The UK Constitution after *Miller*

BREXIT AND BEYOND

Edited by Mark Elliott,
Jack Williams and Alison L Young

THE UK CONSTITUTION AFTER *MILLER*

The judgment of the UK Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* is of fundamental legal, constitutional and political significance. The Supreme Court's judgment discussed the relative powers of Parliament and the Government, the relationship between Westminster and the devolved legislatures, and the extent to which the UK's membership of the EU had changed the UK constitution, both prior to and even after departure. It also provided further evidence of the emerging role of the UK's Supreme Court as a constitutional court, despite the lack of a codified constitution in the UK.

This edited collection critically evaluates the decision in *Miller*, providing a detailed analysis of the reasoning in the judgment and its longer-term consequences for the UK constitution through the period of Brexit and beyond. The case is used as a lens through which to evaluate the modern UK constitution and its potential future evolution. Whatever form Brexit may eventually take, the impact that EU membership and the triggering of Brexit has already had on the UK's constitutional settlement is profound. The book will be of great value to anyone interested in the effect of the *Miller* case and Brexit on the UK's constitution.

The UK Constitution after *Miller*

Brexit and Beyond

Edited by
Mark Elliott, Jack Williams and Alison L Young

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2018

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Elliott, Mark, 1975- editor. | Williams, Jack (Barrister), editor. | Young, Alison L., editor.

Title: The UK constitution after Miller : Brexit and beyond / edited by Mark Elliott, Jack Williams and Alison L Young.

Description: Oxford, UK : Hart Publishing, 2018. | Includes bibliographical references and index.

Identifiers: LCCN 2018011666 (print) | LCCN 2018012292 (ebook) | ISBN 9781509916429 (Epub) | ISBN 9781509916405 (hardback : alk. paper)

Subjects: LCSH: Treaty-making power—Great Britain. | Prerogative, Royal—Great Britain. | European Union—Great Britain. | Miller, Gina, 1965—Trials, litigation, etc. | Great Britain. Department for Exiting the European Union,—Trials, litigation, etc.

Classification: LCC KD4452 (ebook) | LCC KD4452 .U39 2018 (print) | DDC 342.41—dc23

LC record available at https://lccn.loc.gov/2018011666

ISBN: HB: 978-1-50991-640-5
ePDF: 978-1-50991-641-2
ePub: 978-1-50991-642-9

Typeset by Compuscript Ltd, Shannon

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

FOREWORD

The simple binary issue placed before the United Kingdom's voters in the 2016 referendum—to remain in the European Union or to leave it—opened up a cleft which is unlikely ever to heal. On one view, setting aside the hubristic political misjudgement which brought it about and the commerce in political mendacity which it licensed, the outcome has been an act of collective folly for which our children and grandchildren will not forgive us. On another view, the UK is at last on the road to freedom from foreign domination and alien immigration, able now to forge its own destiny as a world trading power.

I happen to hold the first view. But one's personal view of Brexit has little or nothing to do with what this book is about, even if authorial partisanship leaks through many of the fissures in its chapters. For scholarship is not neutral: academics, like judges, embark on an inquiry with some sense of where they hope or expect that it will lead. Their minds may be open, but they are not blank.

There are at least two striking things about Gina Miller's claim that any decision to give notice of withdrawal from the EU treaty was legally one for Parliament and not for Ministers. The first is that the litigation was completely unnecessary: once permission was granted to proceed, nothing would have been more straightforward than to put the issue beyond doubt by placing a Withdrawal Bill before Parliament—as of course eventually happened.

The second—and we come now to the essays in this book—is that there is more than one mode of judicial reasoning. It may be cerebral; it may be intuitive; it may be both. The cerebral mode, at least in its platonic form, proceeds from facts to law to conclusion. This is a paradigm, however, which assumes that both facts and law are clear, or at least are ascertainable with confidence. The minority in the Supreme Court considered that *Miller* was such a case, and they find commendation and support among the contributors. Intuitive reasoning is frequently more potent, but correspondingly more difficult to articulate. It proceeds typically from postulated conclusion to law to facts. The paradigmatic question is: can this be right? It is arguably how the Divisional Court and the majority in the Supreme Court went about deciding the case.

There is nothing unlawyerly or intellectually dishonest about such a process. There can be few judges who have not stood back from a logically impeccable draft judgment, looked at the conclusion and asked themselves: can this be right? I have certainly done so, and been satisfied that my initial conclusion could not stand. More importantly, some of the historic judgments of the common law have taken this course. You can debate which fall into this category, but there can be

little doubt that the great judgment of Pratt CJ in *Entick v Carrington* does: notwithstanding clear authority in favour of ministerial powers of search and seizure, Pratt concluded that it simply could not be right—that it was intuitively unacceptable—that such powers were sanctioned by common law.

The contrast between the majority and minority judgments in *Miller* is, I think, of this kind. The majority view may lack the crystalline logic of the minority. But it falls back on something which its authors take to be more fundamental: the centuries-long process of restricting the use by Ministers of the Royal Prerogative to bypass Parliament, and the role of the courts in securing this cornerstone of a modern democracy. This may sound politically charged—as Lord Reed cautioned it was—but it is what the rule of law is about. It is one thing to say, as can today increasingly be said, that Ministers are themselves subject to judicial review if they abuse their prerogative powers; it is another to ensure that Parliament is not simply circumvented by them.

In the end, in one sense, it did not matter: a laconic and practically unopposed Withdrawal Bill handed the Prime Minister the discretionary power the courts had denied her. In a more important sense, however, it has mattered a great deal. The abuse directed by the *Daily Mail* at the Lord Chief Justice, the Master of the Rolls and a Lord Justice of Appeal, for holding that withdrawal was a matter for the legislature, faded when the Supreme Court, whose supremacy the Brexit campaign had been vocally promoting, agreed with them. It has meant something that the Supreme Court has been able, so far, to fly above the storm.

The legal arguments remain massive and are not going to be easily resolved. This is not least because the legal issues and the political critiques tend to be joined at the hip: there is now in substance a pro-Brexit and an anti-Brexit jurisprudence. Both the lawyers and the law students who will spend many years picking their way through the issues and arguments to be found in these pages would do well to keep this in mind as they ponder the future meaning of parliamentary supremacy.

Stephen Sedley
Former Lord Justice of Appeal and Visiting Professor of Law
Oxford
January 2018

CONTENTS

Foreword by Sir Stephen Sedley v
List of Contributors ix

1. **The *Miller* Tale: An Introduction** 1
   Mark Elliott, Jack Williams and Alison L Young
2. **Prerogative Powers After *Miller*: An Analysis in Four E's** 39
   Jack Williams
3. ***Miller* and the Prerogative** 69
   Anne Twomey
4. ***Miller*, Treaty Making and the Rights of Subjects** 91
   Eirik Bjorge
5. ***Miller*, EU Law and the UK** 109
   Paul Craig
6. **Of Power Cables and Bridges: Individual Rights and Retrospectivity in *Miller* and Beyond** 131
   David Howarth
7. **Constitutional Change and Territorial Consent: The *Miller* Case and the Sewel Convention** 155
   Aileen McHarg
8. **Sovereignty, Consent and Constitutions: The Northern Ireland References** 181
   Gordon Anthony
9. **The *Miller* Case and Constitutional Statutes** 203
   Sir John Laws
10. **Sovereignty, Primacy and the Common Law Constitution: What Has EU Membership Taught Us?** 221
    Mark Elliott

11. ***Miller*, Constitutional Realism and the Politics of Brexit**.....249
Richard Ekins and Graham Gee

12. ***Miller* and the Future of Constitutional Adjudication**.....277
Alison L Young

Index 307

LIST OF CONTRIBUTORS

Gordon Anthony is Professor of Public Law at Queen's University Belfast and was Junior Counsel for Mr Agnew and others in the Reference from Northern Ireland in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

Eirik Bjorge is a Senior Lecturer in Law at the University of Bristol.

