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The Miller Case: How it transformed the British Constitution

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Introduction

The process of European integration had an abrupt slowdown mainly due to a widespread lack of confidence of citizens towards European Institutions, highlighted by the growing consensus granted to populist and Eurosceptic parties in several Member States. This political sentiment culminated in June 2016, when the British people expressed their will to withdraw from the European Union through a referendum. Withdrawing from an organisation like the European Union is far from simple, given the advanced level of cooperation among States which has been reached through Treaties. Such an action will inevitably entail significant consequences for legislative mechanisms, and especially for citizens involved. Article 50 of the Treaty on European Union (TEU) establishes the procedure that has to be triggered in order to withdraw, both for the receding state and for the European Institutions, taking into account the future relations between the EU and the state in question.

In the aftermath of the EU referendum, the resignation of the Prime Minister David Cameron, and the nomination of the new Prime Minister Theresa May, EU institutions required from the UK a certain degree of speed in triggering the due procedure, since that atmosphere of uncertainty and instability did not help to reassure European and British markets. Theresa May therefore affirmed that the sending of notice to the European Council, set out by Art. 50, fell within the competence of the government in virtue of the so-called Royal Prerogatives – those powers left over to the executive by the Monarch, which are to be exercised without the consent of Parliament. [1]

Following Theresa May's claim, the British business woman Gina Miller and other British citizens, decided to bring the matter before the High Court of England and Wales under the judicial review procedure, in order to test the legality of the decision taken by the Prime Minister. The objective was to obtain that Parliament be involved in the notification process to the EU. [2] In November 2016 The High Court ruled in favour of Ms. Miller, who saw her second triumph in January 2017 before the Supreme Court of the United Kingdom; [3] the

[1] The conduct of international relations is among those powers.
[2] R (Miller) v SS for Exiting the European Union [2016] EWHC 2768.
[3] R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5.

UKSC rejected the appeal of the Secretary of State, providing the ultimate authorisation to the involvement of the legislator in the triggering procedure.

The rationale behind the Miller judgment is that once Article 50 TEU is triggered, there is no turning back, which implied that the loss of rights is inevitable.[4] This is why interpretative disputes on this point are crucial in this regard. The academic debate surrounding the nature of the effects produced by the act of notice is crucial in clarifying the entire withdrawal procedure, and will definitely affect the latter's outcome. Art. 50 TEU is particularly detailed in its form, however, it omits a crucial aspect of the abovementioned procedure: whether once triggered through the sending of notice, it can be revoked by withdrawing notice, or because of an updated expression of the will of the people.

As the High Court held in its judgement that the notification of withdrawal is not revocable,[5] the opposite view has been expressed by several scholars. As Paul Craig argued,[6] the simplest reason why the act of notifying can be seen as reversible is that notification as provided for by Article 50 TEU, starts to produce its effects only once the withdrawal agreement is concluded, or once two years have passed. Notification can therefore be revoked before that time, as the state will still be enjoying all EU rights and obligations. In order to strengthen its argument, Craig [7] also refers to Article 68 of the Vienna Convention of the Law of Treaties (VCLT), which provides that *"a notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect".*

Some literature provided arguments in favour of the irrevocability of notice.[8] According to this interpretation, for Art. 50 TEU commands that Treaties no longer apply to the withdrawing state when two years elapse after notification has been given, exit from the EU is inevitable, no matter if and when an agreement is reached. In this view, the only way to re-join is, as ex Art. 49 TEU provides, to wait for the two years to elapse, and then trigger an application procedure.

[4] D. Sarmiento, *Miller, Brexit and the (maybe not to so evil) Court of Justice*, VerfBlog, 8 November 2016.
[5] R (Miller) v SS for Exiting the European Union [2016] EWHC 2768 para. 10.
[6] P. Craig, *Brexit: Foundational Constitutional and Interpretive Principles: II*, 28 October 2016
[7] *Ibid.*
[8] C. Curti Gialdino, *Oltre la Brexit: brevi note sulle implicazioni giuridiche e politiche per il futuro prossimo dell'Unione europea,* 29 June 2016.

However, in the view of another scholar,[9] the same provision (Art. 50 TEU) admits revocability from notification. This is so because it would not make sense to wait for two years to elapse before a State can ask to re-adhere to the Union through ex Art. 49 TEU, if the State in question changes its view upon withdrawal one year after having notified the Council. According to this interpretation, such a procedure would be a waste of time, and it would contribute to the process of European integration losing credibility.

The strongest argument in favour of admitting the reversible character of the notification can be derived by EU law, and specifically Article 1 TEU. The provision poses the objective of promoting an *"ever closer union among the peoples of Europe"*, thus the possibility that a Member State left the EU should be considered as an exception, and the withdrawal proceedings should be contrived in line with a logic which preserves, and does not disrupt, membership. [10]

The main purpose of this dissertation is to provide an analysis of the two *Miller* rulings in the framework of the core constitutional principles, and of the reasons which conducted the two courts to their final decisions. The main implications and consequences that the *Miller* judgement entails will be highlighted, as well as different crucial views expressed by the core literature.

