
Centre for International
Governance Innovation



British Institute of
International and
Comparative Law

Brexit: The International Legal Implications | Paper No. 10 – January 2018

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CIGI Masthead

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About the Series

Brexit: The International Legal Implications is a series examining the political, economic, social and legal storm that was unleashed by the United Kingdom's June 2016 referendum vote and the government's response to it. After decades of strengthening European integration and independence, the giving of notice under article 50 of the Treaty on European Union forces the UK government and the European Union to address the complex challenge of unravelling the many threads that bind them, and to chart a new course of separation and autonomy. A consequence of European integration is that aspects of UK foreign affairs have become largely the purview of Brussels, but Brexit necessitates a deep understanding of its international law implications on both sides of the English Channel, in order to chart the stormy seas of negotiating and advancing beyond separation. The paper series features international law practitioners and academics from the United Kingdom, Canada, the United States and Europe, explaining the challenges that need to be addressed in the diverse fields of trade, financial services, insolvency, intellectual property, environment and human rights.

The project leaders are Oonagh E. Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); and Eva Lein, a professor at the University of Lausanne and senior research fellow at the British Institute of International and Comparative Law (BIICL). The series will be published as a book entitled *Complexity's Embrace: The International Law Implications of Brexit* in spring 2018.

About the Author

Helen Mountfield, Q.C., is a barrister in England, where she is a founder member of Matrix Chambers, which has a strong international presence. She specializes in constitutional and administrative law, and has appeared in many leading cases in the Supreme Court, the Court of Justice of the European Union and the European Court of Human Rights. These include being leading counsel for the Pigney group of claimants in *Gina Miller v Secretary of State for Exiting the European Union*. Helen is also an accredited mediator and sits as a deputy High Court judge. From September 2018, she will also be principal of Mansfield College, Oxford.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Executive Summary

This paper addresses the question of whether, as a matter of law, Brexit is now unstoppable, without the agreement of the remaining 27 member states of the European Union (EU27). In other words, what would happen if, on a date before March 29, 2019, Parliament were to conclude that Britain should not leave the European Union, despite notice of its intention to do so having been given by the prime minister on March 28, 2017? There are two parts to this question. The first is whether a formal (and legally binding) decision to leave the European Union has already been taken as a matter of national constitutional law, or whether all that the prime minister has done so far, and all she has had statutory authority to do, is give notice of the present government's intention to leave. On this matter, this paper's view is that a further act of Parliament, not just an indicative vote, is needed before a constitutionally valid decision can be taken to leave the European Union. If no such statutory authority is given before March 29, 2019, no constitutionally valid decision to withdraw has been made, and, in any event, the government could withdraw the notification of an intention to leave the European Union and decide to remain.

The second issue is whether, as a matter of EU law, a member state that has given notice of an intention to leave the European Union is bound to leave, or whether it can nonetheless withdraw the notice and decide, unilaterally, to remain. This question requires close consideration of the text of article 50, and what it might mean, and close consideration of the *Miller* decision. While this paper argues that the better view is that article 50 is unilaterally reversible before the two-year notice period contained in article 50(3) has expired, there is no case law on this question. On this, should it be tested, the Court of Justice of the European Union (CJEU) would be the ultimate arbiter.

Introduction: The Story So Far

On June 23, 2016, in a referendum held under the European Union (Referendum) Act 2015,¹ the British people were asked if they wanted to remain in the European Union or to leave. By a small, but significant, margin,² they indicated that they would prefer to leave. It is now apparent that the then government had not banked on this result, and it had certainly not prepared for it. No consistent government position was on the stocks as to what would happen next,³ and, indeed, no clear or consistent UK negotiating position is yet in the public domain.

Following the referendum result on June 24, 2016, there have been a large number of political shocks. David Cameron immediately announced his intention to stand down as prime minister. The Conservative Party selected Theresa May, a leader who had ostensibly (albeit quietly) campaigned for the Remain cause during the referendum campaign, whose pitch for the leadership was nonetheless based on an assertion that she would deliver on the United Kingdom leaving the European Union as quickly and completely as possible because "Brexit means Brexit."

May and her newly appointed Secretary of State for Exiting the European Union David Davis also insisted that they did not need parliamentary authority to trigger the process of leaving the European Union. This was based on an argument that went as follows: because making and leaving treaties is a prerogative act of the Crown,

¹ *European Union Referendum Act 2015* (UK), c 36.

² The Electoral Commission record is that 16,141,241 (in other words, 48.1 percent) of those voting in the referendum voted to remain, and 17,410,742 (51.9 percent) voted to leave, out of a total electorate of 46,500,001 (therefore, 12,948,018 expressed neither view).

³ *The Conservative Party Manifesto 2015* promised an in-out referendum on membership of the European Union and to abide by the result of the referendum, but it also said, "We are clear about what we want from Europe. We say: yes to the Single Market." See *The Conservative Party Manifesto 2015* at 74, online: <www.conservatives.com/manifesto2015>. Yet, in Theresa May's letter of March 29, 2017, to Donald Tusk, president of the European Council, notifying the United Kingdom's intention to leave the European Union, May recognized that this also meant leaving the Single Market because there could be "no cherry-picking." Letter from Theresa May to Donald Tusk (29 March 2017) [May, Letter], online: <www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>.

a prerogative had taken the United Kingdom into the European Union, and there was also an act of prerogative discretion to take the United Kingdom out. On this argument, the European Communities Act 1972⁴ was no more than a conduit through which the content of whatever EU treaties were or were not in force in the United Kingdom at any particular time could be given effect in national law, and that act could be emptied of any effective content by the stroke of a ministerial pen. The source of EU law would be cut off by the United Kingdom's withdrawal from all the treaties from which EU law was derived.

