UNIVERSIDADE DA CORUÑA

Grado en Derecho

Curso académico 2017-2018

THE MILLER CASE AND ITS CONSEQUENCES IN PUBLIC LAW

EL CASO MILLER Y SUS CONSECUENCIAS EN EL DERECHO PÚBLICO

O CASO MILLER E AS SÚAS CONSECUENCIAS NO DEREITO PÚBLICO

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II. EXECUTIVE SUMMARY

This piece of work addresses the *Miller* case, a case that was decided in the Supreme Court in appeal from the High Court. In light of the factum given, the case is also analysed in relation to Brexit from the perspective of the United Kingdom, and revolving around the matters the case involved.

The case deals with constitutional matters such as conventions and constitutional principles, as well as issues coming from the devolved administrations, whom try to be heard in the case through the references to the Court. The importance of this case is really broad affecting a variety of issues and making it necessary to take into account some ancillary matters to get a full understanding of it.

Moreover, as the *Miller* case is a direct consequence of Brexit and the referendum held in the United Kingdom in 2016, some thought is given to those phenomena and its characteristics. Besides, the European Union law is also relevant to the case, as it was a decision on the way the United Kingdom had to give notification as to the withdrawal from the European Union.

The referencing system used along this paper is the Oxford Standard for Citation of Legal Authorities (OSCOLA), as it is the most common referencing system for legal works in the United Kingdom, from where most of the sources are.

III. *FACTUM:*

The 2007 Governance of Britain Green Paper said, "[a] distinguishing feature of the British constitution is the extent to which the government continues to exercise a number of powers which were not granted to it by a written constitution, nor by Parliament, but are rather ancient prerogatives of the Crown. These powers derive from arrangements which preceded the 1689 Declaration of Rights and have been accumulated by the government without Parliament or the people having a say."

Consider this statement in light of the Brexit debate and the recent rulings in the *Miller* case.

IV. BACKGROUND TO BRITISH CONSTITUTIONAL LAW AND THE MILLER CASE

First of all, a brief historic insight to British Constitutional Law is required in order to get a clear understanding of its functioning and where certain elements as the prerogative powers come from.

Unlike most countries, the United Kingdom does not have a constitution. At least not in the sense of a single coherent code of fundamental law which prevails over all other sources of the law. The fact that William I attained kingship by conquest meant that he held every power or authority. To help himself rule, he surrounded himself with a Council composed by great nobles and officers in attendance of the King.

It was in 1295 when Edward II formed the initial Parliament as he needed more than a small Council to rule. The Parliament was constituted through the invitation by the King of "the barons, the clergy, and the commons, represented by two knights elected by each county, two citizens for each city, and two burgesses for each borough."[1] In spite of that, the Council remained in control of the executive powers, and therefore, the King. The prerogative powers of the Crown which will be analysed later on the paper, are what is left from those original powers of the Crown, that have not been substituted or regulated by statute.

Although there was a certain distribution of powers within the different institutions, there was not a real division of powers, as the power of the King, the Parliament and the Courts were never clearly stablished, and they varied with the power of the King. With the Tudors for example, under the rule of Willian VIII, the power of the King became so strong that he even got an enactment from Parliament to give his proclamations the force of the law.

Even nowadays, the functions of each of the powers of the State is not confined or limited to the powers they come exercising. In fact, there is some criticism towards how the executive has been encroaching the spheres of the legislative and the judiciary.[2]

Given such history, it is no surprise that the Constitution of the United Kingdom is not a coded body of legislation, but a series of principles spread through the case law with its roots on the Law of the Land, and subject to being continuously growing. Reflecting on its development and its contents, the United Kingdom's constitution was described by the constitutional scholar, Professor AV Dicey, as "the most flexible polity in existence".[3]

In the *Miller* case, the United Kingdom Supreme Court ruled that the United Kingdom Government may not initiate withdrawal from de European Union by formal notification to the Council of the European Union –as prescribed by Article 50 of the Treaty on the European Union– without an Act of Parliament allowing it.

The Court ruled against the government and, two days later they brought to Parliament the European Union (Notification of Withdrawal) Bill 2017. In the *Miller*

[1] AB Keith, *Introduction to British Constitutional Law* (Clarendon Press 1931), 3.
[2] Ibid, 2.
[3] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915), p 87.

case, there was also debated whether the three regions that compose the UK had to agree to such withdrawal.

Since the referendum of the 23rd of June 2016, Brexit has been the major political topic in the United Kingdom and Europe. With the triumph of the exit over the remain in the European Union (51.9% and 48.1% respectively),[4] there has been a lot of concern with the implications of the result –due to the disparity of the vote and the small voting difference between both choices.

Such disparity was made evident in the distribution of the votes. Out of the four countries that form the United Kingdom, in two of them (Scotland and Northern Ireland) the majority voted for remain. In that scenario, the Devolved Administrations of the countries wanted to have a say in the decision, rather than completely leave it to the Central Government.

The result of the referendum, carried out by the government lead by former Prime Minister David Cameron, gave place to a sharp polarization of the public; divided in those in favour or against of the remain in the European Union. The division of the vote was strong between different generations, social classes, levels of education and between big cities and rural areas.

This way, the youngest tended to vote for remain –up to 73% of under 24– while the older the voter, the more probability it would vote for leave –up to 64% of +65 years old.[5]

After the referendum was celebrated and the majority voted to leave, the Government started to take the required steps to abandon the European Union; starting by executing the Article 50 of the Treaty on European Union,[6] which contemplates this process.

In a situation like the aforementioned, with various political promises that had been used in the campaign for and against Brexit and which were recognised to be unworkable; many critics and opposition arose against the Brexit referendum and exposed their doubts about the process.

This paper will mainly address the legal implications of Brexit, especially in light of the Miller case;[7] which revolves around the issue of who had the power to trigger Article 50 in order to withdraw from the European Union: the Government, the Parliament or, even, if the devolved legislatures had a say in it.

The *Miller* case draw, because of its relation with Brexit, a lot of attention from the media and the public in general. Being a really controversial judgement, even

[4] The Electoral Commission, 'EU Referendum Results' <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> accessed 2nd March 2018.
[5] D Kingman, 'Intergenerational Foundation' (*Generation Remain: Understanding the Millennial vote,* 4th Oct 2017) <http://www.if.org.uk/research-posts/generations-remain-understanding-millennial-vote/> accessed 2nd March 2018.
[6] Consolidated version of the Treaty on European Union [2012] OJ C326/13, art 50.

[7] *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC5; [2017] 2 WLR 583.

academics held really different and strong opinions. Thus, the case is commented by everyone in the United Kingdom, contributing to an agitated atmosphere around it.

Nevertheless, the significance of this case has little to do with the political implications of it, but with the issues of constitutional law involved. The sovereignty of Parliament and the constitutional place of the Government in international affairs were at the centre of the debate; and this is where the relevance of the case really is, and not in the political scope of it.

V. MILLER CASE

i. Introduction

The central case is *R. (on the application of Miller) v Secretary of State for Exiting the European Union*.[8]

This case was a judgment of the Supreme Court of the United Kingdom in appeal from the High Court, on whether the government had a prerogative power to trigger Article 50 of the Treaty on European Union, which contains the process to abandon it.

