British Institute of International and Comparative Law

BREXIT

FAQ: Brexit and Devolution Post-Miller

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This FAQ discusses:

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- The difference between devolution and federalism proper

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Introduction

In *R (Miller and Ors) v Secretary of State for Exiting the European Union* [2017] UKSC 5, the Supreme Court decided that an Act of Parliament is needed to grant the UK Government the competence to issue notice under Art. 50(2) of the Treaty on the European Union ("TEU"). It is well known that the referendum result was asymmetrical across the UK. Thus *Miller* raises a raft of questions for the relationship between the nations of the UK, as well as for that between the UK and the EU. In this note, we explore how "Brexit" will impact upon the devolution settlement as it stands, and whether that settlement will be able to absorb the tensions that have arisen around the country's relation to Europe. The judgment in *Miller* is addressed in a separate FAQ, which is available here.

Q: What devolution-based arguments were raised in Miller?

A: A: Devolution arguments were not a significant feature of *Miller* [2016] EWHC 2768 (Admin) in the High Court of England and Wales, but they were central in the Northern Irish proceedings *Agnew, McCord* [2016] NIQB 85. McGuire J in the latter case took a stance more favourable to the prerogative power than his London counterparts, and the Northern Ireland Attorney General supported the Secretary of State's case in the joined appeal to the Supreme Court. There were interventions by Scotland's Lord Advocate and the Counsel General for Wales to the opposite effect.

Three strands of devolution-based argument were mounted. First, it was argued that Art. 50 notice could not be given under the prerogative, because devolution legislation presupposed EU membership, and because implementation of EU programmes required an all-Ireland and cross-border basis under the Good Friday Agreement, an international treaty between the UK and the Republic of Ireland. The force of this argument was subsumed within the majority's ruling on the prerogative. Its substance, however, was reflected in a second strand of argument based on *parliamentary* competence under the so-called Sewel Convention, which we address in detail in Q4, below. Finally, arguments were based on a theory of popular sovereignty; it was argued that reference to consent and self-determination in the Northern Ireland Act 1998, and the right under s. 1(2) of the people of Northern Ireland to secede from the UK (and potentially form part of a united Ireland), had transferred sovereignty from Westminster to the people of Northern Ireland.

Q: How were the devolution arguments received by the Court?

A: The majority recognised at para [128] the asymmetry of devolution in the three jurisdictions, as well as two common features: First, that all the devolved institutions must not act in breach of EU law; second, the operation of the Sewel Convention. At para [129] the Court held that the imposition of EU constraints on the devolved institutions did not require the UK to remain a member of the EU, and that they had no parallel competence in relation to withdrawal. At para [130], the Court held that withdrawal would remove those EU law constraints and thus, absent any new constraints, enlarge their sphere of competence. In relation to the self-determination point, the Court blankly said at para [135] that the right to choose by referendum whether to remain part of the UK or join the Republic of Ireland did not effect any other constitutional change, nor required the consent of a majority of the people of Northern Ireland to EU withdrawal. Basing the judgment on the sovereignty of Parliament effectively mitigated the impression of a clash between the Executive and the Judiciary—the judges positioned themselves as guardians of Parliament's constitutional role against cavalier incursion by Executive, rather than activist judges thwarting the popular will. Its reliance on an orthodox cast of parliamentary sovereignty, however, has an impact on devolution more broadly.

Q: What is the Sewel Convention?

A: The devolution of powers to Scotland, Northern Ireland and Wales by the Westminster Parliament has ensured that the competences of those devolved legislatures remain limited by subject matter and territorial scope. From a strictly legal perspective, Westminster remains competent to legislate on any matter it chooses—including devolved matters. This is made clear by section 28(7) of the Scotland Act 1998, for example, which provides that the Act "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland." (See also section 5(6) Northern Ireland Act 1998 and section 107(5) Government of Wales Act 2006.) However, the question necessarily arises as to when Westminster should legislate in areas of devolved competence. The solution is the Sewel Convention, which embodies the expectation that Westminster will not normally legislate with regard to devolved matters without the consent of the devolved legislature. Today, the convention is enshrined in a Memorandum of Understanding between the UK Government and the Scottish Government, as well as in subs. 8 of the Scotland Act 1998. Consent is provided by a legislative consent motion, a number of which have been passed both when the Westminster has legislated on matters which fall within the legislative competence of a devolved legislature and when Westminster has enacted provisions that directly alter the legislative competence of a devolved legislature.

