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

BREXIT JUDICIALISED: CROWN v PARLIAMENT AGAIN

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1 Introduction

Rarely, if ever, has a case attracted more public attention than Secretary of State for Exiting the European Union v R (Miller) (‘Miller’). And no wonder. Following a referendum, which decided narrowly in favour of the United Kingdom (‘the UK’) leaving the European Union (‘the EU’), controversy raged around one of the oldest constitutional conundrums: should authority lie (in respect of the decision to leave the EU) with popular democracy (as expressed through the referendum), with Government Ministers (under the Royal prerogative in the field of international affairs), or with representative democracy (under the principle of the sovereignty of Parliament)? The Prime Minister claimed that triggering the UK’s exit from the EU should be a matter for her and her ministers to decide and it was this assertion which was challenged by Mrs Gina Miller and Mr Deir Tozetti Dos Santos. The Divisional Court held unanimously in favour of Parliament’s making the decision. That judgment resulted in unprecedented media attacks on the Judiciary; attacks which themselves raised additional constitutional questions – first, about the permitted scope of criticism of Judges and second, about whether a duty lay on the Lord Chancellor to intervene in order to protect judicial independence and the rule of law. This broader context is necessary for a full appreciation of Miller’s content and impact (such as it was), which is considered in the main body of this article.

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2 [2016] EWHC 2768 (Admin), [2017] 1 All ER 158.

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2 The Issues

On 23 June 2016, a national referendum (‘the referendum’) delivered a narrow majority in favour of the UK leaving the EU. Although few inside or outside Government knew it at the time (the referendum was held without much prior constitutional due diligence), the procedure for leaving the EU is set out in art 50 of the Treaty on European Union (‘TEU’) as follows:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal […]
3. The Treaties shall cease to apply to the State in question from the date of the 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 […]

The principal issue in Miller can be simply put: do our ‘constitutional requirements’ under art 50(1) place the decision and notification to leave the EU upon the executive (under the prerogative power of the Crown in relation to the conduct of international relations), or upon Parliament (under the constitutional principle of parliamentary sovereignty)? Two prior questions were also in issue. The first was whether the referendum was binding on either the Executive or Parliament. The second question, which was not raised at first instance, but was brought before the UK Supreme Court by the devolved nations, was whether their consent should be sought before art 50 of the TEU could be invoked. Mention should also be made of a third issue: Whether an art 50 notice could be given in qualified or conditional terms, and whether, once given, it could be withdrawn. However, it was common ground that once notice was given the UK would inevitably cease to be party to EU Treaties and in any case, this issue was considered immaterial to the case.
3  *Miller* in the Divisional Court and the Subsequent Reaction

It was unanimously held in the Divisional Court (before Lord Thomas of Cwmgiedd CJ, Sir Terence Etherton MR and Sales LJ),\(^3\) that although art 50 operates on the plane of international law, since the EU Treaties, incorporated into our domestic law by the European Communities Act 1972 (‘the 1972 Act’), apply as part of UK law, the withdrawal from the EU Treaties through art 50 would result in changes in domestic law. The Divisional Court identified three categories of right that would be altered by withdrawal from the EU Treaties:

1. Rights (whether or not embodied in UK law) capable of replication in UK law, such as the rights of UK citizens to employment protection and the rights of non-residents to the benefits of the ‘four freedoms’ (free movement of people, goods and capital, and to provide services);

2. Rights derived by UK citizens from EU law in other member states (such as to the enforcement of judgments in matrimonial matters);

3. Rights of participation in EU institutions that could not be replicated in UK law, as they are dependent on continued membership of the EU. These include rights to stand for selection in the European Parliament, or to vote in European elections.\(^4\)

Because it is clear that some of the rights in each category will be lost if the UK were to withdraw from the EU Treaties,\(^5\) and because Ministers cannot alter domestic rights and duties under prerogative powers,\(^6\) it was not open to the executive to withdraw from EU Treaties under art 50 of the TEU without the authorisation of a statute.\(^7\) Parliament, it was held, and not Ministers, should decide whether to leave the EU and to give notice of that intention to the European Council.

A storm then erupted. The *Daily Mail* called the three senior and respected judges who decided the case ‘enemies of the people’ who ‘had “declared

\(^3\) ibid.

\(^4\) ibid [57]-[61].

\(^5\) ibid [62]-[66].

\(^6\) ibid [86].

\(^7\) ibid [92].
war on democracy” by ‘defying 17.4 million Brexit voters’. The Telegraph referred to ‘the plot to stop Brexit’. The Sun and Express expressed similar views. Elsewhere, allegations were made about the lack of impartiality of the judges who had decided the case, as well as those who would hear it on appeal in the UK Supreme Court, on the ground of their ‘ties to Europe’. Some of the press justified their allegations on the ground that the background and predispositions of Judges were relevant to their decisions and thus appropriate subjects of public knowledge and discussion. It was not, however, said how this justification explained their reference to the fact that one of the Judges was ‘openly gay’, or their belittling of the claimants who initiated the case.

