

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

### REFLECTIONS ON *MILLER*

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We have been invited to open the symposium in this volume of the UK Supreme Court Yearbook with some reflections on the *Miller* litigation, taking as our starting point our blog post, *Pulling the Article 50 Trigger: Parliament's Indispensable Role* ('the blog post').<sup>1</sup> As self-indulgent as it is to accept this invitation, it provides a useful opportunity to set-out the background and provide the context to the *Miller* litigation, before setting out our thoughts on the judgments of the Divisional Court and the UK Supreme Court ('the Supreme Court') themselves. Part I of this chapter examines the context, Part II explores the reasoning of the Divisional Court<sup>2</sup> and the Supreme Court<sup>3</sup> and Part III provides some conclusions regarding the *Miller* litigation.

## 1 The Path to *Miller*

### 1.1 Parliament's Indispensable Role

The blog post was never intended to set-out an argument to be deployed in litigation. When we published it a few days after the referendum result,

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<sup>1</sup> Nick Barber, Tom Hickman, and Jeff King, 'Pulling the Article 50 Trigger: Parliament's Indispensable Role' (UK Const L Blog, 2016) <<https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>> accessed 27 June 2016.

<sup>2</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2017] 2 WLR 583.

<sup>3</sup> *Secretary of State for Exiting the European Union v R (Miller)* [2017] UKSC 5, [2017] 2 WLR 583.

we did not think that litigation was necessary, or even likely. We were hoping, naively, that the Government would either recognise that a statute was needed before art 50 of the Treaty on European Union (‘the TEU’) could be triggered, or at least recognise that an Act of Parliament was in its, and the country’s, interests. The need for legislation would slow down the art 50 process at a time of political crisis within the UK and provide much needed breathing space for political actors. The blog post, of course, also sought to identify those constitutional principles that required observance, and, if the Government failed to observe them, it sought to give Parliament an argument it could use against the Government to protect its position in the Brexit process. In short, we were seeking to make a legal contribution to a political crisis, not to light the touch-paper of litigation.<sup>4</sup>

The blog post that we published on Monday, 27 June 2016, argued that the existence of the European Communities Act 1972 (‘the ECA 1972’ and ‘the 1972 Act’) entailed that primary legislation was required to empower the Government to trigger art 50 of the TEU. This was because the consequence of triggering art 50 would be to withdraw the UK from the European Union (EU) and would strip the 1972 Act of its intended effect, namely, to give effect to our membership of the EU, most notably the rights and obligations flowing therefrom. Animating our argument was the principle of representative democracy, which entailed that in the UK a constitutional change of such moment should only be effected by primary legislation. As we stated, the arguments that an Act of Parliament was necessary ranged from the general to the specific, but ‘[a]t the most general, our democracy is a parliamentary democracy, and it is Parliament, not the Government, that has the final say about the implications of the referendum, the timing of an Article 50 [notice,] our membership of the Union, and the rights of British citizens that flow from that membership.’<sup>5</sup> We identified two common law rules governing the relationship between statute and the prerogative, each of which led, we argued, to the conclusion that a statute was required, and each of which amounted to a working-through of the more general constitutional principle of representative democracy in the substance of the

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<sup>4</sup> It was Lord Pannick QC’s endorsement of the blog post’s argument in his column in *The Times* a few days later that ensured that the contention that there had to be an Act of Parliament was taken seriously and provoked wider discussion including in Parliament and letters to the press: David Pannick QC, ‘Why giving notice of withdrawal from the EU requires act of Parliament’ *The Times* (London, 30 June 2016) <[www.thetimes.co.uk/article/why-giving-notice-of-withdrawal-from-the-eu-requires-act-of-parliament-dz7s85dmw](http://www.thetimes.co.uk/article/why-giving-notice-of-withdrawal-from-the-eu-requires-act-of-parliament-dz7s85dmw)> accessed 10 August 2017. An excellent overview and collection of the various views that were expressed at the time is found in: Nicola Newson ‘Leaving the EU: Parliament’s Role in the process’ (House of Lords Library Note LLN-2016-0034, 4 July 2016), 1-7 <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2016-0034>> accessed 10 August 2017.

<sup>5</sup> Barber, Hickman and King (n 1).

common law.

First, there was the ‘frustration’ argument, which was grounded in a purposive reading of the text of the 1972 Act, including its long title. In the *Fire Brigades Union Case*, the House of Lords had held that the prerogative could not be used in a manner that frustrated a statute, even if the prerogative power was not directly addressed by the statute.<sup>6</sup> The blog post argued that the purpose and effect of the 1972 Act is to provide for the UK’s membership of the EU and for the EU Treaties to have effect in domestic law. The triggering of art 50 would cut directly across that statutory purpose and render the Act a dead letter: it would remain on the statute book but it could not achieve the purpose for which Parliament put it there.

The second, complementary, argument was the ‘rights’ argument. One of the earliest formulations of this is found in a classic case of the common law: *The Case of Proclamations*.<sup>7</sup> The principle is a simple one: where statute has conferred a legal right, the prerogative cannot be used to take that right away. The triggering of art 50 of the TEU will have the effect of stripping British citizens of the rights they now enjoy by virtue of the ECA 1972, *ergo* this can only be done by an Act of Parliament.

We anticipated that some might argue that the 1972 Act only gave effect to EU law rights that ‘from time to time’ were in existence and that, as a consequence, the triggering of art 50 would not result in the loss of statutory rights (but, instead, only in the loss of European rights the domestic effect of which was dependent on continued membership of the EU). For the same reasons, we thought they might argue, art 50 would not frustrate the statutory purpose of the ECA 1972. However, we found this argument to be unpersuasive as the ‘from time to time’ provision in s 2 of the 1972 Act is intended to reflect the evolving nature of EU law within the EU and not the possibility of the removal of EU rights or UK membership altogether. We also noted that the European Parliamentary Elections Act 2002 unequivocally confers statutory rights on British citizens that will be rendered nugatory as a result of withdrawal from the EU; it contains no ‘from time to time’ provision. The subsequent decisions of the courts on the significance of the 1972 Act rendered discussion of the 2002 Act largely unnecessary, but it remained as a second, and in some ways clearer, application of the ‘rights’ principle. The blog post, thus, argued that pre-existing, clear, well-established, legal principles, grounded in the fundamental structure of the constitution, meant that legislation was

<sup>6</sup> *R v Secretary of State for the Home Department ex p Fire Brigades Union* [1995] UKHL 3, [1995] 2 AC 513.

<sup>7</sup> (1610) 12 Co Rep 74.

needed before art 50 was triggered. The consequence of this reasoning was that there was a constitutionally and politically important intermediary stage between the referendum and giving notice of the UK's intention to leave the EU under art 50 of the TEU.

Although we did not address the European Union Referendum Act 2015 in our blog post, the background context was that the 2015 Act had not authorised the UK Government to take any steps consequent on any particular result. It simply said that a referendum shall be held. The effect of that was to gauge the popular will. Indeed, the 2015 Act contrasts sharply with the legislation establishing the 2011 alternative vote referendum, which did determine the conduct of Ministers in the event of a positive result.<sup>8</sup> With hindsight, the general reader of the blog post would certainly have benefited from an explanation of this point. Many thought that the outcome of the vote immediately and necessarily triggered our exit from the Union or provided authority to the Government to affect such exit. But in a representative rather than direct democracy, it is for Parliament to specify how the results of referendums are received.

