Article 50: the trigger that never was?

With the start of Brexit negotiations drawing closer **David Wolchover** argues that the Prime Minister has *not* triggered Article 50 of the Treaty on European Union

On March 29 Sir Tim Barrow delivered a letter from the UK Prime Minister Theresa May to European Council President Donald Tusk purporting to give notice under Article 50(2) of the Treaty on European Union of Britain's decision to quit the EU. Extraordinary as it may seem this article argues there was no legal basis for such notice, the letter had no legal effect and it completely failed in its declared purpose. In short, Article 50 has not been activated. The letter was a *faux* trigger, a chimera, an illusion, not the real thing.

The Gina Miller case: the Referendum Vote was not the withdrawal decision

To see why we are in this incredible predicament we need to begin by visiting the decision of the Supreme Court (SC) in the Gina Miller case, *R. (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5 (https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf. There it was held quite unequivocally (at paras 116 to 125) that the Referendum result was not a constitutionally binding decision to leave: it had to be ratified by an Act of Parliament because only our legislature could make the decision. After *Miller* the ball was firmly in the government's court but the only legislation which Parliament enacted in response to the judgment, the European Union (Notification of Withdrawal) Act 2017, did no more than bestow the Prime Minister with authority to give notice under Article 50. It merely made provision for the initiation of a procedure and did not either expressly or by implication address the substantive issue of whether the UK should withdraw from the EU. This could be the greatest elephant in the room – or the emperor's new clothes – of all time. It is difficult to believe that with so many lawyers in Parliament and with all that breathtaking array of legal glitterati deployed at vast expense in *Miller* no one in government or Parliament spotted its fundamental deficiency.

Article 50 and the requirement for a withdrawal decision

To begin our excursion we need to examine the exact terms and meaning of Article 50. It provides:

> (1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
>
> (2) A Member State which decides to withdraw shall notify the European Council of its intention.

If no constitutionally binding decision to withdraw has been made there will be nothing about which to give notification. It is as simple as that. (An assertion by Dr Andrew Watts, reported after the submission of this article for publication, that the notification was "unlawful" was palpably therefore misconceived: see article by Chloe Farand, 22 May 2017, http://www.independent. co.uk/news/uk/politics/brexit-theresa-may-eu-letter-notification-unlawful-brexit-judicial-review-dr-andrew-watt-scotland-

a7749811.html. It is doubtful whether a projected application for judicial review will be feasible.)

The question is whether there has been a binding decision to withdraw, as to which notification under Article 50 is compulsory. *Miller* held that in the particular context of the European Union Referendum Act 2015 the phrase "in accordance with its own constitutional requirements" in Art. 50(1) effectively translates as "by means of an Act of Parliament." The reason for this, as the SC made crystal clear, is that under the 2015 Act the Referendum result itself did not enjoy the constitutional status of a decision to withdraw. The obvious contrast is with the 2011 Referendum on the question whether the alternative voting system should be adopted in Parliamentary elections. In making legislative provision for that referendum Parliament specifically determined that the outcome was to have a statutorily binding effect without the need for Parliamentary ratification (Parliamentary Voting System and Constituencies Act 2011, s.8; see *Miller*, para 118).

Only a decision enacted by Parliament in pursuance of Art.50(1) can occasion notice under Art.50(2) for the very simple reason that if there has been no decision there can be no decision about which to communicate. So the Referendum vote in favour of withdrawal had to be ratified by an Act of Parliament. Although, as the SC pointed out (para. 119), the 1975 referendum on whether the UK should stay in the European Economic Community (the forerunner of course of the EU) was very similar to the 2016 Referendum the way in which the two procedures were characterised by ministers differed. The 1975 referendum was described by ministers at the time as advisory, whereas the 2016 referendum was described as advisory by some ministers but decisive by others. However, as the SC stressed, nothing hung on that for present purposes:

> "Whether or not they are clear and consistent, such public observations, wherever they are made, are not law: they are statements of political intention. Further, such statements are, at least normally, made by ministers on behalf of the UK government, not on behalf of Parliament."

