

## **Miller: Legal and Political Fault Lines**

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The argument I will advance in this extended note on the United Kingdom Supreme Court's decision in *R (Miller) v Secretary of State for Exiting the European Union* is that the decision and its aftermath can be usefully understood by reference to three fault lines: between form and substance (Part I); between the old constitution and the new constitution (Part II); and between political accountability and legal accountability (Part III). The decision and the academic debate the litigation provoked revealed that British lawyers are deeply divided about how to resolve important questions about the relationship between Parliament, the executive and the courts. And the legislative response to *Miller* reveals that the fault lines can operate differently in a political context than they do in a legal context (Part IV).

As is well known, Article 50 of the Treaty on European Union sets out the procedure by which a member state can leave the European Union; in particular, Article 50 provides for a two-year time period within which a departure can be negotiated and at the end of which the member state will leave the EU. Article 50 must first be 'triggered', by sending a notification to the departing member state's EU counterparts, in a manner consistent with the departing member state's "domestic constitutional requirements".

In June 2016, the UK held a nationwide referendum on EU membership. A majority voted to LEAVE, rather than to REMAIN. Once it became clear that the UK government's position was that Article 50 could be triggered by use of the prerogative power in relation to foreign affairs, various claimants commenced judicial review proceedings in the Northern Irish and English courts, arguing that statutory authority was necessary to provide a legal basis for triggering Article 50.

Decisions were handed down in October 2016. In *Re McCord*,<sup>1</sup> Maguire J. in the Northern Ireland High Court rejected all of the claimants' arguments – which included arguments based on Northern Ireland's devolution arrangements – and concluded that the UK government could trigger Article 50 under the prerogative. However, in *R (Miller) v Secretary of State for Exiting the European Union*,<sup>2</sup> the Divisional Court (Lord Thomas of Cwmgiedd CJ, Sir Terence Etherton MR and Sales LJ) came to the opposite conclusion on the question of whether Article 50 could be triggered as a matter of prerogative.

Acting fast, the Supreme Court heard appeals from both decisions in December 2016. Given that questions about the impact of triggering Article 50 on devolution arrangements had been raised, the Scottish and Welsh governments were allowed to make submissions as interveners.

In January 2017, the Supreme Court handed down its decision in *R (Miller) v Secretary of State for Exiting the European Union*.<sup>3</sup> By majority, in an opinion signed by eight judges (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge),<sup>4</sup> the Supreme Court held that parliamentary authorisation was required for the triggering of Article 50. Three judges (Lord Reed, Lord Carnwath and Lord

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<sup>1</sup> [2016] NIQB 85 [*Re McCord*].

<sup>2</sup> [2016] EWHC 2768 (Admin) [*Miller (DC)*].

<sup>3</sup> [2017] UKSC 5; [2017] 2 W.L.R. 583 [*Miller (SC)*].

<sup>4</sup> I will refer to the authors of the majority opinion as "the *Miller* majority".

Hughes) dissented. However, the Court was unanimous in holding that there was no legal requirement, in putting the power to trigger Article 50 on a statutory footing, to gain the consent of the devolved governments or legislatures.

Drawing the fault lines I have described and using them as analytical tools achieves three objectives.

*First*, providing a description of how and why judges and academic commentators disagreed about the disposition of the case. *Second*, illustrating that important tensions are to be found in the reasoning of the *Miller* majority. For instance, on the juridical effect of triggering Article 50, substance trumped form, but when it came to the impact of triggering Article 50 on the devolution arrangements, form trumped substance; the ‘constitutional’ nature of the 1972 Act weighed heavily in the balance, but other constitutional innovations, such as referendums and devolution, exerted next to no weight at all; and although the executive’s political accountability as a matter of constitutional convention was deemed to be insufficient justification for avoiding parliamentary authorisation for the triggering of Article 50, the enforcement of constitutional conventions relating to devolution was left entirely to political actors. The fault lines thus expose important tensions in the reasoning of the *Miller* majority.

*Third*, demonstrating that these fault lines are political as well as legal. The relationship between form and substance, old and new and political and legal shaped Parliament’s response to *Miller* just as much as it shaped the judgments of the Supreme Court and the first-instance courts. In the political arena, interestingly, form triumphed over substance, the referendum result carried decisive weight, and confidence about the effectiveness of conventional methods of parliamentary oversight of the executive outweighed concerns about the need for legal protection of the interests of individuals or Parliament. This does not represent an additional criticism of the judges. I mean only to highlight how the legislative response to *Miller* demonstrates that, under Britain’s constitutional arrangements, legal and political actors do not respond in the same way to the same stimuli. This phenomenon may not be unique to Britain, but if so, *Miller* is a striking example that ought to be of interest to constitutional lawyers in other jurisdictions.

In what follows, I will refer not only to the decisions handed down by the three courts but also to literature produced by academic commentators on blogs, principally the UK Constitutional Law Blog. A remarkable feature of the *Miller* litigation was the extent to which academics waded in, publicly, on the legal questions the judges had to address. The Supreme Court praised the role academic commentators had played, paying “tribute” to how their “illuminating articles” resulted in the arguments presented to the Supreme Court being more “refined” than those presented at first instance.<sup>5</sup>

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<sup>5</sup> *Miller (SC)*, at para. 11. See also *ibid.*, at para. 274, *per* Lord Carnwath: “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)”. The blog entries referred to are accessible at the following address: (available at <https://ukconstitutionallaw.org/>). See further Paul Daly, “Legal Academia 2.0: New and Old Models of Academic Engagement and Influence” (2015) 20 *Lex Electronica* 39.

## I. Form and Substance

The first fault line is form and substance.<sup>6</sup> A substantive reason “may be defined as a moral, economic, political, institutional, or other social consideration” whereas a formal reason “is a legally authoritative reason on which judges and others are empowered or required to base a decision or action, and such a reason usually excludes from consideration, overrides, or at least reduces the weight of, any countervailing substantive reasoning arising at the point of decision or action”.<sup>7</sup> Accordingly, by form, I mean analysis of legal acts and categories distinct from the effects of doing the acts or placing items in different categories. By substance, I mean analysis of the wider consequences of performing acts or placing items in categories.<sup>8</sup>

Drawing the form and substance fault line helps to illustrate why the consequences of triggering Article 50 were disputed. One group of judges and academic commentators argued that the Article 50 notification *per se* had no juristic effect; another group argued the opposite. The groups disagreed fundamentally on the nature of the relationship between EU law and domestic constitutional law, some taking the view that the introduction of EU law into the British constitutional order effected no substantive change, others taking a diametrically opposed view. This dispute also had an impact on the assessment of the consequences for the devolution arrangements of triggering Article 50.

### A. *The Relationship Between EU Law and UK Law*

A consideration of the terms of the European Communities Act 1972 is the best place to start. Section 2(1) provides:

All 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...

The result is that directly effective European Union measures (Commission decisions, regulations, and directives and Treaty provisions couched in sufficiently clear terms) have

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<sup>6</sup> See also Alison Young, “R (Miller) v The Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin): Constitutional Adjudication – Reality over Legality?”, *U.K. Constitutional Law Blog*, November 9, 2016 (available at: <https://ukconstitutionallaw.org/2016/11/09/alison-young-r-miller-v-the-secretary-of-state-for-exiting-the-european-union-2016-ewhc-2768-admin-constitutional-adjudication-reality-over-legality/>).

<sup>7</sup> P.S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law* (Clarendon Press, Oxford, 1987), at pp. 2-5.

<sup>8</sup> I would not say, however, that members of one group are “formalists” and that members of the other group are “substantivists” – I do not mean, in other words, to suggest that the positions judges and commentators took in this context are linked to deeper theoretical or philosophical commitments that the judges and commentators have about public law in general. Nor do I mean to use “formalism” in a pejorative sense: there may be perfectly defensible reasons for one to take a “formal” view of, for instance, the relationship between European Union law and domestic law (for an introduction to the competing views, see Paul Craig, “Sovereignty of the United Kingdom Parliament after Factortame” (1991) 11 *Yearbook of European Law* 221; T.R.S. Allan, “Parliamentary Sovereignty: Law, Politics and Revolution” (1997) 113 *Law Quarterly Review* 443). My distinction between “form” and “substance” is designed to serve a heuristic purpose, nothing more.

effect in British law automatically without further Parliamentary action. Section 2(2) makes provision for delegated legislation designed to give effect to EU law obligations. Section 2(4), though not a model of clarity, provides that EU law obligations will prevail over domestic law norms in the event of conflict.