## 1.2 The Reaction of the Government

Recall Friday 24 June 2017. The then Prime Minister, David Cameron, stood on the steps of Downing Street, facing the world with news of how Her Majesty's Government would react to the outcome of the referendum. Contrary to his previous statements about the consequences of losing the referendum, the Prime Minister announced that he would not be triggering art 50 of the TEU. Rather, he announced his resignation and said that triggering art 50 would now be a matter for his successor. It was obvious to everybody, not least the Government, that there was no plan for exiting the EU. The brakes were being applied. The Government, it was clear, needed to buy time. But more than that, it was clear to us that the implications of triggering art 50 of the TEU could be disastrous. As the blog post explained, the art 50 process stacks the negotiating deck of cards in favour of the EU Member States by cutting the exiting Member State adrift without any exit deal two years after art 50 notification has been given if no agreement has been reached and there is no unanimous consent of the European Council to extend the two-year negotiating period. That inevitably places an exiting State under enormous pressure to accept whatever is put on the table by the remaining Member States and allows them to control the timing of negotiations. There had been little or no discussion of these consequences of triggering art 50 at the time because few front-bench politicians or

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<sup>8</sup> Parliamentary Voting System and Constituencies Act 2011, s 8.

commentators seem to have thought the outcome of the referendum would be a vote to leave the EU.

And yet the EU institutions and other Member States understood the position perfectly well. Rather than allowing the British Government a period to regroup, there were demands for art 50 of the TEU to be triggered right away, and an insistence that there would be no negotiations before art 50 was invoked. There was even a suggestion floated in the press that efforts would be made to get David Cameron to trigger art 50 over dinner at a European Council meeting to be held on Tuesday, 28 June 2016.<sup>9</sup> In this context, the argument that the Prime Minister simply had no power to trigger art 50 was important: irrespective of the pressure brought by our European negotiating partners, David Cameron simply lacked the power to initiate the art 50 process. This constraint on the powers of the Executive might have been a welcome obstacle rather than a constitutional irritant for a number of reasons.

First, it could have provided a legitimate basis for buying time. That a Member State's executive branch might find itself constrained in such circumstances by internal constitutional requirements would not have been remarkable and would surely have been understood in many other European capitals. After all, the European Union's trade deal with Canada, painstakingly negotiated over seven years, was delayed by the need for approval from the Wallonia legislature, a region of Belgium. Given that the Wallonian Parliament must approve Belgium's agreement to a trade deal before it can be concluded by the European Union, it would hardly have been surprising had exit from the EU required approval of the UK Parliament.

Secondly, it could have provided a basis for seeking to obtain commitments of some form from the other EU Member States prior to triggering art 50 of the TEU. The Government could have relied upon the need to get parliamentary approval as a basis for seeking to secure some assurances either of substantive or procedural nature before art 50 was triggered. The referendum result did not speak to the question of how to leave the EU or even on what terms. Parliament, then, had in our view a potentially important role. As we argued in our blog post:

Parliament could conclude that it would be contrary to the national interest to invoke Article 50 whilst it is in the dark

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<sup>9</sup> See John Henley, Jennifer Rankin and Patrick Wintour 'EU may refuse informal Brexit talks until UK triggers article 50' *The Guardian* (London, 27 June 2016) <[www.theguardian.com/world/2016/jun/26/eu-may-refuse-informal-brex-it-talks-until-uk-triggers-article-50](http://www.theguardian.com/world/2016/jun/26/eu-may-refuse-informal-brex-it-talks-until-uk-triggers-article-50)> accessed 10 August 2017.

about what the key essentials of the new relationship with the EU are going to be, and without knowing what terms the EU is going to offer. Parliament might well conclude that to require the Government to issue the notice immediately would be contrary to the national interest, even if Parliament is committed to leaving the EU, because the legal structure of Article 50 would place the UK at a seriously disadvantageous position in negotiating acceptable terms. Surely, Parliament is unlikely to require the Government to issue notice under Article 50 if it considers that the Government might be forced to accept exit terms which do not protect key aspects of our economy. Parliament may therefore require the Government to engage in extensive informal negotiations or even to seek to negotiate exit from the EU by formal Treaty amendments rather than through the Article 50 process.<sup>10</sup>

The potential advantages of that argument were, however, never taken-up by the Government or, in the end, by Parliament. The Government's position on whether an Act of Parliament was necessary before triggering art 50 of the TEU was not initially made explicit, but eventually statements made in Parliament and then in the course of the *Miller* litigation made it clear that the Government did not accept that an Act of Parliament was required. On 24 June 2016, David Cameron had stated that, 'I think it is right that [the] new Prime Minister takes the decision about when to trigger Article 50 [...]',<sup>11</sup> however at this stage the need for legislation was not contemplated. It was not until 18 July 2016 that Lord Bridges of Headley, Parliamentary Under Secretary of State at the Department for Exiting the EU, stated in Parliament that, '[t]he Government's position is that there is no legal obligation to consult Parliament on triggering Article 50.'<sup>12</sup> The following day at a directions hearing, the Divisional Court directed the Government to respond to arguments advanced by the Miller and de Santos claimants, and, on 25 July 2017, the Secretary of State for Exiting the EU ('the Secretary of State') confirmed the Government's view that an Act was 'not needed' to commence the art 50 process.<sup>13</sup> Horns were therefore locked, and the issue was destined for the Divisional Court; and ultimately for the Supreme Court.<sup>14</sup>

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<sup>10</sup> Barber, Hickman and King (n 1).

<sup>11</sup> David Cameron, 'EU referendum outcome' (PM statement from 10 Downing Street, London, 24 June 2016) <[www.gov.uk/government/speeches/eu-referendum-outcome-pm-statement-24-june-2016](http://www.gov.uk/government/speeches/eu-referendum-outcome-pm-statement-24-june-2016)> accessed 10 August 2017.

<sup>12</sup> HL Deb 18 July 2016, vol 774, col 430.

<sup>13</sup> Letter from the Government Legal Department to the Divisional Court (15 July 2016).

<sup>14</sup> Mishcon de Reya solicitors had written to the Government on 27 June 2016 seeking

It need not have been this way. It is interesting to speculate on why the Government did not simply agree to put a bill before Parliament, even if it considered there was no legal obligation on it to do so. In the months following the referendum, as later events proved, it would not have encountered great difficulty in procuring the passage of such an Act, although it may not have wanted to take the risk of a rebellion by remainder Conservative MPs. Prime Minister Cameron no doubt did not want to tie the hands of his successor. When Theresa May took the helm it became clear that she intended to concentrate decision making power in the Government and was cautious, to say the least, about informing Parliament about her objectives in the Brexit process. By November 2016, freshly elected in the Conservative Party's post-referendum leadership contest, the Prime Minister was not only proposing to invoke art 50 of the TEU unilaterally but was refusing to answer any questions about the Government's position on the wide spectrum of options for a post-EU UK on the floor of the House.<sup>15</sup> Introducing a Bill would certainly have put her under greater pressure to reveal her hand. Perhaps too, the Government's position reflected an age-old and instinctive reaction of the Government and the civil service to defend the realm of prerogative power. There may well have been a sense that to accept the argument would have been to concede ground to Parliament in the sensitive area of foreign relations and treaty making, and this could have had consequences in terms of the gradual increase in parliamentary involvement in the ratification of treaties.<sup>16</sup>

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assurances on behalf of unnamed clients that art 50 of the TEU would not be triggered without a Parliamentary vote, but at this point no argument that an Act of Parliament was required was advanced or developed. This changed after Lord Pannick QC was instructed (together with one of the present authors) by Mishcon de Reya on 31 June 2016 following Lord Pannick's column in *The Times* (see n 5), in a team also including Rhodri Thompson QC, Anneli Howard and later Professor Dan Sarooshi. A claim by Deir dos Santos, the hairdresser who voted for Brexit, was also brought and was joined to that of Gina Miller, with Ms Miller's claim subsequently designated by the Divisional Court as the lead claim.

