwritten) unfold across several layers of government, strongly intertwined and interdependent, as it is for the relationship between the Union and its constituent units, the Member States<sup>2</sup>. And this is so both from the perspective of

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<sup>1</sup> See I. PERNICE, *Multilevel constitutionalism and the Treaty of Amsterdam*, in *Common Market Law Review*, n. 36, 1999, p. 703 ff. and the revised and critical account provided by L.F.M. BESSELINK, who prefers to speak of a *Composite European Constitution*, European Law Publishing, Zutphen, 2007.

<sup>2</sup> According to I. PERNICE, *op. cit.*, p. 707, “The concept [multilevel constitutionalism] treats European integration as a dynamic process of constitution-making instead of a sequence of international treaties which establish and develop an organiza-

the vertical (the form of State) and horizontal (the form of government) separation of powers and for the protection of fundamental rights, even for a country, like the United Kingdom, which has never subscribed to the enforcement of the Charter of fundamental rights in the EU<sup>3</sup>.

Effective as of 1 February 2020, with the EU-UK Trade and Cooperation Agreement signed on 30 December 2020 and entered into force on 1 May 2021, Brexit has paved the way to fundamental transformations in the constitutional systems of the UK and of the EU, even where those changes were not formally codified.

More than six years after the Brexit referendum, on 23 June 2016, the UK Constitution and the constitutional settlement of the EU both look very different compared to the status quo pre-Brexit. This is particularly so if one considers – as it is for this book – the relationships between levels of government within the UK and between the UK, the EU and the rest of the world.

On the first issue, one can wonder what is left of the Union in the UK today. The Brexit referendum and the path taken afterward, under the famous mantra “Brexit means Brexit”<sup>4</sup>, have fundamentally shaken the foundations of the devolution up to the point of questioning whether the Union is going to survive. Indeed, pursuing Brexit at any cost while constituent parts of the UK eminently disagreed with this option, notably Scotland and Northern Ireland, has led to an intensification, if not an explosion, of constitutional conflicts between the centre and the periphery of the Kingdom<sup>5</sup>. How could one name the re-

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tion of international cooperation. The question ‘Does Europe need a Constitution’ is not relevant, because Europe already has a ‘multilevel constitution’: a constitution made up of the constitutions of the Member States bound together by a complementary constitutional body consisting of the European Treaties (*Verfassungsverbund*). The European Union is a divided power system, in which each level of government – regional (or *Länder*), national (State) and supranational (European) – reflects one of two or more possible political identities of the citizens concerned.”

<sup>3</sup> Indeed, it is well known that the UK negotiated and obtained an opt-out from the Charter since the very beginning. See C. BARNARD, *The ‘Opt-Out’ for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?*, in S. GRILLER-J. ZILLER (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Springer, Wien/New York, 2008, p. 257 ff.

<sup>4</sup> Based on the famous speech of Theresa May on 30 June 2016.

<sup>5</sup> Amongst many, see G. SAPUTELLI, *Brexit e devolution nel Regno Unito: quando è lo Stato (e non l’UE) a mostrare i suoi limiti*, in *DPCE online*, n. 4, 2020, p. 4707

vamping of the Scottish claims for independence<sup>6</sup>, after the failed secessionist referendum of 2014, or the prospect of the reunification between Northern Ireland and the Republic of Ireland<sup>7</sup> otherwise? However, we also witness new tensions in local government in England for example<sup>8</sup>, the only region that, except for London, had not been affected by the devolution process.

The way the Brexit negotiations were conducted, and the Brexit agreement was sealed – *de facto* excluding the devolved regions<sup>9</sup> – the implementation of the many Acts of Parliament accompanying the withdrawal process and, even more so, the adoption of the EU-UK Trade and Cooperation Agreement have possibly irremediably undermined the basic level of mutual trust needed for a country to remain united. In this regard, it is sufficient to recall here, on the one hand, the prospect of a second Scottish independent referendum and the judgment of the UK Supreme Court (in the framework of a reference proceeding)<sup>10</sup> which has excluded the competence of the Scottish Parliament to pass an independence referendum bill<sup>11</sup> – the first time the secession process is somewhat subject to judicial review in the UK, in

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ff.; A.L. YOUNG, *What impact has Brexit had on Devolution?*, in *Constitutional Law Matters*, 5 May 2022; R. MASTERMAN, *Brexit and the United Kingdom's Devolutionary Constitution*, in *Global Policy*, n. 13, 2022, p. 58 ff.; C. MARTINELLI, *La Brexit e la Costituzione Britannica. Come e perché il Regno Unito è uscito dall'Unione Europea*, Giappichelli, Torino, 2023.