These unusually vituperative attacks raised the question of whether the Government should intervene to support the Judges whose independence and impartiality had been so vigorously called in question. The Constitutional Reform Act 2005 requires the Lord Chancellor (who, under that Act, was no longer required to possess legal qualifications) to ‘uphold the continued independence of the judiciary’ as well as the ‘existing constitutional principle of the rule of law’. After a few days’ silence, the Lord Chancellor, Liz Truss (who is not a lawyer) stated laconically that ‘the independence of the judiciary is the foundation upon which our rule of law is built’.

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12 ibid.


15 Constitutional Reform Act 2005, s 3.

16 Constitutional Reform Act 2005, s 1.

the Prime Minister briefly expressed her support for both judicial indepen-
dence and the freedom of the press. In a subsequent letter to the Times, the Lord Chancellor expressed her confidence in the Judges in the Miller case but refused to go further so as to avoid interfering with the freedom of the press or to ‘police headlines’, which she did not believe had ‘imperilled’ judicial independence.

Should the Lord Chancellor have invoked those duties by rebutting the press charges? She was surely wrong to say that, by contradicting or correcting the allegation of judicial bias, she would be censoring the press. Rebutting the content of the attacks on Judges need in no way question the freedom of the press overall. It simply engages with the substance of the allegations. Nobody could accuse the Secretary of State for Health of censorship when defending the integrity of our medical profession from press attacks. Censure is not censorship. On the other hand, the Lord Chancellor need not intervene on each occasion the media attack a judicial decision. The former crime of contempt by ‘scandalising the court’ has been repealed and judicial decisions are, and need to be, open to criticism. The Lord Chancellor should employ her duties sparingly and strategically, giving a wide margin of discretion to the press generally. Nevertheless, the charge against the Judges as being ‘enemies of the people’ (and other similar formulations) is, realistically, an allegation that the Judges blatantly sought to overturn the result of the Brexit referendum. It is tantamount to a charge of insurrection (that the Judges sought to nullify the expression of the popular will legitimately arrived at) and thus seeks directly to dent public confidence in the judiciary’s integrity. What more is needed to invoke the Lord Chancellor’s duties? In addition, she surely ought to have criticised the press’s scurrilous attacks on the claimants, who performed a public service in allowing this key constitutional case to be taken forward. Such intimidation undermines access to justice, which is a key ingredient of the rule of law.

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19 Elizabeth Truss, ‘Truss on integrity’ The Times (London, 10 November 2016) 32.
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**Miller** in the UK Supreme Court

4.1 Parliament or Ministers?

As we have seen, rarely can a case in a top court have been heard in a more charged political atmosphere. Recent technological developments providing more open justice and access by the media to the Court were, sensibly, fully utilised in the *Miller* appeal. Thousands watched counsels’ submissions on national television, accompanied by running commentaries seeking to interpret which way the wind was blowing. Probing questions by the full bench of 11 Justices were seized upon as indications of hostility to one side or another. It soon became apparent, however, that the esoteric courtroom argumentation did not suit the manner of football commentary and, importantly, that the case was all about strictly legal, or constitutional, matters and nothing to do with politics, let alone insurrection. When the judgment appeared on 24 January 2017, upholding the decision of the Divisional Court, press reaction was relatively muted and the majority were careful at the outset of their judgment to clear up the misunderstandings about the Court’s role.²¹ They said:

It is worth emphasising that nobody has suggested that this is an inappropriate issue for the courts to determine. It is also worth emphasising that this case has nothing to do with issues such as the wisdom of the decision to withdraw from the European Union, the terms of withdrawal, the timetable or arrangements for withdrawal, or the details of any future relationship with the European Union. Those are all political issues [...] not issues which are appropriate for resolution by judges, whose duty is to decide issues of law which are brought before them by individuals and entities exercising their rights of access to the courts in a democratic society.²²

As clear as the judgments are, any member of the press or public seeking to contradict the majority’s claims would soon have realised that the arcane discussion yielded no hint of political preference, on either side. But lest any expectation on the part of the public that they would be able to relate to the argument be thereby dashed, mention should be made of Lord Hughes’ masterful summary of the issues. He said:


²² ibid.
[...] at some risk of over-simplifying, the main question centres on two very well understood constitutional rules, which in this case apparently point in opposite directions. They are these:

Rule 1

the executive (government) cannot change law made by Act of Parliament, nor the common law;

and

Rule 2

the making and unmaking of treaties is a matter of foreign relations within the competence of the government.  

