Institution: University College London

Unit of Assessment: UoA 18 – Laws

Title of case study: Shaping the legal framework for Brexit

Period when the underpinning research was undertaken: 2011–2016

Details of staff conducting the underpinning research from the submitting unit:

Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Piet Eeckhout	Professor	2012–present
Tom Hickman	Professor	2012–present
Jeff King	Professor	2011–present

Period when the claimed impact occurred: 2016–2020

Is this case study continued from a case study submitted in 2014? No

1. Summary of the impact (indicative maximum 100 words)

UCL Laws contributed directly to shaping the legal framework for Brexit, triggering action leading to litigation, supporting legal advocacy, and informing landmark UK and EU judicial decision-making on fundamental constitutional norms at the heart of the Brexit process:

- Research by Hickman and King (with Hickman part of Gina Miller's legal team) developed arguments that prevailed in the landmark *Miller I* decision (Supreme Court, 2017), which established a critical UK constitutional requirement for Brexit: that the executive could not initiate withdrawal from the EU without an Act of Parliament.
- Research by Eeckhout (later joining the Wightman litigation team) developed a 'constitutionalist' reading of Article 50 TEU on which the Advocate-General and CJEU relied in the *Wightman* case (CJEU, 2018), establishing that a notification of EU withdrawal, once made, could later be unilaterally revoked by the UK.

These decisions strengthened the role of the UK Parliament, developed key EU constitutional norms, and clarified the legal and political possibilities that remained open as the UK approached Brexit.

2. Underpinning research (indicative maximum 500 words)

The first stage in implementing the outcome of the UK's 2016 referendum on membership of the European Union involved triggering Article 50 of the Treaty on European Union (TEU), which allows an EU member state to notify the European Council of its intent to leave the union. However, prior to the referendum, there had been little legal analysis of Article 50, and almost none on its relationship to UK constitutional requirements. This, together with the unwritten nature of the UK's constitution, meant that the referendum outcome presented immediate questions about the understanding of the UK's parliamentary democracy, including in relation to norms of EU constitutional law.

Since joining UCL, Professor Eeckhout (Professor of EU Law at UCL, 2012–present), Professor King (Professor of Law at UCL, 2011–present) and Dr Hickman QC (Reader, now Professor at UCL, 2012–present) have undertaken research into EU and UK constitutional law, and the relationship between the two. With the prospect of Brexit, this research was developed further to address the urgent and novel legal questions raised by the referendum outcome and, in particular, to clarify the process by which the UK could notify the EU of its intention to withdraw from the EU (King and Hickman), and the revocability of that notification (Eeckhout).

Hickman is an established authority on the historical development of prerogative power **(R1)**, and the relation of prerogative to statute, a matter which was directly at issue in the *Miller I* case. King had worked extensively on the role of judicial review and its intersection with democratic legitimacy. His award-winning monograph, *Judging Social Rights*, had considered when

democratic legitimacy does and does not justify judicial deference to Government **(R2)**. This analysis directly supported the legally significant proposition in the *Miller I* case that, when interpreting the object and purpose of the European Communities Act 1972, the courts should treat the outcome of the 2016 Brexit referendum as legally irrelevant to the meaning of the 1972 statute.

In an article for the UK Constitutional Law Blog **(R3)** published on 27 June 2016, three days after the referendum result, Hickman and King, along with Nick Barber (Oxford), argued that notification under Article 50 required authorisation by an Act of Parliament, because withdrawing from the EU would frustrate the operation of the European Communities Act 1972. Whilst the 1972 Act did not overtly commit the UK to EU membership, its general purpose was to make provision for the UK to join the EU, and it did so by conferring enforceable EU law rights on citizens in the UK. By giving notice to the EU, those rights would be extinguished by an act of the Prime Minister rather than of Parliament. King and Hickman developed an argument based on previous authority in a different context (principally the *Fire Brigades Union Case* [1995] UKHL 3) that prerogative power could not be used in a way that would render the Act redundant. The argument also appealed to more general principles of our constitutional democracy, since notification would activate a two-year timetable and affect fundamentally the dynamics of withdrawal negotiations. The argument was entirely novel and exceptionally controversial, attracting intense academic and press discussion.

