

## Brexit and Parliamentary Sovereignty

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This note addresses the implications of *R (Miller) v Secretary of State for Exiting the European Union* for the legal principle of parliamentary sovereignty, and argues that the strong restatement of the latter is the most significant feature of the decision. The aim here is to show how traditional principle in the Dicey tradition has been strongly applied against the competing claims of EU law, the royal prerogative, the referendum and devolution. However, the note also argues that the claims relating to parliamentary sovereignty could have produced a different result and that the most compelling feature of the case was the argument that was not forcefully put by the Government, namely that Parliament had already provided sufficient authority for the triggering of Article 50.

### INTRODUCTION

On 23 June 2016 the people of the United Kingdom and Gibraltar voted to leave the European Union. The Brexiters won by a slim majority (51.89 per cent to 48.11 per cent) on a 72 per cent turnout, and they lost comprehensively in Scotland and Northern Ireland. The Brexiters nevertheless claimed that the Government had a mandate to trigger Article 50 of the Treaty on European Union (TEU) and to do so legally with prerogative power (and without parliamentary approval), a claim perhaps reinforced politically by the Conservative Party election manifesto in 2015.<sup>1</sup> The latter had set in train the referendum process accompanied by a promise that the Conservatives if elected would respect the result, evidently not expecting the outcome delivered. The problem, however, is that the European Union Referendum Act 2015 was silent on the legal effects of the vote, perhaps reflecting the confidence of all concerned that the Brexiters would fail.

The defeated Remainers took a different view, with leading commentators insisting that the country's 'most fundamental constitutional requirement is that there must first be the approval of its Parliament' for the change.<sup>2</sup> Some people in both Northern Ireland and Scotland argued further that not only must the Westminster Parliament approve, so too should the devolved legislatures, given that Brexit would inevitably touch on devolved matters and that the people of these two jurisdictions had voted to remain. These issues were tested in separate legal proceedings, the first in Northern Ireland and the second in

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1 Conservative Party, *Strong Leadership, A Clear Economic Plan, A Brighter, More Secure Future* (2015) 72: 'We will hold that in-out referendum before 2017 and respect the outcome'.

2 G. Robertson QC, 'How to Stop Brexit: Get Your MP to Vote it Down' *The Guardian* 27 June 2016.

England and Wales. According to the High Court in Northern Ireland, there was no need for legislation to trigger Article 50, which could be done using prerogative powers, and there was no need for a legislative consent motion by the Northern Ireland Assembly.<sup>3</sup> Several days later the Divisional Court in England and Wales took a radically different position on the first of these points, and had no cause to consider the second.<sup>4</sup>

The Divisional Court's decision was clearly unexpected and caught the Brexiters by surprise, leading famously to the vituperative personal attacks on the judges involved by the pro-Brexit media.<sup>5</sup> The requirement that there should be parliamentary approval to trigger Article 50 was nevertheless upheld by the Supreme Court by a majority of 8–3 on the only occasion so far that all members of the Court have sat to hear a particular case.<sup>6</sup> The Court also held, however, that there was no obligation on the part of the Westminster Parliament to proceed only with the consent of the devolved legislatures. There could be no Scottish or Northern Irish veto. By now the Supreme Court decision was not unexpected, and the reaction to it was much more muted than the reaction to the Divisional Court's decision, with the Supreme Court spared the abuse that had been heaped upon the latter. The majority decision nevertheless touches many aspects of constitutional law, and much will no doubt be written about the various aspects of the *Miller* case, and the relative merits of the majority and minority decisions.<sup>7</sup>

Looking forward, however, the most eye-catching feature of the decision is its defence of parliamentary sovereignty. When all is stripped away, the core of both of the major questions the court was asked to address is the role of the Westminster Parliament in the modern British constitution, the reasoning if not the result paradoxically responding in terms that reflect the sentiment of the referendum result, at least in those parts of the country where a majority of those voting did so to leave the EU. In thus delivering a clear statement of constitutional orthodoxy and a clear re-assertion of parliamentary sovereignty as the fundamental principle of the constitution, *Miller* has swept aside recent uncertainties, equivocations and qualifications, so that the Government was able confidently to claim only a week after the decision was reached that

The sovereignty of Parliament is a fundamental principle of the UK constitution. Whilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that.<sup>8</sup>

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3 *Re McCord* [2016] NIQB 85.

4 *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

5 *Daily Mail* 3 November 2016, referring to the three Divisional Court judges as 'enemies of the people' for defying 17.4 million Brexit voters and engendering a constitutional crisis, which of course never happened.

6 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (*Miller*).

7 See the excellent piece by J. Grant, 'Prerogative, Parliament, and Creative Constitutional Adjudication: Reflections on *Miller*' (2017) 28 *King's Law Journal* (forthcoming).

8 Department for Exiting the EU, *The United Kingdom's Exit from and New Partnership with the European Union* Cm 9417 (2017) at [2.1]. This led to headlines such as 'The Brexit White Paper completely contradicts a key argument for Brexit': *The Independent* 2 February 2017.

The main purpose of this note is to consider the *Miller* majority decision, highlighting in particular the response of the majority to a number of potential challenges to the sovereignty of Parliament, whether from EU law, the royal prerogative, the EU referendum, or devolution. But although the *Miller* majority decision is most significant for its strong re-assertion of parliamentary sovereignty, a secondary purpose of this note is to consider the *Miller* majority's inadvertent reminder that the arguments from parliamentary sovereignty do not necessarily produce uncontested outcomes, even accepting that the principle of parliamentary sovereignty cannot now be gainsaid. As we will see, perhaps the most troubling question with which the *Miller* majority never fully engaged is how to determine when Parliament has exercised its sovereign authority, and when – if at all – that authority may be disregarded by the courts.