<sup>6</sup> See, e.g. S. TIERNEY, *The Scottish Parliamentary Elections and the "Second Referendum" Debate*, in *Blog of the UK Constitutional Law Association*, 10 May 2021.

<sup>7</sup> J. WEBBER, *Ireland's reunification talk grows louder*, in *Financial Times*, 9 October 2022.

<sup>8</sup> See S. TROILO, *Il local government e la Brexit*, in C. MARTINELLI (ed.), *Il referendum Brexit e le sue ricadute costituzionali*, Maggioli, Rimini, 2017, p. 315 ff. and P. LEYLAND, *England Unincorporated: Reflections on the Constitutional Way Ahead Post Brexit?*, in this Volume.

<sup>9</sup> See the Miller I case: UK Supreme Court, *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*, [2019] UKSC 41.

<sup>10</sup> S. DOUGLAS-SCOTT, *A Second Scottish Independence Referendum in the UK Supreme Court*, in *Verfassungsblog*, 14 October 2022.

<sup>11</sup> UK Supreme Court, Judgment on the Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998, Michaelmas Term, [2022] UKSC 31, 23 November 2022.

contrast to the eminently political procedure followed in 2012-2014; on the other hand, the umpteenth political crisis in Northern Ireland<sup>12</sup>, with the dissolution of the Stormont and new elections in 2023, following Brexit and the largely unsatisfactory settlement of the UK-Irish border<sup>13</sup>, which further increases the chances for a “Border poll” in the future<sup>14</sup>.

On the second issue, namely, the impact of Brexit at supranational and international level, we can equally detect a series of unprecedented (though expected by the most acute observers<sup>15</sup>) constitutional challenges<sup>16</sup>. One can easily recall here the way the UK’s withdrawal has affected the composition and functioning of EU institutions<sup>17</sup>. While the transition to a post-Brexit EU has been relatively smooth for the intergovernmental institutions, like the Council of Ministers of the EU and the European Council, the consequences for the European Parliament and Court of Justice have been much more controversial<sup>18</sup>.

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<sup>12</sup> See e.g. M.C. MURPHY, *Northern Ireland and Brexit: where sovereignty and stability collide?*, in *Journal of Contemporary European Studies*, n. 3, 2021, p. 405 ff.

<sup>13</sup> For more details on the problems raised by the Northern Ireland Protocol and its implementation, see F. FABBRINI (eds.), *The Law & Politics of Brexit: Volume IV – The Protocol on Ireland / Northern Ireland*, Oxford University Press, Oxford, 2022 and the chapter by G. ANTHONY, *Northern Ireland’s Post Brexit Constitution*, in this Volume.

<sup>14</sup> On such a “Border poll” and the possible outcomes, see J. COAKLEY, *A Farewell to Northern Ireland? Constitutional Options for Irish Unity?*, in *The Political Quarterly*, n. 2, 2022, p. 307 ff.

<sup>15</sup> Cf. K.A. ARMSTRONG, *Brexit Time. Leaving the EU – Why, How and When?*, Cambridge University Press, Cambridge, 2017, p. 137 ff.; C. MARTINELLI, *L’isola e il Continente: un matrimonio di interesse e un divorzio complicato. Dai discorsi di Churchill alle sentenze Brexit*, in C. MARTINELLI (ed.), cit., p. 9 ff. and G. SACERDOTI, *The Prospects: The UK Trade Regime with the EU and the World: Options and Constraints Post-Brexit*, in F. FABBRINI (ed.), *The Law and Politics of Brexit: Volume I*, Oxford University Press, Oxford, 2017, p. 71 ff.