<sup>15</sup> See eg Rob Merrick 'Theresa May faces growing anger over Brexit secrecy as Boris Johnson appears to leak key detail' *The Independent* (London, 16 November 2016) <[www.independent.co.uk/news/uk/politics/brexit-theresa-may-plans-boris-johnson-customs-union-single-market-latest-a7420926.html](http://www.independent.co.uk/news/uk/politics/brexit-theresa-may-plans-boris-johnson-customs-union-single-market-latest-a7420926.html)> accessed 10 August 2017 ; BBC News 'Jeremy Corbyn calls for more transparency over Brexit plan' *BBC* (London, 5 November 2016) <[www.bbc.com/news/uk-politics-37880603](http://www.bbc.com/news/uk-politics-37880603)> accessed 10 August 2017. See HC Deb 7 December 2016, vol 618 col 220 (Sir Keir Starmer).

<sup>16</sup> See the Constitutional Reform and Governance Act 2010; and European Union Act 2011. The Secretary of State accepted in *Miller* that it was the Government's 'usual practice' to ensure implementing legislation is enacted before a governing treaty is ratified: Skeleton Argument, p 10, n 13. The Government nonetheless argued that examples could be found of the UK withdrawing from treaties that had been implemented in domestic law. Only two examples were, however, ever identified in the course of the litigation, the first was double taxation treaties (*ibid* 16, para 36); and the second was withdrawal from the European Free Trade Agreement when the UK joined the European Communities. Both of those situations, however, raise distinct legal issues and in any event in neither case had there

Whatever its motives, the Government's resistance to an Act of Parliament was resolute. Rather than accepting the judgment of the Divisional Court handed down in October 2016, the Prime Minister instructed her lawyers to appeal it, running the risk not only of a further high-profile defeat but also adverse findings on the devolution issues had not been raised before the Divisional Court. The Government did, however, eventually agree to a vote in the House of Commons, which is a quite different matter both politically and legally from passing an Act of Parliament. Politically, getting a Bill through Parliament is a far more substantial undertaking because amendments can be tabled against a Bill, triggering debates and significant political pressure, and because it has to pass through both Houses. On 7 December 2016, shortly before the hearing in the Supreme Court, the Commons held a vote on the timetable for triggering art 50 of the TEU and approved the Government's intention to trigger before the end of March 2017.<sup>17</sup> An arguably important concession was however won by the opposition on this occasion, and the motion passed called on the Prime Minister to commit to publishing an outline of her Brexit plans. The vote was drawn to the Supreme Court's attention apparently to demonstrate that Parliament was engaged in the Brexit process. Its legal relevance, however, was nil.

Then, in January, shortly before the Supreme Court was due to deliver its verdict (which, according to leaks, the Government expected to lose<sup>18</sup>) Theresa May delivered a lecture in which she gave the first significant details about the Government's Brexit plans.<sup>19</sup> The speech was later substantially reproduced in the White Paper for the European Union (Notification of Withdrawal) Bill.<sup>20</sup> Despite amendments being tabled in the House of Lords,<sup>21</sup> and substantial debates in both Houses – a process that well

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been any judicial consideration of the Government's actions.

<sup>17</sup> HC Deb 7 December 2016, vol 613, col 220-336.

<sup>18</sup> Christopher Hope 'Supreme Court Brexit appeal: Judges 'heading for split 7.4 decision' in narrow win for Remain campaigners' *The Telegraph* (London, 10 December 2016) <[www.telegraph.co.uk/news/2016/12/10/supreme-court-brexit-appeal-judges-heading-split-7-4-decision/](http://www.telegraph.co.uk/news/2016/12/10/supreme-court-brexit-appeal-judges-heading-split-7-4-decision/)> accessed 10 August 2017.

<sup>19</sup> T May, 'Speech by Theresa May' (Lecture at Lancaster House, reprinted in *The Daily Telegraph*, London, 17 January 2017) <[www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/](http://www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/)> accessed 10 August 2017. The degree to which the provision of this information reflected the motion passed by the House of Commons in December and the degree to which it reflected a recognition that an Act would likely be required by the Supreme Court is a matter of speculation.

<sup>20</sup> Department for Exiting the European Union, 'The United Kingdom's exit from and new partnership with the European Union' (Department for Exiting the European Union, Cm 9471, 2 February 2017) <[www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper](http://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper)> accessed 10 August 2017.

<sup>21</sup> The amendments, in outline, were to: (1) require the Government to bring forward



illustrated the substantial political difference between a vote in the House and passing a Bill - the European Union (Notification of Withdrawal) Bill passed without amendment. The Government did however concede during the passage of the Bill that a further vote in Parliament would be held on any final deal struck with the EU.<sup>22</sup> The *Miller case* did not, therefore, prevent, or even delay, Brexit by requiring an Act of Parliament before art 50 of the TEU was triggered. The part played by the *Miller case* in the UK's Brexit process are matters we leave for others, but if nothing else, parliamentary supremacy was affirmed and the vital role of the courts, and in particular the role of the Supreme Court, in upholding our constitution was stamped into public consciousness.

### 1.3 The role of blogging

Whilst the Internet and blogging have gradually become staples of legal practice and academia over the past few years, *Miller* was the first case in British constitutional history to have been not only shaped by academic blogs but also extensively and publically discussed over the Internet during the litigation process. Within the first three days, our blog post was viewed over 150,000 times.<sup>23</sup> The level of interest provides an interesting social commentary on the feelings of many in the days immediately following the Brexit result and the extraordinary, desperate, thirst for information and analysis, as well as hope amongst remainers that Brexit could still be avoided. However, our blog post proved to be only the first of very many others, many of which analysed the issue in much more detail than we had done. Most, but not all, of these blog posts were posted on the UK Constitutional Law Association Blog. An indication of the way the *Miller case* was reflected in the volume of traffic on the blog site is provided by the following table which shows sharp increases in traffic following the referendum and then before and after the Divisional Court's judgment and in the lead-up to the hearing in the Supreme Court:

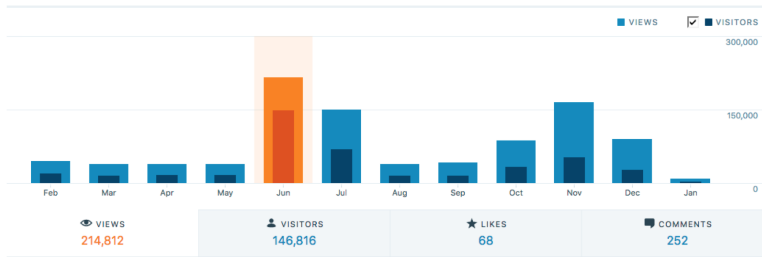
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proposals to secure to persons exercising EU rights in the UK similar or the same rights after Brexit; and (2) that the approval of both Houses of Parliament would be required on the outcome of negotiations with the EU but prior to the formation of an international agreement with the EU. Both proposals were rejected by the Commons '[b]ecause it is not a matter which needs to be dealt with in the Bill.' HL Deb 13 March 2017, vol 779, col 1709.

<sup>22</sup> HC Deb 13 March 2017, vol 623, col 43.

<sup>23</sup> Since publication it has been viewed over 220,000 times.

## Reflections on Miller



Source: UK Constitutional Law Group Annual Report 2017

Following the Divisional Court judgment, *Miller*-related blog posts routinely obtained over 1,000 views with some getting between 5,000 to 10,000. To put this in wider context, academic contributions posted on the Social Sciences Research Network (SSRN) online platform, which is regularly used by academics to get contributions into the public domain in advance of, or as an alternative to, publication in academic journals, have been described as having ‘extremely large’ access rate figures if they reach the low hundreds.<sup>24</sup> The *Miller*-related blog posts reached a wide audience and had an impact on national discourse. As the UK Constitutional Law Blog’s Annual Report noted:

[There were] 102 Brexit-related posts in 2016, many of which are re-read and re-tweeted constantly. Blog posts were referred to in the media in the UK and abroad (e.g. *BBC*, *CNN*, *Financial Times*, *The Guardian*, *The Independent*), and were relied on extensively in parliamentary papers, discussions, and in litigation in the *Miller* case, where all parties submitted UKCLA blog posts in their bundles and several were referred to in discussion.

