R (Miller) v Secretary of State for Exiting the European Union: Thriller or Vanilla? *

This article comments on the recent UK Supreme Court decision on the legality of triggering Article 50. It sets out the background to the decision and explains and evaluates the differences between the majority and the minority. It argues that the decision, in one sense, did not live up to the expectations generated by its publicity. It drew on long-standing principles of UK constitutional law and its outcome appears unlikely to delay or condition the exercise of Article 50. Nevertheless, the majority focused on the constitutional impact of joining the European Union and reinforced both that it is for UK law to determine the relationship between UK law and EU law, and that constitutional principles of the UK may limit the transfer of sovereignty from the UK to the EU. These elements may have more long-term consequences for EU law.

It is impossible to deny the excitement caused by the litigation surrounding how the United Kingdom can trigger Article 50, notifying the European Council of its intention to leave the European Union. 1 There was a heavy media presence and small groups of public protest, throughout the hearing of the United Kingdom’s Supreme Court in December. News outlets broadcast the hearing and legal arguments were discussed and analysed on national television. The delivery of the judgment on 24 January prompted further wall-to-wall media coverage. The focus swiftly moved from the law to an analysis of the political implications of the Court’s decision that there was no prerogative power, meaning that the Government would need to ask Parliament to enact legislation, empowering it to trigger Article 50. The European Union (Notification of Withdrawal Bill) 2016-7 2 appeared two days after the Supreme Court’s decision. The Bill prompted a series of proposed amendments in the House of Commons, 3 the House of Lords, 4 and further academic 5 and media evaluation. However, after

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1 R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.


three days of scrutiny the Bill was passed without amendment at its third reading in the House of Commons on 8 February by 494 votes to 122. An assurance was given by Mr David Jones, the Minister of State, Department for Exiting the European Union, that ‘the Government will bring forward a motion on the final agreement, to be approved by both Houses of Parliament before it is concluded’, with the intention that this will happen ‘before the European Parliament debates and votes on the final agreement.’ The Bill is now before the House of Lords, having had its first reading on 8 February, with the intention for the Bill to receive its third and final reading in the House of Lords on 8 March. The Government has also published a White Paper on the UK’s strategy for leaving the European Union.

The excitement is easy to understand. The referendum outcome has strongly divided British opinion, between so-called ‘Brexiteers’ and ‘Remainers’. The decision of the Divisional Court in Miller was quickly appealed to the Supreme Court, leapfrogging the intermediate stage of an appeal to the Court of Appeal. An unprecedented 11 Justices of the Supreme Court – all of the current members - heard the case. Some of the interveners of the case were crowd-funded, marking the first time a partially crowd-funded action for judicial review had been heard in the Supreme Court. The decision had the potential to embarrass the Government and perhaps even to delay or modify the Government’s plans for Brexit. Moreover, the Supreme Court was presented with an array of questions, whose resolution would shape the UK constitution: what is the relationship between prerogative powers and legislation; how does the UK view the relationship between UK law and EU law, particularly given the principle of parliamentary sovereignty; what is the relationship between
parliamentary sovereignty and the sovereignty of the people as expressed in a referendum; and what is the relationship between Westminster and the devolved legislatures?

As with most thrillers, the excitement was more in the anticipation than in the outcome. Despite the split decision, there is very little disagreement between the majority and the minority as to the principles of UK constitutional law. Where there is disagreement, it concerns how these principles are applied to the European Communities Act 1972 and subsequent legislation determining the nature of the relationship between UK and EU law. All of the Justices of the Supreme Court concluded that any obligation to obtain the consent of the devolved legislatures was political and not legal. Courts may pay attention to, but cannot enforce conventions. The explanatory notes to the European Union (Notification of Withdrawal) Bill assert that a legislative consent motion is not needed from the devolved legislatures. 11

The judgment, therefore, may seem very vanilla – a plain account of provisions of UK constitutional law, which, in the long-run, will have little impact on the Brexit process. Moreover, if there is any impact as regards conditions placed upon the Brexit process, this will stem from members of the House of Commons and the House of Lords, not from the judiciary. However, this is to understate the importance of the Supreme Court’s decision. It highlights an inherent tension as to the Supreme Court’s approach to constitutional adjudication. It also provides the clearest answer yet to the intricate difficulty of reconciling parliamentary sovereignty with the UK’s membership of the European Union. Whilst this may come too late to have any real impact on UK law, other than in the period before the UK leaves the EU, it casts light on the distinct nature of the European Union and on the potential future legal relationship between the UK courts and judgments of the Court of Justice of the European Union. The distinct nature of the UK constitution may give the impression that this discussion may have little to bear on the relationship between the Court of Justice of the European Union and other national courts. However, the focus on potential constitutional limits, set by the courts, to the transfer of sovereignty from Member States to the EU, in addition to the assertion that it is for domestic law to determine the nature of the relationship between the law of the Member States and the EU, may prove to be as ripe for cross-fertilisation to other senior courts as the seminal decisions of the German Bundesverfassungsgericht.

The first section of this article will set out the two main issues in the case, explain the reasoning of the majority and delineate the consequences of the conclusions of the UK Supreme

Court. The second section will then evaluate the reasoning of the majority and the minority. It will argue that it is possible to criticise both and that the real tension between the two concerns their approach to the European Communities Act 1972 and the nature of the UK’s membership of the EU. The majority focuses on the constitutional impact of grafting a new source of law into the UK. Such a constitutionally important change as leaving the EU has to be approved by Parliament and not just the Government. The minority focuses on the relative powers of the Government and Parliament, concluding that the Government enters into Treaties which only have an impact on domestic law when legislation is enacted by Parliament. As such, the Government alone can join and leave the EU and doing so has no impact on domestic law. The difference between these opinions also rests on a distinct approach to legal reasoning in constitutional law cases. The minority focuses more precisely on the wording of legislation whereas the majority looks at the more fundamental or realistic impact of the UK’s membership of the EU. The article will argue in favour of the majority’s approach.

