What about our constitutional requirements? Revisiting the decision of the UK to withdraw from the European Union

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1. INTRODUCTION

The manner in which the UK adopted and notified the European Council of its decision to leave the EU in 2017 is perhaps one of the most contentious chapters of the Brexit saga. It carries significant implications for both future withdrawals from the EU as well as the effect given to such withdrawals in domestic law. While EU law appears to allow Member States certain interpretative leeway through Article 50 TEU in relation to their decision to withdraw in accordance with their own constitutional requirements, ascertaining those constitutional legal requirements for triggering Article 50 TEU was a challenge to say the least for the UK.

The UK uncodified Constitution is in short supply with regard to providing off-the-shelf answers about withdrawal from international agreements that have been incorporated into UK domestic law through legislation. In particular, the Constitution provides no guidance with regard to the way in which the UK's sovereign Parliament shall delegate to the Prime Minister the authority to 'decide' on such a question. Additionally, the Constitution is rather silent as to the circumstances in which the decision to leave an international organisation whose law has been incorporated into UK domestic law through legislation is subject to judicial review. Such constitutional uncertainty is in some respect inevitable due to the uncodified nature of the UK Constitution and becomes further complicated since Brexit is the first test case of EU withdrawal and Article 50 TEU is a relatively new provision that sets out for the first time the procedure and EU law's relevance to that effect.

The chapter will provide a systematic study on the UK's constitutional requirements in relation to the decision to leave the EU (reserved for the legislature in a parliamentary democracy), the decision to notify the EU (a matter for the executive) as well as the validity, in terms of legality and constitutionality, of the respective notification (a matter for the judiciary). We will identify and critique certain grey areas regarding the invocation of Article 50 TEU and the decision to leave the EU which marks a significant moment in UK constitutional history as it resulted to both the loss of EU law rights and EU law as a source of UK law. In doing so, the purpose is not to challenge, as the Supreme Court put it,[2] the wisdom of the decision of the UK to leave the EU but to alert the reader of the technical grounds surrounding it including

[1] We would like to thank Maurice Sunkin and Nikos Vogiatzis and the editors for their useful comments.

[2] See *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

the broader constitutional themes that emerge from the analysis. These concern primarily the separation of powers and legal certainty as central tenets of the rule of law.

The chapter is divided into two sections: the first discusses the key constitutional issues regarding the existence, timing and origin of the EU withdrawal decision and the second looks into the issue of justiciability of that decision from a domestic and EU law constitutional law standpoint. Section 1 will commence by looking at the triggering of Article 50 TEU in relation to when did the UK take the formal decision to leave the EU and what is the established position in terms of whether it was the people and Parliament that decided for the country to leave the EU according to the UK's constitutional requirements or the Prime Minister herself. In this respect it is important to look into the distinction between the actual 'decision' to withdraw from the EU and the 'notification of the intention' which initiated a process of negotiation between the UK and the EU. The purpose is to shed light on the above distinction by looking into the relevant judicial review challenges brought by individuals against the Government during the early days of Brexit. Some of them, like the well-known *Miller* case, were successful in disputing the legal authority of the Government to trigger Article 50 TEU without that decision being sanctioned by parliamentary authorisation. Other judicial review applications, which took place in *Miller's* aftermath and following Parliament's authorisation through the EU (Notification of Withdrawal) Act 2017, were either unsuccessful in challenging the validity of that decision or were refused permission. What both challenges that touch upon the balance between domestic and EU norms reveal, however, is that neither the political institutions nor the courts provided much clarity about the practical details surrounding the decision which was paramount to the commencement of Brexit. For instance, the way the 2017 Act was drafted did not expressly authorise withdrawal or provide any detail about whether or how the giving of the notice was to change domestic law, including the link between the triggering of Article 50 TEU and the loss of legal rights stemming from EU law. Instead, the distinction between the 'notification of the intention' and the 'decision' to withdraw from the EU was often missed or not fully understood.

Having discussed the distinction between the 'notification of the intention' and the 'decision' to withdraw, section 2 will look into the question of justiciability of the decision. We focus in this regard on the extent to which the political decision pertaining to the UK's withdrawal from the EU needed to follow a certain process and be expressed in a certain way. This is especially if we take the view that such political decision was constitutional in character. With regard to the latter, the chapter deals with two specific questions which were not addressed in detail in the relevant case law: First, were there any preconditions that needed to be met from a constitutional law perspective and did failure to meet these conditions render the decision justiciable in courts? Second, does the rule of law requirement of compliance by the State with its international law obligations mandated a reading of the decision in light of EU constitutional law? Responding to these questions is key to our understanding of the legacy of Brexit and the legal framework surrounding the future UK-EU relationship. Most importantly perhaps for the purpose of this chapter, these questions reveal that the decision to withdraw from the EU is essentially a constitutional decision, rather than one of policy or politics, and as such issues pertaining to the format and timing of that decision as well as the identity of the decision maker are more important than meets the eye.

2. THE EXISTENCE, TIMING AND ORIGIN OF THE DECISION TO LEAVE THE EU

2.1 Introduction

While States have an 'inherent right of withdrawal',[3] the peculiarity of a decision to withdraw from the EU, unlike other international organisations, is that Article 50(1) TEU requires that such a decision satisfies the constitutional requirements of the withdrawing Member State. In the EU (Notification of Withdrawal) Act 2017 enacted in response to *Miller*,[4] Parliament made no distinction between, on the one hand, the UK's 'intention to withdraw from the EU' which textually appears in the brief 2017 Act (and which flows from the advisory referendum result) and an express constitutional decision adopted by Parliament itself giving effect to the referendum result which is absent in the wording of the Act. This omission was followed by the Government's own oversight to identify a constitutional decision to withdraw in the *Miller* litigation as well as the Prime Minister's notification letter of 29 March 2017. Instead, the latter identified the referendum result as 'the decision'. As such, Parliament's enactment of a statute empowering the Prime Minister to issue notice without that Act containing an actual decision to withdraw from the EU (from where such empowerment could have been drawn from) left room for challenge as demonstrated by the case law that followed.

2.2 What, When and by Whom the Underlying Decision to Withdraw was Taken

While the decision in *Miller* confirmed that Parliament retained control over the decision as to whether the UK left the EU, it left some open questions about the 'what' – i.e., the format of that decision as in whether a Prime Minister's letter to notify the European Council backed by the delegation of authority of a brief Act of Parliament was sufficient or another formality (such as an additional statute stating clearly the decision to withdraw) was required under the Constitution. In *Webster*, a crowdfunded judicial review challenge under the name *The Article 50 Challenge*,[5] the applicant contested the Prime Minister's notification letter to the European Council President as unlawful and *ultra vires*. The applicant argued in effect that what was required under the UK Constitution was a decision under Article 50(1) TEU in a separate document from the Article 50(2) notification and that the UK Government could not identify

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[3] See Nagendra Singh, *Termination of Membership of International Organisations* (Stevens and Sons Ltd 1958) 27.

[4] [2017] UKSC 5. The case is also known as *Miller I* (to distinguish it from *Miller II* mentioned below) and concerns the challenge brought by Gina Miller in 2016 which asked whether the power to invoke Article 50 TEU and commence the process for the UK's EU withdrawal rested with the executive (the Prime Minister) or Parliament. As is well known the UK Supreme Court held that the executive could not use its prerogative power to trigger Article 50 TEU without statutory authorisation.