Had *Miller* been decided ten years ago, it is unlikely that legal scholars would have had much impact on the public discussion or understanding of the case. Whilst there may have been a few letters or articles published in newspapers, these would probably have had a limited impact. The speed with which the case reached the Supreme Court would have seriously limited the possibility for peer-reviewed contributions, which are already made difficult in the course of litigation by the length of time between

<sup>24</sup> P Daly, ‘Legal Academia 2.0 – New and Old Models of Academic Engagement and Influence’ (2014) <<https://ssrn.com/abstract=2436600>> accessed 10 August 2017.

submission and publication.<sup>25</sup> The blogging around *Miller* allowed public law academics to respond rapidly – but the format also allowed them to respond at some length and in some detail, including replying to arguments advanced by Counsel which – in another first – were made available by the Divisional Court as daily transcripts published on the court website. Likewise, the skeleton arguments for all parties were published on the Internet prior to the Supreme Court hearing. Thus, they became the subject of immediate scrutiny by academics and others in online discussion.

There were at least two benefits brought by these developments in academic legal discourse. First, and perhaps most importantly, those who wanted to be informed about the legal debates had a source to which they could turn. The numbers of those accessing the blog posts confirms that this interest was not confined to legal academics and their students. The blog posts were also read by the general public, keen to know the constitutional issues being debated in the courts. And this interest extended to the media – both in print and broadcast – which ran stories about the *Miller* case that often included interviews with, or quotations from, those academics blogging about the case. This opening-up of legal discussion is an almost unequivocally good thing. This new transparency can enhance public understanding of the courts and the operation of the constitution, and gives resources to those outside of legal academia that want to engage in these constitutional debates.

Secondly, the blogging informed the arguments of the barristers before the courts – especially before the Supreme Court. Thirty-five blog posts were put before the Supreme Court – of which twenty-nine were published or re-published on the UK Constitutional Law Association Blog. The arguments and positions of blogging academics also found their way into the skeleton arguments on both sides. In its judgment the majority of the Supreme Court recorded that it had been ‘much assisted’ by the published academic contributions since the Divisional Court’s judgment was handed down.<sup>26</sup> These papers had, ‘resulted in the arguments advanced before

<sup>25</sup> The Modern Law Review was able to publish three articles on the topic in its November 2016 edition by Sionaidh Douglas-Scott, Robert Craig and Gavin Phillipson, however by the time that these were published they had been superseded by the Divisional Court’s judgment. They nonetheless provided valuable contributions which were cited to the Supreme Court. Lord Millett published a piece on what he believed to be the ‘real question’ in the appeal to the Supreme Court from the Divisional Court’s judgment in *Miller* in Vol 7 of The UK Supreme Court Yearbook, which was cited in argument to the Supreme Court and adopted by the Government in its case: Lord Millett, ‘Prerogative Power and Article 50 of the Lisbon Treaty’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 7: 2015 – 2016 Legal Year* (rev edn, Appellate Press 2017) 190; UK Supreme Court (Transcript, 5 December 2016) <[www.supremecourt.uk/docs/draft-transcript-monday-161205.pdf](http://www.supremecourt.uk/docs/draft-transcript-monday-161205.pdf)> accessed 10 August 2017, 132-33.

<sup>26</sup> *Miller* (UKSC) (n 3) [11] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke,

this court being somewhat different from, and more refined than, those before that court.<sup>27</sup> It is clear from the majority's judgment as well as that of the dissenting judges, that the large number of blog posts examining the Divisional Court's judgment and the arguments advanced by the legal teams on each side had been influential. Blogging functioned as a sort of 'crowd-sourcing' of legal argumentation. A far wider, and more diverse, range of people was involved in the identification and criticism of possible legal arguments than there has ever been before this case. By the time the Supreme Court started its hearings, the legal reasons on which the decision would turn had already been extensively scrutinised and debated online, although, as we shall explain, the Supreme Court majority still managed to surprise by emphasising a line of reasoning that had not been prefigured in the academic debates.

Paul Daly has essayed the 'emergent' new model of academic engagement that was witnessed in the *Miller* case. According to this new model – which Daly terms 'Academia 2.0' – the ability of academics to set-out ideas and engage in debates over the internet breaks down barriers between academic lawyers and the wider community of internet users, which in the right circumstances can facilitate academic contribution to the genesis and course of litigation. As Daly explains, the ability of academics to influence litigation and court outcomes was demonstrated by the *Obamacare* case in the US, as well in Canada, in the litigation in which Prime Minister Harper's nominee for the Canadian Supreme Court was found ineligible. In both cases, blog posts and Internet posts may have shaped legal argumentation and may have affected judicial outcomes.<sup>28</sup> *Miller* is the first case in which this phenomenon has been witnessed in the UK. It is unlikely to be the last.

## 2 Two Landmark Constitutional Cases

The *Miller* litigation resulted in two momentous decisions. The Supreme Court's decision is, of course, the ruling that will now receive most attention, but that decision built on a powerful judgment of the Divisional Court.

### 2.1 The Judgment of the Divisional Court

The Divisional Court, constituted by the Lord Thomas CJ, Sir Terence Etherton MR, and Sales LJ, delivered a unanimous and unequivocal

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Lord Wilson, Lord Sumption and Lord Hodge).

<sup>27</sup> *ibid.*

<sup>28</sup> Daly (n 24); *National Federation of Independent Businesses v Sebelius* 132 S Ct 2566 (2012); *Reference re Supreme Court Act*, ss 5 and 6 [2014] 1 SCR 433.

judgment in favour of Gina Miller and Deir Dos Santos. The Secretary of State relied on the argument that the undoubted Crown prerogative power to make and withdraw from treaties would remain in Crown hands, absent direct and explicit statutory control, ‘even if its use would result in a change to the common law and statutory rights.’<sup>29</sup> He further submitted that the language of the ECA 1972 exhibited no intention to confer rights or keep Britain in the EU, and that the case of *De Keyser’s Royal Hotel*<sup>30</sup> contemplated the prerogative powers surviving unless excluded by express statutory regulation, or the necessary implication of the scheme of the statute.

The Divisional Court found for the claimants. The key infirmity in the Secretary of State’s position was that it gave insufficient weight to the ‘background constitutional principles which inform the inferences to be drawn as to what Parliament intended by legislating in the terms it did.’<sup>31</sup> For a start, the 1972 Act was itself a statute of particular constitutional significance, and must be read accordingly.<sup>32</sup> Drawing on the emerging jurisprudence on ‘constitutional statutes’ the Court found that the 1972 Act was ‘exempt from casual implied repeal by Parliament’.<sup>33</sup> That made the Government’s claim that its legal effects could be removed through the exercise of the prerogative particularly unattractive.<sup>34</sup> The Divisional Court identified a number of rights that would be lost by the triggering of art 50 of the TEU, and found that, ‘unless Parliament legislates to the contrary, the Crown should not have power to vary the law of the land by the exercise of its prerogative powers.’<sup>35</sup> This constitutional principle, embodied in the rules of the common law that determine the relationship between statute and the prerogative, was decisive. Since it was ‘common ground’ between the parties that s 2(1) of the 1972 Act ‘would be stripped of any practical effect’ by giving notice under art 50 of the TEU, the conclusion followed that there was no power to give notice.<sup>36</sup> This conclusion was reinforced by a careful reading of the 1972 Act. There were eight discrete aspects of the 1972 Act – most notably its long title and the wording of s 2 and its heading – that the Divisional Court found evinced a parliamentary intention that EU rights shall take effect in domestic law and that this effect should not be capable of being undone or overridden by action taken by the Crown in

<sup>29</sup> *Miller* (EWHC) (n 2), [76], see further [75]-[81] (Lord Thomas CJ, Sir Terence Etherton MR and Sales LJ).

