

The UK Constitution after *Miller*

Brexit and Beyond

Edited by

Mark Elliott, Jack Williams and Alison L Young

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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 group⁶ 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 to 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 'constitutional 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 initiating 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 parties²⁹ 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 powers³⁸—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-brexite-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 Proclamations 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-brexite-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-brexiteer-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-brexite-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 affirmed 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-brexite-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 dissenters. 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 opinion, 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.

In addition, given the constitutional importance of the ECA, it was clear that such a modification required legislation; a change of such constitutional importance could not be enacted by the executive alone and required parliamentary authorisation.⁸¹

In addition to the reasons given by Lord Reed for disagreeing with the conclusion of the majority, Lord Carnwath provided a further argument. He rejected Lord Pannick QC's analogy that triggering Article 50 was similar to firing a gun. It was not the case that triggering Article 50 would lead to the removal of EU rights from UK law. Rather, in the two-year time period there was time for legislation to be enacted to remove these rights from UK law; indeed at the time of the *Miller* decision the Government had announced its intention to enact a 'Great Repeal Bill'—now known as the European Union (Withdrawal) Bill 2017–19—which would repeal the ECA.⁸²

As regards the devolution issue, the Supreme Court only provided its account of why a legislative consent motion was not required. The majority judgment, with all 11 Justices of the Supreme Court agreeing on this point, acknowledged that there were examples of legislative consent motions having been obtained for legislative provisions which had altered the distribution of powers between Westminster and the devolved legislatures. Nevertheless, even though the Sewel Convention could apply, it was not the role of the courts to enforce the Convention. Conventions were enforced through political and not legal means. Moreover, to enforce the Sewel Convention would require the Court to question proceedings in Parliament, in breach of Article 9 of the Bill of Rights 1689. Nor was this position altered by the reference to the Sewel Convention in section 2 of the Scotland Act 2016. Rather, as the legislation 'recognised' the Convention, the section was best interpreted as expressing an intention to entrench the Sewel Convention as a convention, rather than as creating a legally enforceable statutory obligation.⁸³

IV. Noteworthy Aspects of the Litigation

A. Public Engagement: The Boons of Open Justice

Aside from the substance of the decision and its implications, one thing the *Miller* case will be remembered for is the high level of engagement with the case, at every stage, from members of the public and the academic community. The result of the UK's referendum on EU membership was announced on 24 June 2016. By 27 June, the first blog post (by Nick Barber, Tom Hickman and Jeff King) had appeared on

⁸¹ *Miller* (n 2), [74]–[93].

⁸² *ibid*, [262]–[267].

⁸³ *ibid*, [149].

the UK Constitutional Law Association's blog, highlighting an issue as to whether the prerogative enabled a member of the executive to trigger the Article 50 process.

It is easy to forget, then, in light of the impressive transparency and public access arrangements that followed in both the Divisional Court (with transcripts published daily) and the Supreme Court (with live video broadcasts of the submissions plus published transcripts), that initially the Government opposed publication of its detailed grounds of resistance and other parties' skeleton written arguments to the extent that they referenced or referred to the Government's arguments. On 22 September 2016 (ie during the preparations for the Divisional Court's hearing), Pigney and others (one set of interested parties) were the first to publish their final skeleton argument, appropriately redacted as requested by the Government. At the same time as doing so, the group applied to the Divisional Court for clarification of its Order made in July, as they believed that the Government could (and should) make its case available so that the general public could understand its position. On 27 September, Mr Justice Cranston amended the Order to provide that 'the parties are not prohibited from publishing (1) the defendant's or their own detailed grounds; (2) their own skeleton arguments'. The judge observed that 'Against the background of the principle of open justice, it is difficult to see a justification for restricting publication of documents which are generally available under the Rules.'

All other parties duly followed suit and published their written materials unredacted. Indeed, by the Supreme Court stage, the Court itself was publishing all the parties' written arguments and collating them on a designated 'hub' page for the case.⁸⁴

Such publication of written arguments (and then active dissemination thereof) is unusual, even in high-profile litigation. The usual rule is that such court documents only become publicly available (by request) once they are entered into the court's file and referred to in open court. It is fair to comment that the academy enjoyed the opportunity: the high level of engagement with the legal issues and arguments as presented to the courts by the litigants was unprecedented. Every line of argument was scrutinised and discussed in at least a handful of new blog posts each day in the build up to the litigation. This level of scrutiny was, we are sure, a blessing and a curse—a blessing in that a treasure trove of imaginative and detailed lines of argumentation was thereby at the finger-tips of the legal teams (and courts), enabling them to deploy them or refine their own arguments; but a curse for the juniors and judicial assistants having to read each new publication (adding to the 22,000 pages of written materials before the Supreme Court), or for those counsel whose submissions were not as well received.