Q: How was the Sewel Convention treated in *Miller*?

A: The question in Miller was whether consultation or consent was necessary before Westminster could pass legislation authorising the UK Government to notify the European Council under Art. 50. Recall that the devolved legislatures are legally bound to exercise their competences in a manner compatible with EU law; s. 29(2)(d) of the Scotland Act 1998 makes clear, for example, that Acts of the Scottish Parliament that are incompatible with EU law fall outside the its legislative competence and are "not law" (see also s. 108(6) Government of Wales Act 2006 and s. 24 Northern Ireland Act 1998.) Given the Court's finding that notification of withdrawal under Art. 50 would automatically lead to the UK demitting membership of the EU treaties, notice would inevitably alter the competence of the devolved legislatures, too. The devolution statutes would thus need to be amended to remove the obligation to comply with EU law. These amendments would arguably engage the Sewel Convention. The Court, however, did not rule on the applicability of the Sewel Convention; instead, the majority declared that the Convention was not legally enforceable. Whilst recognising that the *political* sanctions for the breach of a political convention may be severe—including political defeat and loss of office—it could not result in a legal sanction in the courts. Remarkably, the fact that the Sewel Convention is now enshrined in the Scotland Act 2016 did not change matters: Westminster was not seeking to convert the Convention into a rule which can be interpreted, let alone enforced, by the courts; according to the majority, it was simply recognising the convention as a political convention. Different language would have been necessary to convert the Convention into a legally enforceable rule (see paras [141] to [146]).

Q: What impacts might this have in the different nations of the United Kingdom?

A: The judgment in *Miller* makes clear that the devolved legislatures have no legal means of preventing or even stalling notification to under Art. 50. However, that does not mean that the Sewel Convention is irrelevant: Instead, its relevance will be determined by the political process. It will ultimately be for Westminster to determine the extent to which the consultation and/or consent of the devolved legislatures should be sought prior to enacting the European Union (Notification of Withdrawal) Bill. Depending upon the meaning one gives to the words "not normally legislate", the Sewel Convention arguably still applies. What this means in practice is, of course, an open question: At present, the position of the UK Government is that legislative consent motions are *not* required from the devolved legislatures.

If the Convention does apply, the UK Government might find itself acting "unconstitutionally" but not "illegally". In *Miller* at para [144], the Court referred to Privy Council authority and observed: "It is often said that it would be unconstitutional for the UK Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid." This penumbra of constitutionality may reveal stress-points in the UK's flexible constitution; irrespective of one's view of the merits, there is no doubting the antagonistic political realities on the ground.

Q: How has the judgment been perceived in the devolved jurisdictions?

A: Both the outcome of the EU referendum and the devolution aspects of the Supreme Court's decision in *Miller* have been seized upon as evidence that the people of Scotland have no effective voice within the present constitutional settlement. A majority of Scots voted for pro-European political parties at the last Holyrood elections, and to remain in the EU. Post-*Miller*, it does seem that promises about recognising the permanence of the Scottish Parliament, and the placement of the Sewel Convention on a statutory footing, have translated into an option to be consulted at the whim of Westminster. The situation in Northern Ireland is particularly sticky. Unionists regard Northern Ireland as part of the UK, whereas Nationalists regard themselves as part of the Republic of Ireland. The Belfast Agreement established a delicate constitutional settlement between the UK, the Republic of Ireland, and the Northern Irish factions.

This settlement is set out in an international agreement, whose terms refer to the EU treaties as pre-conditions. Asserting the sovereignty of Parliament to make whatever law it likes with regards to EU membership, therefore, could be seen from a Northern Irish perspective to have solved a problem of English politics at the expense of the unity of the UK as a whole. It is not entirely unfair to say that the judgment lacks some of the nuance that might have been expected from the Supreme Court's first major judgment as the as the constitutional court of a complex jurisdiction in a state of unprecedented change.

Q: What are the political implications of the legal position as stated?

