THE "BREXIT" CASE BEFORE THE CONSTITUTIONAL JUDGES OF THE UNITED KINGDOM: COMMENTS REGARDING THE DECISION OF THE HIGH COURT OF JUSTICE OF NOVEMBER 3, 2016, CONFIRMED BY THE SUPREME COURT IN DECISION DATED JANUARY 24, 2017*

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One of the most important decisions on constitutional law adopted by the courts of the United Kingdom has been that issued by the High Court of Justice on the 2d of November, 2016, ratified by the Supreme Court of the United Kingdom on 24th of January, 2017, with regard to the *"Brexit case,"* that is, concerning the United Kingdom's withdrawal from the European Union as a result of the referendum held on this matter on June 23, 2016. This political decision may be the most important decision adopted to this date within the framework of European regional integration, which, since its inception, has been a political process generated hand in hand with constitutional law. [1]

Our intention in this paper is to give an account of the most relevant contents of such decisions in light of contemporary constitutional principles, particularly those regarding the separation of powers pertaining to relationships between Parliament and the Executive Branch of the Government according to the principles of parliamentary sovereignty and the limitations of the Crown's prerogative powers on regulatory matters.

I. SOME PRINCIPLES OF BRITISH CONSTITUTIONALISM

While it is true that the United Kingdom does not have a Constitution to be found

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1 See Allan R. Brewer-Carías, "Constitutional Implications of Regional Economic Integration" (General Report, XV International Congress of Comparative Law, International Academy of Comparative Law, Bristol September 1998), in Allan R. Brewer-Carías, *Études de Droit Public Comparé*, Bruillant, Bruxelles, pp. 453-522. Also see Allan R. Brewer-Carías, *Las implicaciones constitucionales de la integración económica regional*, Cuadernos de la Cátedra Allan R. Brewer-Carías de Derecho Público, Universidad Católica del Táchira, Editorial Jurídica Venezolana, Caracas 1998.

entirely in a written document adopted by the people according to principles deriving from modern constitutionalism,[2] this does not mean there is an absence of a constitution or constitutional law. On the contrary,

> "the United Kingdom has its own form of constitutional law, as recognised in each of the jurisdictions of the four constituent nations. Some of it is written, in the form of statutes, which have particular constitutional importance. Some of it is reflected in fundamental rules of law recognised by both Parliament and the courts. These are established and well-recognized legal rules which govern the exercise of public power and which distribute decision-making authority between different entities in the State and define the extent of their respective powers."[3]

The foregoing is not something that has been said in any writings or book on the constitutional law of the United Kingdom or on comparative constitutional law, but was stated by the High Court of Justice *(Queen's Bench Division, Divisional Court*) of the United Kingdom, in its decision of 3rd of November, 2016, issued in *Gina Miller* et al. v the *Secretary of State for Exiting the European Union,* [4] precisely to decide on a constitutional matter, none other than to determine whether under the constitutional order of Great Britain it is possible for the Government, in exercising the Crown's prerogative powers and without the intervention and prior decision of Parliament, to decide to serve notice on the European Union, under Article 50 of its Treaty, of the decision on the United Kingdom's withdrawal from said Union, pursuant to the people's recommendation expressed in the referendum of 23 of June, 2016. Said referendum was carried out according to the Law approved by the Parliament in 2015 (*European Union Referendum Act 2015*), on the matter of whether the United Kingdom should remain or withdraw from the European Union,[5] the people's response having been, as is known, that the United Kingdom should withdraw from said Union.

To decide on the proposed constitutional matter, the High Court confirmed that in the United Kingdom, as a constitutional democracy, the bodies of the State are subordinated to the rule of law, wherefore the courts of the United Kingdom, as

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2 See Allan R. Brewer-Carías, *Principios del Estado de Derecho. Aproximación Histórica*, Cuadernos de la Cátedra Mezerhane sobre democracia, Estado de derecho y derechos humanos, Miami Dade College, Editorial Jurídica Venezolana International, Miami 2016, pp. 38 ss

3 Case *Gina Miller* et al. v *the Secretary of State for Exiting the European Union (*(Case No: CO/3809/2016 and CO/3281/2016). See the text of the decision: https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union-accessible/

4 *Idem*

5 See http://www.legislation.gov.uk/ukpga/2015/36/contents/enacted/data.htm. The question in the referendum was: "*Should the United Kingdom remain a member of the European Union or leave the European Union?*"

stated by the High Court itself, have a:

> "constitutional duty fundamental to the rule of law in a democratic state to enforce the rules of constitutional law in the same way as the courts enforce other laws."

This statement by the High Court is without doubt one of the most clear acknowledgements by the British judicial bodies regarding the existence of a constitutional jurisdiction in the United Kingdom,[6] based on which the High Court, exercising its power of judicial review, confirmed that in order to decide on this specific case, it was precisely called upon to:

> "apply the constitutional law of the United Kingdom to determine whether the Crown has prerogative powers to give notice under Article 50 of the Treaty on the European Union to trigger the process for withdrawal from the European Union."

