14 Populism, UK sovereignty, the rule of law and Brexit

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14.1 Introduction

The question addressed in this chapter is whether the UK courts have developed new specific constitutional theories or doctrines in addressing the issues raised by Brexit. The chapter begins by considering the implications of the result of the referendum vote in 2016 in favour of Brexit, and the possible influence of populism. Next, Brexit's impact is evaluated in its effects on the relationship between Parliament and government, the working of constitutional conventions and parliamentary procedure during the passage of the European Union (Withdrawal) Act 2018,[1] which is the cornerstone of the post-Brexit era. There follows a discussion of the two most notable Supreme Court decisions on Brexit, *Miller 1*[2] in 2017 on the question of the use of the prerogative and the necessity of parliamentary approval, and *Miller 2*[3] in 2019 on the application by the government of the royal prerogative enabling the prorogation of Parliament. Going forward, the decisive December 2019 election victory of the Conservative Party with a large majority government and a populist leader as Prime Minister has enabled the government to proceed to exit the EU in January 2020 and enter the transition stage of leaving, pending final negotiations by the end of December 2020. The 2019 election victory was a triumph for Brexit supporters over those that supported remain. However, significant questions remain about the Brexit legacy, if any, on the courts, government and Parliament and the future of populism in UK politics.

1 See: Paul Craig, 'Constitutional Principle, the Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018' (2019) 82 Modern Law Review 319–366.

2 *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) and [2017] UKSC 5.

3 *R (Miller) v The Prime Minister and others* [2019] UKSC 41.

14.2 The Brexit referendum and populist politics

Support for a referendum, to be included in the UK's unwritten constitutional arrangements, has a long history.[4] A. V. Dicey[5] was one of the first advocates, describing the referendum as a 'veto of the people'.[6] Dicey's motives for a referendum have been attributed to his opposition to 'party' government usurping Parliamentary power at a time when Irish Home Rule was in its ascendancy and this might result in the break-up of the Union[7]. Late nineteenth-century Britain was a period of considerable constitutional conflict, and Dicey feared the concession of Irish Home Rule would weaken the unity of parliamentary sovereignty through the break-up of the United Kingdom.[8] Dicey also recognised, but accepted with some alacrity, that parliamentary sovereignty, a fundamental pillar of the constitution, might be at variance to any popular referendum vote. He skilfully argued that political expediency of the times necessitated 'the will of the people' to prevail over elected MPs. A referendum offered through politics and polemics 'only a conservative check on legislation which is clearly in harmony with those democratic principles which in the modern world form the moral basis of government'.[9]

In contemporary times, various referendums have been held.[10] Political expediency underpins reasons for holding a referendum. While a referendum may allow a form of direct democracy, it is often in opposition to representative or parliamentary democracy. The reconciliation of different forms of choice – the party political and the popular have proved difficult. In the UK the referendum is normally non-binding,[11] authorised by an Act of Parlia-

4 P. Norton, 'Resisting the Inevitable? The Parliament Act 1911' (2012) 31 Parliamentary History 444–459.

5 A. V. Dicey (1835–1922) See: A. V. Dicey, *Law of the Constitution* (Macmillan 1885) and A. V Dicey, *Comparative Constitutionalism, vol 2* (Oxford 2013) 149.

6 A. V. Dicey, 'Ought the Referendum to Be Introduced into England?' (1890) 57 Contemporary Review 489; R. Weill, 'Dicey Was Not Diceyan' (2003) Cambridge Law Journal 474.

7 A. V. Dicey, *A Leap in the Dark* (2nd ed., London 1893); A. V Dicey and R. S. Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920). See: W. Molyneux, *The Case of Ireland Being Bound by Acts of Parliament in England* (Pamphlet 1688).

8 See: R. A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Macmillan 1980) 35, 103–104, 235–236; A. V. Dicey, *Law of the Constitution* (Macmillan 1893) chapter 3. Also see: Dylan Lino, 'The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context' (2018) 81 Michigan Law Review 739–764.

9 Dicey (n 8) 147.

10 In 2011, on the use of an alternative vote system to replace the first-past-the-post electoral system. Also in 2011, to give more powers to the Welsh Assembly. In 2014, a referendum to give more power to the Scottish government through an independent state was narrowly rejected.

11 An exception under the European Union Act 2011 for a binding referendum was never held. The Northern Ireland Act 1998 provides for a form of referendum that is imposed on ministers depending on the outcome.

ment, triggered by a dissatisfaction with the politics of political parties[12] or an inability of groups within political parties to agree. The EU referendum in 2016 came about because of long-standing deep divisions in the Conservative Party[13] over Europe, but also excited by a diaspora of dissatisfaction and underlying tensions within the United Kingdom. The UK had not triggered a referendum to join the European Community in 1972 but a confirmatory referendum on membership was held in 1975.[14] The 2016 referendum vote to leave the European Union was largely unexpected by the mainstream political parties, as it was a rejection of their advice to remain. Many explanations are offered for what happened in the Brexit vote. The general consensus is that the referendum was an expression of dissatisfaction amongst many voters of a failure of successive governments to address their needs. The term 'populism' is often used to mean an expression or response or corrective dissatisfaction about elites or vested interests and a desire to create political platforms that challenge existing orthodoxy. Notable characteristics that seem to fit the successful Brexit campaign include political activism working outside traditional party structures and organisations; a propensity to replace conventional constitutional structures by the use of popular meetings and skilled manipulation of social media in order to propagate simplified versions of facts and 'sound bites' effective against complex governmental systems; the exploitation and clever manipulation of legal regulations, including the rule of law, to avoid too much scrutiny and oversight; negotiating the electoral system through popular forums to garner support and exploit ideas that find common form in terms of nationalism and patriotism; the exploitation of public fears and suspicions, particular hostility to immigration; the use of ethnicity and race to promote common cause through accentuated differences of 'foreigners'.[15]

Responses to the 2016 referendum fit the model of typical responses to populism, namely a counter-reaction: a fear that the rise in populism will be an unstoppable influence on the political system that may enable 'far right' groups to flourish and gain political momentum and success. There is concern that its success will expose the fragility of democratic systems of government and may even question the vitality of the rule of law itself. In

12 See the evidence to the House of Lords Constitution Committee, *Referendums in the United Kingdom*, 12th Report, Session 2009–10, HL Paper 99, London: The Stationery Office.

