**THE CONSTITUTIONAL IMPACT OF NATIONAL REFERENDA AND THE UK’S SECESSION FROM THE EU**

**David Feldman and Veronika Fikfak**

***Abstract***

The paper has three aims.

1. It outlines the constitutional structure of the UK immediately before the Brexit referendum of June 2016, and explains why referenda do not fit comfortably into it.
2. It reviews previous uses of referenda in the UK or parts of the UK, and explains why the 2016 referendum was particularly unusual in its structure and the in reasons for holding it.
3. It examines the impact of the 2016 referendum on relationships between institutions within the UK, particularly:
   1. the relationship between parliamentary sovereignty and the royal prerogative;
   2. the structure of the devolution settlement, including the effect of constitutional conventions on the powers of the central executive and parliament in the process of giving effect to the referendum results;
   3. the role of courts in establishing how relationships had changed;
   4. the extent to which withdrawing from the EU really empowers the Queen in Parliament to “take back control” of domestic law from EU institutions, rather than either giving greater power to the executive or leaving the UK bound to accept EU law and legal authority for the foreseeable future.

***Text***

# Referenda and the constitutional structure of the UK

The UK’s constitution, which during the late 19th and 20th centuries was conventionally regarded as being unitary, dominated by the power of the Parliament at Westminster to make or unmake any legislation whatever for any part of the UK, was widely recognised by 2016 as being characterised by its multi-level character. The constitution manages relationships between public international law and politics, EU law and politics, national (UK-level) law and politics, and the devolved governmental and legal systems of Scotland, Wales and Northern Ireland. There is no devolved authority in England, but the Standing Orders of the UK House of Commons (the lower chamber of the UK Parliament) now provides for a Grand Committee of M.P.s (in which only M.P.s representing constituencies in England may vote) with power to veto “England-only” provisions in Bills.

Below the level of devolved government, local authorities of different kinds exercise functions under statutory duties and powers at relatively local level. Local government has no formal, constitutional status in UK law. There used to be an understanding, or convention, that central government would respect the local, democratic authority of elected local authorities, but the power of local authorities to fund themselves through local taxes and to determine their own spending priorities has been greatly reduced since the 1980s as part of a centralising tendency which, until devolution from 1997, the Conservative Government saw as a necessary precondition for privatising many of the traditional activities of both central and local government.

From a UK constitutional perspective, parliamentary sovereignty (the doctrine that the Westminster Parliament can make or unmake any legislation, and is not subject to any restriction or even oversight of its work by any extra-parliamentary body) greatly simplified both the centralisation of governmental power and privatisation of the state in the 1980s and 1990s and the devolution of power to Scottish, Welsh and Northern Irish institutions since the end of the 1990s. The only legal (as distinct from political) disability to which the Westminster Parliament is subject is that its enactments are inapplicable to the extent that, in a particular case, giving effect to them would be inconsistent with directly applicable or directly effective EU law; to that extent, and only to that extent, the inconsistent provisions are disapplied and the relevant EU law is applied instead. This disability is likely to end at the end of any transitional period which may follow the UK’s withdrawal from the EU on 29 March 2019.

Nevertheless, the devolution settlement has complicated the relationship between between the Westminster and devolved legislatures. The Scottish Parliament, National Assembly for Wales and Northern Ireland Legislative Assembly (which has been suspended, one hopes temporarily, for more than a year as a result of the parties to Northern Ireland’s power-sharing arrangements being unable to agree sufficiently to elect a First Minister and Deputy First Minister, leaving Northern Ireland with no political heads for devolved executive departments) are empowered to pass Acts within their respective, and rather different, fields of competence which amend or disapply provisions of Acts of the Westminster Parliament so far as they apply to Scotland, Wales or Northern Ireland respectively. The Westminster Parliament can retaliate by passing an Act which repeals the inconsistent provisions in the devolved legislation, and can prevent devolved legislatures from passing Acts inconsistent with particular Westminster Acts by adding a Westminster Act to the list of such Acts which are beyond the power of the devolved legislatures (e.g. Schedule 4 to the Scotland Act 1998), but otherwise the Westminster and devolved legislatures have coordinate jurisdiction in relation to devolved matters.

Alongside and around the legal rules, many extra-legal practices, understandings and conventions have been developed to help officials and ministers at different levels to negotiate arrangements between the central and devolved institutions and resolve disagreements and clashes. The best-known of these, the “Sewel convention”, was an agreement that the Westminster Parliament would not normally legislate for a devolved matter unless the appropriate devolved legislature had passed a “consent” motion. This convention was put into statutory form, but the Supreme Court has held that this did not make it judicially enforceable. Other equally important but less well known agreements include the “concordats” reached between officials to help to manage relationships in areas of overlap between the competencies of the devolved and central institutions.

Two final points should be borne in mind when considering the impact of the Brexit referendum on the UK’s constitution. First, different methods are used for choosing members of the devolved legislatures and the Westminster legislature. At Westminster, the House of Commons is composed of 650 M.P.s, one Member elected by, and representing, each of 650 constituencies across the UK. In the devolved legislatures, the constituencies are more likely to be multi-member, and the members elected on the basis of some form of proportional representation. This affects the way in which Ministers are chosen. In Northern Ireland, there is a special requirement, arising from the Good Friday Agreement (a treaty between Ireland and the UK) of 1998 to provide a constitutional basis for the armed, militant republican and unionist groups to give up their weapons and try to cooperate in civil government, that power should be shared between a First Minister and a Deputy First Minister, one of whom must be a unionist and the other must be a republican.