The work is divided into three chapters. The first chapter examines the principal issues dealt with within the context of the case, the main submissions of the two parties and the main constitutional matters involved. The leading constitutional dispute was that between the long-established principle of parliamentary sovereignty and the Royal Prerogative. The difference between the classical approach adopted by the High Court and the evolutionary interpretation of the Supreme Court concerning the first legal question is also emphasised. As it was pointed out by both judgments, withdrawal from the Union would indirectly imply for British citizens, the loss of a set of rights deriving from EU law. In addition, as the Supreme Court specified in its ruling, Brexit would lead to the abrogation of the European Communities Act 1972 (ECA), which has statutory footing and is therefore a source of domestic law. [11] In virtue of these implications, the courts ruled that, basing on the principle of parliamentary

[9] P. Syrpis *What next? An Analysis of the EU law questions surrounding Article 50 TEU,* 11 July 2016.
[10] A. Miglio, *Brexit e il dilemma del prigioniero: sulla revocabilità della notifica del recesso prevista dall'art. 50 TUE,* 21 September 2016.
[11] R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 80.

sovereignty, prerogative power cannot prevail over an act of Parliament. Royal prerogative cannot be responsible of cutting out a source of European Union law and of depriving British citizens of a set of rights. The opinions of the three dissenting judges of the Supreme Court are also explored in the chapter.

If the reasons of the judgement might appear as obvious to many, the politically divisive and profoundly sensitive character of the case made the judges vulnerable to unprecedented criticism.[12] In this regard, the second chapter is devoted to the concept of judicial independence, and to how the latter can be undermined by criticism coming from the media or from political exponents. *Miller* judges have been widely accused of wishing to overturn the will of the people, [13] the case has been presented as an attempt to prevent Brexit from happening rather than to ensure the process happened lawfully. The fundamental role of separation of powers within the UK constitution will be outlined, as well as the role of Lord Chancellor in older times, nowadays, and in the framework of the case in question.

The second legal question concerned whether the three devolved legislatures, Scotland, Northern Ireland and Wales, should give their consent before the procedure is activated and Art. 50 invoked. The focus of the third chapter will be the devolution question, and how the issue is delineated taking into account the nature and the purpose of the Sewel Convention[14]. The relevance of constitutional conventions is also examined, since that of the convention is a crucial constitutional instrument in the UK. On this matter, the Supreme Court decided that since the Sewel Convention is not enforceable in courts, devolved administrations cannot be involved in the process of withdrawal.[15]

[12] The headline of the front page of the *Daily Mail* on 4 November 2016 branded judges as "*Enemies of the people"* and criticised them for being "*out of touch".*

[13] Criticism also came from politicians: the business secretary Sajid Javid commented during the BBC One's Question Time that *"this was an attempt to frustrate the will of the British people and it is unacceptable".*

[14] The Convention was incorporated in the Scotland Act 1998 and rules that the Westminster Parliament should not normally legislate with regard to devolved matters without the consent of the devolved legislatures.

[15] The Supreme Court concluded that, *"Judges … are neither the parents nor the guardians of political conventions"* and they *"cannot give legal rulings on [their] operation or scope, because those matters are determined within the political world".* R (on the application of Miller and another) v Secretary of State for Exiting the European Union, para. 146.

Chapter I

The *Miller* Case

On January 1973, the United Kingdom joined the European Economic Community (EEC), now the European Union (EU). This was achieved through the Treaty of Accession of 1972 signed by ministers, and the European Communities Act enacted by Parliament on the same year. An Act of Parliament adopted in 2008, approved the incorporation of Article 50 into the EU Treaties. Article 50 of the Treaty on European Union (TEU)[16] provides, in summary terms, that a Member State wishing to withdraw from the European Union may do so by giving notice to the European Council "*in accordance with its own constitutional requirements"* and that EU Treaties shall *"cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification".*

The decision in *Miller* is of major constitutional, legal and political importance, as it has brought into sharp focus a few crucial constitutional principles, namely the rule of law, the independence of the judiciary, and the sovereignty of Parliament. Issues discussed include the fundamental relationship between Parliament and the Government and that between Westminster and the devolved legislatures; the degree to which change to the UK constitution occurred in terms of membership of the EU before departing is also examined, as well as possible changes that withdrawal will entail.

This chapter will present the core legal and political questions dealt with within this litigation, as well as analyse and compare the different approaches used by the Divisional Court and the Supreme Court in settling the dispute. The main themes on which the respective positions are based are the clash between royal prerogatives and parliamentary

[16] The first two paragraphs of Article 50 TEU precisely provide the following:

(1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

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

sovereignty; the relationship between the UK and the EU following the enactment of the European Communities Act 1972.

1.1 Description of the case: main issues and submissions

The main issue at stake was whether government ministers were legally entitled through their prerogative powers, to give notice of withdrawal, without prior approval by an Act of Parliament. Additional issues were raised by Northern Ireland, the Lord Advocate for the Scottish Government and the Counsel General for Wales for the Welsh Government, concerning the role of devolved assemblies in the field of supranational relations; specifically, whether the legislatures in Scotland, Wales and Northern Ireland should be consulted before Notice is served.

