Brexit Editorial Issue 2 Vol 23 June 2017

1 THE SUPREMES HAVE SPOKEN. SILENCE IS NOT GOLDEN. *MILLER ET AL.* IN THE SUPREME COURT

The previous editorial, which examined the judgment of the Divisional Court in *R v. Miller*,[1] dealt with the relationship between the prerogative and legislation in UK constitutional law and the serving of notice under Article 50(2) TEU of the UK's intention to leave the EU. By the 1972 European Communities Act (ECA) the court ruled in *Miller* that Parliament had legislated to introduce EU law into domestic law in such a way that this could not be undone by the exercise of prerogative power.[2] The government's case[3] in the Supreme Court on appeal after judgment had gone against the government was that nothing in law, including the ECA 1972 and subsequent legislation concerning the EU, had removed the prerogative possessed by the Crown to submit notice under Article 50(2). The government case concentrated on the absence of any express or implied limitation on the prerogative by legislation. In short, the 1972 legislation and subsequent EU legislation in 1978, 2002, 2008 and 2011 made specific provision as to how EU treaties and laws were to be implemented into UK law. They made no provision for withdrawing from the EU. This subsequently remained a matter of international relations under the royal prerogative. The 2015 referendum on EU membership conducted after the 2015 Act provided a mandate for the government to issue the Article 50 notice.[4]

The Government argued that the ECA was an 'ambulatory statute' (one that was subject to change according to international obligations) (paragraph 74) and acted as a conduit of rights agreed to by the executive within Union institutions at the international level. 'The 1972 Act does not and cannot create rights and obligations. EU rights are negotiated and are agreed by government and are created

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1 [2016] EWHC 2768 (Admin): http://www.bailii.org/ew/cases/EWHC/Admin/2016/2768.html (all links accessed 4 Apr. 2017).

2 Eadie (Crown counsel) Tuesday 6 Dec. 2016, 3. *See* note below.

3 The SC transcript is at https://www.supremecourt.uk/docs/draft-transcript-monday-161205.pdf https://www.supremecourt.uk/docs/draft-transcript-tuesday-161206.pdf https://www.supremecourt.uk/docs/draft-transcript-wednesday-161207.pdf https://www.supremecourt.uk/docs/draft-transcript-thursday-161208.pdf

4 'The 2015 Act speaks volumes about the intention of Parliament' (Eadie, 195 Thursday 8 Dec.).

'Brexit Editorial Issue 2 Vol 23 June 2017'. *European Public Law* 23, no. 2 (2017): 205–218.

and arise on the international law plane.'[5] Section 2 incorporates the rights in UK law. This conduit could be blocked by government at the international level. The legislation is necessary but not sufficient for the rights' existence.[6]

The respondent's (Ms Miller) case was that the 1972 Act achieved a 'constitutional revolution' in legal terms within the UK[7] and constituted a 'clamp' on withdrawal from the Union which subsequent legislation, including the 2015 EU Referendum Act, had not removed. The Government's case, it was argued, fails to recognize the limits of prerogative power to nullify/frustrate/override/defeat statutory rights in the ECA – a 'constitutional' statute – or to do likewise to a 'new constitutional order that Parliament has created'.[8] The government's argument, that the ECA is a conduit for international rights, treats the ECA as a lesser statute than the Dangerous Dogs Act i.e. the latter could not be nullified etc. by prerogative. For Ms Miller counsel argued that Parliament was the creator of the rights in the ECA. On judicial canons of construction of legislation there was no scope to leave in place, or re-establish, a prerogative under well-accepted principles of statutory interpretation or by implied repeal under section 2(4) ECA. The 1972 Act and successors laid out an elaborate scheme for variation of EU law but none whatsoever for nullification of rights which was 'extraordinary'.[9] Eadie's point was that overriding the prerogative had to be expressly or impliedly contained in the legislation. Counsel for Ms Miller argued that to create or preserve a prerogative could only be expressly done. This was absent.

The Supreme Court proceeded on the presumption that the concessions accepted in the Divisional Court by the government namely (1) Article 50(2) was irrevocable and cannot be withdrawn (paragraph 26) and (2) that much of EU law *will* be cease to have effect within the UK once Article 50 is invoked whether or not the ECA is repealed. 'That is the basis on which the court is proceeding' (paragraph 169). For Ms Miller the future involvement of Parliament was uncertain and not a legal certitude and repeal of the ECA by a possible Great Repeal Bill (GRB) was not something which the Supreme Court could acknowledge. Departure could come about without such legislation by the effluxion of time within Article 50 and a failure to extend the period under Article 50(3). Lord Carnwath describes this Crown concession as 'albeit possibly controversial' (paragraph 261). A bullet does not take two years to reach its target and is not accompanied by intense negotiation over two years (paragraph 262).