I – Issues, Outcome and Consequences

There were two main issues before the Supreme Court. First, the Court had to determine whether the Government enjoyed a prerogative power to trigger Article 50. If not, legislation would be required to empower the Government to act. This led to the second main issue. If legislation is required, can this be enacted by Westminster alone, or must there be an involvement of the devolved legislatures of Scotland, Wales and Northern Ireland? This could either be because convention required such intervention, because of the provisions of section 2 of the Scotland Act 2016, which introduced section 28(8) into the Scotland Act 1998, or because this involvement was a constitutional requirement for the purpose of Article 50 TEU. There was also an additional argument presented by the Counsel General of Wales that even if legislation were not required, the common law could and should be developed in line with convention to govern the exercise of the prerogative power to trigger Article 50. As such, if the Government did have a prerogative power, the common law should be modified such that the prerogative power can only be exercised if the consent of the devolved legislatures is obtained.

A - A Prerogative Power?

The Divisional Court had concluded that the Government did not have a prerogative power to trigger Article 50. 12 They relied on a general principle of the UK constitution that prerogative powers cannot

12 R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin)
change domestic law. The Divisional Court concluded that triggering Article 50 would start the process which would culminate in a change to domestic law, particularly concerning the potential removal of at least some of the rights derived from EU law which were enjoyed by UK citizens currently residing in the United Kingdom. As such, there was no prerogative power to trigger Article 50.

The Government argued against the existence of the legal principle relied upon by the Divisional Court that prerogative powers cannot alter domestic law. They argued that this principle misunderstood the relationship between prerogative powers and legislation. The better reading of English law relied upon the principle illustrated by the seminal case of *de Keyser's Royal Hotel*, which established that, to the extent that prerogative powers regulate the same material as legislation, legislation has to be applied as opposed to the prerogative power. 13 As such, given that there was nothing in the European Communities Act 1972, or later legislation, which either expressly or by implication, limited the prerogative power of foreign affairs – including entering into and withdrawing from Treaties – the Government clearly enjoyed a prerogative power to trigger Article 50. Moreover, the Government argued that to conclude that triggering Article 50 would lead to the alteration of domestic law was to misunderstand the dualist nature of the United Kingdom. Whilst the Government could enter into and withdraw from Treaties on the international stage, these actions had no impact on domestic law. Rather, legislation would be required in order to incorporate international law into domestic law. Therefore, triggering Article 50 would not lead to the alteration of domestic law.

By a decision of 8 Justices of the Supreme Court to 3, the Supreme Court upheld the decision of the Divisional Court. The Supreme Court confirmed that ‘unless primary legislation permits it, the Royal prerogative does not enable ministers to change statute or common law’. 14 The Supreme Court also clarified the source and scope of this ‘fundamental principle of the UK constitution’. 15 The source originates in a statement of Coke CJ in the *Case of Proclamations*. 16 The Court accepted that the statement, at the time, may well have been controversial. 17 Nevertheless, it had been accepted by the end of the seventeenth century. This is evidenced by the provisions of the Bill of Rights 1688, the Scottish Claim of Rights 1689 and the Acts of Union of 1706 and 1707. 18 In particular, the Bill of Rights 1688 confirms that ‘the pretended power of suspending of laws or the execution of laws by regall

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14 *Miller* n 1, [50].
15 Ibid.
16 (1610) 12 Co Rep 74
17 *Miller* n 1, [44].
18 Ibid.
authority without consent of Parliament is illegal’ 19 and that ‘the pretended power of dispensing with laws or the execution of laws by regal authority as it hath been assumed and exercised of late is illegal’. 20

To understand its scope, we need to place this principle in its context. First, it is impossible to create a new prerogative power. 21 Despite the suggestions of some academic commentators, 22 who refer to the statement in the majority decision that ‘[t]he prerogative power claimed by the Secretary of State can only be created by a subsequent statute if the express language of the statute unequivocally shows that the power was intended to be created’, 23 the Supreme Court did not challenge this fundamental understanding of the nature of prerogative powers. It is clear from earlier statements in the judgment that the Supreme Court recognised that the Government has two main sources of power – statutory and prerogative. 24 If there is no prerogative power, legislation would be required to empower the Government to act. 25 A more charitable reading of this statement, which fits with generally understood principles of the law, is that whilst the Government claimed a prerogative power, the power to leave the European Union could only be created by statute, making it a statutory and not a prerogative power. Moreover, it is important to recognise the context in which this statement was made, when the majority were examining whether primary legislation had removed the implied limit on the prerogative power placed by the general principle that prerogative powers cannot modify domestic law. The court was determining whether there was nevertheless specific legislative authority for the prerogative power to be used to modify domestic law. Second, given parliamentary sovereignty, legislation can curtail prerogative powers. 26 Third, the existence and extent of prerogative powers is determined by the common law. 27 Fourth, although the common law can control the way in which prerogative powers are exercised, through the application of the

19 Bill of Rights 1688, Article 1.
20 Bill of Rights 1688, Article 2.
23 Miller n 1, [112].
24 It left for another day the thornier issue of whether the Government also has powers under the common law which do not derive from the prerogative, but derive from the status of the Government as a legal person, possessing the same powers to, for example, enter into contracts, as other legal persons.
25 See, for example, Miller n 1, [46], [47], [123].
26 Id, [48] and [112].
27 Id, [45].
principles of judicial review, this is only for prerogative powers which are justiciable. 28 The majority of the Supreme Court confirmed that ‘prerogative treaty-making powers are not subject to judicial review’. 29