[5] *Webster v Secretary of State for Exiting the European Union* [2018] EWHC 1543 (Admin). The High Court judgment in *Webster* was confirmed by the Court of Appeal (C1/2018/1430) order issued by Lord Justice Patten on 2 January 2019 which refused permission to appeal against the refusal of the High Court to grant permission to apply for judicial review. There have been three other known cases brought before the High Court on similar grounds, namely *Martyn Truss v Secretary of State for Exiting the European Union* (CO3008/2017), *Andrew Watt v the Prime Minister and the President of the European Council* (CO 505072017) and *Mark Gregory Hardy v Prime Minister and the First Lord of the Treasury* (CO5012/2017) neither of which was given permission for judicial review.

a decision to this effect. The argument concluded that without a constitutionally valid prior decision, the notification and the related Brexit process were invalid. The High Court rejected the arguments made by Ms Webster and it held, when referring to the Prime Minister's notification to President Tusk of 29 March 2017, that:

> … this is the language of decision not of notification alone, *in vacuo*, so to speak. The Prime Minister's letter itself contains a decision; backed by the authority of the 2017 Act, that decision complies with the requirements of Miller. No additional UK constitutional requirements remained to be satisfied. I reject the argument that additional formality was required under the UK constitution or that there was any requirement for the Art.50(1) decision to be in some separate document from the Art.50(2) notification.[6]

The hearing further clarifies that the 2017 Act was neither an 'approval' of the withdrawal as required by *Miller*[7] nor an authorisation of a prior decision,[8] but was simply a statutory delegation of authority to the Prime Minister to take a decision to withdraw. Although permission was refused by the Court, the *Webster* case raised a number of interesting constitutional issues. In particular, Ms Webster picked upon certain points made by Dos Santos (Gina Miller's co-applicant) which were not fully addressed by the Supreme Court in *Miller*.[9] She relied, in particular on a point which could be interpreted as touching upon the need for an express parliamentary decision to withdraw from the EU as opposed to a statutory power conferred upon the Prime Minister to implement the referendum result and give notice to the European Council.[10] The High Court in *Miller* was also confronted with the question about whether the case was to be regarded as a challenge to the decision to withdraw under Article 50(1) TEU (instead of the decision to notify under Article 50(2) TEU) before concluding that the notifi-

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6 *Webster*, para 15.

7 Para. 78 reads as follows:

> In short, the fact that EU law will no longer be part of UK domestic law if the United Kingdom withdraws from the EU Treaties does not mean that Parliament contemplated or intended that ministers could cause the United Kingdom to withdraw from the EU Treaties without prior Parliamentary approval.

8 The Secretary of State in the House of Commons in support of the European Union (Notification of Withdrawal) Bill stated that it was:

> not a Bill about whether the UK should leave the European Union or, indeed, about how it should do so; it is simply about Parliament empowering the Government to implement a decision already made – a point of no return already passed.

That it merely implemented a 'process to ensure that the decision made by the people last June is honoured'. It was added that 'this Bill simply seeks to deliver the outcome of the Referendum, a decision that the people of the UK have already made'. https://www.gov.uk/government/news/opening-statement-on-second-reading-of-eu-notification-of-withdrawal-bill accessed on 31 July 2022.

9 See Dos Santos' Skeleton of Arguments of 19 September 2016 filed with the Divisional Court in *Miller*, paras 45 and 46. The second group of interested parties (the People's Challenge IPs) in their skeleton of arguments adopted a similar approach (especially in 2–4). The litigants claimed *inter alia* that:

> this challenge is concerned with who makes the 'decision' that the UK shall withdraw from the EU, not with who ultimately notifies that decision to the European Council. The notification itself is likely to be a matter for the executive, acting on Parliamentary authority conferred by statute, and having regard to the terms of Parliament's decision.

10 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. See para 132: '[…] In light of our conclusion that a statute is required to authorise the decision to withdraw from the European Union, and therefore the giving of Notice […]'

cation (under Article 50(2) TEU) is of a decision (under Article 50(1) TEU). According to the High Court if the executive had no prerogative power under the Constitution to give notice under Article 50(2) TEU, then under Article 50(1) TEU it could not use its prerogative powers to make a decision to withdraw in accordance with the UK's own constitutional requirements.[11]

Notwithstanding the initial distinction between the decision to withdraw and the decision to notify made by the High Court in *Miller*, the *Miller litigation* including the appeal to the Supreme Court only focused on the question of Article 50(2) TEU notification in the context of the royal prerogative. It, therefore, made almost no reference to the Article 50(1) TEU decision (except for the abovementioned point) or what should amount to a decision to withdraw. Of course, the drafting of Article 50 TEU is not at all helpful. It only speaks of constitutional requirements and it is only the *travaux préparatoires* of the Convention on the Future of Europe that provide supplementary means of interpretation as to the terms of the Lisbon Treaty with regard to the need for a decision under Article 50(1) TEU (what was Article 46 in Chapter X of the Treaty establishing a Constitution for Europe). Eeckhout contends for instance that:

> the travaux confirm that to say that a Member State can withdraw in accordance with its own constitutional requirements is not to leave it up to that Member State to do as it pleases – the inclusion of that requirement in Article 50(1) suggests that *only* a decision to withdraw in accordance with a state's constitutional requirements is valid.[12]

Still, the Court did not dwell on the matter and the point about 'a decision to withdraw' was left somewhat unexplored. Commentators have attempted to explain the uncertainty that characterises the concepts of 'constitutional requirements' and 'a decision' arguing that the Supreme Court in *Miller* had set a simple procedure albeit in vague terms: i.e., that Parliament should have approved the giving of the notification (and impliedly the decision too[13]); that the parliamentary act did not have to be long; and that the constitutional change (as set out in *Miller*[14]) could be triggered by merely sending the notification letter.[15] In other words, the Court did not speak of a formal decision having to be made or that the UK's notice could be invalid if no such decision was made. No additional formality was deemed necessary under the UK Constitution beyond a short Act that authorised the notification. This is problematic in our view and finds us in agreement with Paul Daly who following the Supreme Court's decision in *Miller* he expressed his lack of confidence for an Act expressed in general terms as being sufficient to account for the rights that would inevitably be removed by EU withdrawal.[16]

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[11] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), paras 15 and 16.

[12] See Eeckhout's discussion in page 12. https://westminsterresearch.westminster.ac.uk/download/3c5341d27609df3385b4470cb982c0575183becb967fdd08ebe2172f0ffe3d32/3254617/BREXIT_AND_ARTICLE_50_TEU_A_CONSTITUTION.pdf accessed on 31 July 2022.

[13] Robert Craig, 'Why an Act of Parliament Would Be Required to Revoke Notification under Article 50' (*U.K. Const. L. Blog*, 16 October 2017) https://ukconstitutionallaw.org/ accessed on 31 July 2022.

[14] *Webster*, para 81.

[15] Jeff King, 'What Next? Legislative Authority for Triggering Article 50' (*U.K. Const. L. Blog*, 8 November 2016) https://ukconstitutionallaw.org/ accessed on 31 July 2022.