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5 Attorney General, 10, Monday 5 Dec.
6 Eadie, 43, Monday 5 Dec.
7 Lord Pannick QC (counsel for Miller), 183, Tuesday 6 Dec.
8 147–148, Tuesday 6 Dec.
9 Pannick, 198–199, Tuesday 6 Dec.

Mr Eadie was pointedly asked at two stages at the beginning of his case and in his final summing up whether a bill such as the GRB which would be intended to repeal the 1972 Act and remove the jurisdiction of the CJEU would assist his case – this point was made in the previous editorial. It would not assist in the interpretation of existing EU legislation he responded. It may be relevant to 'broader constitutional issues as to whether or not Parliament is going to be involved and if so, how'.[10] He was accused of giving inconsistent answers but accepted it could be relevant but it was a contingency. He seemed wary of placing too much weight on the point 'we are tolerably neutral about it. If it helps, it helps'![11]

The judgment was delivered on 24 January 2017.[12] The court split 8-3 in rejecting the Crown's appeal.

The single judgment for the majority followed counsel for Ms Miller's oral submissions very closely. In short, section 2 ECA provides that EU law and EU institutions are a source of UK law and that source will be lost by serving an 'irrevocable notice' of intention to leave. The ECA provided a 'new constitutional process' for making law within the UK (paragraph 62) and constituted 'EU law as an entirely new, independent and overriding source of domestic law' (paragraph 80). Withdrawal after serving notice under Article 50(2) TEU[13] will effect a 'fundamental change' in a source of UK law. Constitutional change of this nature required the approval of an Act of Parliament in an 'express Parliamentary authorisation' (paragraph 82). This accorded with 'settled constitutional principles stretching back over many centuries'.[14] The Crown's case would allow the law to be changed and a source of 'constitutional law' to be lost by ministerial fiat.

> [W]e consider that, 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 (paragraph 77).

Withdrawal from the EU 'involves a unilateral action by the relevant constitutional bodies which effects a fundamental change in the constitutional arrangements of the UK' (paragraph 78). Withdrawal is fundamentally different from changing the content of EU law (paragraph 81). '[U]nless that Act [ECA] positively created [a power to withdraw from the EU treaties] it does not exist' (paragraph 86). Statutes cannot be interpreted to take away rights unless they are explicit.[15] Silence cannot

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10 Eadie, 6–13, 6 Dec.

11 7–13, Tuesday 6 Dec. 2016: 197–199, Thursday 8 Dec.

12 *R (Miller) v. Secretary of State for Exiting the European Union et al* [2017] UKSC 5, https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf.

13 The majority refer to Art 50 being introduced by the TFEU at para. 104.

14 Lord Neuberger in the live broadcast of the judgments' summary https://www.supremecourt.uk/watch/uksc-2016-0196/judgment.html and para. 91.

15 *R v. Secretary of State for the Home Department ex p Simms* [1999] UKHL 33.

justify a fundamental change in the law. Express *legal* sanction is required and ministerial accountability to Parliament alone is not adequate (paragraph 92).

The arguments relating to the GRB the majority believed missed the point:

> The Secretary of State relied on the fact that it was inevitable that Parliament would be formally involved in the process of withdrawal from the European Union, in that primary legislation, not least the Great Repeal Bill … would be required to enable the United Kingdom to complete its withdrawal in an orderly and coherent manner. That seems very likely indeed, but it misses the point. If ministers give Notice without Parliament having first authorised them to do so, the die will be cast before Parliament has become formally involved. To adapt Lord Pannick's metaphor, the bullet will have left the gun before Parliament has accorded the necessary leave for the trigger to be pulled. The very fact that Parliament will have to pass legislation once the Notice is served and hits the target highlights the point that the giving of the Notice will change domestic law: otherwise there would be no need for new legislation (paragraph 94).

> When taking part in EU decision-making, UK ministers are carrying out the very functions which were envisaged by Parliament when enacting the 1972 Act. Withdrawing from the EU Treaties involves ministers doing the opposite, namely, unilaterally dismantling the very system which they set up in a co-ordinated way with Parliament (paragraph 95).

