

# Devolution in Disguise: Miller and the Curse of the Government's "Victory"

Jo Murkens<sup>1</sup>

The mythical Article 50 TEU gives Member States the option to withdraw from the EU 'in accordance with its own constitutional requirements.' But what are the constitutional requirements of a country with no written constitution? And on what basis should the UK Supreme Court resolve the competing constitutional claims regarding prerogative powers, Acts of Parliament, conventions, and individual rights that were voiced by the government, the devolved administrations, and by the claimants? On the basis of strictly legal questions? Or by taking into account the UK's broader political context and constitutional arrangements?

An unprecedented eleven-member UK Supreme Court decided *Miller*<sup>2</sup> – supposedly the constitutional case of the century – on 24 January 2017. As had been generally predicted, the government's argument; that it could start the process of withdrawing from the EU using a prerogative power instead of an Act of Parliament, was roundly rejected by an 8:3 majority. The *Miller* case will no doubt be discussed for years to come. The government's unconstitutional attempt to bypass Parliament was thwarted by confident and convincing reasoning in a single judgement signed by eight Supreme Court Justices.

## I. Article 50 and EU Law

Lord Neuberger, for the majority, makes two points. He agrees that the European Communities Act 1972 gives effect to the Treaty of Rome and is the source of EU law. That is to say, EU law originates from the institutions of the European Union, and then becomes effective in UK law via the gateway of the European Communities Act 1972. But, instead of leaving it there, he goes on to say that, more fundamentally and more realistically, that, 'it is the EU institutions which are the relevant source of that law.' For as long as the European Communities Act 1972 remains in force, the entire *acquis communautaire*, i.e. the EU Treaties, EU legislation, and the jurisprudence of the Court of Justice, 'are direct sources of UK law.'<sup>3</sup> In other words, the validity of EU law does not originate from the European Communities Act 1972. Instead, the effect of the Act is to 'constitute' (a better term would be: to recognise) EU law as 'an independent and overriding source of domestic law.'<sup>4</sup> Should this make you blink twice, the UK Supreme Court repeats the point by positing EU law

---

<sup>1</sup> Associate Professor of Law at the London School of Economics and Political Science.

<sup>2</sup> R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.

<sup>3</sup> *Miller* [60-61].

<sup>4</sup> *Miller* [65].

'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.'<sup>5</sup>

Referring to the EU as an independent and overriding source of law allows the UK Supreme Court to develop a different line of reasoning from the Divisional Court in November 2016. That decision accepted that prerogative powers could be used to sign and terminate treaties as a matter of international law and foreign relations. However, they could not be used to trigger Article 50 TEU due to the loss of certain rights guaranteed to individuals under EU membership. Although the UK Supreme Court agrees that the government cannot rely on prerogative powers to initiate withdrawal from the EU, it does so by another route. Instead of focusing on individual rights, it makes a broader constitutional argument by establishing a link between triggering Article 50 TEU and the loss of EU law as a domestic source of law, which amounts to a fundamental constitutional change that mandates statutory authorisation.

## II. Article 50 and Devolution

Beyond the headline-grabbing defeat and the subsequent focus on statutory authorisation in the form of the European Union (Notification of Withdrawal) Bill 2017, the government also secured a strong victory on the question whether it needed the consent from the devolved legislatures before the invoking of Article 50 TEU. The UK Supreme Court unanimously held that such consent was not required. The UK Supreme Court had already required parliamentary legislation in relation to the first question, which took some of the heat out of the second question. Yet the government's victory on the devolution question is likely to be short-lived.

Since the referendum in June 2016, the government's official policy towards the regions has been inclusive. In his statement to Parliament on Brexit on 27 June 2016, PM David Cameron said that: 'we must ensure that the interests of all parts of our United Kingdom are protected and advanced, so as we prepare for a new negotiation with the European Union we will fully involve the Scottish, Welsh and Northern Ireland Governments.'<sup>6</sup> On her first visit to Scotland after becoming Prime Minister on 15 July 2016, Theresa May said that:

*I've been very clear with the first minister today that I want the Scottish government to be fully engaged in our discussion. I have already said that I won't be triggering Article 50 until I think that we have a UK approach and objectives for negotiations. I think it is important that we establish that before we trigger Article 50.'*<sup>7</sup>

---

<sup>5</sup> *Miller* [80].

