Part II: Firing the Brexit Bullet – Who Pulls the Article 50 Trigger?
symposium

MILLER AND DEVOLUTION:
HOW WALES APPROACHED THE ISSUES

Richard Gordon QC

1 Introduction

It was billed as the most important constitutional case for decades. The central question could hardly be starker – could the Government trigger Brexit merely by using the prerogative and so bypass the need for legislation? Yet, when it came to it, the conjoined challenges brought by Gina Miller, Dos Santos and the Northern Ireland references (collectively ‘Miller’1 were decided by a majority of the UK Supreme Court (‘the Court’) on a very narrow basis.2 The focus of the Court’s majority decision lay on the, some might say oxymoronic, twin-propositions that EU law was a source of UK domestic law, whilst at the same time holding that our basic rules of recognition had not changed.3 It was, in that fashion, possible for the Court to determine that a statute was necessary to remove EU law as a continuing source of law, just as a statute, the European Communities Act 1972 (‘the ECA 1972’), had been needed to create it in the first place.

One simply does not know whether (and if so what) internal dynamics influenced the writing of the single majority judgment. What is clear, though, is that by deciding the main part of the case in the way that it did, the Court was able to avoid the resolution of rather wider questions that would have ensured Miller’s legacy to constitutional legal history, in particular,

1 Barrister, Brick Court Chambers. Leading counsel for the third intervener, the Counsel General for Wales, in Secretary of State for Exiting the European Union v R (Miller) [2017] UKSC 5, [2017] 2 WLR 583. The views expressed are those of the author alone.

2 In Miller, the UK Supreme Court determined the issues by a majority of 8 to 3 (all serving justices sat on the case; the late Lord Toulson having recently retired). The majority comprised Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge. Dissenting judgments were delivered by Lord Reed, Lord Carnwath and Lord Hughes. This chapter focuses exclusively on the majority judgment.

3 Miller (n 1) [60]-[61] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge).
concerning the role of the devolved administrations in the wider Brexit process. This outline sketch is relevant to an understanding of how Wales approached the issues in *Miller* and to a more general understanding of the wider significance of the Sewel Convention as underpinning fundamental constitutional principle.

The most basic analytic question at the heart of *Miller* was whether it was, in truth, a constitutional case at all or whether, as the minority of the Court supposed, merely one involving a straightforward (if difficult) question of statutory interpretation. Those representing the Counsel General for Wales, who intervened in the Supreme Court but took no part in the first-instance hearing before the Divisional Court, saw the issue as one of an elementary constitutional principle that has subsisted from the seventeenth century. That principle, articulated in the *Case of Proclamations*, was that ‘[...] the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm.’ It was subsequently encapsulated in the Bill of Rights 1688 ‘[t]hat the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall’ and is referred to here as the ‘non-dispensing principle’. Put shortly, and in the specific context of *Miller*, the application of the non-dispensing principle meant that the Government could not use the prerogative power (the triggering of art 50 of the Treaty on European Union (‘TEU’)) to draw a line through existing pieces of legislation. To do so would be to ‘dispense’ with those laws and, in substance, to rewrite them.

In the Divisional Court, the non-dispensing principle had been argued almost exclusively from the perspective of the effect of the triggering of art 50 on rights. Certainly, this assumed the binding effect of the non-dispensing principle, because to dispense with laws containing rights would be as much a violation of the principle as dispensing with any other law. Crucially, though, rights were not at the core of the principle which reflected the outcome of the historic power-struggle between Parliament and the Crown. In truth, the principle was indifferent to statutory content. It was as capable of encompassing the Dangerous Dogs Act 1991 as it was the ECA 1972, or, as appositely, the Government of Wales Act 2006 (‘the GWA 2006’).

The submissions advanced on behalf of the Counsel General focused first,
therefore, on the non-dispensing principle outside the ambit of rights and with specific emphasis on the GWA 2006. It addressed the statutory provisions in that Act that would, necessarily, be dispensed with if the prerogative power could be deployed to trigger art 50. Secondly, however, arguments discretely relevant to devolution, concerned as they were with the materiality of the Sewel Convention, were also advanced. Miller has been imperfectly understood in this respect. Of the devolved legislatures, only in the Northern Ireland references was it claimed that Sewel prevented the UK from exiting the EU without its consent. Neither Wales nor Scotland advanced such an ambitious claim and the unsurprising demise of that argument was not a rejection of any submissions made by either of them. Indeed, the Court expressly recorded each of their concessions that Sewel did not have that effect.7