Secondly, referenda have no place in the UK’s formal, legal constitution, save in one situation: before the UK’s Government could start a process of ending Northern Ireland’s status as part of the UK, there would have to be a poll of the people of Northern Ireland establishing their consent to that move. If such a vote occurred, the Government would have to lay before the Westminster Parliament proposals for giving effect to it.[[1]](#footnote-1) The last such poll took place in 1973, when a leading republican party boycotted it, and, on a turnout of just under 60%, almost 99% of votes favoured Northern Ireland remaining part of the UK.

Nevertheless, referenda have been used from time to time in the UK to allow voters to express a view about matters of constitutional significance. Three have been UK-wide plebiscites. First, in 1975, a little over two years after the UK became a Member State of the EEC, the Labour Government renegotiated the UK’s terms of members, and called a national referendum to see whether there was support for remaining a Member State on the renegotiated terms. On a turnout of almost 65%, 67% of those who voted approved the package. Secondly, in 2011 there was a referendum on a proposal by the Liberal Democrats (then partners with the Conservative Party in a coalition Government) to change the method of selecting M.P.s in the House of Commons at Westminster. Instead of having one member per constituency, that member being the candidate who received the most votes at an election, the Liberal Democrats proposed moving to a form of alternative-vote proportional representation. The proposal was rejected. Finally, in June 2016 there was a second referendum to decide whether the UK should remain a Member State of the EU. Voters rejected continued membership by about 51.89% to 48.11% of those voting, on a turnout of 65.38%.

There have been a further eight referenda in particular parts of the UK. The 1973 referendum in Northern Ireland on whether Northern Ireland should continue to be part of the UK has already been mentioned. The other seven referenda were as follows.

In 1979, Parliament passed legislation to grant devolved government to Wales and Scotland, and the legislation provided that it would not take effect unless, at a referendum, at least 40% of the registered electors in Wales and Scotland respectively voted in favour of it. In the event, on low turnouts, neither Wales nor Scotland achieved the 40% threshold, although a narrow majority of those voting in Scotland were in favour. The electorates in England and Northern Ireland had no opportunity to vote.

The Labour Government which came to power in 1997 had plans for significant constitutional change. Several of these related to devolution, either to the “nations” of Scotland, Wales and Northern Ireland or to the English regions. The Government held a series of referenda, one in each of the areas to which devolution proposals related. In Scotland, the referendum asked two questions: whether Scotland should have a Parliament, and whether any such Parliament should have power to vary the level of taxation from the national level set by the Westminster Parliament. Scottish voters answered “Yes” to each question. As a result, the Scotland Bill (which became the Scotland Act 1998) was introduced to Parliament. In 2014, as a result of pressure from the Scottish Nationalist Party, the Westminster Parliament agreed to the holding of a referendum in Scotland on the question, “Should Scotland be an independent country?” The Scottish electorate voted “No”, on a high (84.59%) turnout, by 55.3% against 44.7%.

In Wales, voters were asked whether there should be a National Assembly for Wales. They answered “Yes”, and the Bill which later became the Government of Wales Act 1998 was introduced to Parliament. Unlike the Scottish Parliament, however, the legislation for Wales did not create a full-blown legislature; the Assembly exercised only subordinate legislative powers which had previously been exercised by the Secretary of State for Wales in the Government in London. In 2011, there was a further referendum on whether the National Assembly for Wales should have powers as an original legislature to make Acts for Wales,[[2]](#footnote-2) instead of having to wait for the Westminster Parliament to delegate legislative power to the Assembly and then making subordinate legislation. The turnout was very low – only 35.63% of registered voters cast votes – but of those who voted, 63.49% approved the proposal. As a result, the Government in London made a Statutory Instrument bringing into effect the provisions of the Government of Wales Act 1998 allowing the Assembly to make Acts.[[3]](#footnote-3)

The voters of Northern Ireland were asked whether they approved the terms of the Good Friday Agreement, including the devolution of legislative and executive functions and a power-sharing executive for Northern Ireland. They did, and the Westminster Parliament passed the Northern Ireland Act 1998 to give effect to the Agreement.

The Labour Government was also keen on creating regional authorities in England to exercise functions with directly elected assemblies and directly elected mayors. A proposal for a Greater London Authority and Mayor of London was approved in a referendum for Londoners in 1998, and legislation followed. In regions outside London, however, there was less popular support for an idea that seemed to many to impose an additional tier of administration and additional costs for no clear benefit. The first referendum on such a proposal outside London was by postal ballot on a proposal for an elected assembly for the North-East of England, and the proposal was rejected so emphatically (albeit on a turnout of less than 50%, by 77.9% against 22.1%) that the Government announced that there would be no further consultation on such devolution for the time being. (The idea is currently being floated once more, but without holding referenda as part of the consultation process.)