Perhaps more importantly, however, this high level of engagement and interaction between practitioners and academics led to rich debates and discussions, which ultimately fed into the preparations for the hearings and the counsel submissions and judicial questions at the hearings themselves. Indeed, the contribution of the

⁸⁴ <https://www.supremecourt.uk/news/article-50-brexite-appeal.html>.

academic community to the case cannot in any way be overestimated. A vivid example of this is the shift in the Government's legal arguments between the Divisional Court level and the Supreme Court level to take into account, for example, arguments about the ambulatory and conditional nature of the ECA and double taxation treaties, which originated in online blog posts.⁸⁵ The *Miller* case is most likely the first UK case to include the citation of blogs in written arguments and judgments: indeed, the Supreme Court expressly praised the blogosphere in its judgment: 'The very full debate in the courts has been supplemented by a vigorous and illuminating academic debate conducted on the web (particularly through the UK Constitutional Law Blog site).'⁸⁶

Whilst in our view overwhelmingly positive in the *Miller* litigation, nevertheless, the extensive interaction between the academy and practice, in a fashion never seen before, does raise interesting ethical questions. For example, to what extent is it proper to comment, via a short and quickly produced blog, on individual barristers' oral submissions, by name, particularly between hearing and judgment, when to do so could—though technically should not—influence the determination of the dispute, without opportunity for rebuttal? To what extent should academics involve themselves in the production of submission arguments (unaccredited); and if they do, what confidentiality and professional boundaries are in place? What weight should be given to academic blogs by the courts? To what extent should legal academics present political arguments in public? There are no easy answers—and we do not pretend either to have extensively outlined the issues or to have begun answering them—but we suspect that many have learnt a great deal about the role of, and pressures at, the Bar, which, with clients seeking a particular result and tactical considerations in play, mean that not every argument can, or will, be developed. At the same time, we expect that many practitioners involved in the litigation equally learnt a great deal from the academics who contributed to the debates.

B. Crowdfunding

Not only were arguments occasionally crowdsourced. Another novel aspect of the case was the use of crowdfunding on a large scale. Grahame Pigney and others (one group of interested parties), for example, crowdfunded over £300,000 via

⁸⁵ J Finnis, 'Terminating Treaty-Based UK Rights', *UKCLA Blog* (26 October 2016), available at <https://ukconstitutionallaw.org/>; J Finnis, 'Brexit and the Balance of our Constitution', Sir Thomas More Lecture, Lincoln's Inn (1 December 2016), available at <https://www.lincolnsinn.org.uk/images/pdf/education/Sir%20Thomas%20More%20Lecture%20-%20Professor%20John%20Finnis%20Text.pdf>; M Elliott, 'On why, as a matter of law, triggering Article 50 does not require Parliament to legislate', *Public Law for Everyone* (30 June 2016), available at <https://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate/>; M Elliott and H J Hooper, 'Critical reflections on the High Court's judgment in *R (Miller) v Secretary of State for Exiting the European Union*', *Public Law for Everyone* (7 November 2016), available at <https://publiclawforeveryone.com/2016/11/07/critical-reflections-on-the-high-courts-judgment-in-r-miller-v-secretary-of-state-for-exiting-the-european-union/>.

⁸⁶ *Miller* (n 2), [274].

the online platform, Crowdfunder, which is a website specifically set up to help raise funds for litigation. In exchange for donations, those signed up received regular updates via email, and a commitment to publish all legal pleadings and the like. This relatively new development may, to some extent, cover for losses in legal aid funding, or provide new opportunities for public interest groups to raise funds for issues that affect a large number of people, or generally raise public interest issues that would otherwise be unfunded. It is notable that since the *Miller* litigation, a number of other crowdfunding groups have been set up in relation to Brexit-related issues, namely, for the challenge of the non-disclosure of Government impact assessments and to trigger the Scottish courts to refer the question of the unilateral reversibility of an Article 50 notification to the European Court of Justice. Again, interesting questions arise out of this developing practice: to what extent, for example, should those who have donated be privy to legal advice about the risks and prospects of success before blindly contributing to a cause?

C. The Nature of Constitutional Adjudication

Two later chapters (by Richard Ekins and Graham Gee, and Alison Young respectively) discuss the implications of the *Miller* judgment on the nature of constitutional adjudication. At this juncture it is appropriate to make only the following comments. The case gives an insight into how major constitutional cases with political impact will be tried. The Supreme Court is increasingly in the public and media gaze. For instance, there were substantial numbers of journalists and reporters both outside and inside court at the hearings; constitutional academics were even called upon to give live commentary and updates on TV and radio. Even the largest court room was unable to fit all those wishing to spectate (and, indeed, all the legal team members, some of whom had to watch on livestreams in other court rooms). Nevertheless, the Court was acutely aware of the broader political arena in which it was necessarily operating, albeit that it refrained from entering that arena as far as possible. For example, despite a resolution by the House of Commons on 7 December 2016 (ie during the hearing), calling on Ministers to give an Article 50 notification by 31 March 2017, the Court held that that could not

affect the legal issues before this court. A resolution of the House of Commons is an important political act. No doubt, it makes it politically more likely that any necessary legislation enabling ministers to give Notice will be enacted. But if, as we have concluded, ministers cannot give Notice by the exercise of prerogative powers, only legislation which is embodied in a statute will do. A resolution of the House of Commons is not legislation.⁸⁷

