

FAQ: The Supreme Court Judgment in *Miller*

Contents

This FAQ discusses:

- The context and constitutional significance of the case
- The question put before the courts for determination
- The relevant legal background and submissions made
- The majority and dissenting judgments
- The ongoing implications

It is intended to present an outline of the main issues relating to the *Miller* litigation, and is therefore not comprehensive.

Professor Robert McCorquodale, Director of BIICL, advised the 1st Interested Party (Pigney and Others), together with Helen Mountfield QC, Gerry Facenna QC, Tim Johnstone, David Gregory and Jack Williams (instructed by Bindmans LLP).

R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5 (Judgment on 24 January 2017)

In its judgment in *Miller*, the Supreme Court reached two key conclusions: that an Act of Parliament is needed before Brexit can be triggered, and that the law does not enable devolved legislatures in Scotland, Wales or Northern Ireland to block Brexit. The latter is addressed [here](#).

Q: What was the context of the *Miller* court case?

A: Article 50 of the Treaty on European Union (TEU) sets out the process whereby a Member State can withdraw from the EU. Article 50(1) TEU specifies that a 'Member State may decide to withdraw from the Union *in accordance with its own constitutional requirements*' (emphasis added). Following the legally non-binding referendum in June 2016, the Government indicated that it would trigger the withdrawal process using its residual prerogative power (a relic from what was originally the almost-unfettered powers of the Crown, now diminished and exercisable by the executive, enabling ministers to act without Parliamentary consent in some areas, notably in the field of foreign affairs). The Claimants in *Miller* argued that, in accordance with UK constitutional law, the Government was not permitted to notify the EU of the UK's intention to withdraw (pursuant to Article 50(2) TEU) until Parliament enacted legislation to this effect. On 3 November 2016, the High Court unanimously found in favour of the Claimants, ruling that the Government could not rely on the Royal prerogative to give notice under Article 50. The Government appealed the decision to the Supreme Court.

Q: Why was this case so important from constitutional and rule of law perspective?

A: Unlike most countries, the UK does not have a written constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law. Instead, UK constitutional arrangements have evolved over time in a principled and pragmatic way. At the heart of the unwritten constitution is the separation of powers doctrine, under which the principal institutions of the state—the executive (Government), legislature (Parliament) and judiciary (Courts)—fulfil different functions in order to safeguard liberties and guard against tyranny. The independence of these institutions creates a system of checks and balances, an important element of which is judicial oversight of the executive. The independent judiciary is able to hold the executive to account, and ensure that the Government does not act beyond the remit of its mandate. This is essential to the rule of law.

The rule of law—one of the fundamental principles of our unwritten constitution—is premised on the idea that the law should apply equally to all, rulers and ruled alike. By ensuring ‘government of law’ and not a ‘government of men’, the rule of law is a non-partisan principle that unites and bridges us across the political divide, facilitating a fair and just society. One of its key characteristics is the maintenance of limits on the exercise of executive acts, ensuring that ministers act within their legal powers. This was the issue at the centre of the Miller case.

Some of the most important issues of law which judges have to decide under the rule of law concern questions relating to the UK’s constitutional arrangements. These unprecedented proceedings raise precisely such issues because they concern the extent of ministers’ power to effect changes in domestic law through exercise of their prerogative powers at the international level.

Q: Why has the case attracted so much criticism?

A: In the aftermath of the High Court’s ruling against the Government, there was a political and media backlash. The judges who decided the case were chastised for acting undemocratically and even lambasted as ‘Enemies of the People’ on the front page of the [Daily Mail](#) the day after the judgment was delivered. It was asserted that by adjudicating on this issue the judges were ostensibly subverting democracy and frustrating the will of the people. First, our courts do not enjoy or claim legitimacy because they are elected. Rather, the judiciary’s legitimacy derives from its independence and political impartiality. This, in itself, is a precondition of democracy. Second, the court was not obstructing the will of the people. Rather, it was ensuring that the outcome of the referendum is put into effect by the Government in a constitutionally compliant manner in accordance with the law. Nothing in the ruling prevents Brexit from taking place, as was made unequivocally clear in both the [High Court](#) and [Supreme Court](#) judgments at paragraphs [5] and [3] respectively.

Q: What were the courts asked to decide?

A: The issue being adjudicated concerned the UK’s constitutional requirements for the purpose of Article 50(1). The courts were called upon to determine the legal process by which Brexit can be initiated, not whether Brexit *should* occur, which is a matter of politics, not law, and is therefore a matter for ministers and Parliament to decide. The question put before the court concerned what legal steps are required, as a matter of UK constitutional law, before the Article 50 withdrawal process can be triggered. Specifically, the Court was asked to determine whether formal notice of withdrawal under Article 50(2) can be lawfully given by the Government without prior authorisation by an Act of Parliament. This is a question of law; a question about where legal power resides.

Q: Why were the courts called on to determine the correct legal process prior to initiation of the Article 50 withdrawal process?

A: The courts were asked to decide the legal requirements for Government to issue notice under Article 50(2) as it was assumed that this would commence an irreversible process whereby the UK would inevitably cease to be an EU member state, effectively altering domestic law through executive action. 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 [EU] Treaties will cease to apply”. This was based on an assumption that Article 50 is irrevocable. It was common ground between the parties that notice under Article 50(2) cannot be given in qualified or conditional terms—for example, by saying that it will only take effect if the UK Parliament approves any agreement reached with the EU in the course of the Article 50 negotiation process—and that, once given, it cannot be withdrawn. These contentions are subject to debate (see, for example, the so-dubbed [‘Three Knights Opinion’](#)). Nevertheless, the courts proceeded on the basis that the common ground was correct and, accordingly, a decision to trigger the Article 50 process would ultimately result in the UK’s exit from the EU.