Finally, local authorities in England, Wales and Scotland (but not Northern Ireland) have power to hold local polls of people within their areas as an aid to consultations about types and levels of services, including transport, provided within those areas. There is statutory authority for such referenda.[[4]](#footnote-4)

# The Brexit referendum in the context of previous referenda in the UK

Several points about the referendum in June 2016 deserve mention. It was only the third UK-wide referendum to have been held in the state’s history, and the second relating to membership of the EEC/EC/EU. Like the first such referendum in 1975, which sought approval for a deal which the Government had already negotiated, the 2016 referendum was preceded by a negotiation led, this time, by David Cameron’s Conservative Government, which had yielded certain minor concessions from other EU member states regarding the terms of the UK’s membership. Unlike the position in 1975, however, the campaign against remaining a Member State was not led by anyone with statesmanlike weight, but by several groups led by single-issue politicians (such as Nigel Farage and his UKIP supporters) or by figures who were marginal in their parties and hoped to enhance their standing through the Leave campaign (such as Boris Johnson and Michael Gove). Also unlike the position in 1975, by 2016 the UK had had 43 years of progressive integration into ever-expanding networks of EU-wide economic markets, structures, laws and institutions, with the result that leaving was far more complex and likely to be far more damaging to the UK’s economy than leaving in 1975 would have been. The Leave campaigners launched a very slick, well targeted campaign. They focussed exclusively on the costs of membership and made wild claims about the money which the UK could save by leaving and the benefits of being able to negotiate trade agreements with non-EU states free from the constraints of EU membership. The Remain campaign responded with dire warnings about the damage to the UK’s economy which would be likely to follow withdrawal, but failed to draw voters’ attention to the many benefits which the UK had gained from being able to share and coordinate regulatory regimes, policing and security arrangements, and tariff-free trade between the 28 Member States. The Conservative and Labour Parties were split on the issue, and Labour leaders did little to assist in presenting a realistic account of the benefits of membership.

There were significant regional variations in the way the vote went. Scotland, which benefits significantly from trade with Europe, voted solidly for Remain by a large margin. Northern Ireland, whose peace and gradually increasing prosperity under the Good Friday Agreement was significantly underpinned by a lack of any border between Northern Ireland and Ireland, and who benefited considerably from EU support both financial and political, voted to remain. Wales, which gained significant economic benefits from membership, nevertheless voted (fairly narrowly) to leave. In England, there were many regional and local variations. Greater London, the financial hub, voted convincingly to remain. So did most University towns and cities. The English country regions, by contrast, fairly consistently voted leave. The overall margin of victory for the Leave campaign was fairly narrow, as noted above, and the emotional heat which the campaign generated lingered and, if anything, grew worse after the results were announced. They revealed that society in the UK was deeply divided along a number of damaging fault-lines: a YouGov survey showed that voters up to the age of 25 were overwhelmingly in favour of remaining, while those over 50 were preponderantly in favour of leaving; those in Scotland and Northern Ireland, and London favoured remaining, while much of Wales and the remainder of England favoured leaving; and people who had university degrees were better educated were very likely to favour remaining, while those whose highest academic qualifications were at or below GCSE level were equally likely to vote to leave. (This explains why towns and cities accommodating universities were very likely to vote to remain, even in parts of the country generally populated by people who voted to leave.)

Whilst a majority of those who voted (37.44% of all registered voters) voted to leave, the question (“Should the United Kingdom remain a member of the European Union or leave the European Union?”) did not allow voters to express a view as to the terms they would be content to leave. Indeed, the campaign had not equipped voters to express such a view. The Remain campaign had carefully avoided doing or saying anything that might lead anyone to suspect that they contemplated losing the vote, to the point where the Government had instructed Civil Servants to make no contingency plans at all for a Leave vote. On the Leave side, campaigners had presented leaving as a straightforward matter of giving the required notification and then legislating to repeal the European Communities Act 1972, which had given effect to EU law in the UK. Whenever anyone had tried to point out the practical, legal and regulatory difficulties which would have to be dealt with in order to give effect to a decision to leave, and the costs of dealing with them, Leave campaigners had dismissed them as “experts” (a term of abuse, in the context of the Leave campaign), and alleged that they had a vested interest in remaining in Europe. Experts’ curricula vitae were scanned for any link with any European organisation in order to discredit their views. Not only had nobody made any serious attempt to plot a path towards withdrawal, but there was, on the Leave side, a naïve view that the commercial interests of companies based in the other EU Member States would ensure that the EU would readily agree to a withdrawal deal under which the UK would retain the ability to trade freely with the EU while being able to negotiate trade deals outside the EU and limit immigration from the EU. The Leave campaigners either did not understand, or seriously underestimated, the degree to which the EU Commission and most EU Member States regard the “four freedoms” and guarantees of their operation through the Court of Justice of the European Union as being both inextricably inter-dependent and non-negotiable.

To sum up this section, the referendum result left the UK with a goal for its future relations with the EU, but without a policy or workable plan for achieving that goal. There was no agreement, even among Leavers, on the type of withdrawal or terms of withdrawal or consequences of withdrawal which would be acceptable.

