

# Brexit's Challenge to the UK's Unwritten Constitution

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Brexit's challenge to the UK's unwritten constitution. Where to begin? Certainly not at the end. That is a long way off. The beginning is too far behind. The Brexit *imbroglio* is far from resolution. The passions unleashed within the countries of the United Kingdom by the UK's departure from the European Union could stretch our unwritten constitution beyond its known tolerances. That constitution no longer appears like that edifice of which, in Charles Dickens' Mr Podsnap's words 'We Englishmen are very proud'. For it was in his words 'A Constitution Bestowed Upon Us by Providence'.<sup>1</sup> Changes in the UK constitution brought about by the Brexit process appear irreversible. The narrow victory for Leave in 2016 produced a Parliament [Commons] in 2017 that reflected that narrow victory. The absence of a government majority resulted in a House of Commons that was all powerful but impotent, determined in its indeterminacy, resolved to be irresolute, as Churchill declaimed to the Commons in November 1937. Parliament became the 'enemy of the people', those who opposed Brexit were 'traitors', 'fascists' surrendering to continental tyrants. The courts who ruled that Parliament must be legally involved in the application to the EU to leave under Article 50 TEU were 'enemies of the people'. A Commons Speaker who appeared determined to allow the Opposition procedural opportunities to challenge the executive through his rulings on the order paper became the most admired/despised Parliamentarian in Brexit. To pick one from many examples, his determination to allow the EU Withdrawal Agreement Bill to be the subject of a Commons motion and vote on its timetable – the Prime Minister had allowed the Commons three days to scrutinize the Bill – and the government defeat was crucial in bringing about the end of the 2017 Parliament and forcing a general election. The third in four years. What would Mr Podsnap say?

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<sup>1</sup> Charles Dickens, *Our Mutual Friend*, Ch. 11. Podsnap was addressing a 'foreign gentleman'!

Into this conflagration have stepped the courts to mould the common law to address constitutional issues on which they traditionally did not tread, or trod very softly. The threshold of justiciability has been lowered, and that of legality has been strengthened. Matters that were hitherto the preserve of royal prerogative and constitutional convention have become subject to legal argument and resolution before the courts. It is no longer true to say that in our constitution a matter could be unconstitutional but not illegal. Constitutionality has become justiciable and subject to the law.

## 1 THE GROWING CONSTITUTIONALISM OF THE COURTS

There was a central question after *Miller No 1*,<sup>2</sup> where the Supreme Court ruled by 8–3 that the government required Parliamentary authorization in legislation to notify the EU under Article 50 TEU to depart from the Union. What precedent would be set by the majority judgment? The majority determined that the question raised was a ‘constitutional’ question and that a major change to UK constitutional arrangements cannot be achieved by ministers alone; it must be effected in the only way that the UK constitution recognizes, namely by Parliamentary legislation. This followed from the ordinary application of basic concepts of constitutional law to the facts.<sup>3</sup> The European Communities Act 1972 (ECA) did not envisage, and did not confer power for, the removal of rights by unilateral decision of Ministers to withdraw from the EU treaties.<sup>4</sup> This was a case of the prerogative of foreign affairs not existing in relation to EU treaties which are ‘inextricably linked with domestic law’ and the foreign affairs and treaty prerogative could not be exercised to withdraw from the treaties.<sup>5</sup> Parliament’s authorization through statute, and nothing less, was required. Parliament had assigned law-making powers to the EU institutions.<sup>6</sup> The ECA effectively constituted EU law as ‘an entirely new, independent and overriding source of domestic law’ which gave special force to the binding decisions of the CJEU. The ECA was a ‘fixed domestic starting point’.<sup>7</sup> This constitutional question concerning authorization was a legal question to be resolved by the court.

Lord Mance, who sided with the majority judgment, wrote that *Miller* was a one-off.<sup>8</sup> The case was about one particular statute which had changed our constitution. *Miller No 1* broke new ground in reviewing the prerogative power of the Crown and it was this sense of novelty that prompted caution in its

<sup>2</sup> *R (Miller) v. Secretary of State for Leaving the EU* (No 1).[2017] UKSC 5.

<sup>3</sup> *Ibid.*, para. 82.

<sup>4</sup> *Ibid.*, para. 83.

<sup>5</sup> *Ibid.*, para. 86.

<sup>6</sup> *Ibid.*, paras 67–68.

<sup>7</sup> *Ibid.*, paras 80–82.

<sup>8</sup> Lord Mance, <https://www.supremecourt.uk/docs/speech-170213.pdf>, at 33.

application in future cases. What the court did was ensure the role of the elected chamber and Parliament as essential features of constitutional change and removal of rights. This was despite the fact that no rights were removed by notification. Three and a half years later those rights were still in place.