Paul Craig is Professor of English Law at the University of Oxford and a Professorial Fellow of St John's College, Oxford.

Richard Ekins is an Associate Professor at the University of Oxford and a Tutorial Fellow in Law at St John's College, Oxford.

Mark Elliott is Professor of Public Law at the University of Cambridge and a Fellow of St Catharine's College, Cambridge.

Graham Gee is Professor of Public Law at the University of Sheffield.

David Howarth is Professor of Law and Public Policy at the University of Cambridge and a Fellow of Clare College, Cambridge.

Sir John Laws is a former Lord Justice of Appeal in the England and Wales Court of Appeal.

Aileen McHarg is Professor of Public Law at the University of Strathclyde.

Anne Twomey is Professor of Constitutional Law at the University of Sydney.

Jack Williams is a barrister at Monckton Chambers and was counsel for one of the interested parties in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

Alison L Young is the Sir David Williams Professor of Public Law at the University of Cambridge and a Fellow of Robinson College, Cambridge.

1

The *Miller* Tale: An Introduction

MARK ELLIOTT, JACK WILLIAMS AND ALISON L YOUNG

I. Prologue

A. Substantive Background

On 23 June 2016, a referendum was held under the European Union Referendum Act 2015, which asked: 'Should the United Kingdom remain a member of the European Union or leave the European Union?' The view of the majority of those who participated in the referendum was that the United Kingdom (UK) should leave the European Union (EU).[1] Article 50 of the Treaty on European Union ('Article 50') provides the mechanism for a Member State to withdraw from the EU. Materially it provides:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention …

The question in *R (Miller) v Secretary of State for Exiting the European Union*[2] ('*Miller*') concerned the UK's 'own constitutional requirements' for giving effect to that decision and triggering the Article 50 process: did the UK Government already possess competence to notify the European Council of the UK's intention to leave under Article 50(2) by use of the foreign affairs prerogative, or was an Act of Parliament necessary to authorise such notification?

As is often the case with the UK's uncodified constitution, answering the apparently simple question generated by this competence dispute (between the executive and the legislature) turned out to be a far from straightforward matter. Indeed, it gave rise to one of the most politically controversial and intellectually contested constitutional cases of recent times, thanks to the fundamentally

[1] 51.9% of those voting agreed that the UK should leave the EU. Majorities in Gibraltar (95.8%), Northern Ireland (62%) and Scotland (55.8%) voted to remain in the EU.

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

significant nature of the legal, constitutional and political issues that were at stake in *Miller*. This litigation represented not only a key milestone in relation to the process of the UK's withdrawal from the EU, but also afforded the UK courts an opportunity to address a range of key issues relating to the operation of the UK constitution and the way in which it interacts with the EU legal system.

This edited collection takes the judgments of the Divisional Court and the Supreme Court in *Miller* as a point of departure for the purpose of taking stock of, and assessing the likely direction of travel of, the contemporary UK constitution. While the *Miller* case is therefore central, this book is not exclusively about the case; rather, the case serves as the launching pad for a wide-ranging analysis of the modern constitution. This introductory chapter, however, provides an overview of the issues giving rise to the *Miller* case, tracks the stages of the litigation itself, summarises the judgments of both the Divisional Court and Supreme Court, and provides a synopsis of the longer-term implications and consequences for the UK constitution that are then addressed, in turn, in successive chapters.

B. Procedural Background

The European Union Referendum Act 2015 did not say anything about what should happen if the majority of votes were cast in favour of the UK's leaving the EU. As such, as a matter of domestic law, it was an advisory referendum. The 2015 Act thus stands in contrast to the Parliamentary and Voting Constituencies Act 2011 and section 1(2) of the Northern Ireland Act 1998, under both of which referendums (depending on the outcome) may result in legal obligations being imposed upon Ministers. The availability of this 'binding' model was well known to Parliament before enactment of the European Union Referendum Act 2015,[3] but Parliament chose to legislate for a referendum the outcome of which would not legally require the Government to take, or to refrain from taking, a particular course of action.

The referendum itself was therefore not the 'decision' for the purpose of Article 50(1). Nor was there anything in the 2015 Act itself to suggest that the holding of the referendum amounted to the taking of a decision that Parliament would, if it wished to do so, be legally incapable of overriding or reversing. None of this, however, determined where authority *did* lie for the triggering of the Article 50 process. As the Court of Appeal held in *Shindler v Chancellor of the Duchy of Lancaster*,[4] the EU referendum 'contains part' of the UK's 'constitutional

[3] See, eg, the House of Commons Library Briefing Paper (No 07212, 3 June 2015), which stated that '[The Bill] does not contain any requirement for the UK Government to implement the results of the referendum, nor set a time by which a vote to leave the EU should be implemented. Instead, this is a type of referendum known as pre-legislative or consultative, which enables the electorate to voice an opinion which then influences the Government in its policy decisions … The UK does not have constitutional provisions which would require the results of a referendum to be implemented.'

[4] *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469.

requirements' for the purposes of Article 50(1). The *Miller* case concerned the remaining requirements.

The litigants in *Miller* argued that it would be unlawful for a Government Minister to notify the European Council of a decision of the UK to withdraw from the EU under Article 50 without statutory authority. Their motives for doing so are surmised to be various: to assist the halting of Brexit altogether (by providing the opportunity for MPs and Lords to vote against any authorisation to notify); to delay the triggering of Article 50 to give the country time either to re-consider, or at least to prepare for negotiations before the Article 50 two-year-to-exit clock began ticking; to constrain the Government's negotiating hand (by providing the opportunity for MPs and Lords to prescribe limitations or conditions on the notification to leave the EU in any Act authorising notification); to protect against the loss of rights; and, quite simply, to uphold what they considered to be the proper functioning of the UK's constitution, with parliamentary sovereignty at the core and the executive subject to parliamentary control. Whatever the motives of the individuals bringing the claims or one's political view of such motives—both of which are materially irrelevant to the underlying legal issues—the question for the courts was a purely legal one, as to the respective allocation of competence in the UK constitutional order between the Government and Parliament.[5]

Letters before claim were sent to the Government on 1 July 2016, on behalf of Gina Miller (and, at that time, other potential co-claimants whose identities were confidential), on 8 July, on behalf of Grahame Pigney and others (self-styled as 'the People's Challenge'), and on 7 and 11 July, on behalf of AB and a child. Mr Deir Tozetti Dos Santos had already filed a claim and published a draft skeleton argument, without having fully complied with the judicial review pre-action protocol. On 15 July, a group of expatriates applied for permission to intervene. Each group[6] alleged that the Government did not possess any relevant prerogative power to trigger Article 50, and averred that statutory authorisation was required before the UK Government could do so. The proposed defendant, at this point in time, was the Chancellor of the Duchy of Lancaster, there being no Secretary of State for Exiting the European Union at this stage.

The matter came before the Divisional Court (Sir Brian Leveson and Cranston J sitting) on 19 July 2016 for directions. Such directions hearings are usually mundane affairs, but there was unprecedented interest in, and attendance at, this one—so much so that the participants and spectators were advised to move from the assigned court room in the Royal Courts of Justice to the largest one next door in order to accommodate the already large legal teams and interested members of the press and public.

Whilst, at this time, only one claim had formally been issued (that of Mr Dos Santos), the Court nonetheless ordered that Ms Miller's (then, future) claim be

[5] Cf Richard Ekins and Graham Gee's contribution in ch 11 of this volume.