Departure will involve 'a large amount of domestic legislation' and such a burden should not be imposed on Parliament without its prior consent. It amounts to a 'major constitutional change which withdrawal from the European Union will involve, and therefore the constitutional propriety of prior Parliamentary sanction for the process' (paragraph 100).

The silence of Parliament on Article 50 (1) and (2) in the 2008 and 2011 Acts – and the specific reference to Article 50(3) in the 2011 Act, which concerns an extension of the two year limit for reaching an agreement which was not otherwise relevant for present proceedings[16], cannot be taken to mean that Parliament intended there were no legal limits on ministerial powers in situations not mentioned by Parliament as being so limited (paragraph 111). The Crown's power to withdraw from the EU treaties never existed. Only the express words of Parliament in legislation could create that power (paragraph 112). No such words were there. The 2008 and 2011 Acts could not be interpreted to assist the Crown (para 113). The referendum Act of 2015 specified no consequences of a vote to leave and was at fault for that omission.

> 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

[16] Art 50(3) is referred to as a provision requiring a referendum before ministerial agreement removing unanimity for extension of the two year period was agreed to: Art 50(3)TEU and 2011 Act Sched1.

made in the only way in which the UK constitution permits, namely through Parliamentary legislation (paragraph 121).

The form of the triggering legislation, as opposed to the quantity of legislation generated by Brexit, is entirely a matter for Parliament. In other words the court could consider the burden of future legislation on Parliament by triggering Article 50 but the content of the triggering Bill was solely for Parliament. It would, however, have to be legislation enacted by the Queen in Parliament (paragraph 122). The Commons resolution of 7 December 2016 which, inter alia, called on the Government to invoke Article 50 by 31 March 2017 would not suffice. The referendum result was of 'great political significance' but it was not legally binding (paragraph 124).

This is a powerful and novel – dare one say revolutionary? – statement of UK constitutional law. UK courts have done nothing like this before *Miller's* case in terms of brooking ministerial powers. The object of the judgment is the executive; its impact was aimed at Parliament. This is the first time the UK has done anything comparable with departure from the EU. Henry VIII did depart from the Catholic Church and papal supremacy and Parliament's Act of Supremacy 1534 established him as head of the Church of England and other legislation dissolved the ties with Rome. Anne Boleyn was at the base of those changes. Ms Miller's name will certainly go down in our history. One sincerely hopes she does not become a martyr to history like Anne Boleyn as some Brexiteers have shamefully threatened!

The Supreme Court's majority ruling in *Miller* has come close to dissolving any remnant of the line between constitutional and legal in our unwritten constitution. It was often said that something could be unconstitutional in England although it was not illegal.[17] By this was meant that no justiciable question was raised. The matter was one of high policy for Parliament, convention and political debate. It has taken the courts to remind Parliament of its supremacy and sovereignty. Could the courts have limited what ministers can do in terms of entering treaties (as opposed to serving a notice to leave a treaty) which will have profound constitutional consequences in our law where no express permission in existing statute was in place? The 'unique' fundamental constitutional nature of our membership of the EU was emphasized as a distinguishing motivation for the judgment. Lord Mance has written extra-judicially that it is 'unlikely to find a homologue in our life times'.[18] What future treaties may the UK enter into where a similar line may be adopted? What, for instance, of comprehensive trade deals

[17] Although courts may interpret a statute to avoid an unconstitutional outcome: Lord Wilberforce in *Vestey v. IRC* [1979] 3 All ER 976 at 984j–985a; *Robinson v. Secretary of State NI* [2002] UKHL para.11, Lord Bingham.

[18] https://www.supremecourt.uk/docs/speech-170213.pdf.

with the US imposing duties on UK companies and government to abide by third party rulings undermining the National Health Service (state funded) as well as other basic rights? What of revoking the Article 50 notice should that become expedient – a point dealt with in the last editorial? Will that also require legislative approval before revocation? What of departure from the much loathed (by Eurosceptics) European Convention on Human Rights? The parts of the Convention introduced into UK law were deliberately incorporated into UK law on a different model to EU law.[19] But the Convention via the Human Rights Act 1998 and common law has had a huge and largely beneficial influence on UK law. Three Supreme Court judgments from the week before *Miller* illustrate the impact of Convention law on sovereign 'immunities' in overseas military campaigns and activities.[20] What of a future separation between the UK and a devolved country? Will an agreement to enter into separation have to be preceded by legislation before discussions commence and a final statute(s) is/are passed? The agreement will certainly lead to profound changes in law and governance. These schemes differ of course from the EU but one can see the arguments progressing. In the past where the prerogative had been abused or did not exist the judicial remedy was a declaration of right, based on the statute or presumably common law.[21] No equivalent declaration was given here, a point made pointedly by Lord Reed in his dissent [para 234]. Why not? This is an important question which the majority judgment does not address.