In parallel, Eeckhout was exploring whether an Article 50 declaration, once made, could be revoked by the UK unilaterally, without the agreement of other Member States of the EU. Eeckhout's research on EU constitutional law and its relationship with Member States' public law underpinned a 'constitutionalist' reading of Article 50 **(R4)** (co-authored with UCL PhD student Frantziou, now University of Durham). This article rejected a reading of Article 50 in purely 'internationalist' terms, as involving a process between two governments alone, and instead developed a 'constitutionalist' reading which understood the withdrawal process in light of EU constitutional law, comprising respect for national constitutional requirements as well as EU values, such as democracy and the rule of law. This gave substantive import to Article 50's reference to a Member State's '*decision to withdraw in accordance with its own constitutional requirements*' and entailed that, should the UK make a new decision *against* withdrawal within the two-year window, in good faith and in accordance with its constitutional requirements, the prior notification of intention to withdraw must be unilaterally revocable by the UK.

3. References to the research (indicative maximum of six references)

R1. Tom Hickman, 'Revisiting *Entick v Carrington*: Seditious Libel and State Security in Eighteenth Century England' in A Tomkins and P Scott (eds.), *Entick v Carrington: 250 Years of the Rule of Law* (Hart 2015), pp. 43–84.

- Awarded the 2016 Sutherland Prize of the American Society for Legal History (for best published article on the legal history of Britain or the British Empire).

R2. Jeff King, *Judging Social Rights* (Cambridge University Press 2012).

- Awarded the 2014 Peter Birks Prize for Outstanding Legal Scholarship.

R3. Nick Barber, Tom Hickman and Jeff King, 'Pulling the Article 50 "Trigger": Parliament's Indispensable Role', UK Constitutional Law Blog (27 June 2016), https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/.

R4. Piet Eeckhout and Eleni Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading' (2017) 54 *Common Market Law Review* 695–733.

4. Details of the impact (indicative maximum 750 words)

In 2016, questions about how the UK Government would implement the referendum result were of enormous democratic and strategic importance, given the narrowness of the Leave majority (52%), and the fact that formal notification under Article 50 of the United Kingdom's intention to withdraw would initiate a two-year window for negotiation of arrangements fundamental to the UK's future political and economic life. The significance of these questions about the Article 50

mechanism was reflected in the opening minutes of the Lords' post-result debate, as Baroness Smith of Basildon, spokesperson for the Opposition, asked, '*How is the trigger for Article 50 authorised? … Why would such a fundamental decision not be a matter for Parliament?*'. Baroness Smith noted that there were divisions of opinion over revocability of the notification and concluded, '*surely the Government must clarify exactly how this works before embarking on the journey*' **(S1)**.

Eeckhout, Hickman and King did precisely this. By developing novel arguments which informed legal debate, advocacy and judicial decisions, UCL Laws researchers shaped the two landmark cases that mapped the political journey ahead: what UK constitutional law required in order to trigger Article 50 (in particular, whether parliamentary approval was required), and whether notification could be revoked if there was a change of heart (a hope which endured through much of the 2-year plus negotiation period amongst the 48% of people who had voted to remain).

Shaping landmark judgments on the legal framework for Brexit decision-making

***Miller v Secretary of State for Exiting the EU* [2017] UKSC 5 ('*Miller I*')**

The 2016 Barber/Hickman/King blog post set the legal stage for the ground-breaking *Miller I* judgment. The novelty and ramifications of the arguments in the blog post **(R3)** attracted significant attention, being viewed some 220,000 times (to January 2017), and causing visits to the blog to multiply roughly five-fold that month relative to previous monthly averages **(S2)**. It attracted some 550 comments, many from leading academics and practitioners, as well as over 100 further submissions to the blog on these themes in the months following publication. The blog post featured prominently in Parliamentary committee proceedings: the House of Lords Select Committee on the Constitution cited the post as the first reference in its survey of arguments that the Government was unable to invoke Article 50 without an Act of Parliament, and submissions to an inquiry of the European and External Relations Committee of the Scottish Parliament similarly cited the post as the leading argument for the view that Parliament had a role in triggering Article 50 **(S3)**. An edited version of the post was reproduced in *Counsel* (journal of the Bar of England and Wales), and the post and its authors were quoted widely in the press (*Financial Times*; *Guardian*; *Independent*; *New York Times*) **(S4)**.

A legal challenge to the ability of the Government to notify its intention to withdraw from the EU using its prerogative power had been initiated prior to the blog's publication, but was advancing arguments different from those in the blog post. On 30 June 2016, a few days after the blog post, Lord David Pannick QC was persuaded by the argument in the post and endorsed it in his *Times* column: '*as Barber, Hickman and King point out, the courts have stated a legal principle that the prerogative may only be used where the subject matter is not already addressed by an act of parliament so that exercise of the prerogative would frustrate what parliament has itself decided. Here, our membership of the EU, and its impact on domestic law, has been approved by parliament in the 1972 act. A notification under Article 50 would start the process by which that legislation would become a dead letter. … Therefore parliamentary approval is required for the Article 50 notification.*' **(S5)**. Hickman was then retained (together with Lord Pannick QC) as counsel to supplement Gina Miller's existing legal team. The arguments developed in the Barber/Hickman/King blog post became central to submissions made in the UK Supreme Court by Miller's team (which also cited subsequent blog posts by King maintaining engagement with the fundamental arguments) **(S6)**.