Lord Hughes went on to say that the second rule, relied on by the Government, ‘operates to recognise its power, as the handler of foreign relations, to unmake the European Treaties’, while the first rule, relied on by Mrs Miller, shows that that power (of foreign relations) ’stops short at the point where UK statute law is changed’.  

Lord Hughes then depicted Mrs Miller’s case, while not denying Rule 2, as relying on Rule 1 and as contending that ‘because there was an Act of Parliament (the European Communities Act 1972) to give effect to our joining the (then) EEC […] there has to be another Act of Parliament to authorise service of notice to leave.’  

The Government’s case, on the other hand, while accepting Rule 1, relied on Rule 2, contending that the 1972 Act ‘will simply cease to operate if the UK leaves.’  

This is because leaving the EU ‘would not be altering the statute; the statute would simply cease to apply because there would no longer be rules under treaties to which the UK was a party.’  

Much has been made of the constitutional importance of this case. As Lord Hughes’ summary shows, however, the argument largely asserted what has rarely been doubted, namely, that the Crown’s prerogative powers (namely, the residual powers of the King or Queen, now exercised on his/her behalf largely by the Executive) have been steadily eroded over the years and such that still exists must be narrowly interpreted. They have even, in relatively recent times, been open to ordinary principles of judicial review. In particular (and this is the essence of Miller), when a statute occupies the space of a prerogative power, such as where there is a parallel

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23 ibid [277].
24 ibid [278].
25 ibid [279].
26 ibid [280].
27 ibid.
statutory scheme, or where it imports laws made through the prerogative into domestic law, then any further change within that space must be made by the elected representatives of the people rather than the Crown.

Why can the Executive not change domestic law? The answer is again straightforward. Despite our lack of a codified constitution, we have shifted over the years from a monarchy, exercising totalitarian power (‘the King can do no wrong’), to a state where Parliament, which consists of members elected by the people (never mind the House of Lords for the moment), makes, amends or repeals domestic law. The principle of ‘parliamentary sovereignty’ sums up, and indeed legitimates, this constitutional arrangement. What then is the point of the prerogative power when it can be curtailed or extinguished by Parliament? The majority judgment gives some examples of where the prerogative power serves a function for reasons of expediency, such as in relation to the terms of service of Crown servants, or the destruction of property in wartime in the interest of national defence. The prerogative in the area of foreign affairs is most significant and it too is based upon expediency. Although Parliament may be able to guide our foreign relations, the negotiation of international agreements requires executive action. As Blackstone put it, the prerogative in international affairs is:

[... ] wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and despatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford.28

Yet there is a safeguard under our ‘dualist’ system: that international law and domestic law operate in different spheres. Therefore, although treaties may be binding in international law, they give rise to no rights or obligations in domestic law. To import those obligations into domestic law, an Act of Parliament is required. As the majority said, ‘the dualist system is a necessary corollary of Parliamentary sovereignty, or, to put the point another way, it exists to protect Parliament not ministers.’29

Despite the commentators’ attempts to talk up the differences between the two sides in Miller, they both, as Lord Hughes rightly said, accepted the

28 ibid [160] (Lord Reed), citing Blackstone’s Commentaries on the Laws of England (1795-1769), Book 1, ch 7.
29 ibid [57].
validity of each of his two rules. The respondents were not denying the Executive the use of prerogative powers on the international sphere and the Executive were not denying Parliament's supreme role in changing domestic law. The essence of the disagreement then boiled down to a matter of the interpretation of whether an art 50 notice has the effect, in relation to the 1972 Act, of Lord Hughes' Rule 1 or Rule 2. In other words, did the 1972 Act authorise a new source of domestic law – by means of the EU Treaties and EU law as they applied, directly or indirectly – in the UK, which established rights and duties which then could only be altered by Parliament? Or would withdrawal from the EU Treaties by the Executive under art 50 of the TEU effectively render the 1972 Act inoperative to the extent that there would henceforth no longer be laws governed by the Treaties which bound the UK's domestic law?

4.2 Interpretation of the European Communities Act 1972

Part 1 of the 1972 Act contains its 'General Provisions'. Section 1(2) defines 'The Communities' to mean the European Economic Community (now the EU). The 'Treaties', and 'Community Treaties' (now the EUTreaties) meant the 1972 Accession Treaty itself, plus other treaties governing the rules and powers of the EEC at that time, plus 'any other treaty entered into by the EU [...] with or without any of the member States, or entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom'. The effect of those definitions was that future treaties altering the rules or membership of the EEC could only become 'Treaties' and 'EU Treaties' and have effect in UK law if added to the section by an amending statute. By contrast, 'ancillary' treaties, under s 1(3), only took effect in UK law if it was declared so by an Order in Council which first had to be approved by resolution of each House of Parliament.