Lord Reed's dissenting judgment, with which Lords Carnwath and Hughes agreed, stands in dramatic contrast to the majority ruling. He interprets the same statutory edifice as the majority but he finds no limit on the use of the prerogative in international affairs requiring Parliamentary legislation before triggering Article 50. The basic point is that the rule of recognition in the UK constitution[22] – that of Parliamentary legislative sovereignty – will not be changed by leaving the EU. He points out the inconsistency between famous judgments of the European Court of Justice on direct effect of EU law and supremacy of EU law[23] and the UK doctrines of dualism and Parliamentary Sovereignty. *Van Gend en Loos* and *Costa v. ENEL* did not change the ultimate rule of recognition when examined through the prism of dualism.

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19 *Rights Brought Home* Cm 3782 (1997).

20 *Rahmatullah No 2* [2017] UKSC 1; *Serdar Mohammed* [2017] UKSC 2; *Belhaj & Anr* [2017] UKSC 3.

21 *Att-Gen v. De Keyser's Royal Hotel* [1920] AC 508 involving statute.

22 HLA Hart, *The Concept of Law* (1961) original edition. The majority did not believe the rule of recognition would change by departure [para 60].

23 *Van Gend en Loos* Case 26/62 [1963] and *Costa v. ENEL* Case 6/64 (1964). These cases (I add without the ECA) are incompatible with the dualist UK constitution and ultimately with the fundamental principle of Parliamentary sovereignty (Reed para. 183).

Reed argues that the 'vital' distinction drawn by the majority between changes to the content of EU law and changes resulting from withdrawal have no basis in the wording of the ECA. The Act 'simply creates a scheme under which the effect given to EU law in domestic law' is activated whatever the content may be ['from time to time created or arising by or under the Treaties... Section 2(1)] reflects the UK's international obligations under the Treaties' (paragraph 187)]. 'If the Treaties do not apply to the UK, then there are no rights, powers and so forth which, in accordance with the Treaties, are to be given legal effect in the UK.' The argument basically is that the treaties and the ECA operate at different levels; dualism in effect. The effect of section 2(1) was contingent on ratification of the Treaty but that does not mean the ECA required ratification of the Treaty (paragraphs 192 & 193). Section 2(1) is *silent* on the contingency of whether the Treaties cease to apply as a result of action by the Crown and whether that must be authorized by Act of Parliament. Neither expressly nor by necessary implication has Parliament deprived the Crown of its prerogative power to serve notice. He notes arguments that Article 50 has been incorporated into domestic law by the 2008 Act[24] which incorporated the Treaty of Lisbon.

> If Parliament chooses to give domestic effect to a treaty containing a power of termination, it does not follow that Parliament must have stripped the Crown of its authority to exercise that power. In the present context, the impact of the exercise of the power on EU rights given effect in domestic law is accommodated by the 1972 Act: the rights simply cease to be rights to which section 2(1) applies. Withdrawal under article 50 alters the application of the 1972 Act, but is not inconsistent with it. The application of the 1972 Act after a withdrawal agreement has entered into force (or the applicable time limit has expired) is the same as it was before the Treaty of Accession entered into force. As in the 1972 Act as originally enacted, Parliament has created a scheme under which domestic law tracks the obligations of the UK at the international level, whatever they may be (paragraph 204).

None of the other statutes restrict the foreign affairs prerogative in this case. The 2008 and 2011 Acts specify restrictions on ministers' prerogative powers in relation to numerous subjects in EU law requiring Parliamentary authorization, legislation or referenda. Article 50(1) and (2) were not included in these restrictions. The Constitutional Reform and Governance Act 2010 would not apply to notification nor does it apply to EU treaties. In short there is no express provision impinging on the prerogative and no implicit limitation. This is the point I made in previous editorials.[25]

> The argument that the 1972 Act created statutory rights which cannot be taken away without a further Act of Parliament starts from a premise which requires examination. The

[24] Craig 2016 MLR.
[25] *European Public Law* 589 (2016) and *European Public Law* 1 (2017).