<sup>16</sup> One of the latest challenges has to do precisely with the implementation of the Northern Ireland Protocol in the UK that has triggered the launching of several infringement proceedings by the European Commission between June and July 2022: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_4663](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4663).

<sup>17</sup> For an overview, L. GORI, *L’impatto della Brexit sulla composizione delle istituzioni europee*, in *Quaderni costituzionali*, n. 2, 2020, pp. 436-439.

<sup>18</sup> As the UK was outside the euro area by choice, the European Central Bank, instead, has not been directly affected.

Since Brexit was postponed several times, MEPs from the UK constituencies were in the end elected in May 2019. As a consequence, they were full members of the European Parliament for more than 18 months, save leaving overnight just before Brexit day. The fate of the 73 “UK seats” was much discussed, before the decision was made to redistribute part of them to the least represented “countries” in the institution, according to the principle of degressive proportionality, and to stock the rest for future accessions. Indeed, one alternative option, endorsed by many, but failed nonetheless, would have been to allocate all the vacant seats or part thereof to a transnational electoral constituency, to improve the supranational commitment of the European Parliament<sup>19</sup>.

Even more doubtful, from a legal perspective, has been the “re-shuffle so to say” of the Advocate Generals at the CJEU following Brexit. Indeed, unlike the judges of the Court, who are one per Member State (two each for the General Court) though they by no means represent the interest of their country, there are 11 Advocate Generals who come from various jurisdictions within the Union and, notably eight were from the biggest Member States and the remaining four were allotted on a rotating basis. The UK, in practice, was “entitled” to have an Advocate General. The last was Eleanor Sharpston, who, however, was kicked off the Court in the aftermath of Brexit (and replaced, as decided by the Member States, by a Greek Advocate General) even though there is no EU law provision requiring the post of Advocate General to be covered by a European citizen<sup>20</sup>. More than reasonably so, scholars have highlighted this move by the Member States and the Luxembourg Court itself as being against the rule of law principles that the CJEU convincingly preaches within and outside the Union<sup>21</sup>.

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<sup>19</sup> See A. CIANCIO, *Brexit e Parlamento europeo*, in *Federalismi.it*, n. 16, 2017, pp. 1 ff.; F. FABBRINI-R. SCHMIDT, *The Composition of the European Parliament in Brexit Times: Changes and Challenges*, in *European Law Review*, n. 44, 2019, p. 710 ff.

<sup>20</sup> See L. CLÉMENT-WILZ, *The Advocate General: A Key Actor of the Court of Justice of the European Union*, in *Cambridge Yearbook of European Legal Studies*, n. 14, 2012, p. 587 ff.

<sup>21</sup> D. KOCHENOV-G. BUTLER, *Independence of the Court of Justice of the European Union: Unchecked Member States power after the Sharpston Affair*, in *European Law Journal*, nn. 1-3, 2021, p. 262 ff.



From the fundamental rights' perspective beyond the UK, Brexit has equally triggered problems both for the UK citizens in other Member States and for the European citizens in the UK. Think of the landmark CJEU judgment in *Préfet du Gers and Institut national de la statistique et des études économiques* (Case 673/20), of 9 June 2022, dealing with residence and social rights of the UK nationals resident in the EU and EU citizens resident in the UK, after the EU-UK Withdrawal Agreement<sup>22</sup>. The European Court found, for example, that, as a consequence of Brexit, the loss of EU citizenship on the part of UK nationals has deprived them of the ability to vote in local elections in the EU Member States although they are a long-term resident: they are treated exactly as any other third country national. In addition to this, by virtue of a long-standing UK rule, the UK citizen in question, a resident of France since 1984, had also lost the right to vote in local elections in the UK<sup>23</sup>, being that UK nationals are disenfranchised if they reside for more than 15 years abroad. In this case, it is patent that, whereas multilevel constitutionalism is often thought of multiplying rights and entitlements for the citizens, the sudden reshaping of the multilevel constitutional relationship has worked the other way around, notably subtracting rights from the former beneficiaries.