This might not have mattered unduly had politicians treated the referendum as merely consultative. As a matter of law, that was what it was. No legal consequences or obligations flowed from it. It would have been possible for the Government to treat it merely as an invitation to explore the possibilities for withdrawing, to draw up a road-map in due course after some preliminary discussion with the EU and other Member States, and to put that road-map to the people at a further referendum. Instead, however, the Government treated itself as subject to a political obligation to withdraw as quickly as possible. This presented a problem, as most members of the Conservative Party favoured remaining in the EU, so it was by no means certain that any necessary Bill would be approved by Parliament. David Cameron, the Prime Minister, had said before the referendum that he would accept the result and would continue to lead the Government in giving effect to it, quickly realised that his position, and that of many of his Ministers who had supported Remain, was untenable. Leavers were understandably reluctant to trust a Government which had, officially, supported Remain to oversee negotiations to withdraw.

Cameron resigned both as Prime Minister and as Leader of the Conservative Party, and instead of advising the Queen to dissolve Parliament and clear the way for a General Election he left the Conservative Party to elect a new leader who, as the leader of the Part with the support of a majority of M.P.s, would by convention be invited by the Queen to form a Government. Following a complex, and often unbelievable, campaign, only one candidate remained in the race: Theresa May M.P., previously Home Secretary, who had supported the Remain campaign but without enthusiasm. She was therefore declared duly elected leader of the Conservative Party, and the Queen invited her to form a Government. In that Government, May included a number of prominent Leave campaigners in key positions for making Brexit feasible: David Davis as Secretary of State for Exiting the European Union; Liam Fox as Secretary of State for Trade; and Boris Johnson as Foreign Secretary.

There is a final point to note about the effect of the referendum result. The UK is, or had been, a parliamentary, not direct, democracy. It was unclear how individual M.P.s would react to being placed in a position where a referendum had produced a majority in favour of pursuing a goal of which those M.P.s disapproved and against which they had campaigned. Would they follow their leaders in accepting that, at a political level, the referendum overrode their usual responsibility to make their own judgement on the merits of any proposal? Would they feel that they should follow the wishes of the majority of voters in their own constituencies as expressed through votes cast in the referendum? Or would they regard themselves as bound to adopt a view about the national, rather than constituency, interest, based either on the result of the referendum nationally or on their own views as to the consequences for the UK in the future? The behaviour of party leaders placed their followers in real difficulties in rethinking their constitutional responsibilities as M.P.s in the light of the referendum result.

# Impact of the Brexit referendum on inter-institutional relationships in the UK

In June 2016, after the referendum result had become clear, Gina Miller spearheaded a legal action to challenge the Government’s view that it had the authority to invoke Article 50 using its prerogative powers, arguing instead that only Parliament had the power to invoke Article 50. In the Supreme Court’s own words, the question before it in R (Miller) concerned “the steps which are required as a matter of UK domestic law before the process of leaving the European Union can be initiated”. This involved assessing the relationship between the UK government and Parliament on the one hand (do ministers have power to trigger Article 50 of the Treaty on European Union without an Act of Parliament?), and the devolved legislatures and administrations of Scotland, Wales and Northern Ireland on the other (must the devolved legislatures be consulted or give their agreement before Article 50 can be triggered?). This section discusses both issues in turn, whilst showcasing how English courts have sought to mediate the changing relationships between the different institutions of the UK constitution.

## Parliamentary sovereignty and the royal prerogative

Article 50 of the Treaty on the European Union provides, in summary terms, that, if a member state decides to withdraw from the European Union (“the EU”) ‘in accordance with its own constitutional requirements’, it should serve a notice of that intention (“a Notice”), and that the treaties which govern the EU (“the EU Treaties”) “shall cease to apply” to that member state within two years thereafter. Following the June 2016 referendum, the Government proposes to use its prerogative powers to withdraw from the EU by serving a Notice withdrawing the UK from the EU Treaties.

The principal issue in Miller was whether such a Notice can, under the UK’s constitutional arrangements, lawfully be given by Government ministers without prior authorisation by an Act of Parliament. Gina Miller and other claimants argued that owing to the well-established rule that prerogative powers may not extend to acts which result in a change to UK domestic law, and withdrawal from the EU Treaties would change domestic law, the Government cannot serve a Notice unless first authorised to do so by an Act of Parliament. The core of the claimant’s case was that legislation enacted by Parliament — the European Communities Act 1972 — conferred EU law rights on people in the UK, and that rights granted in that way by Parliament could not be taken away by the Government. In making this argument, claimant relied upon the ‘long-established principle that Parliament’s legal powers are constitutionally superior to the prerogative powers of the Government, and that the latter must therefore yield to the former.’[[5]](#footnote-5)

In contrast, the essence of the Government’s case was that the entry into and withdrawal from treaties – as part of the conduct of foreign relations — is a matter that falls within the prerogative. Withdrawal from the EU treaties was therefore something that could be initiated by the Government using its prerogative authority. Moreover, said the Government, doing so would not cut across what Parliament had done when it enacted the 1972 Act, because Parliament had only ever intended for EU law, and rights granted by it, to be effective in the UK for as long as the UK remained a Member State.

The legal arguments were made by the two sides in a sensitive political environment where, a number of leading ‘Brexiteers’, as well as Brexit-leaning tabloid publications, vocalised their opposition to the courts’ involvement. It was of great concern to Brexiteers that if Parliament had to make the decision to leave the EU, as opposed to the Government, there was at the time a significant possibility that Article 50 would not be triggered. Brexiteers, therefore, attempted to generate a narrative that Brexit was the ‘will of the people’. Consequently, any attempts to halt or slow the process of leaving the EU were portrayed as undemocratic, with the direct democracy of the referendum being given precedence above representative democracy in Parliament.