> 1972 Act did not create statutory rights in the same sense as other statutes,[26] but gave legal effect in the UK to a body of law now known as EU law. As explained at paras 186–187 above, section 2(1) recognises that the rights arising under that body of law can be altered from time to time, as a result of changes to the Treaties or to the laws made under the procedures laid down in the Treaties, without the necessity of a further Act of Parliament. Such alterations result not only in the creation of EU rights which are consequently given effect in domestic law by the 1972 Act, but also in the repeal and restriction of EU rights previously created, and given effect under domestic law. The successive regulations imposing fishing quotas are an example. [One other example is used] … As these examples illustrate, rights given direct effect by section 2(1) of the 1972 Act are inherently contingent, and can be altered without any further Act of Parliament. This is a very different situation from any contemplated by the judges in the cases relied on, or by the Scottish and English Parliaments at the time of the Glorious Revolution or the Acts of Union (paragraph 216).

Reed casts doubt on whether notification under Article 50 will alter 'the law of the land', in the sense in which judges have used that expression. For him, the giving of notification does not in itself alter EU rights or the effect given to them in domestic law. Neither does it constrain Parliament's ability to approve legislation in the period allowed by Article 50(3) before the treaties cease to have effect including GRB.

> 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. Parliament cannot, however, replicate EU law. It cannot establish those elements of it 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. The fact that notification alters no law, and that Parliament retains full competence to legislate so as to protect rights before withdrawal occurs, illustrates how different this situation is from those addressed in the cases relied upon. Equally, the fact that the enactment of EU law lies beyond the ability of Parliament illustrates how different it is from 'the law of the land' as usually understood (paragraph 218).
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> More fundamentally, however, the argument that withdrawal from the EU would alter domestic law and destroy statutory rights, and therefore cannot be undertaken without a further Act of Parliament, has to be rejected even if one accepts that the 1972 Act creates statutory rights and that withdrawal will alter the law of the land. It has to be rejected because it ignores the conditional basis on which the 1972 Act gives effect to EU law. If Parliament grants rights on the basis, express or implied, that they will expire in certain circumstances, then no further legislation is needed if those circumstances occur. If those circumstances comprise the UK's withdrawal from a treaty, the rights are not revoked by

[26] As previously, I would argue that Parliament did create these rights in UK law albeit by a novel process which incorporated the law established by EU institutions.

> the Crown's exercise of prerogative powers: they are revoked by the operation of the Act of Parliament itself (paragraph 220).

Reed addresses the change in the rule of recognition in the UK, a change that is in how we in the UK perceive the ultimate basis on which legality rests.

> 'The UK's entry into the EU did not, however, alter its rule of recognition, and neither would its withdrawal. That is because EU law is not a source of law of the relevant kind: that is to say, a source of law whose validity is not dependent on some other, more fundamental, source of law, but depends on the ultimate rule of recognition.' Reed refers to Lord Mance in *Pham* [2015] UKSC 19 para 80 [paragraph 224]. EU law is entirely dependent upon statute although it does not have the same effect as devolved or delegated legislation [paragraph 225]. EU law has a 'limited primacy' because that primacy comes from statute. The rule of recognition, recognising the primacy of statute, is unchanged [paragraph 226]. This is recognised by s 18, 2011 Act [paragraph 226]. The only relevant source of law at all times has been statute [paragraph 227] [as illustrated by *HS2* litigation [[2014] UKSC 3 paragraph 79].[27] Our fundamental constitutional principle in respect of the identification of sources of law is not altered [paragraph 228]. The majority argue that withdrawal 'would be a major change in the UK's constitution' [paragraph 229]. Withdrawal, says Reed, is something that follows from the 1972 Act itself 'and does not require further legislation [paragraph 230].