Uniquely, of those raising devolution arguments, Wales sought to use Sewel in a different way. It raised Sewel as being aligned with the main constitutional argument. It pointed to the effect that use of the prerogative to trigger art 50 would have on our informal constitutional arrangements which includes parliamentary conventions such as Sewel. The short-circuiting of the Sewel Convention would, so it was argued, affect these arrangements as surely as would violation of the non-dispensing principle. From the perspective of devolution, the Sewel Convention is of increasing importance, tied, as it is, to emerging notions of sovereignty in the devolved legislatures. That it was not accorded prominence in any of the judgments (majority or dissenting) is, given the respective approaches of the Court, less than surprising. Nonetheless, its constitutional significance was recognised in Miller and the arguments advanced by Wales were designed to highlight that significance.8 In what follows, this paper, after an outline of the forensic questions facing the Counsel General for Wales, addresses:

(i) Wales’ submissions on the non-dispensing principle and the way in which those submissions differed from the other parties;

(ii) The Northern Ireland argument on Sewel and why Wales did not adopt it; and

(iii) Wales’ submissions on Sewel and their relationship to the primary constitutional argument.

7 Miller (n 1) [150].
8 ibid [151].
2 The Forensic Questions Facing Wales

There is a circularity about some of the Divisional Court’s reasoning in Miller. It is apparent that the lower court had no doubt that it was a case raising fundamental constitutional principles. It stated the relevant principles at some length.9 Yet, the Court approached the issue as one of statutory interpretation rather than constitutional principle, albeit that it was the constitutional principles at stake that informed the approach to be taken to interpretation of the ECA 1972 (all the more so, it reasoned, as it was a constitutional statute). As the Court observed, ‘[w]here background constitutional principles are strong, there is a presumption that Parliament intended to legislate in conformity with them and not to undermine them. One reads the text of the statute in the light of constitutional principle.’10

In its discussion of the constitutional principles that informed its interpretation, the Divisional Court addressed the non-dispensing principle as the first of two such relevant principles.11 The other was the complementary principle, which reflects that the prerogative operates only on the international plane.12 In one sense, the Divisional Court tried to have the best of both worlds. It sought both to treat the essential issue before it as one of statutory construction whilst putting the constitutional context to the fore as a strong aid to interpretation. Thus, having discussed constitutional principles in general terms, it reverted to interpretation, explaining a number of detailed textual features of the ECA 1972, so as to derive the true Parliamentary intent and effect ‘read in the light of the relevant constitutional background.’13 This is, perhaps, why the Divisional Court inverted its analysis, dealing with interpretation first and only addressing what it acknowledged to be the claimants’ principal argument at the end of its judgment. That principal argument was recorded as being that:

the Crown could not change domestic law and nullify rights under the law unless Parliament had conferred upon the Crown authority to do so either expressly or by necessary implication by an Act of Parliament. The ECA 1972, in their submission, contained no such authority.14

The difference between the two formulations is subtle but important. The Divisional Court took as its starting point the general intention of

---

9 See in particular, Miller (n 4) [18]-[36] (Lord Thomas CJ).
10 ibid [82].
11 ibid [86]-[88].
12 ibid [89]-[91].
13 ibid [93] (emphasis added).
14 ibid [95].
Parliament informed by constitutional principles, whereas the claimant’s formulation took as its starting point the binding effect of constitutional principles and the need for legislation to conform to those principles. In the claimant’s formulation, Parliament might decide to confer authority for the removal of rights by the Crown, but Parliament would have to legislate for such an outcome. In that event, there would be no breach of the non-dispensing principle because Parliament would have legislated specifically to confer such authority. The Divisional Court’s starting point was one of Parliamentary intention, whereas the claimant’s starting point was one of constitutional effect.

Very little mention of devolution was made at first instance. The Court merely observed in relation to various statutes, including the devolution statutes that, as they came into force after the ECA 1972, they could not affect the meaning of the ECA itself. As Wales had taken no part in the first instance hearing, it was, as an intervenor, able to start from a clean slate. Of all the devolved legislatures, Wales was the only one that had voted for Brexit. Despite this, it was concerned to ensure that there was proper Parliamentary scrutiny of the process. A mere exercise of the prerogative power to trigger art 50 afforded no basis for confidence that there would be proper consultation.

In developing its arguments, there were a number of obvious forensic constraints. First, between them, the claimants had a well-rehearsed series of submissions in terms of the main constitutional argument with which Wales broadly agreed. There was, therefore, a need (so as to add value as an intervening party) to maintain a complementary, yet discrete position, that focused on the devolution statutes. Secondly, however, the devolution statutes follow a broadly similar structure. Accordingly, Wales’ arguments had to be discrete, not merely relative to the claimants’ submissions, but also relative to the submissions of the other devolved legislatures. Thirdly, the Northern Ireland references expressly included the argument that the Sewel Convention required the consent of the Northern Ireland Assembly before the UK Parliament could enact legislation to permit the Executive to trigger art 50. Both Wales and Scotland stood to benefit if such argument were accepted, but the legal merits of the argument were questionable. Wales had to decide whether to advance similar submissions. Scotland faced the same dilemma. Finally, though, it was desirable for Wales to deploy Sewel in some fashion. Indeed, as a matter of practical politics, any of the devolved legislatures would have been hard put to defend an intervention without mentioning it. Thus, space had to be found for using Sewel in a way which avoided both the Scylla of non-justiciability (elementarily, constitutional

15 ibid [102].
conventions are not justiciable) and the Charybdis of irrelevance.