Also at international level, Brexit has triggered a considerable amount of uncertainty both in commercial and security policy and in geopolitics at large. Indeed, the conclusion of the EU-UK trade and cooperation agreement cannot simply be framed within the new EU practice to conclude comprehensive trade agreements with third countries. There is much more to that, also in relation to the functioning of the EU internal market and the role of the UK in the future of trade policy on a global scale and in the WTO. As to the security issue, Brexit and the partnership agreement have had a profound impact at local and at global level. Indeed, the UK withdrawal from the EU has undermined the basis of the Good Friday Agreement, reviving the ten-

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<sup>22</sup> See T. BUCHTA, *Clarifying the Court's judgment in Préfet du Gers on UK nationals' voting rights in local elections in the EU post-Brexit*, in *European Law Blog*, 1 July 2022.

<sup>23</sup> Indeed, British citizens living abroad for 15 years or more without registering to vote in the UK lose their voting rights "at home". Over the last few years several bills were introduced to overcome this limitation (e.g. the Overseas Electors' Bill 2017-19).

sion and the threat of a civil war in Northern Ireland after more than 20 years of peace<sup>24</sup>. Globally and especially in the present situation, with the Russian invasion of the Ukraine, while the UK confirms its firm commitment to the NATO alliance, not having the UK in the EU can limit the effectiveness of the European institution's plan and action, from the standpoint of security and defense<sup>25</sup>.

## 2. Investigating Brexit in a Multilevel Constitutional Context

Brexit has been the object of various strands of legal investigation, which is particularly rich and elaborate. Many have focused on the domestic implications of Brexit and the fate of the devolved regions<sup>26</sup>; others, instead, have looked at Brexit in the supranational and international context, pointing to the effects triggered beyond the UK<sup>27</sup>. While multilevel constitutional analyses have been proposed, they have mainly pictured the first stages of the Brexit process, notably the period from the celebration of the Brexit referendum till the conclu-

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<sup>24</sup> See D. PHINEMORE-K. HAYWARD, *UK Withdrawal ('Brexit') and the Good Friday Agreement*, Study for the AFCO Committee, European Parliament, November 2017, PE 596.826. In particular the common – UK and Irish – membership of the Council of Europe and the EU was a precondition for the peace settlement.

<sup>25</sup> B. TONRA, *Defence and Foreign Policy*, in F. FABBRINI (ed.), *The Law and Politics of Brexit: Volume III. The Framework of New EU-UK Relations*, Oxford University Press, Oxford, 2021, p. 179 ff.

<sup>26</sup> See, for example, just to mention some scholars who have engaged with this dimension, J.O. FROSINI, *Una doppia secessione? Il futuro del Regno Unito dopo la Brexit*, in C. MARTINELLI (ed.), *Il referendum Brexit*, cit., p. 271 ff.; S. TIERNEY, *The Territorial Constitution and the Brexit Process*, in *Current Legal Problems*, n. 1, 2019, p. 59 ff.; K. ARMSTRONG, *Brexit Time*, cit., p. 139 ff.; A. MCHARG, O. DOYLE-J. MURKENS (eds.), *The Brexit Challenge for Ireland and the United Kingdom. Constitutions under Pressure*, Cambridge University Press, Cambridge, 2021; C. MARTINELLI, *La Brexit e la Costituzione Britannica*, cit.

<sup>27</sup> See F. FABBRINI, *Brexit and the Future of the European Union: The Case for Constitutional Reforms*, Oxford University Press, Oxford, 2020; C. CALLIESS, *The Future of Europe after Brexit: Towards a Reform of the European Union and its Euro Area*, in *Yearbook of European Law*, n. 4, 2021, p. 3 ff.; P. CRAIG, *Brexit a Drama, The Endgame – Part II: Trade, Sovereignty and Control*, in *European Law Review*, n. 2, 2021, p. 129 ff.; C. BARNARD-E. LEINARTE, *Movement of Goods under the TCA*, in *Global Policy*, n. 13, 2022, p. 106 ff.

sion of the withdrawal agreement<sup>28</sup>. Moreover, those analyses have not dealt with the intertwined repercussions of Brexit on the various levels of government, from the local to the global setting, and, in most cases they have proceeded by policy area without paying specific attention to the institutional dimension and to fundamental rights' protection.