13 Similar political splits came with the then Labour Government before the referendum in 1975 to modify terms of UK membership agreed earlier by the Conservative Government in 1972.

14 See: Bernard Donoughue, *Downing Street Diary* (Jonathan Cape 2005) 403. In the referendum, 17,378,581 (67.2%) voted yes and 8,470,073 (32.8%) voted no. The then Labour Prime Minister Harold Wilson remained euro-sceptic.

15 Jan-Werner Muller, 'The People Must Be Extracted from Within the People: Reflections on Populism' (2014) 4 Constellations; Ernesto Laclau, *On Populist Reason* (Verso 2005). Also see: Andrew Arato, 'Political Theory and Populism' (2013) 80 Social Research; Nicola Lacey, 'Populism and the Rule of Law' (2019) London School of Economics Working Paper 28; Katrina Forrester, *In the Shadow of Justice: Postwar Liberalism and the Remaking of Political Philosophy* (Princeton University Press 2019).

the Brexit context, the referendum is increasingly seen as a popular vote against the advice of the establishment. 'Taking back control' was doubly nuanced to mean leaving the EU as well as against the views of the majority of elected members of Parliament and their accompanying political parties, who favoured remain. Liberal democracy is accused of failing to represent a sufficiently wide spectrum of opinion and a reaction against an austerity programme of public cuts and a reduction in public services since the financial crisis of 2008.

The UK's decision to leave the EU claimed on the basis of the need to assert sovereignty and 'bring back control'[16] provided a simple slogan that became a compelling political message. The implications of the Brexit message are clear that EU membership had put at risk the UK as a nation state, undermined its sovereignty and impacted on the day-to-day life of many citizens, leaving them less free and able to make decisions on their own behalf. Underpinning many of the concerns about the EU is the question of immigration and its control. Paradoxically, the perception of 'hordes' of EU migrants is not supported by the actual figures, provided by the House of Commons Library. The origin of migrants coming into the UK in 2017 was 13% British nationals, 38% nationals of other EU countries and 50% nationals of non-EU countries. Significantly, it means that at least 50% of all migrants were subject to immigration controls.[17] Perceptions appear to matter more than reality, and in many crucial areas of the Brexit decision, communities believed that they were overcrowded by unwanted and uncontrollable EU citizens. One explanation comes from the 2008 financial crisis. Katrina Forrester offers the analysis[18] that as a consequence, the current political crisis is opportunistic and aimed at displacing liberalism and challenging exiting orthodoxy in our institution of government. Considering how Brexit has impacted on the UK's institutions, government, courts and Parliament provide an insight into how populism, or at least populist causes, may force a change in our perceptions about law and society.

14.3 Brexit: parliamentary procedure and constitutional conventions

Events after the 2016 referendum highlighted the political complexity of a parliamentary system when faced with a non-binding referendum result that most MPs did not want or expect. The government, under the Prime Minister, Mrs May, treated the 2016 referendum result as politically binding,

16 See: J. F. McEldowney, 'The Constitution and the Financial Crisis in the UK: Historical and Contemporary Lessons' in Xenophon Contiades, *Constitutions in the Global Financial Crisis* (Ashgate 2013) 167–194.

17 House of Commons Library Briefing Papers, *Migration Statistics* SN06077 (11 December 2018).

18 Katrina Forrester, *In the Shadow of Justice: Post-War Liberalism and the Remaking of Political Philosophy* (Princeton University Press 2019).

mainly because of a vociferous group of pro-Brexit supporters within the government and the Conservative Party. The majority of MPs in the House of Commons were supporters of remain, although both parties had agreed to give effect to the referendum result. The UK itself was spilt; the 2016 referendum was won by a narrow majority, 51.89% to 48.11%. Scotland and Northern Ireland voted to remain, as did London, while Wales and England voted to Brexit. Faced with likely opposition in the House of Lords, in 2017, the Prime Minister obtained the agreement of the House of Commons (required under the Fixed Term Parliament Act 2011) to call an early general election for 8 June 2017 with the expectation that having triggered Article 50 a few months earlier on 29 March, she might win a larger majority with which to govern. Instead, the government lost its overall majority and there was a hung Parliament. This had two important consequences, outlined below that have significance for the government. First, normally the government controls Parliament but the election result largely left Parliament in control with little room for the government to exercise its own authority. Second, the UK entered an unprecedented period where traditional constitutional conventions began to break down, not least because of the fetter on the government to decide when to call another election under the Fixed-Term Parliament Act 2011. As we shall see, the implications of a weakened government set the background for the issues raised by Brexit in the courts.