3 The Non-Dispensing Principle as Advanced by Wales

If the non-dispensing principle is indifferent to statutory content (beyond the core prohibition against the prerogative dispensing with existing law), it is as applicable to the devolution statutes as it is to fundamental or constitutional rights. This was the premise underlying Wales’ arguments on the impermissibility of using the prerogative to trigger art 50. Accordingly, Wales’ central proposition under this head of the argument, was that giving notification under art 50 would modify the statutory competence of the National Assembly for Wales and the Welsh Government under the GWA 2006. If correct, it followed that the envisaged use of the prerogative was unlawful because the respective statutory competences of the Assembly and Government reflected existing law and could not be dispensed with by using the prerogative to bring about such modification.

Properly analysed, it was logically impossible to atomise the application of the non-dispensing principle by contending that in some way, it applied to the devolution statutes in any special or discrete sense. If the claimants won, so would Wales (and the other devolved legislatures). Yet, the principle has a particular resonance in the context of devolution. The use of the prerogative power attaches solely to the UK Executive. But the Westminster Parliament has legislated separately, and specifically, by devolving powers to the devolved legislatures. Only the Westminster Parliament possesses unlimited constitutional sovereignty, but devolution in the United Kingdom is asymmetrical: it has evolved differently, with different statutory regimes in each of the devolved legislatures in Wales, in Scotland, in Northern Ireland. Parliament has passed different laws at different times and with different content in each of the devolved legislatures which, as a result, exercise different statutory powers. The notion that the prerogative, as opposed to legislation, could be used to modify these powers, is counter-intuitive having regard to the incremental increase of powers to those legislatures over the past two decades. In the most general terms, the trajectory of devolution has been increasing, whereas that of the exercise of prerogative power has been declining. That is a not unimportant big-picture aspect that points to the impermissibility of deploying the prerogative where the effect of doing so is to interfere directly with the legislative competence of the relatively newly emerging devolved legislatures possessing their own emerging conceptions of sovereignty.

As far as the GWA 2006 is concerned, it was argued before the Court that this provided a comprehensive and detailed statutory regime for, amongst
other things, the legislative competence of the Welsh Assembly and the powers of the Welsh Ministers. The GWA 2006 contained within it a statutory scheme both for prescribing and for modifying the legislative competence of the Assembly. One of the component elements of the legislative competence that the Westminster Parliament had prescribed was the constraint that the Assembly must not legislate incompatibly with EU law.\textsuperscript{16} That constraint was part of its legislative competence and would inevitably disappear (ie be struck-through) by the triggering of art 50 of the TEU. Similarly, there was a clear legislative scheme for the modifying of legislative competences within the powers that had been devolved.\textsuperscript{17} That scheme too would be bypassed entirely by the triggering of art 50 by the prerogative.

It was contended for the Counsel General that it was the very comprehensiveness and detail of the devolution regimes in Wales and elsewhere that both supported, and reinforced, the claimants’ submissions on the main constitutional argument. The ECA 1972 and the subsequent devolution regimes were part of an interlocking series of constitutional statutes. They had to be read together and as a whole. Reading through the detail of the GWA 2006 is illuminating and was relied on in the argument before the Court. Section 108(6)(c) of the GWA 2006 places a clear and unqualified restriction on the competence of the Welsh Assembly that it may not legislate contrary to EU law (or Convention rights). Materially, there is no equivalent restriction on legislative competence for types of international obligations other than those found in s 108(6)(c). Other types of international obligation are separately addressed, but only as provided for in s 114(1)(d) of the 2006 Act. That provision gives the Secretary of State a power to veto an Assembly Act which is incompatible with any international obligation. It does not, however, place such Acts outside the legislative competence of the Assembly.

The effect of using the prerogative to trigger art 50 of the TEU would, in substance, therefore, have been to dispense with s 108(6)(c) of the GWA 2006 in so far as it concerns EU law, because there would no longer be any ‘EU Treaties’ (which is the reference point for the definition of ‘EU’ law to be found in s 158 of the 2006 Act) upon which the restriction bites. The provision would have been hollowed out entirely. This would, therefore, be a paradigm case of the prerogative being used to dispense with a statutory provision, which is not permitted according to the non-dispensing principle. In substance, using the prerogative to trigger art 50 would have amounted to the Executive drawing a black line through the relevant part

\textsuperscript{17} ibid s 109.
of s 108(6)(c), thereby removing it from the statute book.