<sup>30</sup> *A-G v De Keyser Royal Hotel Ltd* [1920] AC 508 (HL).

<sup>31</sup> *Miller* (EWHC) (n 2), [82] (Lord Thomas CJ, Sir Terence Etherton MR and Sales LJ).

<sup>32</sup> *ibid* [43]-[44], [82], esp [87]-[88].

<sup>33</sup> *ibid* [88], citing *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 (DC) [60]-[64] (Laws LJ (with whom Crane J agreed)).

<sup>34</sup> *ibid*.

<sup>35</sup> *ibid* [84].

<sup>36</sup> *ibid* [51].

exercise of its prerogative powers.<sup>37</sup> The decision of the Divisional Court rested on both the rights argument and the frustration argument: triggering art 50 of the TEU would frustrate the purpose of the 1972 Act and, in so doing, would also remove rights.

Given these reasons for the decision, it might be asked why the Divisional Court felt the need to engage with the concept of constitutional statutes.<sup>38</sup> The constitutional nature of the 1972 Act might not seem to be of direct relevance: after all, the rules which determine the relationship between statutes and prerogatives apply to any statute, whatever the subject matter. The constitutional nature of the 1972 Act was significant, though, in determining the impact of the exercise of the prerogative on that statute. Following *Fire Brigades Union*, the Divisional Court determined that the prerogative could not be used to strip a statute of effect.<sup>39</sup> In the Divisional Court's judgment, the discussion of constitutional statutes illuminated the purpose and legal effect of the 1972 Act, and, further, supported the view that the intended effects of a statute such as the 1972 Act should not be construed in the narrow fashion contended by the Secretary of State.<sup>40</sup> The Divisional Court wove the conventional legal principles represented by the *Case of Proclamations* and *Fire Brigades Union* case together with the jurisprudence on constitutional statutes. The judgment is compellingly written, in admirable prose, and deserves to take its place as the companion judgment to the longer and more pluralistic judgment of the majority of the Supreme Court.

## 2.2 The Judgment of the Supreme Court

The appeal to the Supreme Court was the first ever to be 'leapfrogged' over the Court of Appeal on grounds of national importance and it was the first case in which the Supreme Court has sat as a panel of eleven judges.<sup>41</sup> Fifty-seven barristers appeared for the various parties and interveners:

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<sup>37</sup> *ibid* [92]-[94].

<sup>38</sup> When we wrote our blog post, we felt that emphasizing the constitutional nature of the ECA 1972 would leave the argument open to the characterisation that it *depended upon* the identification of the 1972 Act as a constitutional statute, when the nature and implications of constitutional statutes remains controversial. In our view, the argument does not depend upon such characterization. We, therefore, merely noted in our blog post that the constitutional nature of the 1972 Act supports the frustration argument that we advanced.

<sup>39</sup> *Miller* (EWHC) (n 2) [98]-[99] (Lord Thomas CJ, Sir Terence Etherton MR and Sales LJ), citing *Fire Brigades Union* (n 6).

<sup>40</sup> *ibid* [86]-[88].

<sup>41</sup> This included all sitting Supreme Court Justices at that time. The power to leapfrog on grounds of 'national importance' is found in the Administration of Justice Act 1969, s 12(3A)(a). Though there have been other leapfrog appeals on the basis of different criteria, this is the first to have done so by reason of being a 'matter of national importance.'

twenty-seven of them were Queen’s Counsel, and there were several law professors. The Governments of Scotland and Wales were represented, as were several Members of the Northern Ireland Legislative Assembly.<sup>42</sup> The judgment of the Divisional Court was upheld. The remainder of this part of the article will examine the majority and dissenting positions on the relationship between the 1972 Act and the prerogative power to give notice under art 50 of the TEU, as well as the devolution issues raised by the case.

### 2.2.1 The majority judgment on the 1972 Act

The central conclusion of majority of the Supreme Court was that:

[B]y the 1972 Act, Parliament endorsed and gave effect to the United Kingdom’s membership of what is now the European Union under the EU Treaties in a way which is inconsistent with the future exercise by ministers of any prerogative power to withdraw from such Treaties.<sup>43</sup>

This central finding was composed of three interconnected sub-arguments: the sources argument, the rights argument, and the frustration argument. The second and third of these are now familiar, but the first is not. Though the rights argument and the frustration argument are reflected in the reasoning of the Supreme Court, centre stage in its reasoning is the emphasis placed on EU law as a ‘source’ of law, which was not reflected in the arguments of the parties to the case before it (though some interveners posited that giving notice would lead to a change in the rule of recognition).<sup>44</sup> The sources argument is also not found, or at least, is not made explicitly, in the reasoning of the Divisional Court: it is new to the Supreme Court.

According to the majority, the ‘main difficulty’ with the Secretary of State’s argument is that it ‘does not answer the objection based on the constitutional implications of withdrawal from the EU.’<sup>45</sup> It found that exit from the EU would result in the removal of a source of law from the domestic legal order, and this was not lawful absent legislative authority.

<sup>42</sup> The Agnew claim included not only Steven Agnew MLA but Members of the Legislative Assembly drawn from the Green Party, the Social and Democratic Labour Party, the Alliance Party and Sinn Féin respectively; and such included three party leaders and a number of former Ministers of the Northern Ireland Executive.

<sup>43</sup> *Miller* (UKSC) (n 3) [77] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge).

<sup>44</sup> A proposition rejected by the majority (*ibid* [60]) and Lord Reed as noted in the discussion below.

<sup>45</sup> *ibid* [81].

At the most general level, the majority found that ‘a major change to UK constitutional arrangements can[not] be achieved by ministers alone; it must be effected in the only way the UK constitution recognises, namely by Parliamentary legislation.’<sup>46</sup> The majority further found that ‘the loss of a source of law is a fundamental legal change [...]’.<sup>47</sup> The 1972 Act provided a new constitutional process for making law in the UK, and thus it constituted EU law and legal institutions as a new source of law for the UK.<sup>48</sup>

That the ECA 1972 brought a new source (or sources) of law into the English legal system is uncontroversial, if we understand the idea of sources in its regular sense – that is, as the incorporation of a new set of rules and rule-making institutions into the system. Plainly, EU law is a source of both legislation and judge-made law that has direct effect in UK law, and several textbooks, including a leading one by Mark Elliot and Robert Thomas, describe EU law as a source of law.<sup>49</sup> Indeed, statutes that create new sources of law are commonplace; for example, many local authorities enjoy a limited power to make law and become ‘sources’ of law in this sense. Furthermore, one would expect that clear statutory intent would be needed for such sources to be removed by executive action without the further sanction of Parliament. However, parts of the majority judgment appear to move beyond such an analysis, and hint at a more radical sense in which European law is a ‘source’ of law. The Judges present European law as a direct source of law, emphasising its capacity to ‘override’ national law, and down-playing – though without denying – the role of the 1972 Act as the basis for this capacity.<sup>50</sup> It is the EU institutions that are the ‘relevant’ source of the law.<sup>51</sup> Such statements are not of course inconsistent with an understanding of the term ‘source’ in the more limited sense previously described; but, significantly, the comparison with delegated legislation –

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<sup>46</sup> *ibid* [82], see also [81], [83].

<sup>47</sup> *ibid* [83], see also [61]-[67].

<sup>48</sup> *ibid* [80] (‘One of the most fundamental functions of the constitution of any state is to identify the sources of its law. And, [...], the 1972 Act effectively constitutes EU law as an entirely new, independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning.’).

