In contemporary politics it is important to emphasize the parliamentary democracy, the separation of powers between the legislator, the executive and the judiciary as well as the rule of law. Such constitutional structures will in turn strengthen the protection of human and fundamental rights. Thus democracy, the rule of law and the protection of human rights are intertwined in a sense that each of them seem to entail the existence of the other two. Good governance is also inseparably interlinked to the democratization, the rule of law and respect for human rights. All these standpoints may seem to be basics of constitutional and administrative law, but yet they are relevant in today’s world of the so-called ‘post-truth era’.

And indeed the concept of rule of law has come to the fore in both political debates and academic studies. The importance of the rule of law can be illustrated by referring to the debate in the UK, whether the UK government can trigger the Article 50 procedure without an act of the Parliament on grounds of the royal prerogative. Currently we know that the UK government cannot do that on grounds of the Supreme Court ruling of 24 January 2017. Instead of dwelling on the details of the important Supreme Court ruling the aim of this article is to illuminate the various conceptions of the rule of law and the constitutional status of the elected Parliament in the context of the current Brexit debate. In order to understand the British constitutional debate it is important to pose a question, whether the concept of rule of law can contain substantive elements from the perspective of British legal theory. One should bear in mind in this respect that although the UK parliament generally has a prerogative

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1 According to former Article 6(1) EU ”The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”, which contains more clearly than the current Article 6 TEU the idea that rule of law is to be linked to the protection of the human and fundamental rights.
3 See Judgment given on 24 January 2017, R (Miller and Dos Santos) v Secretary of State for exiting the European Union (2017) UKSC 5.
power to change treaties, it cannot do that if it will affect the rights of the UK citizens. It is also relevant to point out that the ruling of 24 January was in line with the previous British constitutional case law. Thus it did not breach the expectation of legal certainty either.

1. AN ATTEMPT TO DESCRIBE THE ELEMENTS OF THE RULE OF LAW IN BRITAIN

The Rule of Law (Rechtstaat) is an underlying general principle of law. The term ‘rule of law’ cannot be defined by a few simple descriptive formulations, but perhaps at least the following elements of the rule of law are not controversial. Firstly, the rule of law essentially aims at delimiting the abuse of power. It sets conditions for the proper exercise of legislative power, for example banning or restricting retrospection, and stipulating reasonable generality, clarity and constancy in the law. Secondly, it requires that a legal system must exhibit a relatively high degree of coherence as a normative system. Thirdly, it relates to the separation of powers and thus maintains the constitutional order.

1.1 Old Definitions: Brownlie, Dicey and Raz

Let’s begin with the traditional and relatively positivistic definitions. Brownlie has constructed an epitome of the term ‘rule of law’ in the context of international law. The following elements constitute the rule of law according to him:

1. Powers exercised by officials must be based upon authority conferred by law.
2. The law itself must conform to certain standards of justice, both substantial and procedural.
3. There must be a substantial separation of powers between the executive, the legislature and the judicial function. Whilst this separation is difficult to maintain in practice, it is at least accepted that a body determining facts and applying legal principles with dispositive effect, even if it is not constituted as a tribunal, should observe certain standards of procedural fairness.
4. The judiciary should not be subject to the control of the executive.

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4 See the case study of the Supreme court on the matter in R (Miller and Dos Santos) v Secretary of State for exiting the European Union (2017) UKSC 5, para. 99. For example, one can refer to Lord Denning in case Blackburn v Attorney General (1971) 1 WLR 1037, 1040.

5 For example, in EU law this has been confirmed in cases 13/61 Bosch (1962) ECR 45, esp. p. 52 (legal certainty) and C-314/91 Weber (1993) ECR I-1093, esp. p. I-1109, para. 8 (rule of law). The general principles contain both material principles, like the right to property, prohibition of unjust enrichment or good faith, and procedural principles, which try to ensure the rights of the defence (right to be heard, ne bis in idem etc.).

5. All legal persons are subject to rules of law which are applied on the basis of equality.

To elements offered above, it should be added that the rule of law implies the absence of wide discretionary powers in the Government which may encroach on personal liberty, rights of property or freedom of contract.7

Brownlie’s epitome of the rule of law reflects the English conception of the term, which can be illustrated by his stressing of equality instead of say human rights or fundamental rights based on the constitution. Moreover, the emphasis on personal liberty, rights and freedoms of an individual and the absence of wide discretionary powers of the public authorities all reflect the underlying features of the Anglo-American legal and political culture and the society based on an open market economy. The element of separation of powers can be connected to political science and the Age of Enlightenment, especially to the ideas of Montesquieu in ‘Esprit des Lois’ in 1748.