After the 2017 election the Conservative government, with only minority parliamentary support, reached an agreement with the Northern Ireland Democratic Unionist Party (DUP), resulting in an additional 10 members in support of the Conservative Party on key votes connected with financial supply. Even with the additional support of the DUP, it was not clear that the government would be guaranteed support for a specific agreement with the EU.[19]

The government's ambition to implement the referendum proved more complicated and politically difficult than at first appreciated, as it faced sustained opposition in Parliament, including from its own MPs. Brexit resulted in some novel constitutional challenges. The most serious was that the 2016 Referendum result was silent on the process and mechanics of reaching agreement with the EU as part of withdrawal under Article 50. Control of policy-making, traditionally vested in the government of the day, underwent unprecedented challenge as the government struggled to secure agreement within its own ranks as to the best policy to pursue in negotiations with the European Union. Negotiating with the European Union, a unique, complex and technically difficult process, was being determined by political struggles within the UK Parliament. The latter had far-reaching consequences for constitutional convention and the procedures of the House of Commons. The

19 P. Norton, *Governing Britain: Parliament, Ministers and Our Ambiguous Constitution* (Manchester University Press 2020) Chapters 4 and 5 (hereinafter Norton). I am grateful for the opportunity to read an advance copy of this excellent book.

migration of retained EU law into UK law proved a major challenge, as the debates on the European Union (Withdrawal) Bill 2018 revealed.

In January 2017 the government suffered opposition to its use of prerogative powers when the United Kingdom Supreme Court, in the *Miller 1* case, held that triggering Article 50 required an Act of Parliament. This was duly passed in six weeks.[20] The status of the Sewel Convention in relation to Brexit, also arose in the *Miller 1* decision (discussed in more detail later in this chapter). Scotland and Northern Ireland,[21] both devolved nations that voted to remain, raised the question before the UK Supreme Court of the Sewel Convention that provided that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. In the case of Scotland, section 2 of the Scotland Act 2016 recognised the existence of the Sewel Convention, and it was strongly argued that Scotland's case for the convention to be enforced by the courts came from the 2016 Act. The Supreme Court in *Miller 1* concluded that a 'convention was a convention and could not be enforced by the Courts',[22] thus depriving the legislature of Scotland and Northern Ireland with the need to give consent to Article 50 being triggered. In the particular case of the Scottish Parliament, the majority in *Miller 1* concluded that the UK Parliament has not sought 'to convert the Sewel Convention into a rule which can be interpreted, let alone enforced by the courts'. Interpreting the purpose and aims of the Scotland Act 2016 in this way avoided the Supreme Court having to engage with a 'political convention' which it would otherwise have had to deal with. The Supreme Court's interpretation raises some caution about attempting to place restraints on the powers of the Westminster Parliament through statute but at the same time acknowledges the necessity for the UK Parliament to enact fresh legislation required to trigger Article 50. The Supreme Court's narrow interpretation of the Sewel Convention marked its reluctance to decide whether or not a Brexit Bill needed any form of consent of the Scottish Parliament.[23]

Lord Norton, a leading political scientist and Conservative peer, estimates that largely as a result of Brexit, 38 ministers including 11 cabinet ministers resigned between April 2018 and the end of September 2019; the majority, 22, resigned over differences over Brexit policy. Most embarrassingly, the

20 The European Union (Notification of Withdrawal) Act 2017 see the *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) and [2017] UKSC 5.

21 Previously, a Northern Ireland case, in a judgment delivered by Mr Justice Maguire in *McCord's (Raymond) Application* [2016] NIQB 85, had rejected the attempt for judicial review of the UK Government decision to leave the EU and trigger Article 50 regarding the matter as non-justiciable.

22 This is of course consistent with Dicey's view that conventions were not legally enforceable but moral and political understandings. See: A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed. ECS Wade ed., Palgrave 1959) 39–40.

23 See the analysis offered by K. Ewing, 'Brexit and Parliamentary Sovereignty' (2017) 80 Modern Law Review 685–745. 711.

government was held to be in contempt of the House of Commons when it failed to publish legal advice on aspects of the Brexit arrangements that applied to Northern Ireland.

The full constitutional implications of Brexit on the Executive and Parliament have yet to be fully evaluated. It is clear that the referendum result created 'seismic tremors' within the Westminster system. Some considered it a crisis, while others pointed to the weakness of Parliament's constitutional arrangements, namely its outdated rules of procedures and highly discretionary decision-making, particularly in the discretion enjoyed by the Office of Speaker of the House. A noticeable omission was the use of modern electronic voting, leaving time-consuming votes on procedural motions and amendments to archaic procedures impeding the smooth functioning of decision-making.[24] Government ministers found a large portion of their time was spent not in governing, but hanging around the House of Commons chamber. Other shortcomings[25] related to Erskine May,[26] the long-established authoritative parliamentary book of past 'precedent', which lacked procedures (electronic voting for example) and suitable guidance for the needs of the twenty-first century.

14.4 Brexit and the Courts

Brexit, supported by a popular referendum vote, gave rise to legal controversy over the government's decision to use the ancient prerogative power to trigger Article 50, rather than face parliamentary scrutiny. The history of prerogative powers is distinguished by conflict often fully unresolved and resulting in a considerable lack of legal clarity. Blackstone's definition of the prerogative was couched in very general terms: 'a special pre-eminence, which the King hath over and above all other persons and out of the ordinary course of the common law, in right of his great dignity'. John Locke thought the prerogative 'was the power to act according to discretion of the public good'.[27] Such powers were treated by subsequent writers[28] as defined

24 One exception is the successful use of e-petitions, allowing the public to trigger a wider form of discussion in Westminster Hall and a wide preparation of material and discussion, including the House of Commons Library Briefing Papers and Information Packs.

25 Political and Constitutional Reform Committee, House of Commons (2010), *Fixed-Term Parliaments Bill*, Second Report, Session 2010-12, HC 436, London: The Stationery Office. Political and Constitutional Reform Committee House of Commons (2013), *The Role and Powers of the Prime Minister: The Impact of the Fixed-Term Parliaments Act 2011 on Government,* Fourth Report, Session 2013-14, HC 440, London: The Stationery Office. The House of Lords Constitution Committee 2010, *Fixed-Term Parliaments Bill*, 8th Report, Session 2010–2011, HL Paper 69 (The Stationery Office).