De Keyser is distinguished in so far as that case does not hold that a prerogative power cannot be exercised where the '*eventual consequence*' will be the statute ceases to have a practical application (paragraph 232). There is nothing in the ECA which prevents the prerogative being applied and neither does that Act regulate the means and process of withdrawal (paragraph 233). The remedy in *De Keyser* and the omission of that remedy in *Miller* have been noted above. *Rees-Mogg* is taken as authority for holding that Parliament had not fettered the Crown's prerogative powers in relation to the Treaties (paragraph 237) unless they are specifically included in a statute as so fettered.[28]

Reed is especially cautious about judicial oversight replacing ministerial accountability to Parliament for the exercise of prerogative powers in matters of high policy. War has been declared and invasions undertaken without any prospect of judicial oversight. This is true but I add that ministerial accountability to Parliament should not be an excuse for no judicial oversight based on legality. And *Miller* goes further than any previous case. This of course is the former division between 'constitutionality' and legality referred to above.

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[27] In the celebrated *Thoburn* judgment [2002] EWHC 195 (Admin) Laws LJ referred to the ECA as a 'constitutional statute' with a higher status over ordinary legislation. But EU law could not be entrenched by that statute and assume overriding constitutional status because Parliament could not do that. The '*English* constitution' would not allow it! (Para. 59).

[28] *R v. Secretary of State for Foreign Affairs ex p Rees-Mogg* [1994] QB 552.

> For a court to proceed on the basis that if a prerogative power is capable of being exercised arbitrarily or perversely, it must necessarily be subject to judicial control, is to base legal doctrine on an assumption which is foreign to our constitutional traditions. 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 (240).

There are matters of high policy which are appropriate for judicial restraint. I agree. But that is not a blanket excuse for judicial self-denial because a minister must account to Parliament. There is a line to be drawn.

Lord Carnwath's primary concern is that Miller's arguments are not supported by the classic rule expressed by Lord Oliver in *JH Rayner* and lack precedent.[29] Miller's arguments run the risk of upsetting the balance of power in the UK constitution and Parliamentary accountability. Both Reed and Carnwath brought these points out in their questions to counsel. 'The courts may not inquire into the methods by which Parliament exercises control over the Executive, nor their adequacy' (paragraph 249). Carnwath supports an argument expressed in my previous editorial – that service of an Article 50(2) notice neither changes nor purports to *change any laws or affect any rights*.

> It 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 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 (paragraph 259).

As anticipated by his questioning in the hearings he was firmly of the view that a GRB would provide Parliament's input and legal authorization for the changes. There was no constitutional rule that 'the prerogative does not extend to any act which will necessarily lead to the alteration of the domestic law, or of rights under it, whether or not that alteration is sanctioned by Parliament' (paragraph 264). Unlike *FBU* (a case of abuse not absence of power [paragraph 266]) there was no 'frustrating or pre-empting' of Parliament's will (267). He raises the question of whether an Article 50 statute will change anything – some may regard it as 'an exercise in pure legal formalism' (paragraph 273).

Article 50, he continues, necessarily involves a partnership between Parliament and the Executive. But its initiation does not require legislation. He recalls Lord Mustill's warnings in *FBA* concerning judicial intervention into Parliamentary business:

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[29] [1990] 2 AC 418 at 499 on dualism and Parliamentary Sovereignty.

> Legislation will undoubtedly be required to implement withdrawal, but the process, including the form and timing of any legislation, can and should be determined by Parliament not by the courts. That involves no breach of the constitutional principles which have been entrenched in our law since the 17th century, and no threat to the fundamental principle of Parliamentary sovereignty (paragraph 274).

My overall perspective is that Reed and the minority were correct in law and conventional understanding. Their judgments are more firmly based in judicial precedent and the hitherto understanding of the balance to be struck between the courts, Parliament and the executive in the UK. Hence my views in the previous editorials. The majority judgment was a statement of principle: you cannot do this without legislation because that would undermine a bulwark of our constitution. Which approach better reflects another bulwark of the UK constitution – the rule of law? In these times of populist executives, popular sovereignty and the fear of the many it may be appropriate to strike a chord for constitutionalism through the courts.

On 7 December in the middle of the legal submissions, the Commons passed an opposition motion (not legislation) calling on the 'PM to commit to publishing the government's plan for leaving the EU before Article 50 is invoked (448-75 votes) and to call on the government to invoke Article 50 by 31 March 2017.

The Bill presented to Parliament[30] as a result of the *Miller* judgment contained two clauses one of which basically said ignoring anything in the ECA and other legislation:

> 1. (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.