Section 2 of the 1972 Act is headed 'General Implementation of Treaties'. Section 2(1) provides that:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the 'Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly [...]
Section 2(2) of the 1972 Act provides for the making of Orders in Council by Her Majesty and for the making of regulations by Ministers for the purpose of implementing any Community (now EU) obligation of the UK (which is defined as any obligation ‘created or arising by or under the Treaties’) or ‘enabling any rights […] enjoyed […] by the United Kingdom under or by virtue of the Treaties to be exercised’, or for ancillary purposes, including ‘the operation from time to time of subsection (1)’.

In the years following the 1972 Act (and the referendum held in 1974 which held in favour of the UK remaining in the EEC), over 20 Treaties relating to the EEC or EU were signed on behalf of member states (in the UK, by Ministers) and then added to the list of ‘Treaties’ in s 1(2) of the 1972 Act by amendment to the Act and ratified by the UK. Up until 2007, there was no mechanism for a Member State to withdraw from the EU, and it was only then, through the Treaty of Lisbon which amended the old TEU (the Maastricht Treaty, 1992), that the Article 50 scheme for withdrawal was introduced. The majority interpreted the language and scheme of the 1972 Act as instituting an unprecedented ‘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.30

This process is achieved in three ways. Firstly, by the direct application of EU Treaties themselves, under s 2(1) (some of which create rights and duties). Secondly, where, under the Treaties, EU legislation has a direct effect in the UK without need for further legislation (in respect of EU Regulations31). Thirdly, through the implementation of EU law by delegated legislation (under s 2(2) of the 1972 Act). In one sense, the 1972 Act could therefore be said to be the source of EU law but ‘in a more fundamental sense and […] in 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’.32

Having set-out that the 1972 Act established that the EU Treaties, EU legislation and the interpretations of the Court of Justice are direct sources of UK law, it follows that the rights, duties and rules which derive from the EU should apply in domestic law. However, more than that, it provided for a ‘new constitutional process for making law in the United Kingdom’.33 The recognition of this new constitutional process by no means conflicts with the sovereignty of Parliament, because Parliament can itself reverse the

30 ibid [60].
32 Miller (in 1) [61] (emphasis added).
33 ibid [62] (emphasis added).
process at any time, provided that the reversal is clear in its terms and not ambiguous, as befits any statute that has a ‘constitutional character’.\textsuperscript{34} Under this interpretation, although the 1972 Act ‘gives effect’ to EU law, it is not the originating source of that law.\textsuperscript{35} It is the ‘medium’ or ‘conduit pipe’ by which EU law is introduced into UK domestic law. But its effect is ‘to constitute EU law [as] an independent and overriding source of domestic law’.\textsuperscript{36}

The majority fully confronted the ‘powerful’ argument set out in Lord Reed’s dissent, and argued by James Eadie, counsel for the Secretary of State for Exiting the European Union (‘the Secretary of State’), that although some rights would be lost on exiting the EU Treaties, the loss of those rights had already been sanctioned by Parliament through the 1972 Act.\textsuperscript{37} Since the 1972 Act gives effect to whatever the UK’s international obligations happen to be ‘from time to time created or arising by or under the EU Treaties’,\textsuperscript{38} Lord Reed contended that, since changes in EU law are brought into domestic law through the 1972 Act, once the UK ceases to be bound by the EU Treaties there will no longer be any rights to which s 2(1) could apply, nor any EU obligations which require delegated legislation under s 2(2). At that point, he said, ‘there are no rights, powers and so forth which, in accordance with the Treaties, are to be given legal effect in the UK’\textsuperscript{39} and, therefore, the 1972 Act foresaw the possibility of withdrawal from the Treaties without Parliamentary authorisation. Lord Reed thus interpreted the 1972 Act as giving effect to the EU in UK domestic law in a way that is ‘inherently conditional on the application of the EU treaties to the UK, and therefore on the UK’s membership of the EU’.\textsuperscript{40} This is shown, he said, by the fact that the condition was not satisfied when the 1972 Act initially came into force, because the Treaties did not then apply to the UK:

The satisfaction of the condition, some months later, depended on the decision of a UK entity: it depended on the Crown’s exercise of prerogative powers. The content would return to zero if the condition ceased to be satisfied as the result of the UK’s invoking article 50.\textsuperscript{41}

\textsuperscript{34} ibid [67]. The notion of ‘constitutional statutes’ not being amenable to implied repeal was first raised by Laws LJ in Thoburn v Sunderland City Council [2002] EWHC 195 (Admin), [2003] QB 151 [58]-[59]; and by Lord Reed, Lord Neuberger and Lord Mance in R (Buckinghamshire County Council) v Secretary of State for Transport [2014] UKSC 3, [2014] 1 WLR 324, [78]-[79], [206]-[207].
\textsuperscript{35} Miller (n 1) [65].
\textsuperscript{36} ibid (emphasis added).
\textsuperscript{37} ibid [77].
\textsuperscript{38} ibid [179], citing the European Communities Act 1972, s 2(1).
\textsuperscript{39} ibid [191] (emphasis added).
\textsuperscript{40} ibid [177].
\textsuperscript{41} ibid [197].
Since s 2(1) is silent on the question of whether art 50 of the TEU should be invoked by Parliament, no implication can be derived that ‘Parliament has, by necessary implication, deprived the Crown of its prerogative powers’.  