26 Erskine May, Parliamentary Procedure and Practice edition London. Also see J. Redlich, *The Procedure of the House of Commons: A Study of its History and Present Form*, *Vol. 1* (Archibald Constable 1908).

27 J. Locke, *The End of Civil Government,* chapter 14.

28 See: J. Chitty, *A Treatise on the law of the Prerogatives of the Crown,* 1820.

in the common law in terms of nature and extent.[29] Modern theory of the prerogative[30] is substantially a legacy from the seventeenth century and the constitutional struggles of the Stuart period of kingship.

Sir Edward Coke's (1552–1634) influence was perhaps the most decisive and set the trend away from the absolutist nature of royal power, to one of increasing judicial oversight. The judges in the *Case of Proclamations*[31] defined the King's powers as having no legislative authority without Parliament. This was followed by the *Case of Prohibitions del Roy*[32] that the king 'could not judge except through the intermediary of his judges'. While Coke's influence was considerable, it is clear that different judicial approaches also prevailed and accepted a greater latitude to the King.[33] Contemporary discussion of prerogative powers mirrors some of the earlier conflicts and uncertainties. De Smith noted how difficult it was to determine the question over the extent of the justiciability of the prerogative:

> There are simply categories of questions, some but not all having a strongly political flavour, which they have decided for historical or policy questions, to treat as non-justiciable.[34]

In contemporary times,[35] prerogative powers have largely given way to statutory powers.[36] The precise limits of judicial review very much depend on the 'justiciability' of the power being exercised.[37] Justiciability is a very vague concept, leaving much scope for judicial discretion. Any exercise of

29 *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.

30 See: *Bancoult (no 2)* [2008] UKHL 61 in which the Order in Council prohibiting native Chagos islanders to return to their home were considered by the House of Lords as falling within judicial review.

31 (1611) 12CO.REP.74.

32 (1607) 12 CO.REP.63.

33 For example in *R. v Hampden* (1637) 3 St.Tr.825 Croke. J in his dissent relied on the absolutist power of the Monarch. The theory of the prerogative was further discussed. *Bate's case* allowed the Monarch King the right to raise duties to regulate trade rather than raise revenue, and the courts could not look behind the King's statement of motive. *Darnel's case* (1627) 3 ST.Tr. 1 (known as the Five Knights Case), allowing the detention of prisoners to pay a debt for a loan required under the Privy Seal, broadly favoured the King, allowing the prisoners to be remanded. *Hampden's case* drew much greater clarity from the judges that if the King were allowed to levy taxation (ship-money) without Parliamentary consent, this would inevitably leave Parliament without authority.

34 De Smith, *Judicial Review of Administrative Action* (3rd ed. Stevens and Sons 1973) 255. Also see G. Sawer, 'Political Questions' (1963) 15 University of Toronto Law Journal 49.

35 See: House of Commons Library Briefing Paper, *The Royal Prerogative* Number 03861 (17 August 2017).

36 The Constitutional Reform and Governance Act 2010 codified the convention applied since 1924 on the ratification of treaties, giving the House of Commons a veto over treaties. The same Act made the appointment and regulation of the civil service to be on a statutory basis, replacing the prerogative powers of appointment.

37 See A. W. Bradley, K. D. Ewing, and C. J. S. Knight, *Constitutional and Administrative Law* (Longman 2015) 260–261.

prerogative powers by the government also falls within ministerial responsibility to Parliament.

14.5 The interpretation of prerogative powers: *Miller 1* – can the government trigger Article 50 by making use of prerogative powers?

Article 50 (TEU) provides that any Member State might leave the European Union 'according to its own constitutional arrangements'. The use of the prerogative to trigger Article 50 without prior parliamentary approval proved controversial. Gina Miller, a businesswoman and pro-remain supporter, argued that such use of prerogative powers could be triggered only after the UK Parliament had given its express approval. Miller made an application to the Divisional Court which unanimously upheld her argument that Parliament's authority was required to authorise the triggering of Article 50. The decision to appeal the Divisional Court was odd as it was well known, within government, that in advance of the Divisional Court's decision, the European Union (Notification of Withdrawal) Bill was in the process of being drafted. On appeal, the UK Supreme Court upheld the Divisional Court and held that the government could trigger Article 50 only after having express approval from Parliament.[38]

The question arises as to whether the Supreme Court in reaching this decision created new constitutional doctrines or approaches by placing constraints on the Executive's use of the prerogative. The majority in *Miller 1* reasoned that as with the *Case of Proclamations*,[39] the authority of Parliament is paramount and without its consent, the UK could not leave the EU. In reaching this decision, the majority were consistent with earlier case law that prohibited the prerogative from taking away statutory rights.[40] Article 50 had one significant aspect, namely that its effect was to dismantle an entire source and system of law in the United Kingdom that had become embedded in the legal system, with accompanying rights and obligations that changed the relationship between the individual and the state such as the *Working Time Directive*. The majority reasoned that such was the scale of change that only statute[41] could authorise a departure from the various rights and obligations the assumed into UK law. Parliament had not in the 1972 European Communities Act envisaged any significant changes in domestic

38 *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) and [2017] UKSC 5.

39 (1611) 12 Co. Rep 74.

40 Ibid.

41 It is useful to look at *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (admin). Section 12 of the European Parliamentary Elections Act 2002 preventing any Treaty from increasing the powers of the EU Parliament without the approval by the UK Parliament. The Court rejected the argument that this required a referendum and this matter had already been covered under the European Union (Amendment) Act 2008.

law that would end the relationship with the EU. This could occur only by explicit legislation and not the prerogative.

