# WHO IS TAKING (BACK) CONTROL OF BREXIT?

## Assessing the implications of the UK Supreme Court decision in *Miller*

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On 24 January 2017, the UK Supreme Court rendered its judgment in the highly-anticipated *Miller v Secretary of State for Exiting the EU*. By an 8-3 majority, the Court held that in order to start the formal process of leaving the EU, the Government must first seek the approval of Parliament. But despite the controversy surrounding the case, are its likely effects on the immediate Brexit process limited?

### Introduction

It has been nine months after the UK's historic decision to leave the European Union by a 52% to 48% margin, and at the time of writing this article we are just days away from the 29st March deadline Prime Minister Theresa May has given for officially invoking Article 50 TEU, thereby starting the process to end the UK's 40-year membership of the Union. Although negotiations are due to begin imminently, it is still far from certain just what kind of 'Brexit' the Government will eventually pursue. It has recently published a hastily-compiled White Paper,[1] which suggests that the focus will be on reducing immigration and budgetary contributions, as well as leaving the jurisdiction of the Court of Justice of the European Union (CJEU). These will be prioritised over economic considerations, such as retaining preferential access to the internal market, in what is being called a 'hard Brexit'.

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This uncertainty has resulted in a range of legal problems connected to the process of withdrawal, and the judicial system has been no different. This is unsurprising, given the uncharted territory the UK finds itself in. Before the Treaty of Lisbon there was no formal procedure for a Member State to leave the Union at all, and even now the infamous Article 50 TEU only covers some procedural aspects of the exit process. Article 50(2) TEU states that the Union will negotiate a withdrawal agreement taking into account the 'future relationship with the Union'. Article 50(3) TEU provides for a two-year time limit to these negotiations, after which the treaties will cease to apply.

### The Supreme Court Case

By far the highest profile and most controversial legal action has been the case of *Miller & Dos Santos v Secretary of State for Exiting the European Union*,[2] which concerned the process by which the (unwritten) UK constitution would permit the Government to notify the EU of its intention to leave the European Union, i.e. in accordance with what Article 50(1) TEU refers to as the Member State's 'own constitutional requirements'. The Supreme Court case actually concerned two separate appeals. The first was that of *Miller*, the highly controversial High Court decision against the Government,[3] which was spearheaded by Gina Miller, the charismatic businesswoman claiming to be merely providing a framework by which the UK could exit the EU. Given the national mood since the referendum, she inevitably became the enemy/saviour of democracy (depending on one's position). This divisive rhetoric was not helped by the tabloid press, whose reaction to the High Court's original decision against the Government was extreme to say the least, with some labelling the judges 'enemies of the people', inviting parallels with Nazi propa-

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1 HM Government White Paper: The United Kingdom's exit from and new partnership with the European Union (2017) Cm 9417. The White Paper's time stamp suggests it was printed at 4.30 on the morning of its publication, and was littered with errors, including the interesting claim that UK workers are entitled to a staggering 14 weeks paid holiday leave (the real figure is 5 weeks, one more than the harmonized EU minimum (see p. 32, now corrected).

2 *Miller & Dos Santos v Secretary of State for Exiting the European Union* [2017] UKSC 5 (24 January 2017).

3 *Miller & Dos Santos v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (3 November 2016).

ganda.[4] The second appeal was that of *McCord*,[5] in which the applicants appealed the decision of the Northern Irish High Court – this time in the Government's favour – that the consent of the Northern Irish population was not required before Article 50 TEU could be invoked.

In its highly anticipated judgment, the Supreme Court dismissed the Government's appeal in *Miller* by an 8-3 majority, finding that the consent of Parliament was required before the Government could invoke Article 50 TEU. To do otherwise would infringe upon the constitutional principle that Government executive action through the 'royal prerogative' should not alter or remove the domestic rights of individuals. The Supreme Court also unanimously dismissed the applicants' appeal in the *McCord* case, finding that there was no need for the UK Government to obtain the approval of the devolved legislatures before notifying under Article 50 TEU.