One view, which focuses on form, is that the 1972 Act is simply the “conduit” through which EU law flows “from time to time”.<sup>9</sup> Indeed, the 1972 Act is expressly premised on exercises of the prerogative that would cause Britain to become a party to “the Treaties”. Without the prerogative, s. 2(1) would simply make no sense. Such “rights” as exist under this regime are “rights from time to time created or arising by or under the Treaties”.<sup>10</sup> As Professor Finnis put it:

Treaty-based rights are statutory in that they depend for their effect in UK law on Parliamentary enactment; but they are not statutory inasmuch as they are not themselves enacted by Parliament and can be terminated (“destroyed”) by termination of treaties in the course of the Crown’s dealings with foreign entities or states.<sup>11</sup>

For Lord Reed, the rights enjoyed by individuals by virtue of the UK’s membership of the EU are “inherently conditional on the application of the EU treaties to the UK...”<sup>12</sup> On this view, triggering Article 50 changes nothing, a conclusion that for Lord Reed flowed inexorably from the form of the 1972 Act, which “creates a scheme under which the effect given to EU law in domestic law exactly matches the UK’s international obligations, whatever they may be”;<sup>13</sup> any rights therein are “inherently contingent” on agreements struck between the EU member states on the international plane.<sup>14</sup> Triggering Article 50 simply “commence[s] the formal legal process by which the UK leaves the EU, no more and no less”.<sup>15</sup> As Maguire J. put it in *Re McCord*:

On 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. The rights of individual citizens will not have changed – though it is, of course, true that in due course the body of EU law as it applies in the United Kingdom will, very likely, become the subject of change. But at the point

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<sup>9</sup> *Miller (SC)*, at para. 65, associating this view with Professor John Finnis. See also Mark Elliott & Hayley J. Hooper, “Critical reflections on the High Court’s judgment in *R (Miller) v Secretary of State for Exiting the European Union*”, U.K. Const. L. Blog, November 7, 2016 (available at: <https://ukconstitutionallaw.org/2016/11/07/mark-elliott-and-hayley-hooper-critical-reflections-on-the-high-courts-judgment-in-r-miller-v-secretary-of-state-for-exiting-the-european-union/>).

<sup>10</sup> John Finnis, “Terminating Treaty-based UK Rights”, *U.K. Constitutional Law Blog*, 26 October 2016 (available at: <https://ukconstitutionallaw.org/2016/10/26/john-finnis-terminating-treaty-based-uk-rights/>).

<sup>11</sup> John Finnis, “Terminating Treaty-based UK Rights”, *U.K. Constitutional Law Blog*, 26 October 2016 (available at: <https://ukconstitutionallaw.org/2016/10/26/john-finnis-terminating-treaty-based-uk-rights/>).

<sup>12</sup> *Miller (SC)*, at para. 177, *per* Lord Reed.

<sup>13</sup> *Miller (SC)*, at para. 189.

<sup>14</sup> *Miller (SC)*, at para. 216, *per* Lord Reed.

<sup>15</sup> Adam Tomkins, “Brexit, Democracy and the Rule of Law”, *Notes from North Britain*, November 5, 2016 (available at: <https://notesfromnorthbritain.wordpress.com/2016/11/05/brexit-democracy-and-the-rule-of-law/>). See also *Miller (SC)*, at para. 218, *per* Lord Reed: “The giving of notification does not in itself alter EU rights or the effect given to them in domestic law”.

when this occurs the process necessarily will be one controlled by parliamentary legislation, as this is the mechanism for changing the law in the United Kingdom.<sup>16</sup>

Moreover, even at the end of the Article 50 period, the 1972 Act would remain on the books, ready to spring back to life if Britain were to re-enter the “Treaties”. As Lord Reed put it, “Parliament has created a scheme under which domestic law tracks the obligations of the UK at the international level, whatever they may be”.<sup>17</sup> But in the meantime, the Act will “cease to operate because there are no longer any treaty rules for it to bite upon”.<sup>18</sup> Indeed, on this more formal view, no fundamental change in the domestic constitutional system would be effected just by triggering Article 50: “the rule of recognition is unchanged”.<sup>19</sup>

The opposing view, which focuses on substance, is that triggering Article 50 will turn the 1972 Act “into what is in substance a dead letter”,<sup>20</sup> because the inevitable effect will be that, two years later, a series of rights in three categories — directly effective rights (such as worker protections) enjoyed in the UK, directly effective rights (such as freedom of movement) enjoyed by UK citizens elsewhere in Europe and derivative rights (such as the ability to stand for election to the European Parliament) — will be eliminated: “By issuing an Article 50 declaration, the Prime Minister would start the process that would inevitably end in the loss of EU rights (even if a way was found to negotiate a set of substitute, non-Treaty rights)”.<sup>21</sup> As the Divisional Court observed, triggering Article 50 would, in respect of the three categories of rights, “deprive[] domestic law rights created by the ECA 1972 of effect”;<sup>22</sup> effect a “material change” to domestic law;<sup>23</sup> and “undo...rights which Parliament intended to bring into effect”.<sup>24</sup>

The *Miller* majority took a similar view of the 1972 Act. They refused to accept that triggering Article 50 would be a mere formality. Doing so would, rather, “cut off the source of EU law entirely”,<sup>25</sup> eliminating EU law and rights derived from it from the domestic legal

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<sup>16</sup> *Re McCord*, at para. 105. The particular result there was that triggering Article 50 would have no effect on the Northern Ireland Act 1998, two sections of which (ss. 6(2)(d) and 24(1)(b)) prohibit legislative and administrative action that would be incompatible with EU law.

<sup>17</sup> *Miller (SC)*, at para. 204.

<sup>18</sup> *Miller (SC)*, at para. 281, *per* Lord Hughes.

<sup>19</sup> *Miller (SC)*, at para. 226. Compare H.R.W. Wade, “Sovereignty – Evolution or Revolution?” (1996) 112 *Law Quarterly Review* 568.

<sup>20</sup> Nick Barber, Tom Hickman and Jeff King, “Pulling the Article 50 ‘Trigger’: Parliament’s Indispensable Role”, *U.K. Constitutional Law Blog*, 27 June 2016 (available at: <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>). As the *Miller* majority put it, “by the 1972 Act, Parliament endorsed and gave effect to the United Kingdom’s membership of what is now the European Union under the EU Treaties in a way which is inconsistent with the future exercise by ministers of any prerogative power to withdraw from such Treaties”. *Miller (SC)*, at para. 77. See similarly at paras. 81, 83, 95. The *Miller* majority and Lord Reed disagreed about the inferences one could draw from the 1972 Act on the extent to which a distinction could be made between modifications to the Treaties (with consequent effects on rights) and withdrawal from the Treaties (with consequent elimination of rights). As Lord Carnwath observed, however, it is “illogical to search in that Act for a presumed Parliamentary intention in respect of withdrawal, at a time when the treaty contained no express power to withdraw, and there was no reason for Parliament to consider it”. *Miller (SC)*, at para. 257.

<sup>21</sup> Nick Barber, Tom Hickman and Jeff King, “Pulling the Article 50 ‘Trigger’: Parliament’s Indispensable Role”, *U.K. Constitutional Law Blog*, 27 June 2016 (available at: <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>).

<sup>22</sup> *Miller (DC)*, at para. 64.

<sup>23</sup> *Miller (DC)*, at para. 64.

<sup>24</sup> *Miller (DC)*, at para. 66.