The dissenting minority emphasized this point. Lord Reed did not infer this constitutional change by notification. The power of notification and revocation are contained in the ECA itself which provided a 'conditional basis for putting EU law into effect'.<sup>9</sup> The ECA had not removed the prerogative power of withdrawal from the EU treaties.<sup>10</sup>

The majority judgment was the end result of almost fifty years of UK courts grappling with major constitutional questions involving EU legal supremacy. The courts had come to put fundamental questions to the concept of sovereignty and constitutionalism, first in EU law and then in domestic law.<sup>11</sup>

It should be noted that Lord Reed warned against judicializing the exercise of the royal prerogative by ministers. If a prerogative power is exercised arbitrarily or perversely then subjecting it to judicial control would be foreign to our constitutional traditions. 'Legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary'.<sup>12</sup>

## 2 MILLER NO 2

With these words of Lord Reed in mind we come to *Miller No 2*.<sup>13</sup> The case concerned the prorogation, suspension, of Parliament by the Prime Minister (PM) for a period between 9–12 September and 14 October 2019. *Miller No 2* did not centre on arbitrariness or perversion but alleged unlawful action which took a prerogative power outside its legitimate parameters. The background detail is in paras 3–25 including commencement of proceedings in Scotland and England. The purported reason for prorogation was to prepare for the opening of a new session of Parliament by a Queen's Speech. The period of five weeks was unusually long. It looked like an attempt to throttle Parliament's voice at a crucial stage in Brexit negotiations. Prorogation is an act of the royal prerogative exercised by the Queen personally on the advice of the Prime Minister through the Privy Council. The object of attack is not the Queen but the minister who advised the Queen, Boris Johnson.

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<sup>9</sup> *Miller*, *supra* n. 3, para. 177.

<sup>10</sup> *Ibid.*, para. 219.

<sup>11</sup> The high point is *Factortame* [1991] 1 All ERE 70 (HL & ECJ).

<sup>12</sup> *Ibid.*, para. 240.

<sup>13</sup> *R (Miller) v. The Prime Minister* [2019] UKSC 41 (No. 2).

At issue was not whether the prerogative existed, as in *Miller No 1*, in relation to withdrawing from EU treaties, but whether a prerogative had been exercised lawfully. Courts have long ruled on whether a prerogative exists and what is the extent (scope) of a prerogative power. Lord Coke's famous statement 'the King hath no prerogative, but that which the law of the land allows him' exemplifies the principle that the prerogative's existence and scope are judicially reviewable.<sup>14</sup>

Cases brought in Scottish and English courts raised the same four issues<sup>15</sup>:

- (1) Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law?
- (2) If it is, by what standard is its lawfulness to be judged?
- (3) By that standard, was it lawful?
- (4) If it was not lawful, what remedy should the court grant?

The Crown's argument was that the subject matter was not justiciable because it was a political question, a matter of 'high policy'. The courts have ruled since the 1960s, indeed the seventeenth century, that the prerogative is susceptible to judicial review but not in subjects which are inappropriate for courts to rule upon. Dissolution of Parliament had been illustrated in previous litigation as an example of a non-justiciable subject although dissolution was now contained in the Fixed-term Parliaments Act 2011.<sup>16</sup> The Crown's argument on prorogation was rejected by the Inner House in *Cherry* but accepted by the Divisional Court in *Miller*.

The Prime Minister, like any public official, is under a duty to act in a constitutionally responsible manner. Advising the Queen exemplifies that responsibility. The PM must regard all relevant interests in his advice including those of Parliament and fulfilment of its constitutional role.<sup>17</sup> Although courts cannot decide a political question 'Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense'.<sup>18</sup>

The Prime Minister's accountability to Parliament (a convention) is not a reason to diminish the role of the courts and their legitimate responsibility. Indeed, prorogation prevents accountability. The legitimate role of the courts is adjudication and

<sup>14</sup> *Case of Proclamations* (1611), 12 Co. Rep. 74.

<sup>15</sup> See *Miller No 2*, paras 24–25.

<sup>16</sup> In the *Council of Civil Service Unions* [1985] AC 374, 'the House of Lords concluded that the answer to that question would depend on the nature and subject matter of the particular prerogative power being exercised. In that regard, Lord Roskill mentioned at 418 the dissolution of Parliament as one of a number of powers whose exercise was in his view non-justiciable' *Miller No 2* [35]. Review of the prerogative was operable where individual rights or privileges were involved; see *De Smith's Judicial Review* 3.039–3.045 (8th ed., 2018).