As is now history, that argument failed in the divisional court in the case of *Miller & Others v Secretary of State for Exiting the European Union*⁵ (Miller) and failed again in the UK Supreme Court.⁶ Sitting in a full eleven-judge court for the first and only time in its history, the UK Supreme Court held that since the European Communities Act 1972 had rendered EU law an enforceable system of law, as a matter of UK law, the Crown could not act so as to contradict the will of Parliament. Because Parliament had taken the United Kingdom into the EU system of law, as set out in the European treaties, only primary legislation passed by the legislature could authorize the government to withdraw from the treaties.⁷

The Supreme Court's judgment was handed down on January 24, 2017. Two days later, on January 26, 2017, the European Union (Notification of Withdrawal) Bill⁸ was introduced (and curiously followed, rather than preceded, by a white paper). Parliament passed this bill on March 13, 2017, and the bill received royal assent on March 16, 2017. Whatever the United Kingdom thought Brexit is Brexit may have meant, and however many members of Parliament may have supported the Remain cause during the referendum campaign (at least 478 did so openly), there was a clear majority in favour of respecting the result of the referendum. The bill received little genuine opposition and no significant amendment.

The act's short title, European Union (Notification of Withdrawal) Act 2017, is a misnomer, because its only operative provision (section 1) gives the prime minister parliamentary authority to notify the United Kingdom's *intention* to withdraw from the European Union, "notwithstanding any provision made by or under the European Communities Act 1972 or any other enactment," rather than to withdraw the United Kingdom from the European Union. The act's long title more accurately describes it as "an Act to confer 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."⁹

On January 17, 2017, the prime minister confirmed in her speech at Lancaster House that the government would put whatever deal it came up with "to a vote in both Houses of Parliament before it comes into force,"¹⁰ but this was in the form of a political assurance only: no mechanism for seeking parliamentary approval of any deal before withdrawing from the European Union was put into the terms of the legislation itself.¹¹

Those schooled in the Harvard Law School negotiating techniques¹² will know that successful negotiations depend on a party going into them with a clear idea of what it wants to achieve by agreement *and* a clear idea as to a bottom line, informed by a decision as to the best result that can be achieved unilaterally if negotiations work out: the best alternative to a negotiated solution (BATNA). The prime minister talked tough on her Brexit BATNA: in her Lancaster House speech, she said that "no deal is better than a bad deal

⁴ *European Communities Act 1972* (UK), c 68.

⁵ [2016] EWHC 2768 [Miller Div Ct].

⁶ [2017] UKSC 5 [Miller SC].

⁷ *Ibid* at paras 5, 82–83, 101, 111, 124.

⁸ Bill 132, *European Union (Notification of Withdrawal) Bill* [HL], 2017–2019 sess (1st reading 26 January 2017).

⁹ *European Union (Notification of Withdrawal) Act 2017* (UK), c 9 [emphasis added].

¹⁰ Theresa May, "The government's negotiating objectives for exiting the EU: PM speech" (Speech delivered on 17 January 2017), online: <www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>. This assurance was repeated by Minister of State David Jones in the House of Commons on February 7, 2017. UK, HC, *Parliamentary Debates*, vol 621, col 264 (7 February 2017) (David Jones [Jones, Debates]).

¹¹ After a government defeat on an amendment proposed in debate by MP Dominic Grieve on December 13, 2017, during the passage of the European Union (Withdrawal) Bill, there will now be a parliamentary vote on the terms of any proposed withdrawal agreement before it is signed. But the legislative consequences if Parliament rejects any proposed agreement are not specified in the proposed amendment to the legislation, which, when this article went to press, was still in committee stage.

¹² First articulated by Roger Fisher & William L Ury, *Getting to Yes: Negotiating Without Giving In*, 3rd ed (New York, NY: Penguin Books, 2011).

for Britain.”¹³ In other words, she contemplated leaving the European Union without any trade deal or other transitional arrangements in place if the EU27 did not give her a deal that she considered to be in Britain’s interests, on terms she wanted.¹⁴

But the problem with this approach is that Britain is only one country, albeit an important one to the European Union. In a negotiation with a bloc of 27, the smaller party is unlikely to have a strong bargaining hand. And time for negotiating something other than a “no deal” Brexit was already running. On March 29, 2017, less than two weeks after the prime minister received authority to do so, the government gave notice to the European Union that it intended to leave. This triggered a two-year negotiation period, which will end on March 29, 2019. The government’s position is that if there is no deal by then, or if Parliament rejects whatever deal the government proposes to it, then Britain will simply withdraw from the European Union with no transitional arrangements in place. If this is what happens, there will be the hardest of “hard” Brexits: the United Kingdom will simply cease to be a member of the European Union and will fall back on World Trade Organization (WTO) trading rules for its relationships with the European Union.¹⁵ This is widely regarded as an economically catastrophic alternative to a negotiated solution of almost any kind.

