
Brexit Report No 1

# The Case of R (Miller et al) v Secretary of State for Exiting the European Union: a legal analysis

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## Introduction

The failure of Prime Ministers David Cameron and Theresa May to immediately begin implementation of the Referendum decision to leave the European Union, either by repealing the European Communities Act (1972) or invoking Article 50, gave those opposed to Britain leaving the European Union the time to regroup and counter-attack.

The Remainers wasted no time and took court action to challenge the Government's right to invoke Article 50 by means of the ancient right of the Royal Prerogative to sign or repudiate treaties.

The court action dragged on from July 2016 until January 2017 when the Supreme Court finally ruled against the Government and required it to invoke Article 50, not just by means of a vote in Parliament, but by means of an Act of Parliament. This was an unprecedented interference in the supremacy of Parliament.

This report analyses the background to this case, and highlights not just the Supreme Court's interference in the supremacy of Parliament, but also raises serious questions about the political impartiality of the Supreme Court.

This report is the first in a series to be published by the EFDD Group, intended to monitor and analyse the Brexit process.

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# The case of R (Miller et al) v Secretary of State for Exiting the European Union:

# a legal analysis

***research paper prepared for EFDD Group***

## Contents



## 1. Introduction

The purpose of this paper is a legal and constitutional analysis of the historic Supreme Court judgement in *R (Miller et al) v Secretary of State for Exiting the European Union.* The paper does not seek to set out the complete history of that litigation, but rather focuses on the final judgement of the Supreme Court and its consequences for the UK constitution.

It will be argued, however, that the political circumstances surrounding that litigation will also have constitutional consequences, most notably in further undermining the public confidence in the administration of justice.

## 2. Procedural history

At the Referendum on 23 June 2016, the UK voted 52% to 48% to leave the European Union. That result led to the resignation of 'Remain' campaigner David Cameron as the Prime Minister, and the appointment of another 'Remain' campaigner, Theresa May. A number of public announcements in the very first days of her government made it clear that it intended to implement the Referendum result by following the procedure set out in Article 50 of the amended EU Treaty. The first step would be giving a notice to the European Council under Article 50(2).

### *2.1. In English High Court*

On 27 June 2016, Mr. Deir Dos Santos made an application to the High Court for a *judicial review* of that decision. On 29 July 2016, a similar application was made on behalf of Ms. Gina Millar. A large number of other campaigners, represented by different legal teams, also sought to challenge that decision using the same procedure and on similar grounds. On 19 July 2016, the High Court (Sir Brian Leveson PQBD) directed that all the claims should be joined and heard together, with Ms. Miller as the lead claimant. Other proposed parties could be represented as co-claimants, 'interested parties', or interveners.

*Judicial review* is the procedure which permits citizens to challenge any administrative decision in courts as unlawful. Typical judicial review claims would challenge such decisions as a refusal of an immigration status, of social benefits, etc. However, the Courts also recognise the right of a genuinely concerned citizen to use the procedure to challenge government decisions of a much more global nature on the grounds of constitutional law. Ironically, that principle was first established in the case brought to challenge the government's intended decision to join the EU: *Blackburn v Attorney General* [1971] 1 WLR 1037.

The case known as *Miller* was in fact a large number of challenges similar to Ms. Miller's brought by different campaigners in parallel, who were formally designated (more or less arbitrarily) as claimants, interested parties, or interveners:

(1) Gina Miller was the First Claimant
(2) Dier Tozetti Dos Santos was the Second Claimant
(3) Graham Pigney and others were designated as the First Interested Party
(4) AB, KK, PR and children were designated as the Second Interested Party
(5) George Birnie and others were designated as the First Intervener

In substance, despite having separate legal representation, those parties adopted and/or supplemented each other's legal arguments. It is therefore convenient, as has been done in the Courts' judgements and in academic articles on the case, to treat the totality of their arguments as parts of the same legal case advanced on behalf of Ms. Miller and others.

As explained below, the parties further multiplied when the case came before the Supreme Court.

The substance of their argument and the government' response is explained further below. The High Court (Lord Thomas of Cwmgiedd CJ, Sir Terence Etherton MR and Sales LJ) agreed with Ms. Miller's case and rejected the government's case.

Previously, the Court (Sir Brian Leveson PQBD) had indicated that, unlike in 'usual' cases where the a High Court judgement may be appealed to the Court of Appeal, the alternative procedure was more appropriate in this case: a 'leapfrog' appeal to the Supreme Court (bypassing the Court of Appeal). That was because of the importance of the case, which ultimately made an appeal to the Supreme Court inevitable, and its urgency, which made it undesirable to lose time for an intermediate appeal.

Having lost in the High Court, the government duly appealed to the Supreme Court.

### *2.2. In the High Court of Norther Ireland*

In parallel, different groups of campaigners brought similar claims in the High Court of Northern Ireland: *McCord, Re Judicial Review* [2016] NIQB 85. The High Court of Northern Ireland also had to merge two claims:

- One claim was brought Mr. Raymond McCord; and
- The other claim was brought by nine claimants, including seven individuals, some of them Northern Irish politicians, and two NGOs. That group of claimants became known as '*Agnew and Others*'. The full list is:
    - (1) STEVEN AGNEW
    - (2) COLUM EASTWOOD
    - (3) DAVID FORD
    - (4) JOHN O'DOWD
    - (5) DESSIE DONNELLY
    - (6) DAWN PURVIS
    - (7) MONICA WILSON
    - (8) THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE
    - (9) THE HUMAN RIGHTS CONSORTIUM

The High Court of Northern Ireland rejected both claims are ruled for the government.