All this set clear that the United Kingdom has a constitution as supreme rule that prevails over State decisions, and that the courts have judicial review powers over state decisions.[7]

II. THE "BREXIT" CASE

The case of *Gina Miller et al. v the Secretary of State for Exiting the European Union* before the High Court was, therefore, a typical constitutional proceeding or judicial review of the constitutionality of the Government's decision,[8] in this case of a preventative nature, in view of the British Government's official announcement that was made public after the governmental readjustment caused by the outcome of the referendum, to give notice to the European Union of the United Kingdom´s withdrawal therefrom.

In this proceeding, the High Court based its decision on the consideration that the *European Communities Act* of 1972 (*ECA 1972*), [9] which made the community law effective in the national legal system of the United Kingdom, was a constitutional law to which the Government was subject and which it could in no way modify by exercising the Crown's prerogative powers.

The constitutional rank ("constitutional statute") of the Act, according to the High Court, was confirmed in due time by the House of Lords in *R* v *Secretary of*

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6 I anticipated this some years ago when analyzing the situation of the constitutional courts in comparative constitutional law. See Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators in Comparative Law*, Cambridge University Press, New York 2010, p. 25

7 Something that had not been readily accepted some decades ago. See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989.

8 See, in general, regarding constitutional proceedings: Allan R. Brewer-Carías, *Derecho Procesal Constitucional. Instrumentos para la Justicia Constitucional*, Editorial Jurídica Venezolana International, 2015.

9 See in http://www.legislation.gov.uk/ukpga/1972/68/contents

State for Transport, ex p. Factortame Ltd [1990] 2 AC 85, deeming that the ECA 1972 was in force as long as it remained in the statute book, granting a direct and prevailing effect to the law of the European Union over the primary domestic or national legislation. That is, by virtue of the *ECA 1972*, the national courts give full effect to the law of the European Union as part of the internal law applied by them.

As Lawton LJ stated in *Thoburn v Sunderland City Council* [2003] QB 151 (DC) at [62], quoted in the decision: "It may be there has never been a statute having such profound effects on so many dimensions of our daily lives," considering the ECA 1972:

> "as a constitutional statute, having such importance in our legal system that it is not subject to the usual wide principle of implied repeal by subsequent legislation. Its importance is such that it could only be repealed or amended by express language in a subsequent statute or by necessary implication from the provisions of such a statute. Similarly, the ECA 1972 was described as one of a number of constitutional instruments by Lord Neuberger of Abbotsbury PSC and Lord Mance JSC in *R (Buckinghamshire County Council)* v *Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WI.R 324. at [207]."

Said parliamentary law, of a constitutional rank, sealed the incorporation of the United Kingdom into the European Community, which was materialized on the 1st of January, 1973, and was enacted as a result of the condition established in the Community's law: that in order for the same to be incorporated into domestic law, it should be approved by a primary legislation in each State. As stated by the High Court in its decision,

> "the Crown could not have ratified the accession of the United Kingdom to the European Communities under the Community Treaties unless Parliament had enacted legislation. Legislation by Parliament was needed to give effect to EU law in the domestic law of the jurisdictions in the United Kingdom as was required by those Treaties and as was necessary to give effect in domestic law to the rights and obligations arising under EU law."

The constitutional proceeding before the High Court, questioning the possibility that the Government alone decide on the United Kingdom's withdrawal from the European Union, was brought by a British citizen who filed an action equivalent to the so-called *acción popular de constitucionalidad* for judicial review of constitutionality in Latin American law.[10] The *actio popularis* was filed precisely

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[10] See Allan R. Brewer-Carías, "Acción popular de inconstitucionalidad," in Eduardo Ferrer Mac-Gregor, Fabiola Martínez Ramírez, Giovanni A. Figueroa Mejía (Coordinadores), *Diccionario de derecho procesal constitucional y convencional*, Poder Judicial de la Federación, Consejo de la Judicatura Federal, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, Serie Doctrina Jurídica, Nº 692**,** pp. 232-233.

Something that was not readily accepted some decades ago. See Allan R. Brewer-Carías,

against the Government's purported intention to give such notice, and the court recognized such citizen's legal standing since such challenge could be brought by everyone in the United Kingdom or with British citizenship whose interests might be affected if the notice to withdraw from the European Union were served. The claimant in the proceeding was joined by other persons and lawyers dealing, among others, with matters of parliamentary sovereignty; the impact that such notice would have on the freedom of movement rights under the EU Law of British citizens who lived in other member States and had access to public services there; and how would the immigration status of persons living in the United Kingdom be affected as a result of the notice under Article 50.

It was accepted that the defense of this case be conducted by the U.K.'s Secretary of State for Exiting the European Union, considering that it was the appropriate body to act in the name of the Government on behalf of the Crown, thus covering the action by any other minister of the government.

III. THE CONSTITUTIONAL MATTER POSED

The matter posed by the plaintiffs to the High Court was that:

> "it is a fundamental principle of the UK constitution that the Crown's prerogative cannot be used by the executive government to diminish or repeal rights under the law of the United Kingdom (whether conferred by common law or statute, unless Parliament has given authority to the Crown (expressly in or by necessary implication from the terms of an Act of Parliament) to diminish or abrogate such rights."