This book tries to convey Brexit and its present and future challenges from the perspective of the constitutional interdependences between the local, the national and the supranational levels of government. Indeed, Brexit has made it clear that, despite the myth of claiming "to take back control!", today there is no authority that can validly pretend to be sovereign and to command its own destiny having been engaged in a regional integration process for years, as it was for the UK in the EU. That sovereignty in the European context no longer exists according to the traditional category of the "sovereign state" is a *fait accompli* that many scholars have also highlighted in the past<sup>29</sup>. What is new in the post-Brexit era, however, is the awareness that, where the process of integration is so deep, far-reaching and pervasive, constitutional developments occurring at subnational level in one of the EU countries or in a former Member State can fundamentally alter the supranational and the domestic dynamics elsewhere, as the case of the Scottish independents claims or the Northern Ireland question can prove. And vice versa: Decisions taken at EU level – for example the type of withdrawal a country is going to negotiate – can reshape the constitutional identity of the withdrawing country and, indirectly, even call its territorial integrity into question.

This should sound as an alarm bell for any other EU country inclined to risk the path of the withdrawal from the Union. Indeed, as things stand, the claims for "Gre-xit", "Ital-exit" and "Fre-xit", just to name a few, have almost disappeared in their most violent forms<sup>30</sup>,

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<sup>28</sup> See, for example, P. CRAIG, *Brexit: A Drama in Six Acts*, in *European Law Review*, n. 41, 2016, p. 447 ff.; ID., *Brexit, A Drama: The Interregnum*, in *Yearbook of European Law*, n. 36, 2017, p. 3 ff.

<sup>29</sup> See, e.g., N. MCCORMICK, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford University Press, Oxford, 2002, and D. GRIMM, *Sovereignty. The Origin and Future of a Political and Legal Concept*, translated by B. COOPER, Columbia University Press, New York, 2015.

<sup>30</sup> At the latest Italian elections, on 25 September 2022, the new party "Italexit"

following the turmoil triggered by Brexit. The paradox, however, is that a more subtle, but no less dangerous, form of “rebellion” against the EU has arisen: To remain within the Union, benefiting from the prerogatives and the public goods it delivers (notably, regarding the internal market), without abiding to its foundational rules (i.e. the respect of the principle of primacy and of the EU values under Article 2 TEU)<sup>31</sup>. Countries’ free riding attitude, indeed, can also be eminently problematic in terms of allegiance to the community of values and to the European identity that the Union aspires to protect<sup>32</sup>.

In other words, in such a context of multilevel interdependences, Brexit has also triggered a broader set of constitutional questions, surrounding the meaning and the scope of membership and constitutional loyalty within domestic and supranational “compound democracies”<sup>33</sup>. What are the limits and the boundaries of the membership not to be trespassed to remain fully committed and loyal to the Union (in our case, being the Union represented by both the EU and the United Kingdom in its relationship with the devolved regions)? Can the constitutional identity discourse be used to justify or, on the contrary, to prevent secession and withdrawal<sup>34</sup>? Indeed, according to some and depending on the constitutional text we look at, the participation in the EU (but the same can apply to anti-secessionist clauses in the Constitutions) could even be considered as an unamendable constitutional principle<sup>35</sup>.

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obtained just 2% of the votes and, thus, has not been entitled to any seat in the Parliament, given the electoral threshold.

<sup>31</sup> See, for example, the ruling of the Polish Constitutional Tribunal, n. K 3/21, of 7 October 2021, which has led some to talk of a veiled “Pol-exit”. See, for instance, A. ŁAZOWSKI-M. ZIÓŁKOWSKI, *Knocking on Polesit’s door?*, in *CEPS Updates*, 21 October 2021.

<sup>32</sup> See Court of Justice of the EU, Cases C-156/21, *Hungary v. Parliament and Council*, and C-157/21, *Poland v. Hungary and Council*, 16 February 2022.