However, subsequently the Attorney General for Northern Ireland used his statutory power to refer the 'devolution issues' arising from the case to the UK Supreme Court.

### *2.3. In the Supreme Court*

The Supreme Court joined the English appeal with the Northern Irish reference. A number of further parties applied to intervene, including the Scottish and Welsh governments. So, the number of parties before the Court multiplied to become practically incapable of precise calculation. The avoid confusion, it is best to consider the case not by reference to individual parties, but by reference to the substantive arguments advanced by them first in the High Court (whether in England or Northern Ireland) and then renewed before the Supreme Court.

## 3. The majority judgement of the Supreme Court

The appeal was heard by the unprecedentedly large panel of all 11 justices of the Supreme Court. By a majority 8 to 3, the Court dismissed the appeal and ruled that an Act of Parliament was necessary to trigger Article 50 in accordance with the UK's 'constitutional requirements'.

The majority judgement was given jointly by Lord Neuberger (President of the SC), Lady Hale (Deputy President), Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, and Lord Hodge. The following aspects of it are noteworthy:

(a) Observations on the constitutional nature of UK membership in the EU;
(b) The resulting ruling on the issue of Royal Prerogative;
(c) Comments on the legal insignificance of the Referendum;

(d) Constitutionally controversial comments, arguably second-guessing further political developments in Parliament;
(e) The ruling on the devolution issues.

### *3.1. Observations on the constitutional nature of UK membership in the EU*

The real constitutional problem of Brexit is not the dichotomy between the Royal Prerogative and Parliamentary Supremacy. Rather, it is the fundamental mismatch between the two views of the constitutional nature of UK membership in the EU from the point of view of, respectively, the UK constitutional law and the EU law. In other words, the issue is not whether the Parliament or the Cabinet has the final say, but whether the EU or the UK has the final say on the terms of the withdrawal.

That mismatch (and its implications for Brexit) is analysed in a separate research paper, but in a brief summary:

- The EU considers itself a 'new legal order', governed by the Treaties like any federal state is governed by its written constitution. That includes the provisions which allocate competences between the Union and member-states, but ultimately, the Treaty has supreme authority.

- The UK constitution does not recognise any such 'new legal order'. It only recognises the parliamentary sovereignty, i. e. the Parliament's virtually unlimited legislative powers. In the EEC Act, those powers were exercised at an unprecedented scale: the entire body of present and future EU law was incorporated into UK law, and vast powers were delegated to the EU. If the Parliament wills it, it is law; but that is only so by virtue of the specific provisions of this specific statute which the Parliament might well repeal at any time.

The dilemma has been prominent in much of the UK courts' jurisprudence on the issue. The majority judgement in *Miller* addresses it as follows:

> *61. In one sense, of course, it can be said that the 1972 Act is the source of EU law, in that, without that Act, EU law would have no domestic status. But in a more fundamental sense and, we consider, a more realistic sense, where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law. The legislative institutions of the EU can create or abrogate rules of law which will then apply domestically, without the specific sanction of any UK institution.* […] *It is also true that EU law enjoys its automatic and overriding effect only by virtue of the 1972 Act, and thus only while it remains in force. That point simply reflects the fact that Parliament was and remains sovereign: so, no new source of law could come into existence without Parliamentary sanction - and without being susceptible to being abrogated by Parliament. However, that in no way undermines our view that it is unrealistic to deny that, so long as that Act remains in force, the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice are direct sources of UK law.*
>
> […]

*63. Under the terms of the 1972 Act, EU law may take effect as part of the law of the United Kingdom in one of three ways. First, the EU Treaties themselves are directly applicable by virtue of section 2(1). Some of the provisions of those Treaties create rights (and duties) which are directly applicable in the sense that they are enforceable in UK courts. Secondly, where the effect of the EU Treaties is that EU legislation is directly applicable in domestic law, section 2(1) provides that it is to have direct effect in the United Kingdom without the need for further domestic legislation. This applies to EU Regulations (which are directly applicable by virtue of article 288 of the TFEU). Thirdly, section 2(2) authorises the implementation of EU law by delegated legislation. This applies mainly to EU Directives, which are not, in general, directly applicable but are required (again by article 288) to be transposed into national law. While this is an international law obligation, failure of the United Kingdom to comply with it is justiciable in domestic courts, and some Directives may be enforced by individuals directly against national governments in domestic courts. Further, any serious breach by the UK Parliament, government or judiciary of any rule of EU law intended to confer individual rights will entitle any individual sustaining damage as a direct result to compensation from the UK government: Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport (Ex p Factortame Ltd) (No 4) (Joined Cases C-46/93 and C-48/93) [1996] QB 404 (provided that, where the breach consists in a court decision, the breach is not only serious but also manifest: Köbler v Austria (Case C-224/01) [2004] QB 848).*

[…]

*65. In our view, then, although the 1972 Act gives effect to EU law, it is not itself the originating source of that law. It is, as was said on behalf of the Secretary of State echoing the illuminating analysis of Professor Finnis, the "conduit pipe" by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU law an independent and overriding source of domestic law.*