[16] Paul Daly, 'The Form of the Article 50 Authorisation Bill: Some early thoughts on Miller', Administrative Law Matters, 24.01.2017. Available from https://www.administrativelawmatters.com/

Indeed, the lack of explicit guidance by the Supreme Court regarding the form of the legislation sanctioning EU withdrawal can be regarded as mindful of the principle of separation of powers. We can also speculate that by focusing on the domestic constitutional impact of the notification in *Miller*, the Supreme Court must have considered the adoption of the decision to be irrelevant while the notification to be sufficient constitutionally, as long as the Prime Minister had the power to notify. Conversely, *Webster* contradicted this interpretation pointing instead that the notification constitutes the mandatory consequence deriving from the adoption of a constitutional decision. In effect the applicant argued unsuccessfully that whether or not the notification was valid is irrelevant to the question of the validity of the decision itself which it neither mentioned the rights stemming from EU law likely to be affected by triggering Article 50 TEU nor did it clarify whether or not the Government was authorised to terminate those rights.

The Government's interpretation of 'what' amounted to a decision to withdraw also raises particular interest in relation to the question of 'when' and by 'whom' the decision to withdraw was taken.[17] Prior to the *Webster* hearing of 12 June 2018, the Government, citing *Miller*, maintained in its skeleton arguments that the TEU required no prior decision to leave the EU. It emphasised that '[t]here is no basis for an argument that, in addition, any person or body had to make a decision to leave before the notification could lawfully be given'.[18] The Government stressed that the only decision identifiable and reviewable was 'the decision to notify'.[19] Consistently, the Government indicated that the EU (Notification of Withdrawal) Act 2017 'provided parliamentary approval for the Prime Minister to notify under Article 50(2) TEU)'.[20] From the Government's skeleton arguments it was evident that the 2017 Act did not deal with the decision to leave but rather with the decision to notify. At the hearing, the Government then conceded that the decision to leave the EU was deduced by the notification embodied in the notification letter itself sent to the European Council on 29 March 2017.

The above reasoning is problematic from the perspective of legal certainty. The conclusion that the Prime Minister took the decision in the notification itself is somewhat inaccurate. Equally, the argument that no separate decision to withdraw had been taken seems questionable. Looking back at the 2017 Act, it can be argued that it forms testament of the UK's intention to leave as well as authorisation of the relevant notification. While this is true, it is not easy to discern from the Act 'the policy intention' of Parliament in relation to Brexit.[21] Regardless of the absence of express language that 'this Act hereby constitutes the decision to

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blog/2017/01/24/the-form-of-the-article-50-authorisation-bill-some-early-thoughts-on-miller-2017-uksc-5/ accessed on 31 July 2022.

[17] See comment by Jack Williams 'Article 50 decision validly taken: new judgment' (20.06.2018) where he mentions that '[a]n issue that was never fully resolved in explicit terms in the *Miller* litigation remained, however: when and by whom the underlying decision to withdraw from the EU was taken'. (Available from https://www.monckton.com/article-50-decision-validly-taken-new-judgment/ accessed on 31 July 2022.)

[18] *Webster*, para 33.

[19] *Webster*, para 34.

[20] *Webster*, para 9.

[21] According to Lord Carnwarth in *R (on the application of Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22 (at paras 106 and 107) the argument that a statutory interpretation is limited to a 'careful examination of the language of the provision, having regard to all aspects of the statutory scheme, and the status or the body in question, in order to "discern the policy Parliament intended in the legislation"' downgrades 'the critical importance of the

withdraw', it can be contended that an actual parliamentary approval of the decision to leave the EU (as required by *Miller*) could arise 'by necessary implication' in the 2017 Act. One has to be careful, however in making such an argument. Under common law, the notion of a necessary implication:

> '[…] distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.[22]

On a similar note, the intent of Parliament should 'be gathered from the words used by Parliament, considered in the light of their context and their purpose'.[23] As such, a necessary implication may arise if 'one very important purpose of the Act would have been frustrated'.[24] One way of looking at the 2017 Act is that its only express purpose was to confer a power to give the notice in lieu of the royal prerogative rather than to bind the Prime Minister to give the notification. Such delegation of powers would not however be frustrated by the lack of parliamentary approval which could have been given in an earlier or a later separate Act. In addition, ministerial declarations which comprise a useful interpretative aid[25] in understanding the 'context' and 'Parliament's thought' and in assessing whether the necessary implication doctrine applies to the case at issue may be weak as evidence that the 2017 Act implied an approval of the decision to leave.

It follows that the fact that the Supreme Court in *Miller* abstained from setting out the terms of what eventually became the EU (Notification of Withdrawal) Act 2017 does not automatically imply that a generic delegation of authority to the Prime Minister to send the notice under Article 50(2) TEU could be, per se, regarded as 'an approval' of the UK's exit from the EU.[26] Neither could it be construed with certainty as confirmation of the referendum result as stated in the Prime Minister's notification letter. As such there is some force in the argument that a generic delegation of authority from Parliament to the Prime Minister to issue the notice under Article 50 TEU amounts neither to a UK decision to leave the EU under Article 50(1) TEU nor to writing 'the government a blank cheque'[27] in relation to the prospective elimi-

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common law' in interpreting statutes. While Lord Carnwath spoke in relation of ouster clauses, one can argue that an interpretation of the 2017 Act required a scrutiny based on common law.

[22] *R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] UKHL 21, Lord Hobhouse, para 45.

[23] See para 36(4) of Lady Hale's judgment in *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81.

[24] See ibid., para 36(6).

[25] See Lord Nicholls in *Jackson and others v Her Majesty's Attorney General* [2005] UKHL 56, para 65.

[26] As required by the UKSC in *Miller*. On similar terms see Helen Mountfield QC, 'Brexit: can the UK change its mind?', CIGI and BIICL, Paper No. 10, January 2018, in https://www.cigionline.org/sites/default/files/documents/Brexit%20Series%20Paper%20no.10_3.pdf accessed on 31 July 2022.

[27] Mark Elliott, 'Why on Earth didn't Parliament Take Control when it had the Chance?', *Prospect*, 16 January 2019 in https://www.prospectmagazine.co.uk/politics/why-on-earth-didnt-parliament-take-control-when-it-had-the-chance accessed on 31 July 2022. As indicated on 13 and 20 November 2019 by Philip Hammond in an interview given to the think-tank UK in a Changing Europe 'the idea to go for "Brexit in the hardest possible terms" was taken by the Prime Minister alone', https://ukandeu.ac.uk/brexit-witness-archive/philip-hammond/ accessed on 31 July 2022. See also a piece making a strong

nation of affected rights. It further does not seem to encompass a reinstatement of the royal prerogative by restoring the antecedent legal position.[28] While therefore the position taken by the Supreme Court in *Miller* can be described as constitutionally sound on the issue of the notification (although the judgment was not unanimous), more clarity on the issue of the decision would have been welcome. In particular, the Supreme Court could have provided more guidance about whether a simple decision *to give effect* to the referendum result embodied in the notification letter was the most appropriate way to commence a process which initiated significant constitutional change in the UK.[29]