The Scottish National Party immediately threatened fifty amendments in the hope of wrecking the Bill! On 25 January Mrs May promised to Parliament a white paper on Her Majesty's Government's plans for Brexit.[31] This followed her Lancaster House speech where she spelt out the basic priorities of her government in leaving the EU.[32] The Bill above commenced its Parliamentary proceedings on 31 January.[33] On 8 February the Bill was approved by the Commons in a third reading by a majority of 372 with the expectation it would be signed into law before the end of March 2017 after passage through the Lords. The focus will then turn to what looks, sadly, like an increasingly bitter battle between the UK and the EU on their future relationship.

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30 European Union (Notification of Withdrawal) Bill 2017.

31 *The United Kingdom's Exit from and New Partnership with the European Union* Cm 9417.

32 https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech.

33 498 MPs (including many 'Remainers') in the Commons voted in favour of the Bill in the second reading, 114 against. Many MPs voted according to their constituents' referendum vote.

2 DEVOLUTION ARGUMENTS

The proceedings were also joined by references from Northern Ireland (NI) and interventions by the Scottish and Welsh governments arguing a variety of devolution issues.

Basically, the argument was that the intervening devolved governments supported the case of Ms Miller that the Crown possessed no prerogative to nullify etc. statutory rights. Furthermore, it was argued by the claimants in the case of NI that there were questions relating to the Belfast agreement and the British-Irish Agreement between the UK and Republic of Ireland concerning greater cooperation between NI and the Republic that could not be affected by prerogative alone. Use of the prerogative would drive a wedge between NI and the Republic.[34] The objectives of the NI Act 1998 and these agreements could not be so affected by prerogative. There were also consequences for the North South Ministerial Council covering the whole of Ireland to similar effect. However, if such a prerogative power was ruled not to exist, so that legislation was required (above), then the devolved governments would have to be consulted on, and consent to, such a Westminster bill by the UK government under the Sewell resolution because it affected devolved subject matters.

The court unanimously held that the relevant devolution legislation did not confer on the devolved governments and legislatures a statutory right to be consulted on the UK legislation, let alone provide a veto. Relations with the EU are solely for the UK government under the relevant legislation. Furthermore the Sewell convention, under which devolved legislatures would be asked to consent to UK legislation affecting their competences, was a rule of political convention and not legally binding. 'Judges are neither the parents nor the guardian of political conventions; they are merely observers' (paragraph 146). The fact that the convention had been elevated into statute for Scotland[35] entrenched it as a convention not a justiciable rule of law (paragraph 149).

The quality press was probably correct in assessing that Mrs May's defeat over the *Miller* issue was easily outweighed by victory on these devolution points. Defeat here could have wreaked havoc on the Brexit timetable causing serious obstacles to Article 50 notice. This ruling gave succour to the Prime Minister and Secretary of State acting for the Crown. The Scottish First Minister's response, as well as that outlined above, was to say that Scotland will not be listened to.[36]

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34 122, Wednesday 7 Dec.

35 S. 28(8) Scotland Act 1998 via s. 2 of the Scotland Act 2016.

36 https://www.theguardian.com/politics/video/2017/jan/24/sturgeon-supreme-court-article-50-ruling-means-scotland-will-not-be-listened-to-video

Meanwhile there are threats of legal actions in Dublin hoping to lead to an Article 267 reference on Article 50 as well as an unsuccessful challenge[37] to UK departure from the EEA without legislation. It was also confirmed that Brexit will lead to UK departure from Euratom.

The Editor.
8 February 2017.

Postscript

On 13 March 2017 the European Union (Notification of Withdrawal) Bill was passed by the Lords and Commons after the Lords introduced two amendments seeking to protect the EU rights of EU citizens in the UK and requiring a Parliamentary vote on the outcome of Brexit negotiations. The Lords backed down when the Commons voted against these amendments. The outcome seemed anti-climactic after the heights of the *Miller* judgment. Mrs May had already conceded a Parliamentary vote on a 'Take it or leave it basis' before the deal was concluded. On the same day the leader of the Scottish National Party announced her intention to seek an order under s 30 Scotland Act 1998 requesting the UK Prime Minister's agreement to hold a referendum in Scotland on Scottish independence. It became clear that Mrs May would not agree to such a referendum until the final outcome of the Art 50 negotiations is concluded. On 29 March, the President of the European Council received the UK's letter of notice to quit the EU under Article 50. Plans were then made for the introduction of the Great Repeal Bill to repeal the ECA.[38] The next editorial will cover this Bill and further developments.

[37] *Financial Times* (10 Dec. 2016).
[38] http://www.bbc.co.uk/news/uk-politics-39431070