Brexit and the 'Constitutional Requirements' of Article 50

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This short note sets out an argument about the function of TEU Article 50's reference to the Member State's 'own constitutional requirements' and about the role which that reference might play in the imminent development of the Brexit process. The argument consists of four propositions, which are explained and developed in the following four sections. The first proposition is that Article 50's condition of observance of the Member State's 'own constitutional requirements' applies throughout the withdrawal process. The second proposition is that the UK's 'own constitutional requirements' include respect for the Rule of Law, for the Sovereignty of Parliament, and for its Devolution of Powers to its constituent nations. The third proposition is that the present conduct of the Brexit process may be tending towards a systemic failure to comply with those constitutional requirements. The fourth proposition is that if and when that systemic failure had become effectively inevitable, this could be regarded as casting doubt on the validity of the withdrawal process.

1 The duration of Article 50's condition of accordance by the Member State with 'its own constitutional requirements'

It is uncontroversial to say that the right or facility of withdrawal from the EU which Article 50 confers upon the Member States of the EU is to some degree qualified by a condition of observance by the Member State of 'its own constitutional requirements'; that is the significance of the concluding words of para 1 of Article 50[1]. The exact meaning and extent of that condition has not, however, been fully clarified. In particular, it does not seem to have been settled whether it applies only to a Member State's initial decision to withdraw, as signified by its notification to the EU of that intention, or whether, on the other hand, it continues to apply during the next stage of the withdrawal process, that is to say down to the moment at which the MS leaves the EU. This turns out to be a question of great significance with regard to the Brexit process in which the UK is currently engaged, and this note addresses that question in that specific context.

[1] Article 50 para 1 enacts that 'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'.

There seems to have been a general assumption, in the case of the Brexit process, that the former understanding is the correct one; the sole question was whether the UK had acted 'in accordance with its own constitutional requirements' down to and including the moment of notifying its intention to withdraw from the EU – which it did on 29 March 2017 – and that it had so acted. However, as a matter of literal and grammatical interpretation, Article 50 para 1 is ambiguous in this regard. The adverbial phrase 'in accordance with its own constitutional requirements' might control the verb 'decide' or the verb 'withdraw'. The absence of a comma before the adverbial phrase might slightly point towards the latter view, so that the facility afforded by Article 50 to a Member State is, but is limited to, that of <withdrawing from the Union in accordance with its own constitutional requirements> – the condition being an inherent one the compliance with which can be tested only by reference to the *whole* withdrawal process down to and including the actual moment of withdrawal.

Even if that condition does control the verb 'decide' rather than the verb 'withdraw', there could still possibly be an understanding of para 1 in which the condition of acting 'in accordance with its own constitutional requirements' continues to apply until and including the actual moment of leaving; the action of 'deciding to withdraw' could be regarded as a continuous one which is completed only by the leaving itself. This understanding of para 1 is somewhat supported by the decision of the CJEU in the *Wightman* case[2] that the notification of the intention to withdraw may be unilaterally revoked by the Member State at any time before the withdrawal takes effect; it means that the decision to withdraw is a continuing choice until that moment has occurred.

It is important to add that this view of the condition of acting 'in accordance with its own constitutional requirements' as an essentially continuing one can also be seen as being in line with the *underlying purpose* of Article 50. The framers of Article 50 wished to confer a unilateral right of withdrawal from the EU upon each Member State, which meant that the withdrawal could not be made conditional upon approval by the EU: therefore the condition of acting 'in accordance its own constitutional requirements' was the only control which could suitably be placed upon the Member State's exercise of its right: it would seem to follow that the EU would wish that control to be a continuing one

[2] Case C-621/18, Wightman v Secretary of State for Exiting the European Union

throughout the withdrawal process. The fact that this control has not thus far appeared to be a *sufficient* one to ensure the constitutional integrity of the Brexit process should not preclude the conclusion that the framers of Article 50 will have regarded it as fully *necessary* for this control to apply throughout the withdrawal process until the MS in question has actually left the Union. That observation leads on to the remaining propositions of the present argument.