1.1.1 Main question – Royal Prerogative or parliamentary sovereignty?

The principal issue was raised by Gina Miller [17] and Deir Dos Santos, who challenged the Secretary of State for Exiting the European Union through a judicial review procedure. The Divisional Court of England and Wales declared that the Secretary of State did not have power to notify withdrawal, without Parliament's prior authority.[18] The Secretary of State has appealed against this decision to the Supreme Court, which, on 24 January 2017, confirmed the judgement of the High Court of Justice.[19]

The main question which stands at the heart of the dispute is the one between, the prerogative power to make and unmake treaties which lies with the government on the one hand, and the supremacy of Parliament on the other. According to Article 50, only after notice is given, the treaty provides for the opening of negotiations which are meant to detail the proceedings of withdrawal and the future relationship between the Member State in question and the European Union. It is therefore clear that the act of notice is one of great significance; the notice, as the Select Committee on the Constitution of the House of Lords has highlighted, represents *"the moment at which the countdown starts and an initial deadline for the UK's*

[17] Gina Nadira Miller is a Guyanese-British woman who had standing to bring judicial review against the Government in virtue of her interest in safeguarding their rights as a European citizen.
[18] R (Miller) v SS for Exiting the European Union [2016] EWHC 2768.
[19] R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5.

withdrawal from the EU is set".[20] However, neither the question posed to the electorate nor the provisions contained in the European Union Referendum Act 2015 [21] were able to determine clearly which body was entitled, in case the popular consultation was given legal effect, to trigger the withdrawal clause contained in the Treaty and to notify the European Council. It should be also mentioned that both the claimants and the defendant accepted that the result of the referendum was not legally binding, and therefore did not itself represent a decision by the UK to withdraw from the Union, nor an authorisation to trigger Art. 50. Albeit in the absence of an explicit procedure, the British Government has assumed since the beginning to be the body to hold such triggering power,[22] believing the sending of notice of withdrawal to be an act of royal prerogative, exercisable autonomously by the executive.

1.1.2 The parties' main submissions

The primary submission[23] brought by the claimants before the High Court of Justice of the United Kingdom was that, according to a fundamental constitutional principle, the Crown's prerogative powers cannot modify domestic rights conferred by Parliament unless Parliament so authorises. It was also argued that the Government could not demonstrate any statutory authority that empowered it to trigger Article 50. The claimants also provide an alternative submission, which holds that any removal of rights deriving from EU law, applicable in domestic law, is prevented by the European Communities Act 1972 (ECA).

The Secretary of State [24] responded to the claim in a formalistic and technical way, aiming to draw a line between the "decision to leave" – the referendum outcome which it regarded as an mandate directed to the Government from the people – and the use of the prerogative power to notify the European Council.[25] The Government took the view that a notification is a mere administrative act which applies on the international law plane, reducing it to a

[20] 'The invoking of Article 50' 4th Report of Session 2016-17, HL Paper 44.

[21] The European Union Referendum Act 2015, 17 December 2015. Full text at http://www.legislation.gov.uk/ukpga/2015/36/section/14/enacted

[22] On 27 June 2016, the former Prime Minister David Cameron declared to the House of Commons that "*the triggering of Article 50 is a matter for the British Government*" and "*a national sovereign decision*", Hc Hansard, *Outcome of the EU Referendum.*

[23] R (Miller) v SS for Exiting the European Union [2016] EWHC 2768 para. 74.

[24] David Michael Davis MP (23 December 1948) is a British Conservative Party politician who served as Secretary of State for Exiting the European Union from July 2016 to July 2018, and has served as Member of Parliament (MP) for Haltemprice and Howden since 1997. He is the Secretary of State responsible for the United Kingdom's withdrawal from the European Union.

[25] These submissions are accurately reported in the detailed grounds of resistance on behalf of the Secretary of State, CO/3809/2016; CO/3281/2016. Available at: https://www.bindmans.com/uploads/files/documents/Defendant_s_Detailed_Grounds_of_Resistance_for_publication.PDF

bureaucratic sideshow. For this reason, the act of notifying is seen as the procedural application of a decision, that of withdrawing, that had already taken place on 23 June 2016 as a result of the EU referendum. As reported by the defendant's argument, the will of the people is sufficient to initiate the withdrawing procedure which, constitutionally, is in the hands of the Government, and which consists in triggering Article 50.

1.2 Royal Prerogative: its exercise and limits

Historically, the Royal Prerogative takes its roots in the medieval period, when the Monarch was both a feudal lord and the head of the Kingdom, possessing a set of residual powers which could be used for the public good. [26] The King could not be sued in the courts, administered justice through his Council, and had unrestricted power over foreign policy. Following some disputes in the 17th century, the Bill of Rights was approved in 1689, declaring illegal certain specific uses and abuses of the prerogative.[27] Namely, the Bill of Rights prevented monarchs from levying taxes and suspending laws without the consent of Parliament. [28] Over time, the concept of ministerial responsibility was affirmed; it became clear that prerogative powers could not be exercised but on the advice of ministers accountable to Parliament.[29] Today, the prerogative includes areas such as defence, the conduct of international affairs and national security.