With a relatively slim parliamentary majority, but with apparently strong authority, the prime minister sought to shore up her national position by calling a snap general election, which was announced on April 18, 2017. In another political shock, on June 8, 2017, she lost her majority. Further, at the time of writing, May’s own future as prime minister remains in doubt. At a Conservative Party conference event on October 1, 2017, the prime minister said that the relative success of the Labour Party led by Jeremy Corbyn indicated that the

“consensus in Britain has changed” and urged her party to work to restore the old one.¹⁶

The period since the referendum has shown, if nothing else, that the political wind can change quickly. There may be a consensus that the economic and social consensus has changed (no one is quite sure how). However, in Britain, at the time of writing, there is still also a broad consensus that Brexit in some form or another will happen, come what may; the current political debate is not as to whether Brexit will happen, but as to the terms on which it will take place.

Even so, more than a quarter of the way through the notional two-year period envisaged by the text of article 50 of the Treaty on European Union (TEU) between notification of intention to withdraw and a member state ceasing to be a member,¹⁷ there is no detailed indication of what a deal with the European Union might look like: no resolution is in prospect of a new free trade agreement with the European Union, the Irish border, EU citizens’ rights or the EU financial settlement.

What if the political consensus changes? What if the European Union offers some compromise that makes the majority of parliamentarians inclined to advocate that membership is more attractive than leaving? As a matter of law, can the United Kingdom change its collective mind and decide, unilaterally, that it wants to stay in the European Union and instruct the government to notify the European Council that it does not, after all, wish to leave? Or, as a matter of EU law, is the die cast, and is the United Kingdom bound by the notification of March 29, 2017, to take whatever deal the EU27 may offer? Should the United Kingdom simply fall out of the European Union altogether?

However fast the political weathervane may change, a change of political mood on Brexit would be entirely irrelevant if, as a matter of law, the decision to leave the European Union has already been taken and cannot be unilaterally

¹³ May, *supra* note 10.

¹⁴ This was repeated in the text of the prime minister’s letter to Donald Tusk on March 29, 2017, in which she said that if no satisfactory arrangement could be made, Britain would fall back on WTO terms for international trade. May, Letter, *supra* note 3.

¹⁵ Jones, Debates, *supra* note 10, cols 272–273.

¹⁶ Theresa May, (Speech delivered at the reception for Conservative women activists, Conservative Party conference, Manchester, 1 October 2017).

¹⁷ *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, [2007] OJ, C 306/01, art 50 (entered into force 1 December 2009) [TEU]. This period – provided for in article 50(3) – is different from the potential for a further two-year “transition period,” during which EU rules continue to apply in the United Kingdom, which may be agreed by member states as part of a withdrawal agreement. At the time of writing, the precise terms of this deal were still under negotiation.

revoked without the agreement of the EU27 (which may not be forthcoming). This paper addresses the question of whether Brexit is unstoppable. What — as a matter of law — would happen if, before March 29, 2019, Parliament concludes that the British people have changed their collective mind? There are two parts to this question. The first is whether a formal (and legally binding) decision to leave the European Union has already been taken as a matter of national constitutional law, or whether all that the prime minister has done so far, and all she has had statutory authority to do, is give notice of the present government's intention to leave. On this, this paper's view is that a further act of Parliament, not just an indicative vote, is needed before a constitutionally valid decision can be taken to leave the European Union. If no such statutory authority is given before March 29, 2019, no constitutionally valid decision to withdraw has been made, and, in any event, the government could withdraw the notification of an intention to leave the European Union and decide to remain.

The second issue is whether, as a matter of EU law, a member state that has given notice of an intention to leave the European Union is bound to leave, or whether it can nonetheless withdraw the notice and decide, unilaterally, to remain. This question requires close consideration of the text of article 50, and what it might mean, (which has not been considered by the CJEU), and close consideration of the *Miller* decision.

The Text of Article 50

Article 50 provides as follows:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship

with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3) (b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.¹⁸

The Common Ground in *Miller*

It is an irony that the *Miller* litigation was founded on common ground whereby, for the purpose of the proceedings, all parties proceeded on the basis that the article 50 notification could not be given on a qualified or conditional basis,

¹⁸ *Ibid*, art 50.

and that once it had been given, it could not be withdrawn, and so was effectively irreversible.¹⁹

As the Supreme Court put it: “If Ministers give Notice without Parliament having first authorised them to do so, the die will be cast before Parliament has become formally involved. To adapt Lord Pannick’s metaphor, the bullet will have left the gun before Parliament has accorded the necessary leave for the trigger to be pulled. The very fact that Parliament will have to pass legislation once the Notice is served *and hits the target* highlights the point that the giving of the Notice will change the domestic law: otherwise there would be no need for new legislation.”²⁰

Given the intense legal controversy that has since arisen about this question, it is worth examining why the forensic consensus that article 50 was irreversible was advanced as a collectively underpinning presumption in the proceedings.

The consensus that article 50 was irreversible was a tactically convenient way of putting things from both parties’ points of view. For the claimants, this position avoided tricky factual questions as to whether merely notifying the European Council of an intention to withdraw from the European Union actually changed anything. It avoided addressing the question of whether, if a later Parliament were to decide it did not wish to leave the European Union, the decision not to withdraw would have the effect of dodging the withdrawal bullet that was triggered by the article 50 notification, so that no authority was needed (in national law) simply to indicate an intention to withdraw. It avoided the possibility of a decision where, as a matter of national constitutional law, an indication of an intention to leave was reversible, and did not require statutory authority, but without a decision as to whether the CJEU would, in fact, accept the reversibility of article 50 as a matter of international law.