### PARLIAMENTARY SOVEREIGNTY AND THE EU

The fundamental principle of the British constitution to which the Court turned was the one famously addressed by Dicey, namely that Parliament has 'the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament'.<sup>9</sup> The reference to Dicey is striking, for although the Court warmly acknowledged the academic debates that had helped to define the issues with which it was dealing, it was to the old masters that it returned, notably Dicey and Wade (but not Jennings),<sup>10</sup> the legacy of Dicey in particular impossible now for contemporary scholars to shake off, however intense the effort. That said, while an early edition of Wade's work was cited on the prerogative powers of government, the majority clearly rejected his claims about the 'revolutionary' nature of *R v Secretary of State for Transport, ex p Factortame (Factortame)*, albeit without expressly referring to these views.<sup>11</sup>

So far as the first limb of the Dicey thesis is concerned, we probably now have a clearer view about the impact of the European Communities Act 1972 on traditional constitutional doctrine. In *Factortame*, the ECJ had insisted that domestic courts must dis-apply any rule of national constitutional law that would otherwise prevent the application of what was then EC law,<sup>12</sup> following which the House of Lords refused to apply the Merchant Shipping Act 1988, in preference to conflicting directly effective EC law.<sup>13</sup> This is said to have been the first time since the Civil War that Parliament had refused to apply an Act of Parliament, giving rise to Wade's famous claim about the 'revolutionary' nature

9 A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London: Palgrave, 10<sup>th</sup> ed, E. C. S. Wade, 1959) 39–40 cited in *Miller* n 6 above at [43].

10 Notably, the H. W. R. Wade text to which reference is made is the original edition of his *Administrative Law* (1961): *Miller* *ibid* at [47].

11 See H. W. R. Wade, 'Sovereignty- revolution or evolution?' (1996) 112 LQR 568.

12 *R v Secretary of State for Transport, ex p Factortame* [1990] ECR I-2433, ECLI:EU:C:1990:257 (*Factortame*).

13 *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603 (*Factortame (No 2)*).

of the decision,<sup>14</sup> but giving rise more importantly to questions about how fundamental constitutional principles could be so easily elided, and about how this could be done by what appeared to be a judicial sleight of hand, without the detailed argument that would surely be expected today.

One way of reconciling parliamentary sovereignty with *Factortame* was to adopt Lord Bridge's position in that case that the limitation was consensual,<sup>15</sup> or Lord Bingham's later view that it was conditional.<sup>16</sup> Neither of these seemed particularly persuasive at the time they were presented. The former suggests that Parliament could limit its sovereignty whenever it liked, provided it was done with the consent of the Parliament at that time. Parliament would thereby bind future Parliaments, whose sovereignty would be based on the fiction that it could always restore the status quo at pleasure. The latter seemed implausible for the different reason that in the days before UKIP, it was presented at a time of ever-closer union and an ever-expanding EU, a time when there was no foreseeable prospect of the United Kingdom ever leaving. The transfer of sovereignty seemed permanent and irrevocable, conditionality appearing (wrongly as it turns out) to be a convenient fiction to deal with an awkward fact.

In these circumstances, the issue was not the power of the United Kingdom to leave, but the more immediate problem of whether Parliament could assert its sovereignty while Britain remained a member of the EU. This might be done by expressly providing that an Act of Parliament is to apply over an otherwise inconsistent EU law, or by Parliament otherwise clearly indicating an intention not to be bound by EU law. Before *Factortame* there had been some suggestions that in these circumstances the domestic courts would give effect to the wishes of Parliament,<sup>17</sup> though as the matter was never tested post-*Factortame* the rather uncompromising decision of the ECJ in that case was never confronted. In recent years, however, there has been a suggestion that the transfer of sovereignty was not complete even within the framework of EU membership,<sup>18</sup> the Supreme Court arguably reflecting emerging EU scepticism within the country at large.

Whether such a reserve constitutional power would have been acknowledged judicially in a different political climate is of course unknown, as is the question of whether there would have been a need for any such power. But striking a different note from *Factortame*, the *Miller* majority made it clear that the *Factortame* litigation had not been fully understood. Rejecting any suggestion of the revolutionary nature of the latter decision, the majority did

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14 Wade, n 11 above. For different views, see A. W. Bradley, K. D. Ewing and C. J. S. Knight, *Constitutional and Administrative Law* (London: Pearson, 16<sup>th</sup> ed, 2014) 136. Also, A. Tomkins, *Public Law* (Oxford: OUP, 2003) 120.

15 *Factortame (No 2)* n 13 above, 658–659.

16 Lord Bingham, 'The Rule of Law and the Sovereignty of Parliament' (2008) 19 *King's Law Journal* 223.

17 *Macarthy's Ltd v Smith* [1979] ICR 785, 789 *per* Lord Denning; *Garland v BREL* [1983] 2 AC 751, 771 *per* Lord Diplock. The former was referred to by the *Miller* majority (n 6 above at [99]), but the latter was not.