<sup>33</sup> On this concept, see S. FABBRINI, *Compound Democracies: Why the United States and Europe Are Becoming Similar*, Oxford University Press, Oxford, 2010.

<sup>34</sup> For a comparison between the two, see C. CLOSA, *Troubled Membership: Secession and Withdrawal*, in C. CLOSA, (ed.), *Secession from a Member State and Withdrawal from the European Union*, Cambridge University Press, Cambridge, 2017, p. 1 ff. and E. FRANTZIOU, *Was Brexit a Form of Secession?*, in *Global Policy*, n. 13, 2022, p. 69 ff.

<sup>35</sup> For such an interpretation in relation to the Italian Constitution, see N. LUPO, *L’art. 11 come “chiave di volta” della Costituzione vigente*, in *Rassegna parlamentare*, n. 3, 2020, p. 379 ff.

At the same time, as the second part of the book shows, alongside other current threats like the pandemic and the war in Ukraine, Brexit could also deeply affect the external dimension of the Union's action in various policy areas (from commercial policy to security)<sup>36</sup>, being, on the one hand, a constraint, and, on the other, an enabler for a new equilibrium following the departure of an influential Member State. From this standpoint, one can even wonder whether the premises and the consequences of the withdrawal from the EU could be the same as for Brexit, should a small Member State or, by contrast, a founding Member State decide to leave the EU. In fact, it is well known that the UK has always been the Member State with most opt-outs<sup>37</sup>, so it used to also be one of the least integrated countries inside the EU.

All in all, this book aims to show that, when zooming in on the UK constitutional system, its specificities, and on the internal and external challenges posed by Brexit, it is very difficult (and possibly not methodologically sound) to use the UK as a benchmark of what would happen in case of withdrawal from the EU by any other Member State. This is so also due to Article 50 TEU's insistence on the national constitutional requirements of the State at stake, when it comes to any decision to withdraw<sup>38</sup>. The Brexit process was triggered in a legal system that lacks a unique and rigid constitutional text regulating, with ad hoc procedures and qualified majorities, referendums and the dynamic of the devolution, for instance. Moreover, the asymmetric nature of the devolution, the aspiration of Scotland to become independent and to rejoin the EU, and the controversial status of Northern Ireland<sup>39</sup> have been further exacerbated by Brexit.

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<sup>36</sup> Cf. K.A. ARMSTRONG, *Brexit Time*, cit., p. 151 ff. and O. GARNER, *Justice and Home Affairs*, in F. FABBRINI (ed.), *The Law & Politics of Brexit: Volume III. The Framework of New EU-UK Relations*, Oxford University Press, Oxford, 2021, p. 157 ff.

<sup>37</sup> Amongst many and in addition to the already recalled opt-out from the Charter, one can also mention those from the Schengen area and from the Economic and Monetary Union.

<sup>38</sup> See, P. CRAIG, *The Process: Brexit and the Anatomy of Article 50*, in F. FABBRINI (ed.), *The Law and Politics of Brexit*, Oxford University Press, Oxford, 2017, p. 49 ff.

<sup>39</sup> G. ANTHONY, *Brexit and the Irish Border: Legal and Political Questions*, Briefing paper for British Academy and Royal Irish Academy, October 2017, <https://>

Yet, Brexit can still work as a proxy to what separatist claims may lead to when they operate on multiple levels of government (supranational, national and regional) and in an entangled constitutional setting that certainly the EU is today.

### 3. *Overview of the Volume*

This book represents one of the outputs of the Research Project of National Significance (PRIN) 2017 on “The constitutional implications of European separatist claims”, coordinated by Alessandro Torre at national level. In particular, the collection is the result of the research activities carried out by the team at LUISS University focusing on the constitutional consequences of Brexit at the national and supranational level.

On 29-30 October 2021, the research Team at LUISS University, in cooperation with LUISS Centre for Parliamentary Studies, the Devolution Club and the Jean Monnet Module on “Supranational Integration and National Identities” at the University of Milano-Bicocca, organized a conference with national and foreign scholars, whose contributions were first published in a special issue of *Federalismi.it* devoted to the “Constitutional Implications of Brexit” (Issue 10/2022).