The uncertainty stemming from the lack of clear guidance about whether Parliament must have decided to confer a new legal power on the Government to make a decision (under Article 50(1) TEU) and to give notification of that decision (under Article 50(2) TEU) is somewhat evident in the Government's variable position about 'when' and by 'whom' the decision to withdraw was taken. It is telling, for instance, that in the advent of the *Webster* judgment, in a response dated 3 September 2018 to a request made under the Freedom of Information Act 2000, the Government altered its position by stating that:

> […] the decision to trigger Article 50 was taken by Parliament, not by the Prime Minister. The purpose of Prime Minister's letter was to formally communicate the democratic decision taken by the electorate of the United Kingdom to leave the European Union. The exit decision was taken at multiple levels in Government, including Parliamentary processes, and as a result there is no one document, nor series of documents which illustrates the information you seek.[30]

It is also striking that the Prime Minister's Office, even after having considered the High Court's findings in *Webster* downplayed the Prime Minister's role in the decision, which was rather attributed to the 2016 referendum. This position was also confirmed by the Attorney General who, on 3 October 2018, at the Conservative Party Conference identified the decision in the EU referendum result which carries no constitutionally binding effect.[31] The above arguments only confirm that there are still grey areas pertaining to whether the 2017 Act can be interpreted as authorising a decision and conferring a broad statutory power or forming 'the decision' itself. We will now turn to consider the role of Parliament in the withdrawal process going beyond the question of what action exactly did Parliament authorise in 2017 and considering its role in terms of issuing through its decision binding instructions to the Government as to the forthcoming negotiations with the EU.

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argument about the notification letter being a 'faux trigger' by David Wolchover, 'Article 50: The Trigger That Never Was?' (08.06.2017) Available from https://www.counselmagazine.co.uk/articles/article-50-the-trigger-never-was.

[28] Richard Ekins and Graham Gee, 'Miller and the Politics of Brexit' in Mark Elliott, Jack Williams and Alison L Young (eds) *The UK Constitution after Miller: Brexit and Beyond* (Hart 2018) 272.

[29] UK courts have previously engaged with the issue of the withdrawal from the EU Treaties and held that an Act of Parliament would be necessary before the UK could withdraw. See Denning LJ (as he then was) in *Blackburn v AG* [1971] 1 WLR 1037 at p 1040 and in *Macarthys Ltd v Smith* [1979] 3 All ER 325 at p 329.

[30] See answer from the Prime Minister's office dated 3 September 2018 to request no. FOI326443 by a private citizen under the Freedom of Information Act 2000.

[31] See Geoffrey Cox, Attorney General - Speech to Conservative Party Conference 2018. Available from: https://www.youtube.com/watch?v=UHqFAYDDy0I accessed on 31 July 2022.

2.3 The Role of Parliament Prior to and at the End of the Negotiation Process

The role of Parliament in the withdrawal process is crucial given the UK's constitutional position on parliamentary sovereignty which is key in relation to the country's unique constitutional requirements. Following from the previous discussion we recognise the difficulty that Parliament would have faced in adopting an additional Act which would have addressed the distinction between the 'notification' and the 'decision' and expressly authorise the latter. At the same time, however, we shall be mindful of the technical and perhaps legalistic grounds which are nonetheless important from a legal certainty (as a central requirement for the rule of law) perspective. For instance, the claimants' petition in the *Cherry* case before the Court of Session (which led to the Supreme Court decision in *Cherry/Miller II*) throws some light on the limitations of the 2017 Act:

> Accordingly, in passing the European Union (Notification of Withdrawal) Act 2017 the Union Parliament did nothing more than authorise the Government to open negotiations with the European Commission over the terms of the possible withdrawal of the United Kingdom from the European Union. Parliament did not, in passing this Act, either commit the United Kingdom to withdrawal nor did it authorise the UK Government to diminish or take away individuals' EU law derived rights.[32]

The above touches upon another related issue emerging later in the Brexit process, namely the requirement of an Act of Parliament to ultimately give effect to Brexit following the conclusion of negotiations between the UK and the EU. While the 2017 Act endorsed the Government to notify the European Council it did not implicitly authorise Brexit to take place on whatever terms characterising a future relationship. As became evident in *Cherry/Miller II*, the Government, also due to the enactment of the 'Benn Act' 2019,[33] was not handed a blank cheque of power by the Supreme Court. On the contrary, it emerged that the 2017 Act could not allow a no deal Brexit to occur by necessary implication. The Supreme Court impliedly admitted that the notification letter per se (and indirectly the 2017 Act) could not lead to a constitutional change and expressly stated that Parliament needed to give a further statutory authority, whether expressly or by necessary implication, to pursue a policy of no deal Brexit.[34]

The above conclusion of the Supreme Court shares some of the traits of the position expressed in the so-called *Three Knights Opinion* issued in 2017,[35] which was supported by an amendment moved to the EU (Notification of Withdrawal) Bill before the House of Lords on 7 March 2017 by Baroness Hayter of Kentish Town, Lord Pannick, Lord Oates, and Lord Hannay of Chiswick. The amendment clarified that the UK shall leave the EU *only* when Parliament has legislated to approve the terms of a withdrawal agreement or to authorise withdrawal in the absence of any agreement (hence both in the case of a deal and of a no-deal). In

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[32] *Cherry*, para 21

[33] This refers to the EU (Withdrawal) No2 Act 2019 which was introduced as a Private Member's Bill by MP Hilary Benn and provided a statutory obligation for the Government to prevent a no-deal Brexit by requiring the Prime Minister to seek for an extension of Article 50 TEU. It also established an obligation for the Government to keep Parliament informed about the status of negotiations with the EU which could be voted by the House of Commons.

[34] See in particular *Cherry/Miller II*, para 57.

[35] David Edward, Francis Jacobs, Jeremy Lever, Helen Mountfield, 'In the Matter of Article 50 TEU', 10.02.2017, available from https://www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf accessed on 31 July 2022.

substance, the authors of the *Three Knights Opinion* argued that a conditional notification of the intention to withdraw followed by a proper statutory approval at the end of the negotiation process also to amend or abrogate individual rights was the most appropriate constitutional procedure to be applied to the UK's withdrawal from the EU. It concluded that if at the end of the negotiation period, there was no statutory approval, then the notification given would have to be treated as having lapsed because the constitutional requirements necessary to give effect to the notified intention would have not be met.

While the *Three Knights Opinion* has been contested as incompatible with the position in *Miller* which stressed the irreversible consequences of the notification,[36] it was later echoed in Aidan O'Neill QC's submission on the 18 September 2019 hearing of the *Cherry/Miller II* case before the Supreme Court. It was articulated in analogous terms: i.e., that the UK Parliament had yet to decide to leave the EU when substantiating the unlawfulness of the prorogation of Parliament by the Prime Minister. The Supreme Court did not reject this argument but impliedly admitted that the notification was only an inconclusive step, and per se conditional upon a further prior statutory authority being enacted.[37]

3. JUSTICIABILITY OF THE DECISION TO LEAVE THE EU

3.1 Domestic Law Standpoint

The speculation regarding the 'what', 'when' and 'by whom' the decision to withdraw was taken is central to the discussion about the substance regarding the constitutional requirements, if any, that such decision needed to satisfy prior to being made. It also bears on the question about whether the matters stemming from the decision are suitable for judicial resolution. This is particularly important if we accept the High Court's view in *Webster* that the decision was contained in the Prime Minister's letter and supported by the 2017 Act rather than the electorate and Parliament. The latter would have brought together more elegantly the concepts of 'constitutional requirements' with 'a decision' and courts would have no power to review primary legislation. Locating the decision in the Prime Minister is important with regard to its justiciability given that the courts are able to subject decisions of the executive to judicial review and in this case the exercise of the power to trigger Article 50 TEU authorised by Parliament affected the legal position of individuals vis-à-vis their rights under EU law.