<sup>25</sup> *Miller (SC)*, at para. 79.

system. Triggering Article 50 would, inevitably, have far-reaching substantive consequences: “Even those legal rules derived from EU law and transposed into UK law by domestic legislation will have a different status. They will no longer be paramount, but will be open to domestic repeal or amendment in ways that may be inconsistent with EU law”.<sup>26</sup> In particular, the category one rights would be lost unless Parliament chose to replicate them in domestic law;<sup>27</sup> that Parliament might ultimately decide to do so<sup>28</sup> could not establish the lawfulness of triggering Article 50 as an act of prerogative, because “the die will be cast before Parliament has become formally involved”.<sup>29</sup>

### B. Devolution

The form and substance fault line cut across another set of issues decided in *Miller*, relating to the effect of Brexit on the devolved administrations. Although devolution operates quite differently in Northern Ireland, Scotland and Wales, some common issues arise. Do they have to consent (by means of legislative consent motions<sup>30</sup>) to any legislation passed by Westminster to authorise the triggering of Article 50? In *Re McCord*, mindful that the Westminster Parliament retains plenary power “to make laws for Northern Ireland”,<sup>31</sup> Maguire J. replied in the negative, on the basis that relations with the EU remain the sole and exclusive competence of the Westminster Parliament.<sup>32</sup> “the better view is that any legislation for the purpose of notification under Article 50(2) would be legislation relating to an excepted matter *i.e.* it would be legislation concerning relations with the European Communities and their institutions. It would not, in the court’s view, be legislation ‘with regards to devolved matters’, even if one was to adopt a broad approach to the meaning of this phrase”, as a matter of constitutional convention.<sup>33</sup>

But this might be to elevate form over substance. For Maguire J. also said: “The devolved institutions, to a greater or lesser extent, *within the area transferred to them* will be administering EU provisions and considering the future development of EU law in relevant subject areas”.<sup>34</sup> It is unclear the extent to which areas such as agriculture, currently dominated by EU law, will be regulated post-Brexit by the devolved institutions; the default position under the Northern Irish and Scottish devolution legislation is that agricultural matters would be devolved.<sup>35</sup> Maguire J. can at least be read as suggesting that it will fall to

<sup>26</sup> *Miller (SC)*, at para. 80.

<sup>27</sup> *Miller (SC)*, at paras. 70, 73. Lord Reed acknowledged that some rights would be inevitably lost, no matter what Parliament subsequently decrees: “Parliament...cannot establish those elements of [EU law] which involve reciprocal arrangements with the other member states, or which involve the participation of EU institutions. Nor can it create rights which have the distinguishing characteristics of EU rights, such as priority over subsequent legislation, and authoritative interpretation by the Court of Justice”. *Miller (SC)*, at para. 218. Even though Lord Reed recognised that triggering Article 50 can have substantive effects, he fell back on his view of the form of the 1972 Act: “the rights are not revoked by the Crown’s exercise of prerogative powers: they are revoked by the operation of the Act of Parliament itself”. *Miller (SC)*, at para. 219.

<sup>28</sup> See especially *Miller (SC)*, at para. 218, *per* Lord Reed: “Parliament can enact whatever provisions it sees fit in order to address the consequences of withdrawal from the EU, including provisions designed to protect rights which are currently derived from EU law”.

<sup>29</sup> *Miller (SC)*, at para. 94.

<sup>30</sup> See *e.g.* Scottish Government, “Sewel Convention - Legislative Consent Motions”, March 18, 2016 (available at: <http://www.gov.scot/About/Government/Sewel>).

<sup>31</sup> Northern Ireland Act 1998, s. 5(6).

<sup>32</sup> Northern Ireland Act, 1998, Schedule 2.

<sup>33</sup> *Re McCord*, at para. 121.

<sup>34</sup> *Re McCord*, at para. 106, emphasis added.

<sup>35</sup> The Prime Minister has said that these matters would be for negotiation:

the Northern Irish institutions to “administer[] EU provisions”, which raises the prospect that triggering Article 50 might indeed have an effect “with regards to devolved matters”, especially given that the nature of the regulatory regimes (now subject to EU law) would inevitably change post-Brexit. More generally, the devolved administrations are obliged to comply with EU law, an obligation that will be either strange or ineffective once the UK has left the EU. In a curious passage, the *Miller* majority seemed to accept that triggering Article 50 would effect a substantive change to the devolution arrangements:

...it is normally impermissible for statutory rights to be removed by the exercise of prerogative powers in the international sphere. *It would accordingly be incongruous if constraints imposed on the legislative competence of the devolved administrations by specific statutory provisions were to be removed, thereby enlarging that competence, other than by statute. A related incongruity arises by virtue of the fact that observance and implementation of EU obligations are a transferred matter and therefore the responsibility of the devolved administration in Northern Ireland. The removal of a responsibility imposed by Parliament by ministerial use of prerogative powers might also be considered a constitutional anomaly.* In light of our conclusion that a statute is required to authorise the decision to withdraw from the European Union, and therefore the giving of Notice, it is not necessary to reach a definitive view on the first referred question. The EU constraints and the provisions empowering the implementation of EU law are certainly consistent with our interpretation of the 1972 Act but we refrain from deciding whether they impose a discrete requirement for Parliamentary legislation.<sup>36</sup>

Having already concluded that legislation was necessary to provide the authority to trigger Article 50, the *Miller* majority was able to avoid coming to a definitive conclusion on whether legislation would be needed to account for changes to devolution arrangements as well as for the elimination of EU law and EU-law derived rights. Plainly, however, the quoted passage – especially the highlighted portions – strongly suggests that a substantive change would be effected.

This makes the *Miller* majority’s conclusions on the devolution issues all the more puzzling. On this point, the *Miller* majority spoke for the whole court. Although s. 28(7) of the Scotland Act 1998 makes clear that devolution “does not affect the power of the Parliament of the United Kingdom to make laws for Scotland”, the relevant constitutional convention (the Sewel Convention) has now been placed on a statutory footing by the Scotland Act 2016:<sup>37</sup> “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”.

In the Court’s view, however, judges “are neither the parents nor the guardians of political conventions; they are merely observers”.<sup>38</sup> The Sewel Convention “operates as a political

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Part of [delivering a Brexit that works for Britain] will mean working very carefully to ensure that – as powers are repatriated from Brussels back to Britain – the right powers are returned to Westminster, and the right powers are passed to the devolved administrations of Scotland, Wales and Northern Ireland.

Theresa May, “The government’s negotiating objectives for exiting the EU: PM speech”, January 17, 2017 (available at: <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>).

<sup>36</sup> *Miller (SC)*, at para. 132, emphasis added.

<sup>37</sup> See s. 2, inserting a new s. 28(8) in the Scotland Act 1998.

<sup>38</sup> *Miller (SC)*, at para. 146.

restriction on the activity of the UK Parliament”, activity on which, pursuant to Article 9 of the Bill of Rights, the courts are not permitted to adjudicate.<sup>39</sup> By enacting the Scotland Act 2016 “the UK Parliament [was] not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it [was] recognising the convention for what it is, namely a political convention, and [was] effectively declaring that it is a permanent feature of the relevant devolution arrangement”.<sup>40</sup> That the Sewel Convention is on a statutory footing changes nothing – it is a statute that ‘bears no law’,<sup>41</sup> or, one might say, a matter of form rather than substance. Even though the *Miller* majority recognised the substantive effect that triggering Article 50 would have on the devolution arrangements and took a substantive rather than formal view of the effect that triggering Article 50 would have on UK law, it refused to give any substance to the Sewel Convention.

## II. The Old Constitution and the New Constitution

The second fault line is the old and the new. The “Old Constitution” can be described as follows. Since the Glorious Revolution, the British Constitution has featured the Queen-in-Parliament at its heart. There are no higher norms in the British constitutional order than those laws duly passed by the House of Commons and the House of Lords.<sup>42</sup> What Parliament enacts is the supreme law of the land and Parliament can make or unmake any law on any subject.<sup>43</sup> The prerogative continues to subsist as the “residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown”,<sup>44</sup> as long as it has not been superseded by statute – it is, as Lord Reid once said, “a relic of a past age, not lost by disuse, but only available for a case not covered by statute”.<sup>45</sup>

But this old view is, as Lord Reid’s *dictum* implies, being displaced by the new. On the one hand, there is significant momentum behind those who argue that sovereignty is “bi-polar”, shared between Parliament (acting in the political sphere by developing policy) and the courts (acting in the legal sphere by developing the common law),<sup>46</sup> and those who might be tempted to see sovereignty, in today’s globalised world of international agreements and regulatory standards, as chimerical;<sup>47</sup> moreover, with its patchwork of devolution statutes, Britain resembles less and less a unitary state.<sup>48</sup> On the other hand, direct democracy has begun to creep onto territory previously occupied by Parliament. Referendums, whether on devolution of powers, reform of the electoral system or membership of international organizations, have become predicates to the passing of legislation on certain fundamental

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<sup>39</sup> *Miller (SC)*, at para. 145.