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**The Majority Judgment**

*Miller* is a behemothic judgment of 283 paragraphs and covers a whole range of constitutional issues – the limits to the royal prerogative powers, the status of EU law within the domestic UK legal order, and the competences of the devolved legislatures. It is clearly a judgment that will be referred to for years to come. However, maybe the most contentious aspect (certainly as regards the immediate Brexit consequences) is something barely mentioned in the judgment, namely the ability of the UK to unilaterally revoke its notification under Article 50 TEU. This questionable assumption was agreed on by both parties, meaning that once the UK notifies the EU of its intention to leave the EU, the procedure cannot be unilaterally withdrawn by the UK. As the Government did not contest the point, the Court was willing to proceed without expressing its own view, and considered that '(…) once the United Kingdom gives Notice, it will inevitably cease (…) to be a member'.[6]

**The Royal Prerogative**

The first issue in the case concerned the use of the royal prerogative, a residual customary power historically reserved for the Crown. Whilst originally used to separate the powers of the Monarch from those of Parliament, this archaic power can today be understood as the executive powers Government Ministers are permitted to exercise independently of Parliament. Often referred to as a 'relic of a past age',[7] the prerogative still serves an important role by allowing the Government to perform certain executive functions that cannot reasonably be done with parliamentary interference. This includes the power to enter into and depart from international organisations, and the 'signing and un-signing' of international treaties.

The Government's main argument was that the power to invoke Article 50 TEU fell inside this 'general rule' of the royal prerogative. However, the Court emphasised that whilst this is the general rule, the use of prerogative powers is by no means unconditional, and is subject to the long-established principle that individual rights cannot be removed or altered through the use of prerogative powers. The earliest example of this principle is the *Case of Proclamations,* where Sir Edward Coke made the famous statement that the King could not use prerogative powers to change or remove any law of the land, 'be it statutory, common or customary'.[8] The principle was codified in the Bill of Rights, which prohibited the suspension of laws 'by regall authority without consent of Parlyament', which in 21st century English means it does not empower the Crown to change English common or statute law.[9] Furthermore, it can only be used in situations not covered by statute,[10] as if it is covered then the executive no longer derives authority from the royal prerogative but from Parliament.[11] On the other hand, parliamentary sovereignty is unconditional and allows Parliament to 'make or unmake any law whatsoever', with no person or body being able to set these aside, even the Crown.[12] The crucial issue then becomes the status of the EU Treaties within this constitutional framework: is leaving the EU within the general 'making and un-making' part of the royal prerogative, or does the special nature of the EU Treaties prohibit the Crown from exercising these powers as to do so would effectively change or remove domestic laws?

International and domestic law operate on entirely separate planes and thus international treaties do not grant individuals directly applicable rights

**Dualism, Primacy and the European Communities Act 1972**

An inherent by-product of parliamentary sovereignty is the dualist nature of the UK legal order, meaning international and domestic law operate on entirely separate planes and thus international treaties do not grant individuals directly applicable rights. This is opposed to a 'monist' legal system, such as the Dutch system, whereby international treaties and obligations are automatically enshrined within the domestic legal order and thus can conditionally be directly applied by national courts.

The Government's position builds on an argument most eloquently made by Professor John Finnis, that this dualist system means that the rules originating from the EU are not *statutory* or *domestic* rights within the meaning of the royal prerogative. Instead, they are merely international laws given effect through Section 2 European Communities Act 1972

4 J. Slack, 'Enemies of the people: Fury over "out of touch" judges who have "declared war on democracy" by defying 17.4m Brexit voters and who could trigger constitutional crisis', *MailOnline* 3 November 2016, *www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html* (last accessed 1 March 2017).

5 *McCord, Re Judicial Review* [2016] NIQB 85 (28 October 2016) .

6 *Miller* [2017] UKSC 5, para. 26.

7 Lord Reid in *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75 (21 April 1964).

8 *Case of Proclamations* [1610] EWHC KB J22 (1 November 1610).

9 Lord Hoffman in *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Bancoult (No 2)* [2008] UKHL 61 (22 October 2008).

10 Lord Reid in *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75 (21 April 1964).

11 Lord Parmoor in *Attorney-General v De Keyser's Royal Hotel Limited* [1920] UKHL 1 (10 May 1920).

12 See A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, London: McMillan 1889.

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(ECA), which would not relieve the Crown of its power to leave international treaties through the royal prerogative.[13] This perspective sees Section 2 of the ECA as the source of EU rights, acting as a 'conduit pipe' that creates a link between EU law and the domestic legal order. At least from the UK perspective, this means that the principle of the 'primacy' of EU law as developed by the CJEU can be maintained, as even within this dualist system, EU laws will in general always take priority over UK statutory rights. However, the two legal orders must be seen as entirely separate, meaning that whilst withdrawal from the EU would result in its laws ceasing to apply in the UK, this could never infringe upon individuals' *domestic* rights.