Perhaps aware of political ramifications for individual Justices (particularly in light of the media reaction after the Divisional Court's judgment), only one majority

⁸⁷ *Miller* (n 2), [123].

judgment, written and assented to by all the majority Justices, was issued. This is an increasing trend in Supreme Court judgments, the aim presumably being to simplify judgments. It is arguable, however, that the desire in *Miller* to speak with one voice in a relatively accessible fashion may, paradoxically, have served to obscure the majority's reasoning, thereby giving rise to some of the controversies surrounding the judgment that are discussed in this book.

V. Implications of *Miller*

The Divisional Court and the Supreme Court were both keen to emphasise that the questions they had to consider were not political but purely legal ones. Nevertheless, the implications of the judgment were, at least in the short term, intensely political, not least because the Government had to introduce a Bill into Parliament to authorise the initiation of the Article 50 process. The Bill progressed rapidly and unscathed through the House of Commons, and was passed at third reading 494 to 122 votes. The Bill's passage through the House of Lords was more eventful, with two amendments being made: to protect the EU citizenship rights of those living in the UK, and requiring parliamentary approval of any agreement between the UK and the EU at the end of the withdrawal process. However, when the Bill returned to it, the Commons voted against the Lords' amendments, and in the end the Bill was enacted in an unamended form, receiving Royal Assent on 16 March 2017. Section 1 of the European Union (Notification of Withdrawal) Act 2017 simply states:

- (1) The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.
- (2) This section has effect despite any provision made by or under the European Communities Act 1972 or any other enactment.

Even if, prior to the enactment of this legislation, no 'decision' had been taken for Article 50(1) purposes, the 2017 Act is surely evidence of Parliament's having implicitly made or endorsed that decision, or of its having authorised the Prime Minister to do so. Against the background of the litigation, the resolution in Parliament during the litigation and the terms of debate concerning the Bill, the notion⁸⁸ that the notification issued by the UK to the European Council on 29 March 2017 is invalid because no 'decision' to withdraw has (yet) been taken in a way that conforms to the UK's 'own constitutional requirements' within the meaning of Article 50(1) TEU seems hard to sustain. Whether that decision is inherently conditional (as a matter of domestic law on account of parliamentary sovereignty) or revocable (as a matter of EU law) are different matters.

⁸⁸ See, eg, the crowdfunding pitch for a new claim at <https://www.crowdjustice.com/case/a50-chall-her-e50/>.

Apart from requiring the parliamentary legislative process to be followed, *Miller* thus had no substantive effects in terms of halting, or significantly delaying, or conditioning the UK's withdrawal from the EU. If these were any of the claimants' ultimate aims then the litigation itself did not achieve them.⁸⁹ The *Miller* case does, nevertheless, have significant and long-term effects on the nature, and our understanding, of the contemporary UK constitution. Regardless of the immediate political consequences that the *outcome* of the case produced, the *reasoning and nature* of the judgments in *Miller* have significant implications that will be relevant well after Brexit, and in non Brexit-related areas. It is with those broader constitutional implications that this book is concerned.

VI. Contributions to this Volume

This book begins with an analysis of the impact of the *Miller* decision on prerogative powers. In Chapter 2, Jack Williams examines the reasoning of the Supreme Court, explaining how the decision clarifies the manner in which UK law controls prerogative powers. He argues that the decision demonstrates that control over prerogative powers is not limited to control over the exercise of justiciable prerogative powers or determining the degree to which statutory powers regulate the same matter previously regulated by the prerogative, such that the prerogative power has been abrogated. Instead, Williams argues that there are four elements of the control over prerogative powers, which he refers to as the 'four E's': existence; extent; exclusion; and exercise. First, courts can determine whether a purported prerogative power exists, through an examination of the common law and historical record. Second, the court can determine the extent of the prerogative power. When doing so, the court pays attention to legal principles that delimit the very nature and scope of prerogative powers themselves. For example, prerogative powers cannot be used to modify domestic law, to remove common law or statutory rights, or to suspend or dispense with legislation. These first two controls are necessarily prior to the third and fourth controls. It is not possible to determine whether legislation has excluded the prerogative before one has determined the existence and extent of the prerogative that legislation is purported to have excluded. Third, prerogative powers cannot be used to exclude legislation. Williams argues that this extends beyond the situation in *De Keyser's Royal Hotel* to include the limitation of using prerogative powers to frustrate legislation. Lastly, to the extent a relevant prerogative exists, courts can review the exercise of such

⁸⁹ The litigation itself could never, of course, have achieved such matters in and of itself. It did, though, give Parliament the opportunity to consider and address such matters—an opportunity taken up by a minority of MPs and the majority of the Lords, but ultimately rejected by a majority of MPs in the House of Commons.