On 24 January 2017, the Supreme Court held that the UK Government could not initiate withdrawal from the EU without an Act of Parliament, on the basis of arguments initially suggested in the blog post. Lord Carnwath (albeit in dissent on the substance), recognised the contribution of Hickman and King's research and ensuing discussion, noting that '*the very full debate in the courts has been supplemented by a vigorous and illuminating academic debate conducted on the web (particularly through the UK Constitutional Law Blog site)*' **(S7)**. The seminal role of the post by Hickman and King (with Barber) in developing the argument that succeeded in *Miller I* has been publicly recognised by both Pannick, lead counsel for Miller (noting that '*the core of their argument … was upheld by the Supreme Court seven months later*'), and other leading scholars, including Professor Mark Elliott (Cambridge), Professor Kenneth Armstrong (Cambridge) and Professor Gavin Williamson (Bristol) **(S8)**.

***Wightman v Secretary of State for Exiting the EU* (C-621/18)**

Miller I did not address the question of whether an Article 50 notification could be revoked by the UK without the agreement of the remaining 27 EU Member States. Indeed, the parties had assumed the notification was *not* unilaterally revocable in this way. The point was of real importance: if a notice *was* unilaterally revocable by the UK, there remained a prospect of the UK revisiting, with more information, the decision to leave the EU. The revocability issue was taken up in litigation in December 2017, by a cross-party group of MSPs. The question was referred rapidly to the Court of Justice for the European Union. Upon being instructed as counsel for Wightman, Maya Lester QC requested Eeckhout's article **(R4)**, and Eeckhout was invited to serve as academic consultant to the Wightman counsel.

The European Council and Commission believed that revocation of the UK notification required the unanimous consent of the European Council: once notification of intention to withdraw had been given, the ensuing negotiation period was a multilateral one, no longer susceptible to unilateral changes of heart. Advocate General Campos Sánchez-Bordona (providing an advisory opinion to the bench on points of law) argued the opposite, citing Eeckhout's work **(R4)** with reference to the importance of '*national constitutional mechanisms*', as referred to in Article 50: where an application of national constitutional mechanisms undermines the decision to withdraw, then '*the second phase of the procedure* [the two-year negotiation period] *must also be affected, since the premiss upon which it is based has fallen away. As there is no longer a constitutional basis for the withdrawal, the State must communicate to the European Council that it thereby revokes its previous notification*' **(S9)**.

On 10 December 2018, the CJEU agreed, deciding that a member state could unilaterally revoke its Article 50 notification during the two-year negotiation period, adopting arguments in **R4**:

> '*the sovereign nature of the right of withdrawal enshrined in Article 50(1) TEU supports the conclusion that the Member State concerned has a right to revoke the notification of its intention to withdraw* [until a withdrawal agreement has entered into force or until the two-year negotiation period, as extended, has not expired]*. … It is also appropriate to underline the importance of the values of liberty and democracy* [which] *form part of the very foundations of the European Union legal order … since citizenship of the Union is intended to be the fundamental status of nationals of the Member States … any withdrawal … is liable to have a considerable impact on the rights of all Union citizens … In those circumstances, given that a State cannot be forced to accede to the European Union against its will, neither can it be forced to withdraw from the European Union against its will* [as would be the case if a notification of withdrawal could not be withdrawn without the agreement of the other 27 EU Member States]' **(S10)**.

Co-counsel for the applicants in *Wightman* has testified that **R4** was '*vastly influential in the litigation*' and '*formed the central plank of the Court's reasoning*'. This influence is also acknowledged by academics; Professor Dagmar Schiek, for example, writes that '*[t]he Court … followed the 'Constitutionalisation' idea submitted by Eeckhout and Frantziou, coupled with a strong emphasis on the autonomy of the Union legal order*' **(S11)**. This jurisprudence decided a critical point of EU law, of real importance in the sequence of Brexit decision-making, but also of wider applicability in the European legal order.