A comprehensive and officially recognised definition of prerogative powers has never existed. However, several scholars have attempted to define the scope of such powers. In the 17th century, Sir William Blackstone delineated prerogative as being limited to *"that special pre-eminence, which the King hath, over and above all other persons".*[30] The prominent 19th century constitutional theorist A.V. Dicey, gave a broad description of the Royal Prerogative, which future judicial decisions have tended to refer to, defining it as: *"the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers."* [31]

[26] C. Munro, *Studies in Constitutional Law*, Butterworths, 1999.
[27] House of Commons Factsheet G4, *The Glorious Revolution.*
[28] The Bill of Rights 1689 provides *"That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal"* and *"That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal".*
[29] AW Bradley and KD Ewing, *Constitutional and Administrative Law*, 13th edition, 2003.
[30] Blackstone, *Commentaries on the Laws of England*, 8th edition 1778.
[31] A.V. Dicey, *An introduction to the study of the Law of the Constitution*, 10th edition, 1959.

1.2.1 The scope of the prerogative as a matter of common law

The central constitutional principle of parliamentary sovereignty which has often clashed with the prerogative suggests that there is no other source of law more authoritative than an Act of Parliament and that no other body can challenge the validity of the laws made by Parliament. Statutory law is, therefore, superior to any other kind of power including prerogative power or common law decided by the courts. In Dicey's view, the principle of parliamentary supremacy is a cornerstone of the English Constitution, on which everything else depends. It is clear that, in the absence of a codified constitution, the role of Parliament as a law-maker acquires extraordinary importance. [32] The difficulty in determining the scope of the prerogative power is widely known and evident; indeed, its existence and extent of its applicability has come to be a matter of common law, as courts are recognised as the final arbiter when such issue arises.[33]

The leading case exposing the principle of parliamentary sovereignty over prerogatives is *Attorney-General v De Keyser's Royal Hotel Ltd* [34]. In the dispute in question, the claimant demanded compensation under the Defence Act 1842 for the requisition of his hotel during the First World War. The House of Lords held that the hotel's owner was entitled to compensation in the manner provided by the Defence Act 1842. Requisition and compensation were therefore said to be now governed by statute which superseded the prerogative power. Similarly, in the *Fire Brigades Union case* of 1995 Lord Brown-Wilkinson stated that *"it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament as expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme..."*.[35]

The historical origins of the modern interpretation of the principle date to the *Case of Proclamations*,[36] where the court was required to express an opinion as to whether the monarch could prohibit new buildings or the making of wheat, as James I had wished to outlaw these activities.[37] In his judgment Sir Edward Cook stated that "*the King hath no*

[32] A.V. Dicey, *The Law of the Constitution*, 1885, pp 39-40.
[33] R (Miller) v SS for Exiting the European Union [2016] EWHC 2768 paras 20-23. In this regard, it is also relevant to refer to the *Review of the Executive Royal Prerogative Powers*: Final Report, Ministry of Justice, 2009.
[34] [1920] AC 508.
[35] R v Secretary of State for the Home Department, ex parte Fire Brigates Union [1995] 2 All ER 244.
[36] The Case of Proclamations [1610] EWHC KB J22.
[37] R (Miller) v SS for Exiting the European Union [2016] EWHC 2768 para. 27.

prerogative but that which the law of the land allows him" and he ruled that the Royal Prerogative did not enable the King to outlaw previously legal actions without Parliament consenting. Furthermore, the GCHQ case is particularly relevant [38], where the government of Margaret Thatcher issued an Order in Council in virtue of the Royal Prerogative to prevent employees of the Government Communications Headquarters (GCHQ) from joining trade unions for reasons of "national security". The crucial principle confirmed by the courts is that the exercise of the prerogative can be challenged through judicial review. Even though the challenge to the Prime Minister did not success for security reasons, this principle was strongly endorsed by the House of Lords.

In the *Miller* case, the Secretary of State had claimed that, since treaty-making and treaty-unmaking was the domain of the Crown, and since neither the ECA 1972 nor any other parliamentary statute have ever abrogated such prerogative powers relating to the conduct of international relations, [39] Article 50 was to be invoked by the Government in the exercise of the prerogative powers. The High Court of Justice and the UK Supreme Court rejected this argument and applied the principles established in case law discussed above. The Courts ruled that the Crown cannot alter statute law using the prerogative, as this is not what Parliament intended to provide through the ECA 1972 [40].

1.3 Questioning dualism and the protection of EU fundamental rights

Before analysing the decision of the UK Supreme Court, it is appropriate to grasp its roots, which lie in the Divisional Court's judgement.

Regarding the relationship between the prerogative and statute, the Court traced the historical origins of the royal prerogative, as well as its application in the context of the progressive expansion of the statutory authority. Prerogatives represent *"the residue of legal authority left in the hands of the Crown"*[41]. The extension of prerogative powers is subordinated to the exercise of the legislative activity of Parliament: the power of the government can produce effects only within the limits fixed by legislative acts. Hence, in accordance with this principle, *"statute beats prerogative"*.[42] However, a generally recognised rule states that

[38] Council of Civil Service Unions v Minister of the Civil Service (1984/5).
[39] R (Miller) v SS for Exiting the European Union [2016] EWHC 2768 para. 31.
[40] R (Miller) v SS for Exiting the European Union [2016] EWHC 2768 paras. 77 and following.
[41] R (Miller) v SS for Exiting the European Union [2016] EWHC 2768 para. 24.
[42] N. Barber, T. Hickman, J. King, *Pulling the Article 50 'Trigger': Parliament's Indispensable Role*, in UK Const. L. Blog, 27 June 2016.