2 The content of the 'Constitutional Requirements' condition in the case of the United Kingdom

The proposition which was advanced in the previous section, as to the duration of the 'constitutional requirements' condition of Article 50, is especially relevant to the Brexit process by reason of the largely unwritten character of the British Constitution. If a Member State with a formal written constitution were invoking Article 50, the question of the duration of the 'constitutional requirements' condition would probably not be crucially important. That formal written constitution would be likely to impose concrete substantive and procedural requirements which would have needed to be satisfied *before* the Article 50 notification of intention to withdraw could have been validly submitted by the Member State in question – such as for example a requirement that the constitution itself would have to be amended to allow for the withdrawal. It would not then greatly matter whether the 'constitutional requirements' condition of Article 50 continued to apply *after* that notification had been validly submitted, since the constitutionality of the withdrawal proposal would already have been fully tested.

Some would no doubt argue that, in the case of the proposal for Brexit, the whole issue of its constitutionality was fully tested in litigation in the *Miller* case[3], so that the decision of the Supreme Court in that case, coupled with the closely subsequent enactment of the European Union (Notification of Withdrawal) Act 2017 ('the Notification Act'), had ensured a definitive satisfaction of the 'constitutional requirements' for the whole of the Brexit process. In this note, it is argued to the contrary that the requirements of the British largely unwritten constitution for an eventual valid withdrawal from the European Union should not be regarded as having been fully tested out and satisfied at that juncture. It is here asserted that the informal constitution supports and insists upon an irreducible core of three fundamental principles, the application of which

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

to the Brexit process was not fully tested out and satisfied by the litigation and legislation of 2017. In that context, it becomes highly significant that the 'constitutional requirements' condition of Article 50 continues to apply after the notification of intention to withdraw, as was argued in the previous section of this note. In the remainder of this section, those three principles are identified, and it is shown how their application to the Brexit process had not been exhaustively resolved by the time that the Article 50 notification was submitted on 29 March 2017.

As was indicated at the outset, the argument of this note identifies an irreducible core of three fundamental principles of the British Constitution, consisting of respect for the Rule of Law, for the Sovereignty of Parliament, and for its Devolution of Powers to its constituent nations. There might well be a case for adding to that list, for example by including respect for established human rights as a fourth distinct element, but few people would wish to subtract from it. It is useful to consider the latter two principles first, because they were both directly under consideration in the *Miller* case, and then to return to a consideration of the relevant content of the principle of the Rule of Law, that being the most elusive matter yet also ultimately the most important question to resolve.

It is difficult definitively to assess the impact of the *Miller* case upon the role and standing of the principles of respect for the Sovereignty of Parliament and of the Devolution of Powers with regard to the Brexit process; but the following analysis is put forward in this note, namely that both principles were recognized as being engaged by and at stake in the Brexit process, and that the application of neither principle to the Brexit process should be regarded as having been exhausted by the decision of the Supreme Court in that case.

There can, of course, be no doubt that the principle of respect for the sovereignty of Parliament was regarded by the Supreme Court as being crucially at stake in the Brexit process: the decision that was essentially to the effect that the sovereignty principle dictated the need for Parliament's statutory authorization of the notification of intention to withdraw from the European Union. However, I see no reason to regard the *Miller* case as having decided that the provision of that authorization would preclude any further issue of respect for the sovereignty of Parliament from arising in the course of the Brexit process. I would suggest that the subsequent enactment of the Notification Act 2017 was *necessary* to comply with the requirements of the sovereignty principle as identified by the *Miller* case, but not *sufficient* to disengage this principle

from the subsequent stages of the Brexit process. I would on this basis argue that the principle of respect for the sovereignty of Parliament has remained applicable throughout the subsequent evolution of the Brexit process, its application to that process not having been exhausted by the *Miller* case or by the subsequent enactment of the Notification Act in 2017.

Still less can it be said of the decision of the Supreme Court in the *Miller* case that it exhausted the application of the principle of respect for the Devolution of Powers to the Brexit process. The Supreme Court can be said to have recognized that the principle was fully engaged by and in the question of what authorization(s) were constitutionally required for notification of the intention to withdraw from the EU – but the Court in effect disclaimed the necessity to resolve all the issues which could be thought to arise from the application of this principle to the Brexit process. This disclaimer was partly on the basis that their firm decision on the sovereignty of Parliament made it unnecessary to pursue all the devolution issues which had been raised, and partly on the basis that some of the devolution issues were questions about the observance of a political convention[4] which could not be policed by the courts[5]. The Supreme Court thus treated those issues as marginal to its own immediate decision without in my view by any manner of means eliminating them from relevance to the Brexit process.