<sup>40</sup> *Miller (SC)*, at para. 148.

<sup>41</sup> David Feldman, “Legislation Which Bears No Law” (2016) 37 (3) Statute Law Review 212.

<sup>42</sup> See e.g. *Pickin v British Railways Board* [1974] A.C. 765, at p. 798, *per* Lord Simon; *British Coal Corporation v The King* [1935] A.C. 500, at pp. 520-522, *per* Lord Sankey (P.C.).

<sup>43</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at p. 40.

<sup>44</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at p. 424.

<sup>45</sup> *Burmah Oil v Lord Advocate* [1965] A.C. 75, at p. 101.

<sup>46</sup> The term is associated with Sir Stephen Sedley. See e.g. “Human Rights: a Twenty-First Century Agenda” [1995] PL 386.

<sup>47</sup> See generally, Cheryl Saunders, “Designing and operating constitutions in global context” in David Feldman and Mark Elliott eds., *The Cambridge Companion to Public Law* (Cambridge University Press, Cambridge, 2016), at p. 256.

<sup>48</sup> Mark Elliott, “Law, Rights and Constitutional Politics” in Guy Lodge and Glenn Gottfried ed., *Democracy in Britain: Essays in honour of James Cornford* (IPPR, London, 2014), at p. 91.



matters.<sup>49</sup> Finally — and here the two hands meet — the common law has begun to recognize a new category of ‘constitutional’ statutes, which are immune from implied repeal<sup>50</sup> and, beyond that, may be taken to express certain constitutional fundamentals about the British legal order;<sup>51</sup> judges have even suggested that, in “exceptional circumstances” the courts could legitimately refuse to apply legislation passed by Parliament.<sup>52</sup> The upshot is that there is, arguably, a “hierarchy of domestic constitutional norms”, a phenomenon that can more readily emerge in a climate in which sovereignty is fragmented and/or variegated.<sup>53</sup>

The clash between the old and new constitutions prompted two questions in respect of Article 50, relating to the referendum and the nature of ‘constitutional’ statutes.

#### A. ‘Constitutional’ Statutes

In *Miller*, the Divisional Court placed significant emphasis on the ‘constitutional’ nature of the 1972 Act. For these first-instance judges, the government’s argument that the claimants had to identify an abrogation of the prerogative in the 1972 Act “left out part of the relevant constitutional background”.<sup>54</sup> Rather, statutory interpretation — especially of a ‘constitutional’ statute — “must proceed having regard to background constitutional principles which inform the inferences to be drawn as to what Parliament intended by legislating the way it did”; the statute has to be read “in the light of constitutional principle”.<sup>55</sup>

Critics objected to the Divisional Court’s imputation of an intention to Parliament. For instance, “the common law’s designation of a statute as ‘constitutional’ does not tell us *anything whatever* about legislative intention, because that designation is in the first place a matter of common law”.<sup>56</sup> Put another way, “a statutory provision is constitutional not because the legislature intended it to have that status (which in any case had not been recognized in law when the 1972 Act was passing through Parliament) but because the

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<sup>49</sup> Brigid Hadfield, “Devolution: A National Conversation” in Jeffrey Jowell and Dawn Oliver eds., *The Changing Constitution*, 7<sup>th</sup> ed. (Oxford University Press, Oxford, 2011), p. 213, at p. 233 suggests that devolution has radically altered the constitutional order:

[D]evolution marks a clear movement from the formal doctrine of parliamentary sovereignty standing alone...to its combination with a process, already a constitutional convention, whereby the holding of a referendum on any fundamental change to devolution...is not a matter of a concession or a (central government) convenience (for resolving internal disputes) but a nascent right. Devolution is not simply a gift from the Westminster Parliament but a reflection of an autochthonous movement which continues to develop.

<sup>50</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] *Q.B.* 151.

<sup>51</sup> See e.g. *R. (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 *W.L.R.* 324, especially at para. 207, *per* Lord Neuberger and Lord Mance.

<sup>52</sup> *Jackson v Attorney General* [2006] 1 *A.C.* 262, at para. 102, *per* Lord Steyn; see also, *ibid.*, at para. 104, *per* Lord Hope and at para. 159, *per* Baroness Hale, *Axa General Insurance v Lord Advocate*, [2011] UKSC 46, [2012] 1 *A.C.* 868, at para. 51, *per* Lord Hope, at para. 97, *per* Lord Mance and at para. 153, *per* Lord Reed.

<sup>53</sup> Mark Elliott, “Reflections on the HS2 case: a hierarchy of domestic constitutional norms and the qualified primacy of EU law”, *U.K. Constitutional Law Blog*, 23 January, 2014 (available at: <https://ukconstitutionallaw.org/2014/01/23/mark-elliott-reflections-on-the-hs2-case-a-hierarchy-of-domestic-constitutional-norms-and-the-qualified-primacy-of-eu-law/>).

<sup>54</sup> *Miller (DC)*, at para. 84.

<sup>55</sup> *Miller (DC)*, at para. 82.

<sup>56</sup> Mark Elliott & Hayley J. Hooper, “Critical reflections on the High Court’s judgment in *R (Miller) v Secretary of State for Exiting the European Union*” *U.K. Constitutional Law Blog*, 7 November, 2016 (available at: <https://ukconstitutionallaw.org/2016/11/07/mark-elliott-and-hayley-hooper-critical-reflections-on-the-high-courts-judgment-in-r-miller-v-secretary-of-state-for-exiting-the-european-union/>).

common law confers that status on it”.<sup>57</sup> The critics are surely right on this point: the notion of a statute being ‘constitutional’ in nature only emerged many years after the enactment of the 1972 Act;<sup>58</sup> Parliament could not be said to have “intended” effects that it has subsequently been interpreted as having.

But “EU law is *sui generis* as a matter of constitutional law...because domestic law has provided for its direct effect”<sup>59</sup> — indeed, *overriding* direct effect; the normative force of EU law is of a different order to anything else the common law has recognised. No other statute has been held to be immune from implied repeal<sup>60</sup> or require the inoperability of other laws passed by Parliament.<sup>61</sup> The 1972 Act, as passed by Parliament and interpreted by the courts is a “constitutional innovation”.<sup>62</sup>

The “effect” of the 1972 Act, as the *Miller* majority observed, was “to constitute EU law an independent and overriding source of domestic law”.<sup>63</sup> This was an innovation, which gave the 1972 Act a “constitutional character”.<sup>64</sup> “The primacy of EU law means that, unlike other rules of domestic law, EU law cannot be implicitly displaced by the mere enactment of legislation which is inconsistent with it”.<sup>65</sup> Indeed, the provisions of the 1972 Act were “unique in their legislative and constitutional implications”.<sup>66</sup> The 1972 Act did “considerably more” than statutes that give effect to international treaties in domestic law; it was “unprecedented” in “constitutional terms” because “[i]t authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes”.<sup>67</sup> By removing EU law from the British legal order, the triggering of Article 50 would effect a “major constitutional change”.<sup>68</sup>

A complete withdrawal represents a change which is different not just in degree but in kind from the abrogation of particular rights, duties or rules derived from EU law. It will constitute as significant a constitutional change as that which occurred when EU law was first incorporated in domestic law by the 1972 Act. And, if Notice is given, this change will occur irrespective of whether Parliament repeals the 1972 Act. It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone. All the more so when the source in

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<sup>57</sup> David Feldman, “Brexit, the Royal Prerogative, and Parliamentary Sovereignty”, UK Const. L. Blog, 8 November 2016 (available at: <https://ukconstitutionallaw.org/2016/11/08/david-feldman-brexit-the-royal-prerogative-and-parliamentary-sovereignty/>)

<sup>58</sup> See *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [2003] *Q.B.* 151.