The plaintiffs also argued that one cannot find any express or implicit word in the *ECA 1972* or in any other subsequent legislation related to the European Union, whereby Parliament would have conferred such authority to the executive government to start the process of terminating the European Union Treaty; and that Parliament did not grant any authority to the Crown in the *Referendum Act of 2015*, to serve the notice referred to in Article 50 of the Treaty on the European Union.

This was, as stated in the decision, a "pure matter of law" that was deemed entirely justiciable under the United Kingdom constitution, which, of course, had nothing to do with the merits or demerits of the decision to exit the European Union, which the Court deemed to be "a political issue"[11] beyond its jurisdiction.

The justiciable matter, as inferred from the plaintiffs' allegations, was ultimately to determine whether under the constitutional law of the United Kingdom, the Government, in exercising the Crown's prerogative powers and without

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Judicial Review in Comparative Law, Cambridge University Press, Cambridge 1989.

[11] The Court added in its decision that the same "cannot interfere *in* the government's policies, because government policy is not law. The policies to be applied by the executive branch of the government and the merits or demerits of the exit are matters of political opinion to be settled through a political process."

Parliament's intervention, could serve, pursuant to Article 50 of the Treaty on the European Union, the official notice of the governmental decision to exit the same; basing this on the assumption, which had been accepted by the parties, that neither the *Referendum Act of 2015* nor any other Act of Parliament had conferred upon the Government any legal authority other than the prerogative powers of the Crown, that would enable it to give said notice under Article 50.

On the other hand, the Court also stated that the system governing the European Community's procedure for a State to exit the European Union implies that once a State gives notice of its decision under Article 50 of the Union's Treaty, there starts to run a term of two years to negotiate a withdrawal agreement. This notice, as accepted by the Government in the proceeding", cannot be subject to conditions such as, for example, the Parliament's approval. The consequence of this notice according to Article 50 is, as noted by the Court, that upon completing the State's process for exiting the European Union, British citizens will unavoidably lose some of the rights sanctioned in the law of the European Union, which precisely were included in the domestic law of the United Kingdom by the *ECA 1972*.

IV. CONSTITUTIONAL PRINCIPLES OF THE UNITED KINGDOM CONSIDERED

In deciding the case, the High Court analyzed the "constitutional principles" of the United Kingdom, highlighting what it stated to be the most fundamental rule of the UK's constitution: "that Parliament is sovereign and, as such, can make and unmake any law it chooses;" one of the aspects of Parliament's sovereignty, established hundreds of years ago, being that the Crown –that is, the Government- cannot exercise its prerogative powers to repeal legislation enacted by Parliament.

The Court deemed that this principle was of the utmost importance when analyzing the context of the general rule on which the Government sought to base its argument in this case, which was the executive branch's competence, in exercising Royal prerogative powers, to conduct international relations and enter into or denounce treaties on matters deemed to fall within the scope of such prerogative powers.

The High Court deemed that such a general rule actually exists, but is only valid on the international scope, not having such prerogative any effect on the domestic law established in the legislation enacted by Parliament. Citing Lord Oliver of Aylmerton in his presentation in the *Tin Council case*, *J.H. Rayner (Mincing Lane) Ltd* v *Department of Trade and Industry* [1990] 2 AC 418, at 499E-500D, the High Court deemed that

> "as a matter of constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament."

Lord Oliver of Aylmerton concluded by stating the principle that "a treaty is not part of English law unless and until it has been incorporated into the law by legislation."

Therefore, in deciding, the High Court stated – which the Government accepted and argued in a positive way -, that if the notice were served pursuant to Article 50, this would inevitably alter the effects of domestic law in the sense that the legal provisions of the European Union that Parliament had made part of domestic law by enacting the *ECA 1972*, in due time would thereupon cease to be effective.

The Government's main allegation to counteract this reasoning was that it should be assumed that Parliament, when enacting the *ECA 1972*, had the intention to consider that the Crown would retain its prerogative powers to decide on the United Kingdom's exiting the Treaties on the European Community (today, the Treaty on the European Community), and also that the Crown would have the power to decide whether the law of the European Union should continue to be in effect in the sphere of the domestic law of the United Kingdom. The High Court did not accept this reasoning in its decision, but rather deemed that there were no grounds for this in the *ECA 1972*, dismissing it and accepting the arguments brought forth by the plaintiffs, on the basis of the language used by Parliament in said Law, on the constitutional principle of Parliament's sovereignty, and on the Crown's lack of power to change domestic law by exercising its prerogative powers.

Based on these arguments, the High Court of Justice decided that the Government of the United Kingdom had no power based on the Royal prerogative power to serve the notice contemplated in Article 50 of the Treaty on the European Union for the United Kingdom to withdraw from or exit the European Union.