(justiciable) prerogative powers. Williams defends his approach from other analyses of the decision, as well as explaining how this framework was used in the *Miller* decision. In doing so, he is highly critical of the ambulatory thesis adopted by the minority Justices in *Miller* and those who criticise the result of the case.

Our discussion of prerogative powers moves on from an analysis of legal controls over the prerogative to an assessment of the impact of *Miller* on prerogative powers more generally. In Chapter 3, Anne Twomey explains how aspects of the *Miller* decision failed to clarify some areas of prerogative powers. In particular, the decision failed to recognise the existence of legislative as well as executive prerogative powers, which calls into question the Supreme Court's broad assertions concerning the inability of prerogative powers to change domestic law. In a similar manner, Twomey argues that it is important to recognise that the relationship between prerogative powers and common law rights is more subtle than the mere assertion that prerogatives cannot alter common law rights. The prerogative forms part of the common law. As such, there can be instances in which the common law 'accommodates' the exercise of prerogative powers, including to the extent of modifying rights and interests to avoid potential conflicts. While the Supreme Court recognised this subtlety, it is perhaps lost amongst its broad assertions, which could lead to a potential future misunderstanding of prerogative powers. Twomey's contribution also investigates the impact of the *Miller* decision on the prerogative power to withdraw from treaties, concluding that unless *Miller* is interpreted narrowly, requiring legislative authority because of the constitutional impact of withdrawal from the EU, the Supreme Court's decision could have too great a negative impact on treaty-making powers. Twomey also notes that the *Miller* decision could have a serious negative impact if applied in Australia, where the executive has a long-recognised ability to expand Commonwealth legislative power through the ratification of treaties. As such, Twomey concludes that *Miller* is best understood as reaching its conclusions given the very particular and specific constitutional circumstances. To understand *Miller* more broadly would significantly reduce the use of prerogative powers that play an important role in most constitutions, often accompanied by significant political scrutiny over their use.

Eirik Bjorge's contribution (Chapter 4) follows on from Anne Twomey's argument, considering the judgment's international law-related implications and the relationship between international law and domestic law. Bjorge argues that the ratio of *Miller* is a classic assertion of dualism. If the prerogative cannot be used to trigger Article 50, that is because of the position, agreed to by all the Justices of the Supreme Court, that only Parliament, and not the executive, can remove rights. Where disagreement arose was as to whether triggering Article 50 would remove rights. However, Bjorge also recognises that the broad provisions concerning the relationship between domestic and international law provided at the beginning of the judgment may paint a misleading picture of the place of international law in domestic law.

Bjorge argues that the conclusion in *Miller* is based, in part, on the assumption that, whilst treaties can bind in international law, they are not capable of creating

rights and obligations in domestic law unless and until they have been incorporated into domestic law. However, Borge questions the extent to which this assumption holds true in English law, pointing to situations in which the courts have been prepared to base their judgments on treaty principles not according to whether the treaty has been incorporated, but according to whether the treaty affected, or extinguished, private rights. These exceptions, and the approach in *Miller*, question the extent to which the UK's adoption of dualism is based upon an understanding of parliamentary sovereignty, perhaps instead illustrating a form of dualism based on the need to protect individual rights from intrusion by the executive. If we base dualism on parliamentary sovereignty then treaties have no impact in domestic law until they are incorporated into domestic law through legislation. If the basis of dualism is the protection of individual rights from executive intrusion then it is possible for treaties to be enforced even if not implemented by Parliament, where to do so would protect individual rights from executive erosion.

Although *Miller* may suggest a move to a focus on the protection of individual rights, Borge concludes that it provides no specific answer that would offer definitive support for either of these justifications of dualism. It asserts the connection between dualism and parliamentary sovereignty in its general account of the law; yet the Court's specific focus appears to be the protection of individual rights. As such, the legacy of *Miller* for international law is unclear—its potential unfulfilled until the English courts are required to determine specifically whether unincorporated treaties can be relied upon in English law.

This volume then turns to consider more specific questions concerning the relationship between EU and UK law. In Chapter 5, Paul Craig considers the impact of *Miller* on that relationship, and begins by considering the pre-Brexit position. The conceptual frame through which EU law was accommodated in the UK was, in Craig's view, a mixture of legislative and common law *pragmatism*, coupled with statutory and judicial reserve grounded on *normative principle*. He concludes that *Miller* represents 'continuity with the status quo' rather than a reconceptualisation of EU law within the UK legal order. First, the majority's judgment demonstrates *pragmatism* in its conceptualisation of EU law within the UK legal order: while the ECA was the formal basis for EU law in the UK, the substantive reality was that where EU law applies in the UK, it is the EU institutions which are the relevant source of that law, since they made the rules that the ECA then incorporated into UK law. The *normative* dimension of *Miller* built on the conception of constitutional statutes: while the triggering of Article 50 would not in itself repeal the ECA, withdrawal would deprive it of substance, since we would no longer be party to the EU. The majority in *Miller* believed that this consequence should not ensue without parliamentary authorisation. In the second part of his contribution, Craig examines the relationship between UK and EU law in the period between triggering Article 50 and exit from the EU. During this period, the UK remains fully bound by EU law, such that the Court of Justice of the European Union retains its status as the ultimate authority on issues of EU law that are central to any