Even within this dualist system, EU laws will in general always take priority over UK statutory rights. However, the two legal orders must be seen as entirely separate

The Court actually agreed with the Government in principle, however, concluded that this 'general rule' applies only when two further assumptions are also true. First, international treaties signed by sovereign states only have effect in international law and are therefore only binding on the UK. Secondly, these treaties are not part of UK law and give no rise to domestic legal rights or obligations. The majority of the Court then found that the ECA in fact does 'considerably more' than merely giving effect to an international treaty. It authorises a dynamic legal process by which, without the need for any further primary law, 'EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law'.[14]

The Court then rejected the Government's 'rule of recognition' argument that Section 2 ECA is in fact the source of laws originating from the EU. The Court concluded that in one sense the 1972 Act can be seen as the source of EU law, insofar as without it EU law would have no domestic status. However, according to the Court, in a 'more fundamental and realistic' sense, the *EU institutions themselves* are the relevant source of law. They create, amend and abrogate laws which will then apply domestically, without any further action by any UK institution.[15] Not only does the ECA provide that rights and duties deriving from EU law should apply domestically, but it also provides for an entirely new constitutional process for law-making in the UK.[16] Therefore, the ECA created an entirely *new source of law*. It provides for how this new source of law is given effect in the domestic legal order, but in itself is not the originating source of such laws.

Once it had been concluded that EU law is a source of domestic laws granting individual domestic rights, the majority then turned to the matter of the effect on individual rights – the approach taken by the

13 See J. Finnis, 'Terminating Treat-based UK rights', *Judicial Power Project* 26 October 2016, *http://judicialpowerproject.org.uk/john-finnis-terminating-treaty-based-uk-rights* (last accessed 1 March 2017). See also J. Finnis, *Brexit and the Balance of Our Constitution* (Sir Thomas More Lecture), December 2016. Available at *www.lincolnsinn.org.uk/images/word/education/Sir%20Thomas%20More%20Lecture%20-%20Professor%20John%20Finnis%20FBA.pdf* (last accessed 1 March 2017).

14 *Miller* [2017] UKSC 5, para. 60.

15 *Miller* [2017] UKSC 5, para. 61.

16 *Miller* [2017] UKSC 5, para. 62.

High Court in the first instance. In that decision, three types of rights were found that could potentially be affected by withdrawal: (i) rights capable of replication by Parliament (e.g. Directives); (ii) rights enjoyed in other EU Member States (e.g. Free Movement rights); and finally (iii) rights which cannot be replicated in UK law (e.g. the right to vote in European elections).[17] The majority considered it unnecessary to go beyond the assessment of the first set of rights, as this was enough to demonstrate that by invoking Article 50 TEU under the royal prerogative, the Government would ultimately alter or remove individual rights. Some of these directly applicable rights would automatically cease to have effect upon withdrawal. Whilst these may theoretically be replicated in the Great Repeal Bill – the Parliamentary Act proposed by the Government that will transfer *all* EU laws into UK law, at least until Parliament decides to alter or remove them[18] – this is only the promise of a minister, and as the Court had earlier stated 'ministers' intentions are not law, and the courts cannot proceed on the assumption that they will necessarily become law'.[19]

The reasoning of the majority goes further than the decision in the first instance. Not only does it confirm the High Court's approach, but it turns the Government's argument on its head. The ECA 1972 is not the source of EU law, but it does create the 'conduit pipe' link between the two legal orders, meaning that 'so long as the 1972 Act remains in force, its effect is to constitute EU law into an independent and overriding source of domestic law'.[20] As these domestic rights would inevitably be lost upon withdrawal, it would be 'inconsistent with long-standing and fundamental principle for such a far-reaching change to UK constitutional arrangements to be brought about by ministerial action alone'.[21]

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The judgment can be seen as an endorsement of the principle of primacy of EU law as developed by the CJEU, which states that EU law must take priority over all conflicting domestic laws.[22] However, this confirmation of primacy comes with an important caveat: EU law as a source of law is always subordinate to the principle of parliamentary sovereignty. Another way to think of this is that EU rules have primacy over UK laws, but only because this primacy derives from an Act of Parliament.[23]

The consequence of this is that Parliament will always retain the ability to adopt legislation that 'alters the domestic constitutional status of EU institutions' (such as exiting the EU altogether) without any requirement of its conformity with EU law.[24] This means that, whilst the state of affairs with regard to EU law is unprecedented, Parliamentary Sovereignty means that this situation will only continue so long as Parliament wishes it to do so – the 1972 Act can still be repealed just like any other statute.[25] Whilst the CJEU's position on the primacy of EU is absolute, finding in cases such as *Handelsgesellschaft*[26] that even national law of a constitutional nature must be set aside if it conflicts with EU law, it seems highly unlikely that primacy should go as far as to prohibit national legislation implementing a political decision to leave the European Union entirely.