As the government intended to do so, an action was brought to the High Court by Gina Miller and Deir Tozetti Dos Santos that questioned the entitlement of the Government to trigger Article 50. The High Court was unanimous in the judgement that the Crown's prerogative powers did not allow the Government to trigger Article 50, and that it was the exclusive right of the Parliament to do so.[9]

The government, not agreeing with the decision of the High Court, appealed the decision to the Supreme Court in the same terms alleged to the first instance. To this appeal, references by the Attorney General for Northern Ireland[10] and by the Court of Appeal (Northern Ireland)[11] joined the case. The references are a procedure through which the administrations can raise questions to the Court. Apart from that, Wales and Scotland were represented by the Counsel General of Wales and the Lord Advocate, respectively. The mentioned references made allusion to the involvement of the devolved administrations in the decision of triggering Article 50 of the Treaty on European Union.

The Supreme Court in this appeal upheld the decision of the High Court in the previous judgement. Eight out of the eleven Justices supported the defendants initial claim and decided that an Act of Parliament was required in order to trigger Article 50. Apart from this, in respect to the references brought by the devolved administrations, the Supreme Court decided that their consent was not necessary in order to proceed with the withdrawal from the European Union.

[8] *Miller* (n 7).
[9] *R. (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768.
[10] *Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review* [2017] UKSC 5.
[11] *Reference by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5

ii. Case Law and Prerogative Powers of the Crown

In the *Miller* case, one of the main issues that arose, was whether the government of the United Kingdom had the capability to trigger Article 50. Such capability would come, according to their arguments, from the prerogative powers of the Crown; these prerogative powers allow the government to carry out certain measures without going through Parliament. In the words of the justices:

"The Secretary of State's case is based on the existence of the well-established prerogative powers of the Crown to enter into and to withdraw from treaties. He contends that ministers are entitled to exercise this power in relation to the European Union Treaties, and therefore to give Notice without the need for any prior legislation."[12]

The prerogative powers, as explained before, are what remains of the powers with which monarchs used to govern the country. Nowadays, such powers are exercised by the executive, i.e. the Government, in order to perform some of its activity. The prerogative powers include some such as the declaration of war, the disposition of the armed forces, the signing of international treaties and the conduct of international relations; nevertheless, they are so imprecise that it is impossible to include them in a list.[13]

Whenever the Parliament legislates through statute any of the matters that can be carried out by prerogative powers, it ceases to be a prerogative power, and becomes a statutory power, and therefore, controlled by the Parliament.[14] The existence of this unregulated powers may seem anachronic in a liberal democracy at the present time, having in mind that these have not been debated in or restrained by Parliament. Furthermore, the lack of transparency is another characteristic that may seem odd in the XXI century; the fact that there is not a way to compose a list of such powers, and the difficulty to make Ministers accountable for the exercise of the prerogative powers, contribute to the growing criticism to this instrument.

Despite that criticism, the Parliament could indeed regulate the prerogative powers and substitute them for more limited and detailed statutory powers, but it has not done so; thus, it must be assumed that the Parliament does not find these powers as a challenge to its sovereignty. There have been, nevertheless, some attempts to change this situation, and the idea that at least there should be a list of such powers is increasing its presence within the Parliament.[15]

In 2007, the Government agreed that the prerogative powers should be –to some extent– regulated through statute, and that the control of the Parliament over them should be greater.[16] As consequence, the Constitutional Reform and Governance Act 2010 was enacted, regulating the organization of the Civil Service and the power to make international treaties.

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[12] *Miller* (n 7), para [34].
[13] Constitutional Reform and Governance Act 2010, Pt 2.
[14] M Elliot and R Thomas, '*Public Law*' (2nd edn, Oxford University Press 2014), 144.
[15] House of Commons Public Administration Select Committee, '*Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*' (HC 422 2003-04).
[16] Ministry of Justice, 'The Governance of Britain' (Cm 7170 2007), 15-17.

In the *Miller* case, the Crown's prerogative powers were subject to judicial review, as the claimants argued that that was not the appropriate process in order to withdraw from the European Union. The main argument of the claimants against the use of the prerogative powers was as the Court put it that

"The applicants' case in that connection is that when Notice is given, the United Kingdom will have embarked on an irreversible course that will lead to much of EU law ceasing to have effect in the United Kingdom, whether or not Parliament repeals the 1972 Act. As Lord Pannick QC put it for Mrs Miller, when ministers give Notice they will be "pulling … the trigger which causes the bullet to be fired, with the consequence that the bullet will hit the target and the Treaties will cease to apply". In particular, he said, some of the legal rights which the applicants enjoy under European Union law will come to an end. This, he submitted, means that the giving of Notice would pre-empt the decision of Parliament on the Great Repeal Bill. It would be tantamount to altering the law by ministerial action, or executive decision, without prior legislation, and that would not be in accordance with our law."[17]

Such argument was based in that, although the prerogative powers do allow the government to conduct international relations without the assistance of Parliament; in this case, that would result in the citizens of the United Kingdom losing all their rights protected under European Union law.

Moreover, the European Union law is enforceable in the United Kingdom due to the European Communities Act 1972 as it says in its section 2(1) that "[a]ll 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; and the expression "enforceable European Union right" and similar expressions shall be read as referring to one to which this subsection applies." Therefore, the exercise of the prerogative powers would contravene the constitutional principle of Parliamentary sovereignty, inasmuch as the executive would be legislating instead of Parliament by triggering Article 50 –because that would leave ineffective the Communities Act.

The principle of Parliamentary sovereignty in the United Kingdom is among the most stablished and respected principles, being one of the principles that basically configurated all the history of the United Kingdom since the creation of its Parliament; being one of the earliest countries where the people had a certain control over the monarchs.

What the Secretary of State –representing the government in the case– answered to this argument was that unless the Parliament had enacted a statute, expressly limiting the prerogative powers of the Crown as to this matter (which it had not done); there was no basis to sustain that the prerogative should not be used in the context of exiting the European Union. In this first argument the Secretary of State resorts to the preeminent

[17] *Miller* (n 7), [36].

position of the literacy in the Anglo-Welsh law, which is considered more reliable and enjoy a better consideration in Courts than principles, which are more uncertain.

Also, he argued that the Parliament would have to play his part after the notification, by the negative ratifying procedure with the withdrawal treaty; i.e. once notified the withdrawal, the Parliament should ratify –or not– the leaving treaty and its conditions. Thus, with that necessary decision in the ratification by Parliament, the Government thinks that the involvement of the Parliament would be enough; as it would have the final decision on the ratifying of the agreement.

Nevertheless, the intention of the claim by the applicants is not on the intervention of Parliament in the process, but the inadequacy of the prerogative powers to give notice to the European Union, which they think should be made by Parliament. Even if it has to ratify it afterwards, is in who holds the power to trigger Article 50 where the claim is.

As to the European Communities Act 1972, the Secretary of State says that as the Parliament did not expressly mention that the withdrawal of the treaty should be made through an act of Parliament; that suggests that it was the intention of the Parliament that it should be done through the prerogative. The assumption the Secretary of State makes here is an interpretation of the facts that should be done by the Court and that therefore holds not real weigh as an argument beyond making the Justices consider such uncertain interpretation.

Moreover, the Secretary of State recognises that although the 2015 Referendum Act does not expressly allow the government to give notice, the fact that it is silent on that matter means, again, that the Parliament supported the persistence of the prerogative powers to give notice.

"Although the 2015 Referendum Act does not itself confer statutory power on the Secretary of State to give notice under Article 50(2), the implication from the fact that the 2015 Referendum Act is silent on the issue whether legislation is required before notice could be given under that Article supported the contention that Parliament accepted the continued existence of the prerogative powers of the Crown to give such notice: it certainly contains no restriction on such prerogative power as may still exist."[18]

It is not irrelevant that the Secretary of State uses as argument the inexistence of an express wording in the law saying that the prerogative powers may be used, but at the same time he argues that the principles that the High Court considered applicable are uncertain because they are not exactly developed or written in the law. It is relevant because that argument can easily be applied to his own arguments as they are mere suppositions, and therefore, even more uncertain.