It was in this context, that the High Court rendered its decision. On 3rd November 2016, the Lord Chief Justice (Lord Thomas), the Master of the Rolls (Sir Terence Etherton) and Lord Justice Sales, sitting in the High Court, ruled that the Government did not have the power under the Crown’s prerogative to give notice pursuant to Article 50 for the UK to withdraw from the EU. Miller then appealed to the Supreme Court, at which stage numerous parties, including the Scottish and Welsh devolved governments, joined the case as interested parties, and two References from Northern Ireland were joined to the case (about these below).

The Supreme Court ruled on the issue on 24 January 2017, holding by an eight-judge majority (Lords Reed, Carnwarth and Hughes dissenting) that an Act of Parliament is required to authorise ministers to give notice of the decision of the UK to withdraw from the EU. The majority held that EU law had become part of — indeed, a source of — UK law thanks to the 1972 Act. Now that EU law has that status, said the majority, getting rid of it is not a matter of foreign relations, meaning that its removal cannot be accomplished via the foreign relations prerogative. And, said the majority, when Parliament passed the European Communities Act in 1972, it endorsed and gave effect to the UK’s membership of the EU: having intended that the UK should be a member of the EU, Parliament had not intended the Government to be able unilaterally to take the UK out of the EU. The fact that a referendum had taken place and secured a majority in favour of Brexit did not affect this legal analysis: the significance of the referendum, said the Court, was political.

So what does Miller tell us about the relationship between the royal prerogative and parliamentary sovereignty? On one side, the case raises questions about the extent to which prerogative power may be constrained by other treaty-based arrangements. However, since the majority’s reasoning appears to rest upon the particularities of EU law (eg in particular by becoming an ‘independent source’ of domestic law), ‘it seems likely that the shadow cast by Miller over the prerogative will be relatively modest.’[[6]](#footnote-6) On the other side, the judgment in Miller does not break significant ground in terms of parliamentary sovereignty. Indeed, the majority is at pains to emphasise the centrality of that principle, to demonstrate that its judgment operates in the service of the sovereignty of Parliament, and to articulate the implications of EU membership in a manner that is compatible with — rather than, as Wade argued, an existential threat to — it. There has been little analysis of the implications of EU membership for parliamentary sovereignty since Factortame itself and although there was a possibility this would be addressed in Miller — given the nature of the issues raised by the case — the Court chose ‘to be economical in this area.’[[7]](#footnote-7)

Sovereignty, we are told by the majority, is ‘a fundamental principle of the UK constitution’, and the ‘unprecedented state of affairs’ wrought by EU membership — having itself been brought about by Parliament — ‘will only last so long as Parliament wishes: the 1972 Act can be repealed like any other statute’. Thus the majority (like Lord Reed) rejects, as already noted, any suggestion that the rule of recognition has been altered by EU membership. EU law, it follows, ‘can only enjoy a status in domestic law which that principle allows’.

According to constitutional law scholars, ‘The only real novelty is the majority’s view that Parliament is capable of legislating so as to institute a source of UK law that is independent of the legislation enacted to achieve that outcome — a conclusion that arguably presses even the ample notion of legislative supremacy beyond its logical boundaries.’[[8]](#footnote-8)

## The devolution settlement and Brexit

Another issue that was raised in *Miller* (at the Supreme Court level) was linked to the devolved composition of the UK. Key to the devolution issue was a ‘constitutional convention’ — that is, a political understanding and agreement about how the constitution operates — known as the ‘Sewel Convention’, according to which when the UK Parliament plans to legislate so as to change the powers of a devolved institution, the relevant devolved legislature must normally consent before the legislation is enacted. Since Brexit would change the devolved bodies’ powers (eg they will no longer have to comply with EU law), references were received from Northern Ireland, and interventions by the Lord Advocate for the Scottish Government and the Counsel General for Wales for the Welsh Government, arguing that consent was required from the devolved legislatures before Article 50 Notice could be served. These devolution issues required the court to consider whether the terms of the Northern Ireland Act 1998 (‘NIA’), and associated agreements, require primary legislation.

Yet, in *Miller* the Supreme Court refused to answer the question. It held that judges ‘are neither the parents nor the guardians of political conventions; they are merely observers’: while they can ‘recognise the operation of a political convention in the context of deciding a legal question’, they cannot ‘give legal rulings on its operation or scope, because those matters are determined within the political world’. In this regard, the Court ruled that the Sewell Convention governing the relationship of the Westminster Parliament with the devolved assemblies does not give rise to a legally enforceable obligation, nor did s.1 nor s.75 of the Northern Ireland Act 1998 impose requirements.

This finding is important for two reasons. First, it had been suggested that the Sewel Convention was no longer just a political convention. That argument was based on the fact that the Scotland Act 2016 — enacted in the wake of the Scottish independence referendum — acknowledges the Convention: it says that it is ‘recognised’ that the UK Parliament ‘will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament’. Did this make the Convention into a law — or at least into something that the Court could adjudicate on? The Supreme Court said no. 'The Sewel Convention remained just that — a convention — and therefore not a matter for the Court. That conclusion was unsurprising, and underlines the politically awkward fact that the ‘recognition’ of the Convention by the 2016 Act was of limited relevance: it amounted to a political token, but did not legally enhance the constitutional position of the devolved institutions.