Moreover, the use of the prerogative power to dispense with the EU law restriction in s 108(6)(c) would have cut across the specific (supplementary) procedure that the Executive must follow if it wishes to alter the listed sch 7 competences of the Assembly under s 109 of the GWA 2006. That discrete procedure requires a draft Order in Council to be placed before both Houses of Parliament, as well as receiving Assembly endorsement. Crucially, s 109 does not permit the Executive to amend the limits on the competences of the Assembly set out in the body of the GWA 2006 itself (including the EU law restriction in s 108(6)(c)). Instead, Parliament has deliberately confined the amending power to the competences set out in sch 7. It was, therefore, argued that it would be a clear subversion of s 109 and the carefully crafted and comprehensive legislative scheme for modifications to the Assembly’s legislative competence by the Executive, if the Executive were able to rely on the prerogative to alter the restrictions on the Assembly’s competences contained in s 108, including the EU law restriction in the GWA 2006, thereby bypassing the requirement for parliamentary approval under s 109(4)(a). Triggering art 50 of the TEU would also dispense with s 113 of the GWA 2006, which enables the Assembly to reconsider a Bill where a reference on its compatibility with EU law has been made to the Court of Justice of the European Union.

Finally, in the context of Assembly powers – although not argued as a free-standing point – it was observed that withdrawal from the EU (inevitably brought about by the service of notification under art 50) would have significant effects on the future interpretation of Acts of the Assembly. Section 154(2) of the GWA 2006 thus requires Acts of the Assembly to be interpreted, where possible, in a way which brings them within the Assembly’s competences. It follows that, wherever possible, a court must interpret an Act of the Assembly in a way which complies with EU law (even if that is not the most natural interpretation) in order to comply with the restriction on the Assembly’s competence in s 108(6)(c). As s 108(6)(c) would, in substance, be repealed when the UK withdrew from the EU, it followed that this interpretative requirement would cease to apply, thereby demonstrating the significant effects that withdrawal from the EU would have on Acts of the Assembly and therefore on the devolution framework for Wales as a whole. Similar and parallel arguments were advanced in respect of the Welsh Ministers where, again, it was clear that the drafting of the GWA 2006 envisaged an express statutory scheme for modification of powers and where use of the prerogative to trigger art 50 would have the effect of drawing a black line through other provisions of the statute.18

18 ibid s 80.
In fact, the Court did not really grapple with the primary constitutional argument at all, let alone with the crystallisation of that argument by reference to the devolution settlements. Insofar as the Court dealt with the claimant’s primary argument, it studiously recited it,\(^{19}\) promising to return to it after considering ‘some relevant constitutional principles’.\(^{20}\) However, before coming to what it termed ‘subsidiary arguments’, the ensuing paragraphs did not revert to that primary argument, but rather addressed a somewhat different point which is the unique significance of EU law as a source of law.\(^{21}\) The heading to this cluster of paragraphs is: ‘The status and character of the 1972 Act.’\(^{22}\) Instead of deciding the application of the relevant constitutional principles identified earlier, however, the majority judgment analysed the ECA as a unique constitutional statute. It observed that the ECA 1972 ‘authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes.’\(^{23}\) But this new (and ‘unprecedented’) ‘source of UK law’ was, however, also unique in another sense. Unlike any other source of UK law, no rule of recognition was changed by its introduction. Rules of recognition are fundamental rules by which all other legal rules are validated. Thus, a statute is the most obviously relevant meta-rule because it describes how other rules should be used. Ostensibly, there was a Frankenstein-like tension at the heart of the analysis, in that the ECA 1972, as one statute (a meta-rule), has created a further meta-rule (EU law) which then takes precedence over another meta-rule (all other statutes). Yet the Court embraced this potential contradiction by observing that:

\[
\text{In one sense, of course, it can be said that the 1972 Act is the source of EU law, in that, without the Act, EU law would have no domestic status. But in a more fundamental sense and, we consider, a more realistic sense, where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law. [...] It is also true that EU law enjoys its automatic and overriding effect only by virtue of the 1972 Act, and thus only while it remains in force. That point simply reflects the fact that Parliament was and}
\]

\(^{19}\) *Miller* (n 1) [34]-[38].
\(^{20}\) *ibid* [39], [50]-[59] (emphasis added).
\(^{21}\) *ibid* [60]-[93] (emphasis added).
\(^{22}\) *ibid* [60].
\(^{23}\) *ibid*. 