<sup>59</sup> Sir Jeffrey Jowell Q.C. and Naina Patel, “*Miller* Is Right”, *U.K. Constitutional Law Blog*, 15 November, 2016 (available at: <https://ukconstitutionallaw.org/2016/11/15/sir-jeffrey-jowell-qc-and-naina-patel-miller-is-right/>).

<sup>60</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [2003] *Q.B.* 151.

<sup>61</sup> *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 A.C. 603 and *R v Secretary of State for Transport, Ex p Factortame Ltd (No 5)* [2000] 1 A.C. 524.

<sup>62</sup> Sir Jeffrey Jowell Q.C. and Naina Patel, “*Miller* Is Right”, *U.K. Constitutional Law Blog*, 15 November, 2016 (available at: <https://ukconstitutionallaw.org/2016/11/15/sir-jeffrey-jowell-qc-and-naina-patel-miller-is-right/>).

<sup>63</sup> *Miller (SC)*, at para. 65.

<sup>64</sup> *Miller (SC)*, at para. 67.

<sup>65</sup> *Miller (SC)*, at para. 66.

<sup>66</sup> *Miller (SC)*, at para. 90.

<sup>67</sup> *Miller (SC)*, at para. 60.

<sup>68</sup> *Miller (SC)*, at para.100.

question was brought into existence by Parliament through primary legislation, which gave that source an overriding supremacy in the hierarchy of domestic law sources.<sup>69</sup>

The “clear implication” from the terms of the 1972 Act “is that the continued existence of the conduit pipe, as opposed to the contents which flow through it, can be changed only if Parliament changes the law”.<sup>70</sup> Such a fundamental alteration of the UK’s constitutional architecture could *only* be effected under the authority of an Act of Parliament, not “by ministers alone”; “it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation”.<sup>71</sup> The overriding status that EU law enjoys in the domestic legal order resulted from Parliament and the executive acting in tandem: “before (i) signing and (ii) ratifying the 1972 Accession Treaty, ministers, acting internationally, waited for Parliament, acting domestically, (i) to give clear, if not legally binding, approval in the form of resolutions, and (ii) to enable the Treaty to be effective by passing the 1972 Act”.<sup>72</sup> With this history and the principle of parliamentary sovereignty in mind, “it seems most improbable that those two parties had the intention or expectation that ministers, constitutionally the junior partner in that exercise, could subsequently remove the graft without formal appropriate sanction from the constitutionally senior partner in that exercise, Parliament”.<sup>73</sup> On the *Miller* majority’s view, it might be said, ‘constitutional’ statutes – and their fundamental features – cannot be modified by the executive acting alone. This view is eminently plausible, in isolation.

### B. Direct Democracy

But the *Miller* majority’s view of the permissible modalities of major constitutional change is open to a serious objection in this particular context. The constitutional change envisaged by the executive was to be effected on foot of a referendum result; it did not arise in a vacuum.

One line of criticism of the Divisional Court’s decision in *Miller* was based on how little weight was given to the referendum, a “stark omission”: “Ministers’ exercise of the prerogative to trigger Article 50 is no ordinary executive act: it is an act ministers have been told to undertake in a referendum authorised by Act of Parliament”.<sup>74</sup> Indeed, it was argued that “[t]he [Divisional] Court’s determination to examine the constitutional appropriateness of executive action triggering Article 50 without any reference to the broader context lends the decision a highly artificial air”.<sup>75</sup> It is true that, as Lord Reed observed in *Miller*, the parties proceeded “on the basis that the referendum on membership of the EU...does not provide the answer” to the question whether triggering Article 50 required legislation or not.<sup>76</sup> He noted, nonetheless, that “Parliament considered withdrawal from the EU, and made the holding of a referendum part of the process of taking the decision under article 50(1)”.<sup>77</sup>

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<sup>69</sup> *Miller (SC)*, at para. 81.

<sup>70</sup> *Miller (SC)*, at para. 84.

<sup>71</sup> *Miller (SC)*, at para. 82.

<sup>72</sup> *Miller (SC)*, at para. 90.

<sup>73</sup> *Miller (SC)*, at para. 90.

<sup>74</sup> Adam Tomkins, “Brexit, Democracy and the Rule of Law”, *Notes from North Britain*, November 5, 2016 (<https://notesfromnorthbritain.wordpress.com/2016/11/05/brexit-democracy-and-the-rule-of-law/>).

<sup>75</sup> Mark Elliott & Hayley J. Hooper, “Critical reflections on the High Court’s judgment in *R (Miller) v Secretary of State for Exiting the European Union*” *U.K. Constitutional Law Blog*, 7 November, 2016 (available at: <https://ukconstitutionallaw.org/2016/11/07/mark-elliott-and-hayley-hooper-critical-reflections-on-the-high-courts-judgment-in-r-miller-v-secretary-of-state-for-exiting-the-european-union/>).

<sup>76</sup> *Miller (SC)*, at para. 171.

<sup>77</sup> *Miller (SC)*, at para. 214.

And for Lord Carnwath the referendum formed part of the background context in which the executive proposed to use the prerogative to trigger Article 50: “It is one thing...to use the prerogative to introduce a scheme which is directly contrary to an extant Act, and which Parliament has had no chance to consider. It is quite another to use it to give effect to a decision the manner of which has been determined by Parliament itself, and in the implementation of which Parliament will play a central role”.<sup>78</sup>

The *Miller* majority gave short shrift to this line of argument: “Where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation”.<sup>79</sup> The procedural posture of the *Miller* litigation might well be significant. The claimants did not attack the reasonableness of political reliance on the referendum result to justify triggering Article 50. Rather, they attacked the existence of a prerogative power to trigger Article 50 in the first place: their claim went to the jurisdiction to trigger Article 50, not to the merits of doing so. The distinction relied upon by the *Miller* majority between jurisdiction – the authority to trigger Article 50 – and merits – the rationality of doing so – is a formal distinction. Using the distinction may well be defensible, but such heavy reliance on a formal distinction here, having preferred (for the most part) a substantive approach on the effects of triggering Article 50, is at least incongruous. Moreover, when one takes into account the importance accorded to the ‘constitutional’ nature of the 1972 Act, the distinction relied upon to avoid giving weight to the result of the referendum – itself a constitutional innovation – seems to look tenuous if not opportunistic.

It is true that, pushed to its logical conclusion, the government’s position was that it would have had jurisdiction to trigger Article 50 with or without a referendum. The *Miller* majority found this proposition “implausible”, because “it would have been open to ministers to take such a course on or at any time after 2 January 1973 without authorisation by Parliament...even if there had been no referendum or indeed, at least in theory, even if any referendum had resulted in a vote to remain”.<sup>80</sup> However, the rationality of any such purported exercise of the foreign affairs prerogative could be called into question in the courts. Although the *Miller* majority described this as a “bold suggestion”,<sup>81</sup> there are recent examples of British courts adjudicating on the rationality of exercises of the foreign affairs prerogative.<sup>82</sup> Were the Prime Minister to have attempted, prior to the referendum result or notwithstanding a REMAIN vote, to trigger Article 50 on the basis, to take an outlandish example, that the German Chancellor has red hair, judicial review would be possible.<sup>83</sup> Of course, it is necessary to posit an outlandish example because any such review would be highly deferential.<sup>84</sup> But there would be a safeguard, in the form of rationality review, to prevent the occurrence of the scenario feared by the *Miller* majority.<sup>85</sup> In other words, a firm

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<sup>78</sup> *Miller (SC)*, at para. 267.

<sup>79</sup> *Miller (SC)*, at para. 121.

<sup>80</sup> *Miller (SC)*, at para. 91.

<sup>81</sup> *Miller (SC)*, at para. 92.

<sup>82</sup> See *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61, [2009] 1 A.C. 453, at para. 35, *per* Lord Hoffmann; and *e.g. R. (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 W.L.R. 2697.