[6] Together, all these parties will be referred to as 'the claimants' in relation to the Divisional Court proceedings and 'the respondents' in relation to the Supreme Court proceedings.

designated as the lead claim, and that the other parties had, at their discretion, permission to have their separate claims joined, or to become interested parties or interveners in the Miller claim. Mr Dos Santos ultimately opted to continue his claim, becoming the second claimant, whilst, for reasons of procedural convenience and cost, others decided to join as interested parties or interveners, rather than as claimants. This decision was taken on an explicit mutual understanding—articulated at the directions hearing—that there was no real practical disadvantage in so doing, save that submissions were not to be duplicative. This at least partially explains the intriguing list of names and formal statuses to be found in the judgments that were subsequently issued.[7] There may, indeed, have been others but for the vitriolic abuse many potential claimants received at the pre-action stage, something the Court was particularly quick to condemn and caution against, both orally at the directions hearing and in its Order dated 26 July 2016:

> Upon the Court expressing its grave concern on receiving reports that parties and prospective parties to these proceedings, and their legal representatives, have been the subject of abusive conduct by a minority of the members of the public which may be criminal and/or in contempt of court, and indicating that the Court will be prepared to deal with such conduct severely if it interferes with the bringing or conduct of this litigation.

A strict timetable was laid down by the Court in its Order following the directions hearing. The Government, now in the form of the Secretary of State for Exiting the European Union, was to reply to the pre-action letters by 25 July; the lead claimant, Ms Miller, was to serve and file her written skeleton argument by 14 September (with each of the interested parties and interveners to file and serve additional written skeleton arguments by 21 September); and the Government was to respond substantively by 30 September. The substantive hearing was listed for 13, 17 and 18 October 2016 on account of the Court's availability and a judicial determination not to be accused of delaying the political process. The Order noted that

> it is not the present intention of the United Kingdom Government … to make notification under Article 50(2) of the Treaty on European Union before the end of 2016 … the intended Miller claim (including any other claims joined to it), including any appeal … should, subject to the Supreme Court, be finally determined before the end of 2016.

For similar reasons, the Court already envisaged a 'leapfrog' appeal to the Supreme Court (ie missing out the usual Court of Appeal stage),[8] and informal conversations were taking place with the Supreme Court's staff so that the matter could be

[7] The parties before the Divisional Court were, then, all private parties save for the Secretary of State for Exiting the European Union. The devolved Governments were not formally involved until the Supreme Court stage. What might not have been widely known, however, is that the Welsh and Scottish Governments both had counsel in attendance on noting briefs. Legal representatives for clients from Northern Ireland were also observers.

[8] Pursuant to the Administration of Justice Act 1969, s 12. The Order stated that 'The Court shall make arrangements to liaise with the Supreme Court concerning the possibility of a certificate being granted … for a leapfrog appeal, so that (in the event such a certificate is granted) any such appeal could, subject to the Supreme Court, be heard and determined before the end of 2016.'

concluded by the end of 2016 in line with the Government's then intention not to trigger the Article 50 process before the start of the New Year.

The Divisional Court, once constituted, was essentially (though not formally) a Court of Appeal bench, and a strong one at that. It consisted of the Lord Chief Justice, the Master of the Rolls and Lord Justice Sales. The rest of this chapter analyses the substantive decision reached by the Divisional Court and the aftermath of that Court's decision (section II), followed by a description of the events and submissions at the Supreme Court stage (section III), a discussion of noteworthy features of the *Miller* litigation (section IV), and, in section V, an overview and summary of the substantive implications of the case, which are discussed more thoroughly by the authors of each of the chapters in this book. The chapter concludes in section VI with a brief forward-looking discussion situating the *Miller* case in its wider context in the Brexit process.

II. *Miller* in the Divisional Court

A. Submissions of the Parties

In contrast to the somewhat convoluted position advanced by the Government in the Divisional Court—a position that we sketch below—the claimants' central argument was clear and attractively presented. It is difficult to improve (in terms of summarising this argument) upon the formulation adopted by Lord Pannick QC, counsel for the lead claimant. He likened notification under Article 50(2) to the firing of a bullet from a gun: the trigger is pulled by the act of notification, and the bullet eventually hits the target, causing the EU Treaties to cease to apply to the UK. Contained within this metaphor was a chain of reasoning that had every appearance of being—and which the Divisional Court plainly considered to be—irresistible. On this view, then, once the exit process was triggered by the giving of notice under Article 50(2), the default consequence of that process was that the EU Treaties would cease to apply two years later, yielding vast changes to the law applicable in the UK: changes that would include the removal from individuals of a wide array of legal rights.

The question then became whether the prerogative could be used to remove legal rights or otherwise change domestic law, to which, it was argued, the answer was 'no'. On this analysis, it was contended that it would be lawful for the Government to trigger Article 50 only if it had statutory authority to do so, because (as the Court put it, summarising the claimants' primary contention) 'the Crown's prerogative powers cannot be used by the executive government to diminish or abrogate rights under the law of the United Kingdom'.[9] Nor, said the

[9] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2017] 1 All ER 15, [74].

claimants, could the Government show any statutory authority that enabled it to trigger Article 50. Moreover, the claimants argued that even if they were wrong that general principles of constitutional law precluded the removal of rights that derived from EU law and exercisable in domestic law, any possibility that might otherwise have arisen of using the prerogative to that end was removed by the European Communities Act 1972 ('ECA'), properly construed.

In contrast, lying at the heart of the Government's position was its conviction that it already had prerogative authority to trigger Article 50, and that there was therefore no need for Parliament to legislate so as trigger, or to empower the Government to trigger, the exit process. As Oliver Letwin put it on 5 July 2016, speaking in his capacity as Chancellor of the Duchy of Lancaster and the Minister with caretaker responsibility for handling the fallout from the referendum pending the appointment of a new Prime Minister:

> It is entirely a matter for the new administration to take how to conduct the entire negotiations, and obviously part of that decision is about when to trigger Article 50 … I am advised that the government lawyer's view is that it clearly is prerogative power. No doubt that will be heard in court.[10]

Following this early indication of its line, the Government's position as to the legal issues was revealed more fully when it published its first written case—or 'detailed grounds of resistance'—at the end of September 2016, a step that it was prepared to take only when required to do so by a court order. In its written case, the Government took the view that the giving of notice under Article 50(2) amounted to nothing more than 'an administrative step on the international law plane'.[11] This audacious suggestion, which attempted to reduce notification to a bureaucratic sideshow, rested on the proposition that the main event—that is, the taking of the 'decision' to leave the EU for the purpose of Article 50(1)—had *already* taken place. As the Government saw it, notification was merely 'the procedural implementation of the decision to withdraw'—a decision that had been 'articulated in the outcome of the referendum'.[12] But an obvious difficulty with this view is that while the taking of a 'decision' in the Article 50(1) sense requires the relevant Member State to notify the European Council under Article 50(2), it is the giving of that notification, as distinct from the taking of the decision, that sets in train the exit process, the default consequence of which is that the EU Treaties cease to apply to the withdrawing state two years after notification. To characterise the giving of notice as a purely administrative matter was thus to attempt to heavily disguise what was, in reality, an act that would have momentous legal, constitutional, political and economic consequences.

We note in passing that the Government's reliance upon the distinction between the taking of the decision and notification of it highlights an issue that was never

[10] Available at http://parliamentlive.tv/Event/Index/46df4956-a397-4fc2-ad0a-20f70fb08e65.

[11] Government's detailed grounds of resistance, para 8(2), available at https://www.bindmans.com/uploads/files/documents/Defendant_s_Detailed_Grounds_of_Resistance_for_publication.PDF.

[12] ibid, para 9.

fully resolved in the *Miller* litigation: namely, when and by whom the underlying decision to withdraw from the EU was taken.[13] Indeed, this issue was obscure even in the Government's written case—which is surprising, given the analytical weight the point had to bear in the light of the Government's line of argument. For instance, having argued that the decision had been 'articulated in the outcome of the referendum', the Government went on to appear to suggest in its written case that the combination of the European Union Referendum Act 2015 and the outcome of the referendum meant that the *Government* was 'entitled to decide that the UK should withdraw from the EU',[14] albeit that this was a line that the Government did not press in oral argument: by that point, the Government had accepted it did not contend that the 2015 Act provided any relevant statutory authority.[15] In any event, whatever uncertainty might have surrounded the issue of when and by whom the 'decision' was taken, the matter was surely put beyond doubt by the legislation enacted in the wake of the Supreme Court's judgment in *Miller*, the European Union (Notification of Withdrawal) Act 2017, authorising the giving of notification under Article 50(2) (as discussed further in section V).