withdrawal agreement and future trade agreement between the UK and the EU. Lastly, Craig explores the possible relationship between UK and EU law post-Brexit. Craig concludes that the legal and political reality is that the control and choice wielded by the UK concerning the future relationship between UK and EU law ranges on a spectrum. At one end of the spectrum, the UK has maximum (albeit not absolute) control in the terms of domestic legislation. Here, Craig explores the terms of the European Union (Withdrawal) Bill 2017. At the other end of the spectrum, there are many matters where the UK only retains partial control over the relationship between UK and EU law in important areas such as regulatory and trade provisions, including equivalence provisions. In these areas, domestic legislation will be constrained.

In Chapter 6, David Howarth also considers the relationship between EU and UK law. He focuses on how EU law rights and obligations acquired legal force in the UK, by inquiring into the viability of two competing metaphors. In doing so, he questions one of the most basic premises that underpinned the way in which the *Miller* case was argued and decided. Howarth's first metaphor treats section 2(1) of the ECA as a 'power cable'. On this view, EU law rights and obligations are 'powered' at the EU end of the cable, meaning that they continue to work in UK law only for as long as the cable is plugged in, in (let us say) Brussels. The effect of withdrawal—and of the EU Treaties no longer applying—would be to switch off the power at its (European) source, depriving EU law (as it operates in the UK) of its essential energy supply, and causing EU law rights and obligations to cease to apply. It was the power cable theory that formed one of the foundations of the claimants' case in *Miller*. Nor did the Government question that theory, choosing instead to argue that the ECA anticipated the possibility of the Government's using its prerogative power to flick the 'off' switch. Howarth contrasts this power cable theory with a second view, according to which the ECA serves as a 'bridge'. On this analysis, EU law is transported across the English Channel by the ECA—the metaphorical bridge—and is then plugged into the UK legal system. According to this view, departure from the EU has more modest effects. While nothing more can move across the bridge, that which has already crossed it remains where it is: in the UK, plugged into the domestic system and fully operational. As Howarth points out, whereas the power cable theory is relatively monist, the bridge theory is fundamentally dualist—and in that sense, is the more consistent of the two theories with the UK's constitutional tradition.

Howarth argues that the bridge theory forms the better fit with the language of section 2(1) of the ECA, as well as with section 18 of the European Union Act 2011. He further argues that adopting the power cable theory can be said to result in the unpalatable conclusion that the European Union (Notification of Withdrawal) Act 2017 gave the Prime Minister a power to extinguish vested legal rights, leading to an 'obnoxious' form of retroactivity. The bridge theory, in contrast, produces no such results, because legal rights and obligations that have already crossed the bridge remain available after Brexit. Nevertheless, Howarth acknowledges that the Supreme Court in *Miller* clearly adopted the power cable theory when it treated

the EU institutions as the source of EU law as it applies in the UK. He does not, however, go as far as to argue that what he considers to be the Court's failure to adopt the better of the two theories led it to reach the wrong result. He suggests, for instance, that the conclusion at which the majority arrived might be supported by the bridge theory on the ground that in creating the bridge in the first place, Parliament could be taken to have intended traffic, in the form of EU law, to cross it, and that the bridge's closure was therefore properly a matter for parliamentary legislation, not prerogative action. Howarth concludes by considering the potential implications of the Supreme Court's having proceeded on what he regards as the wrong theoretical basis. Perhaps the most significant, and troubling, is the equanimity (as Howarth puts it) with which the 2017 Act was met, which might be taken by future governments as a precedent for the constitutional acceptability of handing Ministers wide powers to eliminate extant legislation.

Although devolution-related arguments were given short shrift by the Supreme Court, the implications of *Miller*—and of Brexit more generally—for the UK's territorial constitution are potentially highly significant. It is with such matters that Aileen McHarg is concerned in Chapter 7—the first of two contributions on the devolution-related aspects of the case. McHarg concentrates on *Miller's* treatment of the Sewel Convention, particularly as regards its impact on Scotland. She first examines the scope of the Sewel Convention, recognising its policy and its constitutional arms. The former refers to the Convention's application to instances when Westminster legislates in a manner that is within the devolved competences, and the latter to situations where Westminster legislates to alter the devolved legislative or executive competences. McHarg provides a detailed evaluation of whether the Sewel Convention should have applied to the European Union (Notification of Withdrawal) Act 2017, which authorised the UK Government to notify the UK's intention to withdraw from the EU, concluding that there exists sufficient evidence of past practice and sufficient constitutional justification for the constitutional arm of the Sewel Convention to have applied to this legislation. McHarg then evaluates the refusal of the Supreme Court to determine the scope of, or to enforce, the Sewel Convention in the *Miller* decision. She is critical of the Supreme Court's approach, concluding that it was not obvious that the Sewel Convention was legally irrelevant, particularly in the light of the argument that the 'constitutional requirements' noted in Article 50 could extend to conventional as well as legal requirements. McHarg is also critical of the Supreme Court's overly narrow approach to conventions more generally. She refers to previous examples of when courts have been willing and able to determine the scope of conventions, as opposed to limiting their inquiry as to the convention's existence. This leads to her criticism of the Supreme Court's overly narrow approach to the relationship between law and conventions, referring to instances in which courts have in the past been willing to enforce conventions indirectly, if not directly. The overly narrow approach is not just limited to the Supreme Court's interpretation of the Sewel Convention, but also extends to its reading of section 2 of the Scotland