V. A LESSON ON THE CONSTITUTIONAL LAW OF THE UNITED KINGDOM

Besides the importance that the decision by the High Court of Justice of the United Kingdom had for the European community law and for the future of the European Union, the decision of 3rd of November, 2016, is of special importance for those interested in constitutional law, particularly Continental and Latin American law, because the same is in itself, as stated, a clear lesson on the contemporary constitutional law of the United Kingdom, particularly with regard to the rules governing the relationship between the legislative and executive powers, established on the basis of the constitutional principles of parliamentary sovereignty and the prerogative power of the Crown.

1. Principle of Sovereignty of the Parliament of the United Kingdom

In fact, as argued by the High Court, the primary rule of the United Kingdom's constitutional law is the principle of the sovereignty of Parliament, that is of the "Crown in Parliament", which is sovereign, so that the legislation enacted "by the Crown with the consent of both Houses of Parliament is supreme."

Consequently, only Parliament can enact the primary legislation of the United Kingdom and change the laws however it may decide, there being no law above the primary legislation, with the sole exception of cases in which Parliament itself has expressly provided that this be otherwise; as is precisely the case of the ECA 1972, whereby it granted precedence to the law of the European Union over the acts of Parliament.

But, even in those cases, Parliament continues to be sovereign and supreme, and to have full powers to remove any authority or rank given to other laws by means of previous primary legislation.

To summarize, the Court concluded that, "Parliament has the power to abrogate the *ECA 1972*, if it so resolves," going on to review the traditional doctrinal principles of British constitutional law, starting with what it considered the leading doctrine contained in the book of professor A.V. Dicey, *An Introduction to the Law of the Constitution*, where he explains that the parliamentary sovereignty principle means that Parliament has:

> "the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament,"[12]

In the opinion of the High Court, this means, among other things, that a law cannot be said to be invalid because it is opposed to the electorate's opinion, since as a legal principle:

> "The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the grounds of its having been passed or being kept alive in opposition to the wishes of the electors."[13]

This Parliamentary sovereignty principle, as stated by the High Court, has been recognized in many cases by leaders of the highest judicial authority, wherefore, since it is an accepted principle, it has merely quoted the presentation made by Lord Bingham of Cornhill in *R (Jackson) v Attorney General* [2005] UK HI. 56; [2006] 1 AC 262 at para., stating that "the bedrock of the British constitution… is the supremacy of the Crown in Parliament..."

2. On the matter of the limits of the Crown´s prerogative powers

As to the powers of the Crown pursuant to its prerogative (often referred to as "regal prerogative"), the Court touched on its extension, considering that such "prerogative powers are the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown," citing in support thereof what was stated by Lord Re in *Burmah Oil Co (Burma Trading) Ltd* v *Lord Advocate*

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[12] Quoted by the Court: "p. 38 of the 8th edition, 1915, the last edition by Dicey himself; and see chapter 1 generally."

[13] Quoted by the Court: "*ibid.* pp. 57 and 72."

[1965] AC 75, at 101:

> "The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute."

With regard to the prerogative, the Court stated that an important aspect of the Parliamentary sovereignty principle is that the primary legislation is not subject to replacement by the Crown by exercising its prerogative powers; further adding that the "constitutional limits" on such powers are even more extensive, considering that the Crown has those prerogative powers only when they are recognized by the common law and their exercise is only effective within the limits acknowledged thereby. Beyond these limits, the Crown has no power to alter laws, whether they be part of common law or the legislation.

The Court stated that the subordination of the Crown, and particularly that of the executive Government, to the law, is the foundation of the rule of law in the United Kingdom, with its roots settled much before the war between the Crown and Parliament in the 17th Century, which was finally confirmed, as heretofore acknowledged, in the agreement reached after the Glorious Revolution of 1688.[14]

To support this statement, the Court then cited what Sir Edward Coke referred as his opinion and that of contemporary judges of renown regarding the *The Case of Proclamations* (1610) 12 Co, Rep. 74, in the sense that "The King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm," and that "the King hath no prerogative, but that which the law of the land allows him."

This, in the opinion of the High Court, was confirmed in the first two parts of the First Section of the Bill of Rights of 1688, to wit:

> "Powers of suspension: The pretended power of suspending the laws and dispensing with laws by regal authority without consent of Parliament is illegal.
>
> "Late dispensing power – That the pretended power of dispensing with laws or the execution of laws by regal authority as it hath been assumed and exercised of late is illegal."

This legal stance, as the High Court recalled, was summarized by the *Privy Council,* in *The Zamora* [1916] 2 AC 77, at 90, as follows:

> "The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by the Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make the rules having the force of statutes, but all such rules

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[14] See comments that we made on this matter in Allan R. Brewer-Carías, *Reflexiones sobre la revolución norteamericana (1776), la revolución francesa (1789) y la revolución hispanoamericana (1810-1830) y sus aportes al constitucionalismo moderno*, 2ª Edición Ampliada**,** Serie Derecho Administrativo No. 2, Universidad Externado de Colombia, Editorial Jurídica Venezolana, Bogotá 2008.

derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity…"

The High Court considered these principles to be generally accepted, hence deeming it unnecessary to explain them in greater detail, and on the basis thereof it analyzed the matter of the Crown's power to make and unmake treaties, with reduced effects in the international sphere and no effects on domestic law, as explained above.