**Additional Arguments**

In a final point the majority dismissed the Government's argument that nothing in the wording of the ECA 1972 abrogated the general rule that ministers can use the royal prerogative to withdraw from international treaties. This assertion was based on the decision in *De Keyser*,[27] in which it was held that prerogative powers only cease when the issue is *directly* regulated by statute. Therefore, the argument goes, as Parliament was silent on the issue in the ECA 1972, the power was retained by the Crown. However, the Court considered that this approach ignored the domestic status of EU law, and that notwithstanding the wording of the ECA 1972, the use of the royal prerogative could not remove these domestic rights. The Court quoted Lord Hoffman, who stated that principle of legality means Parliament must 'squarely confront' what it is doing and the political costs involved.[28] The general words (or absence thereof) within a statute cannot override fundamental constitutional rights as there is '…too great a risk that the full implications of their meaning may have passed unnoticed in the democratic process'. It cannot be said that Parliament 'squarely confronted' the idea that it was relieving ministers of the right to use a treaty-making power to remove an important source of domestic law and domestic rights.[29]

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**The Question of Devolution**

The appeal in the Northern Irish case of *McCord*, as well as an intervention of the Scottish Advocate General, concerned the powers of the devolved legislatures in relation to invoking Article 50 TEU. Since the 1990s the United Kingdom has seen a dramatic shift of powers from Westminster to both Scotland and Northern Ireland. Scotland is the most devolved, with a broad range of devolved competences in most areas, including tax raising (although this is yet to be exercised). Northern Ireland's long history of sectarian violence resulted in the Belfast (Good Friday) Agreement, creating a delicately balanced devolved legislature.

The UK Supreme Court held unanimously that devolution 'does not require the United Kingdom to remain a member of the European Union … and the

17 See *Miller & Dos Santos v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin). For more analysis, see D.W. Carter, 'UK Parliament must give consent to Brexit, but is a constitutional crisis developing?', *Leiden Law Blog* 14 November 2016, *http://leidenlawblog.nl/articles/uk-parliament-must-give-consent-to-brexit-constitutional-crisis-developing* (last accessed 1 March 2017).

18 It should be noted that the Government has not explained how it will do this, given the immense practical difficulties in transferring thousands of EU Regulations and other pieces of relevant legislation, as well as every CJEU decision, into the statute books.

19 *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513 (5 April 1995).

20 *Miller* [2017] UKSC 5, para. 65.

21 *Miller* [2017] UKSC 5, para. 81.

22 For example see CJEU 15 July 1964, ECLI:EU:C:1964:66, C-6/64 (*Costa/ENEL*).

23 See O. Garner, 'So long (as) and Farewell? The United Kingdom Supreme Court in Miller', *European Law Blog* 26 January 2017, *http://europeanlawblog.eu/2017/01/26/so-long-as-and-farewell-the-united-kingdom-supreme-court-in-miller/* (last accessed 1 March 2017).

24 *Miller* [2017] UKSC 5, para. 67.

25 *Miller* [2017] UKSC 5, para. 60.

26 CJEU 17 December 1970, ECLI:EU:C:1970:114, C-11/70 (*Handelsgesellschaft*).

27 *Attorney-General v De Keyser's Royal Hotel Limited* [1920] UKHL 1 (10 May 1920).

28 *R v Secretary of State for Home Department ex parte Ian Simms* [1999] UKHL 33 (8 July 1999).