The matter is rather different with regard to the principle of respect for the Rule of Law. That principle was not treated as being directly in issue by the Supreme Court in the *Miller* case in the way that the other two principles were. In the judgment of the Court of Appeal, it had been said that:- 'The United Kingdom is a constitutional democracy framed by legal rules and subject to the rule of law. The courts have a constitutional duty fundamental to the rule of law in a democratic state to enforce rules of constitutional law in the same way as the courts enforce other laws.'[6] There is no reason to think that the judges in the Supreme Court did not share that view of the principle and its relevance, but they did not themselves invoke it. So it is satisfactory to infer that the principle of the Rule of Law was regarded as engaged in the *Miller* case in a general or background sense, and there is no cause at all to think of its application to

[4] This refers to the so-called 'Sewel Convention' that the UK Parliament will not normally exercise its right to legislate with regard to devolved matters without the agreement of the devolved legislature.
[5] See the majority judgment of the Supreme Court in the *Miller* case at paras 148-151.
[6] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) at para 18.

the Brexit process as having been exhausted by the *Miller* case or by the subsequent enactment of the European Union (Notification of Withdrawal) Act.

By the same token, it certainly could not be claimed that either of the two courts in which the *Miller* case was heard were proceeding upon the basis of a precisely formulated understanding of the principle of respect for the Rule of Law, either in general or in relation to the Brexit process in particular. There are some constitutional law theorists who would view such a formulation as intrinsically impossible. We might nevertheless agree that a very useful account of the Rule of Law and of its role in contemporary British constitutional law was provided by Lord Bingham in his published lectures on that subject.[7] His analysis was centred upon eight key elements of the Rule of Law, each giving rise to its own normative statement.

Two of these stipulations were of key relevance to the Brexit process. The first was concerned with 'Law not Discretion' and was to the effect that 'Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion'[8]. The second related to 'The Rule of Law in the International Legal Order' and stated that 'The rule of law requires compliance by the state with its obligations in international law as in national law'[9]. Each of those two formulations is expanded into its own chapter of Lord Bingham's monograph, and both are capable of vast further exposition; but even in this succinct form they provide us with the groundwork for the next proposition which this note puts forward.

3 Possible non-compliance by the United Kingdom with 'its own constitutional requirements' in the course of the Brexit process

In the two previous sections of this note, it has firstly been argued that Article 50's condition of the Member State's observance of 'its own constitutional requirements' should be regarded as applicable to the United Kingdom throughout the conduct of its Brexit process down to and including the projected moment of its actual withdrawal from the European Union (and therefore as extending well beyond the moment of its notification of intention to withdraw). Secondly, it has been argued that those constitutional requirements should be seen as being located in and concentrated upon three fundamental constitutional principles,

[7] T Bingham, *The Rule of Law*, (Allen Lane, 2010).
[8] Ibid, p 8.
[9] Ibid, p 110.

namely those of respect for the Rule of Law, for the sovereignty of Parliament, and for the devolution of powers to its constituent nations. From those starting points, it is now argued that the Government of the UK, with the effective acquiescence of its Parliament, has placed itself in a situation of possible, and possibly imminent, non-compliance with those constitutional requirements.

The hinge upon which that argument turns is the fact that the UK Government and Parliament have set the nation on a legal course towards its withdrawal from the European Union on 29 March 2019 in the hope that a withdrawal agreement between the UK and the rest of the EU will have been reached before that date but in the absence of any such agreement, and with the prospect of such an agreement being reached seeming to be deeply uncertain at the time of writing in late February 2019. That we can and should understand this state of affairs as constituting possible non-compliance with the UK's 'own constitutional requirements' is confirmed by a projection of the way in which the Brexit process might develop before the end of March 2019.

It is a projection along a path towards several possible alternative destinations, it being deeply uncertain at this stage in which of those directions the path will turn and at what point that turn might be made: each of these potential turns represents a possible Brexit scenario. In one of those turns, a withdrawal agreement would be made, possibly with a short 'technical' delay to the withdrawal to give time to put the agreement in place; we could think of this as 'the agreement turn' or 'the agreement scenario'. In another turn, no such agreement would be made but the withdrawal would nevertheless take effect on 29 March 2019; we could think of this as 'the no-deal turn' or 'the no-deal scenario'. In yet another turn, no such agreement would be made, and the withdrawal would be postponed for a significant time to allow for a process of re-consideration perhaps by the holding of a further referendum; we could regard this as 'the re-consideration turn' or 'the re-consideration scenario'. This note proceeds to project and speculate upon the constitutionality of the path of the Brexit process towards each of those possible destinations.