Secondly, the finding that no consent is required from the devolved powers is important since both Northern Ireland and Scotland had voted against Brexit. Yet the Supreme Court made it clear that the devolved legislatures lack the legal power to block Brexit. This has re-opened the issue of a potential independence referendum for Scotland. Although in 2014 the vote was against independence, since the 2016 EU referendum, the SNP have been slowly pushing for a second referendum on Scottish independence. This is in light of the fact, they argue, that the situation has changed. The SNP would argue that since the UK Government is now committed to leaving the EU (and especially since it appears to be heading for a Hard Brexit outside of the Single Market), and since Scotland voted by a clear majority to remain in the EU, Scotland’s interests are no longer aligned with the rest of the UK and these are sufficient grounds to justify a second referendum on Scottish independence. Although recent polls do not suggest that there has been a big change in the views around a second referendum, in light of her numerous comments on ‘the will of the people’ and the entirety of the UK being committed to Brexit, there is a gross irony that a departure from the EU in order to take back control may ultimately lead to a disintegration of the UK.

This disintegration could also lead ultimately to the secession of Northern Ireland from the UK, probably to join with and become part of Ireland. At present, the Democratic Unionist Party (DUP) in Northern Ireland, a pro-Brexit, unionist party, has considerable influence over the UK Government because its M.P.s are allowing the Government to maintain the support of a majority in the House of Commons. The European Union Withdrawal Act 2018, section 10 seeks to prevent Ministers in London from making regulations providing for a border with physical infrastructure between Northern Ireland and Ireland, and also prevents Ministers from making regulations which would restrict the co-operation between Northern Ireland and Ireland provided for under the Agreement between the UK and Ireland in relation to the government of Northern Ireland. It is quite possible, however, that the effect of the DUP’s insistence on avoiding a customs and immigration-control border in the Irish Sea between Northern Ireland and mainland Britain might lead to a “hard” border being re-established between Ireland and Northern Ireland, damaging the arrangements for co-operation across the island of Ireland and threatening the future prosperity of the population of Northern Ireland. If that were to happen, it seems at least possible that a majority of that population of Northern Ireland might, on pragmatic grounds, decide it would prefer to throw in its lot with Ireland than to stay with a post-Brexit UK.

## The roles of courts in mediating the changing institutional relationships

Throughout the *Miller* litigation, courts were attacked in the media for adjudicating in the case. In response to the High Court judgment, for example, the Daily Mail published what has now become an iconic front page, criticising the judges as being ‘enemies of the people’ and accusing them of undemocratically defying the will of those who voted for Brexit by placing the decision to invoke Article 50 in the hands of Parliament as opposed to the Executive. This was accompanied by other Daily Mail headlines accusing the judges of a ‘power grab’ and latching onto their careers and personal qualities to suggest that they had not been sufficiently impartial in deciding the case.

At the time, the Government, particularly the Lord Chancellor (who is ultimately responsible for upholding judicial independence), came under heavy fire from opposition political parties and from the Bar Council for failing to defend the judiciary and uphold the rule of law. In the immediate aftermath, a spokesperson for the Prime Minister said “I don’t accept the question. I don’t think the British judiciary is being undermined”. Only after significant delay did Liz Truss, the Lord Chancellor, make a statement, and even then she faced criticism for talking about the importance of judicial independence in the abstract, not specifically addressing the backlash against the ruling from some parts of the media. Lord Judge, the former Lord Chief Justice, suggested Truss had failed in her statutory duties and had broken the law by failing to stand up strongly for the judiciary. Theresa May, the Prime Minister, similarly glossed over the significance of media attacks on the judiciary in stressing the importance of a free press being able to criticise judges. This was regarded as a disappointing response as, although there is a fine line between them, the media backlash was a straightforward example of attacking the judiciary’s independence as opposed to legitimately criticising the reasoning in the case, the decision reached or any actual misconduct of the judges concerned.

A similar attack on judges involved in the R (Miller) litigation occurred on 2December, when the Daily Mail published an article with the following text:

*“The judges and the people: Next week, 11 unaccountable individuals will consider a case that could thwart the will of the majority on Brexit. The Mail makes no apology for revealing their views - and many have links to Europe*

*Four have formal links to either the EU, its courts or European institutions Five have publicly expressed views which appear to be sympathetic to EU Six have links with individuals who've been critical of the Leave campaign*

*Crucially, the British justice system revolves around the principle that judges… are fair-minded individuals capable of treating all cases entirely on their legal merits, regardless of their private loyalties. So who are these men and one woman? How do they each view the EU and its influence on British law? And what personal beliefs (if any) must they put aside to give dispassionate hearing to one of the most important court cases in our country’s history?”*

This was a slightly more refined attack than the ‘Enemies of the People’ headline after the High Court judgment. However, the Mail still ran a fine line between what could have been framed as a legitimate argument that the judges on the Supreme Court might be biased by their extra-judicial activities, and illegitimately criticising judges as being inappropriate people to be involved in any processes relating to Brexit purely because of their career backgrounds (a ‘Remainer vs Brexiteer’ narrative). The Mail heavily implied that it believed most of the judges to be insufficiently impartial to be hearing the case.