powers such as managing international relations, as well as ratifying and terminating treaties on behalf of the United Kingdom, fall within the competence of the government in virtue of its prerogative powers.[43] The reason for this power can be found, according to the judges, in the typically British dualistic approach to international law. This idea is based on a perfect separation between the domestic plane and the external one. It means that a supranational legal provision produces effects in the legal order of the UK only in virtue of a legislative act by Parliament authorizing it. *"Any obligations arising from international law treaties do not take effect at domestic level until Parliament chooses to incorporate all or part of the international law into the domestic sphere. To be clear, there is a formal separation between the international and national spheres; the Royal Prerogative allows the Government, on the Sovereign's behalf, to conduct foreign affairs and enter into international treaties but these treaties only have any direct domestic application because Parliament (through an Act) intends it to be so".* [44]

1.3.1 UK-EU relations after the ECA 1972

The issue is slightly more complex when it comes to the relationship between the internal legal order and the European one, as the latter produces direct effects on the legal sphere of single citizens.[45]

The European Communities Act 1972 (ECA 1972) is a source of multiple international obligations, having the role of incorporating directly effective provisions of EU law into English law. As Section 2 of the Act provides, *"all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties,"* have to be granted legal effect in the United Kingdom, without the need for additional legislation enacting them. [46] The interaction between the EU legal order and the English order

[43] R (Miller) v SS for Exiting the European Union [2016] EWHC 2768 para. 30.
[44] T. Fairclough, *Article 50 and the Royal Prerogative*, in UK Const. L. Blog, 8 July 2016.
[45] As the *van Gend en Loos* case established in 1963: *"The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit with in limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage".* Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nerlandese Administratis der Belastingen* [1963] ECR 1, 12.
[46] Section 2 (1) of the ECA 1972 provides as follows: *"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly."*

is summed up in the dichotomy monism/dualism, with the Government suggesting the need to separate the international sphere of the legal consequences of the membership to the Union and the domestic plane. As explained above, according to the dualist conception, internal law and international law constitute two different systems, composed of norms which are independent the ones from the others, and in virtue of this, they must be kept separate. On the other hand, the monistic theory holds that the internal and the international judicial orders should be considered as belonging to the same system of legal norms – in states with a monist system the act of ratifying an international treaty automatically assimilates that international law into domestic law. As the High Court argues, the dualistic logic fails to catch the peculiar nature of the EU. Aware of such peculiarities, the judges keep themselves close to a linear approach, in accordance with the dualistic model. However, some passages stand out where the Court seems to be taking a more monistic view, when it advocates for legality not to be *"divorced"* from reality.[47] The predominance of the dualistic approach in the High Court's decision is nonetheless clear.

The European Communities Act has given domestic legal force to a wide range of fundamental civil and political rights recognised under the EU Charter of Fundamental Rights (EU Charter).[48] The court had to consider whether it would be legal for the executive to unilaterally trigger Article 50 and abrogate these fundamental rights. The Government contended that triggering Article 50 would not cause the removal of rights created by an Act of Parliament, and would not undermine the purpose of the ECA 1972. However, on the basis of the Legality Principle, which is a cornerstone of the UK Constitution, legal subjects cannot be exposed to the risk of losing the fundamental rights they enjoy under the EU Charter.[49] In the House of Lords, Lord Hoffman explained in an earlier case that: *"The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. (…) In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."*[50]

[47] *"The reality is that Parliament knew and intended that enactment of the ECA 1972 would provide the foundation for the acquisition of British citizens of rights under the EU law which they could enforce in the courts of other Member States"* R (Miller) v SS for Exiting the European Union [2016] EWHC 2768 para. 66.
[48] Charter of Fundamental Rights of the European Union (2012/C 326/02).
[49] J. Adenitire, *The Executive Cannot Abrogate Fundamental Rights without Specific Parliamentary Mandate – The Implications of the EU Charter of Fundamental Rights for Triggering Art 50* in UK Const. L. Blog, 21 July 2016.
[50] Regina v. Secretary of State for the Home Department Ex parte Simms [2000] 2 AC 115, para.131.

Furthermore, in *Thoburn v Sunderland City Council* Laws LJ had categorised the ECA 1972, even though only in the form of an *obiter dictum*, as a constitutional statute. This was because of its content and the effects produced in the internal legal order.[51] It flows from this that the ECA would not be subject to the principle of implied repeal by subsequent legislation as would be the case with other legislation. Only through explicit language contained in a *"subsequent statute or by necessary implication from the provisions of such a statute"*[52] may such statute be repealed. Since the nature of the ECA provides for it to overcome national borders between Member States and to produce rights and obligations which directly affect individuals, as the source of law coming from the EU is cut off, those rights would no longer be applicable.[53] Thus, allowing the executive to autonomously invoke Article 50 would imply abrogating through prerogative powers fundamental community rights which produce effects in the domestic sphere. This would not comply with the principle according to which *"prerogative power cannot be exercised to take away rights of citizen recognised by statute, or be exercised to undermine the aim of a statute"*.[54]

1.3.2 The Supreme Court's evolutionary decision

The decision coming from the eleven Supreme Court judges confirmed the High Court's judgment, which denied the Government the power to exercise the procedure of withdrawal from the European Union according to Article 50 TEU in the absence of prior authorisation by Parliament. At first glance, the UKSC seems to be consistent with the dualistic principle expressed by the High Court, as it confirms the reconstruction of the latter regarding the origin of royal prerogatives and its application in the field of supranational relations.[55] The