Lord Reed dissented and argued that triggering Article 50 was part of a Treaty obligation and fell within a long-standing acceptance of the Executive's use of the prerogative to sign and agree international Treaties. The question of existing rights and obligations created since the UK joined the EU was covered by section 2(1) of the 1972 Act that broadly accepted that rights under the Act could be revoked or amended and given effect under the Act. International relations fell within the category of Executive discretion and the conduct of foreign relations' long-standing areas which valued 'unanimity, strength and dispatch' fell within prerogative powers. Underlying Lord Reed's analysis is the assumption that the EU is no different from any other treaty relationship, and that the Executive is best used to make such decisions about withdrawal from a Treaty.

The majority's approach followed the leading case of *Attorney General v De Keyser's Hotel*[42] in 1920, affirming that the prerogative is part of the common law, a residual power and not one that could endure for all time in its ancient form. The judges made a number of findings. Once executive power had been applied in an Act of Parliament, the Executive could no longer rely on the use of the prerogative. The judges' role in construing the use of legal powers required a careful exercise of judicial discretion in favour of the subject. The majority in Miller reasoned that the *De Keyser* principle indicated a predisposition to statutory over prerogative powers and that Parliament assumed that it would be consulted before any change would be made to the status quo of membership, given the major consequences this might have for the rights of the subject.

Lord Reed considered that the *De Keyser* principle did not apply in this case as Parliament had not yet, at any rate, regulated the withdrawal from the EU; it only recognised the existence of Article 50 TEU, not the means of withdrawal.

Popular reaction to both the Supreme Court and the Divisional Court included newspaper headlines claiming that the judges were 'enemies of the people' and arguing that the judges had usurped the popular mandate of the people found in the 2016 referendum in favour of leaving. Social media became an active source of 'hate mail' against MPs and remain supporters including Gina Miller. Political criticism of the judiciary reached unprecedented levels in opposition to the decision. The government's defeat in *Miller* resulted in the European Union (Notification of Withdrawal) Act 2017, passed within a few days of the Supreme Court decision.

The *Miller* decision attracted a wide range of academic opinions.[43] Some claimed that it broke new ground in the role of constitutional scrutiny by the

42 [1920] AC 508.

43 See the Special Edition to (2018) Public Law. Paul Craig, 'Miller, Structural Constitutional Review and the Limits of Prerogative Power' (2018) Public Law 48. Also see 'A Special Section on *R(Miller) v Secretary of State for Exiting the European Union*' (2017) Modern Law Review 685, 745.

Supreme Court, while others claimed the case was wrongly argued or poorly justified. Interpreting the correctness of otherwise of the majority's approach in *Miller* became tainted by the dispute between remain and Brexit. This overlooks the obvious and more mundane, that the *Miller* decision is largely in line with the orthodox Diceyan analysis of parliamentary sovereignty and the use of prerogative powers. The reasoning of the unanimous decision on the Sewel Convention also fits that analysis by refusing to construct section 28 of the Parliament Act 1998 as creating a status for the Convention, the Court followed a long-standing tradition of not giving legal effect to a constitutional convention.

There were some missed opportunities in the *Miller* case.[44] On the Sewel Convention, there was authority from the Canadian case law[45] that the Court could have explored the political significance of a Brexit withdrawal in the light of Scotland having voted to remain in terms of what kind or degree of consultation Scotland might have expected, even if that consultation fell short of requiring consent of the Scottish Parliament. On the need for parliamentary authority, there is the significance of the European Union (Amendment) Act 2008 incorporating Article 50 of the Treaty of European Union which had already provided Parliament with the authority to leave the EU. Taken together with the 2015 Referendum Act, was the 2008 Act not sufficient to give authority to leave the EU? This question was not addressed by the Supreme Court, but the Court might have considered the implications of such a question in their reasoning. Finally, the Supreme Court might have made clearer the consultative nature of a non-binding referendum, the role of populism and support for the democratic principles of parliamentary consultation underlining the constitutional role of ministerial responsibility to Parliament as a check on arbitrary power, including any use of the referendum. It is hard to take from *Miller* any guidance, if a government in the future might wish to withdraw from the European Convention of Human Rights.

14.6 Prerogative powers: *Miller 2* – can the courts review the exercise of the prerogative to prorogue Parliament?

The second *Miller* case also involved a legal challenge to the government's use of prerogative powers, this time, to prorogue Parliament. The Supreme Court unanimously held that the prorogation of Parliament for a period of five weeks was unlawful, void and of no legal effect. The first question is

44 Contrast the analytical style of the Supreme Court in *R(on the application of UNISON) v Lord Chancellor* [2017]UKSC 51 to *Miller*. The Unison decision was truly pathbreaking in the way public law issues were integrated through a horizontal effect into disputes between private parties. See Alan Bogg, 'The Common Law Constitution at Work *R(on the application of UNISON) v Lord Chancellor*' (2018) 81 Michigan Law Review 509–538.

45 See the Supreme Court of Canada: *Re Resolution to Amend the Constitution* [1981] 1 SCR 753.

whether or not the prorogation of Parliament is justiciable. The answer was unanimously agreed by all eleven justices, the one and only judgment delivered by Lady Hodge. Notably, Lord Reed, who dissented in the *Miller 1* case, agreed with the unanimous decision, that the government's decision to prorogue Parliament was null, void and of no legal effect. The Supreme Court overturned an earlier Divisional court decision but upheld the Scottish Court of Session's decision in *Cherry*. Unsurprisingly, academic reaction to the decision was spilt, with some in support[46] and adverse criticism by others,[47] including the claim that the decision was 'unconstitutional'.[48] The government was strongly critical of the Supreme Court's decision and accused the Supreme Court of making political rather than legal decisions, suggesting that in the future political decisions should be immune from judicial review and that the powers of the Supreme Court would come under review at some future date by the government.[49]