The backlash by certain politicians and sections of the media after the High Court judgment and in the lead up to the Supreme Court hearing, exemplified by the activities of the Daily Mail, partly explains why Lord Neuberger, on the first day of the hearing of the appeal to the Supreme Court, noted that “at the direction of the court, the registrar has asked all parties involved in these proceedings whether they wish to ask any of the justices to stand down. All parties to the appeal have stated that they have no objection to any of us sitting on this appeal”. It also explains why both at the hearing and in the judgment, Lord Neuberger firmly emphasised that the Court is deciding questions of law, and that any wider political questions were not the subject of, nor influenced the decision in, the appeal.

## “Taking back control”: whose control over what?

While it has often been said that a purpose of withdrawing from the EU is to allow the UK to “take back control” of its laws and policy-making, it is not yet clear which institutions will exercise the control thus recovered, or over which fields of activity control will be taken back. Since 1 January 1973, when the UK became a Member State of the EEC, there have been few, if any, fields in which UK institutions have lost competence *ratione materiae*. Competences have generally been shared between national and EU institutions. It is generally recognised, too, that developments of law and policy at the level of the EU have frequently been very beneficial for the UK. Few people would want to remove from domestic law in the UK all measures resulting from the UK’s 45-year membership.

The main causes for concern amongst anti-EU activists have been (a) loss of parliamentary supremacy, as a result of the principle of the supremacy of EU law, in relation to matters covered by directly applicable or directly effective EU law, and (b) loss of control over policy-making in fields governed by EU law such as aspects of immigration, data protection, and the operation of the Charter for Fundamental Rights. In a number of fields, including international trade agreements, regulation of pharmaceuticals, patents, air traffic control, justice and security, the system of shared responsibility between Member States and the EU institutions has resulted in beneficial pooling of resources and responsibilities.

From a legal perspective, UK policy-makers and law-makers therefore face a number of problems in reshaping the UK’s law and constitution to prepare for life after membership of the EU. First, it will be a huge task to identify, and then trawl through, all legal changes since 1973 which have resulted from the operation of EEC/EC/EU law, to decide which parts should be retained, to put those on a statutory footing, and to remove the rest. Secondly, as negotiations for a withdrawal agreement continue with no certainty as to the outcome, both the time of the UK’s withdrawal and the terms of any transition deal remain unclear: unless an agreement is reached, Article 50 means that the UK will leave the EU at 11.00 p.m. on 29th March 2019 (“exit day”), but that may be postponed either by agreement of the other 27 Member States to allow further negotiations or in accordance with a withdrawal or transition agreement if one can be achieved.

The domestic legal framework for dealing with this uncertainty and ambivalence is provided by the European Union Withdrawal Act 2018. This Act starts by repealing, as from exit day unless an extension is agreed, section 2 of the European Communities Act 1972, which gives effect in UK law to directly applicable and directly effective law of the EEC/EC/EU and allows Ministers to make subordinate legislation to give effect in domestic law to other requirements of EEC/EC/EU law.[[9]](#footnote-9) The Act then makes the whole of EU law which is directly effective or directly applicable as it applies to the UK on that date part of domestic law as from that date, with the important exception of the Charter of Fundamental Rights, and domestic legislation which has been made to give effect to obligations of the UK under EU law.[[10]](#footnote-10) It preserves the doctrine of the supremacy of EU law so far as it applies to laws made up until exit day, but not thereafter.[[11]](#footnote-11) Next, the Act creates vast power for Ministers to make subordinate legislation to change domestic law, including those parts of it originally derived from EEC/EC/EU law.

What is the effect of this on parliamentary supremacy? It allows the Queen in Parliament to legislate inconsistently with EU law after Brexit, but retains EU law’s supremacy in respect of laws which remain in force in the UK after exit day. It makes clear that the Queen in Parliament makes no initial choice as to which rules of EU law continue to operate after exit day, and passes the primary responsibility for that to Ministers acting through subordinate legislation. In relation to the types of legislation which may amend or repeal those rules of EU law which will continue to operate as rules of domestic law after exit day, the Act distinguishes between “retained direct principal EU legislation” and “retained direct minor EU legislation”; more parliamentary scrutiny will be required for subordinate legislation which amends or repeals retained direct principal EU legislation than for that which amends or repeals retained direct minor EU legislation.[[12]](#footnote-12) Section 6 of the European Union Withdrawal Act 2018 makes complex and somewhat problematic provision for the approach courts in the UK are to take to interpreting retained EU law after exit day. Ministers will also have extensive power to make subordinate legislation to amend domestic law where necessary to remove inconsistencies between domestic law and the newly patriated retained EU law.[[13]](#footnote-13)

The first consequence of these provisions for parliamentary supremacy is that the subordination of the Queen in Parliament to EU law is replaced by a significant level of subordination to Ministers. Particularly in respect of retained direct minor EU legislation, the arrangements for parliamentary scrutiny of Ministers’ regulations will not allow for Parliament to amend the regulations, but only to reject or accept them as a whole. In relation to many such regulations, there will not even be a routine requirement for votes in either House of Parliament: the “negative resolution” procedure will result in the regulations taking effect unless, within a specified period, one House passes a motion to disapprove of the regulations, and many regulations will come into effect before receiving any parliamentary consideration at all.