VI. CONSTITUTIONAL INTERPRETATION AND CONSTITUTIONAL CONTROL

With this, the Court went on to exercise its constitutional oversight over the Executive's intention to issue the notice contemplated in Article 50 of the Treaty on the European Union, deemed to be a constitutional law, without the intervention of Parliament, for which the Court set a series of criteria on constitutional interpretation.

1. The principle of the presumption of constitutionality of Acts of Parliament

The first one was the classical criterion of the presumption of constitutionality of Parliament's acts, in the sense that where constitutional principles are strong, there is a presumption that "Parliament legislates in conformity with them and not to undermine them," citing multiple judicial decisions in support thereof, for example, considering that there is a strong presumption against Parliament being deemed to have intended to give retrospective effect to a legal provision, even if the language used in the statute might appear to create such effect; as well as with regard to the territorial effects of statutes. There is also strong presumption that Parliament does not intend to preclude access to the ordinary courts for determination of disputes.[15] The High Court continued its reasoning stating that:

"All these presumptions can be overridden by Parliament if it so chooses, but the stronger the constitutional principle the stronger the presumption that

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[15] Quotes by the Court: "see, for example, *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 AC 147. Another example, debated at some length at the hearing, is the principle of legality, i.e. the presumption that Parliament does not intend to legislate in a way which would defeat fundamental human rights: see R v *Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539 at 573G, 575B-G (Lord Browne-Wilkinson) and *R* v *Secretary of State for the Home Department, ex p. Simms* [2000] 1 AC 115, 131D-G (Lord Hoffmann). see, for example, *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 AC 147. Another example, debated at some length at the hearing, is the principle of legality, i.e. the presumption that Parliament does not intend to legislate in a way which would defeat fundamental human rights: see R v *Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539 at 573G, 575B-G (Lord Browne-Wilkinson) and *R* v *Secretary of State for the Home Department, ex p. Simms* [2000] 1 AC 115, 131D-G (Lord Hoffmann)."

Parliament did not intend to override it and the stronger the material required, in terms of express language or clear necessary implication before the inference can properly be drawn that in fact it did so intend. Similarly, the stronger the constitutional principle, the more readily can it be inferred that words used by Parliament were intended to carry a meaning which reflects the principle."

This interpretation was important, in the opinion of the High Court, because the Secretary of State, in his argument when interpreting the *ECA 1972* omitting part of the constitutional background referred to above, alleged that it was up to the appellants to identify the express language in the statute that eliminated the Crown's prerogative with regard to the conduct of international relations on behalf of the United Kingdom. That is, the Secretary of State alleging in his defense that it was necessary to find an express and, in any event, clear language that evidenced that Parliament had the intention to remove the Crown's prerogative power to take the necessary steps for the United Kingdom to withdraw from the European Communities and the Treaty on the European Community.

In making this allegation, in the Court's view, the Secretary of State did not assign in his analysis of the *ECA 1972*, any value to the constitutional principle that, only when Parliament legislates otherwise, the Crown's prerogative powers cannot be used to amend the law of the land.

Consequently, the High Court dismissed the allegations of the Secretary of State on the grounds of two constitutional principles.

2. The principle that the Crown has no prerogative power to alter domestic legislation

First, the constitutional principle that the Crown has no prerogative power to alter domestic legislation, which in the opinion of the High Court, is the result of an especially strong constitutional tradition of the United Kingdom and the democracies which follow that tradition.[16] The principle evolved through the long struggle referred to above, which asserted parliamentary sovereignty and restricted the Crown's prerogative powers. For this reason, the High Court deemed that it would have been surprising if, in light of that tradition, Parliament, as the sovereign body under the Constitution, should have intended to leave the continued existence of all the rights it introduced into domestic law by enacting the *ECA 1972* subject to the choice of the Crown, in exercising its prerogative powers, either to allow the Community Treaties to continue in place or to have the United Kingdom withdraw therefrom. The High Court added, as Lord Browne-Wilkinson put it in *R* v *Secretary of State for the Home Department, ex p. Fire Brigades Union* [1995] 2 AC 513 at 552E:

"It is for Parliament, not the executive, to repeal legislation. The constitutional

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[16] Quote by the Court: "see for example the New Zealand decision in *Fitzgerald v Muldoon* [1976] 2 NZLR 615 at 622).'

history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body."

In this context, the High Court also deemed it relevant to bear in mind the profound effects which Parliament intended to produce on domestic law by enacting the *ECA 1972*, which precisely has led to its being identified as a "statute of special constitutional significance," wherefore due to the profound and extended legal changes it brought about, it is especially unlikely that Parliament intended to leave their continued existence in the hands of the Crown through the exercise of its prerogative powers. Parliament having taken the major step of setting the direct and prevailing effect of the EU law in the national legal system, by passing the *ECA 1972* as primary legislation, it is not plausible to suppose that Parliament intended that the Crown be able, through its own unilateral action pursuant to its prerogative powers, to eliminate its effect.