In the divisional court, the attorney general submitted on behalf of the secretary of state for exiting the European Union that he, too, was content to accept that once the notice trigger had been pulled, the Brexit bullet would hit the Leave target, but for rather different reasons.

He said that the Crown was prepared to accept this position because the legal possibility of the United Kingdom changing its mind was irrelevant. This was essentially a political concession made not as a matter of law, but because (according to the attorney general) as a matter of “firm policy,” the United Kingdom’s notification, once given, would not be withdrawn.²¹

For both parties and the court, this position avoided the politically unattractive possibility of referring the question (which was untested and could not have been regarded as *acte clair*) as to the meaning of article 50 to the CJEU on a preliminary reference under article 267 of the Treaty on the Functioning of the European Union.²²

So it was that the Supreme Court examined the legality of the government’s espoused intention to use prerogative powers to trigger article 50 on the assumption that a notification, once given, would not be withdrawn. It found that no such prerogative power existed, and the government lost the case.

This then left open the issues of whether separate parliamentary authority was needed for the Crown to decide to withdraw from the European Union, as well as to indicate an intention to do so, and whether the indication of intention could be withdrawn. Without a reference to the CJEU, no firm answer on the irreversibility premise, which remained unquestioned in *Miller*, could be given; however, this paper asserts that the tactical *Miller* consensus was wrong as a matter of law.

The Constitutional Requirement of Parliamentary Authority

Article 50(1) of the TEU provides that the decision to withdraw from the European Union must be taken by a member state in accordance

19 *Miller SC*, *supra* note 6; *Miller Div Ct*, *supra* note 5.

20 *Miller SC*, *supra* note 6 at para 94 [emphasis added]. Lord (David) Pannick was counsel for *Miller*.

21 *Miller Div Ct*, *supra* note 5 (Transcript of 17 October 2016 at 64).

22 *Consolidated Version of the Treaty on the Functioning of the European Union*, 13 December 2007, [2012] OJ, C 326/47, art 267 (entered into force 26 October 2012).

with “its own constitutional requirements.”²³ What these are is a matter for the law of the member state, itself (see Lord Dyson in *Shindler v Chancellor of the Duchy of Lancaster*),²⁴ and, in the absence of a written constitution, the law is what the Supreme Court says it is.

In *Miller*, the Supreme Court reaffirmed an old constitutional principle, namely that primary legislation is the highest source of law in the Constitution, and the government does not have prerogative power to act in a way that would override the intention of Parliament, expressed through a statute. The court held, “The essential point is that if, as we consider, what would otherwise be a prerogative act would result in a change in domestic law, the act can only lawfully be carried out with the sanction of primary legislation enacted by the Queen in Parliament.”²⁵

The court also gave a rights-based rationale for precluding the use of Crown prerogative powers to withdraw from the European Union. EU law grants persons and businesses fundamental rights, and fundamental rights can only be overridden by express statutory language. General or ambiguous words will not do.²⁶

The European Union (Notification of Withdrawal) Act 2017 does not expressly say that rights in EU law can be withdrawn, nor does it give the government authority to take the United Kingdom out of the European Union. It does not remove any rights, nor does it, itself, expressly change domestic law. All it gives is express statutory authority for the government to notify the European Union of an *intention* to withdraw. If (as some have suggested) article 50(2) requires that a properly authorized decision to withdraw be taken *before* notice is given, then it is at least arguable that, on the basis of *Miller*, the notification of intention was not properly authorized in accordance with the United Kingdom’s constitutional requirements.

The consequence of this lack of authorization is that, because article 50(1) only permits the actual

decision to withdraw to be taken in accordance with the country’s constitutional traditions, further statutory authority is required for the actual decision to withdraw. Such authority cannot be implied, because — at the point when the European Union (Notification of Withdrawal) Act 2017 was passed — Parliament may have known that some, but not which, fundamental EU law rights would be altered or amended if the United Kingdom fulfilled the intention to withdraw. Simple authority to remove a whole swath of fundamental rights without knowing which rights would be altered or repealed, or to what extent, is arguably contrary to the *Simms* principle of legality.²⁷ The Constitution does not allow for so sweeping an enabling law for the government to legislate as it will in uncertain future factual and legal circumstances.

The twin principles of parliamentary sovereignty and legality and the rule of law require that once the terms of withdrawal are known, but not until then, Parliament and *only* Parliament can take the decision as to whether to leave the European Union on the terms on offer, or to leave the European Union without any deal at all being agreed. The European Union (Notification of Withdrawal) Act 2017 does not set out any future mechanism by which Parliament could agree to terms of withdrawal;²⁸ only a statute would confer such parliamentary authority to depart from earlier legislation. Without such parliamentary authority, it is at least strongly arguable that the United Kingdom cannot lawfully leave the European Union as a matter of domestic law.

During the passage of the European Union (Notification of Withdrawal) Bill, the government said that parliamentary authority for abrogating from EU law rights that formerly existed would be granted by a so-called Great Repeal Bill,²⁹ which would repeal the European Communities Act and transpose much of the body of EU law into national law.

²⁷ Fisher & Ury, *supra* note 12.

²⁸ The EU (Notification of Withdrawal) Act might have also given the prime minister authority actually to withdraw, once Parliament had approved the terms of withdrawal by a parliamentary motion; this mechanism would then have had the imprimatur of statutory authority, but — despite proposed opposition amendments suggesting that it should (which were not passed) — the act does not include any such device.