367
remains sovereign: so, no new source of law could come into existence without Parliamentary sanction – and without being susceptible to being abrogated by Parliament. However, that in no way undermines our view that it is unrealistic to deny that, so long as that Act remains in force, the EU Treaties, EU legislation and the interpretation placed on these instruments by the Court of Justice as direct sources of UK law.24

The Gordian knot is thus avoided by preserving the ultimate rule of recognition (Parliamentary sovereignty) and placing different statutes and their legal effects in a relative hierarchy. Put shortly, the constitutional simplicity of the majority analysis made it unnecessary to apply the supposedly uncontentious constitutional principles outlined.25 That had two further consequences. First, by narrowing the issue to one that could be confined to the unique constitutional nature and effect of the ECA 1972, the majority judgment was able to avoid its judgment in Miller from creating any further constitutional ripple effects. It was, implicitly on the majority reasoning, a narrow issue unlikely to recur. Secondly, and relatedly, the nature of the majority analysis avoided the need for any detailed (indeed, any) examination of the constitutional effects of using the prerogative power on the devolution statutes. As far as the devolution statutes were concerned, the Court addressed their content only generally and then only in the context of the Northern Ireland references. The fact that ‘the devolved legislatures do not have a parallel legislative competence in relation to withdrawal from the European Union’ did not affect the application of the non-dispensing principle since the specific legislative competence of the devolved legislatures by reference to EU law was still being modified by the triggering of art 50 of the TEU.26

As explained above, it is true that the resolution of the devolution arguments on applying basic constitutional principle stood or fell with the claimants’ arguments. Nonetheless, the devolution settlements are constitutionally highly significant. They could usefully have formed part of the ‘big picture’ when evaluating whether, in the post-millennium UK, it was really possible to force through major constitutional changes through the use of the prerogative. As it was, in its majority judgment, the Court was able to bypass consideration of any wider constitutional implications by simply focusing on the unique nature of the ECA 1972. Devolution would, however, surface again in Wales’ submissions, but this time in relation to the Sewel Convention. As we shall see, these submissions, too, were not

24 ibid [61].
25 ibid [40]-[59].
26 ibid [130].
addressed by the Court. The only question on Sewel that was addressed was that raised in the Northern Ireland references.

4 Sewel – The Northern Ireland References

The majority judgment of the Supreme Court records, expressly, that neither Wales nor Scotland contended that the Sewel Convention had any binding effect. In particular, it observed that ‘[t]he Lord Advocate and the Counsel General for Wales were correct to acknowledge that the Scottish Parliament and the Welsh Assembly did not have a legal veto on the United Kingdom’s withdrawal from the European Union.’

As described by the Court, the Sewel Convention was originally embodied in a Memorandum of Understanding (‘MOU’) between the UK Government and the devolved Governments in December 2001. Paragraph 14 of the current MOU states that:

> The UK Government will proceed in accordance with convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.

At the same time, para 21 of the MOU makes it clear that (materially) ‘[t]he devolved administrations are responsible for observing and implementing [...] European Union obligations which concern devolved matters.’ The Sewel Convention thus raised thorny political considerations for each of the devolved legislatures when deciding what arguments to deploy before the Court. It is, as the MOU shows, a convention common to each of the legislatures (though at the time of Miller, legislated for only in the Scotland Act 2016). It reflects the growing constitutional importance of the devolution settlements. But it is still no more than a parliamentary convention and as such, subject to its meaning and effect in the Scotland Act at the time Miller was decided, not justiciable in the courts. It was, though, difficult to see how Wales or, indeed, any of the devolved legislatures could, sensibly, go before the Court without invoking Sewel in some way. The political cost of not doing so might be considerable, since without Sewel,

---

27 ibid [150].
28 ibid [138]; Cabinet Office, Memorandum of Understanding and Supplementary Agreements (Cm 5240, 2001).
29 Cabinet Office, Memorandum of Understanding and Supplementary Agreements (2013).
a discrete basis for intervention separate from the main constitutional argument was difficult to locate and their intervention, therefore, not easy to justify. On the other hand, there was no obvious basis for relying on Sewel as anything more than a non-justiciable convention. If any arguments were to be advanced as to the binding nature of Sewel, they were more appropriately brought as part of the Northern Ireland reference or by Scotland.

Wales could, at least in theory, have supported (but could not have fronted) a coherent argument based on the provisions of the Scotland Act 1998 (as amended by the 2016 Act) which codified Sewel in s 28(8), by providing that: ‘[…] it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.’ The basis of the argument would have been that s 28(8) removed the bar of non-justiciability of Sewel precisely because it was not provided for in statute. However, Wales (rightly as it transpired) decided not to argue the point, considering that any assertion that Sewel was binding because of the introduction of s 28(8) of the Scotland Act 1998 was doomed to failure. This was so for two reasons. First, art IX of the Bill of Rights 1688 operates to prevent proceedings in Parliament from being questioned in the courts. The application of a Parliamentary convention does not, in constitutional terms, constrain Parliament from legislating, but an argument for an interpretation of s 28(8) that viewed it as a constraint of that kind would have to overcome the fact that the Parliamentary draftsman was unlikely to have envisaged such a constraint since that would invite the court to adjudicate on proceedings in Parliament. Secondly, s 28(8) appears, simply, to accord declarative recognition to the Sewel Convention. This point also influenced the Political and Constitutional Reform Committee of the House of Commons in its Report ‘Constitutional Implications of the Government’s Draft Scotland Clauses’.