It had been suggested to the SC on behalf of the Secretary of State that, having referred the leave/remain question to the electorate, Parliament could not have intended that on the vote being to leave, the same question would be referred back to it (para. 120). This was rejected as classic *petitio principii*, the court pointing out that the argument assumed what it sought to prove, namely that the referendum was intended by Parliament to have a legal effect as well as a political one. The contrast was drawn with the 2011 Act which specifically envisaged both effects. In short, the SC held (at paras 121 and 122):

> "Where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation. . . . [T]he fact that Parliament may decide to content itself with a very brief statute is nothing to the point. There is no equivalence between the constitutional importance of a statute, or any other document, and its length or complexity."

What is important is that there must be certainty and absolute clarity. So an Act ratifying the Referendum vote for withdrawal would not need to state, for example, anything more than:

> "The United Kingdom shall withdraw from the European Union . . ."

or more particularly:

> "The result of the referendum of 23 June 2016 is hereby ratified and, accordingly, the United Kingdom shall withdraw from the European Union."

Nothing less would do. Since this article was first published on 1 June 2017 the further incisive point has been made to the author by Richard Bird that a key indicator of the non-binding nature of the Referendum was that a binding result would have required the specific enactment of a simple majority or a supermajority. Had the issue fallen for debate it is likely that a supermajority of 60 or 66 per cent might well have been considered appropriate for a major constitutional change. No such debate took place for the simple reason that the vote was not intended to be binding. (See also Bird's article "Why the UK needs another EU debate and vote," http://www.huffingtonpost.co.uk/richard-bird/eu-debate-_b_12669548.html, 1 November 2016.)

The European Union (Notification of Withdrawal) Act 2017

From the SC's clear statement that without Parliamentary ratification, the Referendum did not enjoy binding constitutional, legal status there was an implied hint to the government that they needed to ask Parliament to enact a suitable measure articulating an express, unequivocal decision to withdraw. But the express injunction was to obtain an Act authorising Article 50 notification and that is all the Government duly obtained. Section 1(1) of The European Union (Notification of Withdrawal) Act 2017 merely provided:

> "The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU."

On the face of it this certainly does not appear to express any decision by Parliament to withdraw but is confined to giving an authority to the PM to notify the UK's intention to withdraw. If, however, there has been no statutorily binding decision to withdraw there can be said to be no intention to do so, the words decision and intention being synonymous. So when Mrs May's letter to Donald Tusk was delivered on March 29 there had been no constitutional decision (that is, no such binding declaration of intent) about which to notify him and so nothing material to communicate. Art.50(2) was not yet capable of being implemented.

Could the 2017 Act have amounted to an implicit decision to leave?

Yet in spite of appearances might s.1(1) nonetheless have been intended – and understood – to stand as an implicit decision to exit? The SC ruled in *Miller* that Parliament in essence owns the Leave/Remain decision in consequence of the European Communities Act 1972 and other relevant provisions. It may be asked whether in giving the Prime Minister authority to invoke Article 50 Parliament was thereby implicitly exercising its constitutional power (consequent upon but independent of the Referendum vote) to decide that the UK should exit the EU. The argument in essence is that Acts of Parliament are presumed to be purpose led, that without such an implicit decision the notification authority bestowed on the PM would have had no purpose, and accordingly that the implicit decision to withdraw must be read into the Act to infuse it with meaning.