Although courts may regard such issues arising from the conduct of foreign affairs as largely the province of the executive, they will equally show caution about the possible dangers posed by the exercise of prerogative powers or broad statutory powers. For instance, if the notification, and hence the decision, was justiciable, then natural justice would have required that a reason for the decision was given[38] and that sufficient notice was provided so

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[36] See Mark Elliott's comment: 'The Three Knights Opinion on Brexit: A Response', 17.02.2017. Available from https://publiclawforeveryone.com/2017/02/17/the-three-knights-opinion-on-brexit-a-response/ accessed on 31 July 2022.

[37] *Cherry/Miller II*, Para 57

[38] See Lord Donaldson MR in *R v Civil Service Appeal Board ex p Cunningham* [1991] 4 All ER 310 and Pill J. in *R v Crown Court of Harrow, ex p Dave*, [1994] 1 All ER 315. In *Padfield v Minister of Agriculture, Fisheries and Food*, [1968] 1 All ER 694 HL, although the Agricultural Marketing Act

that an affected person had the opportunity to bring a challenge against such administrative decision.[39] It shall be noted that the Government (in its pleadings in *Webster*) had indicated that the referendum had a direct consequence on its actions, albeit its clarification (in *Wilson*) that any related illegality could not impinge on such consequence. At the same time one can argue that while the referendum counts as the first constitutional step, it was advisory in nature, and could not therefore constitute 'the reason' from an administrative law standpoint.[40] Furthermore, at common law, the reason can be identified neither in the Government's high policy, nor in statements by ministers nor in a manifesto commitment, as this was impliedly confirmed in *Miller*.[41]

The outcome of both *Webster* and *Wilson* was that the Prime Minister's actions are formally justiciable from a 'legality' standpoint, but, somehow, subject to a lower level of scrutiny (with respect to undue delay and detriment to good administration). This was because the Prime Minister was effectively acting under the instructions of the people[42] while the fate of complex negotiations with the EU was at stake. In *Wilson*, Lord Justice Hickinbottom justified the reluctance of the Court of Appeal to engage with the issues brought to its attention: 'And, I repeat, the fact that Parliament has maintained control over withdrawal makes it patently inappropriate for the court to intervene.'[43]

Accordingly, the Court of Appeal in *Wilson* reached the same conclusion set out in *Webster*:[44] 'Bluntly, the debate that the [c]laimant seeks to promote belongs in the political arena, not in the courts....'[45] The same Court reiterated that [j]udicial review is not, and should not be regarded as, politics by another means'.[46] These statements summarise the position maintained by the Government in *Wilson* regarding the claim for judicial review contending that the decision to notify and the notification were unlawful because they were based upon the result of an unlawful referendum.[47] The Government's position, summarised in that the courts

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1958 did not expressly set out for reasons to be given, Lord Denning said that if no reason was given, the court might infer that no good reason existed."

[39] See *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36.

[40] On a related point, based on *R (Stirling v Haringey LBC)* [2014] UKSC 56, paras 23–28 per Lord Wilson and 35–41 per Lord Reed and 44, it should be possible to declare a non-binding consultation unlawful.

[41] See *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at para 27 per Lord Dyson (Lord Hope, Lord Walker, Lady Hale, Lord Collins, Lord Kerr agreeing: paras 170, 195, 218, 219 and 238) and *R v Department for Education Employment ex parte Begbie* [2000] 1 WLR 1115.

[42] See Vernon Bogdanor, 'Beyond Brexit: Towards a British Constitution' in The Constitution Unit, 22.02.2019 '… the people have in effect become a third chamber of Parliament, issuing instructions to the other two', in https://constitution-unit.com/2019/02/22/beyond-brexit-towards-a-british-constitution/#more-7640 accessed on 31 July 2022.

[43] *Wilson*, para 53.

[44] *Wilson*, para 24.

[45] *Wilson*, para 56.

[46] See Singh LJ and Carr J in *R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin) at [326]. The same choice of words was also used by the Government when it launched the Independent Review of Administrative Law in July 2020 following its manifesto commitment. Available from https://www.gov.uk/government/groups/independent-review-of-administrative-law accessed on 31 July 2022.

[47] See para [51.b] of the Summary Grounds of Resistance in the *Wilson* case before the Divisional Court (CO3214/2018) in which the Prime Minister argued as follows:

should only be concerned with the legality of public law decisions and not a wider notion of constitutionality has been supported by other commentators.[48] This view seems to suggest that when the application of the rule of law affects politics, the democratic process, and foreign affairs then it should be disapplied, even in a context where the Government cannot rely on its prerogative powers.[49] If we apply this logic against the main argument of the applicant made in *Webster* about the 'what', not only a separate identifiable formal decision to leave the EU was not necessary but even a decision which could be loosely construed as multi-level did not have to meet any constitutional requirements.[50] Of course, we need to be mindful of the consequences of the separation of powers, one of them being that courts shall refrain from reviewing certain governmental powers. At the same time, however, we shall recall Lord Bingham's words regarding the role assigned to courts to uphold the rule of law in order to preserve democracy:

> I do not … accept the distinction which [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament… But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.[51]

Lord Bingham's above statement was more recently corroborated in *UNISON* which was given by the Supreme Court a few months after *Miller* and constitutes a landmark case in UK constitutional law on access to justice and the rule of law.[52] The legacy of *UNISON* on the constitutional requirements of the rule of law – especially the process of statutory construction making use of the principle of legality as a way of securing constitutional rights would have been relevant to a judicial assessment of the constitutionality of the decision to leave the EU with a view to ensuring that such decision complies with the rule of law.[53] In *UNISON*,

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> It appears to be suggested that in exercising its judicial review jurisdiction the Court would not be concerned only with the legality of public law decisions but also with some wider (undefined) notion of 'constitutionality' (see eg SFG, §4). This is incorrect. The Court's jurisdiction is concerned solely with legality, and specifically public law errors in public law decisions. The Court is not the forum for political arguments or disputes.

48 See Ekins and Gee (n 28 above).

49 This view de facto intends to make hollow the requirement set out in *Miller* that any major constitutional change must be realised by primary legislation.

50 We disagree with other commentators who assert that '[t]he reference to "a" decision must be the right approach, ultimately, insofar as that means a soft political decision ("a decision") rather than a hard legal decision ("the decision")', and that '[t]he attempt to map onto the constitution, ex post facto, the requirement for a separate formal legal "decision" is seriously mistaken. Furthermore, no one can cite any source for such a rule in domestic law and there is no EU law basis for such a rule because Article 50 does not have direct effect'. See Robert Craig, 'New Article 50 Case Resoundingly Rejected by the Divisional Court' (*U.K. Const. L. Blog*, 26 June 2018) https://ukconstitutionallaw.org/ accessed on 31 July 2022.

51 *A v Secretary of State for the Home Department* [2005] 2 AC 68, at para 42.