In fact, the judges of the High Court stated in relation to the Communities Act, that the argument of the Secretary of State goes too far in its interpretation that the non-express exclusion of the prerogative powers means that indeed they can be used in this matter.[19]

[18] *Miller* (n 9), [76].
[19] Ibid, [81].

The judgement was based in two main reasons:

1. The principle that the Crown cannot use its prerogative powers to alter domestic law and,
2. The Crown's prerogative power operates only in the international plane.

1. The High Court said in its judgement that the first principle had a strong constitutional tradition evolved to this days from the attempts to constrain the prerogative powers of the Crown. Therefore, it would be hard to believe that actually by the enactment of the European Communities Act 1972, the Parliament intended to leave the door open for the prerogative powers to act.

This first constitutional principle was summarised in *The Zamora* case, in which Lord Parker said, "No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity".[20] Also, in *The Case of Proclamations,* Sir Edward Coke said that "the King by his proclamation or other ways cannot change any part of the common law, or statute law or the customs of the realm" and "the King hath no prerogative, but that which the law of the land allows him".[21][22]

2. As the court states, this is a principle quite interrelated with the previous one and it derives from the conception that the Crown can act through prerogative powers on the international plane because it has no effect in domestic law.[23] The idea is, in short, that the prerogative powers cannot have any impact into the domestic law whenever they act. The judges refer to the case of *R v Secretary of State for Foreign Affairs, ex p Lord Rees-Mogg,*[24] in which the decision of the judges was that the signing of the Treaty of Maastricht could not happen without the approval of Parliament, since this treaty would have a great impact in the national law.

In the mentioned case, in order to sign a Treaty that affected national law, as the Treaty of Maastricht did, it was necessary the approval of Parliament; then, it is indeed easily deducted by analogy that the same should happen the other way around, i.e. if the withdrawal of a Treaty will affect the national law, the Parliament should approve such withdrawal.

Another element of the judgement, which has been quite criticised, was the interpretation of the European Communities Act 1972 as a 'constitutional' statute.[25] The interpretation that the Court does of this Act is as it had a superior qualification than other statutes, making it more protected in a certain way, or at least, it seems to be treated not just as a normal act derived from an international treaty; but conferring it a special value.

[20] *The Zamora* [1916] 2 AC 77.
[21] *The Case of Proclamations* (1610) 12 Co Rep 74.
[22] *Miller* (n 9), [27-33].
[23] Ibid, [89].
[24] *R v Secretary of State for Foreign Affairs, ex p Lord Rees-Mogg* [1994] QB 552.
[25] *Miller* (n 9), [82-85].

In respect to that, as it had been said by Laws LJ in *Thoburn v Sunderland City Council*,[26] where he described the Communities Act as a constitutional statute, the Court also said that it "[has] such importance in our legal system that it is not subject to the usual wide principle of implied repeal by subsequent legislation. Its importance is such that that it could only be repealed or amended by express language in a subsequent statute or by necessary implication from the provisions of such statute",[27] stating hence, its different qualification compared with other statutes.

In the same line, to support this idea of a constitutional statute with a different qualification, the Court mentions that Lord Neuberger of Abbotsbury PSC and Lord Mance JSC in *R. (Buckinghamshire County Council) v Secretary of State of Transport*[28] describe the Communities Act 1972 as one of a number of constitutional instruments.

These principles supported the idea of the judges that, as triggering Article 50, would result in the loss and ineffectiveness of quite a lot of European rights for United Kingdom citizens –that had been transposed into domestic law, or that are in fact directly applicable– then triggering that Article through the prerogative powers, would mean that the prerogative have indeed altered the domestic law, and therefore, it goes against those constitutional principles.

As to this matter, the High Court stated that the constitutional principle of parliamentary sovereignty prevents the Crown from having power to alter domestic law through prerogative power[29] and therefore, the withdrawal from the European Union should be notified through an act of the Parliament.

The judgement of the Supreme Court was in the same lines than that of the High Court. The Justices remarked the *Case of Proclamations* and *The Zamora* again as an important source of the limits of the prerogative; as well as, the Bill of Rights 1688 and the Claim of Rights 1689 (the latter for Scotland), which again exclude the possibility to change the law by any other than Parliament.

The Court highlighted the dualist version theory by which domestic and international affairs happen in different spheres, and how this is the reason why the prerogatives are able to conduct international affairs. The dualist vision says that while the two spheres do not have effect in the other, the supremacy of the Parliamentary should be secure; nevertheless, in the *Miller* case that dualism is challenged.[30]

In the judgement the Justices recurred to what Professor Campbell McLachlan said of the dualist theory, being it that "if treaties have no effect within domestic law, Parliament's legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the

[26] *Thoburn v Sunderland City Council* [2003] QB 151 (DC).
[27] *Miller* (n 9), [44].
[28] *R (Buckinghamshire County Council) v Secretary of State of Transport* [2014] UKSC 3; [2014] 1 WLR 324, [207].
[29] *Miller* (n 9), [86-89].
[30] *Miller* (n 7), [57].

international plane will require domestic implementation, parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged."[31]

As to the European Communities Act 1972, the Supreme Court decided, after some major reasoning, that it is an "entirely new, independent and overriding source of domestic law".[32] In this view, such act is a source of domestic law as it was enacted by Parliament; and it is because of this that European law is applicable in the United Kingdom. This way, the European Communities Act 1972 would be a source of European law within the domestic law, given force by Parliament, and therefore, part of the domestic legislation. What this means is that the mentioned act is as the court says an independent source of domestic law,[33] and therefore it cannot be repealed or amended via the prerogative powers, as it would get into the national sphere of law.

What the Supreme Court decided –without getting too deep into it, since the judgement and arguments were similar– was to uphold the previous decision made by the High Court, sustaining the same ideas in which it was based, and adding some further justifications for the validity of the given arguments.

The majority of the Justices held this view of the case, but there were three of them who dissented. The major reasons for dissenting were the willingness –in the majority's view– to talk about constitutional principles to support their arguments without fully getting into the constitutional traits of them. The Justices often refer to concepts such as "constitutional statute", which deserve an exhaustive explanation, without giving too much importance to the fact that they are naming it a constitutional matter.

The Justice that held a more opposite view to that of the majority was Lord Reed. In his view, the Communities Act gives European Union law direct effect on national law, but within a framework stablished by Parliament in which Parliamentary sovereignty remains the fundamental principle.[34] He also held that the wording of the section 2 of the Act "demonstrates that 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."[35] However, it should be noted that the section 2 of the Act does not include –as Lord Reed says– the word "revoke" at all.

The minority (through Lord Reed's judgment) determined that the European Communities Act 1972 did not create any statutory rights, at least not as other statutes. On the contrary, it gave legal effect in the United Kingdom to European Union legislation for as long as the Country is a Member State. Such condition depended and still depends on the Crown's prerogative powers and there was and still is nothing in the Communities Act to demonstrate that Parliament has taken away the Crown's prerogative power to withdraw from Treaties.

Nevertheless, the dissenting Justices could be regarded as too formal or technical, lacking a broader view of the issue and being too dependent of the exact wording of the

[31] C McLachlan, 'Foreign Relations Law' (1st edn, Cambridge University Press 2014), 156.
[32] *Miller* (n 7), [80].
[33] *Miller* (n 7), [61].
[34] Ibid, [183].
[35] Ibid, [186].

relevant law to the case; ignoring these constitutional principles that should affect the perception of the case.