The government's avowed aim behind the Act

To such an argument one might respond with the accolade "nice try!" However, a recent line of authority has established the principle that where fundamental rights are likely to be at stake (as they may well be on exiting) statutory provisions must be expressed with the utmost clarity. Thus, in *Miller* the SC declared that Parliament must "squarely confront" what it is doing in the clearest terms of its intent. To reiterate the point made earlier, the natural meaning of the wording of the Act was merely to give the Prime Minister the power of Art 50 notification, the words "where applicable" being implicit without strain. On its face it manifestly did not enact the condition under which the Article could apply, namely the withdrawal decision. Moreover the drafter was self-evidently implementing the Government's avowed intention that the purpose of the Act was not to establish or achieve that condition. There was nothing Delphic about Ministerial pronouncements when shepherding the legislation through Parliament. Playing down the importance of the Bill and the decision as having already been made (through the Referendum vote) they stressed that the Bill did not address that substantive issue at all but only a procedural matter. No claim whatever was made that the withdrawal decision was recondite but nonetheless present in the legislative wording. The explanation given to the House of Commons by David Davis, Secretary of State for Exiting the European Union, could not have been clearer. The Bill was not–

> "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." (see https://hansard.parliament.uk/Commons/2017-01-31/debates/C2852E15-21D3-4F03-B8C3-F7E05F2276B0/EuropeanUnion(NotificationOfWithdrawal)Act#contribution-4E407196-E047-424D-8243-C533B5E3647F.)

In the Lords, the Lord Privy Seal, Baroness Evans of Bowes Park, similarly stated:

> "This House passed an Act to deliver a referendum without placing conditions on the result. On 23 June 2016, the British people delivered their verdict. The Bill is not about revisiting that debate; rather it responds to the judgment of the Supreme Court that an Act of Parliament is required to authorise ministers to give notice of the decision of the UK to withdraw from the European Union" (https://hansard.parliament.uk/lords/2017-02-20/debates/30224DBB-4C77-4D65-A591-699EB7F99981/EuropeanUnion(NotificationOfWithdrawal)Bill).

So, in spite of and in contravention, if not defiance, of *Miller* the government remained rooted to its position that the decision had already been made in the shape of the Referendum vote. No Parliamentary ratification was required, Davis was telling Parliament. Article 50 was ready to go. It may or may not be appropriate in the present context to invoke the authority of *Pepper v Hart*, [1992] 3 WLR 1032, for the purpose of inferring legislative intent from ministerial pronouncements reported in *Hansard.*

Pepper created a limited exception to the long-established rule that courts were not permitted to take cognisance of ministerial or other statements made in parliament. The change gave courts a new discretion (not an obligation) to consider ministerial statements, but only as an aid to interpretation where the wording of the statute was ambiguous. "Ambiguity" is defined by dictionaries as doubtful, indeterminate, equivocal. Any contention that implicit in the wording of the Act is the extended, further recondite purpose of ratifying the Referendum as a

constitutional decision must involve an admission that the ambit of the statutory words is a matter of doubt or uncertainty. The ministerial statements must therefore be admissible in the discretion of any court. As to the discretion, where such pronouncements are overtly in concordance with the natural meaning of the legislative text it would seem wholly unreasonable and unrealistic to ignore them.

But even if in the event of litigation the statements were strictly speaking inadmissible under *Pepper* a court in judging any claim that there was such a unexpressed recondite purpose behind the wording would have to assume that on that basis Parliament had manifestly failed in its responsibility to implement the obligation imposed by *Miller* and earlier authorities to be clear and precise in enacting laws which impact on fundamental rights. The presumption would have to be that Parliament has not failed in its duty and that it was doing precisely what the Act lays down and no more, namely giving the Prime Minister a warrant to notify the EU of *any* decision of the UK to leave the EU.

The government is warned

Very oddly, however, the government seem to have been dismissive and secretive about the possibility of trouble. In the Commons on March 14 the leading Eurosceptic politician Sir William ("Bill") Cash, Conservative member for Stone, asked the Prime Minister whether it was time to take legal advice in order to thwart unforeseen further attempts to undo the Bill, to which Mrs May gave an assurance that the government took appropriate legal advice at every stage but, as she reminded Cash, they did not discuss it on the Floor of the House (https://hansard.parliament.uk/commons/2017-03-14/debates/B5826F13-CE59-42DD-9DE4-ACDEA7E308DA/EuropeanCouncil).