According to Dicey, the rule of law, a fundamental principle of the British constitution, means the absolute supremacy of regular law as opposed to the influence of arbitrary power and equality before the law. It also means that in the UK the law of the constitution is a consequence of the rights of individuals, as defined and enforced by the national courts.8 Dicey’s exposition of the rule of law thus laid emphasis upon the universal applicability of the legal order within the UK and the answerability of both citizens and officials before a common set of courts. The insistence on the unitary character of public and private law can be related to the Diceyan conception of the rule of law, which is essentially hostile to arbitrary powers.9

According to Raz, the basic idea of the rule of law is literally what the expression says: the rule of the law, which means that people should obey the law and be ruled by it. He has pointed out that in practice the rule of law has been interpreted in the narrower sense that the government shall be ruled by the law and subject to it.10 In order to avoid confusion caused by vague definitions, Raz has specified the requirements of the rule of law as follows:

1. All laws should be prospective, open and clear.
2. Laws should be relatively stable.

3. The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.
4. The independence of the judiciary must be guaranteed.
5. The principles of natural justice must be guaranteed.
6. The courts should have review powers over the implementation of the other principles.
7. The courts should be easily accessible.
8. The discretion of the crime-preventing agencies should not be allowed to pervert the law.\footnote{11}

However, the conception of rule of law has changed as the society and its values have changed.\footnote{12} The Diceyan conception of the rule of law with its emphasis on national legal sources is no longer accurate in the light of current legislation and the powers of the judiciary. For example, the British courts must nowadays take into consideration the doctrine of indirect effect of EU law\footnote{13} and the Human Rights Act 1998 in order to satisfy the requirements of the rule of law. The indirect effect of EU law requires judges to evaluate whether the national authorities have complied with the demands of the EU law.\footnote{14} The Human Rights Act, in turn, requires the courts to give effect to primary and secondary legislation in a way which is compatible with fundamental rights, in as much as it is possible to do so.\footnote{15} The current legislation in UK thus seems to require a certain substantive element to be taken into account in the framework of the rule of law. The Diceyan conception of the rule of law is thus problematic and outdated also for the reason that it gives no substantive content to the rule of law.\footnote{16}

1.2 Formal and Substantive Elements of the Rule of Law

Like in legal certainty,\footnote{17} respectively, there has traditionally emerged a debate concerning formal and substantive conceptions of the rule of law. For example,

\footnote{11} Ibid., pp. 214–219.
\footnote{13} For an example of the indirect effect in English courts, see the case Webb v Emo Air Cargo (UK) Ltd. (No. 2) (1995) 1 WLR. 1454, esp. pp. 1455–1460. However, currently we don’t know how the bindingness of EU law will change in the post Brexit UK.
\footnote{16} See Bingham 2011, p. 66–67. Bingham aptly describes the following situation: ‘A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed’.
\footnote{17} See Aarnio, Aulis: The Rational as Reasonable, A Treatise on Legal Justification, Dordrecht/
Collins has already in the 1980’s described how the term ‘rule of law’ has traditionally been understood in different ways depending on the particular school of legal theory. The legal positivists identify the ideal of the rule of law as one requiring strict observation of established legal rules. From the positivist point of view, the legal reasoning ought to employ formal logical rationality, which is the application of rules according to their established literal meaning. On the other hand, the ‘idealists’, or natural lawyers, conceive of the rule of law as a substantive principle which embodies the liberal political settlement, with its allocation of institutional responsibilities and a distribution of rights to individual citizens.