²⁹ At the time of writing, legislation intended to achieve this object is before Parliament: Bill 5, *European Union (Withdrawal) Bill* [HL], 2017–2019 sess (1st reading 13 July 2017).

²³ TEU, *supra* note 17, art 50(1).

²⁴ [2016] EWCA Civ 469 at para 7.

²⁵ *Miller* SC, *supra* note 6 at para 122.

²⁶ *Ibid* at paras 56–57, 83–87; *Miller* Div Ct, *supra* note 5 at para 83, in reliance on the *Simms* principle of legality: *R v Secretary of State for the Home Department ex parte Simms*, [2000] 2 AC 115 at 131 E-G [Simms].

There are two objections to this argument. First, the terms of the European Union (Withdrawal) Bill (as the Great Repeal Bill is more prosaically called) are actually intended to give ministers power to enact secondary legislation to *retain* EU law, while only making some changes, subject to parliamentary oversight and sunset clauses. However, it is not yet clear how such powers — if conferred — would be used, and there are many rights that are enjoyed as a matter of EU law, which Parliament would not be able to replicate without the cooperation of other member states or the EU institutions. These include, for example, (reciprocal) rights of free movement or decisions that are referred to EU institutions in the event of disagreement.

Second, the Supreme Court in *Miller* rejected the suggestion that some kind of parliamentary “involvement” at a later stage would be adequate to fulfill the constitutional requirement for parliamentary authority to change the law.³⁰ It is not enough for Parliament to be given an opportunity to ratify (or not) what ministers may or may not have negotiated on the international plane after the fact, when it is too late in practical terms for them to change it. However, notwithstanding advice — including from claimant-side parties in the *Miller* litigation — to include some statutory parliamentary approval mechanism in the European Union (Notification of Withdrawal) Act 2017,³¹ the government declined to do so. Therefore, the prime minister does not yet have any statutory authority to agree to any terms of withdrawal from the European Union, and she will require it, if she is to do so, because this would inevitably make significant changes to domestic law and the rights conferred by it.

As Lord Hope, the former deputy president of the Supreme Court, put it in the second reading debate of the European Union (Notification of Withdrawal) Bill in the House of Lords:

There is a respectable argument...that only Parliament has the constitutional authority to authorise, by legislation, the

concluding of an agreement with the EU or the act of withdrawal if that is what the Government decide that they have to do. As the Supreme Court said in *Miller*, at paragraph 123, a resolution of Parliament is an important political act, but it is not legislation and, “only legislation which is embodied in a statute will do”.

That was why the Court held that the change in the law that would result from commencing the Article 50 process must be made in the only way that our constitutional law permits: namely, through parliamentary legislation, which is where we are today. The argument that the Government may face is that the same reasoning must be applied to the final stage in the process, too.

I...caution the Government against thinking that this Bill on its own will give them all the authority they need, or that obtaining approval for an agreement by resolution is the same thing as being given statutory authority to conclude that agreement. They could have provided for that in this Bill, perhaps using the same formula as in Clause 1, by saying that the Prime Minister may conclude an agreement with the EU if the agreement has been approved by both Houses — but it has not done so... they cannot escape from the effect of the *Miller* decision when we reach the end of the negotiation. It is all about respecting the sovereignty of Parliament. The law will see to that whatever the Government think, as it always does.³²

In summary, the government does not yet have sufficiently clear and unambiguous parliamentary authority to withdraw from the European Union.

The current law is that the United Kingdom is part of the European Union, and that there has, as yet, been no constitutionally valid decision by the United Kingdom (in other words, by Parliament) to leave the European Union, whether with or without a concluded withdrawal treatment. Thus far, Parliament has given the prime minister authority only to give the European Council notice

³⁰ *Miller* SC, *supra* note 6 at para 94.

³¹ To make it clear that the United Kingdom would withdraw from the European Union when Parliament had legislated to authorize the terms of a withdrawal agreement. The text of the proposed amendment advanced by the People’s Challenge parties in *Miller* (Pigney & Others) is available at “Proposed Amendment by the People’s Challenge”, online: <www.bindmans.com/uploads/files/documents/Peoples_Challenge_Amendment.pdf>.

³² UK, HL, *Parliamentary Debates*, vol 779, col 274 (20 February 2017) (Lord Hope).

of an *intention* to cease to be a member. This is not the same thing as the authority to withdraw. Ultimately, the decision to leave the European Union must be taken by Parliament, either by legislating to approve the terms of a withdrawal agreement or legislating to authorize the United Kingdom to leave without any agreement in place. This is because only Parliament can give effect to the removal or conferral of individual rights that will necessarily follow from that decision: this follows from the decision in *Miller*. Parliament is not yet in a position to do so because, without knowing whether or not there is any agreement between the United Kingdom and the European Union, or the terms of any such deal, it cannot know what rights of British citizens and businesses and of the nationals of other member states who are resident or established in the United Kingdom will be lost. Without such knowledge, Parliament cannot properly authorize the loss of these rights in sufficiently clear and unambiguous terms to comply with the legality principle.³³ In effect, therefore, the notice of an intention to leave the European Union that the prime minister addressed to the European Council on March 29, 2017, was given contingently on a future parliamentary decision to do so.

Can the Notice Given under Article 50(2) Be Given Conditionally, or Withdrawn?