Q: What features of UK constitutional law warranted consideration by the courts?

A: The main issue of the case pivoted around the ability of ministers to change domestic law by exercising their powers at the international level, to which two seemingly contradictory features of the UK's constitutional arrangements were relevant. First, ministers enjoy a residual prerogative power to enter into and to terminate treaties without recourse to Parliament. Second, ministers are not normally entitled to exercise any power they might otherwise have if it results in a change in domestic law unless provided to do so by an Act of Parliament. Parliamentary sovereignty/supremacy has become a fundamental principle of the UK constitution, as was conclusively established by the 1689 Bill of Rights. It was famously summarised by Professor Dicey as meaning that Parliament has "the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament" (*Introduction to the Study of the Law of the Constitution* (8th ed, 1915) at p.38).

Relevant to this is the status and character of the [European Communities Act 1972](#). As with many statutes, the 1972 Act gives effect to a supranational treaty by prescribing the content of domestic law in the areas covered by the treaty. However, the 1972 Act does more than this: it authorises a dynamic process by which EU law is an independent and overriding source of domestic law, so long as the UK is party to the EU Treaties. This effect of the 1972 Act is unprecedented in constitutional terms. Of course, consistent with the principle of Parliamentary sovereignty, this unprecedented state of affairs will only last so long as Parliament wishes: the 1972 can be repealed by Parliament like any other statute.

Q: What were the arguments put before the court?

A: The Government's argument was that the well-established Royal prerogative empowered ministers to conduct foreign relations by entering into and withdrawing from treaties, including EU Treaties, and that, by extension, this enabled the executive to give notice under Article 50(2) without the need for any prior approval through an Act of Parliament. The contention was made that the prerogative power to withdraw from the EU Treaties was not excluded by the terms of the 1972 Act which gave effect to EU law only insofar as the UK remained party to the Treaties. It was suggested that Parliament had in effect stipulated that EU law should cease to have domestic application in the event that ministers decided to withdraw the UK from the EU. It was put before the court that at the end of the Article 50 withdrawal process a "Great Repeal Bill" would be laid before Parliament, repealing the 1972 Act and converting existing EU law into domestic law wherever practicable.

The claimant's case was that the 1972 Act 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, the 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. It was put to the court that by issuing notice the UK would embark on an irreversible course, ultimately resulting in much of EU law ceasing to have domestic effect, regardless of whether Parliament ultimately repealed the 1972 Act or not. It was submitted that this meant giving notice would pre-empt the decision of Parliament on the Great Repeal Bill. It would be tantamount to altering the law by ministerial action without prior legislation. Owing to the well-established rule that prerogative powers may not be used to alter domestic law, the argument followed that the Government could not serve notice under Article 50(2) unless first authorised to do so by an Act of Parliament.

Parliamentary sovereignty/supremacy has become a fundamental principle of the UK constitution, as was conclusively established by the 1689 Bill of Rights. It was famously summarised by Professor Dicey as meaning that Parliament has "the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament" (*Introduction to the Study of the Law of the Constitution* (8th ed, 1915) at p.38).

Q: What did the Supreme Court rule?

A: By a majority of 8 to 3 the Supreme Court dismissed the Government's case and upheld the High Court's ruling that the Royal prerogative cannot be relied on to trigger Article 50. In a joint judgment, the majority held that an Act of Parliament is required to authorise ministers to give notice under Article 50(2). It was reasoned that, although Article 50 operates on the international plane, withdrawal from the EU Treaties would change domestic law and affect rights enjoyed by UK residents under EU law, and ministers cannot claim prerogative powers to take action which has such an effect without statutory authorisation. In other words, the 1972 Act had rendered EU law a source of domestic law, and now that it had acquired that status getting rid of it was not a matter of foreign affairs and therefore beyond the scope of the prerogative. Further, the majority held that by passing the 1972 Act Parliament had endorsed, and given effect to, the UK's membership of the EU. It had not intended the Government to be able to take unilateral action to pull 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 result, the Supreme Court said, was purely political.

Q: What was said in the dissenting judgments?

A: Lord Reed, with whom Lord Carnwath and Lord Hughes agreed, gave the fullest judgment. He argued that EU law is not a source of UK law, but rather a distinct body of law. The extent to which Parliament has given domestic effect to EU law under the 1972 Act is conditional on the domestic application of the EU Treaties and therefore on the UK's membership of the EU. As the Act establishes arrangements whereby alterations in the UK's obligations under the EU Treaties are *automatically* reflected in alterations in domestic law, it follows that if the UK leaves the EU, and therefore no longer has any relevant Treaty obligations, this too shall automatically take effect in domestic law. Parliament did not intend that people in the UK should have or retain any particular EU rights, merely that UK and EU law should be aligned for the duration of membership.

Lord Carnwath held that service of notice under Article 50(2) will not itself change any laws or affect any rights but merely start an essentially political process of negotiation within the framework of Article 50. The Government will be accountable to Parliament throughout those negotiations, and the process can only be completed with the enactment by Parliament of primary legislation in some form.

Q: What action has been taken as a result of this ruling?

A: In response to the Supreme Court's ruling, the Government has laid the [European Union \(Notification of Withdrawal\) Bill](#) before Parliament. At 137 words and comprising just two clauses, it grants the Prime Minister an unconditional mandate to issue notice under Article 50(2), thereby commencing the negotiation process. At the time of writing, [the Bill was being debated in both Houses of Parliament](#).