Craig, for one, has adopted a relatively formalistic interpretation of the rule of law. In his opinion the concept of rule of law addresses the manner in which the law is promulgated, its clarity and temporal dimension. This stance implies that no assessment is made about the content of law. Paunio has described, how this formalistic stance is further elaborated by Raz, who has warned against confounding the rule of law with other important virtues that legal system should possess. Such a virtue would be the respect for fundamental rights. Paunio continues her analysis by referring to Tuori, who also has observed a danger, if certain legal concepts are pumped up with almost everything experienced as

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19 See Raz 1979, p. 217. The rule of law applies to judges primarily in their duty to apply the law.


positive. In that way legal concepts may become “rhetorical balloons”, which illustrates the broad interpretation of rule of law as well.\textsuperscript{23}

Those who espouse a substantive conception of rule of law accept that it has the formal attributes mentioned above, but take the doctrine further so that certain substantive rights can be derived from the rule of law. Dworkin is perhaps the most famous example of those, who have adopted a rights-based or substantive conception of the rule of law.\textsuperscript{24} The Dworkinian way of interpreting the rule of law has gained acceptance in the contemporary legal literature also in the continental Europe. For example, Sellers has recently pointed out that positive laws promulgated in the private interests do not satisfy the rule of law, although they may sometimes be an advance on otherwise unregulated tyranny.\textsuperscript{25} There is a difference of rule by law compared to rule of law. In Nordic countries Hallberg, for one, has stated that the rule of law is not just a material principle, but it takes a dynamic, societal character as the number of laws increases and they gain material substance.\textsuperscript{26} On the other hand, even according to the case law of the European Court of Justice the expression ‘rule of law’ seems to refer to certain substantial requirements of legal decision-making.\textsuperscript{27} One may point out, however, that the expression ‘rule of law’ is relatively often employed in cases relating to non-contractual liability of the European Union.\textsuperscript{28}

Craig has thus referred to Dworkin in order to illuminate the opponents of formalists. Dworkinian theory of law can be used as a means to avoid an overly positivistic approach to law. It gives an argument for why there can be scope for valid legal justification even outside the positivistic concept of law. Dworkin maintained that positivism is defective because it rejects the idea that individuals can have rights against the state that are prior to the rights created by explicit legislation. For Dworkin, individual rights were political trumps held

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\textsuperscript{23} See Tuori, Kaarlo: Ratio and Voluntas: The Tension between Reason and Will in Law, Farnham: Ashgate, 2011, p. 211, (Tuori 2011) and Frändberg, Åke: Begreppet rättsstat, in Sterzel, Fredrik (ed.): Rättsstaten – rätt, politik och moral, Göteborg, 1996, s. 21–41. Frändberg has originally applied the expression “rhetorical balloon” in the context of the rule of law, or “rättsstat” to be more precise.

\textsuperscript{24} See Craig, Paul: Constitutional Foundations, the Rule of Law and Supremacy, Public Law, 2003, pp. 92–111, (Craig 2003).


\textsuperscript{27} See 8/55 Fédechar (1955) ECR 292, esp. p. 299.

by individuals when a collective utilitarian goal was not sufficient justification for denying them what they wanted.29

Dworkin challenged the theory of legal positivism especially in the Hartian sense, which holds that the truth of legal propositions consists in valid rules that have been adopted by specific social institutions. H.L.A. Hart introduced the distinction between primary and secondary rules, which are the minimum conditions necessary for the existence of a legal system.30 Those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed. On the other hand, the rules of recognition specifying the criteria of legal validity and the rules of change and adjudication must be effectively accepted as common public standards of official behaviour by the officials of the legal system.31 However, although Dworkin has chosen the Hartian version of positivism and his “rule of recognition” as his main “target”, his challenge to legal positivism32 affected to the Kelsenian legal positivism and its famous ideas of “Stufenbau” and “Grundnorm” as well.33 Even this short introduction to the history of legal positivism shows, how closely the definitions of rule of law are linked to the ontological and epistemological choices of the one, who is making the definition.

2. THE RULE OF LAW IN RELATION TO THE STATE IN BRITAIN – THE PONTING – CASE 1985

MacCormick has described the British concept of rule of law in relation to the historical development of the notion of ‘state’ in Britain. Constitutional law in the UK does not define the state or its functions specifically. The kingdom became a state in an unusually picaresque way and without avowing its changed character through a formal constitution. The separation of powers between the executive (“Crown”), the legislature and the judicature is acknowledged to be