The justiciability of prorogation has divided opinion.[50] Contemporary case analysis in the 1985 decision in GCHQ[51] drew a distinction between judicial recognition of the *existence* of a prerogative power and the question of having to offer justification. Opinions divided on the latter being reviewable while the former was accepted as reviewable. Significantly, the majority, Lords Diplock, Scarman and Roskill, emphasised the need for evidence to justify claims made by the minister, but Lord Diplock had some reservations of the need to give reasons in the area of national security, leaving some doubts as to the level of judicial scrutiny available and leaving the possibility that certain matters were non-justiciable. In the GCHQ case, the court accepted the government's claim that 'national security' justified a ban on trade unions at GCHQ, the government's main intelligence centre. Such

46 Paul Craig, The Supreme Court, Prorogation and Constitutional Principle, https://ukconstitutionallaw.org/.

47 Stephen Laws, http://judicialpowerproject.org.uk/stephen-laws-the-supreme-courts-unjustifiedlawmaking/; John Larkin, 'The Supreme Court on Prorogation and Its Justiciability' http://judicialpowerproject.org.uk/john-larkin-the-supreme-court-on-prorogation-and-its-justiciability/; Prorogation3.pdf; Martin Loughlin, *The Case of Prorogation, The UK's Constitutional Council Ruling on Appeal from the Judgment of the Supreme Court* https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf.

48 John Finnis, 'The Unconstitutionality of the Supreme Court's Prorogation Judgment', Policy Exchange, https://policyexchange.org.uk/publication/the-unconstitutionality-of-the-supreme-courts-prorogation-judgment/

49 The 2019 Conservative Election Manifesto included. See: *The Guardian*, 22 February 2020.

50 Stephen Tierney, 'Turning Political Principles into Legal Rules: The Unconvincing Alchemy of the Miller/Cherry Decision', http://judicialpowerproject.org.uk/stephen-tierney-turning-political-principles-into-legal-rules-theunconvincing-alchemy-of-the-millercherry-decision/; Richard Ekins, 'Parliamentary Sovereignty and the Politics of Prorogation', Policy Exchange, https://policyexchange.org.uk/wp-content/uploads/2019/09/Parliamentary-Sovereignty-and-the-Politics-of

51 *Council of Civil Service Unions v Minister for the Civil Service* (the GCHQ case) [1984] UKHL 9

justification was accompanied by *ex gratia* compensation paid to workers for the abandonment of their trade union rights.

However, in the GCHQ case, Lord Roskill suggested that there were certain powers that were non-justiciable, including the dissolution of Parliament. Dissolution needs to be distinguished from prorogation. The former is where Parliament is brought to an end and a general election is called. However, the latter, prorogation, does not permit either House to be recalled. Prorogation also brings to an end the current parliamentary session with the loss of Bills, unless specifically carried over. Parliament's consideration of secondary legislation is suspended and select committees may not meet, though they can continue limited inquiries. However, the government can exercise its lawmaking powers to make regulations.[52] Undoubtedly, the period of prorogation reduces the influence of Parliament over the way its country is governed, This means that both Houses are unable to formally debate government policy and legislation, submit parliamentary questions for reply by government departments, or scrutinise government activity through parliamentary committees or introduce legislation. Normally prorogation is no more than a formality and without much political dissent, the implication is that Parliament gives it tacit consent.[53] Legally, Parliament is unable to prevent a prorogation, but it is possible for Parliament to replace the prerogative through legislation such as the Fixed-Term Parliaments Act 2011. Though there are financial consequences of prorogation, since a government might run out of supply as it would not be able to pass votes on account. This may limit the time for prorogation.

The question is whether the category of non-justiciability applied to prorogation in *Miller 2*. The Supreme Court considered what might be the limits of prerogative powers. The answer may be gleaned from the key historical developments of the prerogative.[54] In the past the prerogative was used to grant immunities to the Crown and potentially unfettered powers. Over the years, the courts considered Parliament's powers should not be threatened through the use of prerogative powers which, they held, could be limited by the common law and statute.[55] The result was that the courts recognised that Parliament had exclusive powers of taxation, and that the prerogative could not override statutory powers. It was also settled that there could be no new prerogatives, and the extent of existing prerogatives[56] could be settled by the courts.

52 That is under the negative resolution procedure.

53 There are examples in Australia and Canada where prorogation has to be made for explicit political reasons at federal and state levels.

54 See A. Twomey, 'Article 9 of the Bill of Rights 1688 and its Application to Prorogation' *UK Const. Blog* (4 October 2019).

55 O. Hood Phillips and Paul Jackson, *O. Hood Phillips' Constitutional and Administrative Law* (7th ed. Sweet and Maxwell 1987) 262–263, 266–267.

56 Ibid.

Limiting the use of prerogative powers in this way was a notable constitutional achievement that helped define parliamentary sovereignty[57] while also recognising the role of Parliament in holding government to account.[58] Both aspects, sovereignty and accountability, were adopted by the Supreme Court for their reasoning in *Miller 2*. The Supreme Court reasoned that the use of the prorogation power challenged both aspects of Parliament's roles. Sovereignty because Parliament was unable to meet and vote or pass legislation, and accountability, because Parliament was deprived of the opportunity to scrutinise the government over its policies. The two roles are inextricably linked.