<sup>49</sup> Mark Elliot and Robert Thomas, *Public Law* (2<sup>nd</sup> edn, OUP 2014) 45 (indicating international law as being ‘in some sense’ a source of UK constitutional law); Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (Hart Publishing 2012) 28-29. Notably, Colin Turpin and Adam Tomkins, *British Government and the Constitution* (8<sup>th</sup> edn, CUP 2012) do not include EU law as a source but do include subordinate legislation, which is also incompatible with the narrow reading of ‘source’ adopted by Lord Reed in dissent. Anthony Bradley, Keith Ewing and Christopher Knight, *Constitutional and Administrative Law* (16<sup>th</sup> edn, Pearson 2015) 11-18, do not single out EU law or delegated legislation as sources of the constitution.

<sup>50</sup> *Miller* (UKSC) (n 3), [61] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge).

<sup>51</sup> *ibid*.



that is, a legislative acts done under authority of an Act of Parliament – is expressly rejected.<sup>52</sup> The majority says that unlike with delegation legislation, there has been an ‘assignment of legislative competences’ by Parliament to the EU institutions.

A conservative reading of *Miller* – a reading that ties the case to past jurisprudence – would treat the sources argument as a working-through of the frustration argument. Like the Divisional Court’s discussion of constitutional statutes, the claim that the 1972 Act incorporates a new source of law and a new set of legal rights into the into the domestic legal system demonstrates that the triggering of art 50 of the TEU would frustrate the purpose of the statute and strip people of their existing legal rights. Indeed, without doubt, the frustration argument remains at the core of the majority’s reasoning in the Supreme Court. The majority found that giving notice under art 50 would be incompatible with the terms of the 1972 Act. The provisions of the 1972 Act, ‘far from indicating that ministers had the power to withdraw from the EU Treaties [...] support the contrary view.’<sup>53</sup> Here again following the Divisional Court, the majority found that the long title, the general scheme of s 2 of the 1972 Act, and the side-note to s 2 (‘General Implementation of the Treaties’) ‘points away from a prerogative to terminate any implementation.’<sup>54</sup> Indeed, as a general matter, they found that the 1972 Act Parliament ‘endorsed and gave effect to the UK’s future membership of the European Union, and this became a fixed domestic starting point.’<sup>55</sup> Thus, the UK Government would be acting contrary to the statutory purpose by taking the UK out of the EU. Furthermore, the majority was not persuaded by the claim that since s 2 of the 1972 Act envisages that the content of EU rights could vary ‘from time to time’ the arrangements under the Act must be viewed as contingent on membership, rather than be understood as the parliamentary conferral of vested rights: ‘A complete withdrawal represents a change which is different not just in degree but in kind from the abrogation of particular rights, duties or rules derived from EU law.’<sup>56</sup> The majority, furthermore, held that whilst s 2 of the 1972 Act envisages the rights of UK citizens changing under the Act as EU law varies, it does not envisage the rights changing by way of executive withdrawal from the EU.

In contrast to the majority’s extensive discussion of the purpose of the 1972 Act, their discussion of the particular significance of the rights conferred by European Law is relatively brief. This was partly because there was

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<sup>52</sup> *ibid* [68].

<sup>53</sup> *ibid* [88].

<sup>54</sup> *ibid*.

<sup>55</sup> *ibid* [82], see also [77].

<sup>56</sup> *ibid* [81].

extensive debate before the Divisional Court as to what ‘category’ of rights would be lost by withdrawal from the EU and whether withdrawal would in truth frustrate any rights that could not be replicated in domestic law, such as working time rights of employees. Before the Supreme Court, the Secretary of State did not challenge the Divisional Court’s analysis of the effect of withdrawal from the EU on rights,<sup>57</sup> but sought to contend that all rights given effect by the 1972 Act were inherently conditional on membership. The majority expressly endorsed the Divisional Court’s conclusion that the loss of EU rights intended to be given effect by the 1972 Act represented ‘another’ and ‘related’ ground for holding that art 50 of the TEU could not be triggered without an Act of Parliament.<sup>58</sup> Nevertheless, the majority considered that the rights reasoning did not go far enough because the 1972 Act not only gave effect to EU rights but created an even more fundamental constitutional change: a wholly new source of law.

As with the Divisional Court’s discussion of constitutional statutes, the Supreme Court’s discussion of the sources argument can be seen to reinforce the frustration argument and is, as the majority itself said, related to the rights argument. The majority reasoned that the 1972 Act created a structure through which institutions outside of our constitutional order were accorded the capacity to make law for the UK. The triggering of art 50 of the TEU would lead to the loss of this capacity, the loss of a source of law, and – as a result – the loss of certain rights for individuals; but not only rights, obligations and powers, and immunities and well: an entire corpus of law, EU law. Triggering art 50 would deprive the 1972 Act of its intended purpose by reversing a substantial constitutional change – the creation of a new source of law – that was brought about by Parliament in 1972. On this interpretation, rather than a discrete argument for the conclusion reached by the Supreme Court, the sources argument is an aspect of the frustration and rights arguments. However, central propositions in the majority judgment suggest a considerably bolder premise for the decision, which is distinct from the frustration and rights arguments.

On this reading, the majority recognise a distinct, new principle of the common law, amounting to a broad demand that fundamental constitutional changes in the UK can only be undertaken through statute, at least absent clear words in a statute to the contrary. This reading of the judgment may explain the efforts made by the majority to present EU law as a direct source of law, one which cannot be compared to delegated legislation. Whilst there may be a justification for developing such a new legal principle, it is not clear that a case of this controversy was the occasion for it, above all when other

<sup>57</sup> *Miller* (EWHC) (n 2), [57]-[66] (Lord Thomas CJ, Sir Terence Etherton MR and Sales LJ).

<sup>58</sup> *Miller* (UKSC) (n 3) [83] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge).

grounds were sufficient to dispose of the appeal in a way that recognised its constitutional significance. *Miller* is easily explicable on the grounds of long-standing rules of the common law, and, as we have seen, these common law rules can be traced through the majority decision. The creation of a new legal principle on top of this reasoning is, perhaps, an unnecessary distraction, though it certainly adds to the interest and importance of the Supreme Court's judgment.

### 2.2.2 The Dissenting Judgments

For reasons of space, we focus in this section on the judgments of Lord Reed and Lord Hughes. Lord Hughes's short judgment is helpful in elucidating an important aspect of the legal conundrum at the heart of the *Miller* case. Lord Hughes posited two legal rules which apparently point in opposite directions. Rule 1 is that the executive cannot change law made by Parliament (or the common law) (i.e. effectively the rights argument based on the *Case of Proclamations*); Rule 2 is that the making of treaties and conducting foreign relations is a matter for the competence of Government. In its submissions, the Government emphasised this latter rule and said – basing itself on *De Keyser's* case – such a power could only be removed by express words or necessary implication. However, in our view, the two rules set up a false conflict. The second rule is not, and was never intended to be, understood as permitting any derogation from the first rule. The Government is free to act on the international plane only insofar as doing so does not affect domestic rights. This point is central to understanding the strength of the argument for Ms Miller. It was explained most clearly by Lord Oliver in the *Tin Council case*, 'as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, *does not extend to* altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament.'<sup>59</sup> Save perhaps in relation to certain acts done in war time, the royal prerogative does not empower the government to abrogate or change existing statutory or common law legal rights and obligations in the UK. Therefore, the rule that the government can act on the international plane does not 'pull in the opposite direction' from the rule that government cannot change the law, because the former rule merely describes a domain of Governmental freedom of action that exists *because it does not affect domestic legal rights*.