[51] *"It may be there has never been a statute having such profound effects on so many dimensions of our daily lives." Thoburn v Sunderland City Council* [2003] QB 151 (DC) para. 62.
[52] *Ibid.* para. 44.
[53] *"It is common ground that if the United Kingdom withdraws from the Treaties pursuant to a notice given under Article 50 of the TEU, there will no longer be any enforceable EU rights in relation to which this provision will have any application. Section 2(1) would be stripped of any practical effect".* R (Miller) v SS for Exiting the European Union [2016] EWHC 2768 para. 51.
[54] *"As a matter of constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament".* R (Miller) v SS for Exiting the European Union [2016] EWHC 2768 para. 32.
[55] *"The most significant area in which ministers exercise the Royal prerogative is the conduct of the United Kingdom's foreign affairs. This includes diplomatic Page 19 relations, the deployment of armed forces abroad, and, particularly in point for present purposes, the making of treaties […] subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts […] This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions.*

Court also confirmed the reasons put forward by the judges of first instance on the matter of the protection of rights: "*Although article 50 operates on the plane of international law, it is common ground that, because the EU Treaties apply as part of UK law, our domestic law will change as a result of the United Kingdom ceasing to be party to them, and rights enjoyed by UK residents granted through EU law will be affected"*.[56] Thus, it is necessary to intervene by a statute which authorises the Government to proceed, since prerogatives are intrinsically limited by statutory rights and cannot be utilised to frustrate the will of Parliament. It is clear that as a result of the UK withdrawing from the EU several rights deriving from the EU treaties will be lost.[57]

As in proceedings at first instance, even before the Supreme Court the arguments of the Secretary of State appeared weak, presenting a formalistic logic according to which the ECA 1972 does not autonomously *create* rights in the national sphere, but merely *transposes* such rights into the domestic order. The government posits that the role of the 1972 Act is simply that of conferring efficacy to rights coming from an external source and, therefore, there would be no need for parliamentary approval. The fragility of the thesis put forward by the Secretary of State resides in its lack of flexibility which pushes the dualist principle to extreme consequences.[58]This view is profoundly rooted to an excessively classical conception of the British constitutionalism, one which does not admit the intrusion of a supranational legal order not approved by a legislative act, failing to capture the peculiarity of the nature of the Union. The judges of last instance assert that the ECA 1972 did not simply give efficacy to the European law, but rather transferred to Brussels part of the legislative

The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state." R (on the application of Miller and another) v Secretary of State for Exiting the European Union, [2017] UKSC 5, paras. 54-55.

[56] R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 69.

[57] In this regard: *"the EU Treaties not only concern the international relations of the United Kingdom, they are a source of domestic law, and they are a source of domestic legal rights many of which are inextricably linked with domestic law from other sources. Accordingly, the Royal prerogative to make and unmake treaties, which operates wholly on the international plane, cannot be exercised in relation to the EU Treaties, at least in the absence of domestic sanction in appropriate statutory form.*" R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 86.

[58] S. Gianello, *Il caso "Miller" davanti alla UK Supreme Court: i principi del costituzionalismo britannico alla prova della Brexit*, Osservatorio Costituzionale, Fascicolo 1/2017, 24 April 2017.

sovereign owned by Westminster; [59] this is the reason why the UKSC decision represents a tangible proof of an evolutionary flow in British constitutional law. [60]

1.4 The UKSC beyond dualism and EU rights – EU law as a source of UK law

The judgment of the Supreme Court deserves to be analysed in virtue of the wide range of reasons put forward. The UKSC undertakes a different autonomous path compared to that of the High Court, one which goes beyond the protection of rights and the relations between the European Union and the United Kingdom. The Court rather centres its reasoning on the relationship between the powers of the state, through an in-depth journey across the current system of sources of law, and how the latter changed as a consequence of the UK adhering to the European order. The Supreme Court deals with the issue of loss of rights only in a consequential way, focusing instead on constitutional principles and equilibriums.[61]

The majority view was that the ECA 1972 *"effectively constitutes EU law as an entirely new independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning".*[62] The implementation of European Treaties allowed a supranational legal source to act autonomously producing direct effects prevailing over the existing sources. [63] This is the reason why, as the court puts it, the withdrawal from the European Union would not only undermine solely individual rights, but it would seriously affect the constitutional system of sources, removing community law from the UK legal order. According to the Supreme Court judges giving the majority opinion, this would constitute a powerful and serious change in constitutional law, a change which cannot occur without the Parliament legislatively repealing the 1972 Act. *"It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action*

[59] "*The 1972 Act effectively operates as a partial transfer of law-making powers, or an assignment of legislative competences, by Parliament to the EU law-making institutions (so long as Parliament wills it), rather than a statutory delegation of the power to make ancillary regulations […] The 1972 Act cannot be said to constitute EU legislative institutions the delegates of Parliament: they make laws independently of Parliament, and indeed they were doing so before the 1972 Act was passed".* R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 68.

[60] S. Gianello, *Il caso "Miller" davanti alla UK Supreme Court: i principi del costituzionalismo britannico alla prova della Brexit*, Osservatorio Costituzionale, Fascicolo 1/2017, 24 April 2017.