Act 2016. McHarg argues that this overly narrow approach has damaged the delicate relationship between Westminster and the devolved legislatures, both in terms of devaluing the importance of the Sewel Convention as a convention and in terms of the damage it may have done to the perception of the Supreme Court as a neutral arbiter in disputes between Westminster and the devolved nations.

In Chapter 8, Gordon Anthony evaluates the impact of *Miller* on Northern Ireland, focusing on the decisions of *Agnew* and *McCord*, whose appeals were joined with *Miller* in the Supreme Court. Anthony argues that, given the conclusion of the Supreme Court that the prerogative could not be used to trigger Article 50, the decision in *Miller* left more questions concerning devolution unanswered than answered. The Supreme Court's focus on the issues raised in *Miller* is problematic, signalling a potential u-turn from the recognition in *Robinson v Secretary of State for Northern Ireland*⁹⁰ of the specific constitutional importance of the Northern Ireland Act 1998, particularly given its connection to the Belfast Agreement. Anthony is also critical of the failure of the Supreme Court to engage fully with issues arising from the Sewel Convention, again explaining how this leaves the perception of the downgrading of the interests of the devolved legislatures. Whilst the devolved legislatures may perceive the UK as a sovereign country with power devolved to its component nations, this is not the perception of Westminster; the Supreme Court's orthodox account of sovereignty appears to reinforce this picture. Anthony's contribution then turns to an evaluation of the provisions of the European Union (Withdrawal) Bill, focusing in particular on the extent to which the Bill—by prohibiting the Northern Ireland Assembly from legislating contrary to retained EU law—effectively redistributes power to Westminster. Anthony also recognises the further asymmetry that may arise given the special nature of Northern Ireland, the only component nation of the UK which has a land border with another EU Member State. He further evaluates the implications of the recent Phase One Agreement, regarding the position of Northern Ireland. Anthony suggests that a better solution may be to adopt a model of federalism in the UK, whilst recognising that in the immediate future, it is important to ensure that proper consent is obtained from the Northern Ireland Assembly if Brexit is to proceed smoothly, without the ensuing risk of further fracturing the delicate union between the component nations of the UK.

The volume then turns to address the implications of the *Miller* case in relation to wider principles of UK constitutional law. In Chapter 9, Sir John Laws focuses on constitutional statutes—a category of legislation in whose development Sir John was himself instrumental through his well-known judgment in *Thoburn v Sunderland City Council*.⁹¹ One of Sir John's aims is to consider the extent of the use to which the notion of constitutional statutes was—and was not—put

⁹⁰ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 39.

⁹¹ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151.

by the courts that heard the *Miller* case. He proceeds on the basis that the ECA is a constitutional statute, and that, as such, it is immune from implied repeal. He also notes that the majority in the Supreme Court acknowledged that the ECA plays an important role in securing the domestic effect in the UK of EU law. But he concludes that the majority judgment does not itself directly rely on the ECA's status as a constitutional statute, and that this may have led it into analytical error (even if it did not cause it, ultimately, to make what Sir John would have regarded as the wrong decision). Thus, while Sir John observes that the majority said that *the primacy of EU law* means that it cannot be implicitly displaced, he argues that this is to misunderstand both the true legal position and the role played by the concept of constitutional legislation in making sense of that position. On Sir John's view, it is (contrary to the majority in the Supreme Court) not the primacy of EU law that shields it from implied repeal, but the fact that EU law is given domestic effect by a constitutional statute that is itself (on this analysis) immune from implied repeal.

More broadly, Sir John is critical of the way in which both the majority and Lord Reed dealt with the question of what should be understood to be the *source* of EU law as it applies in the UK—and in particular what role the ECA should be understood to play in that regard. Sir John argues that the contrasting positions adopted by the majority and Lord Reed on this issue—pitting the EU institutions against the ECA—'obscure more than they reveal', and form a 'distraction' from the essential question, namely: 'How far should our constitutional law allow the executive to make or unmake domestic law?' Ultimately, Sir John concludes that the majority—in denying the executive the power to give notice under Article 50(2)—answered that question correctly within the context of the *Miller* case. But he argues that in arriving at what he considers to be the right answer, the majority's reasoning might have benefitted from greater reliance on the concept of constitutional legislation. In particular, he suggests that if the ECA is a constitutional statute by dint of conditioning the legal relationship between the individual and the state in a general, overarching manner, then it necessarily alters the law of the land in some fundamental way—and that that, on its own, should be sufficient to disqualify the executive from interfering with the arrangements it has put in place. However, his caveats concerning the majority's reasoning notwithstanding, Sir John is in no doubt that it reached the right result, and welcomes the fact that as well as preventing what would, on his view, have been an improper administrative incursion into Parliament's proper domain, *Miller* illustrates and confirms the courts' role as guardians of the constitution.