31 Ibid., p. 116.
32 See Jääskinen, Niilo: Eurooppalaistuvan oikeuden oikeusteoreettisia ongelmia, Helsinki: Yliopistopaino, 2008, pp. 95–97, (Jääskinen 2008), in which he refers to Walter Ott and his list of various models of legal positivism.
33 See Kelsen, Hans: Pure Theory of Law. Berkeley: University of California Press, 1970, pp. 221–222 (Kelsen 1970) and Kelsen, Hans: Reine Rechtslehre, Wien: Österreichische Staatsdruckerei, 1960, p. 228, (Kelsen 1960). Kelsenian theory of law requires that legal norms must be separated from the norms of universal morality or religion, because the validity of a legal norm can be derived from another legal norm of a higher status in the Stufenbau, in which for example the hierarchical status of degrees, statutes and Constitution differ from one another. The Kelsenian ‘basic norm’, the Grundnorm, represents the highest reason for the validity of norms, one created in conformity with another, thus forming a legal order in its hierarchical structure.
only an imperfect separation of them. In these circumstances, it is no wonder that the term ‘rule of law’ cannot be defined in an accurate way. According to MacCormick, the rule of law has been held to depend on the fact that one single structure of courts is a final arbiter of the legality of every action, governmental or non-governmental, and on the fact that it is primarily out of the traditional common law that the rights of the subject are defined.34

According to MacCormick, the rule of law does not necessarily imply the theory of law as pure normative order. He has employed a concrete example of Britain’s politics to illustrate his point of view, namely the Ponting case.35

A senior civil servant of the Ministry of Defence Clive Ponting had prepared for his Ministers a study of the controversial events surrounding the sinking of an Argentinian cruiser Belgrano during the Falklands conflict in 1982. The study revealed that the previous accounts given to the Parliament had been incorrect and that there were no good reasons of state security against giving the correct information. In relation to questions that had been raised in particular by MP Dalyell, Ponting had also drafted answers for use by his Ministers. The Ministers Heseltine and Stanley decided not to reveal Ponting’s study to the Parliament as response to a question posed by Mr. Dalyell. However, Mr. Ponting sent to Mr. Dalyell the document which contained draft answers for the use of his Ministers and a document with a view advising the Ministers how to avoid revealing to the Parliament what had really happened. Eventually Mr. Ponting was prosecuted for a breach of section 2(1) of the Official Secrets Act, according to which it was an offence to pass on information obtained in an official capacity unless the communication was to an authorized person or a person to whom one had a duty in the interest of state to give the information. At the trial the defence argued that Ponting had passed the documents to Dalyell (i.e. Parliament) in pursuance of a duty in the interest of state. On this, the trial judge McCowan directed the jury that the defence depended on a wrong interpretation of the law and that the jury should convict him of the offence against section 2 of the Official Secrets Act. The jury ignored the judge’s direction and pronounced the verdict ‘Not guilty’.36

Law is not merely a set of established rules that are always applied in a deductive way by finding out the facts, subsuming the facts under appropriate rules, and drawing legal conclusions accordingly. For example, MacCormick has described the Perverse Verdict Theory or the Unsound Interpretation Theory as ways to relate a certain dimension of acceptability to the concept of law and rule of law. If the law used by the executive becomes a moral affront to ‘the ordinary decent person’, then the jury can set aside or ignore it by giving a ‘perverse verdict’ without acting against the rule of law. One might think that in the case at hand Mr. Ponting protected the highest constitutional authority, Parliament, from being deliberately misled by persons who are subordinate to

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34 See MacCormick 1999, pp. 28–29. The word ‘subject’ does not refer merely to a ‘citizen’ in this context.
it in their role as Ministers. On the other hand, if the judge gives an unsound conception of law to the jury, it can ignore the misconception and act according to the rule of law.\footnote{Ibid., pp. 29–33.} One might sum up the misconception by saying that the interests of the state are not the same as the interests of the majority or the interests of government of the day.