[61] C. Martinelli, *I poteri costituzionali di fronte alla Brexit: la UKSC fissa i confini,*. FORUM DPCE Online-Brexit.

[62] R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 80.

[63] *"In 1972, for the first time in the history of the United Kingdom, a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts".* R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 90.

alone. All the more so when the source in question was brought into existence by Parliament through primary legislation, which gave that source an overriding supremacy in the hierarchy of domestic law sources".[64] Letting the Government alter the system of sources of law, and therefore alter the constitution itself, in place of the legislative body, would not only render the constitution vulnerable to abuse by the majority, but also frustrate the principle of parliamentary sovereignty. According to a principle, which represents an underlying constitutional value, statutory authority is more appropriate than prerogative authority when the actions in question are of such importance and necessarily lead to substantial constitutional changes. [65] In this regard, it is interesting to mention the Government's Green Paper, The Governance of Britain,[66] launched by the Prime Minister Gordon Brown in July 2007 which was not approved. One of the most important proposals of the reform project intended to shift power from the executive to Parliament, reducing ministerial function in the international field. Brown stressed that in a modern parliamentary democracy, crucial decisions affecting the country – such as ratifying and terminating international treaties or deploying the armed forces – should be made with Parliament's consent.

Affirming that the ECA 1972 gave birth to a new source of law, the judges go beyond the dualist principle; admitting that a new legislative process came into existence thanks to the 1972 Act, and that it now acts independently and autonomously. The judges of last resort open up to the possibility of conceiving the relationship between the State and the EU in a different way. This new understanding goes beyond the usual binary interpretation which imposes the strict separation between the two legal orders. The Supreme Court manages to justify the existence of a new supranational source of law, yet without ignoring the dualistic logic. It was argued that dualism does not constitute an absolute, essential doctrine: it can indeed represent a limit, especially when it comes to interacting with the European legal order, whose degree of integration is significantly high. In this litigation, we see the emergence of the flexible character of the UK constitution, which, if on the one hand did not favour a straightforward identification of the body possessing the right to trigger Art. 50, on the other hand it allowed the judges the flexibility to confer on Parliament the power to trigger Brexit. The absence of rigidity inherent to the constitution made it possible to the

[64] R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 81.
[65] A. Blick, R Gordon QC, *Using the Prerogative for Major Constitutional Change: The United Kingdom Constitution and Article 50 of the Treaty on European Union,* 19 July 2016.
[66] *The Governance of Britain*, July 2007, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf

constitution itself to evolve, taking into account the unique characteristics of the European legal order. According to the decision of the Supreme Court, European Treaties are not to be considered international law sources, but domestic law sources. They are an effective part of the British constitutional system, which means that withdrawal will not simply modify the relationships between Britain and the rest of the Union, rather it will cause a real constitutional mutation. [67]

In summary, the reasoning on which the decision of the Supreme Court is based is two-fold: the Government cannot determine on its own a significant change in the constitutional system of the sources of law to which the European legal order belongs, as well as it cannot modify the rights of British citizens deriving from European sources. Furthermore, the Court ruled that the relationship between the UK and the EU, including the decision of withdrawal, are of exclusive competence of Parliament. Therefore, the UKSC judgements produces its effects both in the UK-EU relations and on the British constitutional setting.

1.5 Dissenting opinions

The disagreement between the majority judgment and the dissenting opinions given by Lord Reed, Lord Carnwath and Lord Hughes finds its essence in the dilemma on whether Article 50 TEU can be triggered in virtue of prerogative powers. The most comprehensive view was provided by Lord Reed, an opinion shared by the other two dissenters. The central question does not concern the generally recognised – and undisputed – rule according to which the conduct of international relations is a matter for the Government under its prerogative powers, but rather whether EU law can be treated as a source of domestic law. This is so because, since the majority considers EU law as an effective source of English law, the prerogative power to manage international relations is no longer relevant. It is however clear that, because Lord Reed does not regard EU law as a source of domestic law, he still considers the international relations prerogative power to remain a valid argument.[68]

[67] In order to support their decision, the majority judges in *Miller refer to H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476. Here, Lord Oliver of Aylmerton explained that even though the Royal Prerogative *"embraces"* the power to make and unmake treaties, the act of conferring rights to individuals or depriving them of rights is not included.

[68] As it will be outlined below, the dissenting judges pick up the arguments provided by John Finnis, which assert the analogy between the European Communities Act 1972 and the Taxation Act 2010, and state that the rights generated by such treaties should more correctly be considered as non-statuary, and can therefore be eliminated without a parliamentary act.