Moreover, the High Court stated that the *ECA 1972*, as a constitutional statute is such that Parliament is deemed to have made it exempt from the operation of the usual doctrine of implied repeal by enacting the subsequent inconsistent legislation.[17] To the contrary, no part of the Law can be repealed if Parliament does not clearly state such repeal in a subsequent legislation, that is to say, that it is what it wishes to do. The High Court concluded by stating that:

> "since in enacting the *ECA 1972* as a statute of major constitutional importance, Parliament has indicated that it should be exempt from casual implied repeal by Parliament itself, still less can it be thought to be likely that Parliament nonetheless intended that its legal effects could be removed by the Crown through the use of its prerogative powers."

3. The principle that the conduct of international relations is a matter for the Crow with no effect on domestic law

The second constitutional principle referred to by the Court in deciding was the above-mentioned principle that the conduct of international relations is a matter for the Crown through the use of its prerogative powers, and that those powers have no effect on domestic law, it being a principle accepted by the courts that this is a field of action left to the Crown without the interference of Parliament. But the justification for a presumption of non-interference with the Crown's prerogative in the conduct of international affairs is substantially impaired in the case at issue, in which the Secretary of State, to the contrary, stated that he could bring about major changes by exercising the Crown's prerogative powers, and this was rejected by the Court.

The High Court's conclusion when interpreting the *ECA 1972* in light of the constitutional background referred to above, sets it clear that Parliament's intention

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[17] Quote by the Court: "see *Thohurn v Sunderland City Council,* at [60]-[64], and section 2(4) of the ECA 1972."

when enacting that Law and introducing the law of the European Union into domestic law was that this could not be undone by the Crown through its prerogative powers. That is, the enactment of the *ECA 1972* precludes the Crown's prerogative powers to decide on the United Kingdom's exiting the Treaties on the Community and affect the rights of citizens thereunder by serving the notice set in Article 50 of the Treaty on the European Union; consequently, rejecting the allegations made by the Secretary of State.

Finally, the High Court referred to the *Referendum Act of 2015* regarding the UK and the European Union, agreeing with the fact that the Secretary of State did not argue that the same allegedly granted statutory power to the Crown to serve the notice under Article 50 of the Treaty on the European Union, for this allegation would be untenable as a matter of statutory interpretation.

In the opinion of the High Court, the *Referendum Act of 2015* was interpreted in light of the basic constitutional principles of Parliamentary sovereignty and representative democracy applied in the United Kingdom, which lead 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 in question," but no such language is found in the text of the Referendum Act of 2015.

Moreover, in the case of the *Referendum Act of 2015*, the High Court recalled that the relevant act:

> "was passed against a background including a clear briefing paper to parlamentarians explaining that the referendum would have advisory effect only. Moreover, Parliament must have appreciated that the referendum was intended only to be advisory as the result of a vote in the referendum in favour of leaving the European Union would inevitably leave for future decision many important questions relating to the legal implementation of withdrawal from the European Union."

In any event, the High Court concluded in its judgment that it "did not question the importance of the referendum as a political event, the significance of which will have to be assessed and taken into account elsewhere," finally deciding that "the Secretary of State has no power under the Crown's prerogative, to issue the notice pursuant to Article 50 of the *Treaty on the European Union* for the United Kingdom to exit the same."

VII. CONFIRMATION OF THE DECISION OF THE HIGH COURT OF JUSTICE BY THE SUPREME COURT OF THE UNITED KINGDOM

The decision of the High Court of Justice of 3rd of November, 2016, after being appealed by the Government, was confirmed by the Supreme Court of the United Kingdom in a judgment issued by a majority of 8 to 3, on 24th February, 2016 (Case: *R (on the application of Miller an another) v Secretary of State for Exiting the*

European Union) ([2017 UKSC 5) (UKSC 2016/0196),[18] ratifying that in this case, it was necessary that an Act of Parliament authorize the Ministers to give notice of the decision on the United Kingdom's exit from the European Union.

It should be noted that after the High Court's decision of November 3, 2016, and having filed the appeal, on December 7, 2016, the House of Commons adopted a resolution calling upon the ministers to give by March 31, 2017, the relevant notice on the United Kingdom's withdrawal from the European Union, in accordance with Article 50 of the Treaties. However, in the opinion of the Supreme Court, with what the Government agreed upon in the proceeding, it was only a political decision that in no way affected the matters arising from the appeals in the proceeding.

Among such matters, the most important that was considered to decide the appeal was the Supreme Court's holding that the terms of the *ECA 1972*, which gave effect to the United Kingdom's becoming a member of the European Union, are inconsistent with the claim that Ministers can exercise any power regarding the exit of the United Kingdom from the Treaties on the European Union without Parliament's prior authorization.

In the Court's opinion, Section 2 of the *ECA 1972* authorized a dynamic process whereby the law of the European Union became a source of law of the United Kingdom, prevailing over the application of all other sources of the domestic law thereof, including the statutes. Therefore, while the *ECA 1972* remains in force, its effects are those of making the law of the European Union as an independent and prevailing source of domestic law. The Supreme Court also deemed that *the ECA 1972* brought about a partial transfer of law-making powers and assignment of legislative competences by Parliament to the institutions of the European Union, except and until Parliament otherwise decides. This implies that the domestic law of the United Kingdom would change if the same ceases to be a member of the Treaties on the European Union, and that the rights arising from the community's law that are enjoyed by the residents of the United Kingdom would be affected.