<sup>17</sup> *Ibid.*, para. 30.

<sup>18</sup> *Ibid.*, para. 31.

enforcement of the law.<sup>19</sup> Enforcing the law is the proper constitutional function of the courts and not a denial of the separation of powers but a realization of that separation. 'Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers'.<sup>20</sup>

The existence and extent (coverage) of the prerogative are long established as questions of law.<sup>21</sup> The sensitive issue in *Miller No 2* was the unlawful exercise of a prerogative power. This introduced the question of whether the decision was challengeable under the recognized heads of judicial review and whether the lawful limits had been exceeded.

Justiciability arises 'where the lawfulness of the exercise of a prerogative power within its lawful limits' is raised, 'rather than as one concerning the lawful limits of the power and whether they have been exceeded'.<sup>22</sup> The gist here is a distinction between a decision within the scope of the prerogative which is alleged to be deficient in some manner, and a decision which is unlawful and which takes the matter outside the extent of the prerogative. These are not easy distinctions to make.<sup>23</sup> Was the PM exercising a power within its lawful limits but which was in some sense incorrect but permissible, or had he trespassed in error taking him beyond his power? Was there an error he was entitled to make or one he was not entitled to make? In a statutory context this raises the old thorny issue of vires and jurisdiction. Prerogative is not based in statute but common law. The courts are empowered to rule on the limits of a prerogative power under the common law (above). The common law will set out the boundaries of that power and the common law's illumination and determination of 'the fundamental principles of our constitutional law'<sup>24</sup> will act as standards of judgment. Those principles come from an unwritten constitution which is pragmatic and flexible.<sup>25</sup>

The constitution displays two such principles the court believed: Parliamentary sovereignty and ministerial accountability [42]. Parliamentary sovereignty cannot be limited by an unlimited prerogative.<sup>26</sup> That would prevent sovereignty, and also accountability, being exercised. Statute, where applicable, limits the prerogative, as does the common law's invocation of 'the constitutional principles with which [the prerogative] would otherwise conflict'.<sup>27</sup>

<sup>19</sup> *Fire Brigades Union* [1995] 2 AC 513, 572–73, Lord Lloyd.

<sup>20</sup> *Miller No 2*, *supra* n. 15, para. 34.

<sup>21</sup> *Case of Proclamations*, *supra* n. 14.

<sup>22</sup> *Miller No 2*, *supra* n. 15, para. 36.

<sup>23</sup> *Ibid.* See para. 37.

<sup>24</sup> *Ibid.*, para. 38.

<sup>25</sup> *Ibid.* See paras 38–39.

<sup>26</sup> *Ibid.*, para. 44.

<sup>27</sup> *Ibid.*, para. 49.

The ratio of the case is in paragraph 50:

For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.

The PM's responsibilities and experience and political judgment have to be respected but the court has to ask whether 'the PM stayed within the lawful limits of the power' and, if not, are consequences sufficiently serious to call for the court's intervention.<sup>28</sup>

The court ruled that it was determining the extent of the prerogative. It was not concerned with the mode of exercise of the prerogative power within its lawful limits, e.g. a bad judgment. The court was concerned with the limits of the power. The court sought to determine a 'standard which determines the limits of the power, marking the boundary between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty of Parliament and responsible government on the other hand'. Applying that standard to resolve a question of public power concerns 'the extent of the power to prorogue, and is therefore justiciable'.<sup>29</sup>

The court of eleven judges ruled unanimously that the PM's advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null, void and of no effect.<sup>30</sup> The actions had the effect of preventing or frustrating Parliament's constitutional role.<sup>31</sup> No good reasons for prorogation were offered by the PM in the evidence.<sup>32</sup> The unchallenged evidence of a former PM, John Major, accentuated the unusual length of this prorogation.<sup>33</sup> Usually, 4–6 days would be required. These actions were at a critical juncture when 'fundamental change' to the UK constitution was to take place on 31 October 2019.<sup>34</sup> In this, Parliament's role as the people's representative was 'indisputable'. The PM could not avoid criticism in the Commons. The result was that the PM's advice was unlawful, and outside his powers. The Order in Council authorizing the prorogation was unlawful. The advice and the Order in Council were null and void and were not protected by the Bill of Rights Article 9.<sup>35</sup> The court so

<sup>28</sup> *Ibid.*, para. 51.

<sup>29</sup> *Ibid.*, para. 52.

<sup>30</sup> *Ibid.*, para. 69.

<sup>31</sup> *Ibid.*, paras 55–56.

<sup>32</sup> *Ibid.*, paras 58 and 61.