52 *R. (UNISON) v Lord Chancellor* [2017] UKSC 51.

53 Mark Elliott, 'The Rule of Law and Access to Justice: Some Home Truths' (2018) 77 *Cambridge Law Journal* 5, 5–6. For other comments on *UNISON* see Michal Hain, 'Guardians of the Constitution – the Constitutional Implications of a Substantive Rule of Law' (*U.K. Const. L. Blog*, 12 September 2017) https://ukconstitutionallaw.org/ accessed 10 August 2021; and Christina Lienen, '*Unison v Lord Chancellor:* The Things That Landmark Constitutional Cases are Made of' (*The Constitution Unit*

the Supreme Court pointed out numerous '[i]ndications of a lack of understanding' of the importance of the rule of law.[54] By way of demonstrating the wrong-headedness of these views, the Court – in what reads as a primer on the rule of law – observed that the 'idea of a society governed by law' lies '[a]t the heart of the concept of the rule of law' and that '[t]he constitutional right of access to the courts is inherent in the rule of law'.[55] Hence, while courts may generally treat foreign affairs with particular caution, acknowledging the rule of law and giving due respect to constitutional propriety and due process are paramount to responding to the politics.[56] This extends even in relation to Parliament's conferral on another body of the power to override fundamental rights.[57]

The above sentiments aside, judicial review has had little resonance in changing the Government's position on Brexit. This is both due to the issues in question as well as the manner in which the claims challenging the Government were formulated by the applicants in the relevant proceedings. On a positive note, however, it should be noted that courts did not disparage the motivation of the respective challenges. Upon a closer look, these challenges reveal existing gaps and silences vis-à-vis the perennial debate in the UK about the limitations of the uncodified Constitution and the role of unelected judges meddling in political matters. Having said that, as Millns remarked, 'Brexit is not all about politics. Brexit and its surrounding processes, must be governed by and according to, the Rule of Law. The judges are the independent authority charged with the constitutional task of upholding the rule of law.'[58] Such a task includes, as Lord Bingham remarked, giving due regard to international law.[59] In the case of Brexit this encompassed an application of the general principles of EU law and the rule of law requirements under Article 2 TEU as have been clarified by the European Commission and the Court of Justice of the EU (CJEU).

3.2 EU Law Standpoint

Key to the decision to leave the EU and the validity of the respective notification is the application of EU law to the process of withdrawal. Still, the question of application of EU law at

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Blog, 28 July 2017) https://constitution-unit.com/2017/07/28/unison-v-lord-chancellor-the-things-that-landmark-constitutional-cases-are-made-of/ accessed on 31 July 2022.

[54] *UNISON*, para 66.

[55] *UNISON*, para 68.

[56] See discussion by Catherine Barnard 'Brexit and the Rule of Law', Policy Brief, University of Cambridge, 2019. Available from: https://www.bennettinstitute.cam.ac.uk/media/uploads/files/Policy_brief_BIPP_Catherine_Barnard_Nov_19.pdf accessed on 31 July 2022.

[57] Lord Reed in *AXA* [2011] UKSC 46, para 152 stressed that clear language was needed to achieve constitutional change that impacts on rights: 'The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so.' Lord Browne-Wilkinson in *Pierson* [1998] AC 539: <p:footnotes_quotation_1>A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.</p:footnotes_quotation_1>

[58] Sue Millns, 'Brexit and the Rule of Law, Expert Comment. Available from: https://blogs.canterbury.ac.uk/expertcomment/brexit-and-the-rule-of-law/ accessed on 31 July 2022.

[59] Tom Bingham, *The Rule of Law* (Penguin, 2011).

the beginning of the withdrawal process was hardly addressed by the Government or indeed by domestic courts in the relevant judicial review challenges – it only featured in some judges' reasoning in a rather implicit manner. This perhaps relates to the broad terms of the Article 50 TEU drafting which suggests significant leeway granted to Member States to withdraw by merely pointing to their constitutional requirements. In other words, it can be argued that EU withdrawal is purely a matter of national sovereign legal competence. The CJEU has only so far dealt in *Wightman* with revocation of the Article 50 TEU notification and its features (i.e., that it need to be in writing, unambiguous, unconditional, constitutional, and compliant with the common values).[60] If we accept that these traits can equally apply to the decision to withdraw – especially since the latter is meant to undo the former – then the invocation of Article 50 TEU is not as straightforward as it seems. For instance, as Advocate General Campos Sánchez-Bordona opined in *Wightman*: 'if the original decision was invalidly adopted, or because the application of the national constitutional mechanisms have undermined that decision or deprived it of effect', then the notification will be affected.[61]

The academic debate on the scope of application of EU law to the exit process (Article 50(1) TEU in particular) also provides a useful compendium in relation to the subjection of the withdrawal decision to EU institutional and substantive rules. It points to the fact that in exercising its sovereign right to withdraw from the EU the UK had to be sensitive about the impact of the manner of exercise of that right upon EU law. This appears to include the way in which the UK adopted the decision to leave the EU and communicated such decision to the European Council. Equally, the importance of interpreting Article 50(1) TEU and the steps taken by the withdrawing Member State in line with EU law have been highlighted by various commentators. For instance, Eeckhout and Frantziou have summarised that:

> One can hardly imagine provisions that are more 'constitutional' in character than those concerning the make-up, objectives, membership, and withdrawal from the EU. In regulating the latter process, Article 50 is directly constitutive of what the EU is. The interpretation of Article 50 affects the Union's very identity as a constitutional order committed to the values of 'respect for … the rule of law …'.[62]

Kostakopolou[63] and Tatham[64] also argued in similar terms. Their views are consistent with the opinion of LJ Lloyd-Jones in *Shindler* on Article 50(1) TEU:

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[60] Para 37.

[61] C-261/18 *Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:978, Opinion of Advocate General Campos Sánchez-Bordona., para 106.

[62] Piet Eeckhout and Eleni Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading' (2017) 54 *CML Rev* 695, 699.

[63] See additionally, Dora Kostakopolou, 'Brexit, Voice and Loyalty: Reflections on Article 50 TEU' (2016) 41 *EL Rev* 487, 488. Kostakopoulou argues that 'If they [Member States] do not follow the voice or exit provisions contained in the Treaties, their actions essentially undermine the integrity of the EU's institutional framework and can easily lead to a decline in trust and confidence in the EU [...]' and 'Giving a dissenting Member States the licence to ignore the voice and exit mechanisms existing in the Treaties would also be tantamount to authorising the EU's involvement with domestic political games and intra-party interests and agendas, but the EU can only be guided by the "collective good"'.

[64] Allan F Tatham, 'Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (ed), *EU Law after Lisbon* (OUP 2012) 128, 149.

> However, it does not follow that the manner in which such a competence of a Member State is exercised is incapable of engaging EU law. On the contrary, *Preston, Rottmann and Tas-Hagen* among other authorities demonstrate that a Member State when acting within a field of national sovereign competence must nevertheless have regard to the impact of the manner of exercise of that competence on fundamental rights in EU law. In this way, EU law may be engaged in principle.