MacCormick’s presentation of the rule of law is exemplary in that he has used a concrete case to clarify the various aspects of rule of law instead of trying to define it. The idea that the conception of the rule of law requires a certain kind of conception of democracy, in which the government is subordinate to Parliament, does not answer all the crucial questions raised by the Ponting case. To whom is Mr. Ponting responsible is a problem which requires weighing up and balancing between the requirement of loyalty of civil servants and the traditional British conception of parliamentarianism.\footnote{See about the British (or Lockean) conception of parliamentarism, Freeman, M.D.A: Lloyd’s Introduction to Jurisprudence, Sixth Edition, London: Sweet & Maxwell ltd., 1994, pp. 139–141, (Freeman 1994).} The Ministers are clearly responsible to the Parliament according to the British Constitution. Despite the fact that Mr. Ponting was directly responsible to his superiors at the government, one might argue that a primary interest of any state is an interest in the integrity of its Constitution irrespective of whether it is written or unwritten. To uphold the constitutional order which constitutes the organs of state and to uphold the constituted relationships of subordination between the organs might be considered to be in the ‘interest of State’ even more than to promote the implementation of the policies that are determined by the duly constituted organs of state.\footnote{See MacCormick 1999, pp. 39, 41–42.} On the other hand, one might defend the jury’s verdict by referring to the requirement of openness in the decision-making. The openness cannot be achieved if those, who are responsible for providing information to the Parliament do not reveal all the relevant facts correctly.

To conclude, one might point out that the rule of law requires that in a legal process a question of fact ought to be resolved under constraints of due process and a certain kind of insight as to what is ‘acceptable’.\footnote{Ibid., p. 45. According to him, the question whether or not conduct actually has been conformable to law “has to be resolved under constraints of due process and natural justice”.} What is acceptable in law or in the circumstances at hand relates to the inner morality of law.\footnote{See Fuller, Lon L.: The Morality of Law, Revised Edition, New Haven and London: Yale University Press, 1969, pp. 33–94, (Fuller 1969) and Lyons 1984, pp. 74–78.} For example, old maxims of the due process such as “no-one should be judge in his or her own cause” or “the various sides of the dispute must be heard” may reflect the commonly accepted consequences of applying the rule of law. Like MacCormick, I find that the conception of the rule of law requires that in the judicial decision-making the requirements of the acceptability of the substance
of the case must be taken into consideration in addition to the process-based
values. For example, an observance of basic civil and political rights and even
certain socio-economical guarantees are also essential. In any case one may note that the British conception of the rule of law is
open rather than closed to extra-legal contexts and social circumstances. This
can be linked to the peculiarities of the UK Constitution, which is ‘the most
flexible polity in existence’. The influence of various extra-legal contexts in
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flexible polity in existence’. The influence of various extra-legal contexts in
can be linked to the peculiarities of the UK Constitution, which is ‘the most
flexible polity in existence’. The influence of various extra-legal contexts in
judicial decision-making in common law countries might not be considered to
be totally undemocratic in nature, which in turn gives a novel aspect to the rule
of law and powers of courts as well. I think that MacCormick’s interpretation
of the Ponting case gives a good starting-point to approach the rule of law in
Britain, because he clearly distinguishes the interests of state and the interests of
the majority from one another, but at the same time he stresses the importance
of the democratic legislature and independent courts acting under the require-
ments of the rule of law.

3. THE RULE OF LAW IN RELATION TO
THE STATE IN BRITAIN – THE BREXIT
AND THE MILLER – CASE 2017

The Brexit referendum was held in 23 June 2016 to decide whether the UK
should leave or remain in the European Union. As a surprise to many, Leave
won by 52% to 48%. The UK Government had not been properly prepared
for the Leave campaign’s victory. Prime minister David Cameron had supported
strongly the Remain campaign, and he decided to resign on the day after lo-
sing the referendum. The former home secretary Theresa May became the new
Prime Minister in July 2016.

Why did the Leave campaign win? There has been for decades suspicious
sentiments in Britain against the EU for its bureaucracy or democratic deficit.
Especially gaining back control in the field of immigration was perhaps the
most decisive political argument in favour of the nationalistic Leave campaign.

42 See MacCormick 1999, p. 46.
43 This description is originally from Dicey, but it is still topical, since the Supreme Court
referred to it in its ruling of 24 January 2017, R (Miller and Dos Santos) v Secretary of State
for exiting the European Union (2017) UKSC 5, para. 40 and Dicey A.V.:Introduction to
44 See Collins 1986, pp. 71 and 79.
45 http://www.bbc.com/news/uk-politics-32810887. The referendum turnout was 71.8%, with
more than 30 million people voting. England voted strongly for Brexit, by 53.4% to 46.6%,
as did Wales, with Leave getting 52.5% of the vote and Remain 47.5%. Scotland and North-
ern Ireland both backed staying in the EU. Scotland backed Remain by 62% to 38%, while
55.8% in Northern Ireland voted Remain and 44.2% Leave.
But then again one could ask, whether the traditional reasons for the UK’s EU Membership are not valid any more. A British government’s white paper in July 1971 enrolled the arguments in favour of the accession to the EEC as follows:

“*Our country will be more secure, our ability to maintain peace and promote development in the world greater, our economy stronger, and our industries and people more prosperous, if we join the European Communities than if we remain outside them.*”

In the Brexit debate only a few things are uncontroversial. Firstly, it is up to the UK, when to trigger Article 50 TEU procedure and start negotiations in order to exit the Union. According to Article 50 any Member State may decide to withdraw from the Union “in accordance with its own constitutional requirements.” Secondly, the remaining EU Member States have announced that there can be no negotiations of any kind before the UK has notified European Council of its intention to withdraw. Also this stance can clearly be based on the wording of Article 50. Thirdly, there is a unanimity requirement as regards extending the 2 year’s negotiation period, which makes it very difficult to extend in practice.

The constitutional problems in the United Kingdom related to the question, what is the correct constitutional procedure for the UK Government to trigger Article 50 TEU to start the negotiations. As stated above, this falls for the national law to decide. However, the problem here is that neither the UK constitutional law nor the 2015 EU Referendum Act set out clearly the procedure for notification. The EU Referendum Act of 2015 did not give binding status for the EU referendum. The question therefore has arisen whether the decision to notify the EU under Article 50 TEU can be simply approved by a royal prerogative, or if it needs to be submitted to a parliamentary approval, in other words that a debate and vote by both houses of the Parliament would need to take place.

The UK government has been arguing during the fall 2016 that it has royal prerogative to trigger Article 50 in the EU. The government has declared that it will present in the Queen’s speech in spring 2017 a “Great Repeal Bill” for the Parliament, which will aim to disconnect wholly the UK legal system from the EU.47 The UK Parliament seemed to disagree, since the House of Lords constitution committee required an explicit parliamentary approval for the Brexit notification.48 The judicature is also involved in the Brexit debate. As described earlier, for the British conception of the rule of law it is important to stress the

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48 The House of Lords constitution committee. “In our representative democracy, it is constitutionally appropriate that parliament should take the decision to act following the referendum. This means that parliament should play a central role in the decision to trigger the Article 50 process, in the subsequent negotiation process, and in approving or otherwise the final terms under which the UK leaves the EU”, The Guardian, 14 Sept. 2016.
rights and freedoms of an individual. There have been several cases pending at the UK Courts as regards the constitutional issues of the Brexit procedure initiated by the individuals. The claimants argue that the democratically elected Parliament should decide, whether to trigger the Article 50 procedure or not.

In November 2016, the High court in London agreed with the claimants in the Miller-case that the government cannot side-step the UK Parliament. The royal prerogative can only be used in foreign affairs and that the use of it does not amend current statute law of the UK. In the case of Brexit existing EU law and the provisions of the European Communities Act 1972 (ECA 1972) would be stripped of their effect in national law. The ECA 1972 provides that all rights, powers, liabilities, obligations and restrictions created by or arising under EU Treaties will be recognizable or given effect to in UK law. The High Court pointed out that the 2015 Referendum Act was passed against a background including a clear briefing paper to parliamentarians explaining that the referendum would have advisory effect only. Therefore the UK Parliament still has to pass the main law that will get UK out of the EU, starting with the repeal of the ECA 1972. At the end the High court concluded: "For the reasons we have set out, we hold that the Secretary of State does not have power under the Crown’s prerogative to give notice pursuant to Article 50 of the TEU for the United Kingdom to withdraw from the European Union". The UK government appealed the High court ruling.

The interpretation of the royal prerogative seemed to be a highly controversial issue even after the London High court ruling in the Miller-case. Namely, the Belfast High court ruled later in November 2016 that neither the UK Parliament in London, nor the Northern Ireland assembly, had to be asked for their consent before the UK government triggers the Article 50 procedure. The High Court in London took it for granted that once the Article 50 procedure is triggered, it can’t be stopped, whereas the High court in Belfast did not agree

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49 See R (Miller) v Secretary of State for exiting the European Union, CO/3809/2016, CO/3281/2016, High Court of Justice, Queen’s Bench Division, judgment 3 November 2016 (the Miller case).