18 *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 3421.

not accept that the so-called fundamental rule of recognition (ie the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal.<sup>19</sup>

Not only can the 1972 Act ‘be repealed like any other statute’, but the ‘principle of Parliamentary sovereignty’, which is ‘fundamental to the United Kingdom’s constitutional arrangements’, means that ‘EU law can only enjoy a status in domestic law which that principle allows’.<sup>20</sup>

If we cannot say confidently what ‘that principle allows’, we are probably much clearer now about what it does not allow, the majority claiming slightly awkwardly that

legislation which alters the domestic constitutional status of EU institutions or of EU law is not constrained by the need to be consistent with EU law. In the case of such legislation, there is no question of EU law having primacy, so that such legislation will have domestic effect even if it infringes EU law (and that would be true whether or not the 1972 Act remained in force).<sup>21</sup>

This is consistent with and develops similar views expressed in the *HS2* case (though the *Miller* majority position is much more explicit),<sup>22</sup> and appears directly to contradict the demands of the ECJ in *Factortame* that EC law overrides even the constitutional law of Member States.<sup>23</sup> By repealing the 1972 Act, it appears that Parliament will thus be asserting its sovereignty to reclaim a power it had never surrendered, which may help to explain the curious drafting of the White Paper referred to above.

## PARLIAMENTARY SOVEREIGNTY AND THE PREROGATIVE

Although powerfully restating and applying Dicey’s first principle in relation to the 1972 Act, it was with Dicey’s second limb that *Miller* was principally concerned, that is to say the power of the Government by the use of the prerogative to trigger Article 50. By doing so, the Government would bring to an end the operation of EU treaties in the United Kingdom (automatically after two years, subject to an agreed extension of the two-year period). The question was whether rights that had been given effect by section 2(1) of the European Communities Act 1972 could be revoked in this way, or whether additional parliamentary approval in the form of primary legislation was necessary. The argument here was that by its anticipated intervention the Government would in Dicey’s terms be overriding or setting aside legislation passed by Parliament. Indeed, it is hard to see how the triggering of Article 50 could be otherwise described, the only question being the nature of the Government’s power to ‘pull the trigger’.

<sup>19</sup> *Miller* n 6 above at [60].

<sup>20</sup> *ibid* at [67].

<sup>21</sup> *ibid*.

<sup>22</sup> *R (Buckinghamshire County Council) v Secretary of State for Transport* n 18 above.

<sup>23</sup> *Factortame* n 12 above. This of course is a well-established principle of EU law.

It is arguable that the Government had a choice here. One option would have been to rely on prerogative powers, which seems to have been a choice made at an early stage after the referendum,<sup>24</sup> a choice perhaps emboldened by messages sent out in the *Shindler* litigation (about eligibility to vote in the referendum), messages to the effect that it was under the authority of domestic law that the UK joined the EU, and it is under the authority of domestic law that it will leave.<sup>25</sup> The alternative would have been to rely on section 2(1) of the 1972 Act, (as amended by the European Union (Amendment) Act 2008), which gives direct effect to ‘powers’ in various EU treaties, including the TEU. It is at least arguable that Article 50 contains a power to which section 2(1) applies, a power to be exercised in accordance with ‘constitutional requirements’ (whatever they may be).<sup>26</sup> But that argument was not run,<sup>27</sup> perhaps understandably if matters of interpretation of Article 50 would lead to a request for a reference under Article 267 of the Treaty on the Functioning of the European Union (TFEU), the last thing the government would have wanted.<sup>28</sup>

Although statutory authority to trigger Article 50 nevertheless plausibly existed, the preference to rely on the prerogative seemed bound to fail, in the light of fairly elementary jurisprudence restricting the ability of the prerogative to take away statutory rights.<sup>29</sup> For present purposes the latter included rights ‘arising under EU Regulations or directly under the EU Treaties’, which ‘will cease to have effect upon withdrawal (save in relation to rights and liabilities already accrued)’.<sup>30</sup> The Government had argued that the provisions of section 2(1) of the 1972 Act were ‘ambulatory’ in the sense that they gave effect to EU rights only to the extent that any such rights were in force from ‘time to time’. If by exercising prerogative powers the Government withdrew from the EU, the treaties would cease to apply by operation of law and section 2 would be emptied of its content. There would be nothing to enforce. This rather unattractive back door argument was rightly rejected by the majority, on the ground that these rights were brought into UK law by statute, and it was statute that added new treaties to the core of these rights.

24 HC 431 (2016–17), Q 86 (Mr Oliver Letwin).

25 *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469 (*Shindler*). See B. Davies, ‘The EU Referendum: Who were the British People?’ (2016) 27 *King’s Law Journal* 323.

26 See also R. Craig, ‘Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum’ (2016) 79(6) MLR 1041. For a summary, see R. Craig, ‘Miller: The Statutory Basis Argument: A Primer’ UK Const L Blog, 5 December 2016 at <https://ukconstitutionallaw.org/2016/12/05/robert-craig-miller-the-statutory-basis-argument-a-primer/> (all URLs last accessed 20 April 2017).

27 See *Miller* n 6 above at [104] and [201], in the latter paragraph notably citing Craig, ‘Casting Aside Clanking Medieval Chains’ *ibid*. See also Craig, ‘Miller: The Statutory Basis Argument’ *ibid*, for discussion of Lord Mance’s raising the point in oral argument, to be told by Government counsel that Article 50 does not have direct effect.

28 Though any such fears may have been misplaced following *Shindler* n 25 above, and in light of the strong assertion of parliamentary sovereignty by the *Miller* majority which of course could not have been foreseen at the time the action was launched and was being defended.

29 *Case of Proclamations* (1611) 12 Co Rep 74; *The Zamora* [1916] 2 AC 77; *Attorney General v De Keyser’s Royal Hotel Ltd* [1920] AC 508 (*De Keyser*).