And

> [...] we consider that in principle the manner in which the United Kingdom exercises its sovereign competence in this regard is capable of engaging EU law.[65]

After all, EU law was still part of domestic law at the time of the decision because 'Parliament has so willed'.[66] This means that the EU fundamental principles enshrined in Article 2 TEU, such as the rule of law (as a commonly-shared principle safeguarded and enforced in the EU legal order) applied to the exit process by virtue of the UK's EU membership obligations.[67] Specifically, with reference to respect to the rule of law as an overarching principle of EU law, the Commission has laid down a set of commonly shared rule-of-law principles that include a mixture of formal and substantive qualities such as legality, which implies a transparent, accountable, democratic, and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.[68] While the Commission has been heavily criticised for its handling of the rule-of-law crisis in Poland and Hungary, it has framed the rule of law debate according to a rather broad set of legal values that aim, inter alia, to safeguard the EU *acquis* from prospective breaches. It is therefore imperative that these values apply to all stages of EU membership, inclusive of accession and the process of withdrawal from the EU. As indicated by Hillion:

> [b]oth in law and practice, therefore, the procedure of Article 50 TEU is firmly embedded in the EU legal order. While the right to withdraw that it acknowledges is not in itself conditional upon acceptance by the EU, the exercise of that right is nevertheless subject to EU institutional and substantive rules.[69]

While the above discussion demonstrates that the EU legal framework is rigorous with reference to the decision, it is noticeable that the relevant case law in the UK did not provide a basis for challenge under EU law of the process by which a Member State had arrived at

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[65] *R (Shindler) v Chancellor of the Duchy of Lancaster* [2016] EWHC 957 (Admin) paras 24 and 26. In its judgment the Supreme Court did not deal directly with the general application of EU law to the exit process, although it clarified how EU law engages with freedom of movement. Giving the Court's decision, Lady Hale (then Deputy President of the Supreme Court) said 'Assuming for the sake of argument that European law does apply, we have decided that it is not arguable that there is an interference with right of free movement, for the reasons given by the Divisional Court and the Court of Appeal'.

[66] *Pham v Secretary of State for the Home Department* [2015] UKSC 19, para 80.

[67] See for a discussion on the protection and enforcement of EU law against the Member States: Theodore Konstadinides, *The Rule of Law in the European Union* (Hart 2017), Chapter 5.

[68] Commission, 'Communication to the European Parliament and the Council, 'A new EU Framework to strengthen the Rule of Law' COM (2014) 158 final.

[69] Christophe Hillion, 'Withdrawal under Article 50 TEU: An integration-friendly process' (2018) 55 *CML Rev* (special edition) 29.

a decision to withdraw from the EU. It was rather acknowledged that the withdrawal reflected the position under international law and that Article 50 TEU was to be free from interference by EU law. For instance, despite its obvious constitutional importance, *Miller* does not provide a clear authority on the actual decision-making process underpinning the invocation of Article 50 TEU to trigger Brexit, including the constitutionality of the decision to leave the EU and validity of the respective notification from an EU law standpoint, also due to manner in which the claimants led the case.

A UK precedent which touched upon the above issue is the judgment in *Shindler* which concerned the applicability of EU legal principles to the 2016 referendum and to the withdrawal arrangements.[70] In particular, the opinion of Lord Justice Elias in the Court of Appeal was unequivocal in confirming that EU law has no place in a State's decision to remain or withdraw from the EU.[71] Such an opinion expressly borrowed from the German Constitutional Court's (*Bundesverfassungsgericht* or *BVerG*) reserved judgment regarding the ratification of the Treaty of Lisbon. As it is well-known, the *BVerfG*'s *Lisbon judgment* concerned a review of the compatibility with German constitutional law of Germany's ratification of the Lisbon Treaty. In its usual approach,[72] the *BVerfG* interpreted EU law in its own domestic terms by placing emphasis on satisfaction of domestic constitutional requirements over EU ones and declaring itself to be the final arbiter of the constitutionality of a potential withdrawal over and above the external assessment of the CJEU.[73]

The above approach adopted in *Shindler* can be problematic for two reasons. First, it is predicated on the assumption that the only applicable rules of interpretation of Article 50 TEU should be domestic and that neither the *travaux préparatoires* nor the general principles of EU law are to be used as reference, not even in principle. Such conclusion contradicts the legal justification under EU law as confirmed by the CJEU in *Wightman*, mentioned earlier in this section,[74] as well as certain key public international law principles. According to both 'external' sources of law, domestic courts need to give regard to the *travaux* (as indicated by Lord Kerr in in *Moohan*[75]*)* and to the principle of *effet utile* highlighting the uniform effect of material EU law in the Member States.[76] Second, as also confirmed by Lady Hale's judgment

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[70] [2016] EWCA Civ 469 at [60] '…the construction of Article 50 ...which simply recognises the political reality that EU law can have no part to play in the decision whether a state chooses to remain in the EU.'

[71] *Re Ratification of the Treaty of Lisbon* [2010] 3 CMLR 13, German Constitutional Court.

[72] See *Brunner v European Union Treaty* [1994] CMLR 57; *OMT judgment,* FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13. See for an extensive analysis of the *OMT* case the special issue (2014) 15(3) *German Law Journal*, especially Mattias Kumm, 'Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and what the CJEU Might do about it' (2014) 15 *German Law Journal* 203.

[73] See paras 305–306.

[74] Case C-621/18 *Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999, para 47, when interpreting Article 50 TEU an interpreter is required to give due regard to the *travaux* ('The origins of a provision of EU law may also provide information relevant to its interpretation') and to the whole EU law system, including the general principles ('… the interpretation of a provision of EU law requires that account be taken not only of its wording and the objectives it pursues, but also of its context and the provisions of EU law as a whole'.)

[75] *Moohan v Lord Advocate* [2014] UKSC 67. See also more recently on *travaux préparatoires* as aids: *Warner v Scapa Flow Charters (Scotland)* [2018] UKSC 52.

[76] With reference to the principle of *effet utile*, it is common knowledge that the CJEU has constructed and applied the principle as an interpretive technique to mitigate the entrenchment and extension of EU

dealing with Mr Shindler's application for leave to appeal to the UK Supreme Court (permission to appeal was refused), the *Shindler* case is concerned with freedom of movement and internal situations. In this context, the Supreme Court's assessment that EU law might not apply was less prone to challenge given the wider scope of manoeuvre allowed to Member States by the CJEU in relation to purely internal situations.[77] One way of thus interpreting Lord Justice Elias's opinion in the Court of Appeal's decision in *Shindler* regarding the place of EU law in a State's decision to withdraw from the EU is that the Court sought to derive a more general rule from the 'purely internal situation' doctrine.

The bottom line is that while the decision to leave the EU derives from the sovereign will of the withdrawing State,[78] such sovereign decision needs to be respectful of the EU constitutional rulebook[79] including the principle of effectiveness of EU law and respect for fundamental rights that individuals derive from EU law. Even if one were to assume that such decision is caught by the non-exhaustive definition of an 'essential State function' under Article 4(2) TEU[80] this does not imply that the decision should not uphold the protection of fundamental rights and common values that express European constitutional consensus. In this respect, the CJEU even in relation to security issues has clarified that 'essential State functions' need to respect fundamental rights.[81] The CJEU in *Wightman*[82] confirmed also in respect of a decision taken under Article 50 TEU that such essential State function needs to conform to common values and expressly recalled that Article 50 TEU engages with the protection of fundamental rights.[83]

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general principles such as primacy and direct effect of EU law as well as fundamental rights (especially prior to the Charter becoming legally binding in the Lisbon Treaty). See Case C-223/98 *Adidas* ECLI:EU:C:1999:500; Case 292/82 *Firma E. Merck v Hauptzollamt Hamburg-Jonas* ECLI:EU:C:1983:335, para 12. Also beyond the established jurisprudence of the CJEU, effective interpretation is also implicitly embodied in Article 31(1) of the Vienna Convention on the Law of Treaties. See ILC Report (no 4) 219 para 6

[77] For an analysis of the 'pure internal situations' doctrine see Sara Iglesias Sánchez 'Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?' (2018) 14 *EuConst* 7.