The volume here collects and systematize the essays written in English, which first appeared in the special issue, in an edited collection on “A Multilevel Constitutional Perspective on Brexit: From Local to Global”. They are preceded by a Foreword by Paul Craig and a new Introduction by the co-editors.

Taking stock of the growing literature on the topic<sup>40</sup>, the objective

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*www.ria.ie/sites/default/files/ba-border-2-online.pdf*, p. 3 ff.; C. MCCALL, *Border Ireland. From Partition to Brexit*, Routledge, London, 2021, p. 82 ff.; D. DE MARS-A. O'DONOGHUE, *Beyond Matryoshka Governance in the Twenty-First Century: The Curious Case of Northern Ireland*, in A. MCHARG-O. DOYLE-J. MURKENS (eds.), *The Brexit Challenge for Ireland and the United Kingdom*, cit., p. 64 ff.

<sup>40</sup> Amongst the monographic works only, see K. ARMSTRONG, *Brexit Time: Leaving the EU – Why, How and When?*, Cambridge University Press, Cambridge, 2017; G. BALDINI-E. BRESSANELLI-E. MASSETTI, *Il Regno Unito alla prova della Brexit*, Il Mulino, Bologna, 2021; F. CAPRIGLIONE-R. IBRIDO, *La Brexit tra finanza e politica*, Utet, Torino, 2017; F. FABBRINI, *Brexit and the Future of the European Union: The Case for Constitutional Reforms*, Oxford University Press, Oxford, 2020; P. MARIANI, *Lasciare l'Unione europea. Riflessioni giuridiche sul recesso nei giorni di Brexit*,

of this book is to engage with – two years after the signature of the EU-UK partnership agreement, three years after “Brexit day” and six-and-a-half years after the withdrawal referendum – the effects that such a complex and multifaceted phenomenon has produced on classic notions of contemporary constitutional law, like vertical separation of powers, and on the theory of multilevel constitutionalism, combining together the domestic-sub-national UK dimension of analysis with the supranational and international dimension, both in the relationship between the EU and the Member States and between the EU and the outside world.

Despite the multi-disciplinary nature of this endeavor – in between constitutional law, comparative law, EU and international law – all the authors deal with, from their own specific perspective, the same research question: Which constitutional implications has Brexit determined and which are likely to be triggered in the near future based on the relationship between the various levels of government within and beyond the UK?

As was convincingly argued by Beniamino Caravita elsewhere<sup>41</sup>, here Brexit is treated as a turning point, intended to affect the understanding of traditional categories and constitutional concepts like State, federalizing process, secession and constitutional democracy for the years to come. Indeed, Brexit can be seen as a milestone in the theory and practice of secession, in line with the approach of a regulated and negotiated secession envisaged by the Supreme Court of Canada in the famous reference on the secession of Quebec ([1998] 2 SCR 217), but never put into practice in that legal system<sup>42</sup>. The contents of Article 50 TEU, the way EU membership can be terminated, the management of the interdependence between levels of govern-

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Igea, Milano, 2018; G. MARTINICO, *Il diritto costituzionale come speranza*, Giappichelli, Torino, 2019; F. SAVASTANO, *Uscire dall'Unione europea. Brexit e il diritto di recedere dai Trattati*, Giappichelli, Torino, 2019; J.O. FROSINI, *Dalla Sovranità del Parlamento alla Sovranità del Popolo. La rivoluzione costituzionale della Brexit*, Cedam, Padova, 2020; C. MARTINELLI, *La Brexit e la Costituzione Britannica*, cit.

<sup>41</sup> B. CARAVITA, *Secession, withdrawal, and the experience of the European Union*, in *federalism.it – Costituzionalismo multilivello nel terzo millennio: scritti in onore di Paola Bilancia*, 2 February 2022, espec. p. 3 ff.