It may be the position as a matter of national constitutional law that no valid decision to leave the European Union can be taken without express statutory authority, but notice has been given to the European Union that the United Kingdom intends to withdraw, and article 50(3) appears to suggest that this notice takes effect two years after the giving of notification, in the absence of an agreement by the rest of the European Union to extend that period. So there is an important question of EU law as to whether, even if the UK Parliament changes its mind and decides that it no

longer wishes to follow through with the notice of an intention to withdraw, the European Union can or will regard notice of intention to withdraw as having been given on a constitutionally conditional basis. Moving forward to the end of the negotiation period, it is not clear what the position, as a matter of EU law, is as to whether the government can do no deal with the European Union or can do a deal that is politically unacceptable to a majority of the members of Parliament. In other words, having given the European Council notice of an intention to leave the European Union and having put the council to a lot of trouble in negotiating the terms of such a divorce, can the United Kingdom decide to change its mind? If Parliament decides not to accept the terms of any deal the prime minister might come up with, but also declines to authorize withdrawal in the absence of such a deal, then the question, as a matter of EU law, is whether the notification of intention to withdraw from the European Union lapses or could be withdrawn by the United Kingdom acting unilaterally, without the consent or agreement of the EU.²⁷

A wide range of views have been expressed on this question³⁴ and the language of article

34 See e.g. in favour of revocability: Charles Streeten, "Putting the Toothpaste Back in the Tube: Can an Article 50 Notification Be Revoked?" (13 July 2016), *UK Const Law Assoc* (blog); Alan Dashwood, "Revoking an Article 50" (18 July 2016), *InFacts*, online: <<https://infacts.org/revoking-article-50/>>; D Wyatt & D Edward, quoted in UK, HL, "Select Committee on the Constitution, 4th Report of Session 2016–2017: The Invoking of Article 50" (13 September 2016) at para 13, online: <<https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/44/44.pdf>>; Aurel Sari, "Biting the Bullet: Why the UK is Free to Revoke its Withdrawal Notification under Article 50 TEU" (17 October 2016), *UK Const Law Assoc* (blog); Paul Craig, "Brexit: Foundational Constitutional and Interpretive Principles: II" (28 October 2016), *Oxford Hum Rts Hub*; Takis Tridimas, "Article 50: An Endgame without an End?" (2016) *King's LJ* 297; Aurel Sari, "Reversing a Withdrawal Notification under Article 50 TEU: Can the Member States Change their Mind?" (2016) *Exeter Law School Working Paper Series*; Piet Eeckhout & Eleni Frantziou, "Brexit and Article 50 TEU: A Constitutionalist Reading" (2016) *UCL European Institute Working Paper*. For those supporting a non-revocability interpretation, see e.g. Nick Barber, Tom Hickman & Jeff King, "Pulling the Article 50 Trigger: Parliament's Indispensable Role" (27 June 2016), *UK Const Law Assoc* (blog); Jake Rylatt, "The Irrevocability of an Article 50 Notification: Lex Specialis and the Irrelevance of the Purported Customary Right to Unilaterally Revoke" (27 July 2016), *UK Const Law Assoc* (blog); Stijn Smismans, "About the Revocability of Withdrawal: Why the EU (Law) Interpretation of Article 50 Matters" (29 November 2016), *UK Const Law Assoc* (blog), online: <<https://ukconstitutionalaw.org/2016/11/29/stijn-smismans-about-the-revocability-of-withdrawal-why-the-eu-law-interpretation-of-article-50-matters/>>. For the views of EU officials, see e.g. Donald Tusk, (Speech 575/16 delivered at the European Policy Centre conference, 13 October 2016), online: <www.consilium.europa.eu/en/press/press-releases/2016/10/13/tusk-speech-epc/#>; Jean-Claude Piris, "Article 50 is not for ever and the UK could change its mind", *Financial Times* (1 September 2016); Jean-Claude Juncker, "Answer given by President Juncker on behalf of the Commission" in response to European Parliamentary question P-008603/2016 (17 January 2017), online: <www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2016-008603&language=EN>.

33 Established in cases such as *R v Secretary of State for the Home Department ex parte Simms*, [1990] 1 AC 109 per Lord Hoffmann at 131E-G.

50 does not give a clear answer. Of course, no country has ever before indicated an intention to leave the European Union on the basis of article 50, so this is also an untested question that would ultimately have to be determined by the CJEU. Although there are legal arguments both ways, the principles of EU law provide a strong indication that the European Union can treat the notification of intention to withdraw as conditional and that EU law would treat it as capable of being unilaterally withdrawn.

On the one hand, there is some support in the language of article 50(3) for the suggestion that article 50 is irrevocable. Article 50(3) provides that, in the absence of a concluded withdrawal agreement, the treaties “shall cease to apply” to the state in question two years after the notification given in article 50(2), unless the European Council unanimously agrees with the member state to extend that period.³⁵ It might be said that, read literally, this means that, once notification has been given, then either the treaties would cease to apply following the conclusion of a withdrawal agreement, or the treaties would automatically cease to apply two years after the notification, unless the European Council, acting unanimously, agreed with the member state to extend the two-year notice period. In other words, using Lord Pannick’s metaphor from the *Miller* litigation, the triggering of article 50 set off an arrow or bullet that would inevitably meet the target of the United Kingdom leaving the European Union two years later, unless all other 27 member states agreed to extend the negotiation period.