30 *Miller* n 6 above at [70].



It is striking that no convincing authority was provided to contradict the view that rights cannot be interfered with by prerogative. True, reference was made to *Council of Civil Service Unions v Minister for the Civil Service (CCSU)* as authority for the proposition that ‘the Crown has a prerogative power to decide on the terms of service of its servants, and it is inherent in that power that the Crown can alter those terms so as to remove rights’.<sup>31</sup> But even that is to concede too much: the whole point about being employed at pleasure is that civil servants had no rights, in a case that was concerned with whether their representatives had a ‘legitimate expectation’ to be consulted; to the extent that the civil servants had rights to freedom of association under statute, in *CCSU* these were taken away by using statutory not prerogative powers.<sup>32</sup> The other example given of the power to take and destroy property in time of war is hardly more persuasive. Apart from the fact that such powers would in practice now be displaced by legislation, the prerogative right would be contingent on a common law duty to compensate.<sup>33</sup>

In *Miller*, however, the problem was greatly compounded by the fact that the Government was proposing by prerogative not only to take away important rights, but also to dismantle an entire source of law. The latter not only contained a substantial body of rights which had direct effect (which appears to have been accepted, no examples being given), but also a right of access to the CJEU for guidance on the interpretation of these rights.<sup>34</sup> This is an important matter to which the majority referred, for although the Government is proposing in a Great Repeal Bill to ‘novate’ existing EU rights formally as British rights, there will still be the loss of access to the Court of Justice of the European Union (CJEU) and the loss of a possible uplift as a result.<sup>35</sup> In this context, the majority’s reference to the Working Time Directive was perhaps particularly apt,<sup>36</sup> the CJEU illustrating what will be lost/gained by Brexit by holding in a notable British reference that the denial in implementing legislation of holiday pay to workers on short term contracts was a breach of the Directive.<sup>37</sup>

There are many other cases where the CJEU has intervened on a wide range of issues to lift British law to meet obligations under a range of Directives.<sup>38</sup>

31 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

32 In a discussion of *CCSU*, it has been claimed that there was no suggestion in that case that ‘the Royal Prerogative could not give to the Minister a power to deprive workers of a right which they had previously enjoyed’: D. Feldman, ‘Brexit, the Royal Prerogative, and Parliamentary Sovereignty’ UK Const L Blog, 8 November 2016 at <https://ukconstitutionallaw.org/2016/11/08/david-feldman-brexit-the-royal-prerogative-and-parliamentary-sovereignty/>.

It is important to recall, however, that at the time of this decision, civil servants had no contracts of employment and were employed at pleasure.

33 *Burmah Oil Co v Lord Advocate* 1964 SC (HL) 117.

34 *Miller* n 6 above at [70].

35 As pointed out in *Miller*, Ministers intend that the ‘Great Repeal Bill’ ‘will repeal the 1972 Act and, wherever practical, it will convert existing EU law into domestic law at least for a transitional period’: *ibid* at [34].

36 *ibid* at [70].

37 Case 173/99 *R v Secretary of State for Trade and Industry, ex parte BECTU* [2001] ECR I-4900, ECLI:EU:C:2001:356.

38 Thus in cases to be found in all good labour law textbooks, the CJEU has required the United Kingdom to recognise the principle of equal pay for work of equal value, for workers in workplaces

Such opportunities will be lost after Brexit, with the likelihood that space will open up between EU law and EU-origin UK law after the Great Novation, the *Miller* majority acknowledging that

Upon the United Kingdom's withdrawal from the European Union, EU law will cease to be a source of domestic law for the future (even if the Great Repeal Bill provides that some legal rules derived from it should remain in force or continue to apply to accrued rights and liabilities), decisions of the Court of Justice will (again depending on the precise terms of the Great Repeal Bill) be of no more than persuasive authority, and there will be no further references to that court from UK courts. Even those legal rules derived from EU law and transposed into UK law by domestic legislation will have a different status. They will no longer be paramount, but will be open to domestic repeal or amendment in ways that may be inconsistent with EU law.<sup>39</sup>

If statutory rights cannot be removed as a matter of prerogative, it is inconceivable that the same would not be true 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'.<sup>40</sup> For this the majority rightly concluded that legislation would be required, but wrongly failed to examine more fully whether such legislation already existed, a matter to which we return.

## PARLIAMENTARY SOVEREIGNTY AND THE REFERENDUM

In the context of this developing line of argument by the *Miller* majority, what was the status of the referendum? The response in some quarters to the referendum result and the questions raised about its legal effects clearly shocked many commentators, who appeared genuinely to be under the mistaken impression that the not wholly decisive vote provided sufficient legal authority to trigger Article 50. Parliament had asked the people to decide and the people had decided, albeit in a way that it seems neither the Prime Minister nor Parliament had intended. Here we confront questions about the legal effects of referendums and the suggestion that the sovereignty of Parliament has been displaced by the sovereignty of the people.<sup>41</sup> Could it be argued that whatever may be the parliamentarian's constitutional duty to the nation as a whole,<sup>42</sup> MPs had been trumped by the people to whom they had entrusted the solemn duty to decide the Brexit question?

This was going to be a hard argument to win, as the House of Lords Constitution Committee had made clear in 2009 when it observed that

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with no recognised trade union to be consulted in the event of a collective redundancy, and the cap on compensation to be removed in sex discrimination cases. The last would seem to be especially vulnerable post-Brexit, despite Government promises that workers' rights will be protected.

<sup>39</sup> *Miller* n 6 above at [80].

<sup>40</sup> *ibid* at [93].