Empowering the UK parliament

Together, these cases preserved important possibilities for UK parliamentary and public engagement on the terms of Brexit. *Miller I* meant that Parliament's consent was required to trigger Article 50. The fact that a Bill had to be presented to Parliament in turn gave MPs an opportunity to pressure the Government and to shape the Brexit process. The European Union (Notification of Withdrawal) Act 2017 was passed, enabling notice to be given on 29 March 2017, but the Government undertook to give Parliament a meaningful vote on draft texts of the ultimate withdrawal agreement and agreement on future UK–EU relations. Parliament's role in the withdrawal process was thus asserted, creating new avenues for legislative engagement on the timing and terms of Brexit. As Ken Clarke MP observed, '*The process started with the extraordinary suggestion that the royal prerogative would be invoked, that treaty making was not going to involve Parliament at all, and that leaving did not require parliamentary consent. Rather astonishingly, that matter had to be taken to court, and it came to a fairly predictable conclusion*'.

While Clarke was wrong to think the conclusion was predictable—it was hotly disputed among constitutional lawyers and one from which three Supreme Court judges dissented—his estimation of the political significance of the case is entirely accurate. As Chris Leslie MP had observed earlier, '*[i]t took the Supreme Court to remind us that we live in a parliamentary democracy*' **(S12)**.

The CJEU's decision in *Wightman* was announced on 10 December 2018, days before MPs were to vote on then-Prime Minister May's withdrawal agreement. It gave MPs legal confirmation that the option to remain subsisted, ensuring that a deeply divisive debate about the political future of the UK was not foreclosed by May's agreement: the choices were not simply May's proposed agreement, or no agreement. Parliament retained a role in shaping the detailed and complex political steps to follow. The holding in *Miller I* that Article 50 could not be triggered by prerogative power alone led the Speaker to rule that bills requiring the Government to extend the Article 50 process did not restrict the prerogative, and thus did not require Government consent. Consequently, the Government was unable to block the Cooper-Letwin Bill (EU (Withdrawal) Act No. 1 2019), providing for extension to the negotiation period from April 2019 to October 2019; nor the Benn-Burke Bill (EU (Withdrawal No. 2) Act 2019), requiring the prime minister to seek an extension to Brexit beyond 31 October 2019 in the event that no deal was agreed by then.

In sum, the *Miller I* and *Wightman* decisions ensured Parliament's role in what has proved a fundamentally important, and deeply controversial, phase in Britain's political history.

5. Sources to corroborate the impact (indicative maximum of 10 references)

S1. House of Lords Hansard, 5 Jul 2016, vol 773, cols 1852–3.

S2. Annual report of Jeff King (then UK Constitutional Law Association (**UKCLA**) Treasurer and blog co-editor) and Stephen Tierney (co-editor) to Executive Committee and members of UKCLA, 5 Jan 2017.

S3. Parliamentary evidence: House of Lords Constitution Committee, 'The invoking of Article 50' HL Paper 44, 13 Sep 2016, p. 6, https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/44/44.pdf; Tobias Lock to European and External Relations Committee, Scottish Parliament, p.1, http://www.parliament.scot/S5_European/General%20Documents/Dr_Tobias_Lock.pdf.

S4. Media bundle: *Counsel* (25 July 2016); *Financial Times* (4 July 2016); *Guardian* (27 June 2016); *Independent* (4 July 2016); *New York Times* (17 Oct 2016).

S5. David Pannick QC, 'Why giving notice of withdrawal from the EU requires act of parliament', *Times*, 30 June 2016, https://www.thetimes.co.uk/article/why-giving-notice-of-withdrawal-from-the-eu-requires-act-of-parliament-dz7s85dmw.

S6. Submission by Gina Miller (lead claimant), para [29]ff, https://www.mishcon.com/assets/managed/docs/downloads/doc_3091/Miller_Written_Case_signed_24.11.16.pdf; submission by Steven Agnew and others (further claimants), para [88]ff, https://www.supremecourt.uk/docs/agnew-and-others.pdf.

S7. *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, paras [51], [86]ff; for Lord Carnwath comment, para [274].

S8. Bundle of secondary literature by Pannick QC, Armstrong, Elliott, Phillipson.

S9. Opinion of Advocate General Campos Sánchez-Bordona, 4 Dec 2018, para [106] fn 72; Eeckhout and Frantziou also cited at para [59] fn 32.

S10. Case C-621/18, 10 Dec 2018, paras [57], [62], [64]–[65].

S11. Evidence of influence of **R4**: Testimonial of co-counsel for the applicants in *Wightman*, 14 Nov 2020; Dagmar Schiek, 'The ECJ's Wightman ruling, the "Brexit" process and the EU as a constitutional entity', 11 Jan 2019, http://qpol.qub.ac.uk/ecjs-wightman-ruling-brexit-process-eu-as-constitutional-entity/.

S12. House of Commons Hansard, 13 Dec 2017, vol 633, col 429 (Clarke); 31 Jan 2017, vol 620, col 867 (Leslie).