In the aftermath of Miller, it was widely misreported that all of the devolved legislatures had lost their common argument that the Sewel Convention bound the UK Government to seek their consent before being able to pass legislation to give notice to exit the EU. In the event, however, as the judgment makes clear, only the references from Northern Ireland raised this point as one of the five questions that they set out for consideration. As those advising Wales had anticipated, the Court dealt with the question quite shortly, by reference to the non-justiciability of parliamentary conventions generally and to the fact that the inclusion of Sewel in the Scotland Act 2016 merely reflected the legislative intent to

entrench it as a convention.\textsuperscript{32} The fact that, in Wales’ view, Sewel could not be argued to be binding in law, did not though, necessarily, exhaust the possibility of raising it as an issue before the Court. That Sewel was constitutionally highly significant is, perhaps, a truism and was expressly recognised by the Court itself when it stated that:

\ldots{} we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.\textsuperscript{33}

The question for those advising Wales was whether Sewel could, despite the fact that it was not legally binding, still be legally relevant to the claimants’ main constitutional argument. All of the submissions advanced by Wales in Miller in relation to Sewel were predicated on this being so.

5 Sewel – The Submissions Made By Wales

Wales’ submissions on the Sewel Convention were designed to provide an alternative and exclusively devolution-focused basis for a more general common law evaluation of the legal limits on the exercise of the prerogative when withdrawing from Treaties in the highly unusual context of exiting the EU. That the general common law, as distinct from specific constitutional principles themselves derived from the common law, could be used to determine the limits of prerogative power was an underlying principle established by one of the landmark cases in judicial review, namely Council of Civil Service Unions v Minister for the Civil Service (‘CCSU’).\textsuperscript{34} The source of the prerogative power is the common law. As Lord Scarman said in CCSU:

Without usurping the role of legal historian, for which I claim no special qualification, I would observe that the royal prerogative has always been regarded as part of the common law, and that Sir Edward Coke had no doubt that it was subject to the common law: Prohibitions del Roy (1608) 12 Co Rep 63

\begin{itemize}
\item \textsuperscript{32} Miller \textsuperscript{(n 1)} [136]-[151].
\item \textsuperscript{33} ibid [151].
\item \textsuperscript{34} [1984] UKHL 9, [1985] AC 374.
\end{itemize}
and the Proclamations Case (1611) 12 Co Rep 74. In the latter case he declared, at p. 76, that ‘the King hath no prerogative, but that which the law of the land allows him’.\textsuperscript{35}

Similarly, Lord Diplock said:

\begin{quote}
The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e., that part of the common law that is given by lawyers the label of ‘the prerogative’.\textsuperscript{36}
\end{quote}

The limits of the Government’s prerogative powers are, therefore, a question of common law, which the Court was being asked to interpret and apply in \textit{Miller}. The Counsel General submitted that the Court should interpret the common law limits on the prerogative in compliance with the Sewel Convention. In the context of a modern and developing constitution, Sewel was, it was submitted, of particular significance. The reason for this lay in the relationship between the Convention and the emergence of devolution in the United Kingdom involving, as that Convention does, a dialogue between the Westminster and the devolved legislatures as part of the gradual process of transforming Britain, through incremental devolution, from a unitary state into a quasi-federal state. In important ways, devolution affected our perception of the United Kingdom as constituting (20 years or so since the process started) a multinational state holding together people belonging to a number of different nations. The prerogative formed no part of that which was envisaged by the Convention. Sewel required a legislative dialogue; a dialogue between the national Parliament and the devolved assemblies or Parliaments. That dialogue was necessarily one between legislatures – one national, the other devolved. It was, Wales submitted, counter intuitive that a residual prerogative power deriving from the days of royal authority over the whole nation, could be used in modern times as a substitute for the participatory law-making involvement of the different parts of the United Kingdom when it came to laws that affected them directly. It was submitted to be important to set the Counsel General’s intervention in its proper context, namely by reference to: (i) the permanence of devolution, together with increasing

\textsuperscript{35} CCSU (n 34) 407C (emphasis added).
\textsuperscript{36} ibid 409C (Lord Diplock).
empowerment of each of the devolves legislatures, as features of the United Kingdom constitution;\(^\text{37}\) and by way of contrast (ii) the narrow, residual nature of the prerogative power. Five general points were then made about Sewel.