But the CJEU tends toward a purposive interpretation of treaty provisions, and this reading does not accord with the apparent purpose of article 50 or other overriding principles of EU law. The better view, and apparently the view that the government’s legal advice supports, is that article 50 is revocable.³⁶

Notwithstanding the terms of article 50(3) discussed above, there are other indications

in the language of article 50 that it is intended to be reversible. The text of article 50(1) (cited above) says that a decision to withdraw from the European Union must be in accordance with the member state’s constitutional requirements.³⁷ As explained above, the constitutional requirement for the granting of irrevocable parliamentary authority to leave the European Union could not lawfully be given at the point when notice was given because Parliament would not, at that stage, have enough information to know what rights and laws would be abrogated by leaving.

The text of article 50(1) uses the language of “intention” (to leave) in article 50(2), and the present tense (“which decides,” not “has decided”) allows for the possibility that a member state could change its intention when the political consensus changes or if, for example, there is a change of government.³⁸ This is also in accordance with article 4 of the TEU,³⁹ which recognizes the inherent political and constitutional structures of member states, and the principle recognized in article 5 of the TEU⁴⁰ of subsidiarity and proportionality. If, following a democratic political change, the legislature of a member state wished to reach a constitutionally valid decision to withdraw an earlier notice of intention to withdraw from the European Union, it would be surprising if the CJEU were to say that this could not be done, which would, in effect, expel the member state against the will of its people as expressed through their elected representatives. To do so would be contrary to the shared democratic values of the European Union and the views on the role of parliaments, which are expressed in Protocol 1 of the TEU on the role of national parliaments in the European Union. This states that “the way in which national Parliaments scrutinize their governments in relation to the activities of the Union is a matter for the particular constitutional organization and practice of each member State.”⁴¹

This protocol goes on to note that it is desirable for national parliaments to be involved in and able to express their views on matters of

³⁵ TEU, *supra* note 17, art 50(3).

³⁶ On October 8, 2017, the *Observer* reported that “two good sources” had suggested that the prime minister had been advised that article 50 notification could be withdrawn by the United Kingdom at any time before March 29, 2019, with the result that the United Kingdom could then choose to remain in the European Union with all its existing opt-outs in place: Toby Helm, “Come clean on right to Brexit Halt, May urged”, *Observer* (7 October 2017), online: <www.theguardian.com/politics/2017/oct/07/theresa-may-secret-advice-brexit-eu>.

³⁷ TEU, *supra* note 17, art 50(1).

³⁸ *Ibid*, art 50(2).

³⁹ *Ibid*, art 4.

⁴⁰ *Ibid*, art 5.

⁴¹ *Ibid*, Protocol 1.

particular interest to them. Plainly, leaving the European Union is a matter of particular interest and concern to the UK Parliament.

A decision reached without satisfying a state's own constitutional requirements does not amount to a valid decision for the purposes of article 50(1). It is true that, in article 50(2), the treaty provides that a state that "decides" to withdraw "shall notify the European Council of its intention."⁴² This could suggest that the decision to withdraw must have been taken before the notification is given, but this cannot be the correct interpretation. The decision to leave must be in accordance with constitutional requirements, and the requirement of sufficiently precise parliamentary authority cannot be met before Parliament has before it adequate information about the negotiated terms of withdrawal which it is being invited to give statutory authorization. It follows that if Parliament decides to vote not to accept the terms of any deal agreed with the European Union, but does not pass legislation to authorize withdrawal in the absence of such a deal, there would be no constitutionally valid decision to leave the European Union at all.

The matter is not free from doubt, but it seems likely that the CJEU would accept, if the matter were to be challenged, that the notification of a decision to withdraw had simply lapsed. Provided that the United Kingdom had expressed a genuine intention to leave the European Union in good faith and in accordance with its own constitutional requirements, as it did on March 29, 2017, the notification would be treated as subject to any constitutionally valid change of heart within the notice period and subject to the national constitutional requirement that the terms of withdrawal must be authorized by any subsequent act of Parliament.

Moreover, there is no provision in article 50 that expressly precludes revocation of notice of withdrawal from the treaties. Since a treaty is, in effect, an international contract, in the absence of express language to the contrary, notice of a future intention to revoke could be unilaterally withdrawn at any time until the notice expires. Article 50 is a mechanism for the voluntary withdrawal of a member state from the European Union, not an expulsion mechanism. The *travaux*

preparatoires indicate that those who drafted article 50 intended it to be revocable.⁴³ Article 50 has its origin in article I-60 of the proposed Treaty Establishing a Constitution for Europe (which did not in the event come into force), and the draft article I-60 was actually entitled "Voluntary Withdrawal from the Union."⁴⁴ Lord Kerr of Kinlochard, who, as permanent secretary of the Foreign and Commonwealth Office,⁴⁵ played a significant role in drafting article 50, has said in public that article 50 was intended to provide a procedural framework for the right, which already existed as a matter of public international law, for a member state to leave the European Union of its own free will. He is also of the view that a state's decision to leave is unilaterally revocable before the expiry of the notice period.⁴⁶

By contrast, article 50(5) does expressly address the situation of a member state that has already withdrawn from the European Union, but later has a political change of heart and wishes to ask to rejoin. In those circumstances, article 50(5) sets out the formal constitutional mechanism through which such a request to rejoin is to be considered.⁴⁷ In effect, that is a request to make a new international law contract with the Union, and such a fresh agreement could not be entered into unilaterally, but would have to be entered into by agreement with all the remaining member states. The fact that there is no equivalent mechanism for a member state that has given notice of an intention to leave, but which decides not to leave, tends to suggest that there is no formal requirement for the agreement of the other member states if the state that had given notice decides not to follow through. The principles of respect for the democratic choices of member states and solidarity between member

43 Eeckhout & Frantziou, *supra* note 34. The authors' analysis of the *travaux* establishes that the respect for the constitutional requirements of the withdrawing state is key to a reading of article 50 that complies with EU law constitutional principles, and the broad discretion in article 50(1) is to be contrasted with the strict limitation on the negotiation period in article 50(3), the object of which is to prevent the withdrawing state from holding the Union to ransom during negotiations.