The Supreme Court analyzed the Government's argument that the *ECA 1972* had not excluded the Ministers' power to withdraw the United Kingdom from the Treaties on the European Union, and that Section 2 of the Law set forth for the exercise of such power when giving effect to the law of the European Union only and up to the moment that the power to decide on the exit is to be exercised. However, the Supreme Court indicated that there is a vital difference between the changes that may occur in the law of the United Kingdom as a result of changes in the law of the European Union, and the changes that may result from exiting the Treaties on the European Union. In the latter case, if the relevant notice is served, the unavoidable result would in truth be a fundamental change in the constitutional

[18] See text of the decision in: https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf See press information on the decision in https://www.supremecourt.uk/cases/docs/uksc-2016-0196-press-summary.pdf

framework of the United Kingdom, for this would imply the elimination of the sources of law of the European Union in the domestic sphere.

In the Supreme Court's view, such a change in the constitution of the United Kingdom must be effected through parliamentary legislation. Furthermore, the fact that the United Kingdom's exiting the European Union implies the elimination of certain domestic rights enjoyed by the residents of the United Kingdom, makes it impossible for the Government to decide to exit the Treaties of the European Union without Parliament's prior authorization.

Of course, when Parliament enacted the *ECA 1972*, it could have authorized the ministers to decide on the United Kingdom's exit from the Treaties on the European Union, in which case, however, this possibility would have to be clearly set forth in the express text of the Law, which did not occur. To the contrary, not only is there no clear wording on this matter, but the provisions of the *ECA 1972* itself expressly state that ministers do not have such power. And the fact that ministers are accountable to Parliament for their actions is not a useful constitutional answer to settle the matter at issue, especially if the power to act does not exist, and if the decision would irrevocably void Parliament itself from acting.[19]

In any event, in the opinion of the Supreme Court, the subsequent legislation related to the European Union enacted after 1972, including the introduction of parliamentary controls with regard to decisions adopted by ministers at the level of the European Union with regard to the competencies thereof or the process for creating community regulations, although not to give the notice contemplated in Article 50 of the Treaties, is entirely consistent with Parliament's assumption that there is no power to decide the United Kingdom's exit from the Treaties in the absence of a statute that authorizes it.

Finally, the Supreme Court, in its decision, also referred to the 2016 referendum, considering that while it was an event of great political importance, its legal meaning was that established by Parliament in the Law that authorized it, and the Law merely provided for it to be carried out, but did not specify its consequences. Therefore, the Supreme Court deemed that the changes in law required for implementing the results of the referendum could only be made in the sole manner permitted by the constitution of the United Kingdom, that is, by means of legislation.

The outcome of this entire constitutional proceeding carried out before the bodies competent to exercise the Constitutional Jurisdiction in the United Kingdom was, therefore, that the exit thereof from the Treaties on the European Union could only be settled by an act of Parliament deciding on the matter, and that the political recommendation expressed in the 2016 referendum had no constitutional legal effect.

This was the criterion set forth in their decisions both by the High Court of Justice

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[19] Quote by the Court: "The Supreme Court of the United Kingdom Parliament Square London SW1P 3BD T: 020 7960 1886/1887 F: 020 7960 1901 www.supremecourt.uk."

and the Supreme Court of the United Kingdom, in a proceeding for judicial review or constitutional control, rejecting the possibility for the Executive to have any competence to make this decision without Parliament's prior authorization.

VIII. OUTCOME OF THE JUDICIAL REVIEW PROCEEDING AND NEW CONSTITUTIONAL CHALLENGES

The general conclusion of this entire constitutional proceeding carried out before the competent Courts in the United Kingdom on matters of Judicial Review was, therefore, that the exit from the Treaties on the European Union could only be decided through an act of Parliament, and that the political recommendation expressed in the 2016 referendum had no constitutional or legal obligatory effect.

This was the criterion set forth in their decisions both by the High Court of Justice and the Supreme Court of the United Kingdom, in the proceeding for judicial review or constitutional, rejecting the possibility for the Executive to have any competence to make this decision without Parliament's prior authorization.

The immediate consequence of the judicial decisions was that on 16 of March 2017, at the request of the Government, the Parliament passed the *European Union (Notification of Withdrawal) Act 2017*, conferring "power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU."[20] The Prime Minister interpreted such Act of Parliament, as she explained in the letter dated 29 of March 2017 that she sent to Donald Rusk, President of the European Union, triggering Article 50 of the European Union Treaty,[21] as an Act that "confirmed the result of the referendum by voting with clear and convincing majorities in both of its Houses for the European Union (Notification of Withdrawal) Bill."