<sup>83</sup> *Short v Poole Corporation* [1926] Ch. 66 at pp. 90-91; *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

<sup>84</sup> See generally Paul Daly, “Justiciability and the ‘Political Question’ Doctrine” [2010] PL 160.

<sup>85</sup> By contrast, in *Re McCord* Maguire J. relied on the referendum result because in the Northern Ireland case the reasonableness of the government’s exercise of the prerogative was in issue. Maguire J. rejected the claim that

distinction between jurisdiction and merits in respect of triggering Article 50 might not be as necessary as the *Miller* majority seemed to think.

Furthermore, the *Miller* majority's response to the argument that s. 1 of the Northern Ireland Act 1998<sup>86</sup> memorialised the 'principle of consent' again privileged the 'old' over the 'new'. In their view, the provision "gave the people of Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland" but "neither regulated any other change in the constitutional status of Northern Ireland nor required the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union".<sup>87</sup> Standing on its own, there might much to be said for the *Miller* majority's proposition. But by refusing to countenance a creative approach to the Northern Ireland Act 1998 (and, for that matter, the Scotland Act 2016), while emphasising the extraordinary nature of the 1972 Act, the *Miller* majority again left itself open to the charge of opportunism.

### III. Legal and Political Accountability

The third fault line lies between legal accountability and political accountability. It might be said that there are (at least)<sup>88</sup> two perspectives on the British constitution. One is primarily characterised by legal accountability and emphasises the role of courts in imposing constraints of law and due process on the freedom of action of those in the political branches of government.<sup>89</sup> For instance, it is "fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen".<sup>90</sup> Similarly, constitutional principles will constrain grants of authority, such that, to take a well-known example, powers to modify statutory provisions by

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triggering Article 50 would be substantively unreasonable. A number of arguments were made, relating to matters such as Northern Ireland's unique constitutional place in the United Kingdom, the need to assess alternative options and the giving of excessive weight to the referendum result. See *Re McCord*, at para. 125. For Maguire J., it was "difficult to avoid the conclusion that a decision concerning notification under Article 50(2) made at the most senior level in United Kingdom politics, giving notice of withdrawal from the EU by the United Kingdom following a national referendum, is other than one of high policy...unsuitable for judicial review". *Re McCord*, at para. 133, emphasis added. I would not take this to mean that such questions are inherently unreviewable — Maguire J. cited *Youssef v Foreign Secretary* [2016] 2 W.L.R. 509, *Sandiford and Bancoult (No. 2)*, each of which countenances review of even sensitive prerogatives in respect of foreign affairs — but that the applicants did not discharge the heavy burden of demonstrating that the government's desire to proceed with triggering Article 50 would be unreasonable. Inviting a court to second-guess the weight the executive should give to factors relevant to the exercise of a discretionary power is rarely successful. Maguire J.'s conclusion is correct, though the language of "high policy", is too strong inasmuch as it suggests that the substance of the Article 50 notification is inherently unreviewable.

<sup>86</sup> The section provides:

(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

<sup>87</sup> *Miller (SC)*, at para. 135.

<sup>88</sup> See also David Feldman, "None, One, or Several? Perspectives on the UK's Constitution(s)" (2005) 64 CLJ 329.

<sup>89</sup> See e.g. Mark Elliott and Robert Thomas, *Public Law* 2<sup>nd</sup> ed. (Oxford University Press, Oxford, 2014), at p. 35-37, using the terms political and legal constitutionalism.

<sup>90</sup> *R. (Evans) v Attorney General* [2015] UKSC 21, [2015] 1 A.C. 1787, at para. 52, *per* Lord Neuberger.

subordinate legislation (so-called Henry VIII Clauses) will be narrowly construed.<sup>91</sup> And, of course, where fundamental rights are at stake, Parliament must clearly authorise their elimination: this is the “principle of legality” and it “means that Parliament must squarely confront what it is doing and accept the political cost”.<sup>92</sup>

But a competing perspective is characterised by political accountability, which relies on individual interests and the public good being safeguarded by robust debate within the political process.<sup>93</sup> On this view, constitutional principles, including fundamental rights, are protected by the proper operation of political institutions and public debate: “Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate. Ideally, it is these latter methods which should be used to check executive errors and excesses; for it is the task of Parliament and the executive in tandem, not of the courts, to govern the country”.<sup>94</sup>

#### A. *Emphasising Political Accountability: the Miller Dissenters*

The dissenters in *Miller* were heavily influenced by the importance (in their view) of political accountability. In Lord Carnwath’s view, “[t]he Executive is accountable to Parliament for its exercise of the prerogative, including its actions in international law. That account is made through ordinary Parliamentary procedures”.<sup>95</sup> Lord Reed was even more forthright:

...controls over the exercise of ministerial powers under the British constitution are not solely, or even primarily, of a legal character...Courts should not overlook the constitutional importance of ministerial accountability to Parliament. Ministerial decisions in the exercise of prerogative powers, of greater importance than leaving the EU, have been taken without any possibility of judicial control: examples include the declarations of war in 1914 and 1939...It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary.<sup>96</sup>

Lord Carnwath agreed with Lord Reed that the triggering of Article 50 is a matter of form rather than of substance. His conclusion on this point was underscored by his appreciation of the role of political accountability within the constitutional framework:

[Triggering Article 50] is merely the start of an essentially political process of negotiation and decision-making within the framework of that article. True it is that it is intended to lead in due course to the removal of EU law as a source of rights and obligations in domestic law. That process will be conducted by the Executive, but it will be accountable to Parliament for the course of those negotiations and the contents of any resulting agreement. Furthermore, whatever the shape of the ultimate

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<sup>91</sup> See e.g. *R. (The Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] A.C. 1531.

<sup>92</sup> *R. v Home Secretary, ex parte Simms* [2000] 2 A.C. 115, at p. 131, per Lord Hoffmann.

<sup>93</sup> See e.g. Mark Elliott and Robert Thomas, *Public Law* 2<sup>nd</sup> ed. (Oxford University Press, Oxford, 2014), at p. 35-37.

[2014] UKSC 60, [2015] A.C. 945, at para. 32.

<sup>94</sup> *R. v Home Secretary, ex parte Fire Brigades Union* [1995] 2 A.C. 513, at p. 567, per Lord Mustill.

<sup>95</sup> *Miller (SC)*, at para. 249.

<sup>96</sup> *Miller (SC)*, at para. 240.

agreement, or even in default of agreement, there is no suggestion by the Secretary of State that the process can be completed without primary legislation in some form.<sup>97</sup>

On this view, there is nothing to fear from the prerogative, the exercise of which is always subject to parliamentary scrutiny, through the convention of ministerial responsibility.<sup>98</sup> It might even be said, in support of this view, that political accountability to Parliament would be an effective means of ensuring that the executive will faithfully implement the referendum result; perhaps the best way to enforce the requirements of the ‘new’ Constitution (such as referendums) is through the tried and trusted ‘old’ methods of the political process.

### *B. Emphasising Legal Accountability: the Miller Majority*

In recent years in the UK, legal accountability has tended to have the upper hand, presumably because political accountability “has on occasion been perceived as falling short, and sometimes well short, of what was needed to bring the performance of the executive into line with the law...”, such that, “[t]o avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen 30 years ago”.<sup>99</sup>

And on the legality of triggering Article 50 without legislation, legal accountability again had the upper hand. It was “clear”<sup>100</sup> that a wide variety of rights would be lost as a result of the triggering of Article 50, including, “for instance, the rights of UK citizens to the benefit of employment protection such as the Working Time Directive, to equal treatment and to the protection of EU competition law, and the right of non-residents to the benefit of the ‘four freedoms’ (free movement of people, goods and capital, and freedom to provide services)”.<sup>101</sup> Accordingly, the *Miller* majority invoked the ‘principle of legality’ in support of its conclusion that statutory authorisation would be required to trigger Article 50: “[f]undamental rights cannot be overridden by general ... words” in a statute, “because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process”.<sup>102</sup> Here, the consequences of accepting the government’s arguments would be drastic. And the statute was not clear:

Had the Bill which became the 1972 Act spelled out that ministers would be free to withdraw the United Kingdom from the EU Treaties, the implications of what Parliament was being asked to endorse would have been clear, and the courts would have so decided. But we must take the legislation as it is, and we cannot accept that,

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<sup>97</sup> *Miller (SC)*, at para. 259. See also *Miller (SC)*, at para. 262.