<sup>41</sup> On which, see B. Davies, 'Popular Participation and Legitimacy in Constitutional Change: Finding the Sovereign' (2015) 36 *Liverpool Law Review* 277.

<sup>42</sup> *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87 *per* Lord Shaw of Dunfermline. See also *Kemp v Glasgow Corporation* 1920 SC (HL) 73.



[B]ecause of the sovereignty of Parliament, referendums cannot be legally binding in the UK, and are therefore advisory. However, it would be difficult for Parliament to ignore a decisive expression of public opinion.<sup>43</sup>

But while the latter point is probably correct (though as the EU referendum made clear, the term ‘decisive’ is not free from disputation), the former needs to be treated with caution. As the *Miller* majority pointed out, the ‘effect of any particular referendum must depend on the terms of the statute which authorises it’,<sup>44</sup> with referendum legislation providing for the consequences of the result in a variety of ways. So although we have had general rules which apply universally to the conduct of referendums,<sup>45</sup> legislation is required on an ad hoc basis to hold them, and it is to that legislation that we must look for the legal effects of the referendum in question. Here there is a chaotic range of provision, beginning with the EEC/EU referendums legislation of 1975 and 2015, which are silent on the outcome.<sup>46</sup> Also in this category is the devolution referendum legislation introduced by the Blair Government, seeking popular approval in advance of legislation being introduced.<sup>47</sup>

A second category of legislation does, however, provide that referendum outcomes have clear legal effects, and may be legally binding. This is the legislation referred to by the *Miller* majority, which imposes duties on ministers to take steps to implement the results:

The Parliamentary Voting System and Constituencies Act 2011 had a provision requiring the alternative vote system to be adopted in Parliamentary elections, but by section 8 stated that the minister should bring this provision into force if it was approved in a referendum, but, if it was not, he should repeal it. Section 1 of the Northern Ireland Act 1998 (‘the NI Act’) provided that if a referendum were to result in a majority for the province to become part of a united Ireland, the Secretary of State should lay appropriate proposals before Parliament.<sup>48</sup>

In the latter case, it is true that it would be possible for Parliament to reject the minister’s proposals,<sup>49</sup> though it is also true that in the former case the

43 HL Paper 99 (2009–10) at [197], referred to in *Miller* n 6 above at [125].

44 *ibid* at [118].

45 Political Parties, Elections and Referendums Act 2000, Part VII. This was enacted after the second wave of devolution referendums to create a level playing field in the shadow of an anticipated referendum on the United Kingdom’s possible membership of the Euro, a matter on which the Government was split, bizarre though all this may seem now. See Committee on Standards in Public Life, *The Funding of Political Parties in the United Kingdom, Vol 1: Report Cm 4057-I*: ‘it now seems generally accepted that during the next few years there will be UK-wide referendums on whether or not the present system of elections to the House of Commons should be replaced or modified and on whether or not Britain should participate in the third stage of Economic and Monetary Union’ (para 12.2).

46 Referendum Act 1975; European Union Referendum Act 2015.

47 Referendums (Scotland and Wales) Act 1997.

48 *Miller* n 6 above at [118].

49 The effect of Parliament doing so is unclear, it being uncertain whether the duty to lay the recommendations before Parliament also gives Parliament a right to vote on them, though it is inconceivable that such a vote could be refused. It is also the case that the proposals to be laid by the minister depend on an agreement being reached with the Irish Government about how to give effect to the wishes of the people of Northern Ireland.

legislation imposed a mandatory obligation on the minister to give effect to the wishes of Parliament (and the people).

A third category of legislation provides a clearer example of legally binding referendum legislation. Here we find the European Union Act 2011, the provisions of which will not now ever be used,<sup>50</sup> but which extends to the people the right to veto legislation. This could be said to both an expression of Parliament's sovereignty as well as a limitation thereof, for it is not to be forgotten that the referendum requirement would apply only if Parliament were to require it in circumstances where the statutory 'referendum condition' was met,<sup>51</sup> giving rise to nice questions of what would happen if these conditions were met and no provision was made for a referendum in the legislation approving an extension of EU powers. Also in this category (and the only examples of legislation which was vetoed by referendum) is the first round of devolution legislation,<sup>52</sup> which in the case of Scotland faltered on the never to be repeated requirement of 40 per cent support by those eligible to vote.<sup>53</sup> Had that requirement been in force for the EU referendum, the Brexiters would have lost.<sup>54</sup>

Yet although the EU referendum fell into the first of these three categories, what is not clear is whether silence as to effect means no intention to be bound, or indeed that the silence means that the Government was not entitled to take the result as sufficient authority to exercise existing legal powers. As already suggested, a good argument could be made that although the referendum result was not legally binding, it did nevertheless have potential legal effects without the need for any further statutory formality. By the European Union (Amendment) Act 2008, Parliament had already provided the legal authority to the Government to trigger Article 50 (in accordance with our 'constitutional requirements'), by including the TEU as one of the treaties to which the European Communities Act 1972 applies. Having previously thus conferred the power to withdraw, Parliament intervened again in the European Union Referendum Act 2015 to ask the people whether the Government should exercise that power.

For all its political importance, the referendum was nevertheless side-stepped by the *Miller* majority, which insisted that where 'implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation'.<sup>55</sup> That of course begs the question never fully put to the court, but to which we return, about whether the 2008 Act 'provided for that change',

50 For a good account of the Act see M. Gordon and M. Dougan, 'The United Kingdom's European Union Act 2011' (2012) 37 *European Law Review* 3.