<sup>42</sup> On the use (and abuse) of the Quebec secession reference in comparative law, see G. DELLEDONNE-G. MARTINICO (eds.), *The Canadian Contribution to a Comparative Law of Secession. Legacies of the Quebec Secession Reference*, Springer, New York, 2019.

ment, and the provision of a transition period are proof of a bargained secession, though *sui generis*. Therefore, as anticipated, Brexit can be perceived both as a “precedent” within the EU vis-à-vis new withdrawal attempts by other Member States and, from a comparative perspective, as a point of reference for federalizing processes characterized by separatist claims.

The first part of the volume, on “The devolution and the separatist claims in the aftermath of Brexit”, is opened by Peter Leyland’s chapter on England that highlights the existence of a “democratic deficit” in the UK Parliament due both to the electoral system in place for the House of Commons and for the missing transformation of the House of Lords into a Senate of the regions. Moreover, the contribution deals with the recent governmental initiative to establish “City Regions” in England as an attempt to cope with persistently asymmetric devolution. Lastly, the author critically reviews the *Internal Markets Act* and the *Subsidy control bill* and their doubtful compatibility with the Devolved Acts.

Aileen McHarg, instead, focuses on Scotland, tracing back the various secessionist initiatives put forward in the past prior to the withdrawal from the EU. The chapter examines how Brexit has affected the constitutional preferences of the voters in Scotland and considers the prospects for the separatist claims in light of the Scottish elections of 2021, of the national government’s strategy on a future independence referendum, and of the various options at stake.

Gordon Anthony’s chapter, on the delicate situation in Northern Ireland, the *Good Friday Agreement*, and the Northern Ireland *Protocol*, follows. It analyzes the political tensions surrounding the government of the region, the complex enforcement of the Brexit agreements (the withdrawal and the partnership agreements) and on the case law stemming from it.

Oran Doyle closes the first part of the book dealing with the post-Brexit separatist claims from the perspective of the Republic of Ireland and in a comparative perspective, inside and outside of the United Kingdom. The chapter delves into the articulated process that should be followed in the event of a reunification between Northern Ireland and the Republic of Ireland and the numerous constitutional questions that need to be tackled in such circumstances. It also addresses the main lessons to be learnt from Brexit, in particular for the rules presiding over the celebration of referendums and for the difficulty to negotiate in a context of mutual distrust between the parties.



In the second part of the volume on “The European and international implications of Brexit”, Robert Schütze’s chapter engages with the prospective impact of Brexit on the future constitutional landscape of the EU, in particular on the hypothesis of further enlargements or, rather, of the deepening of the integration process. It is argued that Brexit has indeed affected EU integration, by stimulating a serious reflection on the avenues to achieve a closer Union, driving Europe in the opposite direction compared to the motto “take back control”, which has characterized the UK withdrawal. Marise Cremona’s contribution, instead, focuses on how the way the EU-UK partnership and cooperation agreement was negotiated could influence the EU relationships with third countries. The chapter supports that Brexit has let a clearer distinction between the various types of EU external agreements to emerge, especially between “integrational” and “transactional” agreements, and has helped to better identify the “red lines” not to pass with a view to the conclusion of future agreements. Filippo Fontanelli’s chapter follows, highlighting how Brexit has significantly changed the regime of the UK trading with third countries. It analyzes the new status quo set by the EU-UK partnership and cooperation agreement and what the likely scenario would have been in the event of *no deal*. The author emphasizes that the agreement signed looks like a pretty effective free trade agreement (compared to the option of grounding trade on the rules of the World Trade Organization only) instead of considering it like a downgrading of the preferential relationships shaping the EU internal market. Last but not least, Valsamis Mitsilegas deals with the challenges of global security in the post-Brexit context, in particular on the effectiveness of the criminal action, with regard to the overcoming of the European arrest warrant, and the adherence of the future EU-UK relationships on security to EU fundamental values.

All in all, these contributions, from a variety of different legal disciplines and approaches, aim to disentangle the conundrum of Brexit from a multilevel constitutional perspective ranging across the various layers of government. They try to read the withdrawal process according to the interdependent effects it triggers between sub-national, national and supranational authorities, whereby the implications of Brexit on the devolved regions retroact in the EU and international arena and vice versa. Never before have the weight and influence of (regional and national) separatist claims been so far-reaching as in the Brexit saga.

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