51 See the Miller case, para. 107. The Court stated: “Moreover, Parliament must have appreciated that the referendum was intended only to be advisory as the result of a vote in the referendum in favour of leaving the European Union would inevitably leave for future decision many important questions relating to the legal implementation of withdrawal from the European Union”.

52 Ibid, para. 111.

53 The claimant Mr McCord claimed that the Brexit could undermine a 1998 peace deal, reinstate a hard border with the Republic of Ireland and cut EU cross-community funding. Irrespective of all this the High Court found that the 1998 Northern Ireland Act created no substantive legitimate expectation that its people will be consulted on before withdrawing from the EU.
The Rule of Law and the Brexit

In a surprising way, it finds that the decision to notify the EU of the intention to leave under Article 50 does not itself generate changes in law. Therefore, the UK’s Supreme Court faced a dilemma, which interpretation of the royal prerogative and Article 50 procedure it prefers.

In December 2016 the case was heard in the UK Supreme Court, which delivered its ruling in 24 January 2017. The key questions related to the interpretation of the royal prerogative and the status of the devolved legislatures in the context of Brexit. As regards the prerogative powers the Supreme Court confirmed by a majority of 8 to 3 that the UK government cannot trigger Article 50 procedure without an authorizing Act of Parliament. The line of reasoning follows a clear logical pattern. To put it simply, the prerogative powers may not extend to acts which result in a change to UK domestic law. One cannot conclude that the triggering the Brexit is just a simple ‘administrative act’ in the field of foreign affairs. As Birkinshaw and Varney point out there is hardly an aspect of law that is not influenced, or completely occupied, by EU law. Now the Act of Parliament is needed, since it is obvious that withdrawal from the EU treaties would change domestic law, which in turn would remove some existing domestic rights of UK residents. The main source of interpretation is the European Communities Act 1972, which gave domestic effect to the UK’s obligations under the existing EU Treaties.

It was necessary to interpret the role of the devolved legislatures as well in the Supreme Court ruling. Under each of the devolution settlements in Northern Ireland, Scotland and Wales the devolved legislatures have responsibilities to comply with EU law. Additionally, there is the Sewel Convention that the UK Parliament will not normally exercise its legislative rights with regard to devolved matters without the agreement of the devolved legislature. The Attorney General for Northern Ireland supported the Secretaries of State’s case that no statute is required before ministers can give Notice of withdrawal from the EU. On the other hand, there were interventions on devolution issues on behalf of the Scottish and Welsh government. Both regional governments relied on the Sewel Convention and supported the argument that a statute is required before ministers can give the Notice of withdrawal. According to the UK government there is no problem as regards the devolved legislatures, since the triggering

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55 See Judgment given on 24 January 2017, R (Miller and Dos Santos) v Secretary of State for exiting the European Union (2017) UKSC 5.

56 Ibid, para. 136. The Sewel convention (1998) provides a political framework for the devolution. The convention was adopted as a means of establishing cooperative relationships between the UK Parliament and the devolved institutions, where there were overlapping legislative competences. In each of the devolution settlements the UK Parliament has preserved its right to legislate on matters which are within the competence of the devolved legislature.
of Article 50 TEU concerns only exercise of foreign powers. The devolution Acts were passed by the Parliament on the assumption that the UK would be a member of the EU, but they don’t require EU membership. The Supreme Court unanimously concluded that neither the Northern Ireland Act nor the Sewel Convention is of assistance in this case.

Yet, there is at least a political problem concerning the devolution and the power of the regional Parliaments, especially Holyrood in Scotland, because the decision to withdraw will have consequences to many EU law matters now fall under the competences of the Scottish Parliament. One may bear in mind that Scotland backed Remain campaign by 62 % to 38 % in the Brexit referendum and has maintained that “Remain means remain”. However, the Supreme Court ruled that the devolved legislatures do not have a veto on the UK’s decision to withdraw from the EU. This outcome was not totally unpredictable, since the political nature of the Sewel Convention has previously been recognised by Lord Reed in the Imperial Tobacco-case.⁵⁷

So the legal problem in the Brexit debate relates to the interpretation of the British fundamental constitutional principle of the sovereignty of Parliament⁵⁸ and well as the traditional British conception of the rule of law.⁵⁹ As regards the rule of law I would like to emphasize in the same tone than MacCormick that one should be willing to distinguish the interests of state and the interests of the majority from one another. Both the Ponting case and the Miller case lead to the same conclusion that the government must be subordinate to the Parliament, not vice versa. This might be labelled as a political comment, but more profoundly it can be derived from the constitutional doctrine of the separation of powers as well as on the rule of law.