In Chapter 10, Mark Elliott analyses the implications of *Miller* for parliamentary sovereignty, focusing on how the approach of the Supreme Court regarding the interplay between the primacy of EU law and the UK Parliament's legislative supremacy can best be understood as demonstrating the inherently pragmatic and flexible approach of the UK constitution. The UK constitution, it is argued, prefers to answer questions as and when they arise, providing practical solutions, rather than providing a deep and detailed analysis of constitutional principles.

This approach is illustrated by what Elliott refers to as the two bookend cases to address this issue, *Factortame (No 2)*⁹² and *Miller*.

Elliott proposes that there are three possible approaches to resolving the conundrum of the primacy of EU law and the supremacy of UK legislation. First, the UK could adopt a position of intransigence, refusing to accept the primacy of EU law. A second (and at the other extreme) view fully accepts the primacy of EU law because this is required by EU law itself, which has either ‘overwhelmed’ or ‘inundated’ the domestic system. Between these poles lies a third, intermediate position, which recognises an element of accommodation between these two more extreme views. This middle view acknowledges the primacy of EU law but in a manner that is determined by UK law. This intermediate view itself is a broad church, providing a series of potential reconciliations. *Factortame* and *Miller* make it clear that the first option is not a possibility, both providing solutions which accorded at least some primacy to EU law. This leaves the choice between the second and third approaches.

Elliott recognises that *Miller* appears to provide support for the view that EU law has primacy over UK law because this is a requirement of EU law. In particular, the judgment of the majority focuses on the unique nature of the EU Treaties. However, this interpretation is hard to reconcile with the Supreme Court’s conclusion that membership of the EU, and the ECA, had not altered the rule of recognition. As such, we are left with the conclusion that, to the extent that primacy is accorded to EU law, this stems from requirements of UK law. However, there is a range of possible ways in which this reconciliation could have occurred. First, it could be through the provisions of the ECA, this being seen as providing for a modification or suspension of implied repeal for EU law. Yet this is hard to argue given a lack of specific provision in the ECA to this effect. Moreover, *Miller* appears to suggest that, to the extent that the ECA has a unique status, this turns as much on its classification as a constitutional statute as it does on the precise wording of its provisions. Second, this may occur through the common law, which recognises some legislation as constitutional and, therefore, immune from implied repeal. However, this argument also fails to reflect the true nature of the UK constitution. It requires a binary distinction between ‘constitutional’ and ‘ordinary’ legislation, and between implied and express repeal. Neither of these distinctions operate in a binary manner in practice.

Elliott concludes that *Miller* provides further illustration of the subtle and complex nature of the UK constitution, with its interplay between the role of the courts and Parliament. Whilst the preference for pragmatic resolution of specific problems may mean that judgments appear to be under-theorised, this also illustrates the flexible manner in which the UK constitution accepts and applies a hierarchy of norms, even though this may not always be clearly expressed. The UK constitution is one which prefers ‘constructive ambiguity over conceptual clarity’.

⁹² *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603.

In Chapter 11, Richard Ekins and Graham Gee turn their attention to the political context and consequences of the *Miller* decision. They argue that it is impossible to fully comprehend *Miller* if the decision is divorced from its political context—a move by the political elite to delay an unexpected and unwanted outcome from the Brexit referendum. Their contribution first charts the reaction to the Brexit referendum, noting the attempts of the political and legal elite both to question the use of referendums to decide such matters and to utilise the narrative of constitutional crisis. Gee and Ekins argue that both criticisms are unfounded. The Brexit question was a legitimate issue to put to a referendum, and its outcome did not give rise to a constitutional crisis. Second, they explain the political motivations behind the *Miller* litigation. Whilst they recognise that this may have been the only realistic course of action for those wishing to delay the referendum, they are critical of the litigation, believing this to be based on ‘cleverly crafted’ but ultimately ‘legally unsound’ reasons. Their third section supports this conclusion, setting out their argument as to why Lord Reed’s dissenting judgment provided the more legally persuasive argument. In particular, they focus on the use, by the majority, of adopting a ‘realistic’ interpretation of the ECA, which they regard as evidence of a decision which focused on what the majority believed to be constitutionally proper, as opposed to what was legally sound.