The majority certainly address most of the arguments of the Secretary of State –which were quite weak, in some cases just appealing to the mere existence of the prerogative– in a really logical manner, and they easily discard them. Nevertheless, it is in the backing of their own arguments were the Justices start to employ this conceptual wording which makes the case somewhat feeble and not as convincing as a constitutional principle should be.

As it has been shown, the result of the decision of the Supreme Court was similar to that of the High Court; nevertheless, it was also questioned about devolution issues by Northern Ireland, Scotland and Wales.

iii. Devolution issues and Conventions

To the initial appeal of the Government made by the Secretary of State, joined two references made by the Attorney General for Northern Ireland and the Court of Appeal of Northern Ireland.[36] In addition to this, devolution issues brought by the Scottish and Welsh administrations were also raised before the Supreme Court.[37] A reference is basically a question raised to the Supreme Court by certain institutions of the United Kingdom that can use such instrument.

- The questions raised by Northern Ireland in the references, involve the possibility that the Northern Ireland Act 1998 (or the Belfast Agreement and the British-Irish Agreement) may require primary legislation before the notice is given by the government under the prerogative powers. Moreover, if that was the case, if the Northern Ireland Assembly needs to consent to such legislation.

- On the other hand, it is also questioned if under the Northern Ireland Act section 75, it is necessary the consent of the Northern Ireland Office in order to give notice. Besides, a question on whether giving notice without the consent of the people of Northern Ireland would go against section 1 of that same Act.

There was another question inquiring if there was any limitation to the use of the prerogative powers due to the Northern Ireland Act 1998 or the Belfast Agreement and the British-Irish Agreement. This question was superseded because it was already stablished by the Court that the use of the prerogative powers of the Crown was not the way to proceed to trigger Article 50.[38]

The commonality of the issues brought by the devolved administrations made the Court give a broad answer for every of them in most of the issues (except for some of the questions in the references).

[36] *Reference* (n 10 and 11).
[37] *Miller* (n 7), [126].
[38] Treaty on European Union (n 3).

To the possibility that primary legislation may be needed due to the Northern Ireland Act 1998, before making use of the prerogative powers; the Court refers to what it said previously about the need for primary legislation. Because domestic law will be changed by the exercise of Article 50 (also affecting the Northern Ireland Act), the prerogative powers are not adequate to give notice and it is necessary an act of Parliament –as the Justices already argued.

As to the consent of the Northern Ireland Assembly, it is necessary to refer to the Sewel Convention.[39] The Sewel Convention is contained in the Memorandum of Association and Supplementary Agreements and says that normally the Parliament of the United Kingdom would not legislate on devolved matters, but with the consent of the devolved legislature.[40] Nevertheless, in section 5(6) of the Northern Ireland Act 1998, section 28(7) of the Scotland Act 1998 and section 107(5) of the Government of Wales Act 2006, it is substantially said that despite it, the Parliament still has the power to make laws in the devolved legislatures. Therefore, the Parliament is allowed to legislate in spite of what the Sewel Convention says.

This way section 5(6) of the Northern Ireland Act says that "[t]his section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland." Accordingly, the Acts of the other two devolved legislatures have a similar section.

The reason why the legislation of the devolved administrations includes sections where basically it is said that the Parliament can ignore the Sewel Convention is because conventions, as will be analysed more deeply later in the paper, do not hold legal nature.

Apart from this, the convention is described in the second paragraph of the Memorandum of Understanding as a source of political intention, but not as a legal source. Because of this political nature the Justices refused to give an answer, saying that they could not enforce a convention as it does not create legal obligations.

The Court was in this decision quite conservative saying that 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". [41] In contrast with every other matter that was decided in this case in which the judges resorted to constitutional principles and concepts derived from them, in a quite progressive and interpretative manner.

In fact, it is reasonably argued the idea that the conventions do hold certain legal nature as they can be considered to have a constitutional status as part of the devolution agreements.[42] Existing this debate and being it clearly more in line with the overall of the judgement given, it is unclear why the judges chose to understand it the other way around.

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[39] *Miller* (n 7), [136].
[40] 'Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee' (2013), [14].
[41] *Miller* (n 7), [146].
[42] M Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention.' (2002) 22(3) Legal Stud 340, 356.

What can be understood by that is that, the inconsistency with the previous arguments of the judgement can be interpreted as the reluctance of the Court to decide on the matter. This probably because –in line with the argument of the Justices– the resulting decision of the Court could be quite unpopular, and they had no interest in dragging even more attention to the case, which was already quite unpopular.[43]

The last two questions made by the references are based on sections 75 and 1 of the Northern Ireland Act 1998; by the first one it is being asked if the Northern Ireland Office should consent to the notification of Article 50. The section 75 of the act[44] contains certain obligations for public authorities exercising its functions in relation with Northern Ireland; but as the Court points out, it is not applicable to the Ministers of the Crown as they are not in the definition that section gives of "public authority". Besides, as it had been decided that there was no prerogative power to give notice, the Northern Ireland Office does not have any part in it as it is a matter of the Parliament.

As to the last question, section 1 of the act[45] recognises the possibility for Northern Ireland to become part of the Republic of Ireland and, therefore, it does not really have any interest or consequence in this case.

It is clear that the devolution issues in the *Miller* case played a minor role and that the Court was not willing to get into them in depth; that decision was probably right as the centre of the case was the notification of Article 50 by prerogative powers and not the issues arising from the devolved legislatures. The devolved legislation and the conventions, and its part in the constitutional structure of the United Kingdom, should be addressed in its own on a different judgement, because the legal consequences of that would be great but not related to this case.

As we have seen in the case, the conventions do not have a legal nature, but a political one. In *Reference Re Amendment of the Constitution of Canada*,[46] the Supreme Court of Canada shared the view that conventions are not laws but some of them may even be more important than laws. Although conventions are rules, they do not impose any legal obligations, and the Courts cannot enforce them; they should be regarded as a guidance for the government and politics.[47] As Dicey said, another way conventions should be regarded is as a way to keep the constitution flexible, without affecting the legal framework of the rest of the law.

As it is of interest on this case, the prerogative powers of the Crown are also developed by convention. The conventions put a limit on some of the powers of the Crown: [48]

a) The Monarch's prerogative to appoint the Prime Minister must be exercised in favour of the person who commands a majority in the House of Commons.
b) The prerogative to appoint other members of the government must be exercised on the advice of the Prime Minister.

[43] James Slack, 'Enemies of the people' *Daily Mail* (London, 4 November 2016) 1.
[44] Northern Ireland Act 1998.
[45] Northern Ireland Act 1998.
[46] *Reference Re Amendment of the Constitution of Canada* (1982) 125 DLR (3rd) 1.
[47] A Carrol, 'Constitutional and Administrative Law' (6th edn, Longman 2011), 59.
[48] Ibid.

c) The prerogative to grant or refuse the Royal Assent must be exercised in favour of all Bills approved by the Commons and the Lords.
d) The prerogative to summon Parliament must be exercised annually.
e) The prerogative to dissolve Parliament must be exercised on the advice of the Prime Minister.

Conventions also rule aspects of the governing of the United Kingdom such as the practice of the Cabinet government, the work of Parliament or the relation between the United Kingdom and the Commonwealth.

Nevertheless, not every usual or ritualistic practices are recalled as conventions; in order to be recognised as a convention Sir Ivor Jennings proposed three tests that must be answered:[49]

a) Are there sufficient precedents?
b) Did those involved believe they were bound by a rule?
c) Is there a good constitutional reason for the rule?