In response, the majority accepted that the 1972 Act envisaged domestic law, and therefore the rights of UK citizens, changing as EU law varies and that indeed ‘there was no practical alternative to such an arrangement in a dualist system.’ However, it did not follow that those rights could change ‘as a result of ministers unilaterally deciding that the United Kingdom should withdraw from the EU Treaties’:

There is a vital difference between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation, and changes in domestic law resulting from withdrawal by the United Kingdom from the European Union. The former involves changes in EU law, which are then brought into domestic law through section 2 of the 1972 Act. The latter involves a unilateral action by the relevant constitutional bodies which effects a fundamental change in the constitutional arrangements of the United Kingdom.

As such, it was held that the 1972 Act could not be stretched to provide ministers with the ‘far-reaching and anomalous right to use a treaty-making power to remove an important source of domestic law and important domestic rights’.

4.3 The Constitutional Authority of the Referendum

The Secretary of State argued that since the result of the referendum was in favour of leaving the EU, Parliament could not have intended that, upon the electorate voting in favour of leave, the same question should be referred straight back to it for consideration. The Court held that that argument ‘assumes what it seeks to prove, namely that the referendum was intended by Parliament to have a legal effect as well as a political effect.’ Secondly, it was held that the effect of any referendum must depend upon the terms of the statute which authorised it. And unlike the Acts authorising previous referendums, which in effect stipulated that a change in the law

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42 ibid.
43 ibid [79].
44 ibid [83].
45 ibid [78] (emphasis added).
46 ibid [87].
47 ibid [120].
would be an inevitable consequence of a positive vote by the electorate in the referendum, the Act authorising the Brexit referendum made no provision for any consequences of its outcome, providing only that the referendum would be held. For that reason, any force the referendum might have remains ‘political rather than legal’ until such time where the necessary legal change is ‘made in the only way in which the UK constitution permits, namely through Parliamentary legislation’.

4.4 The Devolved Nations and the Sewel Convention

The third issue in Miller was whether the UK Government could make the significant decision to depart from the EU without the consent of the devolved institutions in Northern Ireland, Wales and Scotland. The discussion in relation to Scotland, in particular concerning the ‘Sewel Convention’ is especially relevant. That convention has, in effect, provided the means to regulate the relationships between the UK Parliament and the Scottish Parliament where there are overlapping or disputed legislative competences. In each of the devolution settlements, a section provides that the powers devolved to the relevant legislature ‘does not affect the power of the Parliament of the United Kingdom to make laws for [Northern Ireland, Wales or Scotland]’. However, there is a convention, as stated by Lord Sewel (the Minister of State in the Scotland Office in the House of Lords who was responsible for the progress of the Scotland Bill in 1998), that ‘we would expect a convention to be established that Westminster would not normally legislate with regard to the devolved matters in Scotland without the consent of the Scottish Parliament’.

It was acknowledged by the UK Supreme Court that this expectation has been observed over the years. It was confirmed first in a Memorandum of Understanding (‘MOU’), published in October 2013, which required the devolved administrations to provide consent (through a ‘legislative consent motion’) for legislation on devolved matters by the UK government (apart from legislation which changed the competences of EU institutions). The

48 See eg the Parliamentary Voting System and Constituencies Act 2011 which authorised a referendum on the subject of an alternative vote system in Parliamentary elections.
49 The European Union Referendum Act 2015.
50 Miller (n 1) [124].
51 ibid [121].
52 ibid [136]-[151].
55 Miller (n 1) [137].
56 Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern
MOU stated that this was a statement of political intent which did not create legal obligations. The Sewel Convention has more recently received statutory recognition through s 2 of the Scotland Act 2016, which alters s 28 of the Scotland Act 1998 that governs the law-making powers of the Scottish Parliament to read:

(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

(8) 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 Scottish Parliament.

In *Miller*, the Government of Scotland submitted that the Sewel convention should be judicially endorsed and enforced. The Supreme Court did not ‘underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution’. However, it held that Judges ‘are neither the parents nor the guardians of political conventions; they are merely observers’. While their existence could sometimes be ‘recognised’, their validity cannot be the subject of judicial proceedings. As for the Sewel convention, it operates only as a ‘political restriction’ on the activity of the UK Parliament. Since its function is in the realm of politics rather than the law, the ‘policing of its scope and manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law’. The UK Supreme Court held that even the affirmation of the convention into its statutory form under s 2 of the Scotland Act did not permit its judicial enforcement, since ‘the purpose of the legislative recognition of the convention was to entrench it as a convention’. In other words, not as a legal rule.