Contemporary, judicial attitudes to the prerogative reflected the view that whenever any public powers are being exercised, statutory or prerogative, both should be subject to the same standard and intensity of review. In the *Miller 2* case, the Supreme Court set the limit upon the prerogative prorogue on the principle of legality, namely that it 'will be unlawful if the prorogation has the effect of frustrating, preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the Executive. In such a situation the court will intervene if the effect is sufficiently serious to justify such an exceptional course'.[59] Placing the review of the prerogative on the same par as discretion exercised under a statute sets the terms of review as well as the rationale for the decision based on the primacy of the courts to determine the legality of matters raised in the courts. Two background considerations that set the context of the Supreme Court's decision are relevant. First, as amply demonstrated in the earlier discussion, a minority government had been defeated in successive attempts to gain parliamentary support which at that time was not forthcoming and that de facto the government of the day had lost the confidence of Parliament. Second, the government was unable to sign any affidavit certifying reasons for the exercise of the prorogation powers. The latter may have tipped the balance the other way – if a reasoned opinion justifying the government's position had been advanced. On the basis of *Wednesbury*[60] unreasonableness such reasons might have been accepted as a justification. Arguments that the Supreme Court was acting in an unconstitutional fashion have little historical support as courts have invariably strayed into constitutional conflicts and asked to determine the legality of actions by one side or another.[61]

57 House of Commons Library, Briefing Paper Number 03861 *The Royal Prerogative* (17 August 2017) 7–9. Also see, House of Commons Library, Briefing paper Number 8589 *Prorogation of Parliament* (11 June 2019).

58 Also see: *R. v Secretary of State for the Home department ex parte Fire Brigades Union* [1995] 2 AC 513.

59 *Miller 2*. UKSC 41 at [50].

60 *Associated Picture Houses v Wednesbury Corporation* [1948] 1KB 223.

61 M. Detmold, 'The Monarch in the Room', U.K. Const. L. Blog (2 October 2019) (available at https://ukconstitutionallaw.org/).

14.7 Has Brexit resulted in new constitutional theories or doctrines?

The question of how to assess whether the courts in the UK have developed new specific constitutional theories or doctrines in addressing the issues raised by Brexit falls to be answered. The answer may well disappoint those who seek a new and possibly far-reaching normative answer. The reality is much more mundane.[62] Viewed through the law of the prerogative, both *Miller 1* and *2* have been subject to close scrutiny and criticism. Both cases are consistent with a long-established constitutional and judicial pathway of reviewing prerogative powers on the same basis as statutory powers. In both cases Parliament was given sovereignty and legal priority, not the government of the day. The question raised by the devolved nations on the Sewel Convention under the Scotland Act 2016, *Miller 1* rejected any special status to be accorded to constitutional conventions, even when such a convention was recognised in a statute, fully in keeping with the orthodox Diceyan view that conventions should not be given any legal enforceability by the courts. The reasoning in *Miller 1* follows the reasoning in *HS2*,[63] namely, that a significant statute, the European Communities Act 1972 should not be devoid of effect by the use of the prerogative. Similarly, consistent with the principles of ministerial accountability, *Miller 1* prioritises Parliament in its EU scrutiny functions over the Executive. It is hard to distil new or novel underlying principles that distinguishes *Miller 1* from other decisions.[64]

Both *Miller 1* and *2* are unlikely to set new precedent on the use of prerogative powers as the particular issue of leaving the EU is not likely to recur again and it is highly unusual to withdraw from a Treaty of such magnitude and significance. Parliament is surely the most appropriate forum to resolve closely contested political choices that arise from EU membership, as will be the case when considering what will be retained on leaving the EU.

Miller 2 is in line with some contemporary cases, but without extending their analysis, or developing their line of reasoning. In 2002, in the *Thorburn v Sunderland City Council*, Lord Justice Laws acknowledged that parliamentary sovereignty was a principle of the common law, reviewable by the courts, within the category of constitutional importance that might include the European Communities Act 1972, the Human rights Act 1998 and the statutory framework for devolution. In the case of devolution, far from resisting this approach in the Scotland Act 1998 the Scottish Parliament was made permanent, further

62 R. Hazell 'Out of Court: Why Have the Courts Played No Role in Resolving Devolution Disputes in the United Kingdom' (2007) Journal of Federalism 589.

63 *R (on the application of HS2 Action Alliance Ltd., v Secretary of State for Transport* [2014] UKSC 3.

64 See the controversial decision in *R (Evans) v Attorney General* [2015] UKSC 21 and the discussion in M. Elliott, 'The Supreme Court's Judgment in Miller: In Search of Constitutional Principle' (April 2017) Paper 23/2017 University of Cambridge Legal Studies Research Paper Series.

signifying the special status given to Scotland. Since *Factortame 2*,[65] when EU enjoyed primacy over domestic law, this created a hierarchy of laws including the existence of what Laws refers to as 'constitutional statutes'. In 2005 in *Jackson*,[66] a case involving a challenge to the validity of the 2004 Hunting Act passed under the procedure set out under the Parliament Act 1949 further confirmed the existence of a hierarchy of Acts. Lord Steyn and Lord Hope both observed that parliamentary sovereignty was 'a construct of the common law', thereby transposing Dicey's doctrine of the sovereignty of Parliament into contemporary times. The 'absolute' nature of sovereignty is qualified in terms of any attempt to 'subvert' the rule of law. This line of reasoning has continued in the *Axa case*[67] in 2011, on the legality and incompatibility of acts of the Scottish Parliament. The Court held that the rule of law enforced by the courts was the 'ultimate controlling' factor on which the constitution is based.

In *HS2* the Supreme Court[68] recognised that various significant and fundamental constitutional statutes could not be impliedly repealed, and that a statute, the European Community Act 1972, should not be impugned to have no effect by the use of the prerogative.