[78] As confirmed by the CJEU in *Wightman* in para 56: 'It follows that Article 50 TEU pursues two objectives, namely, first, enshrining the sovereign right of a Member State to withdraw from the European Union and, secondly, establishing a procedure to enable such a withdrawal to take place in an orderly fashion.'

[79] See Theodore Konstadinides, 'The Rule of Law as the Constitutional Foundation of the General Principles of EU Law' in Katja S. Ziegler, Päivi J. Neuvonen and Violeta Moreno-Lax (eds), *Research Handbook on General Principles in EU Law. Constructing Legal Orders in Europe* (Edward Elgar 2022).

[80] This provision refers to national identity. See Theodore Konstadinides, 'Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse' (2015) 34 *Yearbook of European Law* 127.

[81] See judgment in Case C-216/18 PPU *Minister for Justice and Equality v LM (Deficiencies in the system of justice)* ECLI:EU:C:2018:586, especially para 35.

[82] See Case *Wightman*, para 63.

[83] See Case *Wightman*, paras 62–64.

4. CONCLUSION

The decision to withdraw from the EU as implemented by the Prime Minister's notification letter of 29 March 2017 has raised a number of questions regarding the 'what', 'when' and 'by whom' the decision was made as well as 'whether' that decision had to comply with a set of constitutional obligations and could be justiciable as a matter of domestic and EU constitutional law.[84] In this regard, the chapter highlighted the tension between legal clarity and certainty, on the one hand, and the practical imperatives of Brexit taken into consideration on both sides, on the other hand. Of course, one can appreciate that in the midst of fast approaching and tense negotiations it would have been inconceivable for a court to step in and interfere with the political decision to leave the EU. While therefore a number of applicants identified a trigger in terms of the constitutional propriety surrounding the decision, the relevant applications for judicial review were substantially out of time and regarded as raising no legal matter requiring an extension of time.

Hence, when all was said and done, it was the Government, not Parliament, that in the end had the final say about the implications of the UK-EU referendum. Also as warned by Parliamentary Committees and later confirmed by the relevant withdrawal legislation, Brexit is subject to an extensive usage of Henry VIII powers to determine individual rights.[85] Given the abstention from judicial review of political questions and the difficulty of UK judges to accommodate constitutional challenges about the decision post-*Miller*,[86] the referral to the CJEU of the interpretation of Article 50 TEU from the Scottish Court of Session in *Wightman*[87] and then the *Cherry/Miller II* decision[88] provided an additional perspective which helped prescribing the traits of the decision to leave, in particular in the case of a no-deal scenario, which of course did not materialise. The UK Supreme Court, after *Miller,* also engaged with the scope of statutory interpretation, necessary implication, principle of legality and protection of fundamental rights when engaging with EU law and/or with constitutional statutes, respectively, in landmark cases such as *Privacy International*, *Black*, and *UNISON*. These judgments help clarifying some of the silences of the 2017 Act, which become evident in *Cherry/Miller II*: primarily the fact that it was based in such general terms that did not account for the rights that were lost as a result of Brexit.

The importance of the post-*Miller* legal issues surrounding the underlying decision to withdraw from the EU give some credence to the argument that primary legislation needed to clearly and unequivocally adopt (prior to the notification under Article 50(2) TEU) a decision

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[84] This is contrary to what the Court of Appeal held in *Webster v Secretary of State for Exiting the EU & Others,* REF:C1/2018/1430, 2 January 2019.

[85] The Henry VIII powers provided for under the European Union (Withdrawal) Act 2018 restrict Parliament's ability to engage with large-scale changes to the statute book. This has raised concerns in the House of Lords. See https://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/news-parliament-2017/legislative-process-delegation-of-powers/ accessed on 31 July 2022.

[86] See footnote 5. As mentioned there has been a number of related challenges against the Government brought before the High Court which have failed at the permission stage of judicial review proceedings.

[87] See *Andy Wightman MSP and others v Secretary of State for Exiting the European Union* [2018] CSIH 62 issued on 21 September 2018.

[88] Para 57.

to leave and deal with any consequences on fundamental rights or indeed devolution which was fundamentally undermined during the Brexit process.[89] In particular, primary legislation could have clearly delegated the authority to the Prime Minister to take a formal decision in writing under Article 50(1) TEU. Parliament could have equally set out the criteria informing her decision, and providing for the Prime Minister and her Ministers to be compelled to perform their duties or restrain them from exceeding their powers while adopting the decision.[90] Such criteria could have included, for instance, clear instructions on the scope of any interference with EU-law derived fundamental rights and freedoms after the UK's withdrawal.

One has to acknowledge that as negotiations had not begun at the early phase of Brexit, the Government would have not perhaps wished to bind itself in such a way especially since on issues such as citizens' rights it sought reciprocity. At the same time, one appreciates that more clarity would have been welcome especially on the requirement confirmed more recently in *Cherry/Miller II* that ministerial actions need to have a reasonable justification; hence, such actions would need to be subject to compliance with common law rights, human rights scrutiny and the rule of law. Conversely, as discussed in this chapter, the UK's withdrawal followed, constitutionally, a much more winding path and any aspiration for legal elegance and clarity was lost in the realm of political expediency and the desire to achieve short-term goals. The chapter suggests that an important lesson stemming from the initial phase of Brexit is therefore that any future decision to withdraw from another international treaty, especially one that creates rights in national law,[91] would be better served by an Act of Parliament which explicitly authorises withdrawal and sets out the rights likely to be affected by it as well as the role of the executive in modifying them. Notwithstanding the competing theories as to what procedures need to be followed in making a decision to depart from the EU some common lessons can also be drawn from the initial stages of Brexit discussed in this chapter. These pertain to the complexity of constitutional issues which all Member States shall have regard to when they decide to exercise their right to withdraw from the EU legal order, the most fundamental question being: What about our constitutional requirements?

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[89] See Paul Daly, 'The Form of the Article 50 Authorisation Bill: Some Early Thoughts on Miller [2017] UKSC 5' (*Administrative Law Matters*, 24 January 2017) https://www.administrativelawmatters.com/blog/2017/01/24/the-form-of-the-article-50-authorisation-bill-some-early-thoughts-on-miller-2017-uksc-5/ accessed on 31 July 2022.

[90] *Davidson v Scottish Ministers*, 2006 SC (HL) 42.

[91] The Government's consultation on the HRA 'Human Rights Act Reform: A Modern Bill of Rights' confirms (in para 70) that 'the UK will remain party to the Convention and will continue to fulfil its international obligations.' Available from https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation accessed on 31 July 2022.