<sup>6</sup> HC Deb, 27 June 2016, vol. 612.

<sup>7</sup> L Brooks, 'May tells Sturgeon Holyrood will be 'fully engaged' in EU talks' (*The Guardian*, 15 July 2016) <<https://www.theguardian.com/uk-news/2016/jul/15/theresa-may-nicola-sturgeon-holyrood-article-50-decision>> accessed 13 July 2017.

In contrast to the inclusive approach, PM May has also repeatedly made clear that agreeing a UK-wide approach did not mean giving any of the regions a veto. The devolved legislatures would not be allowed to 'block Brexit.'<sup>8</sup>

The UK Supreme Court has now stepped into the breach by concluding that the consent of the devolved legislatures is not constitutionally necessary before official notice to withdraw from the EU is given under Art. 50 TEU. The question it had to address was whether any UK legislation that sought, for instance, to repeal the European Communities Act 1972 and amend the devolution legislation would be subject to the Sewel Convention.

### III. Law vs. Politics

This question opens up a gulf between constitutional law and constitutional politics. Legally speaking, the UK government can claim that EU relations are an 'excepted' matter or reserved to Westminster. The devolution legislation in Scotland, Wales, and Northern Ireland assumes that the UK would be a member of the EU, but does not require the UK to remain a member.<sup>9</sup> It follows that there can be no 'parallel legislative competence' by which the devolved legislatures could withdraw from the EU.

However, the devolved administrations will point out equally correctly, that to give effect to EU withdrawal Westminster would have to relieve the devolved legislatures of their statutory obligation to respect EU law. This will require changing the devolution legislation – which is no mean feat. The Northern Ireland Act 1998 has been described as the 'constitution' for Northern Ireland.<sup>10</sup> It involves a delicate three-way power sharing structure between the Republic of Ireland, the devolved administrations and legislatures, and the UK. Amending the Northern Ireland Act 1998 unilaterally would be especially reckless, if not actually impossible as a matter of international relations and practical politics.

As a matter of constitutional law, Westminster may of course repeal the European Communities Act 1972 or amend the devolution legislation at any time. However, as a matter of constitutional politics, the UK government will not normally invite Westminster to legislate on devolved matters or on the extent of devolved powers without first obtaining the consent of the relevant devolved legislature. That understanding stems from the Sewel Convention, which exists in two forms: first, as an uncodified constitutional convention for Northern Ireland; second, in statutory form for Scotland and Wales. The Smith Commission was established in the aftermath

---

<sup>8</sup> S Johnson, 'Theresa May: No Scotland opt-out or veto from Brexit' (*Daily Telegraph* 2 October 2016) < <http://www.telegraph.co.uk/news/2016/10/02/theresa-may-no-scotland-opt-out-or-veto-from-brexit/> > accessed 13 July 2017; P Walker 'Theresa May to warn devolved nations: you have no veto on Brexit' (*The Guardian* 30 January 2017) < <https://www.theguardian.com/politics/2017/jan/30/theresa-may-devolved-nations-veto-brexit-scotland-northern-ireland-wales-article-50> > accessed 13 July 2017.

<sup>9</sup> *Miller* [129].

<sup>10</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; [2002] NI 390.

of the Scottish Independence referendum of 2014. As part of the overall drive to create a stronger and more autonomous Scottish Parliament it proposed that 'the Sewel Convention will be put on a statutory footing.'<sup>11</sup> The Scotland Act 2016 inserted this recommendation into the 1998 Act,<sup>12</sup> and the Wales Act 2017 has now similarly amended the Government of Wales Act 2006.<sup>13</sup>