The Government further argued that Parliament had not legislated so as to curtail the foreign affairs prerogative in this context, meaning that it remained available for the purpose of giving notification under Article 50(2). In adopting this position, the Government took the view that its prerogative authority could be restricted by statute only *expressly*, and argued that nothing in the ECA was inconsistent with the use of the prerogative for the purpose of effecting withdrawal from the EU. In putting forward the latter argument, the Government maintained that while the ECA 'might be said to *assume* that the UK remains a member of the EU', it contains no provision that '*requires* the UK to remain a member'.[16] On this view, the fact that withdrawal would result in there being 'no [EU law] rights etc upon which s 2(1) [of the ECA] would bite'[17] posed no problem, because the purpose of that provision was not to vouchsafe that there would be such rights, but merely to give domestic effect to whatever rights, if any, might derive from any relevant UK Treaty obligations at any given time—a line of argument that would later go on to be advanced by the Government more rigorously before the Supreme Court, albeit that it would be found persuasive only by the dissentients. Meanwhile, in what appeared to form part of a belt-and-braces strategy, the Government simultaneously (initially at least) contended that the European Union Referendum Act 2015 supplied positive, if implicit, authorisation for the triggering of Article 50, on account of the fact that (as the Government saw things) Parliament, when enacting that legislation, had granted the Government permission 'to give effect to the

[13] For discussion of this issue, see M Elliott and AL Young, 'On whether the Article 50 decision has already been taken', *Public Law for Everyone*, 9 October 2016.
[14] Government's detailed grounds of resistance (n 11), para 12(3).
[15] *Miller* (n 9), [105].
[16] ibid, [32].
[17] ibid, [34].

result' of the referendum.[18] The Government's position thus appeared to be that the 2015 Act supplied positive authority for the triggering of Article 50, albeit that (according to the Government's analysis of the ECA) no such authority was in the first place required.

Yet further arguments were advanced by the Government in its written case, including the surprising proposition that a decision to notify the European Council under Article 50(2) was a 'polycentric' one engaging 'matters of high, if not the highest, policy', thus rendering the matter non-justiciable.[19] But this argument overlooked the fact that while considerations of justiciability (and deference) might limit the appropriateness of judicial review of the *exercise* of extant prerogative powers, it is much harder to see why such matters should have any purchase when courts are asked to rule on the logically prior question of the *existence* of such authority: a question that raises issues only of law.[20] Sensibly, the Government did not press this view, and by the time the case was argued orally, it had been 'agreed on all sides that this is a justiciable question which it is for the courts to decide', the Court choosing to emphasise that it was 'only dealing with a pure question of law'[21]—not that that spared the Court, in the wake of its judgment, from the excoriating and ill-informed media onslaught to which we refer more fully in section II.D.

B. The Northern Ireland Litigation: *McCord and Agnew*

While the *Miller* case was being litigated before the Divisional Court in London, parallel proceedings were underway in Northern Ireland, where *Re McCord and Agnew* was heard between 4 and 6 October 2016 by Maguire J.[22] To the extent that these proceedings duplicated issues that were being considered in *Miller*, Maguire J stayed consideration of them. He did, however, rule on the questions that arose in *McCord and Agnew* that were specific to Northern Ireland's constitutional arrangements. Maguire J handed down judgment shortly after the Divisional Court had concluded the oral hearing in *Miller*, but before the Divisional Court had given judgment. Whereas the Divisional Court would go on to rule against the Government, Maguire J, restricting himself to the Northern Ireland-specific issues, found in favour of the Government.

The key argument advanced by the claimants was that it would be unlawful for the prerogative to be used to serve notice under Article 50(2), because any prerogative power that might otherwise have been exercisable to that end had been

[18] ibid, [12(2)].
[19] ibid, [15].
[20] For a contrasting analysis, see Richard Ekins and Graham Gee's contribution in ch 11 of this volume. See also Lord Carnwath's classification of frustration arguments as concerning the exercise and not the existence of prerogative powers.
[21] *Miller* (n 9), [5].
[22] *Re McCord and Agnew* [2016] NIQB 85, [2017] CMLR 7.

excluded by the Northern Ireland Act 1998, read with the Good Friday Agreement. In essence, the argument was that ongoing UK membership of the EU was one of the constitutional premises underpinning Northern Ireland's contemporary constitutional arrangements, such that EU membership and the 1998 Act were 'inextricably interwoven' with one another.[23] This argument, however, did not persuade the Court, which indicated that it would need clear evidence before concluding that legislation had displaced the prerogative, the question being 'whether the prerogative has become unavailable by reason of any necessary implication arising out of any of the statutory provisions read in the light of their status and background'.[24] In applying this test, Maguire J set considerable store by what he did—and did not—consider to be the consequences of serving notice under Article 50(2). In particular, to characterise the taking of that step as 'the *beginning* of a process which ultimately will *probably* lead to changes in UK law'.[25] However, he considered it important that '[o]n the day after the notice has been given, the law will in fact be the same as it was the day before it was given', and that '[t]he rights of individual citizens will not have changed'.[26] Being unpersuaded that giving notice under Article 50(2) would produce specific legal changes that would run counter to the 1998 Act, Maguire J went on to consider whether it would produce relevant changes of a more diffuse nature. But he concluded, applying similar reasoning, that it would not. It could not be said, concluded Maguire J, that any 'constitututional bulwark … would be breached' simply by virtue of triggering Article 50,[27] the point being (on this view) that notification would not immediately or necessarily produce such consequences. None of these things would happen (if they were to happen at all) 'by reason of the step of notification per se', the 'reality' being that 'it remains to be seen what actual effect the process of change subsequent to notification will produce'.[28]

Thus, as we shall see, a fundamental difference between Maguire J's analysis and that of the Divisional Court (and, subsequently, the majority in the Supreme Court) lies in the former's willingness to downplay the legal and constitutional significance of triggering Article 50, on the ground that it is impossible to know, at the point in time when the withdrawal process is initiated, whether it will actually lead to withdrawal and, if it does, what the precise consequences of withdrawal will be for relevant purposes. In contrast, the Divisional Court and the majority in the Supreme Court focused not on the fact that we *could not be certain* of what would happen at the point of triggering Article 50, but on the fact that it was plain that the *default consequence* of initating the exit process is wholesale departure from the EU by dint of the EU Treaties ceasing to apply after two years.

[23] ibid, [87] (Maguire J).
[24] ibid, [103] (Maguire J).
[25] ibid, [105] (emphasis added).
[26] ibid.
[27] ibid, [106].
[28] ibid, [107].

The Court considered a number of further issues in *McCord and Agnew*, not all of which need be rehearsed here. Among other things, however, Maguire J concluded—in relation to a matter that would later surface in the Supreme Court—that if, contrary to his conclusion on the main point, legislation authorising the triggering of Article 50 were in fact needed, there would be no requirement under the Sewel Convention, as it applies to Northern Ireland, for the consent of the Northern Ireland Assembly. Once Maguire J's judgment was handed down in Northern Ireland, back in the Divisional Court proceedings in London, one of the sets of interested parties[29] filed and served brief submissions updating the Divisional Court on the Northern Irish litigation and suggesting ways in which that judgment did (and did not) affect the proceedings before the English Court.