In countries where written constitutions confer executive powers in certain areas such as international relations there might be a genuine conflict

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<sup>59</sup> *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL), 500 (emphasis added).

between two such rules, if the executive power is stated to be devoid of any relevant qualification.<sup>60</sup> Yet under the British constitution, there is no such conflict. Furthermore, to say that there must be positive parliamentary intent found to exclude the prerogative is to get the matter the wrong way around; rather, there must be positive parliamentary intent for executive action to be allowed to abrogate domestic statutory or common law rights.<sup>61</sup>

Lord Hughes considered that which rule was to prevail depended on the correct reading of the ECA 1972, and his Lordship agreed with the reasons given by Lord Reed for concluding that the 1972 Act ‘was only ever to be operative for so long as the UK was a member’ of the EU.<sup>62</sup> Hence, Lord Hughes found that it was intended that it would ‘cease to operate’ to give effect to EU law rights and obligations if the UK ever left the EU.<sup>63</sup> It is to Lord Reed’s judgment, therefore, that we must turn. And a crisp statement of Lord Reed’s key reasoning is easily found:

[T]he effect which Parliament has given to EU law [...] is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK’s membership of the EU. The Act imposes no requirement, and manifests no intention, in respect of the UK’s membership of the EU. It does not, therefore, affect the Crown’s exercise of prerogative powers in respect of UK membership.<sup>64</sup>

In Lord Reed’s view, the reliance placed by the majority on EU law as a source of law was misguided. His Lordship rejected the idea that EU law was a source in the sense that to remove it would be to alter the rule of recognition: ‘EU law is not a source of law of the relevant kind:

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<sup>60</sup> For related considerations, see eg *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP). The North Gauteng High Court found that though the constitution conferred executive authority to negotiate and sign treaties, the constitutional requirement of parliamentary approval prior to executive ratification of treaties also entails that such approval is required before giving notice of withdrawal from ratified treaties.

<sup>61</sup> The position is different where there are two overlapping powers, one prerogative and one statutory and the question is whether the statutory power is exclusive. In such a case, *De Keyser* holds that the prerogative is not ousted absent express words or necessary implication (cf *R v Secretary of State Home Department, ex p Northumbria Police Authority* [1989] QB 26). The *De Keyser* case, decided at a time when courts more readily accepted that statutes did not bind the Crown, may itself be open to question in modern times, but it does not affect the result in *Miller*: cf *De Keyser* (n 30).

<sup>62</sup> *Miller* (UKSC) (n 3) [281].

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid* [177].

that is to say, a source of law whose validity is not dependent on some other, more fundamental, source of law but depends on the ultimate rule of recognition.<sup>65</sup> For the reasons given in the previous section, we believe this overstates significance of EU law as a source of law. There is nothing in the majority argument that turns on using the term ‘source’ in the narrow way that Lord Reed finds ‘relevant’, and nor can it be denied that EU institutions generate enormous amounts of law that are immediately applicable and override national law in the case of conflict. That the new source of law depends on a statute – the 1972 Act – for its legal validity does not prevent us from identifying it as a discrete source of rights and obligations in UK law: it is the statute that has brought this source into the system. The majority’s conclusions based on the frustration argument is not affected by Lord Reed’s rejoinder. Even though the domestic effect of European law depends on a UK statute, it remains the case that triggering art 50 will lead to the removal of this source from the English legal system. That will represent a major alteration to the sources of domestic law.

Of the majority’s argument that for EU law to cease to have effect in the UK would be a ‘major change’ in the UK constitution, Lord Reed found that it depended on what one took the effect of the 1972 Act to be. It depended on whether the ECA 1972 was understood to create new rights and obligations, as the claimants contended, or merely provided a conduit through which the Crown’s treaty obligations would be given effect.<sup>66</sup> In his Lordship’s view, ‘EU law’s ceasing to have effect as a result of the UK’s withdrawal from the Treaties is something which follows from the 1972 Act itself, and does not require further legislation.’<sup>67</sup> Lord Reed similarly rejected the rights argument because the possibility under s 2 of the 1972 Act that rights would, in the language of the statute, change ‘from time to time’ shows, in his view, that Parliament recognised that rights given effect under the Act ‘may be added to, altered or revoked without the necessity of a further Act of Parliament [...]’.<sup>68</sup> The so-called ‘vital difference’ between alteration and withdrawal, on which the majority judgment laid emphasis, had ‘no basis in the language of the 1972 Act’, according to Lord Reed.<sup>69</sup>

The frustration argument was also rejected for all the reasons given above.

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<sup>65</sup> *ibid* [224]. The reference here to the ultimate rule of recognition is to borrow from the analysis of HLA Hart, *The Concept of Law* (2<sup>nd</sup> edn, OUP 1994) ch VI. Under this analysis, some rules of law have authority not because they are derived from a superior law or rule that confers that authority on them, but merely because they are ‘recognised’ by the law applying officials as having such authority.

<sup>66</sup> This rolls together two arguments that are presented in his judgment as alternatives at: *ibid* [229]-[230] (Lord Reed).

<sup>67</sup> *ibid* [230].

<sup>68</sup> *ibid* [187], see further [204].

<sup>69</sup> *ibid*.

If the point of the 1972 Act was to create a conduit, but leave to the Crown's treaty power the option of whether to connect it, then it is wrong to say that the Crown *disconnecting* that pipe is contrary to the purpose of the Act. The Act's legal effect was contingent upon separate and discrete executive action. For that reason, the *Ex p Fire Brigades Union* case was inapposite and the conclusion is only reinforced by the *De Keyser* case, which makes it clear that only direct statutory wording or necessary implication will be read to oust the prerogative powers.

In our view, Lord Reed's dissent, though powerfully argued, is unconvincing. It requires us to take an artificial view of the 1972 Act, the purpose of which, as the majority found, was to bring European Law into domestic law and thereby to give effect to the UK's membership of the EU. It is compatible with the wording of the Act on only very a strained reading, and is clearly incompatible with its spirit. There are no textual indications which support it, and several textual indications, identified by the Divisional Court and Supreme Court majority, which contradict it. The majority also took the view, along with the Divisional Court, that given the constitutional significance of the 1972 Act, the power for the executive to withdraw from the EU would require clear statutory authority. The executive could not justify doing so without a further Act of Parliament, merely by invoking the legislative silence on the issue. Interestingly, Lord Reed agreed with this approach to statutory interpretation: 'As the majority of the Court rightly state [...], the fact that a statute says nothing about a particular topic can rarely, if ever, justify inferring a substantial change in the law.'<sup>70</sup> However, Lord Reed spun this the other way, reasoning that the absence of any express statutory term addressing withdrawal from the EU meant that it had not disturbed what his Lordship described as a 'fundamental principle', that powers relating to the UK's participation in treaties 'are exercisable by the Crown.'<sup>71</sup> However, this form of reasoning is open to the same criticism as Lord Hughes' judgment, in that it assigns some positive constitutional basis and force to the ability of the executive to act in the realm of treaty making, rather than recognising, as Lord Oliver explained in the *Tin Counsel* case, that this is a sphere of executive action which exists only because and insofar as it does not affect domestic legal rights.

Notably, Lord Reed also endorsed the contention that there are 'compelling practical reasons' for leaving treaty making powers in the hands of the executive, citing *Blackstone's Commentaries*.<sup>72</sup> However, to use such a proposition as the foundation for a statutory presumption favouring

<sup>70</sup> *ibid* [203] (Lord Reed), citing [108] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge).

<sup>71</sup> *ibid* [203].