<sup>33</sup> *Ibid.*, para. 59.

<sup>34</sup> *Ibid.*, para. 57.

<sup>35</sup> *Ibid.*, para. 69.

declared. Parliament had not been prorogued and Parliament should decide what to do next. Parliament re-convened on the following day.

My belief is that *Miller No 2* rests on a stronger constitutional and legal basis than *Miller No 1*. No rights were changed by Article 50 notification in *Miller No 1* but the inevitability of that occurrence was conceded (mistakenly?) by the Crown. Notification was revocable the CJEU subsequently ruled.<sup>36</sup> Both *Miller* cases display the court's concern to make constitutional questions justiciable and to maintain the sovereignty of Parliament and its constitutional role in legislating and maintaining executive accountability. The statement that a matter may be unconstitutional but not illegal in the UK constitution is looking rather worn. *Miller No 2*, the writer believes, was based firmly in the exegetical tradition of judicial review development in the UK since the 1960s. The case raises the question of what further incursions into the prerogative the courts may undertake in upholding the rule of law – 'every prerogative power has its limits'.<sup>37</sup> It also raises the question of executive backlash and attempts to change the appointment process to the Supreme Court.<sup>38</sup>

### 3 REJECTION OF MRS MAY'S WITHDRAWAL AGREEMENT (WA) AND POLITICAL DECLARATION

Courts react to situations brought about by executive and Parliamentary action. *Miller No 2* was brought about because of the impasse in the Commons over Brexit. Mrs May's WA agreed with EU negotiators in November 2018 was rejected three times by the House of Commons. The political declaration on future relations was rejected twice. She sought, and was then forced by Parliament to seek, extensions to Brexit day. Her failure to secure Parliamentary approval for the WA, a requirement of EUWA section 13 for the Commons to have a meaningful vote, led to her resignation. Her successor as PM, Boris Johnson<sup>39</sup> negotiated an amended deal with the EU.<sup>40</sup> This is, in essence, the May deal so that the parts on Common Provisions, Citizens' rights, Separation Provisions, Finance, Transition, etc., are the same.

<sup>36</sup> Case C-621/18 *Wightman v. Secretary of State for Exiting the EU* EU:C:2018:999.

<sup>37</sup> *Miller No 2*, *supra* n. 15, para. 38. Examples include declaration of war, etc., see Mance, *supra* n. 8 for examples.

<sup>38</sup> See Geoffrey Cox Attorney General, <https://hansard.parliament.uk/commons/2019-09-25/debates/F3541B98-D4E9-487F-BE17-D51C6EF870F2/LegalAdviceProrogation>, col 666. See Postscript.

<sup>39</sup> Voted in by the Conservative Party membership with 92,123 votes!

<sup>40</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840655/Agreement\\_on\\_the\\_withdrawal\\_of\\_the\\_United\\_Kingdom\\_of\\_Great\\_Britain\\_and\\_Northern\\_Ireland\\_from\\_the\\_European\\_Union\\_and\\_the\\_European\\_Atomic\\_Energy\\_Community.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf).

The significant difference is in the Northern Ireland protocol which replaces the Backstop. There are also important changes in direction in the political declaration.

Under the Backstop, the UK continued to be in a Single Customs Territory with the EU; and Northern Ireland would be in a single market in goods, with exceptions, with the EU and under the jurisdiction of the CJEU as specified for the duration of the Backstop. The Backstop would not have come into operation if a trade deal were concluded between the EU and UK before the expiry of the transition period (now implementation period (IP)). The Backstop was a means of avoiding a hard border in the island of Ireland in order to fulfil obligations under the 1998 Belfast Agreement.

#### 4 THE NEW WA & POLITICAL DECLARATION

The revised protocol places NI effectively in the EU single market for goods. NI remains in the UK customs union *de lege* but it is left *de facto* (with important legal consequences) in the EU customs union meaning that a border will have to be created in the Irish Sea between NI and the rest of the UK. NI will be subject to the jurisdiction of the CJEU for numerous subjects covered by EU law in the protocol.

Much to their chagrin the Democratic Unionist Party (DUP) does not have a veto. There will be a majority vote every four years after the initial period ends in 2022 (if IP extended) for continuation, but the period is eight years if the vote in Stormont has a 'cross community support' as spelt out. The about-turn by Johnson was seen as outright betrayal of the DUP who had kept Mrs May's government afloat on a confidence and supply arrangement. The deal struck by Johnson meant he did not have their votes for the new, possibly permanent, arrangements.