51 European Union Act 2011, s 2(2).

52 Scotland Act 1978; Wales Act 1978.

53 Although a majority of those voting did so in favour of devolution in Scotland, it was not enough to meet this threshold. The Welsh vote was lost, with a majority voting against devolution.

54 This is a threshold often used in labour law – for the purposes of trade union recognition and in some cases for the creation of information and consultation procedures. It has now been extended to some trade union industrial action ballots by the Trade Union Act 2016, on which see A. Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45 *ILJ* 299.

55 *Miller* n 6 above at [121].

which the majority is here requiring. It is at least arguable that in legal terms this was a referendum *sui generis*, and was unlike any of the three categories referred to above (despite being included here in the first). Parliament had given the power to withdraw, and had required the views of the people to be sought in advance of the exercise of that power, in furtherance of a clear manifesto commitment of the governing party to be bound by the result.<sup>56</sup> There was no need for the formalism of additional parliamentary approval. Who is to say that constitutional requirements had not been met?<sup>57</sup>

## PARLIAMENTARY SOVEREIGNTY AND DEVOLUTION

The demand for additional legislation also created an unnecessary devolution problem and led to unsightly judicial gymnastics, which might otherwise have been avoided. Devolution perhaps unwittingly presents important questions about ‘manner and form’ restrictions on Parliament’s sovereignty, in the way suggested by Baroness Hale in *Jackson* where she considered the possibility of Parliament redefining itself.<sup>58</sup> *Miller* raises the possibility of Parliament not only redefining itself ‘upwards’ and ‘downwards’ as Baroness Hale had suggested, but also ‘sideways’.<sup>59</sup> Did the momentous nature of the decision which had demanded parliamentary approval in advance also require as a matter of law the formal approval of the devolved legislatures? This takes us to perhaps the most unconvincing aspect of the decision, even though the position of the majority on this point is wholly consistent with the idea that what they were firmly re-establishing intentionally or otherwise was the sovereign authority of the Westminster Parliament.

There were several devolution arguments raised in *Miller*,<sup>60</sup> which were of immense political as well as legal significance, not least because of the decisions of the peoples of Scotland and Northern Ireland to vote to Remain, by margins greater than the United Kingdom as a whole voted for Brexit. But the most urgent of these arguments related to the Sewel Convention designed to regulate the exercise of power by the Westminster Parliament, this providing that

in relation to Scotland 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.<sup>61</sup>

56 Conservative Party, *Strong Leadership* n 1 above.

57 To which we might add that the Constitutional Reform and Governance Act 2010, s 20 requires treaties to be laid before Parliament before being ratified, though there are exceptions.

58 *R (Jackson) v Attorney General* [2006] 1 AC 262.

59 ‘If the sovereign Parliament can redefine itself downwards, to remove or modify the requirement for the consent of the Upper House, it may very well be that it can also redefine itself upwards, to require a particular Parliamentary majority or a popular referendum for particular types of measure. In each case, the courts would be respecting the will of the sovereign Parliament as constituted when that will had been expressed. But that is for another day.’ *ibid* at [163].

60 *ibid* at [126]–[151].

61 Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (October 2013) para 14.

Having held that legislation was necessary to trigger Article 50, the majority nevertheless held that the legislation in question would not need the consent of the Scottish Parliament, which was not a necessary pre-condition of Brexit.<sup>62</sup>

Whatever the political justification for such a decision, the legal reasoning of the majority on this point was not persuasive, anxiety about the political consequences unmatched by the strength of the legal argument deployed to avoid these consequences. The first concern relates to the conclusion that a convention is a convention and cannot be enforced by the courts, support for this to be found in Munro's claim in an elegant article (in defence of a distinction made by Dicey) that 'the validity of conventions cannot be the subject of proceedings in a court of law'.<sup>63</sup> But apart from the fact that *Miller* was not about 'validity', Professor Munro was writing before the Supreme Court of Canada's decision in *Re Resolution to Amend the Constitution*,<sup>64</sup> all the more significant for the fact that three passages from the latter decision were cited by the *Miller* majority.<sup>65</sup>

While the Canadian case does not contradict the view that the courts have no power to enforce a convention, it does make clear that they do have the power to consider (a) whether a convention exists (not an issue here); and if so (b) what does the convention require political actors to do in order to comply. And while it is true that the Supreme Court of Canada did not claim the power to restrain any government action in breach of the convention, it did nevertheless claim the power to answer questions which had significant political if not legal consequences.<sup>66</sup> It would have been open to the UK Supreme Court to follow the Supreme Court of Canada's example, with the power to say whether the Sewel Convention meant that a Brexit Bill required the consent of the Scottish Parliament, just as it asserted on different grounds the power to declare that triggering Article 50 could not be done by the prerogative alone as the Government had argued.

Strongly reinforcing the latter point is a second concern, namely that the Sewel Convention has been embedded in statute,<sup>67</sup> the majority thereby creating a dubious rule of law that a convention is now not enforceable because of its source (as Professor Munro had argued), but also because of its content (regardless of its source).

[T]he UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising

62 *Miller* n 6 above at [136]–[151].

63 C. Munro, 'Laws and Conventions Distinguished' (1975) 91 LQR 218. For the position expressed by Dicey, see Dicey n 9 above and accompanying text.

64 [1981] 1 SCR 753. For a brief account, see E. C. S. Wade and A. W. Bradley, *Constitutional and Administrative Law* (London: Longman, 10<sup>th</sup> ed, A. W. Bradley, 1985) 730 – 733. Professor Munro does address the Canadian case in C. R. Munro, *Studies in Constitutional Law* (Oxford: OUP, 2<sup>nd</sup> ed, 1999) 68, where he reaffirms his argument.