Instead of reiterating doctrinal Westminster-centric notions of sovereignty, the UK Supreme Court could have conceived of the relationship between the centre and the regions with reference to wider considerations of constitutional politics. The UK Supreme Court could have built on its view that the loss of EU law amounts to a fundamental change to the UK constitution to express concern that such a loss would destabilise cooperation in the North-South Ministerial Council as established under the Belfast and British-Irish agreements. This institution is set up to implement EU policies and programmes on an all-Ireland and on a cross-border basis. The observance and implementation of EU law is expressly a 'transferred matter', and as such forms part of the responsibilities of the devolved administration in Northern Ireland. A reasonable case can be made that Westminster legislation that amended those provisions that affected the 'complex power-sharing' arrangements<sup>14</sup> between the Republic of Ireland, the devolved administrations and legislatures, and the UK would not fall under the Sewel convention and would, therefore, require the consent of the devolved legislatures.

On the one hand, the Sewel convention is the key constitutional mechanism by which boundary questions between the centre and the regions are framed. Indeed, the UK Supreme Court recognises that some conventions perform 'a fundamental role in the operation of our constitution.'<sup>15</sup> The function of the Sewel Convention is to facilitate 'harmonious relationships' between the centre and the regions. It acts as the key to an interlocking and interdependent constitutional structure. It can be used as the mouthpiece for cross-community and cross-border dialogue. On the other hand, the Sewel convention creates no legal obligations, and the UK Supreme Court will not police the fundamental role that the convention plays, notwithstanding its statutory form.

## IV. Conclusion

In trying to work out what the constitution requires, the UK Supreme Court is caught by the UK's own constitutional fault lines. Devolution disguises a clash between law, the constitution, and politics. The UK Supreme Court is undoubtedly

---

<sup>11</sup> Smith Commission, Report of the Smith Commission for further devolution of powers to the Scottish Parliament, para. 22.

<sup>12</sup> S. 28(8) Scotland Act 1998, as amended by s.2(2) Scotland Act 2016.

<sup>13</sup> S.2 Wales Act 2017.

<sup>14</sup> B. O'Leary, 'Complex Power-Sharing in and over Northern Ireland: a Self-determination Agreement, a Treaty, a Consociation, a Federacy, Matching Confederal Institutions, Intergovernmentalism, and a Peace Process', in M. Weller and B. Metzger (eds), *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (Boston: Martinus Nijhoff, 2008).

<sup>15</sup> Miller [151].

correct that the consent of the devolved legislatures is not legally required for the purposes of triggering Article 50 TEU – or indeed for the purposes of amending the devolution legislation. However, so long as the Sewel Convention is in place, it is a constitutional requirement that the devolved assemblies pass a legislative consent motion under the Sewel convention before those parts of the devolution legislation incorporating EU law can be amended. Politically, there is a danger that the UK Supreme Court's retreat to constitutional formalism will be interpreted as constitutional intransigence in the regions. The Miller decision allows the SNP to proclaim that the UK government's promises to enhance the Sewel Convention are 'not worth the paper they were written on', and that Scotland cannot be an equal partner in the UK so long as its 'voice is simply not being heard or listened to within the UK.'<sup>16</sup>

The UK Supreme Court adds to the government's humiliation after the Divisional Court's ruling by turning the loss of individual rights into a loss of a domestic source of law. It then appears to throw the government some rope on the devolution question. But it is a devilish rope, which on current evidence looks more like a noose than a lifeline. The single most important constitutional requirement for the UK lies in prioritising the Northern Irish and Scottish questions as a matter of urgency. Devolution happens to be intrinsically tied up with the UK's membership of the EU. It is unfortunate that the British tradition steadfastly refuses to discuss politics through a constitutional matrix. That is an old habit that needs to fade quickly. Finding an answer to the devolution question is not just indispensable to working out the legal process of withdrawal under Article 50 TEU. More than that, it is constitutionally important, politically urgent and, in relation to the long-term national interest, vital.

---

<sup>16</sup> N Sturgeon, 'Nicola Sturgeon responds to UK Supreme Court ruling' (*SNP website*, 24 January 2017) <<https://www.snp.org/nicola-sturgeon-uk-supreme-court-ruling>> accessed 13 July 2017.