Mystery about government's advice

It would certainly be illuminating to solve the intriguing mystery of the nature and source of the advice the government received and whether they were ever given warnings in terms of the analysis offered in this article. Certainly the government's legal team in *Miller* knew exactly what was required, as is abundantly clear from the following passage of the Secretary of State's written submissions to the SC (para 14d):

> "The surprising consequence of the DC judgment is that, if the outcome of the referendum is to be implemented, Parliament must decide to confer a new legal power on the government to make that decision pursuant to Article 50(1) TEU and to give notification of that decision pursuant to Article 50(2) TEU. In other words, if the UK is to withdraw from the EU, Parliament must be asked to answer precisely the same question which was put by Parliament to the electorate and has been answered in the referendum, and must give the same answer in legislative form."

It follows that the government's lawyers in *Miller* were almost certainly not responsible for drafting the bill which became the EU(NoW) Act 2017 and may not even have been consulted on it. In any event they were either ignored or overruled by someone who thought that the decision was none of Parliament's business.

Moreover it is difficult to understand why no legally qualified members of Parliament alighted upon the fundamental problem, in particular why Sir Keir Starmer, a distinguished QC, former DPP and Labour's Brexit spokesman said nothing. One would have assumed that he and his team would have been poring ceaselessly over the relevant authorities and texts. In short, it may be asked whether this was collective blindness and ineptitude or whether there was method in the madness.

Section 1(1) is defective in any event

Even supposing for argument's sake that David Davis was correct that the Referendum vote itself constituted the legally binding withdrawal decision on the basis of which Article 50 might legally be invoked, and that it did not require Parliamentary ratification, there would still have been a fundamental problem with the validity of the 2017 Act. To begin with there is an odd drafting quirk in that the verb "notify" is transitive but the Act does not say whom the UK is to notify. (The drafter must have been in a devil of a hurry to make the elementary error of leaving out the words "European Council" or otherwise eschewing use of the intransitive "give notice." Jolyon Maugham QC believes, perhaps somewhat imaginatively, that the non-inclusion of ratification in the Act was deliberate, praying in aid the fact that it was "carefully drafted": see "A legal eagle with more bad news for the PM," *Evening Standard*, Diary, 14 June 2017.)

But quite apart from its grammatical infelicities there is a fundamental disharmony between Art.50(2) and the sub-section. Although, as the SC recognised in *Miller*, Article 50 "operates only on the international plane," and was not brought into UK law (para.104) there must be comity between the article and the 2017 Act. Yet whereas the Act merely authorises the Prime Minister to give notice (she "may" do so) it does not carry through the *obligation* laid down by Art.50(2). It is not therefore a legislative instrument which implements Art.50(2), in spite of purporting to do so through the phrase "under Article 50(2)." Had the Act stated "The Prime Minister *shall* notify the European Council . . . etc" it would have effected a valid implementation (assuming for argument's sake that the Referendum itself constituted the legal decision or had otherwise been made such by Parliamentary ratification). It may be asked whether Parliament was too deferential for its own good.

Two alternative reasons why the Government misinformed Parliament

There are perhaps two explanations as to why Ministers inaccurately told Parliament that the constitutional leave decision had already been made. One is genuine error and muddle on the part of HMG lawyers and that HMG acted on bad advice. The problem may have been aggravated by the fact that *Miller* was concerned essentially with the question whether or not the Government could use its prerogative treaty-making powers to give notice without Parliamentary sanction. The SC held that the Government needed an Act of Parliament to authorise notification but did not *in terms* tell the Secretary of State to obtain an Act of Parliament ratifying the Referendum decision, although they made it very clear that the leave result had no constitutionally binding effect. Yet it would hardly have been "rocket science" for some wily lawyer in the government's service to pick up on the point. It ought to have been obvious that the Act needed to ratify the result in order to validate notification under Article 50. It would truly be a wonder if HMG really were so ill-prepared as to rush out a fundamentally defective bill but this can hardly be ruled out.