<sup>98</sup> See also Timothy Endicott, “‘This Ancient, Secretive Royal Prerogative’”, *U.K. Constitutional Law Blog*, 11 November, 2016 (available at: <https://ukconstitutionallaw.org/2016/11/11/timothy-endicott-this-ancient-secretive-royal-prerogative/>); *Parliament and the Prerogative: From the Case of Proclamations to Miller* (London: Policy Exchange, 2016).

<sup>99</sup> *Fire Brigades Union*, at p. 567, *per* Lord Mustill. All that said, Lord Mustill was in the minority in finding for the Minister in that case. More broadly, the extent to which Parliament is subservient to the executive is a point of contention. See *e.g.* Meg Russell, Daniel Gover and Kristina Wollter, “Does the Executive Dominate the Westminster Legislative Process?: Six Reasons for Doubt” (2016) 69 *Parliamentary Affairs* 286.

<sup>100</sup> *Miller (SC)*, at para. 73.

<sup>101</sup> *Miller (SC)*, at para. 70. In addition, “the right to vote in elections for MEPs, and (albeit by inference) the right to stand for election as an MEP” would be “inevitably lost”. *Miller (SC)*, at para. 114. Although the *Miller* majority did not express a definitive view on this point, it did “nothing to undermine and may be regarded as reinforcing” the conclusion that statutory authority was needed to trigger Article 50. *Miller (SC)*, at para. 115.

<sup>102</sup> *Simms*, at p. 131.

in Part I of the 1972 Act, Parliament “squarely confront[ed]” the notion that it was clothing ministers with the far-reaching and anomalous right to use a treaty-making power to remove an important source of domestic law and important domestic rights.<sup>103</sup>

Indeed, the *Miller* majority reacted with hostility to the argument that a wide scope should be given to prerogative powers because ministers would be politically accountable for their actions in triggering Article 50 and renegotiating Britain’s relationship with the EU:

[This argument] would justify all sorts of powers being accorded to the executive, on the basis that ministers could always be called to account for their exercise of any power. There is a substantial difference between (i) ministers having a freely exercisable power to do something whose exercise may have to be subsequently explained to Parliament and (ii) ministers having no power to do that thing unless it is first accorded to them by Parliament. The major practical difference between the two categories, in a case such as this where the exercise of the power is irrevocable, is that the exercise of power in the first category pre-empts any Parliamentary action.<sup>104</sup>

It would be wrong, however, to state that the *Miller* majority venerated legal accountability to the exclusion of political accountability. These judges put the definition and enforcement of the Sewel Convention firmly in the political domain: “It is well established that the courts of law cannot enforce a political convention”.<sup>105</sup> Judges “can recognise the operation of a political convention in the context of deciding a legal question...but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world”.<sup>106</sup> The *Miller* majority insisted that they did not “underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution”, but they left the “policing” of the “scope and the manner” of the Sewel Convention to the ordinary workings of the political process.<sup>107</sup> While the *Miller* majority’s resort to the principle of legality was unsurprising in view of their conclusion that triggering Article 50 would have substantive effects – eliminating a source of law and a range of rights – it is in tension with their willingness to leave the enforcement of the Sewel Convention – set out, let us remember, in a statute – entirely to conventional mechanisms of political accountability.

#### IV. Legislative Response

The same fault lines, between form and substance, old and new, and political and legal, can be perceived to have been at work in the political debates subsequent to *Miller*. Interestingly, they shifted in a very different way, with form triumphing over substance, the referendum

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<sup>103</sup> *Miller (SC)*, at para. 87. See also at para. 108, rejecting the argument that subsequent EU-related legislation had been enacted on the understanding that ministers could trigger Article 50 without legislative authorisation. Legal accountability might also be perceived to underlie the analytical starting point adopted by the Divisional Court. It firmly rejected the UK government’s “contention that the onus was on the claimants to point to express language in the statute removing the Crown’s prerogative” and emphasised instead the “usual constitutional principle that, unless Parliament legislates to the contrary, the Crown should not have power to vary the law of the land by the exercise of its prerogative powers”. *Miller (DC)*, at para. 84. In other words, the fact that rights were at risk influenced the starting point that the Divisional Court adopted.

<sup>104</sup> *Miller (SC)*, at para. 92.

<sup>105</sup> *Miller (SC)*, at para. 141.

<sup>106</sup> *Miller (SC)*, at para. 146.

<sup>107</sup> *Miller (SC)*, at para. 151.



result giving the new constitution a decisive victory over the old, and political accountability trumping legal accountability.

The *Miller* majority noted only that there must be “domestic sanction” in “appropriate statutory form”<sup>108</sup> for the triggering of Article 50 and suggested even that “a very brief statute” would be sufficient.<sup>109</sup> The legislative response to the Supreme Court’s decision in *Miller* was swift. The European Union (Notification of Withdrawal) Act 2017 received Royal Assent on March 16, 2017. The Act contains one substantive section, which provides:

(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.<sup>110</sup>

The triggering of Article 50 was presented by the government as a mere administrative formality made inevitable by the referendum, rather than a policy-laden decision that should be accompanied by sustained parliamentary debate to outline publicly the government’s objectives for the negotiations with the EU; it was, as the Secretary of State for Exiting the European Union put it, “simply about Parliament empowering the Government to implement a decision already made”.<sup>111</sup> The Opposition attempted “to establish a number of key principles that the Government must seek to negotiate during the process”,<sup>112</sup> but did not think it appropriate that the Prime Minister should be “blocked from starting the Article 50 negotiations”.<sup>113</sup> The Bill in unamended form was given its third reading by a strong majority of MPs.<sup>114</sup> Proposals from the House of Lords to amend the Bill to guarantee the rights of EU nationals resident in Britain<sup>115</sup> and a parliamentary vote on the final terms of the agreement negotiated under the auspices of Article 50<sup>116</sup> were rejected by the House of Commons,<sup>117</sup> a rejection in which the Lords rapidly acquiesced.<sup>118</sup> Moreover, the triggering of Article 50 – with the inevitable impact it will have on Britain’s devolution arrangements – was effected without the consent of the devolved legislatures (indeed, over the formal objection of the

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<sup>108</sup> *Miller (SC)*, at para. 86.

<sup>109</sup> *Miller (SC)*, at para. 122. But see Paul Daly, “The Form of the Article 50 Authorisation Bill: Some Early Thoughts on *Miller* [2017] UKSC 5”, *Administrative Law Matters*, January 24, 2017 (available at: <http://www.administrativelawmatters.com/blog/2017/01/24/the-form-of-the-article-50-authorisation-bill-some-early-thoughts-on-miller-2017-uksc-5/>).

<sup>110</sup> The authorisation legislation needed to cover the two distinct bases of the Supreme Court’s decision in *Miller*: the government did not have the power under the prerogative to trigger Article 50 because the effect of doing so would be, as discussed above (1) to remove EU law as a source of law and (2) to eliminate rights currently enjoyed by individuals in the UK. Specifying that the Article 50 notification can be sent notwithstanding the 1972 Act covers the first basis of decision while the reference to “any other enactment” is designed to cover the second basis of decision by making clear Parliament’s intention to permit the executive to eliminate EU law rights contained in pieces of legislation that will be emptied of content by Britain’s departure from the European Union.

<sup>111</sup> *HC Hansard*, 31 January 2017, col 818 (Mr. David Davis).

<sup>112</sup> *HC Hansard*, 31 January 2017, col 825 (Sir Keir Starmer). The amendments proposed are detailed in a House of Lords Library Note prepared by Nicola Newson, *European Union (Notification of Withdrawal) Bill (HL Bill 103 of 2016-2017)* (LLN 2017/009, 15 February 2017), pp. 20-41.

<sup>113</sup> *HC Hansard*, 31 January 2017, col 823 (Sir Keir Starmer).