*66. Section 18 of the 2011 Act, set out in para 30 above, was enacted in order to make it clear that the primacy of EU law over domestic legislation did not prevent it being repealed by domestic legislation. But that simply confirmed the position as it had been since the beginning of 1973. 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. That is clear from the second part of section 2(4) of the 1972 Act and Factortame Ltd (No 2) [1991] 1 AC 603. The issue was informatively discussed by Laws LJ in Thoburn v Sunderland City Council [2003] QB 151, paras 37-47.*

*67. The 1972 Act accordingly has a constitutional character, as discussed by Laws LJ in Thoburn cited above, paras 58-59, and by Lord Reed and Lords Neuberger and Mance in in R (Buckinghamshire County Council) v Secretary of State for Transport [2014] 1 WLR 324, paras 78 to 79 and 206 to 207 respectively. Following the coming into force of the 1972 Act, the normal rule is that any domestic legislation must be consistent with EU law. In such cases, EU law has*

*primacy as a matter of domestic law, and legislation which is inconsistent with EU law from time to time is to that extent ineffective in law. However, legislation which alters the domestic constitutional status of EU institutions or of EU law is not constrained by the need to be consistent with EU law. In the case of such legislation, there is no question of EU law having primacy, so that such legislation will have domestic effect even if it infringes EU law (and that would be true whether or not the 1972 Act remained in force). That is because of the principle of Parliamentary sovereignty which is, as explained above, fundamental to the United Kingdom's constitutional arrangements, and EU law can only enjoy a status in domestic law which that principle allows. It will therefore have that status only for as long as the 1972 Act continues to apply, and that, of course, can only be a matter for Parliament.*

*68. We should add that, for these reasons, we do not accept the suggestion that, as a source of law, EU law can properly be compared with, delegated legislation. The 1972 Act effectively operates as a partial transfer of law-making powers, or an assignment of legislative competences, by Parliament to the EU law-making institutions (so long as Parliament wills it), rather than a statutory delegation of the power to make ancillary regulations - even under a so-called Henry the Eighth clause, as explained in the Public Law Project case, cited above, paras 25 and 26. The 1972 Act cannot be said to constitute EU legislative institutions the delegates of Parliament: they make laws independently of Parliament, and indeed they were doing so before the 1972 Act was passed. If EU law had the same status in domestic law as delegated legislation, the Factortame litigation referred to above would have had a different outcome. A statutory provision which provides that legislative documents and decisions made by EU institutions should be an independent and pre-eminent source of UK law is thus quite different from a statutory provision which delegates to ministers and other organs of the executive the right to make regulations and the like. The exceptional nature of the effect of the 1972 Act is well illustrated by the passages quoted by Lord Reed in para 182 below from the decisions of the Court of Justice in Van Gend en Loos (Case C-26/62) [1963] ECR 1, 12 and Costa v ENEL (Case C-6/64) [1964] ECR 585, 593. They demonstrate that rules which would, as Lord Reed says, normally be incompatible with UK constitutional principles, became part of our constitutional arrangements as a result of the 1972 Act and the 1972 Accession Treaty for as long as the 1972 Act remains in force.*

[…]

*80. One of the most fundamental functions of the constitution of any state is to identify the sources of its law. And, as explained in paras 61 to 66 above, the 1972 Act effectively constitutes EU law as an entirely new, independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning. This proposition is indeed inherent in the Secretary of State's metaphor of the 1972 Act as a conduit pipe by which EU law is brought into the domestic UK law. Upon the United Kingdom's withdrawal from the European Union, EU law will cease to be a source of domestic law for the future (even if the Great Repeal Bill provides that some legal rules derived from it*

> *should remain in force or continue to apply to accrued rights and liabilities), decisions of the Court of Justice will (again depending on the precise terms of the Great Repeal Bill) be of no more than persuasive authority, and there will be no further references to that court from UK courts. 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.*

This is a further endorsement of the controversial doctrine of the EEC Act 1972 being a 'constitutional statute', first introduced by Laws LJ in *Thoburn*. That doctrine has been criticised not only as a complete innovation in the UK's constitutional doctrine of Parliamentary sovereignty, but also as a violation of its coherence. The *Miller* judgement does little to address its well-known difficulties.

### *3.2. The ruling on Royal Prerogative*

As regards the principal legal dispute between the parties, the SC held (paras 77-78) 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* […T]*he fact that EU law will no longer be part of UK domestic law if the United Kingdom withdraws from the EU Treaties does not mean that Parliament contemplated or intended that ministers could cause the United Kingdom to withdraw from the EU Treaties without prior Parliamentary approval. There is a vital difference between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation, and changes in domestic law resulting from withdrawal by the United Kingdom from the European Union. The former involves changes in EU law, which are then brought into domestic law through section 2 of the 1972 Act. The latter involves a unilateral action by the relevant constitutional bodies which effects a fundamental change in the constitutional arrangements of the United Kingdom."*

Then in para 86:

> *…the EU Treaties not only concern the international relations of the United Kingdom, they are a source of domestic law, and they are a source of domestic legal rights many of which are inextricably linked with domestic law from other sources. Accordingly, the Royal prerogative to make and unmake treaties, which operates wholly on the international plane, cannot be exercised in relation to the EU Treaties, at least in the absence of domestic sanction in appropriate statutory form. It follows that, rather than the Secretary of State being able to rely on the absence in the 1972 Act of any exclusion of the prerogative power to withdraw from the EU Treaties, the proper analysis is that, unless that Act positively created such a power in relation to those Treaties, it does not exist.*
>
> […]