65 *Miller* n 6 above at [141] – [143].

66 Bradley, n 64 above, 732.

67 Scotland Act 1998, s 28 (8) (as amended by Scotland Act 2016, s 2), which 'recognises' that 'the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.'

the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement.<sup>68</sup>

This is not to deny that the Sewel Convention as enacted would present challenging questions of interpretation for a court. But there nevertheless seems something slightly odd about a court refusing to apply primary legislation in a decision which for all practical purposes is about reclaiming the sovereignty of Parliament, begging questions about what other legislation giving effect to conventions may be equally unenforceable.<sup>69</sup>

In this case the majority thought that there was nothing special about embedding a convention in statute. In taking this view, they thereby rejected the opportunity presented by section 28 of the Scotland Act 1998, for a ‘sideways’ ‘redefinition’ of Parliament, and in doing so provided some unwelcome clarity about the subordinate status of the Scottish Parliament, even on crucial questions involving devolved matters. That said, this aspect of the case compels the need for caution about manner and form restraints on the powers of the Westminster Parliament,<sup>70</sup> the *Miller* litigation a powerful reminder of the pitfalls. Even apparently benign and well intentioned ‘manner and form’ provisions could have explosive political consequences, if as in this case the Scottish tail had been empowered to wag the English dog. In the context of Brexit, enforcement of the Sewel Convention would have placed the *Miller* majority in the invidious position of either (a) dashing a legitimate English expectation, or (b) fuelling an equally legitimate Scottish grievance.<sup>71</sup> But in view of the majority’s earlier decision that fresh legislation was required to trigger Article 50, as a matter of law this was their choice to make.<sup>72</sup>

## CONCLUSION

Following its defeat in the courts, the Government responded swiftly with a short bill, this becoming the European Union (Notification of Withdrawal)

68 *Miller* n 6 above at [148].

69 What other conventions strengthened by legislation would not be enforceable? The Constitutional Reform and Governance Act 2010, ss 20–25 (Ponsonby rule)? But why? Contrast with Sewel and the 2010 Act, ss 20–25, the Parliament Act 1911 (also embedding a convention in statute), s 3, which expressly protects the Speakers’ certificate from legal challenge. Note also Munro, ‘Laws and Conventions’, above, who argues persuasively about the enforcement of law by the courts.

70 On which see W. I. Jennings, *The Law and the Constitution* (London: University of London Press, 5<sup>th</sup> ed, 1959) 153. Jennings’ appeal to manner and form restraints was all the more unfortunate for the example he gave to illustrate it, which was the use of an *A G for NSW v Trethowan* [1932] AC 526 type device to protect the House of Lords from abolition. For further discussion of this issue, see the excellent account in M. Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Oxford: Hart, 2015).

71 This is not to deny that by refusing to enforce the convention the Court is effectively avoiding the former and realising the latter.

72 Even more bizarre was the claim that ‘the policing of [Sewel’s] 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’ (*Miller* n 6 above at [151]). Sewel is the law.

Act 2017. When all is said and done, however, it is not clear precisely what the Remainers' demand for a legislative response to the referendum has achieved, the 57 words of the Act being scant reward for bitter litigation. In the end it all seems rather pointless, seeking to compel the House of Commons in particular to do something for which it had no stomach, and which it had the power to do anyway had the will been present. Passed without amendment, the 2017 Act as a precondition to trigger Article 50 failed spectacularly to fulfil the ambitions of those who saw Parliament as a means of containing the Government or even derailing Brexit. Having authorised the referendum, parliamentarians ultimately refused to exert themselves to subvert the political sovereignty of the people, however dubious that expression of sovereignty may have been. If anything Parliament was demeaned rather than enhanced by the litigation, revealing itself to be a rather cowed sovereign body.<sup>73</sup>

But not only does *Miller* now seem at best a futile gesture, worse still for liberals it must surely also have been counterproductive. Although it may have been a decision against the Government, paradoxically the strong commitment to parliamentary sovereignty takes us back decades in terms of the evolving jurisprudence, and re-asserts a very traditional constitutional principle, with a very traditional role for the courts.<sup>74</sup> In the long term it is a recipe for judicial restraint rather than judicial engagement, and to that extent the Judicial Power Project seems to misread the decision as a judicial power grab.<sup>75</sup> It seems unlikely to be both an assertion of parliamentary sovereignty *and* an expansion of judicial power, and one cannot help but think that it is the applicants who in the long term will have lost most ground for the battles that lie ahead. Ominously for the liberals, this may include Brexit II, if apparently well informed sources are to be believed.<sup>76</sup>

If as looks possible (though only a fool would make predictions in these febrile times), we are entering a long period of Conservative insurgency, one of the casualties in the United Kingdom at some point in the future may well be the European Convention on Human Rights and the Human Rights Act 1998, with the introduction of a British Bill of Rights as a light makeweight.<sup>77</sup>

73 An assessment perhaps less true of the House of Lords than the House of Commons. On the House of Lords, see Baroness Deech, 'My fellow Lords have damaged themselves' *The Daily Telegraph* 2 March 2017.

74 Compare the note struck in *Jackson* n 58 above by Baroness Hale and Lords Hope and Steyn about possible limits on Parliament's power, with the note struck by the *Miller* majority, which included Baroness Hale. Particularly striking in light of the *Miller* majority's reasoning is Lord Steyn's remarks in *Jackson* about the 'new legal order' in which the 'classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place', as a principle 'established on a different hypothesis of constitutionalism' (*Jackson* n 58 above at [102]).