From these principles, it follows that the Supreme Court recognised that, when determining the scope of a prerogative power, the courts need to look at the specific nature of the prerogative in question, and also at general principles of the constitution which provide broader restrictions on the scope of a prerogative power. Whilst there exists a broad prerogative power of foreign affairs, which enables the Government to enter into and to withdraw from Treaties, the scope of this power has to be determined against the fundamental principles of the constitution. The Bill of Rights 1688 confirms Coke CJ’s statement that prerogative powers cannot be used to alter domestic law. Therefore, although there is a general prerogative power to withdraw from a Treaty, this prerogative does not extend to withdrawing from a Treaty when to do so would alter domestic law. The prerogative could only be used to alter domestic law if primary legislation were to permit this extension. 30 In addition, ‘ministers cannot frustrate the purpose of a statute or a statutory provision, for example, by emptying it of content or preventing its effectual operation.’ 31 This places another general restriction on the scope of specific prerogative powers. The prerogative power to withdraw from Treaties does not include a power to frustrate legislation. Again, this means that the Government may possess a general power to withdraw from Treaties, but that this power does not extend to the ability to frustrate legislation by effectively emptying legislation of its content. 32

Having reached this conclusion as to the content of UK constitutional law, the majority then went on to examine its application to the prerogative power to withdraw from the European Union. Fundamental to its analysis were three conclusions as to the nature of the relationship between the UK and the European Union. First, the majority concluded that the effect of the European Communities Act 1972 was to recognise a new source of law in the United Kingdom – namely

29 Miller n 1, [92]. See also [55].
30 Miller n 1, [50].
31 Id, [51].
European Union law enacted by the institutions of the European Union. \textsuperscript{33} 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’. \textsuperscript{34}

Second, the majority relied on the analysis of the Divisional Court regarding the potential change to domestic law following withdrawal from the European Union, focusing in particular on the impact of rights currently enjoyed by UK citizens through the application of European Union law. These rights were divided into three categories: (i) ‘rights capable of replication in UK law’; (ii) ‘rights derived by UK citizens from EU law in other member States’; and (iii) ‘rights of participation in EU institutions that could not be replicated in UK law’. \textsuperscript{35} As ‘it was clear that some of the rights in the first category will be lost’, \textsuperscript{36} indeed the Government had conceded as such before the Divisional Court, then withdrawal from the EU would alter domestic law. \textsuperscript{37} Even if rules from EU law are transposed into UK law, they will then have a different status; ‘[t]hey will no longer be paramount, but will be open to domestic repeal or amendment in ways that may be inconsistent with EU law’. \textsuperscript{38}

Third, the Supreme Court recognised the unique nature of the European Communities Act 1972, focusing on its ‘legislative and constitutional implications.’ \textsuperscript{39} By joining the then European Economic Communities, now the European Union, the Parliament of 1972 had effected a major change to the UK’s constitutional arrangements. It had enabled a ‘dynamic, international source’ of law to be ‘grafted onto, and above, the well-established existing sources of domestic law’, through the actions of Ministers and Parliament. \textsuperscript{40} This led the majority to the powerful conclusion that:

Bearing in mind this unique history and the constitutional principle of Parliamentary sovereignty, it seems most improbable that those two parties had the intention or expectation that ministers, constitutionally the junior partner in that exercise, could

\textsuperscript{33} Miller n 1, [61]-[62], [68], [79]-[86] and [93].
\textsuperscript{34} Id, [78].
\textsuperscript{35} Id, [69].
\textsuperscript{36} Id, [73].
\textsuperscript{38} Miller n 1, [80]. See also [83].
\textsuperscript{39} Id, [90].
\textsuperscript{40} Ibid.
subsequently remove the graft without formal appropriate sanction from the constitutionally senior partner in that exercise, Parliament. 41

The consequences of the conclusion of the Supreme Court are easily expressed. Rather than being able to trigger Article 50 by prerogative, the Government has had to go to Parliament to ask it to enact the European Union (Notification of Withdrawal) Bill 2016-7. At the time of writing, the Bill was in the process of being enacted through Parliament. At the time of publication, it is highly likely that it will be an Act of Parliament and that Theresa May will have informed the European Council of the UK’s decision to leave the EU.

One may be forgiven, therefore, for thinking that the Miller case was very vanilla indeed. However, there is a wealth of difference between using a prerogative power, which is subject to Parliamentary accountability and oversight, and seeking legislation which may be subjected to conditions on the exercise of that power by Parliament. Lord Carnwath was right to point out in his dissent that the exercise of prerogative powers is not without democratic oversight and does not result in no role for Parliament. 42 Parliament will continue to scrutinise the actions of Government, be they exercised through statutory or prerogative power. Nevertheless, as witnessed by the wealth of amendments proposed to the Bill, 43 requiring legislation empowers Parliament to not only scrutinise, but also condition the exercise of the now statutory Governmental power to withdraw from the European Union. Amendments had been tabled in the House of Commons not only to require further Parliamentary scrutiny and debate over the process of the withdrawal negotiations, but also to ask for impact statements on key issues (e.g. worker’s rights, the environment, trade and citizen’s rights), to make the enactment of legislation conditional on guarantees of these rights, or to require the proposed withdrawal agreement to be subject to an approval resolution of both Houses before the Minister has the power to sign it, or to require its ratification to be subject to future legislation or a referendum. Although these amendments were not successful in the House of Commons, the production of the Government’s White Paper, setting out its objectives for leaving the European Union and the assurance given to the House of Commons of a vote of both Houses on a ‘take it or leave it’ basis (i.e. approve the withdrawal agreement, or leave the EU with no agreement) can be seen as concessions from the Government in the face of pressure from Parliament. This pressure may not have been brought to bear so effectively if the Government had the power to trigger Article 50 by

41 ibid.
42 Miller n 1, [255].
prerogative alone, such that it did not need to bring a Bill to Parliament. The judgment of the Supreme Court empowers Parliament; though it is for Parliament to decide whether and how to use that power.