Ekins and Gee argue that the majority Justices of the Supreme Court strayed from their proper constitutional role, which is to maintain the rule of law through an interpretation of the wording of the ECA. In doing so, the Court exchanged political controls over the exercise of prerogative powers for legal controls. They argue that, whilst we may understand why the Supreme Court felt able to act as the guardian of the constitution, particularly given that to do so would fit a proposed narrative of protecting Parliament from the executive, it is nevertheless important to recognise the political background to the *Miller* decision if we are to ensure its proper legacy. In particular, given the potential for future legal actions surrounding the triggering of Article 50, it is important to recognise the particular political context and specific constitutional setting of the *Miller* decision. Whilst the Brexit referendum is not an example of a constitutional crisis, to fail to recognise the political context of, and the weaknesses of the legal arguments which determined, the *Miller* decision could lead to a potential future constitutional crisis caused by the increasing politicisation of the legal process, as more litigation is undertaken for political motives.

This volume concludes, in Chapter 12, with Alison Young’s contribution exploring the implications that the *Miller* case may have for the future of constitutional adjudication in the UK. Young takes as her starting-point the majority’s handling of the argument that ‘the 1972 Act is the source of EU law.’⁹³ The majority

⁹³ *Miller* (n 2), [61].

conceded that this could—‘[i]n one sense’—be said to be so, ‘in that, without that Act, EU law would have no domestic status.’⁹⁴ However, the majority immediately went on to say that ‘in a more *fundamental* sense and, we consider, a more *realistic* sense, where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law.’⁹⁵ First, Young interrogates what the Court might have meant by these notions of ‘fundamental’ and ‘realistic’ readings of the ECA. While she acknowledges that this is not wholly clear, she argues that this language signifies an approach on the part of the Court whereby it is concerned with an interpretation of the ECA that is sensitive to the perceptions of those who have and rely upon rights and obligations under EU law, as distinct from a more legalistic approach.

Second, Young goes on to argue that although the Supreme Court’s reasoning adopted a relatively deductive (as opposed to inductive) approach—in the sense that the Court was prepared to reason down from broad constitutional principles rather than reasoning up, and incrementally, from other cases—the case is not novel in this regard, the more deductive approach being discernible in other apex-level judgments in the UK.

Third, the contribution explores issues arising from the fact that the Court in *Miller* can be understood to have adjudicated on a ‘moot’ constitutional issue, in the sense that it considered the legal issues in advance of the occurrence of the contested legal act—that is, the notification of the European Council under Article 50(2). Again, however, Young suggests that this approach is not novel, and that its adoption, in appropriate circumstances, represents sound constitutional policy rooted in a precautionary principle that serves to anticipate constitutional problems and to avoid the instability that might be occasioned by the absence of such anticipatory intervention.

Fourth, Young considers the approach to the question of whether the Sewel Convention applied, arguing that here—in contrast to its approach to some of the other issues with which it was faced—it was relatively *unwilling* to adopt a ‘fundamental’ or ‘realistic’ approach. The contribution concludes by considering whether the (in general) more ‘fundamental’, ‘realistic’ and (sometimes) anticipatory approach to constitutional adjudication that *Miller* epitomises requires procedural innovation. In this regard, Young raises the question of whether thought should be given to a ‘reference procedure’—akin to those that are found in, for instance, the Canadian, French and South African constitutions—which might accommodate ‘abstract constitutional review’ better than regular claims for judicial review are capable of doing.

⁹⁴ *ibid.*

⁹⁵ *ibid.* (emphasis added).

VII. A Brief Look Ahead

The *Miller* case may have been the first major piece of litigation concerning Brexit,⁹⁶ but it will not be the last. The *Miller* case merely concerned the beginning of the Article 50 process: how, consistent with domestic constitutional requirements, the process of departure from the EU was to be initiated. Many unresolved and contentious issues remain, of both a legal and a political character.

Drawing inspiration from the front cover of this volume, the key question at the heart of *Miller* merely concerned the decision to open the door: questions remain as to how far that door should be opened, whether it can or should be closed again, and what lies behind that door. What the contributions to this volume demonstrate is that the initial process of opening the door has itself raised fundamental legal questions for the UK's domestic constitutional framework, spanning from the nature of prerogative powers, through to the nature of parliamentary sovereignty and representative democracy, the relationship between international and domestic laws, the separation of powers and the respective roles of the branches of the UK constitution, the territorial constitution and devolution arrangements, and the nature of constitutional adjudication. The contributions address those questions and themes, assessing the implications of the *Miller* case for our understandings of the workings of the contemporary UK constitution. The judicial resolution of those questions in *Miller* has had significant and no doubt long-lasting implications and effects on that constitutional framework, regardless of whatever 'type' of Brexit (if any) is eventually effected. The *Miller* case will be at the centre of almost all topics in any UK constitutional law course for generations to come. We hope that the contributions contained in this book will contribute to understanding the ever-evolving and contentious debates concerning the flexible entity that is the UK constitution, both during Brexit and beyond.

⁹⁶ In addition to the prior case of *Shindler* (n 4).