These provisions are not unique to withdrawal-related regulations; they apply to most subordinate legislation made by Ministers on any subject. In the particular context of withdrawal from the EU, however, they are significant in showing that “control” over domestic law is passing not to the Queen in Parliament but to the executive Government, at least in the early years.

A second consequence of the Act is that there will have to be significant, as-yet-undecided adjustments to the devolution settlements for Scotland, Wales and Northern Ireland. Whilst the Act specifies how retained EU law may be amended or repealed, and provides for the effect of withdrawal on the competencies of devolved institutions (which are currently not competent to act incompatibly with EU law),[[14]](#footnote-14) it is left unclear and a matter for inter-governmental negotiation which repatriated functions will be exercised by which institutions at national or devolved levels. This is particularly problematic where the repatriated laws relate to devolved functions. Even where functions are repatriated, therefore, there is no clarity as to whether primary responsibility for the law relating to them will lie in Westminster or in Edinburgh, Cardiff and Belfast. If control is taken back from the EU, it will not necessarily all reside with the Queen in Parliament in Westminster. The Scottish Parliament has already legislated for the effect of withdrawal on Scotland, and the UK Government’s Law Officer for Scotland has referred to the Supreme Court various questions as to the competence of the Scottish Parliament to pass such an Act. Argument has been heard, and the Supreme Court’s judgment, which is awaited, is likely to have a significant impact on the balance of constitutional power between London and Edinburgh in dealing with the fall-out from Brexit in Scotland (and, by implication, in Wales and Northern Ireland).[[15]](#footnote-15)

A final, more general point may be made. Notwithstanding the length and complexity of the 2018 Act, which runs to 227 pages, with only 25 sections but nine very long and detailed Schedules, it is very uncertain whether it will ever have much impact. Whether it has any effect, and for how long it has such effect, will depend on the progress of the negotiations between the UK and the EU over Brexit, on whether there is a transition agreement (which might make some or all of the Act redundant), and when the negotiations and any transition period expire and on what terms. It is at least possible that, in significant fields, the UK will continue to be bound by EU law and to be subject to the law-making and adjudicative organs of the EU for a considerable time to come. In the meantime, the Queen in Parliament has no control over the outcome of the negotiations or the extent to which Parliament will be able to take back control, at any rate in the short to medium term. Section 13 of the 2018 Act provides that the UK’s Government may not ratify a withdrawal agreement unless a Minister has laid a copy of it, and a copy of the framework for the future relationship, before each House of Parliament, the Commons have passed a resolution approving of them, the Lords have voted to take note of them or have not completed their consideration of them within five sitting days of the day when the Commons passed its resolution, and an Act of Parliament would then need to be passed to provide for the implementation of the agreement. This may all take some time. If parliamentary approval is not given, there is no legal obligation on the Government to return to the negotiating table, so the almost inevitable result would be that the UK would leave the EU on exit day without any agreement. If approval is given, the Queen in Parliament would have little control over the content of the legislation to implement the agreement; Parliament would be in control only of the mechanics of enactment, as the Bill would have to reflect accurately the terms of the agreement.

1. Northern Ireland Act 1998, s. 1. [↑](#footnote-ref-1)
2. Provision for such a referendum was made in the Government of Wales Act 2006, ss. 103, 104. [↑](#footnote-ref-2)
3. The Government of Wales Act 2006 (Commencement of Assembly Act Provisions, Transitional and Saving Provisions and Modifications) Order 2011, S.I. [2011 No. 1011 (W. 150) (C. 42)](https://www.legislation.gov.uk/wsi/2011/1011/made), bringing into force s. 107 of the Government of Wales Act 2006. [↑](#footnote-ref-3)
4. Local Government Act 2003, s. 116. [↑](#footnote-ref-4)
5. Mark Elliott, <https://publiclawforeveryone.com/2017/01/25/1000-words-the-supreme-courts-judgment-in-miller/>. [↑](#footnote-ref-5)
6. Mark Elliott, <https://publiclawforeveryone.com/2017/01/25/analysis-the-supreme-courts-judgment-in-miller/>. [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. European Union Withdrawal Act 2018, s. 1. [↑](#footnote-ref-9)
10. European Union Withdrawal Act 2018, ss. 2, 3, 5. [↑](#footnote-ref-10)
11. European Union Withdrawal Act 2018, s. 5(1), (2). [↑](#footnote-ref-11)
12. European Union Withdrawal Act 2018, s. 7. [↑](#footnote-ref-12)
13. See s. 8 of, and Sched. 7 to, the European Union Withdrawal Act 2018. [↑](#footnote-ref-13)
14. European Union Withdrawal Act 2018, s. 12, inserting a new section 30A to the Scotland Act 1998, a new s. 109A to the Government of Wales Act 2006, and a new s. 6A to the Northern Ireland Act 1998. [↑](#footnote-ref-14)
15. *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – a Reference by the Attorney General and the Advocate General for Scotland* UKSC 2018/0080. Details of the parties’ submissions to the Court and video recordings of the hearing are accessible at <https://www.supremecourt.uk/cases/uksc-2018-0080.html>. [↑](#footnote-ref-15)