C. Judgment of the Divisional Court

Judgment was given, unanimously in favour of the claimants, by the Divisional Court on 3 November 2016, just two weeks after the substantive hearing.[30] This was a remarkable turnaround. There was a real sense of anticipation in Court on the morning of 3 November, even for the legal teams: contrary to the usual practice, and in recognition of the extreme political sensitivities raised by the case, no draft judgment had been sent in advance to counsel for the parties. Although the Divisional Court's attention had been drawn to the decision in *McCord and Agnew*, it observed that, to the extent that Maguire J's judgment touched upon matters that intersected with those under consideration by the Divisional Court, the case in Northern Ireland 'appears to have been argued based on the premise that such issues were primarily for determination by us'.[31] Moreover, the Divisional Court was unpersuaded by Maguire J's view that (as the Divisional Court paraphrased it) 'notification under [Article 50] will only "probably" ultimately lead to changes in United Kingdom law', observing that he had adopted this view 'without knowledge it had been accepted before us on all sides that it necessarily *will* have that effect'.[32] The Divisional Court thus did not consider that *McCord and Agnew* resulted in its having anything other than a clear run at the issues that it had considered.

To say that the Divisional Court was underwhelmed by the Government's arguments would be something of an understatement. Indeed, it regarded the Government's position to be 'flawed' at a 'basic level',[33] and concluded that

[29] Namely, Pigney and others, who had a Northern Ireland client amongst their number and who had agreed not to pursue certain devolution submissions in London on the understanding that they were being dealt with by the Northern Ireland High Court, while reserving the right to do so.

[30] The Court also certified that, for the purposes of s 12 of the Administration of Justice Act 1969, 'the relevant conditions have been fulfilled and a sufficient case for an appeal to the Supreme Court … has been made out to justify an application for leave to bring such an appeal'.

[31] *Miller* (n 9), [104].

[32] ibid (emphasis added).

[33] ibid, [85].

the ECA denied the executive any prerogative authority to give notice under Article 50(2) simply by considering, and finding wanting, the Government's own submissions, before it got on to the business of examining the claimant's principal contention.[34] The Court's approach was plainly coloured by what it (rightly) considered to be the fundamental propositions of constitutional law that were implicated by *Miller*. It placed great emphasis upon the principle of parliamentary sovereignty—and in particular upon the implications of that principle for the executive's prerogative power. Thus, said the Court, the Crown 'has only those prerogative powers recognised by the common law', 'their exercise only produces legal effects within boundaries so recognised' and '[o]utside those boundaries the Crown has no power to alter the law of the land, whether it be common law or contained in legislation'.[35] The Court went on to emphasise that 'subordination of the Crown (ie the executive government) to law is the foundation of the rule of law in the United Kingdom'.[36]

It was with these foundational propositions firmly in mind that the Court turned to assess the Government's central argument: that the ECA was to be understood as giving domestic effect to EU law rights only to the extent that the UK's Treaty obligations required, and that the ECA should be further understood as having left it to the Government, through the exercise of its prerogative power, to determine whether such obligations should be extinguished via the UK's departure from the EU. It was at this point that what was, in some senses, the central conundrum of the case had to be confronted. The ECA, of course, was actually silent as to who had the authority to trigger Article 50 (not least because Article 50 was not even a glimmer in future treaty-drafters' eyes when the ECA was enacted in 1972). The question therefore became what should be made of the ECA's silence—a question the answer to which inevitably turned upon the presumptions that were to be brought to bear upon the statute. The Government contended that the ECA should be construed as leaving its prerogative power intact, unless 'the claimants could point to an intention on the part of Parliament as expressed in the 1972 Act to remove the Crown's prerogative power to take action to withdraw the United Kingdom from the [EU] Treaties once they were ratified'.[37] The Court, however, fundamentally disagreed, holding that the Government's position turned the usual, and proper, approach to statutory interpretation on its head. Given that a fundamental constitutional principle—'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'[38]—was in play, it was for the Government to show that Parliament had intended to subvert that principle by leaving the executive with prerogative power to withdraw the UK from the EU and thereby

[34] ibid, [95].
[35] ibid, [25].
[36] ibid, [26].
[37] ibid, [80].
[38] ibid, [84].

effect far-reaching changes to domestic law. And that, the Court concluded, the Government could not do. Parliament, by passing the ECA, had 'intended to legislate so as to introduce EU law into domestic law … in such a way that this could not be undone by exercise of Crown prerogative power'.[39] In the light of this conclusion, the Court, allowing the claimants' application for judicial review, declared that the Secretary of State did not have power under the Crown's prerogative to give notice pursuant to Article 50 for the UK to withdraw from the EU.[40]

D. Aftermath of the Divisional Court's Judgment

The Divisional Court's ruling produced a feeling amongst the claimant parties that this result was a 'game changer'. The Government had been rather 'bullish' to begin with, and many commentators expected the Government to win, thinking that the claimants might stand more of a chance in the Supreme Court. There was generally, we think, some underestimation and surprise at how strong the claimants' arguments were. Some lines of argument had not been fully anticipated by either commentators or the Government. Whilst this chapter does not purport to provide a full political analysis of the events, we sense that at this stage there was a feeling that the judgment had real political implications, changing the views of many members of the press and public and, importantly, MPs, thereby increasing calls for parliamentary involvement, now bolstered by the support of a unanimous judgment. This was reflected in some of the headlines found on the front pages the day after judgment was given in *Miller*. The *London Evening Standard* chose 'Judges' Brexit Blow to May', *The Guardian* selected 'Turmoil for May as judges rule that Parliament must decide Brexit' and the *Independent* decided on 'The verdict that rewrites the rules of Brexit'.

Not all the reaction was positive, however. The day after judgment was delivered saw a flurry of newspaper headlines, many of them highly critical. The *Daily Express* declared that 'three judges yesterday blocked Brexit. Now your country really does need you … WE MUST GET OUT OF THE EU'. The *Sun* featured a picture of Gina Miller, with the headline 'Who do EU think you are?' The *Daily Telegraph* ran pictures of the three High Court judges who heard the *Miller* decision in the High Court, with the headline 'The Judges versus the people'; only to be outdone by the *Daily Mail* with its now (in)famous 'Enemies of the People' headline accompanying its colour photos of Thomas LCJ, noted as a 'europhile', Sales LJ, described as once having worked with Tony Blair, and Sir Terrence Etherton, described as an openly-gay former Olympic fencer. Whatever one's view of the substantive merits of the outcome, or political views as to the merits of Brexit, these sorts of headlines and commentary are shocking.

[39] ibid, [92].
[40] ibid, [111].

The Government's response to the judgment of the Divisional Court—that is, to appeal—came as no real surprise, though some had queried whether it might decide not to: there were dangers associated with such a course of action, namely the risks of a stronger precedent concerning the use of prerogative powers, the increase in delay and cost (rather than simply proposing an Article 50 Notification Bill), and the possibility of the devolved Governments intervening (and securing a more formal, legal place for the Sewel Convention). Nonetheless, appeal the Government did, and the Supreme Court was quick to respond, announcing on 8 November that permission had been granted to appeal from the decision of the Divisional Court (leapfrogging the Court of Appeal), with the hearing listed for 5 to 8 December 2016. The Court also confirmed that the appeal would be heard by the then 11 Justices of the Supreme Court.[41] This in itself is unique, although one can certainly understand the reason for so doing—there could then be no accusations of the panel composition affecting the result or of any bias. The Supreme Court recognised that it was going to be in the spotlight. On the opening day of the four-day oral hearing, Lord Neuberger was at pains to emphasise that no party had asked any of the Justices to recuse themselves, no doubt a subtle response to media accusations that Lady Hale should step aside on the basis of comments which she had made during a lecture a few weeks earlier.[42]

III. *Miller* in the Supreme Court

After some procedural complications,[43] the Northern Ireland matters were also referred to the Supreme Court to be joined with the *Miller* litigation. The Supreme Court case was therefore an appeal by the UK Government against the Divisional Court's judgment, and an appeal by the unsuccessful claimants in Northern Ireland against Maguire J's judgment in the Northern Ireland High Court. Another novelty at the Supreme Court level was the involvement of the devolved Governments of Scotland and Wales in favour of the respondents in the *Miller* litigation (ie the claimants at first instance), and the Attorney-General for Northern Ireland in favour of the appellant, the UK Government.[44]

For the most part, the arguments mirrored those that had been provided in the Divisional Court. The Government continued to argue that there was a prerogative

[41] Notice published on the Supreme Court's website, available at https://www.supremecourt.uk/news/permission-to-appeal-decision-08-november-2016.html.