The effect of *Miller* in respect of the Sewel convention is clear. Cases were cited showing that previous attempts to enforce conventions in the courts failed. They exist simply in the area of politics, as a means of establishing ‘cooperative relationships’, or to act as a practical restraint on power.

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Ireland Executive Committee, October 2013,

57 ibid para 2.

58 *Miller* (n 1) [151].

59 ibid [146].

60 ibid.

61 ibid [145].

62 ibid [151].

63 ibid [149] (emphasis added).

64 ibid [136].
Their enforcement rests with institutions of government other than courts, or with public opinion, and ultimately, with the electorate.

5 Was Miller Rightly Decided?

5.1 Parliament or Ministers?

Perhaps it was a mistake for the Government to argue in this case that, even if the Executive were to trigger art 50 of the TEU, Parliament would in any event be involved in its legislative capacity by means of a large amount of legislation (the ‘Great Repeal Bill’ and more) which would transpose EU law into UK law, at least temporarily. It was held by the majority, however, that that submission ‘would militate in favour of, rather than against, the view that Parliament should have to sanction giving [notice under art 50]’. This is because:

There is […] a good pragmatic argument that such a burden should not be imposed on Parliament by exercise of prerogative powers and without prior Parliamentary authorisation. We do not rest our decision on that point, but it serves to emphasise the major constitutional change which withdrawal from the European Union will involve, and therefore the constitutional propriety of prior Parliamentary sanction for the process.

Although the majority did not ‘rest [their] decision’ on that ‘pragmatic argument’, in an important way it encapsulates their broader approach to the issue of reading the reality of the impact of the 1972 Act in its broad constitutional context. Simply as a practical matter, our law is shot through with rights and obligations that have been pouring out of the EU and some important ones besides (such as the right to vote in EU elections and stand for the EU Parliament). Irrespective of the niceties of the 1972 Act, these laws have a direct and significant impact upon our lives in areas as diverse as detailed provisions about customs duties, value added tax, EU offences, agricultural grants, fishing quotas, environmental controls, immigration, passporting of manufactured goods and financial services. Democratic instinct requires that such rights should only be changed by those we have elected to make or amend or repeal laws on our behalf.

65 European Union (Withdrawal) Bill (2017-19).
66 Miller (n 1) [100].
67 ibid.
Beyond this, however, the majority viewed the 1972 Act not just as another statute, but one with ‘constitutional character’. It could hardly be compared with delegated legislation (which some commentators had proposed), but ‘effectively operates as a partial transfer of law-making powers, or an assignment of legislative competences, by Parliament to EU law-making institutions (so long as Parliament wills it)’. Yes, the 1972 Act gives effect to EU law, but it is not the originating source of that law. Its effect is to ‘constitute EU law [as] an independent and overriding source of domestic law.’ Withdrawal from EU institutions therefore constitutes a ‘fundamental change in the constitutional arrangements of the United Kingdom.’

It is this point that makes the dissenting judgments appear somewhat unrealistic. After the UK’s withdrawal from the EU, even those rules derived from the EU and transposed into UK law by domestic legislation will have a different character. They will be no longer paramount, and will be open to domestic repeal. Withdrawal from the EU therefore does not only represent a change in degree of our law, but a change in kind, amounting to a far-reaching alteration to the UK’s constitutional arrangements. The 1972 Act was not just another statute. Unique in the UK’s history and constitutional arrangements, Parliament decided then that an international source of law was to be grafted onto, and indeed above, our established sources of law. Therefore:

Bearing in mind this unique history and the constitutional principle of Parliamentary sovereignty, it seems most improbable that those two parties [ministers and Parliament] had the intention or expectation that ministers, constitutionally the junior partner in that exercise, could subsequently remove the graft without formal appropriate sanction from the constitutionally senior partner in that exercise, Parliament.