B – A Role for the Devolved Legislatures?

The outcome of the second main issue is easier to explain. If legislation were needed, the question was asked whether this required the consent of the devolved legislatures. This was based on an analysis of the Sewel Convention, which determines when Westminster needs to obtain a legislative consent motion from the devolved legislatures. Arguments had been made before the Supreme Court that the convention should apply to legislation to empower the Government to trigger Article 50. In addition, it was argued that the convention would amount to a constitutional requirement for the purposes of Article 50 TEU. Moreover, complications arose as to the status of the Sewel convention with regard to Scotland, given the existence of section 2 of the Scotland Act 2016, which amends the Scotland Act 1998, and ‘recognises’ that ‘the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.’ 44

All of the Justices of the Supreme Court agreed that the convention could not give rise to a legal obligation of consent or consultation. In doing so, they drew on established principles of UK constitutional law which make it clear that ‘courts cannot enforce a political convention.’ 45 Previous attempts to enforce conventions in the courts had failed. 46 Moreover, to enforce this convention would have required the court to transgress another key constitutional principle – that of parliamentary privilege found in Article 9 of the Bill of Rights 1688. To investigate whether the convention had been followed, in order to legally enforce the convention, the courts would have been required to question proceedings in Parliament, investigating why Westminster had not sought a legislative consent motion when the court believed it should have done so. In a passage that is destined to be frequently cited in the future, the court stated that,

[j]udges therefore are neither the parents nor the guardians of political conventions; they are merely observers. As such they can recognise the operation of a political convention in the context of deciding a legal question...but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world. 47

The enactment of the Scotland Act 2016 did nothing to reverse this conclusion. Section 2 of the Act did not replicate the content of the convention, placing this on a legislative basis. Rather, it is

44 Scotland Act 2016, section 2; Scotland Act 1998, section 28(8).
45 Miller n 1, [141].
46 See, for example, Madzimbamuto v Lardner-Burke [1969] 1 AC 645, cited in Miller n 1, [144].
47 Miller n 1, [146].
‘recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the recent devolution settlement.’ 48 In this sense, the legislation is entrenching the convention as a convention. 49 The legislation is recognising the existence of the convention, and also expressing the intention of Parliament, for as long as the Scotland Act 2016 remains in force, that the requirement of legislative consent motions is a political issue, to be enforced by political institutions, and not a legal issue to be enforced by the courts. It would appear to follow from this, although not expressly stated, that the convention does not constitute part of the constitutional arrangements of the UK for the purposes of Article 50.

It is important to be clear as to the consequences of this determination by the Supreme Court. Its analysis is not conclusive as to whether a legislative consent motion is required in order to enact the European Union (Notification of Withdrawal Bill) 2016-7. The decision of the court is only conclusive as to the lack of a legal obligation. There are also observations of the court which could be relevant in the political arena when determining whether, politically, a legislative consent motion is required. Section 2 of the Scotland Act 2016 refers to a narrow interpretation of the Sewel convention; that consent is normally required when the Westminster Parliament legislates ‘with regard to devolved matters’. This would clearly be the case, for example, were Westminster to legislate on a matter that was not a reserved power, as listed in Schedule 4 to the Scotland Act 1998. However, as the court observed, ‘devolved legislatures have passed legislative consent motions not only when the UK Parliament has legislated on matters which fall within the legislative competence of a devolved legislature, but also when the UK Parliament has enacted provisions that directly alter the legislative competence of a devolved legislature or amend the executive competence of devolved administrations’. 50 The court was able to make these observations given evidence submitted to the court by the Lord Advocate.

Consequently, the court is observing the broader application of the Sewel convention. The court is not creating this broader interpretation; it being instead created by the behaviour of the UK Parliament and the devolved legislatures. Nor is the court enforcing the convention by observing its application in this manner. Nevertheless, by making this observation, the Supreme Court is recognising that evidence exists of a broader application of the Sewel convention. This evidence is also drawn to the attention of anyone reading the judgment – including the Westminster Parliament and the

48 Id, [148].
49 Id, [149].
50 Id, [140].
devolved legislatures. It is for these political actors to confirm whether this means that, politically, a legislative consent motion should be obtained before enacting the European Union (Notification of Withdrawal) Bill 2016-7.  

The political consequences of having to obtain a legislative consent motion could be dramatic, delaying or potentially even preventing the enactment of the Bill, particularly given the different outcome of the referendum in Scotland and Northern Ireland and the current elections taking place for the Northern Ireland Assembly. On the other hand, to conclude that a legislative consent motion is not politically required may exacerbate the tension in the delicate relations between Westminster and the devolved powers, which may add further incentive for Scotland to push for a second Independence Referendum. The UK Supreme Court also recognised that ‘[t]he Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures’.  

The Westminster Parliament would be wise to take this into account when determining the scope of application and the enforcement of this convention, both as it applies to the European Union (Notification of Withdrawal) Bill and the proposed Great Repeal Bill, which is designed to overturn the European Communities Act 1972 and incorporate existing provisions of European Union law into domestic law, pending future parliamentary deliberation as to which aspects of European Union law should remain.