The political declaration, which is not a legal text and is purely exhortatory, was amended so that references to a relationship based upon regulatory alignment with EU law and a single customs territory in the 2018 agreement have been removed. The sentence 'the UK will consider aligning with Union rules in relevant areas' in future trade negotiations' has been dropped. The UK commitment is to a free trade agreement (FTA) sparking opposition fears of wholesale deregulation. The declaration provides a 'framework for future relations' rather than building on commitments in the WA. There is a commitment to a level playing field on climate change, environmental, workers' and social rights, taxation, competition and state aids (PD XIV). However, Annex 4 of the original NI backstop guaranteeing a level playing field as a matter of EU law and international conventions in taxation, environmental protection, labour standards, state aid and competition is removed. The role of the CJEU will not cover non-EU law. Apart from these major changes, much of the remaining detail is largely identical in both declarations and includes a continuing commitment by the UK to the ECHR (A.I.7).

As it happened, the deal was not put to a vote under section 13 EU Withdrawal Act (EUWA) because a majority of MPs by motion agreed a deferral of approval until the Bill had passed its Parliamentary stages. This was to ensure a further extension of exit day to prevent a no-deal exit. Parliament engineered that Johnson would be bound to request such an extension, even dictating the content of his letter to the European Council. This was despite Johnson's boast: 'No ifs, no buts' the UK would leave the EU on 31 October. The EUWA Bill was presented and passed second reading but it was paused by the PM. On Johnson's fourth attempt, he managed to secure the Commons' consent to a general election by amending the Fixed-term Parliaments Act (FTPA).

## 5 THE EU WA BILL 2019 (THE 'BILL')

The EUWA Bill builds upon the EUW Act 2018. In the event of a Johnson election victory the Bill will be brought back to Parliament (the revised Bill). If no outright Johnson victory, there are various possibilities. The 2018 Act was covered in a previous editorial in this journal.<sup>41</sup>

To recap briefly, the 2018 Act repealed the ECA on exit day, it provided for the incorporation of EU law into domestic law by exit day, the supremacy of that incorporated law with significant provisos, the repeal or amendment of EU incorporations as necessary, the non-inclusion of the Charter of Fundamental Rights in domestic law and the interpretation of post exit EU law and CJEU judgments by domestic courts. Post exit EU law will lose its supremacy.

The bill heavily amends the EUWA 2018 to reflect the terms of the WA and to accommodate the IP. The Bill makes necessary modifications to take account of the fact that exit day has been postponed until 31 January 2020 and that the IP will last until 31 December 2020. The Bill implements the EU/UK Withdrawal Agreement (WA) into UK law as well as the EEA and EFTA Separation Agreement, and the Rights Agreement between the UK and Switzerland. It provides for the continuing effect of the ECA 1972 and EU law and CJEU supremacy in the IP. The target date for domesticating EU law is now the end of the IP. The broad effect of the EUWA is unaffected and changes are described as 'technical' by the Bill's explanatory notes.<sup>42</sup> There were significant additions in the revised Bill which are substantive and not simply technical. One of these concerns power for lower courts to depart from CJEU jurisprudence in the case of retained EU law (below).

<sup>41</sup> P. Birkinshaw, 24 Eur. Pub. L. 175 (2018).

<sup>42</sup> For the Bill and the Bill's accompanying documents and notes, see <https://www.gov.uk/government/publications/eu-withdrawal-agreement-bill>.

The Bill will amend the EUWA 2018 in order to give effect to the IP following the repeal of the ECA in section 1 of the EUWA. This will ensure that sections 2 to 4 of the EUWA 2018 will save, and incorporate into domestic law, that EU law which applied in the UK at the end of the IP, a date referred to by the Bill as ‘IP completion day’. This law will then be subject to any changes made by the UK Parliament or the devolved legislatures, consistent with the UK’s international obligations. Clause 1(3)(a)(i) adds Part 4 of the Withdrawal Agreement, except those provisions that relate to the Common Foreign and Security Policy, to the definition of ‘the Treaties’ and ‘the EU Treaties’ in section 1(2) of the ECA. The explanatory note states ‘This means that international agreements concluded by the EU and which enter into force during the IP will be given effect via Part 4 of the Withdrawal Agreement’. Treaties may also be removed.

The Bill creates widespread powers for UK ministers and devolved governments to make secondary legislation, where appropriate, to enable the Withdrawal Agreement to be implemented domestically. This builds on secondary law-making powers and procedures in the EUWA. Henry VIII clauses repealing or amending primary legislation by secondary legislation reappear frequently.

The Bill covers the NI aspects, i.e. access to markets, the Good Friday Agreement, equal opportunities and North-South cooperation. Amendments are included to the Northern Ireland Act 1998 in relation to rights, safeguards and equality of opportunity protections contained in the Good Friday Agreement 1998 and specific roles and reforms for the NI human rights and equality commissions.