75 Policy Exchange, 'Supreme Court has Fumbled the Law' 24 January 2017 at <https://policyexchange.org.uk/supreme-court-has-fumbled-the-law/>: 'The Supreme Court's judgment was not required to vindicate parliamentary sovereignty and is not supported by that fundamental principle of our constitution'.

76 *Daily Telegraph* 28 December 2016 ('Theresa May to fight 2020 election on plans to take Britain out of European Convention on Human Rights after Brexit is Completed' – though that may take some time).



A Bill of Rights devised by the Conservatives is likely to be a different beast even from one devised by New Labour, and it remains to be seen whether a diluted protection of rights would be acceptable to those lawyers now happy to proclaim parliamentary sovereignty. It is one thing to demand that the executive should not usurp the authority of Parliament, but something altogether different for liberals to accept the legitimacy of anything that Parliament does in the exercise of its sovereign authority.<sup>78</sup> The question provoked by putting Dicey back on his pedestal is what happens if Parliament rather than the executive takes away rights or freedoms that Parliament had previously created or the common law had previously acknowledged?

But if the *Miller* decision was futile and counter-productive, the majority were also indefensibly contradictory. It is hard to argue with the demand that a great swathe of statutory rights should be taken away only with statutory authority. Apart from the requirements of parliamentary sovereignty, this would seem to be an essential requirement of liberal democracy, if not the authoritarian populism that seems now to be in vogue. The most unsatisfactory feature of this case, however, was the failure to explore the extent to which that authority already existed, though that is not a fault that can be laid at the door of the judges if the point was not argued, and if the Government mistakenly believed it had other sources of legal authority. What does seem remarkable, nevertheless, is that the respect for the statutory rights of the people of the United Kingdom was not extended to the statutory rights of the Scottish Parliament. It is fundamental to the principle of parliamentary sovereignty that the highest form of the expression of that sovereignty (an Act of Parliament) is respected rather than ignored.

As suggested above, the appeal to parliamentary sovereignty could thus have produced a result the other way, the decision instead on the one hand reflecting constitutional formalism over legislative substance, and on the other hand responding to adverse political consequences over statutory rules. Both could have been avoided, though to do so would have required active Government engagement with the ‘constitutional requirements’ of Article 50, which by statutory incorporation in 2008 would have displaced the prerogative as a putative source of legal authority for triggering the Brexit process. Here we would have confronted the fact that in the United Kingdom we have ‘constitutional practices’ but not ‘constitutional requirements’, save the requirement that the repeal or revocation of statutory rights needs statutory authority, which arguably the European Union (Amendment) Act 2008 already provided.<sup>79</sup> As

77 *ibid.*

78 See, for example, Geoffrey Robertson QC who wrote in favour of parliamentary sovereignty post-referendum (Robertson, n 2 above), but who also wrote earlier, apparently in sympathy with ‘a British Bill of Rights embedded in a written constitution and applied by judges who – as in the United States – have the power to ensure that the liberties won by Milton and Cromwell, Wilkes and Paine are not abandoned by MPs’ (G. Robertson QC, ‘Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law’ *New Statesman* 26 March 2010).

79 For this reason, the *Miller* majority missed the point about the direct effect of Article 50 which they said ‘operates only on the international plane, and is not therefore brought into UK law through section 2 of the 1972 Act’ for reasons not explained. The point here, however, is the claim that ‘Article 50 only entitles a member state to withdraw from the EU Treaties ‘in

was made clear by *Shindler*,<sup>80</sup> that could have been dealt with without an Article 267 reference, in what after all is only the first step of a long journey towards Brexit, in which Parliament will continue to play an essential role, as it has done thus far. So although the restatement of parliamentary sovereignty is eye-catching, it is not clear what or whose purpose has been served by the *Miller* litigation.

## *R (Miller) v Secretary of State for Exiting the European Union: Three Competing Syllogisms*

Nicholas Aroney\*

The *Miller* case concerned the constitutional requirements for the UK to give notice of its intention to withdraw from the EU pursuant to Article 50 of the Treaty on European Union. The parties made submissions in terms of two competing syllogisms. The Government argued that ministers, exercising Crown prerogative, had the power to give notice without statutory authorisation. The Applicants argued that the process required authorisation by Act of Parliament because the UK's withdrawal would deprive people of rights arising under EU law. However, a majority of the Supreme Court decided in favour of the Applicants based on a third and significantly different syllogism, based on the proposition that the European Communities Act had established EU law-making and law-interpreting institutions as new 'sources of law'. This note assesses the three competing syllogisms and examines the constitutional significance of the majority's proposition that these new EU sources of law were integrated into UK domestic law without disrupting the principle of parliamentary sovereignty.

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### INTRODUCTION

The referendum on Britain's withdrawal from the European Union was, from an international point of view, one of the most important political events of

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accordance with its own constitutional requirements', which returns one to the issue in the current proceedings' (*Miller* n 6 above at [104]). But in fact it does not return to the issue of the *Miller* proceedings, but rather opens up a new line of inquiry. If Article 50 was a statutory power, the prerogative would be irrelevant and displaced (*De Keyser* n 29 above), and the question would be simply one of determining whether constitutional requirements had been met. Given the nature of the British constitution it is difficult to see how these 'requirements' had not been met on grounds explained in the text.

<sup>80</sup> *Shindler* n 25 above, especially *per* Elias LJ.

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