There are quite a few similarities between law and convention. On one hand, they are regarded as rules and are affected by precedent in order to stablish its validity; on the other hand, both impose a degree of obligation and the violation of them bring consequences.

Notwithstanding with the above, it is well stablished by the case law that conventions will not be applied by the Courts, and that where the law and a convention may apply, the Court will always apply the law. [50]

In *Madzimbamuto v Lardner-Burke*[51] for example, the Privy Council rejected the argument that the Southern Rhodesia Act 1965 should not be applied because it contravened the convention that stated that Parliament would not legislate for a dominion unless the dominion requested it to do so.

Finally, conventions may be applied in Court if transposed into law (within an Statute) what would make them a legal rule, and not just a political one. There are three possible ways to do so.

The first way is that the wording of the convention or its understanding could be directly transposed into an Statute; the second way would be that in which an Statute makes reference to the relevant terms of the general practice, changing its legal status to that of law; and the third way to make a convention legally binding is a variation of the second method where the name of the convention is expressly referred to as binding.[52]

With all of the above, the decision of the Court on the *Miller* case is clearly sustained as the conventions would not be applicable by the Court; however, looking at the rest of the sentence and the importance the justices give to the 'constitutional' traits that the European Communities Act 1972 has, the justices could have gone a step further

[49] WI Jennings, 'The Law and the Constitution' (5th edn, University of London Press 1963).
[50] Carrol (n 40), 60.
[51] *Madzimbamuto v Lardner-Burke* [1967] 1 AC 645.
[52] M Qvortrup (Editor), 'The British Constitution: Continuity and Change: a Festschrift for Vernon Bogdanor' (1st edn, Hart Publishing 2013).

and recognise the significance of conventions to the British constitutional law, and not just ignore them.

VI. EFFECTS OF BREXIT AND THE MILLER CASE WITHIN PUBLIC LAW

Now that the *Miller* case has been analysed, it is pertinent to approach Brexit and its implications with the case, as it configured the background in which the case evolved.

Brexit exploded in 2016 with the referendum called by former Prime Minister David Cameron, who had promised it if he were to be re-elected as Prime Minister. Prior to that, the scenario in which the Brexit appeared was boosted by the Euro-zone crisis, immigration and the subordination to European Union law, among other things. Politics started to blame the European Union for the situation, and the lack of political resources they had to deal with the crisis. The relation of the United Kingdom with the European Union was difficult since the very beginning of it, and there had always been scepticism towards it.

The situation being as mentioned above and the political and mediatic discourse –especially of the right-wing media– increasing its tone against the European Union, it was a matter of time for a political party to exploit the existing voting space that claiming independence from the European Union could be. The party that arose in that place was the United Kingdom Independent Party (UKIP), this party based its campaign in the necessity to leave the European Union in order to regain the lost sovereignty of the domestic institutions, quotas on immigration and the high cost that the membership supposed.

The anti-euro speech of this party increased the perception that the European Union was to blame for the economic and social situation of the country. As UKIP rose in the polls, the other formations tried to stop them by imitating this speech –adapting the speech to attract more voters– and almost every party was at that point being critical with the Union.

This situation led to the aforementioned promise of David Cameron (Conservative Party), to hold a referendum on the matter if he won the national elections, which he did. Once he won, and the referendum was going to happen, the Government lowered their sceptical speech towards the rest of Europe –which may suggest that they were not really committed with that discourse– and started to promote the vote for remain in the European Union.

The European Union had already faced these issues with United Kingdom since the Treaty on European Union was approved. After it, the United Kingdom enacted the European Union Act 2011, by which any treaty altering the Treaty on European Union or the Treaty on the Functioning of the European Union[53], would be ratified by referendum. Also, after his re-election, negotiations started aiming to re-establish the position of the United Kingdom inside the European Union but did not succeed.

[53] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

After the *Miller* case, apart from what has been said before, some questions arise in relation with Brexit.

The *Miller* case was in the public eye for quite a long time, with a lot of debate around it and not many less controversies. The media played a big role on this agitation around the case as the main newspapers of the country fiercely attacked anyone involved in the case, from the judges to the claimants.[54] *Miller* case forced the Government to go through Parliament, and many people questioned the legitimacy of the decision of the Justices and even how they are elected for such position; questioning the independence of the judiciary.

The Justices tried to make clear from the very beginning of the case that this was not a political matter, but a constitutional one, and that the Court would not under any circumstance impede the United Kingdom from leaving the European Union; the issue to the Court was just how it should be done.

Despite this, it is true that the case result gave place to a series of political consequences as the people in favour of remaining in the European Union, saw the judgement as a sign that the withdrawal from the Union should not happen, and started to claim so to the political parties. Nevertheless, this was not what the Court intended and that is why they made such a remark in the case not being about politics.

i. Devolved administrations

An important question that arises from the case is how the Government will manage the tensions with the devolved administrations as a result from the Government deciding by them; ignoring the conventions stablished between them and their statutes. It is unclear if the competences that the European Union had, will be centralised or devolved to the administrations. The Government has said that the result from Brexit "will be a significant increase in the decision-making power of each devolved administration."[55]

Nevertheless, the Government prepared a repeal of the European Union legislation in order to maintain its effectiveness for now in the United Kingdom called informally the Great Repeal Bill (which will be addressed later). This Bill should, according to what the Government said, give the devolved administrations more competences, but after the Great Repeal Bill was published, both Scotland and Wales rejected it as it just involved more powers to the Central Government; and said that it would not pass the consent of their respective parliaments –as required by the Sewel Convention.[56]

The European Union institutions give the different regions of the Member States a lot of presence within the Union, legal recognition and some level of influence. Northern Ireland, Scotland and Wales have developed their own relationships with the Union,

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[54] A McNeil, 'Miller and the media: Supreme Court judgement generates more measured response' (*The Constitution Unit,* 9th February 2017) < https://constitution-unit.com/2017/02/09/miller-and-the-media-supreme-court-judgement-generates-more-measured-response/> accessed 5th April 2018.
[55] Department for Exiting the European Union*, 'Legislating for the United Kingdom's Withdrawal from the European Union*' (Cm 9446, 2017) 28.
[56] A Greer, 'Brexit and Devolution' (2018) 89(1) Political Quarterly 134, 136.

promoting their interests and priorities; all of which, will cease to exist with Brexit. Particularly affected by this is Wales, as it has been a net beneficiary of the European Union funds for the Common Agricultural Policy and the Structural Funds –as these funds are prioritised to less developed regions among countries. [57]

TABLE 4: Wales' estimated net fiscal benefit from the EU					
	£ million				
	2010	2011	2012	2013	2014
Net benefit (Total receipts less total contributions)	159	140	177	220	245

[58]

The way in which intergovernmental relations are carried out in the United Kingdom is through a multilateral forum, the Joint Ministerial Committee. This committee is formed by Government ministers from Scotland, Northern Ireland and Wales and their equivalent United Kingdom Government Minister. In these reunions the ministers from the devolved administrations seek to influence the Central Government to promote their interests. This committee operates via the Memorandum of Understanding and Supplementary Agreements (mentioned previously in regards of the Sewel Convention) which lay out the procedures and principles for the relations between the administrations. However, these instruments lack any power to make formally binding decisions without being incorporated into a statute, what leaves the effectiveness of the Joint Ministerial Committee very much open to question. Besides, there is no obligation for the Central Government to hold these meetings and therefore, a lot of time can go by from a meeting to the next one.

What this means is that the intergovernmental relations in the United Kingdom are really weak in nature, involving just operations of communication and consultation, cooperation, the exchange of information and confidentiality.