II – Alternative visions of the relationship between UK and European Union law: trouble with the plumbing?

Whilst the majority saw the European Communities Act 1972 as establishing EU law as a new source of law, this was not the view of the minority. This can be most clearly illustrated by the reasoning found in the dissent of Lord Reed. Lord Reed also recognised that the European Communities Act 1972 provided a pipeline through which rights and obligations found in EU law could flow into domestic law. However, he understood the Act in a different manner. The rights and obligations brought into UK law through the 1972 Act were conditional upon the UK’s continued membership of the EU. As

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52 Id, [151].
such, Parliament enacted legislation to join the EU, but the effect of the legislation was conditional upon membership. The UK's membership of the EU commenced following an action of the Government, using its prerogative powers, to ratify the Treaties relating to membership of the then European Communities. Therefore, it was open to the Government to use its prerogative power to withdraw from the EU. To do so would have no impact on domestic law.

Lord Reed’s argument focused on the structure of section 2(1) of the European Communities Act 1972, which states that;

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

Lord Reed argued that this was best understood as a conditional piece of legislation. He classified its ‘essential structure’ as follows: ‘All such [members of a specific category] as [satisfy a specified condition] shall be [dealt with in accordance with a specified requirement].’ For Lord Reed, this meant that all of the rights found in EU law, as arise from time to time through acts of EU institutions, and all such Treaties, and measures made under the Treaties, which also change from time to time, are to be given effect in UK law in accordance with the Treaties. In short, the provisions of EU law which enter into UK law through this provision are conditional upon the UK’s membership of the EU. Therefore, ‘[i]f 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.’

It can be hard to explain the subtle distinction in the reasoning between the majority and the minority. When presenting arguments before the Supreme Court, barristers referred to the extent to which the European Communities Act was a ‘pipeline’, drawing on arguments of John Finnis. This analogy of a pipeline was deployed by both the majority and the minority. It is recognising that, prior to joining the EU, the UK had its own legal system which operated outside the EU. In order for the UK

53 Id, [184].
54 Id, [186]-[189].
55 Id, [191].
to join the then European Communities, it had to be ‘plumbed in’ to that legal system. The European Communities Act 1972 is the pipeline connecting the UK to the EU, allowing the provisions of EU law to flow into domestic law.

Both the majority and the minority in *Miller* accept that, given the dualist nature of the UK, legislation by Parliament was needed to ensure that EU law could become part of UK law. For the majority, the pipeline of the 1972 Act recognised the EU law-making institutions as a new source of law. It makes EU law ‘an independent and overriding source of domestic law’.  

57 The majority also drew a distinction between ‘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.’  

58 Whilst prerogative powers may be used to modify the content of EU law which is incorporated into UK law, ‘it does not follow from this that prerogative powers may be used to withdraw from the Treaties and so cut off the source of EU law entirely’. 59 In other words, to leave the EU would not be the same as turning a tap to increase or decrease the flow of EU law through the pipeline of the European Communities Act 1972 into UK law. Rather, it is to stop the flow all together, rendering the pipe redundant.

For the minority, however, there is no difference between altering the content of EU law flowing through the pipe and stopping the flow of EU law. Parliament enacts legislation to put the pipeline in place and the Government, using its prerogative powers, decides to switch on the tap, by joining the then European Communities, and can use its prerogative powers to switch off the tap by withdrawing from the EU. 60 Does the European Communities Act 1972 recognise a new source of law, or does it merely require the UK to enforce EU law for so long as the condition of our membership of the EU is met? I will evaluate the relative merits of these arguments from two perspectives: (i) whether the legal argument presented by either the majority or the minority is logically sound on its own terms and (ii) a normative evaluation of the constitutional principles on which the arguments are based. I will argue that there are potential flaws in both arguments; but that these flaws are really splitting hairs and both sides can overcome these criticisms. The real issue is a divergence over the approach

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57 *Miller* n 1, [65].
58 Id, [78].
59 id, [79]
60 For the arguments of Lord Carnwath on this point, see *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [256]-[257] and those of Lord Hughes at *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [280]-[282].
to legislative interpretation. I will argue that there are normative justifications for adopting the approach of the majority, given the specific nature of the issue arising before the court in *Miller*.

A – Flawed Logic?

Mark Elliott has already provided two criticisms of the majority in *Miller* which would suggest that the majority’s reasoning process is flawed. First, Elliott draws attention to a tension in the reasoning of the majority that arises as they simultaneously conclude that EU law is a source of UK law, whilst at the same time concluding that the UK’s membership of the EU does not modify the rule of recognition. 61 Lord Reed also concluded that joining the EU did not alter the rule of recognition, reaching this conclusion precisely because the European Communities Act 1972 did not recognise EU law as a new source of law. 62 Elliott regards Lord Reed’s argument as compelling concluding that ‘it is hard to see in what sense the EU’s legislative and constitutional apparatus can be an “independent source” of UK law if the source of EU law’s validity in the UK is itself UK law (in the form of the ECA).’ 63 Is Elliott right and has he found an inherent logical flaw in the reasoning of the majority?