Ultimately this point must be decisive. Despite the meticulous argument of Lord Reed in favour of the prerogative powers in international matters, since the EU Treaties are clearly a source of domestic law, and since withdrawal of the primacy of EU Treaties would so massively change our constitutional structures, it should not be instituted by the Executive, but
by the elected representatives of the people in Parliament. Any doubts on
that score might be allayed by the robust hypothetical proposition put by
counsel for Mrs Miller that:

[…] if, as [the Secretary of State] contends, prerogative powers
could be invoked in relation to the EU Treaties despite the
provisions of the 1972 Act, it would have been open to
ministers to take such a course on or at any time after 2
January 1973 without authorisation by Parliament. It would
also follow that ministers could have taken that course even
if there had been no referendum or indeed, at least in theory,
even if any referendum had resulted in a vote to remain.73

Counsel for the Secretary of State sought to counter that proposition by
submitting, first, that such an exercise of the prerogative power would in
any event have been amenable to judicial review and, second, that ministers
could always be called to political account for their actions (a course of
action particularly preferred by Lord Carnwath over judicial review in a
case such as this).74 The majority, however, lightly batted away both those
submissions. The first, that judicial review would be available to dispose of
the issue, was considered ‘controversial’ due to practice to the contrary in
relation to the foreign affairs prerogative.75 And in relation to the second,
relating to political accountability, a distinction was drawn between: (i)
the power of ministers to do something whose exercise may have to be
explained to Parliament; and (ii) having no power to do that thing unless
Parliament first agree to its exercise.76 It was held that the power to do
something of such importance to the UK constitution as withdrawing from
the Treaties (as opposed, for example to the power to declare war, which
will not itself lead to new laws) clearly falls in the second category:

Thus, the continued existence of the new source of law created
by the 1972 Act, and the continued existence of the rights and
other legal incidents which flow therefrom, cannot as a matter
of UK law have depended on the fact that to date ministers
have refrained from having recourse to the Royal prerogative
to eliminate that source and those rights and other incidents.77

73 ibid [91].
74 ibid [256]-[264].
75 ibid [92].
76 ibid.
77 ibid [93].
5.2 Constitutional Conventions

Whether or not the Sewel convention is of sufficient constitutional weight, or of long enough standing to be incorporated into our law at this point, the emphatic and unanimous statement of the UK Supreme Court in Miller, that conventions operate in the realm of politics rather than law, belittles the significance of these key features of our constitutional structures. As Dicey and others have recognised, in a non-codified constitution, conventions play an important role, particularly in constraining the exercise of power. Examples are the convention that Royal Assent shall be granted (last withheld by Queen Anne in 1708), and the conventions that limit the UK from imposing its will without consultation upon the Crown Dependencies and British Overseas Territories. Sir Ivor Jennings considered that there was ‘no distinction of substance or nature between laws and conventions’. Even if Jennings was wrong about that, an intermediate position between ‘strict law’ on the one hand and convention on the other is that conventions can be crystallised, or transmuted into a legal rule. For example, as Jennings pointed out, constitutional usages about the supremacy of Parliament were themselves initially conventions, which were incorporated into the common law at the end of the 17th century!

Constitutional conventions should not be relegated to the status of mere political bargains. The difference between the ‘recognition’ of conventions in some cases, and consideration of their ‘validity’ was not explored. The door should surely have been left ajar to an assertion that a relevant convention could at some point be adopted as a common law rule, or at least that it might raise a presumption that it should be followed, in a manner analogous to the ‘principle of legality’ (which Miller endorsed, as will be discussed below, as a principle of constitutional construction). By appearing to bar convention from the door of the courts, Miller might have rendered our uncodified constitution even more uncertain than was hitherto believed - and makes the case for constitutional codification more urgent to consider.

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80 Jennings (n 79) 126, which was supported by the Supreme Court of Canada in 1936 where the majority of the Court would have recognised and enforced a constitutional convention conferring treaty-making powers upon the Dominions; see Reference re legislative jurisdiction of Parliament of Canada to enact the Minimum Wages Act [1936] SCR 461, 466-67 (Duff CJ). But see Geoffrey Marshall, Constitutional Conventions (Clarendon 1986).
5.3 The Approach to Parliamentary Sovereignty

All the judgments in Miller analyse and explain the respective roles of a popular referendum, the prerogative power, the sovereignty of Parliament and constitutional conventions. None of the Justices, however, risked engaging in the kind of broader constitutional discourse in the manner of the late Lord Diplock. Nonetheless, the position taken on Parliamentary sovereignty in all the judgments might have been more carefully considered and its context more fully explored. There is no doubt that the sovereignty of Parliament in relation to the Executive and the referendum was the controlling principle in this case, and ought to have been. However, it is less clear that the judgments (particularly that of Lord Reed) should have adopted the assumption that Parliamentary sovereignty constitutes the foundational ‘rule of recognition’ in our law (a term adopted by the late Professor HLA Hart referring to a rule or rules accepted by the ‘officials of the legal system’). Others would argue from a set of principles which are fundamental to our democracy, just one of which is the principle of representative government (which justifies the sovereignty of Parliament) but which also includes other principles such as equality, liberty, the rule of law and respect for human dignity.