The European Union Joint Ministerial Committee was the most effective of the Joint Ministerial Committees[59] as it was the one that met more regularly in advance of European Council meetings. Moreover, this structure allowed the devolved administrations ministers to represent the United Kingdom at the European Union Council; which before was impossible as it was seen as international relations and was hence reserved to the Central Government.

[57] G Ifan, EG Poole and W Jones, 'Wales and the EU referendum: Estimating Wales' Net Contribution to the European Union' (2016) Wales Governance Centre at Cardiff University <http://sites.cardiff.ac.uk/wgc/files/2016/05/Estimating-Wales%25E2%2580%2599-Net-Contribution-to-the-European-Union.pdf > accessed 12th June 2018, 7.
[58] Ifan, Poole and Jones (n 56), 7.
[59] They are divided in three different Committees: one for Europe (JMC (E)), another Plenary (JMC (P)) and the last one for domestic issues (JMC (D)).

With Brexit this Committee will cease to exist; leaving just the existing committees for the United Kingdom, which as opposed to the European one, do not allow ministers from the devolved administrations to participate in the negotiations. The Welsh government tried to call for a seat in the table of negotiations when devolved issues are being discussed, but the United Kingdom did not allow it. [60]

The European Union gives the regions of the Member States the possibility to defend their own interests in its institutions, empowering the region and developing is international presence. This also benefits, as it is the case in the United Kingdom, the regions that do not have a lot of power within their own country as they can pursue their projects within the Union.

As it has been laid out, the position and influence of the devolved administrations will suffer quite a loss of power with the withdrawal from the European Union. The funds they had available from the European Union without the intervention of the Central Government will no longer be available, with the consequent loose of capability to take their own decisions as to the budget –now they will have to resort to the United Kingdom government in order to develop their projects and promote their interests.

ii. Constitutional Law

As it has been analysed before in the text, the *Miller* case has dealt with a lot of relevant constitutional issues. The prerogative powers were constrained, and the sovereignty of Parliament imposed, giving place to the European Union (Notification of Withdrawal) Act 2017 by which the government, with the consent of the Parliament, shall give the notification specified in Article 50 to start the withdrawal process.

First, the conclusion regarding the prerogative as not valid to trigger Article 50, ended in a view that "major" constitutional changes can be made only by legislation. However, that notion is not supported in authority, and gives the law a highly uncertain criterion according to which prerogative power is somewhat delimited and rests upon normative constitutional foundations that are unspecified and even arguably inexistent. Second, the judgement held that the prerogative powers could not be used to give notification because the European Union treaties and European Union legislation are an independent source of domestic law. This argument is again vague and does not avoid scrutiny as it is true in a sense, but too novel to be as final as it was in an argumentation of a judgement. Third, it was argued that the constitutional conventions required an act to be enacted in order to trigger the withdrawal from the European Union only if the devolved legislatures consented. Nevertheless, the Court refused to give a judgement on that matter (with the argument that conventions do not possess legal force) and therefore, it can be said that it was too careless to invoke questionable arguments regarding constitutional principles in order to sustain its analysis of the prerogative issue, but too slow to do the same with the constitutional principles involved in the devolution issue.[61]

[60] J Hunt and R Minto, 'Between intergovernmental relations and paradiplomacy: Wales and the Brexit of the regions' (2017) 19 The British Journal of Politics and International Relations 647, 650.
[61] M Elliot, 'The Supreme Court's judgement in Miller: in search of constitutional principle' (2017) 76 Cambridge Law Journal 257, 2.

In that line, the constitutional principles brought to the judgement by the Justices will give them more weight in future judicial decisions; possibly bringing the law a more progressive view of such concepts, which are rather ignored by the judges who generally prefer more formal and technical argumentations. Nevertheless, this view was quite controversial, and generated a lot of division –which is clear by the dissenting judges– so the future consequences of this case are not that definitive.[62]

The approach taken by the judges, although mainly progressive, loses that interest the judges showed in the arguments referring to prerogative powers, Parliament, etc. when it came to the devolved administrations issues. The intention of the judges was to wash their hands off but, by doing so, they basically took part deciding that even if the Sewel Convention is contained within the devolved legislation in statutes, it is still just of political value, and not real legal value. Refusing to judge in that matter, in the same lines they did with the other matters, goes against their own argumentation, making it look interested and even arbitrary. If they had followed the same line of argumentation, they could have made this case even more relevant, as it can be more easily argued that conventions do hold a constitutional value and should therefore be considered by Courts, than the "constitutional" value they observed in the European Communities Act 1972.

Therefore, the consequences of this case could be great, but only if this current of argument is maintained, bringing a new constitutional analysis in which substance prevails over formality.

iii. Special mention to the referendum procedure in the Anglo-Welsh Law

With the referendum of withdrawal as trigger for the *Miller* case, some notions of the referendum process in the Anglo-Welsh law are convenient.

There are antecedents of referendums held back in the Middle Ages and earlier, nevertheless, the United Kingdom does not have a tradition in holding referendums as other democracies do. Instead, it is common to say that an important Bill is finally determined by an appeal to the electors, i.e. the appointment of general elections, in which key policies are debated. In this way, it can be taken as example the general election of 1831; as it was evidently close to a referendum. In that election, the country voted in a general election to candidates just on the basis of the Reform Bill 1831 (Bill that came into effect as the Representation of the People Act 1832, to reform the electoral system).[63]

Nowadays, referendums are carried out in the framework of the Political Parties, Elections and Referendums Act 2000, in this Act, it was established the Electoral Commission that would act as the regulator of referendums.[64] However, they are still extremely rare, in fact, only three have been held nationally: in 1975 (under the Referendum Act 1975 enacted to give answer to the claim of the people of Northern

[62] M Elliot, 'The Supreme Court's judgement in Miller: in search of constitutional principle' (2017) 76 Cambridge Law Journal 257, 17.
[63] AV Dicey, 'Ought the referendum to be introduced into England?' (1890) 57 The Contemporary Review 489, 494.
[64] House of Lords Select Committee on the Constitution, '*Referendums in the United Kingdom*' (HL 99 2009-10), 7-11.

Ireland, Wales and Scotland to held a referendum), 2011 and 2016. Part of this reluctancy to hold referendums is due to the already discussed principle of parliamentary sovereignty, by which referendums cannot be constitutionally binding on either the government or Parliament and therefore the government could ignore the results. The non-binding nature of the referendums in the United Kingdom is part of the reason why the result of the referendum of 2016 was that controversial; some parts of the public demanded the government to ignore the result because of the possible inherence of external agents in the poll and the small voting difference between the two possible answers (51.9% and 48.1%).[65]

As it is a mere political instrument without any legal force, the process to call a referendum is rather simple. In order for a referendum to be held, an act has to be passed by Parliament in which the question and the possible answers to it must be specified. After that, the Electoral Commission is the government body in charge of the whole process,[66] and who will make sure that everything goes according to the regulation of the Political Parties, Elections and Referendums Act 2000[67].

[65] Electoral Commission (n 4).
[66] Political Parties, Elections and Referendums Act 2000, s 5(1).
[67] Ibid, pt VII.

VII. IMPLICATIONS OF THE WITHDRAWAL FROM THE EUROPEAN UNION

Before the Lisbon Treaty, there was no mention in the European legislation that allowed a member state to withdraw from the Union. There were two main currents of interpretation to this situation. In the first place there was the interpretation that any member state could break its relationship with the European Union due to the right of sovereign states to withdraw from international treaties. However, some held the opposite view, sustaining that the inexistence of such possibility in the European legislation or the treaties was an evidence of the firmness and the irreversibility of the accession to the Union. Therefore, until the Lisbon Treaty was signed, the only possible way out was the negotiation with the European Union representatives.