29 *Miller* [2017] UKSC 5, para. 87-88.

devolved legislatures do not have a parallel legislative competence in relation to withdrawal'.[30] As for the *McCord* case, whilst the Belfast Agreement ensured that the people of Northern Ireland have the right to determine whether or not to remain part of the *United Kingdom*, it does not mean the Government requires the consent of the Northern Irish population for the UK to leave the *European Union*.[31]

The Court also dismissed the complaints of the intervening Scottish Government in relation to the Sewell Convention, which dictates that Westminster should not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. It was found that this only applies in cases where UK Parliament enacts provisions that directly alter the legislative competence of a devolved legislature. However, in cases where Parliamentary Acts implement changes to the competences of *EU institutions* that consequently affect devolved competences, this does not require a consent motion, much like the European Union Act 2008 did not. Moreover, the Court emphasised the long-standing principle that political conventions cannot be enforced in the courts.[32] As the Court stated, 'judges are therefore neither the parents nor the guardians of political conventions; they are merely observers'. The Sewell Convention has been recognised in the Scotland Act 2016, but this cannot elevate the political convention to a 'legal rule'.[33]

The lack of dissent within the Court demonstrates that the final decision in relation to devolution was uncontroversial. However, there is an argument that the Court's interpretation of parliamentary sovereignty is outdated and fails to consider the dynamic and devolved nature of the modern British constitution.[34] Whilst it is correct that the devolved legislatures do not have an effective veto over decisions such as invoking Article 50 TEU, it could be argued that as a matter of constitutional law and principle the devolved legislatures should be making the decision to exit the EU with the UK Parliament *together.* Instead, according to O'Neill, the Court's decision is based on an 'English Imperial constitutional tradition forged in the Victorian Age'.

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**The Dissenters**

The three dissenters, led by Lord Reed, disagreed with the majority's conclusion that EU law is a source of domestic law, claiming that this was in fact Section 2 of the ECA. As such, withdrawal could never affect domestic rights as these would merely just cease to be imported into the domestic legal order. They also agreed that Parliament did not explicitly remove the inherent power under the royal prerogative to withdraw from the EU Treaties in the ECA 1972, and therefore this power still remained with the Crown. According to Lord Reed, 'if Parliament chooses to give domestic effect to a Treaty containing a power of termination, it does not follow that Parliament must have stripped the Crown of its authority to exercise that power'.[35]

An additional argument was based on the separation of powers within the British constitution. According to Lord Carnwath, the use of prerogative powers should not be dealt with by the courts but through Parliament: 'the Executive is accountable to Parliament for its exercise of the prerogative, including its actions in international law. The courts may not inquire into the methods by which Parliament exercises control over the executive'.[36] However, the Lord Justices have hardly been reluctant to interpret the limits of the royal prerogative in the past.

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**The Reversibility of Article 50 TEU**

*Miller* is likely to be a case of constitutional significance for years to come. However, its immediate implications in relation to Brexit are highly uncertain. After the Government lost the *Miller* case, it drafted the European Union Notification of Withdrawal Bill 2017,[37] which it hopes will satisfy the constitutional requirements laid down by the Court. However, during the process of the Withdrawal Bill going through Parliament, it has become clear that the 'common ground' between the parties (that notification cannot be unilaterally withdrawn, and is therefore legally the same as withdrawal) is highly questionable. Indeed, the legal consensus – at least in the United Kingdom – suggests that it is in fact incorrect. The legal advice provided to the House of Lords, dubbed, the 'Three Knights' Opinion' (written by EU law heavyweights Sir David Edward (12 years judge at the CJEU), Sir Francis Jacobs (18 years Advocate General at the CJEU), and Sir Jeremy Lever), is uncompromising in its certainty that a notification under Article 50 TEU can be unilaterally revoked.[38] First, if the 'national constitutional requirements' contained in Article 50(1) TEU are not met (e.g. if the Government *had* used the royal prerogative to invoke Article 50 TEU), then a Member State must be able to unilaterally reverse the process. Secondly, the use of the word 'intention' and the term 'decides' instead of 'has decided' would suggest that the decision is not final. Thirdly, as unilateral revocation is not explicitly precluded, and furthermore provides a process for a Member State *re-joining* the EU, stopping the initial exit process must be allowed. Finally, the Knights make reference to Lord Kerr – Lord Justice at the Supreme Court and main author of Article 50 TEU – who considers that as the process is voluntary, it must be revocable.