> *89. For these reasons, we disagree with Lloyd LJ's conclusion in Rees-Mogg in so far as he held that ministers could exercise prerogative powers to withdraw from the EU Treaties. It is only right to add that his ultimate decision was nonetheless correct for the reason he gave on p 568, namely that ratification of the particular protocol in that case would not in any significant way alter domestic law.*

This reasoning essentially accepts the legal arguments presented on behalf of Miller et al. However, the observations on the EU being a "source of law", quoted above, seem then to creep into the Court's reasoning:

> [para 82…] *We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation. This conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law to the present issue.*
>
> *83. While the consequential loss of a source of law is a fundamental legal change which justifies the conclusion that prerogative powers cannot be invoked to withdraw from the EU Treaties, the Divisional Court was also right to hold that changes in domestic rights acquired through that source as summarised in para 70 above, represent another, albeit related, ground for justifying that conclusion. Indeed, the consequences of withdrawal go further than affecting rights acquired pursuant to section 2 of the 1972 Act, as explained in paras 62 to 64 above. More centrally, as explained in paras 76 to 79 above, section 2 of that Act envisages domestic law, and therefore rights of UK citizens, changing as EU law varies, but it does not envisage those rights changing as a result of ministers unilaterally deciding that the United Kingdom should withdraw from the EU Treaties.*

### *3.3. Comments on the legal insignificance of the Referendum*

The issue of real long-term constitutional interest which might have been usefully addressed in this case is the development of Referenda as a relatively new constitutional phenomenon, and a clarification of their legal consequences. In this respect, the judgement is also disappointing. It provides no analysis of the issue from the point of view of constitutional fundamentals, leaving the legal status and consequences of the Referendum to be determined by an Act of Parliament which initiates it. The judgement reads:

> *118. The effect of any particular referendum must depend on the terms of the statute which authorises it. Further, legislation authorising a referendum more often than not has provided for the consequences on the result.* [Scotland Act 1978; Parliamentary Voting System and Constituencies Act 2011; Section 1 of the Northern Ireland Act 1998]
>
> […]
>
> *121. 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.*

*122. What form such legislation should take is entirely a matter for Parliament. But, in the light of a point made in oral argument, it is right to add that the fact that Parliament may decide to content itself with a very brief statute is nothing to the point. There is no equivalence between the constitutional importance of a statute, or any other document, and its length or complexity. A notice under article 50(2) could no doubt be very short indeed, but that would not undermine its momentous significance. 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.*

[…]

*124. Thus, the referendum of 2016 did not change the law in a way which would allow ministers to withdraw the United Kingdom from the European Union without legislation. But that in no way means that it is devoid of effect. It means that, unless and until acted on by Parliament, its force is political rather than legal. It has already shown itself to be of great political significance.*

### *3.4. 'Political' observations and suggestions*

Politically, the Supreme Court judgement goes a mile further than the High Court judgement before it. The High Court simply granted the declaration that the Minister has no power to give Article 50 notice without Parliamentary authorisation. By contrast, the Supreme Court:

(a) Clarified that it would require an Act of Parliament ("primary legislation" (see eg para 101), rather than a simpler form of authorisation such as, e.g. a resolution (such as the House of Commons resolution of 7 December 2016 discussed in para 123 of the judgement)) and;

(b) Effectively invited the Parliament to make amendments to any Bill which the government would propose to initiate the Article 50 procedure. Thus, in para 34 the Supreme Court observes, by way of introduction: "*The legislative power of the Crown is today exercisable only through Parliament. This power is initiated by the laying of a Bill containing a proposed law before Parliament, and the Bill can only become a statute if it is passed (**often with amendments**) by Parliament (which normally but not always means both Houses of Parliament) and is then formally assented to by HM The Queen. Thus, Parliament, or more precisely the Crown in Parliament, lays down the law through statutes - or primary legislation as it is also known - and not in any other way*." (emphasis added).

Moreover, the judgement gives a fairly transparent hint at a political solution which the Parliament's anti-Brexit majority can impose upon the government: to make the withdrawal from the EU conditional on the replication of the substantive EU law in domestic law. The judgement reads in paras 69-73:

*69. Although article 50 operates on the plane of international law, it is common ground that, because the EU Treaties apply as part of UK law, our domestic law will change as a result of the United Kingdom ceasing to be party to them, and rights enjoyed by UK residents granted through EU law will be affected. The Divisional Court concluded that, because ministers cannot claim prerogative powers to take an action which would result in a change in domestic law, it was not open to ministers to withdraw from the EU Treaties, and therefore to serve Notice, without authorisation in a statute. In that connection, the Divisional Court identified three categories of right:*

*(1) Rights capable of replication in UK law;*

*(2) Rights derived by UK citizens from EU law in other member states;*

*(3) Rights of participation in EU institutions that could not be replicated in UK law.*

*70. Many current EU rights fall within the first category. They include, 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). Some of these rights have already been embodied in UK law by domestic legislation pursuant to section 2(2) of the 1972 Act, and they will not cease to have effect upon the United Kingdom's withdrawal from the European Union (unless the domestic legislation giving effect to them is repealed in accordance with the law), although the Court of Justice will no longer have any binding role in relation to their scope or interpretation. Other rights, arising under EU Regulations or directly under the EU Treaties, will cease to have effect upon withdrawal (save in relation to rights and liabilities already accrued), but many could be replicated in a new statute - eg the proposed Great Repeal Bill. But, as the Divisional Court pointed out, the need for such replication would only arise because withdrawal from the EU Treaties would have abrogated domestic rights created by the 1972 Act of effect, and again the Court of Justice would no longer have any binding role in relation to them.*