The only two examples we have of a territory leaving the European Union –or what then was the European Union– is the case of Greenland and Algeria. Nevertheless, these cases are not really helpful as to the situation of United Kingdom, since they were a part of the European Communities because of they were part of Denmark and France, respectively. In those cases, they ceased to be part of the European Communities when they obtained their independence from the said countries (although Greenland did not leave as a State per se due to its special international condition).[68]

Since the signing of the Lisbon Treaty it is possible to withdraw from the European Union through a regulated method; such method is contained in its Article 50. According to it:

" 1. Any Member State may, in accordance with its constitutional rules, to withdraw from the Union.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

[68] A Deac, 'Withdrawal from the European Union according to Art. 50 of the Treaty of Lisbon. Practical application – Brexit' (2016) 5 Perspectives of Business Law Journal 29.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49."[69]

There has never been a withdrawal of a country from the European Union –as it is nowadays– and therefore, the route to follow is rather uncertain. The only reference to the possible withdrawal of a country is in the Article 50 of the Treaty on European Union (above), in force since 2009, which states in its Article 50(2) that a Member State may withdraw from the Union in the way its constitutional requirements allow it.[70] The constitutional requirements of the United Kingdom have been addressed above and now the withdrawal process should be as contained in the mentioned Article, and once triggered, the process is irrevocable.[71]

The notification, following the judgement of the Supreme Court, was made in the Brexit case through the European Union (Notification of Withdrawal) Act 2017 starting the withdrawal process the 29th of March 2017. Article 50(3) of the treaty gives 2 years once the notification has been given, to negotiate an agreement, if there is not an agreement before those 2 years pass, every "[t]reaties shall cease to apply to the State" unless there is an unanimous agreement between the European Union and the United Kingdom to extend that period[72] –which is highly doubtful since the European Union wants the withdrawal to happen as soon as possible, as it is an anomalous situation spreading uncertainty over the European politics and the internal market.

The process to follow is quite complex since it requires the voting of the agreement in different stages, from the consent of the European Parliament to the approval by a qualified majority of the Council of the European Union. Once triggered, the United Kingdom will continue to take part in most of the decisions but will be excluded from internal discussions or the decisions about its own withdrawal.

The position the United Kingdom may take with respect to the European Union may be in the same condition as Norway, which is a member of the European Economic Area which grants the country access to the single market without being a member of the Union. In that position, the member is affected by most of the decisions taken in the European Union but does not have a vote in them. However, this possible solution is not very popular as it is still seen as a loss of sovereignty; in the United Kingdom, the desired end to the negotiations seem to be the negotiation of new treaties that allow the United Kingdom to remain fully independent from the European Union but able to access its single market. According to the latest information, this is highly improbable as the Union would not allow it without some conditions on the British side.[73]

[69] Treaty on European Union (n 6), art 50.
[70] Treaty on European Union (n 6), art 50(1).
[71] C Barnard, 'Law and Brexit' (2017) 33(S) Oxford Review of Economic Policy s4, 6.
[72] Treaty on European Union (n 6), art 50(3).
[73] A Asthana, D Boffey and A Perkins, 'Theresa May says Brexit will reduce UK access to single market' *The Guardian* (2 March 2018) < https://www.theguardian.com/politics/2018/mar/02/theresa-may-says-brexit-will-reduce-uk-access-to-single-market > accessed 14 June 2018.

Whatever the position both parties support in the negotiation, what is clear is that the negotiations have a due date imposed by Article 50 of two years after the notification of the withdrawal, that will not allow this situation to be extended much longer.

Without the enforcement of European Union law, the United Kingdom will be lacking almost 50 years of legislation on the matters that were regulated on a European level; to avoid this, the Parliament of the United Kingdom is preparing legislation in order to repeal the European Communities Act 1972 but continue to enforce all the European legislation that was enforceable in the United Kingdom, this piece of legislation is the European Union (Withdrawal) Bill,[74] known informally as "the Great Repeal Bill".[75] This way, they will continue under the effect of the European legislation and the "gap" of British legislation will be covered by the European Union one.

With that move, they may be anticipating what the government will have to do to continue its trade with the Union; i.e. not being part of it but having to apply its legislation either way, in order to be able to comply with the standards of the European Union market, which are among the highest in the world.

When triggering Article 50, the Prime Minister, Teresa May, said "we are leaving the European Union, but we are not leaving Europe – and we want to remain committed partners and allies to our friends across the continent."[76] However, that kind of relationship with the European Union is complex. Even outside the Union, the legislation of it will affect every possible co-operation agreement the United Kingdom may reach with a Member State because such agreements must be based in European Union law and with attention not to infringe the external competence of the Union. In short, if a Non-Member State wants to co-operate with a Member State, such co-operation is subject to the requirements of European Union law, irrespective of whether it takes place within or outside of its framework.[77]

The European Union holds exclusive competences in the areas contained in Article 3 of the Treaty on the Functioning of the European Union:

> "Article 3: 1. The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.
>
> 2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of

[74] European Union (Withdrawal) Bill HL Bill (2017-2019) 79.
[75] J Rothwell and L Hughes, 'What is the EU Withdrawal Bill? The only explanation you need to read' *The Telegraph* (12 June 2018) <https://www.telegraph.co.uk/politics/0/eu-withdrawal-bill-explanation-need-read/> accessed 15 June 2018.
[76] T May, 'Prime Minister's letter to Donald Tusk triggering Article 50' (2017) <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50> Accessed 15 June 2018.
[77] P Leino and L Leppavirta, 'Does staying together mean playing together? The influence of EU law on co-operation between EU and non-EU states: the Nordic example' (2018) 43(3) European Law Review 295, 2.

the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

What this means is that the Member States cannot act in any of those areas of exclusive performance by the Union unless it empowers them to do so.[78]

All the above mentioned goes against the desire of the United Kingdom to remain trading with the European Union or any of its members, leaving a difficult scenario for the United Kingdom, who will have to accept the Union conditions in order to keep its current access to the internal market and keep applying European Union legislation on at least commercial matters –or others that the Union considers necessary.

[78] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ 2012 L351/40, para 1.

VIII. CONCLUSION

This case has been by far the most important constitutional case in years. Giving that it is a constitutional case triggered by a matter of international law, it is easy to see how the law is –or was– evolving towards a more open approach, with much more presence of international law in the domestic law; even as the Court said in its judgement as an independent source of domestic law[79] and acquiring some flavour of constitutional law. It is interesting to see how the world is evolving to a greater interrelation of different sovereignties and the legislation of different entities, to a point that one cannot really survive or make sense without the other, unless isolated from the rest of the world. The Law is about setting the rules for the relationships between people, and as such, the increasing relationships between countries forces them to a broader interaction of their legislation and therefore, the confusion of them will be at some point in time, inevitable.

This evolvement is due greatly to the new technologies, which spread without barriers, and the increment in the movement of people, whom start to have a more diffuse concept of the old borders and are shocked by the amount of time, documents and bureaucracy needed to go to a third country –at least in Europe.

While the *Miller* case has given a quite progressive judgement, the judicial system in United Kingdom is still really dependent on formality, on the literacy of the wording, more than the meaning of it, the substance. Courts prefer a written section in a Statute than a not well stablished principle of the law; and given that their legal system is based in case law (which makes principles more uncertain), the Courts are reluctant to make use of them. At the end, this case was the triumph of the sovereignty of Parliament over the Government, which is a principle recognisable by anyone in the United Kingdom, even if complexly argued; and thus, a clear advancement for society.