IP (ending 31 December 2020, 11pm) was extendible for up to two years with Commons approval under the original Bill. The extension followed the WA. There is no power for the Commons to demand an IP extension if a FTA has not been concluded by the end of the IP. Johnson has indicated that there will be no IP extension. This was re-enforced by an amendment to the revised EUWA Bill prohibiting an extension by a UK Minister. The spectre of ‘No deal’ may arise again. Under cl. 39, the IP duration can be amended by ministerial regulation but this is now limited to a change in EU summer-time arrangements.

In the IP, EU law made after the agreement will be directly applicable or implemented in the IP. Section 6 EUWA on interpretation is amended to take account of rights under the WA, EEA, etc., agreements (above). Provision is made to achieve consistency between the treaties. The exclusions and savings in the EUAW re the CFR, *Francovich liability*, etc., are maintained post IP for retained EU law. Section 6(2) EUWA is amended so that basically, a court or tribunal in interpreting EU law may have regard to anything done on or after IP end day by the CJEU, another EU entity or the EU ‘so far as it is relevant to any matter before the court or tribunal’. A new section 7C is added to the EUWA to give guidance on interpretation of WA law (‘separation agreement law’ and see WA Articles 4,

158, 160 and Article 13(2) NI Protocol). The definition of 'separation agreement law', like EU law, is tied to the ECA.

The Bill, as stated, preserves the ECA during the IP. The Bill also modifies the saved ECA provisions to reflect the fact that the UK has left the EU, and that the UK's relationship with EU law during this period is determined by the UK's obligations under the WA rather than *qua* Member State. Further EUWA amendment allows deficiencies to be corrected until the end of the IP. The supremacy of the CJEU and EU law will last until the end of the IP. Thereafter, supremacy, or primacy, will be determined by the provisions of the WA. Preliminary references may be made to the CJEU in the IP.

Article 4 of the WA states that its provisions will have the same effects in the UK as in the EU Member States. 'In broad terms (and subject to the provisions of Article 4 itself), the intention is that the WA and the provisions of EU law applied by the WA have the same legal effects in UK domestic law as attached to EU law while [the UK was] a Member State' [29]. This means that legal or natural persons will be able to invoke directly effective provisions of the WA in UK courts. This mirrors the 'conduit pipe' effect of the ECA re rights in Article 4 [see *Miller No 1*, paragraph 65].

The Bill makes provision for EU citizens' rights, involving entry, residence, employment, social security, appeals, much of which is to be implemented by regulations, and recognition of professional qualifications and coordination of social security systems. Non-discrimination, equal treatment and rights of workers are included here. The Bill also provides for 'foreign workers'.

The Independent Monitoring Authority to monitor Part 2 on Citizens' rights of the WA and the agreements is covered by clause 15 and Schedule 2. The authority will not be a Crown body. Provision is made for 'smooth' carry-over succession provisions after the IP. The Bill further provides for authorization of payment of financial provision of the WA and financial aspects; estimated between GBP 33 and GBP 39 billion.

There will be Parliamentary oversight through the mechanism of the Commons European Scrutiny Committee (ESC) for EU legislation in the IP where the committee believes vital national interests are involved (cl. 29). The minister must raise a motion to be debated and voted on in Parliament within fourteen days of the ESC's report. A similar provision was added in the revised Bill in relation to the House of Lords and the EU Select Committee of the Lords. A clause stating that during the UK-EU negotiations on the future relationship there was to be detailed and on-going Parliamentary oversight was removed. Parliament's role is thereby diminished. Section 13 EUWA is repealed because enactment of the Bill will enable ratification of the WA. The Constitutional Reform and Governance Act 2010 (CRGA) does not apply to the WA but there is a saving for modifications.

In the original Bill derived workers' rights in EU law as specified (schedule 4) were preserved. However, these are removed from this Bill and the Government undertook to present a separate Bill on workers' rights.

It is recognized that the Parliament of the UK is sovereign (cl. 38). Sovereignty subsists notwithstanding any directly applicable or directly effective EU law in the IP or separation agreement law, or provisions on consistency and interpretation. Direct effect and applicability and EU supremacy are recognized after the IP with significant provisos for unmodified retained EU law, and for separation agreement law. Accordingly, nothing in the Act derogates from the sovereignty of the UK Parliament as the supreme legislator. This merely repeats what the Supreme Court decided in *Miller No 1*<sup>43</sup> and other case law. A future Parliament's legislative choices are not constrained legally by a previous Parliament.