*71. The second category may appear to be irrelevant for present purposes as the rights within it arise from the incorporation of EU law into the law of other member states, and not from UK legislation. However, some rights falling within one category may be closely linked with rights falling within another category. For example, the rights under Council Regulation (EC) No 2201/2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (known as "Brussels II Revised"), would be undermined if a domestic judgment governing the residence of a child could not be enforced outside the UK.*

*72. The rights in the third category will cease when the United Kingdom is no longer a member of the European Union, as they are by their very nature dependent on continued membership. They include the right to stand for selection*

*or later election to the European Parliament, and the right to vote in European elections, as well as the right to invite the Commission to take regulatory action. However, they have the character of what Mr Eadie described as "club membership rights", and are of a different nature from the other more "freestanding" rights in the first and second categories.*

*73. Given that it is clear that some rights in the first category will be lost on the United Kingdom withdrawing from the EU Treaties, it is unnecessary to consider whether, for the purpose of their present arguments, the applicants can rely on the loss of rights in the second and third categories. If they cannot succeed in their argument based on loss of rights in the first category, then invoking loss of rights in the other categories would not help them; and if they can succeed on the basis of loss of rights in the first category, they would not need to invoke loss of rights in the other categories.*

To those familiar with the issue, these passages (especially para 70) indicate that the UK Courts are likely to look favourably at any future argument about the continuity of 'vested rights', acquired while the EU law was in force.

### *3.5. The ruling on the devolution issues*

The SC declined to rule whether, in addition to its analysis of the consequences of the EEC Act 1972 and the issues of Royal Prerogative, the Northern Ireland Act 1998 also had the effect of requiring an Act of Parliament before the government could give Article 50 Notice.

The SC held in paras 129-130 that

> "*in imposing the EU constraints and empowering the devolved institutions to observe and implement EU law, the devolution legislation did not go further and require the United Kingdom to remain a member of the European Union. Within the United Kingdom, relations with the European Union, like other matters of foreign affairs, are reserved or excepted in the cases of Scotland and Northern Ireland, and are not devolved in the case of Wales - see section 30(1) of, and paragraph 7(1) of Schedule 5 to, the Scotland Act 1998; section 108(4) of, and Part 1 of Schedule 7 to, the Government of Wales Act 2006; and section 4(1) of, and paragraph 3 of Schedule 2 to, the NI Act. Accordingly, the devolved legislatures do not have a parallel legislative competence in relation to withdrawal from the European Union."*

Policing and enforcing political conventions does not lie within the constitutional remit of the judiciary: paras 141-151.

## 4. The dissenting judgements

Three judges (Lord Reed, Lord Carnwath and Lord Hughes) gave dissenting judgements for the government. The most significant one is the judgement of Lord Reed, which the other two judges fully endorsed.

***Lord Reed*** held in para 177:

> "*the effect which Parliament has given to EU law in our domestic law, under the 1972 Act, is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK's membership of the EU. The Act imposes no requirement, and manifests no intention, in respect of the UK's membership of the EU. It does not, therefore, affect the Crown's exercise of prerogative powers in respect of UK membership.* […] *Further, since the effect of EU law in the UK is entirely dependent on the 1972 Act, no alteration in the fundamental rule governing the recognition of sources of law has resulted from membership of the EU, or will result from notification under article 50. It follows that Ministers are entitled to give notification under article 50, in the exercise of prerogative powers, without requiring authorisation by a further Act of Parliament.*"

In para 187 (having analysed the complex s. 2(1) of the 1972 Act), Lord Reed says:

> "*Parliament has recognised that rights given effect under the 1972 Act may be added to, altered or revoked without the necessity of a further Act of Parliament (something which is also apparent from section 1(3)). In response to this point, the majority of the court draw a distinction, described as "a vital difference", between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation, and changes resulting from withdrawal by the UK from the European Union. There is no basis in the language of the 1972 Act for drawing any such distinction. Under the arrangements established by the Act, alterations in the UK's obligations under the Treaties are automatically reflected in alterations in domestic law. That is equally the position whether the alterations in the UK's obligations under the Treaties result from the Treaties' ceasing to apply to the UK, in accordance with article 50, or from changes to the Treaties or to legislation made under the Treaties. The Act simply creates a scheme under which the effect given to EU law in domestic law reflects the UK's international obligations under the Treaties, whatever they may be. There is nothing in the Act to suggest that Parliament's intention to ensure an exact match depends on the reason why they might not match.*"

Lord Reed also apparently disagreed with the majority's somewhat vague comments on the status of the EU law as a separate 'source of law'. Lord Reed held:

> *224. 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. The true position was explained by Lord Mance in Pham v Secretary of State for the Home Department [2015] UKSC 19; [2015] 1 WLR 1591, para 80:*
>
> *"For a domestic court, the starting point is, in any event, to identify the ultimate legislative authority in its jurisdiction according to the relevant rule of recognition. The search is simple in a country like the United Kingdom with an explicitly dualist approach to obligations undertaken at a supranational level. European law is certainly special and represents a remarkable development in the world's legal*