It is wrong to assume that *Miller 1* and *2* have set in train an expansionist judicial bid for legal rules to overrule political choices. Instead, the evidence appears to suggest the contrary. There have been other Brexit legal challenges,[69] but most have been unsuccessful and also highly predictable in the classification of non-justiciable issues because of the underlying political issues raised by the challenges. For example, a judicial review challenge from a crowdfunding group campaigning to halt Brexit negotiations was rejected because it raised highly political issues that were not justiciable.[70] Similar reasons were advanced in refusing a challenge in April 2019 by the English Democrats claiming that Article 50 was illegal.[71] There were many more similar cases, but all failed to gain any success in the courts.

In terms of normative theory, Ewing neatly summarised the existence of a political constitution with a preference for governments to be held accountable in a political arena rather than through the legal process. There is an alternative approach resting on the existence of a legal constitution that advances accountability in the courts under legal restraint.[72]

65 [1991] 1 All ER 70, [1991] 1AC603.

66 [2006] 1AC 262.

67 *Axa General Insurance Ltd., and others v Lord Advocate* [2011] UKSC 46.

68 *R (on the application of HS2 Action Alliance Ltd., v Secretary of State for Transport* [2014] UKSC 307. Also see: *Thoburn v Sunderland City Council* [2003] QB 151.

69 House of Commons Library Briefing Paper Number 8415, *Brexit Questions in National and EU Courts* (1 November 2019).

70 *R (on the application of Webster) v Secretary of State for exiting the European union* (June 2018).

71 *The Queen on the application of the English democrats v Prime Minister and the Secretary of State for Exiting the European Union* Case no C)/1322/2019.

72 See Jonathan Sumption, *The Trials of the State: Law and the Decline of Politics Policy* (Profile Books 2019).

This may provide some promise to those who argue that *Miller 1* and *2* offer an expansionist view of the juridical and legal constitution triumphing over the political constitution.[73] Little guidance may be gleaned from both cases that in any clash between the Executive and the courts, the courts would fail to follow the Executive if needed and avert a constitutional crisis. More likely than not the courts will exercise self-restraint for Parliament's authority. Undoubtedly judicial oversight has undergone noticeable changes in the past twenty years, partly because of the growth of legislation particularly through the Human Rights Act 1998. A more active use of judicial review and a greater public awareness of the role of judges than in the past is more evident. Brexit has given greater visibility to such developments as well as a public perception that legal controls over the Executive have incrementally increased proportionate to greater legal and judicial controls.

14.8 Conclusions

The Covid-19 epidemic in 2020 has conspired to overtake Brexit in national significance, as the pandemic with a resultant health and economic crisis serves to re-calibrate what matters most and what will have enduring effect. In common with the history of medieval plagues, Covid-19 will undoubtedly adjust the status quo and realign law, the state and how people are governed. Covid-19 has restored technical expertise to its importance. Populist[74] ideology is likely to be reinvigorated as injustices become apparent by the revelation of deep-rooted startling inequality through the pending economic recession.

Brexit is not a single event but a continuous process. The UK exited the EU at the end of January 2020, and the transition stage is time-tabled to be completed by the end of December 2020, with considerable uncertainty as to the agreements that will be reached if any for the future relationship. De Smith writing in 1973 anticipated that the UK's accession to membership of the European Communities as 'entailing a major reappraisal of basis constitutional doctrines' including the question of obedience to the most recent Act of Parliament when a manifest inconsistency might arise. The *Factortame 1*[75] case fulfilled this expectation. He also predicted the readiness of the courts to draw adverse interference from failure to give reasons for decisions.[76]

73 See: Loughlin (n 47).

74 *The Economist* 26 October 2019, p.79. Also see: Emmanuel Saez and Gabriel Zucman, *The Triumph of Injustice* (W. W. Norton and Company 2019); Heather Boushey, *Unbound* (Harvard University Press 2019); United Nations *Human Rights Council Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on Extreme Poverty and Human Rights* (22 May 2019) 1–4. House of Commons Briefing Paper, *Poverty in the UK: Statistics Number 7096* (5 September 2019); Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (Pontifical Academy of Social Science Acta 19 Vatican City 2014); 'Paths from the Past: Historians Make Sense of Today's Political Turmoil' (*The Observer Review* 30 March–1 April 2019).

75 [1990] UKHL 7.

76 De Smith (n 34) 7–8.

Historians of the seventeenth century might find Brexit a modern example of the process of continuous adjustment of constitutional norms to accommodate new sources of power, politics and authority. In a minor way, that process has already begun in the UK because of Brexit. The referendum result has challenged the way elected MPs view their role and purpose.

Two aspects of Brexit's direct impact on the constitution are in the use of constitutional conventions and in the use of prerogative powers. Any attempt to codify each might only result in greater powers to the Executive, thereby replacing political controls with legal ones. This would be the default position of any government anxious to maintain its residual discretion. Paradoxically, this may create a greater expansion for the judicial role, something that might be resisted, at the expense of legislative checks and balances through parliamentary scrutiny. Another, perhaps, unintended consequence of Brexit is that executive controls through a plethora of Henry VIII clauses have given greater control to the Executive than before Brexit under the European Union (Withdrawal) Act 2018. How long lasting will all this be for the UK's constitution? Future historians are likely to relegate Brexit to the same category of constitutional development that historical study ascribes to the period of the Stuarts, noting its continuing constitutional influence and lasting significance in the power relationship between, then the King, Parliament and the courts. Contested accounts prevail as to who gained and lost and the legitimacy of the winner's victory.

The constitutional reform debate has also been re-ignited by Brexit. One possibility is to take the opportunity of dissatisfaction over Brexit to reform parliamentary procedures and/or to consider the merits of a written constitution. The latter is advanced as a means of clarifying the role and function of each element – the legislature, the executive and the judiciary.[77] The government has already signalled a review into the role of judicial review and the Supreme Court, that has yet to be established and its terms of reference announced.

77 Vernon Bogdanor, *Beyond Brexit: The British Constitution* (Hart 2019).