The consequence of this would be that notification and withdrawal cannot be said to be one and the same. Consequently, the mere act of notification

30 *Miller* [2017] UKSC 5, para. 130.
31 *Miller* [2017] UKSC 5, para. 135.
32 *Attorney-General v Jonathan Cape Ltd* [1976] 1 QB 752 (1 October 1975).
33 *Miller* [2017] UKSC 5, para. 148.
34 A. O'Neill, 'Miller, BrEXIT and BreUK-up', *Counsel Magazine* March 2017. Available at *www.counselmagazine.co.uk/articles/miller-brexit-and-breuk* (last accessed 1 March 2017).
35 *Miller* [2017] UKSC 5, Dissenting opinion of Lord Reed, para. 177, 204.
36 *Miller* [2017] UKSC 5, Dissenting opinion of Lord Carnwath, para. 249.
37 Bill 152 European Union (Notification of Withdrawal) Bill 2016-17.
38 Available at *www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf* (last accessed 1 March 2017).

of an *intention* to leave can never by itself alter domestic rights. This would mean another Parliamentary Bill is required before the UK could formally leave the EU. The prime minister attempted to relieve this by giving Parliament a 'meaningful vote' on the deal negotiated by the Government at the end of the two-year period provided for in Article 50 TEU.

Therefore, as the status of this 'meaningful vote' is uncertain, it will ultimately become the crucial constitutional question regarding the UK's withdrawal from the European Union. The Government's position is that this will be a take-it-or-leave-it deal, with Members of Parliament deciding between the Government's negotiated deal or a clean break with no withdrawal agreement whatsoever. As such, the House of Lords inserted an amendment into the Withdrawal Bill stating that Parliament should also have to approve any decision to leave the EU without a deal after the negotiations. Even though the Lords ultimately backed down after the Commons rejected the amendment, there is still much debate as to whether the *Miller* judgment actually means the UK can withdraw from the EU at the end of the negotiations without a further Act of Parliament.[39]

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All this ultimately means that the UK courts could well be confronted by a re-run of the *Miller* case, this time determining whether the UK can (definitively) leave the European Union without another Act of Parliament being passed. Although, it may be that the issue of revocability is eventually resolved not by the UK Supreme Court, but by the European Union. Barrister Jolyon Maugham QC is currently crowd funding a challenge before the Irish courts, with the explicit intention of referring the question of revocability to the CJEU. Whether the Irish courts, or indeed the CJEU, will accept the case is still uncertain.

Whilst this may ultimately dilute the legal value of the *Miller* judgment, the more troubling proposition (for those who prefer a degree of parliamentary oversight to their Brexit) is that the withdrawal process cannot be revoked. This means that as Article 50 TEU has now been formally invoked (assuming Theresa May has done so by the end-March deadline), the UK has effectively already left the European Union. Whilst this outcome is likely inevitable, whatever one's preferences, it will be rather pathetic if the EU Withdrawal Bill, an eight-line bill that passed with zero amendments, is the statute that dumps the UK out of the EU, altering the British constitution more than any other in generations! That being said, even if it is legally possible for the UK to leave the EU without another Act of Parliament, as Shadow Brexit Secretary Keir Starmer has stated, it would surely be untenable for the Government to continue with Brexit if it has just failed to secure a majority in favour of it in the House of Commons.

**Concluding remarks**

Are the EU Treaties standard international law that falls within the general 'signing and unsigning' role of the royal prerogative? Or do they have *sui generis* nature that transforms EU law into statutory, domestic rights? A cynic might argue this decision ultimately comes down to one's opinion on the UK's membership of the EU. However, it is difficult to argue that the EU Treaties do not meet the test as laid down by the Supreme Court. The Union institutions adopt legislation which is instantly applicable in national courts, without any need for further legislation whatsoever. This is a unique situation, and very different from that of other international treaties, such as the European Convention on Human Rights, which is only given partial effect through the Human Rights Act 1998, and does not provide for supranational lawmaking processes that create directly applicable rights without the need for further legislation.

It is certain that the legal issues surrounding Brexit are far from over

As for the immediate Brexit process, given the significant possibility that Parliament will reject the Government's final Brexit deal, it may well be that the Supreme Court faces a re-run of the *Miller* case at the end of the process. However, the UK courts may face many more actions in relation to substantive rights coming from the European Union, particularly once these being altered or removed as a result of Brexit. Whatever the situation as regards the reversibility of Article 50 TEU, it is certain that the legal issues surrounding Brexit are far from over. Although, given that very few expect the negotiations to be anywhere near completed within the two-year timeframe laid down in Article 50 TEU, there is ample opportunity for plenty more legal challenges.

39 A. Lang, T. McGuinness & V. Miller, 'European Union (Notification of Withdrawal) Bill: analysis of Lords' amendments' (Briefing Paper No. 7922), House of Commons Library, 10 March 2017.