The argument against this position requires a deeper analysis of the rule of recognition and further exploration of the way in which the majority regards the relationship between UK and EU law. The majority is clear to point out that they ‘do not accept that the so-called fundamental rule of recognition (i.e. the fundamental rule by reference to which all other rules are validated) underlying UK law has been varied by the 1972 Act or would be varied by its repeal’ (emphasis added). 64 When discussing the rule of recognition, Hart described the ultimate rule of recognition as ‘whatever the Queen in Parliament enacts is law’. 65 This can be seen as fundamental, as referred to by the Supreme Court, in two senses. First, it does not derive its validity from any other source of law. As such, it is a rule of recognition. Second, it is a superior element of the rule of recognition – e.g. it overrides other rules of recognition. 66 What is important to recognise here is that recognising a new source of law

62 *Miller* n 1, [224]-[225].
64 *Miller* n 1, [60].
66 I am extremely grateful to Hasan Dindjer for help with this section of the argument and hope to have done justice to his comments.
does not mean that the rule of recognition is changed. This is particularly the case when this new source of law, like directly effective EU law, gains its validity from an Act of Parliament – i.e. a measure which in turn gains its validity from the rule of recognition that ‘whatever the Queen in Parliament enacts is law’. This recognition of a new source of law does not change the rule of recognition, in the same way that legislation empowering the Scottish Parliament to enact Acts of the Scottish Parliament does not alter the rule of recognition. Where the confusion appears to arise is because of the primacy of directly effective EU law. How can we argue that the recognition of the EU institutions as a new source of law has not altered the rule of recognition when directly effective EU law can disapply legislation enacted by the Queen in Parliament? The answer is simple. Directly effective EU law only overrides UK legislation to the extent permitted by the European Communities Act 1972, and as Miller makes clear, to the extent that this is compatible with parliamentary sovereignty. 67 This is achieved through the wording of sections 2(1) and 2(4) of the 1972 Act. There is no change to the rule of recognition and the recognition of EU law as a new source of law can fit with existing constitutional arrangements.

This conclusion is reinforced when we analyse the way the rule of recognition is used to explain the relationship between the primacy of directly effective provisions of EU law and parliamentary legislative supremacy. The potential conflict between these principles arose in the Factortame series of litigation, where the House of Lords granted an interim injunction to suspend the application of provisions of the Merchant Shipping Act 1988, pending the determination of the European Court of Justice as to whether these provisions contravened directly effective provisions of EU law. 68 One possible interpretation of how the UK courts were able to suspend legislation enacted after the European Communities Act 1972 was to argue that the Act marked a change in the rule of recognition, such that the rule ‘whatever the Queen in Parliament enacts is law’ became ‘whatever the Queen in Parliament enacts is law, provided that this is compatible with directly effective provisions of EU law’. This change occurred through acceptance by officials of the legal system, evidenced by the 1972 Act and its acceptance by the judiciary in Factortame. If that had occurred, then it would have been the case that the 1972 Act had modified the ‘fundamental rule of recognition’. It would also have followed from this interpretation that, even if the UK Parliament had made it clear that legislation was taking effect ‘despite’ or ‘notwithstanding’ provisions of European Union law, 69 the courts would nevertheless have applied directly effective EU law as opposed to UK legislation, to

67 Miller n 1, [67].  
68 R (Factortame) v Secretary of State for Transport (2) [1991] 1 AC 603.  
69 See the proposed section 1(2) of the European Union (Withdrawal) Bill 2016-7.
the extent to which the two conflicted. It is clear from the majority judgment that this is not the case. In these circumstances, the UK courts would apply the specific wording of the UK legislation, which would suffice to overturn the European Communities Act 1972, despite its status as a constitutional statute.  

Rather than recognising a change in the fundamental rule of recognition the Supreme Court in *Miller* is recognising the importance of sections 2(1) and 2(4) of the European Communities Act 1972. Whilst the Act is in force, EU law has force in the UK. Current and future legislation is to be construed and take effect subject to the primacy of directly effective provisions of EU law. Section 2(1) incorporates principles of EU law, including the principles of direct effect and of the primacy of EU law. As such, ‘rules which would...normally be incompatible with UK constitutional principles, become 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.’  In other words, the fundamental rule of recognition has not changed. But legislation recognised as valid according to the fundamental rule of recognition has been used to incorporate a new source of law.

A second possible way in which it has been argued that the European Communities Act 1972 changed the rule of recognition was in modifying one of its component elements – the principle of parliamentary legislative supremacy.  If this had taken place, then the rule of recognition would have changed as the doctrine of implied repeal would have been modified. The doctrine of implied repeal is a part of the rule of recognition, in that it helps to identify which law is to be applied when there is a conflict between competing provisions of legislation. It also does not derive from any other rule in the legal system. Prior to *Factortame*, the argument goes, the doctrine of implied repeal meant that provisions of later legislation, which conflicted with earlier legislation either as to the content of the law, or the manner and form which legislation should take, impliedly repealed earlier legislation. After *Factortame*, however, the rule of recognition had been altered, such that the 1972 Act could not be subject to implied repeal, requiring instead express or specific words to repeal the Act. This being due, as *Thoburn* later explained, to its status as a constitutional statute.  

This possible interpretation is produced here not because of any belief that this is a better or more accurate account of the *Factortame* litigation. Rather, it is produced to demonstrate that, even

70 *Miller* n 1, [67], 71 *Miller* n 1, [68].
if such a modification of the rule of recognition had taken place, it would not have altered the fundamental rule of recognition. It would still be the case that ‘whatever the Queen in Parliament enacts is law’. In a similar manner, recognising EU law as a source of law – even as one whose directly effective provisions have primacy over national law – does not alter the fundamental rule of recognition. It is still the case that whatever the Queen in Parliament enacts is law and, through enacting the European Communities Act 1972, the Queen in Parliament passed legislation recognising the EU as source of law. The Act plumbs the UK into EU law because the Queen in Parliament wished it to be so.