[42] Lady Hale, 'The Supreme Court: Guardian of the Constitution?', Sultan Azlan Shah Lecture 2016, Kuala Lumpur, available at https://www.supremecourt.uk/docs/speech-161109.pdf.

[43] See ss 12–16(1A) of the Administration of Justice Act 1969; ss 42–43 of the Judicature (Northern Ireland Act) 1978; and s 2.1.2.3 of Practice Direction 1 of the Supreme Court.

[44] Lawyers for Britain Limited were also granted permission to file written submissions not exceeding 10 pages by Order of the Supreme Court, dated 25 November 2016. These were in favour of the respondents (ie the claimants).

power to trigger Article 50. The respondents continued their argument that the prerogative could not be used. To the extent that the Supreme Court heard new arguments, they mainly concerned devolution. Three such arguments should be mentioned. First, that the impact of leaving the EU on the devolution legislation provided a further justification for why the Government did not have a prerogative power to trigger Article 50. Second, that if legislation were needed then a legislative consent motion would be required. Third, that the consent of the devolved legislatures would be needed even if the prerogative could be used to trigger Article 50.

In order to understand the legal arguments presented to the Supreme Court, it is helpful to examine first those concerning the correct legal principle to apply in order to determine whether the Government had the prerogative power to trigger Article 50. Second, the application of the relevant legal principle to the facts of the case will be investigated. Third, consideration will be given to the issues surrounding whether the consent of the devolved legislatures would be required, either as regards legislation used to empower the Government to withdraw from the EU Treaties, or in relation to the use of the prerogative to trigger Article 50.

A. Submissions of the Parties

There was no disagreement between the parties as to the existence of the foreign affairs prerogative power, nor as to the inclusion within this general prerogative power of a specific power to withdraw from treaties. The issue arose as to the relevant legal principle to be applied in order to determine whether the prerogative power could be used to trigger Article 50. For the Government, the legal principle to be applied stemmed from *De Keyser's Royal Hotel*.[45] This is the conventional authority governing the relationship between prerogative powers and legislation. It holds that, to the extent that legislation and prerogative powers regulate the same area, legislation abrogates the prerogative. In such circumstances, the Government must use a statutory power found in legislation as opposed to using prerogative power. As it was clear that the ECA did not provide a specific statutory power to the Government to withdraw from the EU Treaties, this meant, on the Government's case, that there was no legislation regulating either the general prerogative power to withdraw from Treaties, or the specific prerogative power to withdraw from the EU Treaties. As such, the prerogative power had not been abrogated by legislation and the Government could use the prerogative to trigger Article 50.[46]

However, the argument of Miller, dos Santos, and various of the interested and intervening parties, was that a different set of legal principles applied.

[45] *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508.

[46] Skeleton Argument of the Secretary of State for the European Union, paras 54–61, available at https://www.supremecourt.uk/news/article-50-brexit-appeal.html.

These principles stemmed from the Bill of Rights 1689/Claim of Rights Act 1689, *The Case of Proclamations*[47] and a series of cases relied upon in support of the claim that prerogative powers cannot, for example, frustrate legislation or remove domestic rights.[48] *The Case of Proclamations* was used to support the existence of the legal principle that a prerogative power cannot modify domestic law, either legislation or common law. This principle is supported by the wording of the Bill of Rights 1689. Article 1 of the Bill of Rights states that 'the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall', with Article 2 asserting that 'the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall'. Similar prohibitions are found in the Claim of Rights 1689 in Scotland, which states that 'all Proclamationes asserting ane absolute power to Cass annull and Dissable lawes … are Contrair to Law'. As such, the starting point was, on the respondents' cases, not to determine whether the ECA provided for a specific power to withdraw from the EU Treaties, but rather to inquire as to whether the ECA was an example of a law which would be modified were the UK to withdraw from the EU. If this were the case then the general prerogative power to regulate foreign affairs would not extend to include the power to trigger Article 50. The only way in which this argument could be rebutted would be if it were possible to show that the ECA nevertheless provided that its provisions could be modified. As this was not the case, the prerogative could not be used to trigger Article 50.[49]

The frustration argument operated in a similar manner. The general prerogative power to withdraw from treaties could not be used to frustrate legislative provisions. In *Laker Airways*, the Minister was prevented from using the prerogative to revoke the designation of Laker Airways as an airline provided for routes between the UK and the USA, as to do so would render useless the statutory licence that Laker Airways had been granted to fly these routes.[50] In *Fire Brigades Union*, the Minister could not use the prerogative to introduce a new compensation scheme for those injured as a result of crimes, as to do so would frustrate a statutory provision which required the Minister to consider when to introduce a statutory compensation scheme set out in legislative Schedule.[51] In a similar manner, it was argued that to use the prerogative power to trigger Article 50 would frustrate the ECA and other legislative provisions, particularly the European Parliamentary

[47] *The Case of Proclamations* (1610) 12 Co Rep 74.

[48] *Laker Airways Ltd v Department of Trade* [1977] QB 643; and *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513.

[49] Skeleton Argument of Miller, paras 66–69; Skeleton Argument of Grahame Pigney and others, paras 12–23; Skeleton Argument of the Lord Advocate (Scottish Government), paras 51–62; and Skeleton Argument of Agnew, paras 81–91. All of the Skeleton Arguments are available at https://www.supremecourt.uk/news/article-50-brexit-appeal.html.

[50] *Laker Airways* (n 48).

[51] *Fire Brigades Union* (n 48).

Elections Act 2002. As such, it would not be possible for the Minister to use the prerogative to trigger Article 50.[52]

B. Application of the Law

One of the main arguments of Miller, dos Santos, and the interested and intervening parties (to varying extents) turned upon the fact that the default effect of triggering Article 50 would be the eventual modification of the ECA, specifically as regards the removal of rights incorporated into domestic law through the Act. The ECA incorporates EU law into domestic law. Therefore, withdrawal from the EU would lead to the inevitable loss of rights, duties, privileges and immunities from EU law incorporated into UK law through the ECA.[53] This meant, on the claimants' case, that the foreign relations treaty prerogative—which does not extend to modifying domestic law or removing domestic rights—could not be used. The hearing before the Supreme Court was heard on the assumption that, once triggered, Article 50 was non-revocable.[54] As such, the process established under Article 50 meant that the UK would leave the EU either with no agreement, or with a withdrawal agreement, after a two-year negotiation process with the EU.[55] The only other possible outcome would be an extension of the negotiation period were all parties to agree, which would delay, but not prevent, the inevitable conclusion that the UK would no longer be a member of the EU.[56]

The Counsel General for Wales,[57] the Lord Advocate for Scotland,[58] counsel for Agnew,[59] and counsel for Pigney and others (one group of interested parties) also argued that using the prerogative power to trigger Article 50 would have an impact

[52] Skeleton Argument of Miller (n 49), paras 20–43; and Skeleton Argument of Grahame Pigney and others (n 49), para 26.

[53] Skeleton Argument of Miller (n 49), paras 44–66; Skeleton Argument of Grahame Pigney and others (n 49), paras 30–47.

[54] *Miller* (n 2), [26]. The reversibility of Article 50 is a matter of EU law. The assumption which the Supreme Court was asked to (and did) make was subject to considerable academic debate prior to the Supreme Court hearing. The assumption was, however, contended for by all the parties, including by the Government. One can only surmise that the reasons for this were, on the claimants' side, that the irreversibility of Article 50 brought to life the definite consequences in terms of loss of citizens' rights (thereby bolstering their legal submissions in relation to the limitations of prerogative powers to affect such rights), and, on the Government's side, for political grounds, not wishing to be seen to go against the 'will of the people'. In any event, see, further, Jack Williams' contribution in ch 2 of this volume, for an explanation as to why, in his view, the assumption regarding Article 50 was irrelevant to the core issue and reasoning adopted by both the Divisional Court and the Supreme Court, ie that the conclusion reached by both courts, and the reasoning utilised in the judgments, is sustainable even if Article 50 is reversible.