The projection of the constitutionality of the Brexit process varies very greatly according to the turn which might be taken. As long as the Brexit process can be viewed as being on a track towards a withdrawal agreement, it should be viewed as compliant with the constitutional requirements which have been identified in this note. The assessment of whether the process really is on that track – of whether, in other words, it

is heading towards and will reliably take the agreement turn – is a profoundly difficult one at this juncture; but it is difficult to regard the pursuit of that path as not being constitutionally compliant – as long, at least, as the path is transparent and the pursuit of it is genuine, though that could be regarded as having come into some serious doubt.

That assessment can perhaps best be understood by contrasting it with the assessment which would in the view of this author be applicable to the Brexit process if and to the extent that it took the 'no-deal' turn. If the path took that turn and culminated in the UK's withdrawing from the EU without a withdrawal agreement, this would seem predictably to result in a systemic failure to comply with the constitutional requirements which have been identified in the course of this note.

Many arguments which support that view have become familiar ones in the discourse of the Brexit process. It is generally accepted, for example, that a 'No-Deal' withdrawal would be most likely to disrupt the constitutional and international arrangements which currently enable the border between Ireland and Northern Ireland to be maintained as an open one. It is also very widely believed that a 'No-Deal' withdrawal would give rise to critical uncertainties in the arrangements for migration of UK citizens into EU Member States and of citizens of EU Member States into the UK, thereby failing to give effect to existing rights or legitimate expectations with regard to such migrations. In these respects there could be crucial failures of respect for the Rule of Law in and on the part of the United Kingdom.

A further supporting argument may be advanced, which is a less familiar one. It would seem very likely indeed that a 'No-Deal' withdrawal would give rise to such serious general disruption to transport arrangements, to public services, and to private commerce and industry, as to make it necessary for the Government to invoke the emergency powers which are conferred on it by the Civil Contingencies Act 2004. That Act greatly extended the authority for governmental emergency legislation which had previously been provided by the Emergency Powers Act 1920.

The powers of emergency regulation which are granted to senior Ministers of the Crown by Part II of that Act are extremely broad, and they extend to the over-riding of Parliamentary legislation for periods of up to thirty days at a time – the only significant restriction upon the scope of such over-riding consists of a protection of the Human Rights Act

1998 from amendment by such regulations[10]. Regulations so made are not subject to prior Parliamentary scrutiny, and the arrangements for subsequent Parliamentary scrutiny are decidedly limited ones.[11] The exercise of these very wide-ranging powers under the exigencies of the consequences of a 'No-Deal' Brexit might very easily encroach upon the observance of all three of the core principles which this note has advanced as forming the UK's constitutional requirements for withdrawal from the EU within the meaning of Article 50.

We have thus assessed the possibilities of non-compliance with constitutional requirements in two turns or scenarios which might occur along the path to Brexit; and the assessment is that non-compliance might be possible but is unlikely to be found to have occurred in the agreement scenario, whereas non-compliance with constitutional requirements is systemically most probable in the no-deal scenario. In the third projected turn or scenario, that in which the withdrawal is delayed for re-consideration, the assessment has to be neutral as between the other two until the process of re-consideration has produced its own outcome – that is to say, until it has become clear whether the process of re-consideration will result in a decision to revoke the original withdrawal notification, or to persist with the withdrawal process and if so whether with or without a withdrawal agreement.

These assessments, in particular that latter one, require us to confront a set of issues about the identification or concretization of non-compliance with the constitutional requirements, and about the consequences of non-compliance once identified: those issues are addressed in the concluding section of this note.