Mark Elliott’s second criticism is of the second justification of the majority of the Supreme court for concluding that the Government does not have a prerogative power to withdraw from the EU, which he refers to as the ‘constitutional scale’ argument. Given the constitutional importance and fundamental nature of the European Communities Act 1972, the majority concludes that ‘[i]t would be inconsistent with long-standing and fundamental principles for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone’. 74 Elliott argues that there is no clear source given for this constitutional principle. However, it is not hard to find such general sources. The majority argue that this stems from the ‘constitutional principle of Parliamentary sovereignty’, 75 combining this with the recognition that this makes Parliament the ‘constitutionally senior’ and the Government the ‘constitutionally junior’ partner in the measures taken to join the European Union 76 – the executive acting through prerogative powers to join Treaties and the legislature by enacting the European Communities Act 1972.

Criticisms could also be levelled at Lord Reed’s reasoning. To illustrate this, we need to revisit section 2(1) of the Act, which states that ‘rights, powers, liabilities, obligations and restrictions from time to time arising by or under the Treaties’ and ‘remedies and procedures from time to time provided by or under the Treaties’ are to be implemented into UK law. Lord Reed argues that ‘[t]he words “from time to time”… mean that section 2(1) is concerned not only with the Treaties, and the regulations and other legal instruments made under them as they stood at the time of accession, but also with the Treaties and instruments made under them as they may change over time in the future.’ 77 However, it is equally possible to read these provisions as meaning that ‘from time to time’ refers to the changing powers, liabilities, obligations, restrictions, remedies and procedures, whose

74 Miller n 1, [81].
75 Id, [90].
76 Ibid.
77 Id, [186].
content changes as EU institutions create new powers, etc, from time to time using the procedures established in the Treaties. Indeed, it is this element of creating binding laws which is part of the unique features of the EU Treaties. It does not necessarily mean that the Treaties themselves change from time to time. That would clearly have been the case if the wording of section 2(1) had been ‘rights etc from time to time created by or arising under the Treaties, which also change from time to time’. As such, it need not be the case that section 2(1) also implies that Treaties may change from time to time through actions of the executive and need not require an Act of Parliament. Indeed, this would appear to be reinforced by the provisions of the Constitutional Reform and Governance Act 2010, which requires that Treaties are normally laid before Parliament before ratification, with Parliament having a period of 21 days to vote to reject the ratification of a Treaty, otherwise it is deemed to have been accepted, albeit that the European Union Act 2011 requires ratification by an Act of Parliament, and in some cases also a referendum, for some modifications of the EU Treaties. Although amendments to the EU Treaties have normally occurred through the enactment of legislation; this need not be the case for all amendments to the EU Treaties and an executive action alone may suffice, normally subject to parliamentary approval falling short of an Act of Parliament.

It could be argued that this distinction is merely splitting hairs. But it is not beyond the realms of possibility to argue that these two interpretations of section 2(1) are possible. If so, it may no longer be the case that there is no support in the language of section 2(1) for distinguishing between changes which arise in the content of EU law from new EU legislation, and changes which arise in EU law through withdrawing from the EU Treaties the ‘vital difference’ relied upon by the majority. More importantly, there may also be other reasons for drawing this distinction. It is reasonable to expect that EU rights will modify over time as EU institutions enact legislation, and as the Court of Justice of the European Union interprets provisions of the European Union Treaties. These are the normal and predictable activities of the EU institutions. However, the signing of a new Treaty in the EU is a much more complex affair. A new Treaty has to be agreed to and ratified by all Member States. This is because Treaty changes may alter the competences transferred from the Member States to the European Union. This difference, as recognised by the provisions of the European Union Act 2011, may provide further justification for differentiating between alterations to the rights and obligations created by the EU institutions and alterations to the rights and obligations with arise from Treaty

78 Constitutional Reform and Governance Act 2010, section 20.
80 Id, [187].
modification. The deeper issue remains – both are arguably vulnerable to criticism which each can rebuff.

B – Constitutional Principle: The Elephant in the Room

The more you analyse the difference between the reasoning of the majority and the minority, the more you realise that the disagreement is evidence of a deeper division, connected to distinct understandings of the workings of the UK constitution. The majority and minority agree on the legal principle to be applied. They also agree that EU law takes effect in the UK constitution through the European Communities Act 1972; that this did not effect a change in the fundamental rule of recognition; and that whilst EU law may determine the scope and interpretation of EU law, it is for the UK law to determine how EU law is incorporated into UK law and the extent of that incorporation. Where the division lies is as to how the courts applied legal principles to the situation before the court and, to a lesser extent, how the court determined the content of these constitutional principles. Both turn on distinct understandings of the role of the judiciary when reasoning about the constitution.

The distinction in reasoning when applying the law is most clearly illustrated by the contrast between Lord Reed’s more ‘literal’ approach to the understanding of section 2(1) of the European Communities Act 1972 and the more ‘realistic’ approach of the majority. Whilst Lord Reed concludes that the words ‘from time to time’ illustrate that the provisions of EU law incorporated into UK law by the statute is conditional on the UK’s membership of the EU, 81 the majority focus on the more ‘fundamental’ or ‘realistic’ sense of the Act and its impact on the UK constitution, to determine that it establishes EU law as a new source of law to be enforced in the UK. 82 This ‘realistic’ interpretation also underpins the conclusion that there is a justification for distinguishing between alterations to the content of EU law through EU law-making, or judicial interpretation, and alterations to the Treaties. The latter change is more fundamental from a constitutional perspective as it may alter the relative competences between the UK and the EU.

