

Can we do No Deal without parliament's approval?

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It is not often that I borrow a post wholesale from somebody else, and I cannot recall the last time I did so without asking, but I think Jolyon Maugham (who I know) will forgive me in this case as the issue is too important for me not to want to share this, [posted on his blog](#):

The updated written pleadings in the case brought by over seventy Parliamentarians to prevent Boris Johnson treating Parliament as an inconvenience he can suspend can be read [here](#).

One of our lines of argument is that 'No Deal' is unlawful as a matter of domestic law and, in extremis, a court would order Boris Johnson to revoke Article 50.

That is a rather striking contention and so I thought it might be helpful to set out, in somewhat greater detail, how the argument runs.

1. As a matter of UK constitutional law, *Miller* in the UKSC (correctly) determined that (i) EU law could be regarded as a direct source of individuals' rights (ii) the Crown has no inherent power to diminish or attenuate or remove the substantive rights of individuals (iii) if individuals' EU law derived rights are to be removed or altered or diminished by Crown action (or omission) this can only lawfully and constitutionally be done if the Crown was expressly authorised/empowered by Parliament by enacting a statute to this effect. 2. The majority in *Miller* proceeded on the assumption (that being the joint position of the parties) that as a matter of EU law the act of notification by a Member State under Article 50(2) TEU of its intention to withdraw was an irrevocable act and therefore could be treated for the purposes of UK law as the commencement of a process which would inevitably lead to the loss of individuals' EU law rights. It was on that basis that the majority concluded that a statute was necessary as a matter of UK law to authorise notification as a matter of EU law. As it turns out, they were wrong. Lord Carnwath in the UKSC had the better analysis on this point, namely, that there was nothing inevitable about the diminution of rights following from notification since there would be up to 2 years of negotiations before one actually knew what the specific consequences of withdrawal would be for individuals' EU law rights. 3. *Wightman* in the CJEU confirmed Lord Carnwath's analysis in *Miller* to be the more soundly based in its

holding that there was nothing irrevocable or inevitable in the effect on individuals' rights about the Article 50 notification, which could be unilaterally withdrawn at any time while the UK remained a member State. 4. Applying the CJEU *Wightman* analysis to the proper interpretation of the *EU (Notification of Withdrawal) Act 2017* that Act can now be seen as doing nothing more than authorising the Crown to open negotiations for withdrawal. What it did not authorise was the Crown to diminish or take away individuals EU law rights. No blank cheque — indeed no cheque of any sort — was given by Parliament to the Government. 5. The *Miller* majority analysis remains good however in confirming that as a matter of UK constitutional law the Crown has no power — whether by its action or inaction — to deprive individuals of their EU law derived rights, other than with express statutory authorisation to do so. 6. If the UK were to leave the EU without any withdrawal agreement having been concluded this would involve a massive alteration in the EU law derived rights of individuals. What this means is that as a matter of UK constitutional law the Government cannot allow for a no deal Brexit without explicit statutory authorisation to this express effect. As matters stand no such statutory authorisation exists. 7. What this means is that if Government policy is indeed one which encompasses a No Deal Brexit, it cannot use the power of suspension of Parliament to further that policy. It would in fact defeat it as if Parliament is prorogued the relevant and necessary No Deal authorisation legislation will not be able to be passed in time for Exit Day. 8. In those circumstances — were the power of suspension to be used — the only relevant active constitutional actor would be the courts which, in order to preserve individuals' EU law derived rights from the inevitable substantial diminution and/removal which would necessarily result from the Crown's action or inaction in failing or refusing to conclude a withdrawal agreement with the EU would have to pronounce a mandatory order ordaining the Government to exercise the UK's power to revoke Article 50. 9. In a representative constitutional democracy however it is far better — far more constitutionally appropriate, for the legislature rather than the courts to make any such decision to keep the Government within lawful and constitutional bounds. 10. Standing back, not only is it clearly the intention of Parliament that it be sitting to determine what options it will authorise the Government to pursue in the run up to Exit Day, but the whole dynamics of the constitution require that the suspension power not be used before there has been clear statutory authority given by Parliament to Government about how to proceed in the face of Exit day — whether that be to seek a further extension of Exit Day, revoke Article 50 altogether or expressly allow for a No Deal exit.