The revised Bill contained a potentially game-changing addition. Under the first Bill, the retained judgments of the CJEU prior to Brexit date (now pre-IP completion date) were to be binding on UK courts. This was not the case with the UK Supreme Court and the Scottish High Court of Judiciary. They could depart from such judgments on similar terms to the manner in which they depart from their own previous judgments. The Bill (Clause 26) confers power on a Minister, after consultation with senior judiciary as specified, to make rules setting out that 'relevant' lower courts and tribunals may depart from CJEU retained case law. The rules may specify the extent or circumstances in which they are not bound as well as the test and relevant considerations that will apply in determining whether to depart from the case law. The senior judiciary may also be empowered to determine the above tests and considerations either with, or without, a Minister's consent. Provision may be made for retained domestic case law relating to retained EU case law. If regulations are made, they must be made before IP completion day.

This provision, which is empowering and not mandatory, brings with it considerable difficulties. There is no detail on the scope of the provision. Will the regulations, if made, apply to all EU case law including that on sovereignty and direct effect?

If made, will it foment serious confusion with an abundance of differing judgments? In the original Bill, only the two top courts could depart.

Lastly, how will this provision be consistent with the 2018 Act's requirement that unmodified retained EU law maintains its sovereignty and direct effect, subject to clause 38 above?

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<sup>43</sup> *Supra* n. 2, para. 67.

The Commons second reading and vote took place on 22 October. The vote on the Bill in principle was in the government's favour 329-299 – the first vote Johnson had won as PM and the Commons first vote in favour of a Brexit deal! However, the vote on his programme motion for the Bill (the timetable through the Commons) was lost 308-322. Johnson had tried to rush a Bill of immeasurable constitutional significance containing 110 pages through the Commons with less time than a bill covering wild animals in circuses containing five pages!

Following his general election victory on 12 December, Johnson re-introduced his revised EUWA Bill to Parliament on 19 December. At the Bill's second reading, it was overwhelmingly approved by the Commons. The revised Bill, as introduced with the above amendments on 19 December, became law on the 23 January 2020. The WA was concluded and ratified and the UK left the EU on 31 January 2020.

## 6 THE FUTURE TRADE NEGOTIATIONS: FREE TRADE AND LEVEL OF REGULATORY ALIGNMENT

Johnson has claimed that a FTA will be concluded by 31 December 2020. This seems recklessly optimistic. Juncker says three years at least. Michel Barnier will head the EU team. Johnson's opponents claim he is aiming for a 'Singapore on the Thames' with free trade and no tariffs. The EU is apprehensive about state aids and competition, tax incentives, dumping and relaxation of economic, employment and social regulation. The UK under Johnson will have to square the circle: free trade, access to the single market and regulatory alignment. Procedures for trade deals with third parties concluded under Articles, 216 and 218 TFEU present far greater procedural obstacles than Article 50 TEU.

## 7 THE SPEAKER AND THE COMMONS

The 2017-19 Parliament was a blocking Parliament and MPs were assertive in what they disliked rather than what they wanted to promote. But the Parliament reflected the division in the country at large over the Brexit vote – 51.9 to 48.1 pc. It was a hung Parliament with the Conservatives desperately seeking the support of the Democratic Unionists to govern. When Johnson's new NI Protocol sold them down the river as they saw it, he had to secure a general election in the hope of achieving a majority government and getting his Bill through Parliament relatively unscathed. Certainly, the non-Brexit bills passed by this Parliament were modest in content and various Brexit bills were not brought to Parliament. A new Parliament was unavoidable for the governance of the country. Certainly the loss of governmental control over the Commons was illustrated by a remarkable series of votes – on the EUWA 2018, EUWA 2019 which required a Minister of the Crown to move a

motion that the House of Commons agreed to the Prime Minister seeking an extension to a specified date and, if the motion was passed, requiring the Prime Minister to seek that extension. The EUW(No 2)A 2019 required the Prime Minister on 19 October to seek, by a letter in the form scheduled to the Act, an extension for Brexit of three months from the European Council, unless by then Parliament had either approved a withdrawal agreement or approved leaving without one. Finally, the motion on the legislative programme preventing a three day only scrutiny of the Bill by the Commons. All these owed an enormous amount to the now retired Commons Speaker. He allowed tabling of motions that MPs should take control of the order paper – in other words decide for themselves what business they would transact. The votes were producing government by Parliament (the Commons) not government through Parliament.