[55] Article 50(3).

[56] ibid.

[57] Skeleton Argument of the Counsel General for Wales, paras 20–57, available at https://www.supremecourt.uk/news/article-50-brexit-appeal.html.

[58] Skeleton Argument of the Lord Advocate (Scottish Government) (n 49), paras 38–49.

[59] Skeleton Argument of Agnew (n 49), paras 33–77.

on devolution legislation. Specifically, it would have an impact on the law-making powers of the devolved legislatures in Wales, Scotland and Northern Ireland. None of the three devolved legislatures has the power to enact legislation which is contrary to EU law. Withdrawal from the EU would mean that this restriction on legislative powers would be removed. However, it was argued not only that this would be contrary to *The Case of Proclamations* and the Bill of Rights 1689 and the Claim of Rights 1689, but in addition that this was not permitted by the devolution legislation itself, which provided a specific means of changing the devolution settlement through Orders in Council,[60] or where new legislation was enacted.

The Government's main response to this argument was to dispute that the ECA incorporated EU law into domestic law in such a manner as to mean that EU rights, powers, liabilities and obligations were examples of domestic rights. Rather, the argument was made that section 2(1) ECA was an ambulatory provision, which incorporated EU rights into domestic law as they arose from time to time. As such, the prerogative powers could be used to modify those rights that were incorporated into domestic law through the ECA. Just as the prerogative could be used to join the EU, and to modify the rights, powers, liabilities and obligations flowing into domestic law through the ECA, so the prerogative could also be used to withdraw from the EU Treaties. This would not be to modify domestic rights, as these rights were conditional on EU membership. They were not statutory rights in the same manner as other rights established by UK legislation.[61]

In addition, the Government disputed the analogy between the triggering of Article 50 and the firing of a gun, first proposed by Lord Pannick QC in argument before the Divisional Court. It was not the case that triggering Article 50 would inevitably lead to a situation in which rights would be removed without legislative intervention. This was because there was, by default, a two-year interval between the triggering of Article 50 and the UK's exit from the EU. During that time, the Government intended to initiate legislation to repeal the ECA, as well as enacting other withdrawal-related legislation. As such, it would be future legislation, and not the mere use of the prerogative to trigger Article 50, that would be used to remove any rights incorporated into UK law through the ECA.

The argument based on the extent of the prerogative focused on the assertion that the default effect of triggering Article 50 would frustrate the purpose of the ECA (which, it was said, was to ensure the UK's membership of the EU), render it a nullity (because its key provisions would have no relevant EU rights etc upon which to bite) and remove individuals' rights. In order to reinforce the respondents' argument, attention was paid to the importance of the ECA. Not only was the legislation of constitutional importance, and an example of a

[60] Scotland Act 1998, s 30; Government of Wales Act 2006, s 95; Northern Ireland Act 1998, s 6.

[61] Skeleton Argument (Supplementary) Secretary of State for Exiting the European Union (devolution issues), paras 4–37, available at https://www.supremecourt.uk/news/article-50-brexit-appeal.html.

constitutional statute, but in addition it incorporated a wide range of rights into UK law.[62] Moreover, directly effective EU law has primacy over domestic law, such that legislation which contradicts directly effective provisions of EU law can be disapplied. In addition, its importance can be seen in the devolution legislation, which, as noted, prohibits the devolved legislatures and administrations from legislating or acting contrary to EU law. The importance of the ECA was drawn upon to reinforce the contention that the prerogative could not be used to frustrate its provisions or render it devoid of purpose.

These arguments were further afforced by reference to additional provisions of constitutional law. In particular, attention was paid to the principle of parliamentary sovereignty.[63] To allow the prerogative to be used to affect the ECA would be akin to allowing the executive to override the will of the legislature. This would be contrary to the principle of parliamentary sovereignty. In addition, the principle of legality was referenced. The principle of legality is best understood as a principle of interpretation. Legislation is interpreted against a background of constitutional principles. More precisely, broad legislative provisions are interpreted in a manner to ensure that they do not override fundamental principles of the common law. If specific words are required in legislation to override fundamental principles of the common law, it follows by analogy that the ECA, which incorporates fundamental EU rights into UK law, cannot be affected by the use of the prerogative to trigger Article 50.

The Government's main objection was as to the interpretation of the ECA. It argued that the purpose of the ECA was to ensure that the UK fulfilled its obligations in international law flowing from its membership of the EU. As such, it was not the case that the purpose of the ECA would be frustrated were the UK to leave the EU. Rather, the purpose of the Act could still be fulfilled, in the sense that it would continue to ensure that the UK discharged whatever Treaty obligations it had, the difference being that it would have no such obligations.

C. Devolution Issues

One set of arguments relating to devolution issues was used to strengthen the respondents' arguments that the prerogative could not be used to trigger Article 50. This was through reinforcing the impact of withdrawal from the EU on the devolved settlements, set out in the Scotland Act 1998, the Northern Ireland Act 1998 and the Governance of Wales Act 2006 (all as amended by future legislation). None of the devolved nations can legislate contrary to EU law. To leave the EU would modify this statutory definition of their powers.

[62] Skeleton Argument of Miller (n 49), paras 31–43; Skeleton Argument of Pigney (n 49), paras 58–58 and para 67.

[63] See the Skeleton Argument of Deir Tozetti Dos Santos, available at https://www.supremecourt.uk/news/article-50-brexit-appeal.html. For further discussion on the implications of *Miller* for the meaning of parliamentary sovereignty, see Mark Elliott's contribution in ch 10 of this volume.

Two further arguments were raised as regards the impact on the devolved legislatures, which merit more detailed consideration. First, the argument was made that, if legislation were required to empower the Government to trigger Article 50, this legislation would require a legislative consent motion.[64] Second, the argument was made that, even if the prerogative could be used to trigger Article 50, there would nevertheless be a requirement to obtain the consent of the devolved legislatures prior to exercising the prerogative power.[65]

The arguments in favour of a legislative consent motion concerned the application of the Sewel Convention. The Sewel Convention, understood narrowly, requires that, although the Westminster Parliament can legislate in areas that have been devolved to Scotland, Wales or Northern Ireland, it will not normally do so without obtaining the consent of the devolved legislature or legislatures concerned. Counsel for Agnew and the Government of Wales, and the Lord Advocate argued that the Sewel Convention also applied more broadly to situations where Westminster legislated to alter the devolved competences. As triggering Article 50 and leaving the EU would alter those competences, a legislative consent motion would be needed as regards any legislation enacted to empower the Government to trigger Article 50. The argument of the Lord Advocate was reinforced by section 2 of the Scotland Act 2016, which inserted a new subsection, section 28(8), into the Scotland Act 1998.[66] This subsection confirms that 'it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'.

The Government argued both that the Sewel Convention did not apply and that, even if it did apply, as a convention it was not capable of being enforced by the courts. The Government preferred the narrower interpretation of the Sewel Convention, which only applies when Westminster legislates on a devolved matter. The triggering of Article 50, however, is not within the scope of devolved powers. Foreign affairs generally, and specifically the nature of the relationship between the UK and the EU, is not a devolved matter, being reserved to the Westminster Parliament. Moreover, even if the Sewel Convention did apply, conventions are not capable of legal enforcement. Although courts can recognise the existence of conventions, they cannot enforce them by imposing a legal obligation to adhere to a convention.[67]

Two arguments were provided to explain why, even if legislation was not required, nevertheless the consent of the devolved legislatures was required before using the prerogative to trigger Article 50. First, Article 50 refers to the ability of a

[64] Skeleton Argument of the Lord Advocate (Scottish Government) (n 49), paras 68–84; Skeleton Argument of Agnew (n 49), paras 120–45.