4 The consequences of non-compliance by the United Kingdom with 'its own constitutional requirements' in the course of the Brexit process

In the foregoing sections of this note, an argument has been developed to the effect that the course of action taken by the Government and Parliament in pursuit of the Brexit process could in certain eventualities be deemed to amount to a non-compliance on the part of the United Kingdom with 'its own constitutional requirements' within the meaning of Article 50. The argument has been that, by reason of the largely unwritten nature of the UK constitution, these requirements consist of

[10] See section 23 of the 2004 Act.
[11] See section 27 of the 2004 Act.

obligations to conform with three very well-recognized but not statutorily defined principles of that constitution.
This somewhat singular feature of the UK constitution has imparted a special character to the argument. It has enabled the view that in the particular case of the Brexit process, the constitutional requirements are immanent to the whole of the process; whereas the formalized requirements of their own constitutions, which would be applicable to other Member States in the equivalent circumstances, might be regarded as operating only on the initial decision to notify the intention to withdraw. Such formalized requirements might be expected to bite hard on the initial decision to notify, but thereafter be deemed to have been fulfilled or exhausted.

This contrast between formal and informal constitutional requirements turns out to be a crucially important one in the ascertainment of whether there has been or will be at any stage an actual non-compliance with Article 50's condition of observance by the UK of 'its own constitutional requirements' in the course of the Brexit process, and in the analysis of the consequences of any such non-compliance. As has just been indicated, the informal nature of the UK's own constitutional requirements opens up the possibility of demonstrating non-compliance with those requirements at any stage of the Brexit process: but by the same token the informal nature of the requirements makes it harder to identify a particular concrete instance and moment of non-compliance, and harder to determine the consequences thereof.

It is especially difficult to identify a concrete moment of non-compliance and to assign consequences to that concrete moment when the path of the breaks it process is indeterminate as to which of the possible turns it might take or in other words as to what the eventual scenario might be. Nevertheless, some specific observations may be made for certain particular turns or scenarios. The argument can usefully be focused on the no-deal scenario, as the arguments of the previous sections have demonstrated that non-compliance with the constitutional requirements is especially likely to occur if and to the extent that the path of the Brexit process turns towards or culminates in that scenario. Indeed, the argument of the previous section went to the lengths of asserting that in the no-deal scenario there would be a systemic failure to comply with the constitutional requirements.

By thus focusing on the no-deal scenario, we can see more clearly how and when a concrete moment of non-compliance with the constitutional requirements might be identified. It could be said that if and when the

Brexit process came to a point where the taking of the no-deal turn had become effectively inevitable, that inevitability or near inevitability would itself identify and concretise a moment of non-compliance with the constitutional requirements. It is possible to argue that there might be other turns in the Brexit process which might give rise to concrete moments of non-compliance, but it is useful to continue to focus upon the no-deal scenario in order to analyse the consequences of arriving at a concrete moment of non-compliance by reason of the Brexit process having taken a decisive turn towards the no-deal scenario, if and when that turn were to occur.

In contemplating such a moment, at which a failure of compliance with the constitutional requirements had become concrete and manifest, we are obliged to address an issue which has been implicitly presented by the foregoing arguments. It can in principle be argued that a failure of compliance with Article 50's condition of the observance of the Member State's 'own constitutional requirements' could be seen as vitiating, even as invalidating, the withdrawal process itself. We could readily imagine that this could occur at the stage at which a notification of intention to withdraw was submitted. It is perfectly conceivable that an objection could be made to the CJEU that the MS had not complied with its own constitutional requirements and that the notification was therefore invalid. It is equally conceivable that the CJEU might refer to the supreme constitutional court of the MS for a determination of whether compliance had taken place or not. It would be possible that the supreme constitutional court would opine that there had been a non-compliance, and that the CJEU would accordingly confirm that the purported notification of withdrawal had not been an effective one.

It follows from the earlier arguments of this note that comparable consequences could also possibly ensue in later stages of the Brexit process. One has to be realistic in admitting that those consequences become less likely as the Brexit process continues, both as a matter of legal analysis and of political prediction. It is in particular hard to imagine that such consequences could ensue before the projected withdrawal date of 29 March 2019.

Nevertheless, this note concludes with two assertions of the significance of the arguments which have been presented. Firstly, the possibility of those consequences should be seen as concentrating and sharpening the perception that there is a legal as well as a political duty upon the Government and upon the Parliament of the UK to comply with the constitutional requirements which this note has identified. Secondly, this

is a set of arguments which will remain relevant and potentially applicable after 29 March 2019. The arguments will apply differently according to the turn or turns which the Brexit process will have taken; *but they will still be in play*, especially if and to the extent that the no-deal scenario has been realized or remains in prospect. It will be singularly important for all concerned to bear this in mind during the tortuous navigation through the Brexit process which is in prospect during the coming weeks, if not months and years.