*history. But, unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed. The question how far Parliament has so willed is thus determined by construing the 1972 Act."*

*225. As Lord Mance rightly explained, it follows from the UK's dualist approach to international law that EU law is not one of the sources of law identified by the UK's rule of recognition. That was recognised in the cases of Blackburn v Attorney General and McWhirter v Attorney General, as explained in para 183 above. As a source of law, EU law, like legislation enacted by the devolved legislatures, or delegated legislation made by Ministers, is entirely dependent on statute (which is not, of course, to say that EU law has the same effects, as devolved or delegated legislation). It derives its legal authority from a statute, which itself derives its authority from the rule of recognition identifying Parliamentary legislation as a source of law. The recognition of its validity does not alter any fundamental principle of our constitution.*

[…227…] *Since EU law has no status in UK law independent of statute, it follows that the only relevant source of law has at all times been statute.*

Unlike the majority, Lord Reed affirmed R v Secretary of State for Foreign Affairs, Ex p Rees-Mogg.

***Lord Carnwath*** agreed with Lord Reed (para 243).

***Lord Hughes*** agreed with Lord Reed, and particularly his analysis of the EEC Act 1972 (para 281)

## 5. Criticisms of impartiality and fairness

Both in the High Court and in the Supreme Court, the case was considered by panels of judges which were ostensibly deliberately composed to be as authoritative as possible:

- In the High Court, that was a panel of as many as three judges (the rules would have also permitted just one or two, while a larger panel than three judges would be unprecedented), including the Lord Chief Justice (the most senior judge in England) and the Master of the Rolls (the second most senior position)

- The Supreme Court consists of 12 justices, but one of the positions was vacant at the time. Depending on the importance of the case, an appeal would normally be heard by a panel of odd number of justices from 3 to 9; a 9-judge panel is exceptional. *Miller* was heard by an unprecedented panel of all 11 justices of the Supreme Court.

Both judgements had a truly devastating effect on public confidence in the administration of justice. The entire body of UK's senior judiciary, so carefully brought in to share responsibility for the decision, was discredited in the public eyes. No matter how many times both Courts emphasised that they were only concerned with legal/constitutional mechanics of Brexit and

not the political merits of the Referendum decision, their judgements were seen as simply an attempt by the unelected elite to frustrate the democratic will of the people.

Infamously, the public mood was well caught by the *Daily Mail* front page on the day after the High Court judgement, with three huge colour photographs of the three High Court judges and a huge headline '*Enemies of the People*'.[1] That sinister allusion to the bloodiest revolutions in history was widely criticised as irresponsible and out of place in a democracy subject to rule of law, if not an implied encouragement of lawless terror against the three judges. There is force in that criticism, but there is no denial that the *Daily Mail* only reflected the public fury at the judgement. The headline was sinister, but so was the public mood.

In the ensuing public debate, the biographies and views of the High Court and Supreme Court judges involved in the case were subjected to intense scrutiny. It was promptly pointed out that many of them had personal and professional links with the EU and their impartiality on the issue was open to question. As a rule, they also had a record of involvement in other political controversies.

Most notably, as regards the High Court panel:

- **Lord Thomas of Cwmgiedd, the Lord Chief Justice**, was a founding member of the European Law Institute. He was also president of the European Network of Councils for the Judiciary for two years. He has a record of involvement in political controversies. Thus, as *Daily Mail* duly recalled, in 2013, Lord Thomas rebuked another High Court judge, Sir Paul Coleridge, for 'bringing the judiciary into disrepute' by speaking out in favour of traditional marriage and describing the devastating impact of family break-up on children.

- **Lord Justice Sales**, as pointed out by the *Mail*, "*came from the same chambers as Tony Blair and once billed taxpayers more than £3million. He defended the Blair government in a 2005 court challenge over the decision not to hold a public inquiry into the Iraq war. Sir Philip Sales charged taxpayers £3.3million in six years during his tenure as Mr Blair's First Treasury Counsel – a lawyer who represents the UK government in the civil courts. His appointment in 1997 had caused consternation in legal circles because he was only 35. He had been a barrister at 11KBW, the same chambers as Mr Blair and then lord chancellor Derry Irvine, leading to claims of cronyism.*"

As regards the Supreme Court panel:

- **The President of the Supreme Court Lord Neuberger's** wife vigorously campaigned against Brexit and the Referendum in her Twitter posts. For example, Lady Nuberger was reported as tweeting at various times[2]:
    - "*Ukip just a protest vote as, I fear, is Brexit for many*"
    - "*This is why referendum dangerous. Reduces complex issues to yes or no: "I didn't understand ramifications""*;
    - indicating her assent to another user's tweet "*How foul this referendum is. The most depressing, divisive, duplicitous political event of my lifetime. May there*

[1] http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html

[2] see e.g. Daily Telegraph on 18 November 2016 and Daily Express on 19 November 2016

*never be another*", to which her Ladyship responded: "*I agree. Referenda mad and bad*".

- re-tweeting other user's messages: "*So many lies, so much ignorance. It's the poorest will suffer most from Brexit*" and
- "*It seems unlikely that a PM could trigger Article 50 without Parliament's approval*".