This article is not the place in which to re-open the debate on the relative role of the judiciary in an uncodified constitution which aims to balance the rule of law with parliamentary sovereignty. However, it is important to recognise the specific context of this disagreement over the approach to legislative interpretation which differs from the standard debate. First, the court is not looking to legislation in order to determine the content of a legal principle. Instead, it is looking to legislation to

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81 Id, [184]-[189].
82 Id, [61].
determine the facts to which a legal principle should be applied. This distinction is similar to the one the Supreme Court recognised as occurring in the case of *AG v Jonathan Cape* \(^{83}\) with regard to conventions. \(^{84}\) In that case, the court did not enforce a convention, or determine the content of the law according to the convention. Rather, facts about the convention were applied to an existing legal principle of the common law, the tort of breach of confidence. In *Miller*, the court is asking whether the 1972 Act demonstrates that, were a prerogative power to be used to trigger Article 50, this would automatically mean that domestic law would be changed. Whilst this requires an investigation of the meaning of legislation, it is arguably more justifiable here to take a more realistic as opposed to technical interpretation, particularly given the context of the constitutional importance of the decision.

To interpret legislation according to its literal meaning gives rise to legal clarity, but may lead to examples of over and under inclusiveness in the application of the rule. To interpret legislation in a purposive manner may be less likely to be over or under inclusive, but also is less likely to provide clarity. However, when interpreting legislation in order to determine how the law is applied, as opposed to determining its content, there is less of a need for clarity and more of a need to minimise an application of the law that is over or under inclusive. In addition, purposive interpretations of legislation are criticised because they may indirectly transfer power from the legislature to the judiciary. If the legislature has determined a rule, which is then interpreted other than according to the intentions of the legislature, then it is possible to argue that the judiciary are being ‘creative’ – adding elements to a legal rule that may not have been intended by the legislature. However, the role of the court when determining the facts to which a legal principle applies is arguably broader. It is more justifiable in these circumstances to take a purposive approach, examining the impact of the 1972 Act as a whole, particularly its impact on the UK constitution, to determine whether triggering Article 50 would modify domestic law. After all, the constitutional structure of the UK is also part of domestic law. Moreover, the accusation of judicial activism or creativity is harder to make when the consequence of the decision would not alter the balance of power between the legislature and the judiciary, or the executive and the judiciary. In *Miller*, the balance of power affected was that between the legislature and the executive.

A further difference is evident in the supplementary principle used by the majority to support the lack of existence of a prerogative power to trigger Article 50. Elliott is right to point out that there

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\(^{83}\) *Attorney General v Jonathan Cape Ltd* [1976] 1 QB 752.

\(^{84}\) *Miller* n 1, [146].
is no clear, precise legal authority specifically setting out this principle in earlier case law. However, the majority is also right to explain that this derives from general principles of the UK constitution. Not only can this be justified by applications of parliamentary sovereignty and the separation of powers — preserving Parliament as the ‘senior’ and the executive as the ‘junior’ partner in the constitution — but also there are examples of these principles of the constitution underpinning other recent developments in the case law. The majority refer to the principle of legality \(^{85}\) and of the approach of the Supreme Court in the HS2 decision, \(^{86}\) where the court made it clear that there are constitutional limits on the UK’s transfer of competences to the EU. \(^{87}\) Both rely on the court developing the common law through drawing on long-standing principles of the constitution, rather than relying on clear analogies to specific legal rules established in earlier cases. Constitutional law cases appear rarely in the UK — hence the excitement over Miller. If the UK constitution is to evolve, it can only do so through the interaction of the institutions of the constitution, with courts relying on long-standing principles to help develop more specific rules. This justification is exacerbated when faced with potentially drastic constitutional change and where the outcome of the development of the common law is to establish a further check on that change. This is even more the case when that check comes not from the courts, but from the legislature, thereby meaning that the courts are not using the common law to add to their own powers.

**Conclusion**

It is tempting to conclude that Miller is more vanilla than thriller. The consequences of the judgment have been minimal. The UK will still leave the EU and the Government’s legislative timetable would tend to suggest that the Prime Minister’s timetable for triggering Article 50 will not be delayed and that few, if any, conditions will be placed on her power to leave the EU. \(^{88}\) The court, for the most part, applied long-standing principles of the UK constitution and disagreement arose not over the content of these principles, but over how they were to be applied.

Nevertheless, Miller will be remembered as a key case in UK constitutional law, not least for the publicity which it generated and the historical context in which it was decided. More importantly, it clarified the nature of the UK’s relationship with the EU. Parliamentary sovereignty is not compromised by the need to accommodate directly effective provisions of EU law. Rather, the

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\(^{85}\) Id, [87].


\(^{87}\) Id, [67].

\(^{88}\) Hansard HC Vol 620, cols 1136-1144 (1 February 2017).
accommodation between these two apparently contradictory principles is mediated through the combination of sections 2(1) and 2(4) of the European Communities Act 1972. It is also clear that UK law determines the nature of the relationship between UK law and EU law, and that parliamentary sovereignty as well as parliamentary privilege may place a constitutional brake on the extent to which the UK has transferred competences to the EU. In particular, if the UK parliament were to legislate that provisions of UK law were to take effect ‘despite’ the operation of EU law – as we find in clause 1(2) of the European Union (Notification of Withdrawal Bill) 2016-7 – then this specific and express wording would prevail. One may well bemoan that this clarification has come a little too late. However, it provides more evidence of the plural nature of the European Union and the complex relationship between national constitutional law and directly effective provisions of European Union law which may well influence superior courts in other Member States.

The main ‘thrill’ in the Miller case is the latent tension between the approach of the majority and the minority to constitutional adjudication. Miller may mark another step on the way towards the UK courts playing a more prominent role in the development of the UK constitution, doing so by drawing on long-standing principles of the UK constitution which have evolved through the tension between institutions of the constitution. Miller is important as another example of the potential tension. In some sense, its importance lies more in what it doesn’t say than it what it does.