But there may perhaps be another possibility, one almost verging on the surreal. We are told that once Article 50 has been invoked and notice of withdrawal given there can be no turning back (see *Miller*, para 26). The EU would be unmoved by any second referendum which rejected the outcome of negotiations. Article 50 is supposedly a one-way ticket. Once notice is served the Member State will leave. So if the EU offers the UK unacceptable terms it will be too late to relent and we shall have no option but to walk away from membership with nothing but World Trade Organisation Rules on which to rely. Wags might therefore ask whether the government's true plan was to adopt a policy of insurance, to deploy sleight of hand in all this, intending later on to respond to the possibility of a bad deal by saying "We now find we never did invoke Article 50 so we'll stay in the EU after all, thank you very much." Doubtless the EU would be only too delighted and so would have an inherent interest in playing along with the charade – except that they would also have a motive in blocking a good exit deal for Britain in order to pressurise us into staying. The crypto Remainers win the day. So strong and stable . . . and sneaky.

Impact on the imminent negotiations and subsequent agreements

Whether the EU would collectively collaborate knowingly in a charade is fanciful. Jesting aside however, it is understood that since this article went online on June 2 its text has been communicated through unofficial channels to all the EU Member States and to certain very senior officials. It is interesting to conjecture what reaction the European Council may in consequence evince if, notwithstanding TEU Article 4, they express concern about the possible validity of the thrust of the argument presented here. If at the start of the negotiating process the UK government team are challenged to justify the government's claim that Article 50 has been triggered it may be envisaged that there will be at least some on the European side who may take some convincing. This could conceivably cause significant delay since the Council would be unlikely to agree to start negotiations if there is any possibility that at the end of the process it is concluded that Britain never did decide to leave "in accordance with its own constitutional requirements" and that time, effort and enormous cost will have been expended to no avail. It should not be overlooked that any Member State which has qualms might challenge the legitimacy of the process in the European Court of Justice by virtue of TEU Article 263. Subject to the question whether such action might be time barred under the article that possibility alone might cause the Council to postpone negotiations as well the withdrawal of the offices of various EU agencies from the UK.

It should be further pointed out that the validity of all consequent agreements with the UK and any treaty of withdrawal will be dependent on there having been a withdrawal decision made by the UK in accordance with its own constitutional requirements. If there has been no such decision there can be no valid withdrawal.

The EU Director-General of Legal Services has received a copy of the article and it is understood will have drawn it to the attention of the Commission. It is to be noted that as a matter of prudence the Commission may well be intending to refer any concerns they may have over the UK's ostensible triggering of Art 50 to the European Union Court of Justice under Lisbon Art 17, for their own protection in the event of later censure by the European Parliament.

Referendum vitiated by paradox

The application of the 2016 Referendum result is arguably vitiated by its very own Catch 22. As it was clearly intended to be no more than advisory – or consultative, to use a synonymous term – HMG was duty bound to consider a whole range of relevant considerations before deciding whether to invite Parliament to enact a statute of withdrawal. The opinion delivered by the 52 per cent majority of the electorate who cast their vote was but one factor. In the nature of any consultative process the government would also need to consider the overall interests of the UK and the myriad complex issues which fall to be assessed before a rational judgment could be reached with finality. That the majority was so slender only reflected the extreme difficulty of identifying where the balance of advantage might lie. Moreover, the fact that those who cast their votes to leave were significantly fewer than half the registered electorate must be an important factor to go into the pot, as would the disenfranchisement of the millions of expatriate Britons living in and outside the EU. (It is noteworthy that the Prime Minister has since

given an undertaking to re-enfranchise that component of the electorate: see https://www.gov.uk/government/news/government-delivers-on-pledge-to-give-back-british-expats-the-right-to-vote. This would seem to imply an admission by the present government that the 2016 Referendum gave a false reading, so to speak, of the will of the people.)