Although the judgement can be criticised in many ways, the final result is clearly the result it should have been; that is why the Secretary of State did not have many arguments in its favour apart from the inexistence of certain words in a statute. The approach of the United Kingdom to the law is quite mechanical in certain matters, ignoring the interpretative role of the courts. Judges should not find it so difficult to give a judgement based on constitutional principles because they are what hold the law together.

As for the prerogative powers of the Crown, given the abuse the Government tried to make of them, they should be under more control by Parliament due to the unusual powers they are and their origin (it should not be forgotten that they are not democratic powers but heirs of the monarchs' power). If such powers are still in place, is because they have proven to be useful as a quick method to rule on some matters but it is important that the Government's actions are subject to scrutiny in order to not lose the balance between the different powers.

The fact that the devolved administrations were mostly ignored in the case (although probably reasonable) does not help the difficult situation the United Kingdom faces. The issues with the devolved administrations could rise if they do not see the Sewel Convention respected by the Government and any other agreements reached as part of

[79] *Miller* (n 7), [80].

the intergovernmental relations instruments. The representation of the countries that compose the United Kingdom is minimal as to governmental decisions, which are handled entirely by the Central Government, who can even come to an agreement with one of them and do the exact opposite of that agreed to.

Finally, Brexit could mean taking back the sovereignty that had been handed over to the European Union, or it could just result in an appearance of that; making Parliament copy and paste every policy that the European Union applies. If that were the case, it would in fact go in detriment of the United Kingdom's sovereignty because the United Kingdom would be applying –by his own Parliament– policies from foreign governments in which it did not take part or vote; resulting in the loss of representation of the United Kingdom and, therefore, its sovereignty. How is a country that is forced to comply with foreign laws sovereign?

IX. BIBLIOGRAPHY

BOOKS

Carrol A, *Constitutional and Administrative Law* (6th ed, Longman 2011)

Dicey AV, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915)

Elliott M and Thomas R, *Public Law* (2nd edn, Oxford University Press 2014)

McLachlan C, 'Foreign Relations Law' (1st edn, Cambridge University Press 2014)

Keith AB, *Introduction to British Constitutional Law* (Clarendon Press 1931)

Qvortrup M (Editor), *The British Constitution: Continuity and Change: a Festschrift for Vernon Bogdanor* (1st edn, Hart Publishing 2013)

Wade HWR and Forsyth CF, *Administrative Law* (10th edn, Oxford University Press 2009)

JOURNAL ARTICLES

Barnard C, 'Law and Brexit' (2017) 33(S) Oxford Review of Economic Policy s4

Curtice J, 'Brexit: Behind the Referendum' (2016) 7(2) Political Insight 4

Dicey AV, 'Ought the referendum to be introduced into England?' (1890) 57 The Contemporary Review 489

Deac A, 'Withdrawal from the European Union according to Art. 50 of the Treaty of Lisbon. Practical application – Brexit' (2016) 5 Perspectives of Business Law Journal 29

Elliot M, 'The Supreme Court's judgement in Miller: in search of constitutional principle' (2017) 76 Cambridge Law Journal 257

Elliott M, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention.' (2002) 22(3) Legal Stud 340

Greer A, 'Brexit and Devolution' (2018) 89(1) Political Quarterly 134

Hunt J and Minto R, 'Between intergovernmental relations and paradiplomacy: Wales and the Brexit of the regions' (2017) 19 The British Journal of Politics and International Relations 647

Leino P and Leppavirta L, 'Does staying together mean playing together? The influence of EU law on co-operation between EU and non-EU states: the Nordic example' (2018) 43(3) European Law Review 295, 2

White S, 'Parliaments, constitutional conventions, and popular sovereignty' (2017) 19(2) The British Journal of Politics and International Relations 320

OFFICIAL PUBLICATIONS

House of Commons Public Administration Select Committee, '*Taming the Prerogative: Strengthening Ministerial Accountability to Parliament'* (HC 422 2003-04)

House of Lords Select Committee on the Constitution, '*Referendums in the United Kingdom*' (HL 99 2009-10)

May T, 'Prime Minister's letter to Donald Tusk triggering Article 50' (29 March 2017) <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50> Accessed 15 June 2018.

'Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee' (2013)

COMMAND PAPERS

Department for Exiting the European Union*, 'Legislating for the United Kingdom's Withdrawal from the European Union*' (Cm 9446, 2017)

WORKING PAPERS

Foster N, 'The case of R (on the application of Miller and another) v Secretary of State for Exiting the European Union on invoking Article 50 of the EU Treaty' (2017) Oxford University Press (Online Resources Centre) <http://fdslive.oup.com/www.oup.com/orc/resources/law/eu/eulaw/resources/updates/eulaw_brexit_foster.pdf> accessed 4th April 2018

Ifan G, Poole EG and Jones W, 'Wales and the EU referendum: Estimating Wales' Net Contribution to the European Union' (2016) Wales Governance Centre at Cardiff University <http://sites.cardiff.ac.uk/wgc/files/2016/05/Estimating-Wales%25E2%2580%2599-Net-Contribution-to-the-European-Union.pdf> accessed 12th June 2018

Snell J, 'Brexit: Navigating Uncertain Seas' (2016) Oxford University Press (Online Resources Centre) <http://fdslive.oup.com/www.oup.com/orc/resources/law/eu/eulaw/resources/updates/eulaw_brexit_snell.pdf>

NEWSPAPER ARTICLES

Slack J, 'Enemies of the people' *Daily Mail* (London, 4 November 2016)

Asthana A, Boffey D and Perkins A, 'Theresa May says Brexit will reduce UK access to single market' *The Guardian* (2 March 2018) <https://www.theguardian.com/politics/2018/mar/02/theresa-may-says-brexit-will-reduce-uk-access-to-single-market> accessed 14 June 2018

Rothwell J and Hughes L, 'What is the EU Withdrawal Bill? The only explanation you need to read' The Telegraph (12 June 2018) <https://www.telegraph.co.uk/politics/0/eu-withdrawal-bill-explanation-need-read/> accessed 15 June 2018

BLOGS

McNeil A, 'Miller and the media: Supreme Court judgement generates more measured response' (*The Constitution Unit,* 9th February 2017) < https://constitution-unit.com/2017/02/09/miller-and-the-media-supreme-court-judgement-generates-more-measured-response/> accessed 5th April 2018

WEBSITES

Gardner C, 'Why the High Court got the law wrong about Brexit' (*Head of Legal,* 4 November 2016) < https://www.headoflegal.com/2016/11/04/why-the-high-court-got-the-law-wrong-about-brexit/> accessed 11th March 2018

Kingman D, 'Intergenerational Foundation' (*Generation Remain: Understanding the Millennial vote,* 4th Oct 2017) <http://www.if.org.uk/research-posts/generations-remain-understanding-millennial-vote/> accessed 2nd March 2018

The Economist, 'A background guide to "Brexit" from the European Union' <https://www.economist.com/blogs/graphicdetail/2016/02/graphics-britain-s-referendum-eu-membership> accessed 5th April 2018

The Electoral Commission, 'EU Referendum Results' <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> accessed 2nd March 2018

Whiteman RG, 'Devolved External Affairs: The Impact of Brexit' (The Royal Institute of International Affairs, February 2017) <https://www.debrige.de/wp-content/uploads/brexit/Richard-Whitman-Devolved-External-Affairs-paper.pdf> accessed 20th March 2018