44 *Treaty establishing a Constitution for Europe*, 16 December 2004, OJ, C-310/1, art I-60 (unratified).

45 Lord Kerr is now a cross-bench peer and was active in the debates on the European Union (Notification of Withdrawal) Bill.

46 See e.g. Glenn Campbell, "Article 50 author Lord Kerr says Brexit not inevitable", *BBC News* (3 November 2016), online: <www.bbc.co.uk/news/uk-scotland-scotland-politics-37852628>.

47 *TEU*, *supra* note 17, art 50(5).

42 *Ibid*, art 50(2).

states also suggest that the European Union could not forcibly expel a member state simply for having expressed an intention to leave, which it later reconsiders. To expel a member state from the European Union would be to remove the rights as EU citizens and nationals from the citizens of a member state without good cause.

Circumstances may change. It seems most unlikely that it could be the case that if a member state recognized that there might be severe economic or security consequences of leaving the European Union, or if an election fought on whether the member state should remain in the European Union indicated a clear desire on the part of the people to remain, or even if the member state held a second referendum that indicated a clear desire to remain, the mere expression of an earlier intention to leave would result in expulsion. That would be contrary to the democratic principles that form the foundation of the European Union.⁴⁸

Finally, a reading of article 50 that allows for the intention to leave to be withdrawn accords with the general provisions of the Vienna Convention on the Law of Treaties (Vienna Convention).⁴⁹ Article 65 of the Vienna Convention sets out a general notice procedure to be followed for (among other things) withdrawing from or suspending the operation of a treaty.⁵⁰ However, article 68 provides that notification of intention to withdraw may be revoked at any time before it takes effect.⁵¹ It is true that article 50 of the TEU provides a special procedure for withdrawal from the European Union. Therefore, the clear terms of the Vienna Convention as to withdrawal from treaties in general are not determinative of the position of a state withdrawing from the EU treaties, in particular. However, they are a clear indication of the general position in international law that the giving of notice is not binding: the general position in international law is that while a state can get so far as indicating an intention to leave an agreement it has entered, until the moment it actually leaves, it may change its mind.

⁴⁸ See Craig, *supra* note 34.

⁴⁹ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980).

⁵⁰ *Ibid*, art 65.

⁵¹ *Ibid*, art 68.

And So, Where Next?

It is true that, by a narrow margin, the British people expressed their view on the simple yes or no question of whether the United Kingdom should remain in the European Union in June 2016, but as the divisional court in *Shindler* and the Supreme Court in *Miller* reinforced, it is a long-established principle that the British courts do not recognize the will of the people, but only the will of the legislature that they choose to elect. An act of parliament that calls for the holding of a referendum is only advisory unless and to the extent it provides for what will happen in the event of a particular result.⁵²

Since Parliament has thus far chosen only to authorize the prime minister to notify the European Council of Britain's current intention to withdraw from the European Union, and has not authorized the withdrawal, itself, there is as yet no authority that accords with UK constitutional requirements for the prime minister to take the United Kingdom out of the European Union. The prime minister's statutory authority is thus far limited to the authority to negotiate a deal with this object, for Parliament to approve or not.

If Parliament ultimately declines to approve the deal the prime minister negotiates, or if there is a material change of circumstances, such as a significant shift in the public mood, detected by Parliament, or a change of government, or, if the prime minister is simply unable to negotiate acceptable terms for withdrawal, so that Parliament votes to reject a deal and also votes not to allow the United Kingdom to withdraw without one, there would be no constitutionally valid decision for the United Kingdom to leave the European Union. Article 50 would permit, and the British Constitution would require, the prime minister to inform the European Council that the United Kingdom's intention has changed, it withdraws its notice and it has decided to remain.

The aphorism attributed to John Maynard Keynes, "When the facts change, I change my

⁵² Contrast the terms of the *European Union Referendum Act 2015*, *supra* note 1, which provided only for a referendum to be held on a particular referendum question, with the terms of the *Parliamentary Voting System and Constituencies Act 2011* (UK), c 1, which provided for steps in the event of specific answers to the referendum question contained in that act.

mind,” may not be precisely what he said,⁵³ but, as the events of recent months have shown, the consequences of leaving the European Union are becoming clearer, the facts are developing and public opinion can change with remarkable speed. If the political mood changes, as a matter of law, Parliament can change its mind.

53 There is no direct source for this well-known attributed statement. Paul Samuelson reported Keynes to have said, “When my information changes, I alter my conclusions. What do you do, sir?” This was in response to a criticism of Keynes’ having changed his position on monetary policy during the Great Depression. Paul Samuelson, “The Keynes Centenary”, *The Economist* (1983), later in Paul Samuelson, *The Collected Scientific Papers of Paul Samuelson*, vol 5 (Cambridge, MA: MIT Press, 1986) at 275.

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