A: Turning to the future, it is the current policy of the UK Government to enact what it terms the "Great Repeal Bill", the purpose of which is to repeal the ECA 1972 and incorporate the corpus of EU law into domestic law. This once again raises the question of the Sewel Convention, this time at the end of the UK-EU negotiation process as domestic legislation is prepared. There are broadly three scenarios which may arise in which legislative consent motions from the devolved legislatures may be required: Westminster legislation (i) lifts the obligation from devolved legislatures to legislate in compliance with EU law, thus changing devolved competence; (ii) amends EU law currently part of the devolved body of law; and (iii) treats as a matter for the UK any measure of EU law that relates to a devolved matter, including by "rolling over" that law so that it continues in force. The prospects of legislative consent motions being deemed as necessary in the devolved jurisdictions seem to be likely. Both the Scottish and Welsh governments have indicated that they expect the consent of the devolved legislatures to be sought wherever provisions of the Bill touch upon matters of devolved competence or alter the scope of their competence (see Scottish Government, *Scotland's Place in Europe* (December 2016); Welsh Government and Plaid Cymru, *Securing Wales' Future* (January 2017)).

Q: What is next for devolution in light of Brexit?

A: The involvement of the devolved administrations in the commencement, negotiation, and conclusion of the UK's withdrawal brings into relief competing understandings of the British constitution—see Sionaidh Douglas-Scott, "Brexit, Article 50 and the Contested British Constitution" (2016) 79(6) MLR 1019. According to the first view, the UK is unitary in nature and founded upon the absolute sovereignty of Westminster. The UK is a unified, centralised state, with an omni-competent Parliament. Matters of foreign affairs, including EU affairs, are reserved or excepted in the cases of Scotland and Northern Ireland, and not devolved in the case of Wales, so the devolved legislatures have no legal rights in this area and will only be consulted as a matter of goodwill. This understanding of the constitution necessarily leads to the conclusion that neither Art. 50 nor the devolution legislation guarantees the regional legislatures any specific role in the withdrawal negotiations. An alternative view sees the UK as a union rather than a unitary state. On this view, the UK is founded upon treaties such as the Treaty of Union 1706 and the Good Friday Agreement; union is reliant upon continued consent—which rests on constitutional practices such as conventions as well as strict legal rules. The UK has been "transformed" or even "revolutionised" by both membership of international organisations such as the EU and the Council of Europe and internally reconfigured by the devolution arrangements since 1998.

At the crux of the *Miller* decision, therefore, is an explicit rejection of the alternative view of the British constitution from the UK's constitutional court. That said, the risks posed by the Brexit process cannot be ignored, and they could prove to be existential for the UK as presently constituted. There have been rumblings of a second independence referendum in Scotland, and the problems of a "hard border" between Northern Ireland and the Republic of Ireland are quite intractable. It seems fair to say that some responsible and mature statesmanship is needed from the UK Government if we are to navigate these uncharted waters. The House of Lords EU Select Committee has launched an inquiry into the implications of Brexit on the devolution settlement. It will consider the transfer of current EU competences that cover devolved matters, the capacity of the devolved institutions to cope with these additional responsibilities, and what the repatriation of powers from the EU to the devolved institutions will mean for the balance of power between the UK Government and Parliament and the devolved bodies. The Committee will also assess how the UK Government should seek to reflect the interests of each of the devolved jurisdictions in the forthcoming negotiations, and whether existing mechanisms for inter-governmental and inter-parliamentary dialogue are sufficient.

Q: What is the difference between devolution and federalism?

A: The main difference between devolution and federalism is the theoretically unlimited sovereignty of Westminster over the whole of the UK. To this extent, Miller could be read as merely underscoring the differentia specifica between devolution and federalism, and stating squarely that devolution is not 'federalism lite'. Another important difference is that in federal systems, the distribution of powers is typically between a truly "central" government and regional governments, which have more or less symmetrical relations with the centre. Whether this is a definitional feature of federalism could be argued, but it is undoubtedly a crucial difference between a federal state such as Australia and a "devolved" unitary one such as the UK. Despite their differences, devolution and federalism share one fundamental feature: The distribution of legislative, executive, and judicial competence among territorial institutions by reference to subject matter. In practice, Westminster is no longer a parliament for the domestic and non-domestic affairs of the whole of the UK: It is a parliament for England, a federal parliament for Scotland and Northern Ireland, and a parliament for primary legislation for Wales. From a pragmatic perspective, this makes devolution look more like 'messy federalism' than 'federalism lite'.

In 2015 a new process of "English Votes for English Laws" was introduced, a procedure which is intended to give English MPs greater say over bills that are certified to relate exclusively to England. If this line of development is pursued to its logical conclusion, the result would be an all-UK legislature in Westminster that split into "virtual chambers" for voting by reference to subject-matter and territorial relation. This would constitute a major step from our present devolution settlement to one that could be considered to be functionally federal.

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