First, although it was not contended that the Welsh Assembly had a legally enforceable right to veto any Westminster legislation authorising art 50 to be triggered or, therefore, for Sewel to be enforced, it was submitted that there could be no prerogative power to short-circuit the Sewel Convention, which, in giving proper respect to and grounding a process of dialogue with the devolved legislatures, was now a fundamental part of the United Kingdom’s devolution framework. Secondly, therefore, the fact that a legislative veto was not claimed, did not mean that Sewel was legally irrelevant. Thirdly, Sewel, at least as applied in Wales, disclosed a clear and consistent practice in which proposed changes by primary legislation to the legislative competence of the Assembly required a Legislative Consent Motion (‘LCM’). This was reflected in the Welsh Assembly’s Standing Order 29, by which a member of the Welsh Government must lay a ‘Legislative Consent Memorandum’ in relation to any ‘relevant Bill’ under consideration in the UK Parliament.\(^\text{38}\) Once a Memorandum was laid, any member of the Assembly might table an LCM seeking the Assembly’s agreement to the Bill.\(^\text{39}\) In the Wales Act 2017,\(^\text{40}\) the Convention was placed on a statutory footing. Section 2 of the Act provides for a new s 107(6) of the GWA 2006 in the same terms as in the Scotland Act 1998 (as amended). This provision states that:

\begin{quote}
(5) This Part does not affect the power of the Parliament of the United Kingdom to make laws for Wales.

(6) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly.
\end{quote}

Crucially, Sewel, whether enacted or left as a convention, is a convention which \textit{operates between legislatures}. Whilst it only requires the Westminster Parliament ‘normally’ to abstain from legislating on devolved matters

\(^{37}\) A helpful outline of the trajectory of devolution in Wales is contained in the \textit{Re Agricultural Sector (Wales) Bill} [2014] UKSC 43, [2014] 1 WLR 2622, [42] (Lord Reed and Lord Thomas CJ).

\(^{38}\) Standing Order 29 of the Welsh Assembly, para 29.2 (emphasis added).

\(^{39}\) ibid para 29.6.

\(^{40}\) At the time of Miller, the Wales Bill was before Parliament. It was subsequently enacted as the Wales Act 2017. This provision was inserted into the Government of Wales Act 2006 by s 2.
without obtaining the consent of the Welsh Assembly, the decision of whether or not to do so rested firmly with Parliament, not the Executive. This is precisely what would be bypassed were the prerogative used to trigger art 50.

Legislation envisaged by the Sewel Convention (that is legislation with regard to devolved matters) is also dealt with expressly in one of the UK Government’s ‘Devolution Guidance Notes’, (which are documents published by the Cabinet Office setting out advice on the working arrangements between the UK Government and the devolved administrations). Devolution Guidance Note No17 (‘DGN 17’) is titled ‘Modifying the Legislative Competence of the National Assembly for Wales’.

Paragraph 13 of the Note states:

The UK Government and the Welsh Government have agreed that the Welsh Ministers should seek the consent of the Assembly when such provisions [modifying the Assembly’s legislative competence] are included in Bills. Any such provision should be included in Bills on Introduction. Further advice on the content of parliamentary Bills which relates to Wales can be found in DGN 9. (emphasis added)

DGN 17 had to be read alongside DGN 9, which provided general guidance about the operation of the Sewel Convention. Paragraph 36 of the Note says:

The UK Government would not normally ask Parliament to legislate in relation to Wales on subjects which have been devolved to the Assembly without the consent of the Assembly. The Assembly grants consent by approving Legislative Consent Motions (LCMs).

The application of the Sewel Convention to Bills which affect the legislative competence of the Assembly is clearly reflected in Standing Order 29 of the Welsh Assembly, which provides:

---

41 Cabinet Office, ‘Devolution Guidance Note 17: Modifying the Legislative Competence of the National Assembly for Wales’, [13].
42 This would include modifications of Welsh Ministers’ functions within the Assembly’s competence. See Cabinet Office, ‘Devolution Guidance Note 9: Parliamentary and Assembly Primary Legislation Affecting Wales’, [50].
43 ibid [36].

---
UK Parliament Bills Making Provision Requiring the Assembly’s Consent

29.1 In Standing Order 29, “relevant Bill” means a Bill under consideration in the UK Parliament which makes provision (“relevant provision”) in relation to Wales:

(i) for any purpose within the legislative competence of the Assembly (apart from incidental, consequential, transitional, transitory, supplementary or savings provisions relating to matters that are not within the legislative competence of the Assembly.

(ii) which modifies the legislative competence of the Assembly.

Paragraphs 29.2 and 29.3 of the Standing Order go on to require the Welsh Government to lay an LCM before the Assembly and allow the laying of a motion seeking the Welsh Assembly’s agreement to the relevant provision. Whether or not the Welsh Assembly provides its agreement is then communicated by the Clerk to the Assembly to the Clerk of the House of Commons. So there was a clear recognition from both sides (that is to say the UK Government through its Guidance Note and the Welsh Assembly through its Standing Orders), that the Sewel Convention applies to Bills which modify the Assembly’s competence (as well as those which fall within the Assembly’s existing competences).