The Supreme Court's *Guide to Judicial Conduct* relevantly reads in para 3.3: "*Each Justice… will bear in mind that political activity by a close member of a Justice's family might raise concern in a particular case about the judge's own impartiality and detachment from the political process.*"

- **Vice President, Baroness Hale** gave a lecture in Malaysia discussing *Miller* appeal on 9 November 2016, just a few weeks before hearing it in the Supreme Court. Her Ladyship sought to summarise both parties' arguments in an impartial way and acknowledged: "*I shall have to be particularly careful about what I say*". Then, however, in a purported summary of the Claimants' argument, Her Ladyship said: "*The argument is that the European Communities Act 1972 grants rights to individuals and others which will automatically be lost if the Treaties cease to apply. Such a result, it is said, can only be achieved by an Act of Parliament.* ***Another question is whether it would be enough for a simple Act of Parliament to authorise the government to give notice, or whether it would have to be a comprehensive replacement for the 1972 Act.***" (Emphasis added). The last sentence implied that one of the possible outcomes of the appeal would mean that the only lawful way of exiting the EU is "*a comprehensive replacement for the 1972 Act*", which was widely seen as a lengthier and more difficult process than simply giving notice under Article 50. In fact, that was not not part of the argument advanced by any party to this case before this Court or before the High Court. Moreover, whether the repeal of the 1972 Act should be accompanied by its "comprehensive replacement" is a purely political question, not a legal one. Baroness Hale's comment has been widely interpreted as an expression of Her Ladyship's own thoughts on this issue, and it is difficult to see it as anything else. Many commentators inferred than Her Ladyship's mind was leaning towards ruling against the government, as she in fact did.
- **Lord Mance** served as a member of a seven-person EU panel that helps select judges and advocates-general of the European Court of Justice and General Court.
- **Lord Reed** was vice-president of the **EU Forum of Judges for the Environment** between 2006 and 2008. As its web-site http://www.eufje.org states, the Forum's "objective" is "to promote the enforcement" of, inter alia, European environmental law. It is also stated that "The Forum is giving also input to D[irectorate ]G[eneral for] Environment of the European Commission while developing proposals for EU legislation". Lord Reed was also an adviser to the **EU Initiative with Turkey on Democratisation and Human Rights** between 2002 and 2004.
- **Lord Carnwath** was one of four co-founders of the **EU Forum of Judges for the Environment** and served as the forum's secretary general from 2004-05.

The Supreme Court struggled to rebut the suspicions of bias arising out of these and other matters. At the beginning of the hearing of the appeal, Lord Neuberger announced (transcript of Day 1, 5 December 2016, p.p. 1-2):

> *…24 Secondly, it is right to record that at the*
>
> *25 direction of the court, the registrar has asked all the*
> *1 parties involved in these proceedings whether they wish*
>
> *2 to ask any of the justices to stand down. All parties*
>
> *3 to the appeal have stated that they have no objection to*
>
> *4 any of us sitting on this appeal.*

This helped little to remove the public concerns. Firstly, while the 'parties' were more numerous than is usual for a court case, the case concerned the entire country, which never had an opportunity to raise or waive the objections to the composition of the court. The government may have generously accepted Lord Neuberger, Lady Hale and others as the appropriate judges of its case. The country never did.

Secondly, many procedural decisions were taken by a smaller number of justices. For example, many 'pro Brexit' applications to intervene were rejected by orders of just two of them: Lord Neuberger and Lady Hale. The unsuccessful applicants were not among 'all parties' who acquiesced to the composition of the Court. Indeed, at least in one case, Gerard Batten MEP and the author of this paper expressly objected to Lord Neuberger and Lady Hale as being proper impartial judges who could hear lawfully hear the appeal or refuse our application for permission to intervene. That objection was rejected.

Ultimately, two of the judges who had previously come under fire for their involvement in the EU Forum of Judges for the Environment, Lord Reed and Lord Carnwath, gave dissenting judgements in favour of the government and an easier Brexit. On the other hand, one judge who was rumoured to be 'Eurosceptic' and likely to dissent, Lord Sumption, joined the 'anti-Brexit' majority. Hopefully, none of the judges were in fact affected by any improper considerations or political sympathies one way or the other. Yet, the enormous damage to public confidence had been done.

## 6. Conclusions

In a sense, both political and legal significance of *Miller* was considerably overrated. Contrary to some of the dramatic comments made in the heat of the moment, that was not a case which determined the fate of Brexit. Nor was it a case which fundamentally re-defined any part of the uncodified common law Constitution of the United Kingdom. It is true, however, that the case highlighted one ongoing constitutional crisis, and triggered another. It highlighted the constitutional paradox, not to say the constitutional absurdity, of the UK's membership in the EU in the first place. Disastrously, it also did enormous damage to what had remained of the public confidence in British courts.

The legal debate focused on the issues of ***Royal Prerogative* vs. *Parliamentary Supremacy***. That used to be a very acute constitutional controversy in the 17th century; but it was resolved in the 17th century and is no longer controversial in the 21st century. The *Miller* judgements adds little, if anything, to the substantive constitutional settlement. Part of that settlement is that now, unlike in the 17th century, the Royal Prerogative is exercised by the same political

force which commands the Parliamentary majority. Whether its political agenda is implemented (a) by enacting primary legislation or (b) secondary legislation, (c) an enabling act conferring discretionary power on the Crown or (d) Royal Prerogative is now truly a question of procedure, which has little bearing on the political outcomes. The principles analysed in this case still have their constitutional significance, in that they prevent the government from saying one thing in an Act of Parliament and then doing another in day-to-day administrative decisions. However, the *Miller* judgement says nothing that might have significantly altered or developed that aspect of UK Constitution.