On the other hand, one might say that in the Ponting case there was no referendum at hand and therefore it can’t be compared to the Miller case. Or one might point out that in the Miller case the significance of the national referendum must be taken into account properly. It is to be noted, however, that the Miller case is unique in a sense that there are no precedents, which could accurately fit to the circumstances of the Brexit issue. However, I find that the relationship between the executive and the legislator do link the Ponting case and the Miller case to the same analogical context. Additionally, one should bear in mind that the Brexit referendum was merely advisory, not legally binding. In any case the constitutional problem to interpret the royal prerogative in the context of the Brexit notification has brought the multidimensional con-

⁵⁸ See e.g. Craig, P and C. de Burca, Text, Cases and Materials, Oxford, Clarendon Press, 1997, p. 267–271 (Craig – de Burca 1997); and Paunio 2013, p. 54–55. According to this principle, Parliament has the power to do anything other than to bind itself for the future.
⁵⁹ See e.g. Dicey 1959, p. 183–205.
cepts of democracy and the rule of law to the spotlight.\textsuperscript{60} To conclude, I would like to stress the separation of the legislative, executive and judicial powers as a prerequisite for the rule of law.

4. PROSPECTS FOR THE FUTURE

At the end of February 2017 it is clear that the UK government will comply with the Supreme Court ruling. The UK government has already published a simple Bill, in which UK Parliament is asked to give the Prime Minister the authority to issue a notice of the UK’s intent to withdraw from the EU.\textsuperscript{61} Such a formulation was the least the UK government should do in current circumstances. However, the referendum decided only whether the UK should withdraw from the EU, but not how or on what conditions. So it is at least in principle possible that the Parliament will try to secure its right to exercise genuine input into the manner in which the UK-EU negotiations shall proceed. For example, it may require rights to comment on UK government’s key negotiating positions and to a response from the UK government to its comments. After the triggering of Article 50 procedure the negotiations with the EU will begin. The question, whether the Article 50 procedure is unstoppable, has during the fall 2016 come to the fore in the British debates, but it remains to be seen, whether it has any significance in the future negotiations with the EU.

The wording of the Article 50 TEU is silent as regards whether the Article 50 procedure is unstoppable.\textsuperscript{62} This leads one to speculate, what will be the method to fill in the lacuna in the provision. In principle, the UK Supreme Court may have requested for a preliminary ruling on this, but it did not do so. One may also pose a question, whether it is the task of the European Council to clarify the Article 50 TEU on the basis of the procedure outlined in the Article 48(6) TEU? So is this a question, which should be solved by the politicians instead of Judges in Luxembourg? For example, the Court has previously declined to deal with a question in advance, whether a certain country can accede to the European Community.\textsuperscript{63} The Court has considered that it lacks competence to rule on political issues like that. Surely the question would arise, whether the situation is now different enough compared to the accession

\textsuperscript{60} The rule of law as a political and legal term has been analysed by the former president of the Finnish Supreme Administrative Court Pekka Hallberg in Hallberg 2004, pp. 11–332.

\textsuperscript{61} In the House of Commons an overwhelming majority of MPs (498–114) voted in favour of passing the Bill on 1 February 2017.

\textsuperscript{62} See e.g. the wording of Article 50(3) TEU: The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

negotiations. On the other hand, the Court has sometimes ruled on questions, which should have been solved in the sphere of politics.64

What about the scenario, in which the UK government has triggered the Article 50 TEU procedure and yet it wants to withdraw its Brexit notification during the negotiation period? One may argue that the EU is in principle not willing to let the negotiation period of two years to be abused for merely tentative negotiations. However, given PM May’s recent “hard Brexit-speeches” the UK government does not seem to start any tentative negotiations. It is highly unlikely scenario that the UK government would like to withdraw from the Brexit even if the possible cherry-picking in the UK-EU negotiations will not succeed. Be that as it may, the future negotiations between the UK and the EU may turn out to be difficult and take many years.65

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64 See e.g. C-364/10 Hungary v Slovak Republic, judgment in 16 October 2012, ECLI:EU:C:2012:630.