Yet even appointing a Royal Commission, for example, to put the diverse relevant issues under the microscope would still leave the problem that until the outcome of negotiations be known it would simply not be feasible to make a rational assessment of the balance of advantage. Since the European Council have refused to enter provisional negotiations before Article 50 is triggered, and would *ex hypothesi* continue to refuse to do so, there could be no logical way in the final analysis for the government to make a rational legislative withdrawal recommendation to Parliament based on all relevant considerations. The Catch 22 is that you can't make a comprehensive determination of the balance of advantage without negotiating for a deal, and you can't negotiate for a deal without deciding to leave.

The only way to avoid this intractable conundrum – to avoid the paradox of unworkability – would be for the government to secure the enactment of a leave decision as soon as possible without regard to any assessment of the balance of advantage. The problem here, however, is that in effect it would be treating the simple majority vote in the Referendum as the exclusive factor on which Parliament was to make the decision, in contravention of the inherently consultative nature of the Referendum. Perception of this escape route from the trap which the Cameron government made for themselves may explain David Cameron's pledge, early in 2016, that his government would not merely "respect the outcome" but would "implement the result," an express disavowal of the consultative nature of the Referendum defined by the terms of their own EUR Act 2015.

It is unclear whether the problem could be resolved through a second referendum based on a comprehensive prognosis of the consequences of leaving. It would depend on the EU's agreement for this to take place after the negotiation process. Another less elaborate option might also lie with the EU, who might indicate that they would be likely to show greater largesse towards Britain's position in any negotiation if a second referendum were now held based on different criteria. Because of the shambles first time round they might insist on a better one ensuring more certainty and legitimacy. Thus it might include the provision for a threshold super-majority of 60 or 66 per cent to change the status quo and the enfranchisement of expatriate Britons presently disqualified from having the vote. With such conditions the new referendum could be made expressly decisive in its own right without the requirement for ratification.

The alternative to a second referendum might be to allow a free vote in Parliament, absent a fresh referendum. This would be entirely consonant with the true purpose of the 2016 referendum – a mere consultative exercise. As already noted it has been contended that once Article 50 is invoked there can be no turning back and that any second thoughts would require an application to rejoin the Union involving insuperable obstacles. However those who favour a second referendum are doubtless confident that in reality the Union would be disposed to greet such an application, if not actually conceding revocation, with a strong sense of relief and to treat it as a virtual formality.

Domestic legal redress by UK citizens

It scarcely seems credible that HMG could have set out to circumvent the problem by *deliberately* misrepresenting the Referendum as the constitutional decision. Yet, just as it is conceivable that any Member State might seek in the ECJ to challenge the validity of the UK government's contention that the UK has decided to leave it is conceivable that if the government persists in the charade of claiming that the constitutional decision was made by the Referendum there must assuredly be counterpart legal redress available domestically. Any concerned UK citizen with the necessary funds might seek on *ultra vires* grounds to ban the Government from executing a treaty of withdrawal under Article 263 of the 1969 Vienna Convention whatever the result of the negotiating process. Indeed it would be conceivably be feasible to seek to prohibit the start or continuation of the negotiating process designed to procure that end, and here we shall be back to *Miller*. The delivery of the March 29 letter was a legal non-event and so probably not in itself unlawful but beginning negotiations with a view to a making a withdrawal treaty not sanctioned by the UK Parliament would be likely to be unlawful. This is because, as *Miller* made clear, the government enjoys no unilateral prerogative power to withdraw from the EU.

(This article was first uploaded on 2 June 2017, and updated on 8 and 15 June. Some of the observations in the last two sections, added since original publication, were inspired by Richard Bird's article, above, and by other contributors, including notably Ros Chappel, to the development of this analysis.)

The highlighted passages have been added since the online version was last amended.

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