That is why in her statement she made before the Parliament that same day, she began by saying that: "On 23 June last year, the people of the United Kingdom voted to leave the European Union," explaining that although "that decision was no rejection of the values we share as fellow Europeans," and that "the referendum was a vote to restore, as we see it, our national self-determination," she insisted that the government was acting "on the democratic will of the British people, " and that "the United Kingdom is leaving the European Union" " in accordance with the wishes of the British people."[22]

The *European Union (Notification of Withdrawal) Act 2017* was fallowed this year by the *European Union (Withdrawal) Act 2018*, devoted to repeal the *European Communities Act 1972*, on exit day, and also to make other provision in connection

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[20] See in http://www.legislation.gov.uk/ukpga/2017/9/contents/enacted/data.htm

[21] See in https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50/prime-ministers-letter-to-donald-tusk-triggering-article-50

[22] See in https://www.gov.uk/government/speeches/prime-ministers-commons-statement-on-triggering-article-50

with the withdrawal of the United Kingdom from the European Union.[23]

In any case, due to the emphasis that was given by the Prime Minster in supporting the government decision to exit the European Union, to the will of the people as expressed in the 2016 Referendum, a group of British citizens residing in other Member States of the European Union (Susan Wilson & Others Complains representing various associations named *Bremain in Spain*, *Fair Deal Forum, British in Italy, and Brexpats*), recently filed (13 of August 2018) before the High Court of Justice (Queen's Bench Division, Administrative Court) a new claim for Judicial Review against the Prime Minister; seeking from the Court to declare that "the Referendum result" as well as the "Decision and Notification are vitiated by reason of corrupt and illegal practices in the Referendum."[24]

As stated in the Complaint:

> "The Prime Minister and the Secretary of State have repeatedly stated the basis for the Prime Minister's decision to withdraw the UK from the EU was that a majority of those who voted in the referendum voted in favour of leaving the EU and the Government had promised to honour the result of the referendum.
>
> It follows that the basis for the Prime Minister's decision to withdraw and notify was her understanding that there had been a lawful, free and fair vote which had produced a result of 51.89% of those voting, voting in favour of the UK leaving the EU (or 34.73% of the voting public, turnout according to the Electoral Commission)." [25]

The Claimants argued that the Prime Minister was obliged to exercise its powers according to the *European Union (Withdrawal) 2017 and 2018 Acts*, in a "lawfully and rationally" way, subjected to "public law principles, in accordance with: (i) the principle of legality; (ii) common law principles of constitutionality;" and (iii) "in accordance with the UK's constitutional requirements" and among them, the "well established principles which value and seek to preserve the integrity of democracy, including the voting process, as well as lawful decision-making."

In the case of the Referendum, the Claimants argued that "it is now clear that it was not conducted in accordance with the UK's constitutional requirements, including the express statutory provisions regulating campaigning in the Referendum," founding its arguments on two recent (May and July 2018) *Reports*

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23 See in http://www.legislation.gov.uk/ukpga/2018/16/introduction/enacted

24 See the document on the case, Susan Wilson & Others Claimants , and The Prime Minister Defendant, Grounds For Judicial Review (Croft Solicitors) 13 August 2018 in http://www.croftsolicitors.com/wp-content/uploads/2018/08/239484-Grounds-for-Judicial-Review-and-Statement-of-Facts.pdf. See also the information in: http://www.croftsolicitors.com/croft-solicitors-are-representing-clients-in-a-court-challenge-against-brexit-on-the-ground-of-the-breaches-of-electoral-law-of-the-campaigns-during-the-2016-referendum/

25 Idem.

by the Electoral Commission,[26] referred to "corrupt and illegal practices" followed in the process of the Referendum.

For all those reasons the Complaints argued that having the Prime Minister "repeatedly emphasized" that her Decision to withdraw from the EU "is based solely upon the outcome of the Referendum," relying upon its outcome, that "factual premises" "can now be seen to be flawed by reason of the said corrupt and illegal practices."

Consequently, the Complaints concluded that being "now known," that the result of the Referendum was "vitiated by corrupt and illegal practices," then "the basis of the decision made by Prime Minister [is] thereby fundamentally undermined," in the sense that "neither the decision nor notification under Article 50 was in accordance with the UK's constitutional requirements," eventually "respectfully" inviting the Court "to grant the relief sought or such relief as it may think fit."

Nonetheless, if the High Court in its ruling of 2016 decided that in the United Kingdom, a law cannot be invalid because it is opposed to the electorate's opinion, it seems that in this new case, the outcome could be in the same line, following what was stated by the High Court in 2016, when it affirmed that:

> "The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the grounds of its having been passed or being kept alive in opposition to the wishes of the electors."

New York, 23rd of August ,2018

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[26] "50.1 Report on an investigation in respect of the Leave.EU Group Limited (Concerning pre-poll transaction reports and the campaign spending return for the 2016 referendum on the UK's membership of the European Union) dated 11 May 2018 ("the Leave.EU Report"). 50.2 Report of an investigation in respect of Vote Leave Limited, Mr Darren Grimes, BeLeave, Veterans for Britain (Concerning campaign funding and spending for the 2016 referendum on the UK's membership of the EU), dated 17 July 2018 ("the Vote Leave & Others Report")." In *Idem*