<sup>72</sup> *ibid* [160].

executive power – one that would operate essentially in the way the presumption in *Ex p Simms* does in favour of a construction of general statutory provisions that avoids infringing human rights – would be a mistake. There are, indeed, sound constitutional reasons for wide administrative discretion in the area of foreign affairs, but there are also sound reasons for wide discretion throughout the operation of the administrative state. There is nothing special about foreign affairs that distinguishes it, in this fundamental respect, from many other areas of national life and law. Hence, to convert such a conventional position into a presumption on par with the principle of legality in *Ex p Simms*, but one pointing in the diametrically opposite direction, would have significant implications beyond the field of foreign affairs to other areas where general statutory terms impact on individual rights in areas of governance where the executive justifiably is recognised as having a broad discretion in exercising those power that it does have. The courts should not interpret legislation in those fields so as to ensure executive power is maximised even when it impacts on individual rights. It should be recalled that it was just such an approach to legislative interpretation that led to the courts finding, without any clear legislative basis for doing so, that the British Government had power to intern British citizens in war time. The legislation had to be read so as to maximise and not frustrate executive power in the field of national security, an approach to statutory interpretation which was subsequently followed by the majority of the House of Lords in *Liversidge v Anderson*.<sup>73</sup> We should be mindful, too, that legislative presumptions operate in a constitutional environment in which a government seeking to rely on a wide interpretation of a statute, but which is stopped by a court from doing so, is able to ask Parliament to pass a bill conferring this authority. On the other hand, a presumption that grants wide latitude to the executive may lead to the conferral of powers which are in practice nearly impossible for Parliament to remove. Such a finding would only rarely be brought to Parliament's attention and, if MPs are unwilling to allow the Government this power, the ability to initiate and enact restrictive legislation without Government support is highly constrained. Thus, the approach taken by Lord Reed, in our view, unjustifiably seeks to elevate the constitutional truism that foreign affairs and treaty matters are the province of the executive, to a principle of law which would be used to empower the Government at the expense of Parliament and individual rights.

<sup>73</sup> *R v Halliday ex p Zadig* [1917] AC 260 (HL); for criticism, David Foxtton, 'R v Halliday ex parte Zadig in Retrospect' (2003) 119 LQR 455, 461-87. The approach to construction was applied in *Liversidge v Anderson* [1942] AC 206 (HL), by the majority to interpret Regulation 19B of the Defence of the Realm Regulations in manner that removed judicial supervision of the reasonable of the grounds for internment during the Second World War.

### 2.2.3 The devolution issues

A major difference between the Divisional Court and Supreme Court hearings was the inclusion of the devolved regions in the Supreme Court case.<sup>74</sup> There was only limited academic discussion on the implications of devolution before the *Miller* case, yet it was an important part of the pleadings before the Supreme Court. The Governments of Scotland and Wales intervened, and there were references from the courts of Northern Ireland for clarification of issues live in proceedings there.<sup>75</sup> The submissions coming from these various parties were sophisticated, but two central arguments emerged.

The first was that the devolution statutes contain provisions that make EU law effective in the devolved regions, including empowering and limiting devolved institutions.<sup>76</sup> Giving notice under art 50 of the TEU would deprive these of practical effect. Since these were also 'constitutional statutes', the arguments pertaining to the relationship between the ECA 1972 and prerogative powers might apply to devolved arrangements as well. This argument was essentially a variation on the point raised on behalf of Gina Miller, but made in respect of the devolution statutes.

The second argument turned on the Sewel Convention, the convention that the Westminster Parliament will not normally legislate on devolved matters without the consent of the devolved assemblies.<sup>77</sup> It was argued that this convention would be engaged by an Act of Parliament triggering exit from the EU or another Act taking the UK out of the EU. Those raising the Sewel convention before the court did not contend that it should be rendered legally binding; whilst there is material from which such an argument could have been made, it would have been highly unlikely to succeed.<sup>78</sup> The best that could be hoped for was that the Supreme Court would issue a declaration that the convention was *engaged*, on the basis that removing EU rights, obligations and powers from domestic law would affect a major alteration in devolved competences. That argument is not as ambitious as it sounds given that s 2 of the Scotland Act 2016 amended the Scotland Act 1998 to read in s 28(8): 'it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.' Parliament has, therefore, translated the Sewel Convention into law. The Supreme Court was not

<sup>74</sup> One case in Northern Ireland was decided just as the Divisional Court was composing its reasons, and it was distinguished by the Divisional Court: *Re McCord's Application* [2016] NIQB 85. It is a first instance court hearing for judicial review claims in Northern Ireland.

<sup>75</sup> *Miller* (UKSC) (n 3) [126].

<sup>76</sup> *ibid* [129]-[132].

<sup>77</sup> *ibid* [136]-[151].

<sup>78</sup> See NW Barber, *The Constitutional State* (OUP 2010) ch 6.



asked to say that s 2 of the Scotland Act 2016 would be breached but that the legislation would engage s 2, and the Sewel Convention more generally, because it would constitute legislation concerning devolved matters.

The majority of the Supreme Court declined to answer the first argument, and roundly rejected the second. The former, it felt, was not necessary to decide in light of the success on the principal claims.<sup>79</sup> The second claim relating to the Sewel convention was rejected unanimously in strong terms.<sup>80</sup> It is basic constitutional law that a convention is political rather than legal. And, the Court held, this basic presumption is not dislodged by the act of putting the convention on statutory footing in s 2 of the Scotland Act 2016. The use of the words ‘it is recognised’ and ‘normally’ in the statutory formula, when combined with the basic principle of non-enforceability, meant that the Sewel convention should be treated as unenforceable and indeed non-justiciable (inappropriate for judicial resolution).

The Supreme Court may have been too quick to reject both arguments. The case for finding that the rights argument applied equally to the devolution statutes seems quite hard to deny. To consciously forego judgment on the issue fails to give recognition to the constitutional significance of the devolution arrangements and of the importance, as a matter of both law and principle, of any such finding for the devolved governments and legislatures. We would also contend that the ruling on the Sewel convention and in particular the effect of s 2 of the Scotland Act 2016 was unnecessarily broad. Whilst it would have been a radical step for the court to turn an apparent convention into law, the court could, following the lead of the Canadian Supreme Court,<sup>81</sup> have provided a declaration on the scope of the convention. Asking a court to provide an interpretation of a statutory clause – even if it is not legally enforceable – is well within the judges’ jurisdiction.

### 3 Conclusion

The decision in *Miller* was determined by the principle of representative democracy that structures the UK’s constitution, and which is instantiated

<sup>79</sup> *Miller* (UKSC) (n 3) [130]-[132] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge). In fact, the tenor of [131]-[132] is that the majority was minded to agree with the submission that rights would be removed but felt it unnecessary to so decide.

<sup>80</sup> *ibid* [136]-[151] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge), [177]-[178], [242] (Lord Reed), [243] (Lord Carnwath), [282] (Lord Hughes).

<sup>81</sup> *Re Resolution to Amend the Constitution* [1981] 1 SCR 753.

## *Reflections on Miller*

in the common law rules regulating the relationship between statute and the prerogative. *Miller* represented the application of pre-existing legal principles to a novel set of facts in a uniquely sensitive and highly-charged context. At the heart of the *Miller* decisions lies a simple legal argument: the purpose of the 1972 Act was to give effect to EU law in domestic law, and that rendering the Act nugatory by taking the UK out of the EU frustrated the basic purpose of the Act. Indeed, on the strength of the fact that EU rights were part of UK law, millions of people moved their lives and livelihoods to the UK, and, domestically, millions of British citizens have structured their lives on the assumption that they too could access these rights. Those social facts, and those legal connections, helped convert a dry and legalistic point about the relationship of statute and prerogative into a sensational case, that grabbed the imagination and attention of the general public as well as lawyers. The 1972 Act was nothing short of a new constitutional settlement which brought EU law into domestic law and gave effect to EU rights in our law. Viewing the Act in its broader social and historical context reinforces the fundamental difference between the evolution of EU rights (and obligations) and their removal altogether. Anyone actually exercising such rights in the UK would recognise the difference instantaneously. For them, the alterations to, and the evolution of, EU law has been business as usual; but the complete removal of such rights would be a matter of personal crisis (or, for some, triumph). Lord Hughes and Reed's judgments, exhibiting the strained artificiality of some of the academic commentators that preceded them, view the 1972 Act as being entirely neutral on this major constitutional point, and entirely agnostic about whether EU rights should be effective in UK law. To regard the purpose of the 1972 Act as being indifferent in this way seems to us to be highly formalistic and unhistorical. The unanimous Divisional Court and the majority of the Supreme Court reached the right answer.