Finally, the ordinary procedure envisaged by DGN 17 for modifying the Assembly’s competence was an Order in Council under s 109 of the GWA 2006. Thus, the Guidance Note stated that:

Exceptionally, there may be occasions when it would be more straightforward to modify the Assembly’s legislative competence in a parliamentary Bill rather than by a Section 109 Order (for example, if the scope of a Bill covered the subject area in which the UK Government and Welsh Government had agreed legislative competence should be conferred on the Assembly).

---

44 An example of a Legislative Consent Motion in respect of a Bill modifying the Assembly’s legislative competence is afforded by the Motion laid by the Welsh Government in relation to what is now the Wales Act 2014. The relevant letter from the Clerk to the Assembly to the Clerk to the House of Commons communicating the result of the vote on the motion is dated 2nd July 2014. It evidences a vote agreeing that the provisions in the Bill which modified the legislative competence of the Assembly should be considered by the UK Parliament.

45 DGN 17 (n 41) [13].
So, the norm envisaged by DGN 17 was that the Assembly’s competences would be modified by an Order in Council made under s 109 of the GWA 2006. Such an Order required the consent of Parliament and the Welsh Assembly. This made it all the more surprising that the Westminster Government was claiming a prerogative power to modify the Assembly’s competences, thereby bypassing both the Sewel Convention process between Parliament and the Assembly and the consent process envisaged under s 109.

Fourthly, for the prerogative to be used as proposed, the whole process of a dialogue operating between legislatures would have been short-circuited. It would have had the effect that matters of legislative competence would be addressed without involvement of the devolved legislatures at all. As importantly, Parliament would not have needed to consider whether it should legislate without the consent of the devolved legislatures. It was, therefore, submitted by Wales that the prerogative power could not be relied upon simply to short-circuit the Sewel Convention by removing the decision to trigger art 50, and therefore, the dialogue envisaged by Sewel, from Parliament.

Fifthly, the fact that the Sewel Convention could not be enforced directly, did not mean that it could not be used to determine the legality of a decision to use the prerogative to trigger art 50. It was well-established that the common law may be developed and interpreted in accordance with constitutional conventions. In A-G v Jonathan Cape Ltd, the Government sought an injunction against the publication of certain cabinet papers on the ground that this would breach the convention of collective cabinet responsibility. The defendant publisher argued that the Court did not have the power to enforce the convention, because it was ‘an obligation founded in conscience only.’ Lord Widgery CJ said that he ‘[could] not see’ why the courts should not find that publication of the information would amount to a common law breach of confidence and that the convention of collective cabinet responsibility was ‘not merely [...] a gentleman’s agreement to refrain from publication.’ The Court thus used the convention of collective cabinet responsibility to inform its interpretation and development of the common law doctrine of confidence. Jonathan Cape Ltd was, therefore, clear authority for the principle that existing common law doctrines may be interpreted and applied to give effect to constitutional conventions, even if the conventions themselves may not be directly enforced.

47 ibid 765F.
48 ibid 769H.
49 ibid 770A.
6 Drawing the Threads Together

The more nuanced constitutional implications of devolution and its relationship to the prerogative were not addressed by the Court in Miller. Given the approach of the majority, which focused on the unique constitutional nature of the ECA 1972, they did not, perhaps, need to be. Viewing the constitutional issues in monochrome may also have avoided more dissenting judgments than there were. Yet, the asymmetric legislation that devolution has engendered is, arguably, as unique a set of constitutional statutes as the ECA 1972 itself. Moreover, using the prerogative in one avowedly unique constitutional arena is likely to have unique effects in other areas.

The role of the devolved legislatures in Miller was, thus, paradoxical. On the political level, it seems likely that the Court was anxious to encourage their involvement. After all, the inclusion of all the component parts of the United Kingdom gave the final outcome a legitimacy that might otherwise have felt to be lacking in one of the most important constitutional cases ever in respect of the legal fall-out from an issue that had almost mathematically divided the nation. Yet, on the forensic level, there was, in the event, little space allowed for devolution in the Miller judgment. It surfaced at its crudest and bluntest (indeed, exclusively) in the five questions resolved in the Northern Ireland reference. But the issues raised there were not the ones that really mattered, or will matter, in the longer-term. In the end, Brexit could even lead to the break-up of the United Kingdom. Certainly its reverberations will be felt in Wales, Scotland and Northern Ireland (and in England) for many decades to come. It would perhaps, therefore, have been fitting for more mention to have been made in Miller of the implications for devolution of using the prerogative power to formally trigger the Brexit process. However, this is merely an advocate’s view and no doubt a partial one at that. Given everything, it seems appropriate to let France have the last word: À chacun ses goûts.50

50 ‘To each his own’.