For Remainers Bercow was super-hero. For Brexiteers arch villain. On retirement Bercow announced Brexit to be the biggest single mistake in British political life since 1945.<sup>44</sup> No-one can deny that the Speaker carries a wide discretion in his crucial role of adjudicating on Commons' procedure. But in the context of a hung Parliament he saw his role as assisting back-benchers of all parties and not succumbing to executive fiat. He was a reforming Speaker over his ten-year tenure promoting the cause of back benchers, the people the constituents voted for. His successor is certainly a far less flamboyant figure. There were also individual MPs whose role in fighting against leaving on no-deal, the one thing a Commons majority agreed upon, displayed ingenuity and courage. Dominic Grieve, Oliver Letwin, Hilary Benn and Yvette Cooper among many others. Like many MPs they were subject to public scorn and threats of violence. As was Gina Miller who sought through the courts to uphold the unwritten constitution.

If the new Parliament is hung we will not escape the impasse. This will not be Parliament's doing but the result of the national vote. A second referendum will be the only way out of the mess. If a new Parliament has a majority in favour of Brexit, Johnson's revised Bill is likely to be enacted. There will be no second referendum. There is a risk of growing division and the threat of violence and intolerance especially if social and economic standards are sacrificed on the altar of free trade.

## 8 CONCLUSION

Parliament can exercise its authority. But what of the risk of abuse of that authority? In a recent essay Baroness Hale, then President of the Supreme Court, has in part responded to Lord Sumption's 2019 BBC Reith Lectures.

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<sup>44</sup> <https://www.theneweuropean.co.uk/top-stories/the-biggest-mistake-after-ww2-john-bercow-finally-confirms-brexit-view-1-6360804>.

The retired Supreme Court justice regrets the diminution of the role of political debate and the contemporary fixation on litigation, especially human rights litigation. Hale comments: 'But in our Constitution [democratic constitutionalism] the fundamental principle is Parliamentary sovereignty, which both the executive and the courts must respect. We in the courts will always ultimately do Parliament's bidding. Forgive me if I don't quite understand what the problem is with that'.<sup>45</sup> Well? ... What if Parliament should come to abuse its position in the future by systemically denying human rights standards and abusing the rule of law? This has been raised by the Supreme Court.<sup>46</sup> In *Miller No 2*, the court also affirmed that it was their responsibility 'to determine the legal limits of the powers conferred on each branch of government and to decide whether any exercise of power has transgressed those limits'.<sup>47</sup>

Is the *Miller* litigation the end of the political constitution? Far from it. But it does indicate a significant advance in juridifying the prerogative. The judgments represent a development from protection of individual rights to protection of democratic institutional integrity.

## 9 POSTSCRIPT ON THE GENERAL ELECTION

The December 2019 general election result saw a dramatic victory for Boris Johnson. Battles loom ahead between a considerably reinforced Scottish National Party and Downing Street over Scottish independence. The longer-term prospect of a united Ireland will put further strain on the Union. For this Parliament, Johnson's majority of eighty means he controls not only the Commons but also, and crucially, his party.

The Conservative Party manifesto for the 2019 election (page 48) signalled that a Conservative government would appoint a Commission on the Constitution to examine and make recommendations on the 'broader aspects of our constitution and the relationship between the Government, Parliament and the courts'. Johnson's recent setbacks explained above were clearly uppermost in his mind. The prerogative was to be included. The Commission will make proposals to 'restore trust in our institutions'. A balance will be sought between individual rights, vital national security interests and effective government. The Human Rights Act (HRA) and judicial review will be updated. In the latter case to

<sup>45</sup> Lady Hale (8 Oct. 2019), <https://www.supremecourt.uk/docs/speech-191008.pdf>. See J. Sumption, *Trials of the State: Law and the Decline of Politics* (2019).

<sup>46</sup> See e.g. Lord Hodge in *Moochan v. Lord Advocate* [2014] UKSC 67, para. 35 and P. Birkinshaw & M. Varney, <https://constitution-unit.com/2016/04/19/how-eu-membership-has-transformed-the-constitution/>.

<sup>47</sup> *Miller No 2*, *supra* n. 15, para. 39.

prevent use of the courts to 'conduct politics by alternative means' or to cause 'needless delays'. These expressions raise points of highly subjective judgment. A strong claim based in law may well raise a political point or cause delay but that does not make it wrong or undesirable. Minimizing opposition seems to be the target here, even where the point of law being pursued is legitimate and firmly based in case law going back to the 1960s and earlier. With his large Commons majority, it may be that some of these issues will lose their urgency and Johnson's sense of frustration is now assuaged. The Human Rights Act (HRA) and judicial review have been a conflict zone between governments and courts for many years. Johnson would be well advised to avoid unnecessary conflict in confrontations that do not need to be engaged.