[65] Skeleton Argument of the General Counsel for Wales (n 57), paras 71–92; and Skeleton Argument of the Lord Advocate (Scottish Government) (n 49), paras 18–22.

[66] For further discussion on these matters, see Aileen McHarg's contribution in ch 7 of this volume.

[67] Skeleton Argument (Supplementary) Secretary of State for Exiting the European Union (devolution issues) (n 61), paras 4–37.

Member State to withdraw from the EU 'in accordance with its own constitutional requirements'.[68] Constitutional requirements should be interpreted broadly to include not just legal but also other constitutional requirements. This would include constitutional conventions. As such, given the impact of triggering Article 50 on the devolution settlement, the Sewel Convention should be counted as a constitutional requirement and consent must be sought before triggering Article 50 by the use of a prerogative power. Second, it was argued that the existence and exercise of prerogative powers were governed by the common law. As such, there were good reasons for the common law to develop a principle to ensure that the prerogative could not be used to modify the devolution settlement without the consent of the devolved legislatures.

The Government countered both arguments. First, it rejected the idea that 'constitutional requirements' would include non-legal rules.[69] As such, the Sewel Convention could not be a 'constitutional requirement' for the purpose of Article 50(1). Second, the Government argued that there were no provisions of the common law that would require consent before the use of the prerogative power to modify devolved powers.[70]

D. Judgment of the Supreme Court

Judgment was handed down on 24 January 2017—again, a relatively quick and unusual turnaround. The handing down was, like that of the Divisional Court, an event in itself, as the vast majority of legal counsel had not seen judgment beforehand (with the exception of leading counsel for the two main respondents and the Government). The Supreme Court concluded, by a majority of eight Justices to three, that the Government did not enjoy a prerogative power to trigger Article 50. As such, it upheld the Divisional Court's conclusion, though this time with dissentients. In addition, all 11 Justices of the Supreme Court concluded that a legislative consent motion was not required given that conventions are not capable of legal enforcement.[71]

The following brief account of the reasoning of the majority in reaching these conclusions (and why the minority Justices disagreed) raises more questions than it provides answers. Whilst it gives a flavour of the legal argument and an outline of the nature of the dispute between the parties and the conclusions in the Supreme Court, it does not purport to provide a detailed evaluation of the relative strengths and weaknesses of these arguments, or their relative importance.[72]

[68] Article 50(1) Treaty on European Union (TEU).

[69] Skeleton Argument (Supplementary) Secretary of State for Exiting the European Union (devolution issues) (n 61), para 38.

[70] ibid, para 39.

[71] *Miller* (n 2).

[72] For more detailed overviews by two of the present authors, see M Elliott, 'The Supreme Court's Judgment in *Miller:* in search of constitutional principle' (2017) 76 *Cambridge Law Journal* 257; and AL Young, '*R (Miller) v Secretary of State for Exiting the European Union:* Thriller or Vanilla?' (2017) 23 *European Law Journal* 280.

This is a conscious choice. The contributions in this collection all reflect on the decision in *Miller*, each providing its own evaluation of the reasoning of the Supreme Court and its impact on the UK constitution. We have deliberately chosen contributors who represent a spectrum of views on the merits of the Supreme Court's decision, ranging from those who strongly agree with the majority opinon, those who support the minority opinion and those who, whilst accepting the outcome of the case, are critical of the process through which this conclusion was reached.

Although there was disagreement over the outcome, all 11 Justices of the Supreme Court purportedly agreed that the relevant legal principles governing the existence and effect of a relevant prerogative stem from *The Case of Proclamations*, the Bill of Rights 1689, the frustration principle and *De Keyser's Royal Hotel*. As such, all agreed that general prerogative powers, and particularly the foreign affairs treaty prerogative, did not extend to include an ability to modify domestic law, either in legislation or in the common law.[73] This also meant that prerogative powers could not be used to modify rights.[74] Further, prerogatives could not frustrate legislation.[75] The only main disagreement over the relevant legal principles stemmed from the classification of the frustration principle. Whilst the other 10 Justices of the Supreme Court regarded this as a further element of the determination of the scope of prerogative powers, Lord Carnwath (dissenting) classified this as a control over the exercise, or abuse, of a prerogative power as opposed to its existence or extent.[76]

In order to understand how the majority reached their conclusion, it is helpful to first set out the main argument of the minority, provided in the judgment of Lord Reed.[77] Lord Reed accepted the argument of the Government that triggering Article 50 would not, on the facts, modify domestic law. This stemmed from his interpretation of the ECA. In particular, he focused on the dualist nature of the UK and on the wording of the ECA. As is well known, and recognised in *Miller* by both the majority and the minority, the UK adopts a dualist position in relation to international law.[78] As such, although the executive can enter into and withdraw from treaties, the provisions found in treaties to which the UK is a party do not apply in domestic law until they have been incorporated into domestic law, normally through an Act of Parliament or through executive action taken under a statutory power that authorises the Government to incorporate specific aspects of international law into domestic law. This is the case, for example, with EU law.[79]

Lord Reed concluded that the ECA established an ambulatory provision in order to incorporate EU law into UK law, which was conditional on the acts of the

[73] *Miller* (n 2), [44]–[46] and [50].
[74] ibid, [69]–[73].
[75] ibid, [51].
[76] ibid, [266].
[77] ibid, [179]–[197].
[78] For further discussion on the international law dimensions of *Miller*, see Eirik Bjorge's contribution in ch 4 of this volume.
[79] ECA, s 2(2).

UK executive on the international plane. This is found in section 2(1) of the Act, which provides that

> [a]ll such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly …

Lord Reed focused on the way in which this section incorporates EU law as it arises 'from time to time'. As such, the section makes it clear, on this view, that the provisions incorporated into domestic law are those arising from the UK's international law obligations under EU law as they change over time, depending on executive action. In short, the rights are conditional on the UK's membership of the EU, and their content changes according to changes in the UK's international law obligations. This means that the rights incorporated are not the same as domestic rights. Rather, they are conditional on the UK's membership of the EU. If the UK leaves the EU then these rights are no longer part of UK law. To leave the EU would not modify domestic rights. Rather, it would remove the condition precedent on which EU rights are based. The ECA would continue to incorporate into UK law those provisions which the UK was required to incorporate given its membership of the EU. However, once the UK leaves the EU, the provisions which the UK was required to incorporate would be removed.[80]

The majority of the Supreme Court, in a jointly written decision given by Lord Neuberger, the then President of the Supreme Court, rejected this interpretation of the ECA. The majority focused more on the constitutional importance of the UK's membership of the EU, in particular the way in which the provisions of directly effective EU law have primacy over UK law, such that legislation which contravenes the provisions of directly effective EU law can be disapplied. The majority agreed that the ECA acted as the conduit through which EU law flowed into UK law. However, they also concluded that EU law was a new source of law—law enacted by the EU institutions. In addition, although the majority accepted, in part, the possible ambulatory nature of section 2(1) of the ECA, they disagreed with Lord Reed's conclusion that this meant that EU law was not domestic law. Instead, they concluded that there was a difference between the alteration of the content of the rights, powers, liabilities, obligations and restrictions incorporated into UK law through the enactment of EU law, and the withdrawal from the EU treaties which would remove all EU law. To withdraw from the EU would alter domestic law by removing rights that had been incorporated into UK law. It would render the legislation futile, frustrating its purpose of ensuring the UK's membership of the EU.

[80] *Miller* (n 2), [184]–[194]. For support of the ambulatory thesis as described in this paragraph, see also M Elliott, 'The Supreme Court's Judgment in Miller', available at https://publiclawforeveryone.com/2017/01/25/analysis-the-supreme-courts-judgment-in-miller/; and Elliott (n 72). For counter arguments to the ambulatory thesis described in this paragraph and in the judgment of Lord Reed, see Jack Williams' contribution in ch 2 of this volume.