<sup>114</sup> *HC Hansard*, 8 February 2017, cols 566-570 (494 votes to 122).

<sup>115</sup> *HL Hansard*, 1 March 2017, col 814 (Baroness Hayter of Kentish Town).

<sup>116</sup> *HL Hansard*, 7 March 2017, cols 1250-1251 (Lord Pannick).

<sup>117</sup> *HC Hansard*, 13 March 2017, cols 73-82.

<sup>118</sup> *HL Hansard*, 13 March 2017, cols 1722-1724.

Scottish Parliament<sup>119</sup>). Although, as the *Miller* majority observed, an important point of constitutional principle was at issue,<sup>120</sup> the brevity of the legislative response to *Miller* would seem to vindicate Lord Carnwath's view that requiring Parliament to pass a statute to permit the executive to trigger Article 50 would be "an exercise in pure legal formalism".<sup>121</sup>

The 'constitutional' nature of the 1972 Act played little or no role in Parliament's deliberations; devolution issues, similarly, were not especially influential, despite the best efforts of MPs from the Scottish National Party.<sup>122</sup> But while the referendum result did not exert a significant gravitational pull on the reasoning of the *Miller* majority, it had a very different effect on Parliament's post-*Miller* deliberations. Time and again members of both Houses invoked the referendum result as a justification for drafting a narrow statute, designed to give the Prime Minister the power to trigger Article 50 but no more. A former government minister, who had campaigned to remain in the European Union, argued that refusing to vote in favour of legislation giving the Prime Minister the authority to trigger Article 50 would "risk putting Parliament against people, provoking a deep constitutional crisis in our country and alienating people who already feel alienated".<sup>123</sup> To go any further would be to place fetters on the government's achievement of the policy objective set by those who voted in the referendum. As Lord Taverne put it, the effect of the referendum – an exercise in direct democracy – was to replace Burke with Rousseau, to substitute an MP's judgement as to the public interest with the general will as expressed in a referendum.<sup>124</sup>

One reason that the Lords' amendments were rejected by the House of Commons was (at least according to the Opposition<sup>125</sup>) that the government provided assurances that the rights of EU nationals would be addressed as a priority in the negotiations with the EU subsequent to the triggering of Article 50<sup>126</sup> and that Parliament would be given a meaningful vote on the final deal negotiated between the EU and the British government.<sup>127</sup> In both cases, deviations from the assurances given will presumably be addressed (if necessary) through the doctrine of ministerial responsibility. Should the ministers renege on their promises, they will face political consequences in the House of Commons. These are precisely the mechanisms of political accountability invoked in dissent in *Miller* by Lord Reed and Lord Carnwath. More generally, the final fate of the rights imperilled by the triggering of Article 50 will be determined at the negotiating table. Parliament could have fettered in advance the freedom of the executive to bargain away some of the rights – indeed, was urged that this was required as a matter of legal obligation<sup>128</sup> – but did not do so. As Lord Carnwath put it, it was difficult to see how the effects of triggering Article 50 would be "mitigated by a statute which does no

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<sup>119</sup> *Official Report, Meeting of the Parliament*, 7 February 2017, p. 85.

<sup>120</sup> "The essential point is that, if, as we consider, what would otherwise be a prerogative act would result in a change in domestic law, the act can only lawfully be carried out with the sanction of primary legislation enacted by the Queen in Parliament". *Miller (SC)*, at para. 122.

<sup>121</sup> *Miller (SC)*, at para. 273.

<sup>122</sup> *HC Hansard*, 31 January 2017, col 832 (Mr. Stephen Gethins); *HC Hansard*, 1 February 2017, cols 1133-1135.

<sup>123</sup> *HC Hansard*, 1 February 2017, col 1034 (Mr. George Osborne).

<sup>124</sup> *HL Hansard*, 7 March 2017, col 1218.

<sup>125</sup> *HC Hansard*, 7 February 2017, cols 265-266 (Sir Keir Starmer).

<sup>126</sup> *HC Hansard*, 6 February 2017, col 24 (Mrs. Theresa May).

<sup>127</sup> *HC Hansard*, 7 February 2017, col 274 (Mr. David Davis).

<sup>128</sup> Sir David Edward KCMG PC QC, Sir Francis Jacobs KCMG PC QC, Sir Jeremy Lever KCMG QC, Helen Mountfield QC and Gerry Facenna QC, *Opinion in the Matter of Article 50 of the Treaty on European Union* (Bindmans LLP, 10 February 2017) (available at: [https://www.bindmans.com/uploads/files/documents/Final\\_Article\\_50\\_Opinion\\_10.2.17.pdf](https://www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf)); *HL Hansard*, 7 March 2017, col 1270 (Baroness Kennedy of the Shaws).

more than authorise service of the [Article 50] notice”.<sup>129</sup> The rights will be protected (if at all) through the operation of the ordinary mechanisms of ministerial responsibility. In the end, political accountability trumped legal accountability.

By observing that politicians viewed Article 50 as a matter of form, felt bound by the referendum result and preferred to rely on the ordinary arrangements for the accountability of the executive to Parliament, I do not mean to level an additional criticism at the *Miller* majority. Judges must decide cases based on the law, not on prognostications as to how the political branches will react to judicial decisions. My point is that the fault lines can again serve as useful analytical tools; here, their application to the political response to *Miller* reveals the very different way in which the fault lines shifted in a political, as opposed to a legal, context. *Miller* is a vivid illustration of how judges and politicians can respond very differently to the same stimuli.

## V. Conclusion

Considering the *Miller* litigation and the legislative response to it as attempts to navigate the fault lines between form and substance, the old constitution and the new constitution, and political accountability and legal accountability achieves the three objectives set out in the Introduction.

*First*, using the fault lines as analytical tools enhances the legal community’s understanding of *Miller* by placing the resolution of the issue relating to the triggering of Article 50 in a broader context. Lord Carnwath was right to observe that the litigation should not be seen in “binary” terms, as a clash between Parliament and the executive.<sup>130</sup> Rather, it raised important questions about the way British lawyers understand their constitution, in particular, how to accommodate constitutional innovations such as EU membership, referendums and devolution.

*Second*, close examination of the fault lines reveals significant tensions in the reasoning of the *Miller* majority. For the *Miller* majority substance trumped form on the nature of the 1972 Act. However, form trumped substance on the nature of Britain’s devolution arrangements. The new constitution trumped the old inasmuch as the ‘constitutional’ nature of the 1972 Act limited the executive’s ability to alter unilaterally the functioning of the legislation. But the old trumped the new when it came to the question of the importance of the referendum result and devolution arrangements. Finally, the *Miller* majority was openly hostile to the proposition that political methods of control would be adequate to safeguard the individual rights put in mortal danger by the triggering of Article 50. Yet when it came to the devolution issues, legal accountability was not influential at all: constitutional conventions would be interpreted and enforced in the political realm only.

*Third*, that such a significant decision of British constitutional law can be marked by a failure to chart a consistent course along clearly visible fault lines and by profound disagreement between groups of judges and commentators seems to confirm Professor Sir William Wade’s observation that “the nearer they come to the bedrock of the constitution, the less certain the judges [and, for that matter, academics] seem to be”.<sup>131</sup> Indeed, that the bedrock of the

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<sup>129</sup> *Miller (SC)*, at para. 269.

<sup>130</sup> *Miller (SC)*, at para. 248.

<sup>131</sup> “The Crown, Ministers and Officials: Legal Status and Liability” in Maurice Sunkin & Sebastian Payne eds, *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, Oxford, 1999) 23 at 23. See

constitution may shift because of the operation of the fault lines I have described may account to some extent for the judges' (and academics') lack of surefootedness. As the *Miller* majority justly observed, Britain's "constitutional arrangements have developed over time in a pragmatic as much as in a principled way",<sup>132</sup> with members of the political branches contributing just as much as the judges to the developments and, as the aftermath to *Miller* illustrates, often contributing in a different way.

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also Sionaidh Douglas-Scott, "Brexit, Article 50 and the Contested British Constitution" (2016) 79 *Modern Law Review* 1019.

<sup>132</sup> *Miller (SC)*, at para. 40.