There is hardly a reference in Miller to the fact that the pure Diceyan orthodoxy about the sovereignty of Parliament has been diluted, or even challenged over the years – not in respect of its place in relation to prerogative powers, but in other contexts. It is common knowledge now, as it was perhaps not in Dicey’s time, that governments representing the will of the majority can act in a way that is as contemptuous of human dignity, equality and the rule of law as the old monarchs or present tyrants. The historical shift of authority from Crown to Parliament should not only be seen as the re-allocation of sovereignty from one locus of power to another. It also heralds a transition from unconstrained power to a culture of rights and justification.

We need not, these days, ask fanciful questions to test this hypothesis, such as whether Parliament could pass laws against blue-eyed babies or to prohibit smoking in the streets of Paris. In Jackson v Attorney General, three of the Law Lords wondered whether, in certain hypothetical cases, such as the suspension of Parliament by Parliament, or the creation of a one-party state, any judge could really uphold such a law without conniving.

81 See eg his discourse on the place of public law in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL).
83 See eg R Dworkin, Taking Rights Seriously (Duckworth 1977); R Dworkin, A Matter of Principle (HUP 1985).
in the undermining of the basic structure of constitutional democracy, from which our Parliament derives its legitimacy. Other hypotheticals include the abolition of judicial review, or the outlawing of the right to criticise government.\textsuperscript{85} Lord Steyn even went so far as to say that Parliamentary sovereignty is a principle of the common law, and the common law is certainly open, in certain circumstances, however unusual or unlikely, to prefer other constitutional principles, such as the rule of law, or the presumption of liberty (both endorsed also by Dicey, if that authority is still needed after 132 years).\textsuperscript{86} Lord Hope has on more than one occasion said that ‘the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based’.\textsuperscript{87}

One can understand why a Diplockian disquisition along these lines might have resulted in even more controversy or uncertainty, but at least mention might have been made of the extent to which constitutional thinking since Dicey’s time has inevitably evolved. The majority recognised that to some extent in adopting the ‘principle of legality’.\textsuperscript{88} This principle was employed in response to the Secretary of State’s argument (adopted by Lord Reed\textsuperscript{89}) that since the 1972 Act was silent on the question of whether the prerogative could be employed to withdraw from the EU Treaties, it should be presumed that it could be. The majority said that, to the contrary, the silence in the 1972 Act could not be used to clothe ministers with the ‘far-reaching and anomalous right to use a treaty-making power to remove an important source of domestic law and important domestic rights’.\textsuperscript{90} Mention might have been made too, of the way that the principle of legality has been employed in other contexts to soften (even if not to challenge) parliamentary sovereignty in favour of the rule of law or fundamental rights, at least where the statute was silent or ambiguous.\textsuperscript{91}

\textsuperscript{85} ibid [159] (Lady Hale).
\textsuperscript{86} ibid [102].
\textsuperscript{87} ibid [107]. See also AXA General Insurance Ltd v HM Advocate [2011] UKSC 46, [2012] 1 AC 868, [50].
\textsuperscript{88} Miller (n 1) [87].
\textsuperscript{89} ibid [194]-[197].
\textsuperscript{90} ibid [87].
\textsuperscript{91} See Harry Woolf et al, De Smith’s Judicial Review (7th edn, Sweet & Maxwell 2013) 1-026, 11-057ff. Notably, Lord Reed has recently fully recognised the force of the rule of law, holding that excessive court fees for access to employment tribunals may violate access to justice, which is a key ingredient of the rule of law. However, the sovereignty of Parliament was not in competition in this case as the court fees were imposed by delegated legislation, see R (UNISON) v Lord Chancellor [2017] UKSC 51.
6 Miller’s Aftermath

The relationship between law and social action is of great interest. Some cases have immediate impact in altering behaviour. Others less so. What has been the impact of Miller? Did members of Parliament leap to the constitutional opportunity to exercise their power under art 50 of the TEU to the exclusion of the Executive? Did MPs and members of the House of Lords seize the judgment as an indication of their sovereign power to steer Brexit according to their will? Quite the contrary. Having won the constitutional battle that had absorbed so much time, expense and energy, Parliament meekly ceded the power to direct the pace and shape of art 50 of the TEU to the Executive, granting virtually unanimous support to a very short bill authorising the Government to give notification under art 50 of the TEU.92 The House of Lords, having raised a number of questions the first time they were seized of the matter, capitulated lamely on the second occasion, on the ground that convention required them not to alter a manifesto commitment on the matter of Brexit. The Prime Minister conceded only some unspecified form of scrutiny before the deal was done and, on 29 March 2017, notified the EU of the UK’s intention to leave the EU.

Time, and the intricate relationship between law and politics, will tell whether Parliament will ultimately assume the responsibility which Miller so rightly held was in their hands. La comedia non è finita!

92 HC Deb 7 December 2016 (The House of Commons resolved 448 to 75 to approve the European Union (Notification of Withdrawal) Bill); see The European Union (Notification of Withdrawal) Act 2017.