One constitutional issue which might have benefited from authoritative judicial analysis, but in fact did not, is the place of **Referenda** in the UK Constitution. The unusual political situation which gave rise to the *Miller* case did not raise issues of the balance of power between a pro-Brexit government and anti-Brexit Parliament, but rather between the anti-Brexit political elite (including the government and Parliament alike) and the pro-Brexit vote of the population. However, the Courts explicitly refrained from providing any such constitutional analysis. All parties (including the government) agreed that the Referendum had no direct legal effect and was purely 'advisory'. Both courts accepted that, and refused to consider the contrary argument offered in an Intervention.

This being so, the **political consequences** of the decision are not very dramatic. The government fought hard for its right to trigger Article 50 without an Act of Parliament expressly authorising that. It lost. It therefore introduced the required Bill to the Parliament, which duly voted for it. That obviously could have been done from the outset, avoiding the whole controversy. The real political effect of the case would be much more subtle than really 'frustrating' the government's action to initiate Brexit:

(1) It has influenced the public opinion to consider the Article 50 procedure as the only way – at least the only realistic way – of withdrawing from the EU. There is a strong case in favour of effecting Brexit by completely different means, namely by an Act of Parliament repealing the EEC Act 1972. However, the parameters of the debate as set in *Miller* case have associated the 'parliamentary' procedure of Brexit with the 'Remain' cause and Article 50 with the 'Leave' cause. The political support for a unilateral repeal of the 1972 Act has been undermined, and the political popularity of Article 50 has been strengthened.

(2) *Miller* litigation has helped to justify the long delay between the Referendum in June 2016 and the proposed date of withdrawal from the EU not before 31 March 2019. Even assuming the Article 50 procedure to be the only legal means of withdrawal from the EU, there is no reason why notice to the EU could not or should not have been given on 24 June 2016. The present intention is to give it by 31 March 2017, and the delay of over 10 months is justified by the need to 'fight' the case in Courts and then in Parliament.

(3) The government has gained some political capital out of its supposedly vigorous fight for Brexit. Being dominated by former Remain campaigners, including the Prime Minister, credentials as hard-line Brexiters was something the government badly needed.

(4) In the future, the concessions made in favour of 'soft Brexit' will be justified by Parliamentary pressure, which would in turn be justified by the ruling of

independent courts. Critics of government from pro-Brexit side will be silenced. The government can share the responsibility for 'too soft a Brexit' with others.

It is difficult to say whether those consequences were intended by the government by dealing with the *Miller* case in the way it did. If they were, that high-profile litigation was simply a dramatic political performance played for the purposes of spin. If the Courts allowed their process to be abused in this way, that can only be described as scandalous.

This brings us to what is probably the most lasting and the worst result of *Miller* litigation for the UK constitution: its devastating effect on the public confidence in the administration of justice. It is an important feature of the UK constitution that the Courts are kept out of politics. It is not enough for the judges to be independent of the government or other political forces, or to resolve cases fairly regardless of political consequences. It is important for the Judiciary to be generally apolitical. A legal case may have political significance, but traditionally, such cases were exceptional.

The public confidence in the political independence of the judiciary was steadily undermined for decades, most significantly by:

(a) The practice (now enshrined in law) of appointing judges to hold 'public inquiries' into various matters of public interest, which often are political matters.
(b) The efforts to reform the system of judicial appointments, culminating in the Constitutional Reform Act 2009.
(c) The wide discretion, including interpretative discretion, conferred on the judiciary by human rights and anti-discrimination legislation, most notably Human Rights Act 1998 and Equality Act 2010.

Times are gone when the judges were universally and absolutely trusted, and considered properly immune from public criticism. The problem is that without such trust, the system cannot operate. The judges cannot be both independent and 'accountable' to the Parliament and/or the public opinion. Any form of 'accountability' would make the politicisation of the judiciary complete, and turn the judiciary offices into political ones. To a large extent, this is what happened in the United States, where a large proportion of presidential debates can be devoted to a discussion which of the Supreme Court judgements the respective candidates proposed to uphold or overturn by appointing a suitable judge to fill the vacancy. Any such system means the end of judicial independence.

It may be argued with some force, however, that the independence of judiciary in the UK has already been lost, and we have no choice but to stop pretending that it still exists.

The maintenance of the system of independent courts, and thus of the rule of law, necessarily requires (a) complete independence, impartiality and fairness of the judiciary and (b) complete public confidence in it.

The role played by the judiciary in the drama of Brexit by entertaining and upholding the *Miller* claim has made these problems very acute. Rightly or wrongly, the public confidence in the judiciary has now fallen to its lowest level in living memory. Unless it is restored swiftly, the likely result will be some system of 'judicial accountability' – accountability to political bodies which have, or deserve, no more public confidence than the judiciary itself. Ultimately, that would mean the end to the rule of law.

The only alternative is for judicial independence to be restored, and seen to be restored. Regrettably, all the recent developments went the other way and catastrophically culminated in *Miller* case. Unless this trend is reversed very soon in some unforeseeable way, the rule of law in the UK has now entered its ultimate crisis, which may well continue long after Britain's withdrawal from the EU.

***Pavel Stroilov***