1.5.1 Lord Reed – meaning and essence of the ECA

According to Lord Reed who gives the 1972 Act a narrow interpretation, EU rights cannot be regarded as domestic law rights in the traditional sense; therefore, for him, invoking Article 50 does not involve the removal of fundamental internal rights or of a source of UK law. Lord Reed argued that the ECA 1972 generally recognises EU law and its effects, however, in his view, the Act does not go as far as introducing rights themselves. He further specified that *"there is no obligation 'in accordance with the Treaties' to give effect in the UK to EU rights, powers and so forth merely because they are directly effective under EU law: such an obligation arises only if and for so long as the Treaties apply to the UK "*.[69] Hence, in Lord Reed's view, with which the two other dissenters agree, rights deriving from the EU legal order cannot become or be considered as equivalent to statute law, they will keep their status of community rights. This is the reason why dissenters argue that the abrogation of such rights can occur even without Parliamentary approval.[70] The question with which the majority deals with, concerns whether the European Communities Act 1972 creates the power which allows the prerogative to extend its function to the triggering of Art. 50. As the 11 majority judges argue, neither the ECA 1972 nor other legislation establishes such power. On the other hand, Lord Reed contends that the faculty of the government to act in regards of foreign relations in the name of the Royal Prerogative remains lawful until legislation precludes it: in his view, such legislation does not yet exist.

Another fundamental point which the dissenting judges and the majority disagree on is the essence and goal of the ECA. Lord Reed refutes the argument according to which the UK should be a member of the EU until Parliament stipulates differently. He affirms that triggering Art. 50 would not repeal or frustrate the ECA 1972; when Parliament enacted the ECA 1972 it meant that rights arising under EU law should have effect in UK law, it was not implied that the UK should continue to be a Member State. Lord Reed argues against the idea that the prerogative exercising withdrawal is implicitly precluded by the 1972 Act. The argument of the majority comes from the belief that it was Parliament's intention, through the ECA, to allow the UK to join the Community, and therefore nothing but Parliament can provide otherwise. In contrast, Lord Reed expresses a diametrically opposite view on the purpose of the ECA 1972. In his words: *"The Act imposes no requirement, and manifests no intention, in respect of the UK's membership of the EU. It does not, therefore, affect the*

[69] R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 190.
[70] R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 216.

Crown's exercise of prerogative powers in respect of UK membership." [71] Moreover, Lord Reed considers the Act to be a mere *"scheme under which the effect given to EU law in domestic law reflects the UK's international obligations under the Treaties, whatever they may be."* [72] Lord Reed further argues that judicial control should not be applied over the exercise of ministerial power, and that doing so is in contrast to the British constitutional tradition.[73] The dissenting judge indicates that the intervention by the court in the case amounts to a risky legalisation of politics, which might result in harming the judiciary. [74]

1.5.2 Lord Carnwath and Lord Hughes – "the balance of power"

In his dissenting opinion, Lord Carnwath places great emphasis on the issue of executive accountability to Parliament for the exercise of its powers, including its prerogative powers. Following the same line as Lord Reed, he refers to the relevant issue of *"the balance of power". "The Executive is accountable to Parliament for its exercise of the prerogative, including its actions in international law. That account is made through ordinary Parliamentary procedures. […] they are a matter for Parliament alone. The courts may not inquire into the methods by which Parliament exercises control over the Executive, nor their adequacy."* [75] Lord Carnwath also criticises the decision of the Divisional Court for examining the issue in a binary way, arguing that it is wrong to see the issues raised by *Miller* in terms of "*a simple choice"* between parliamentary sovereignty and "*untrammeled"* prerogative power.[76]

Lord Hughes expressed a similar view recalling the arguments made by the two other dissenters, stating that *"the government's case is that the European Communities Act 1972, which did indeed make European rules into laws of the UK, will simply cease to operate if*

[71] R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 177.
[72] R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 187.
[73] *"Controls over the exercise of ministerial powers under the British constitution are not solely, or even primarily, of a legal character, as Lord Carnwath explains in his judgment. Courts should not overlook the constitutional importance of ministerial accountability to Parliament. Ministerial decisions in the exercise of prerogative powers, of greater importance than leaving the EU, have been taken without any possibility of judicial control: examples include the declarations of war in 1914 and 1939. For a court to proceed on the basis that if a prerogative power is capable of being exercised arbitrarily or perversely, it must necessarily be subject to judicial control, is to base legal doctrine on an assumption which is foreign to our constitutional traditions."* R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 240.
[74] *"It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary."* R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 240.
[75] R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 249.
[76] R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 249.

the UK leaves. The Act was only ever designed to have effect whilst we were members of the EU. It agrees that as a government it cannot alter the law of the UK which statute has made, but it says that if [the government] *serves notice to leave the EU, and in due course we leave, it would not be altering the statute; the statute would simply cease to apply because there would no longer be rules under treaties to which the UK was a party."* [77]

1.5.3 John Finnis in support of the dissenting argument

Arguably, the main issue discussed in *Miller* attracted so much controversy because of the imprecise drafting of the ECA 1972, which brings about uncertainty and difficulties of statutory interpretation. The ambiguity concerned especially the wide network of relevant constitutional principles, rather than crucial rules applying to the interaction between statute and prerogative.[78] The argument according to which the exercise of the prerogative is legally allowed to result in a change in domestic law has been suggested by John Finnis. [79] He argued the principle that legislation is not a necessary condition to introduce "*treaty-based rights"* in the internal order, whilst the treaty itself is necessary but not sufficient. However, legislation is not sufficient to assure that such rights remain enforceable over time, because their remaining valid depends on the efficacy of the treaty, which is allowed to terminate through governmental action. To support his argument, Finnis recalls that the termination provisions of double-taxation treaties (DTTs), and consequently of the rights which arise under such treaties, follow the logic detailed above. He, therefore, asserts the analogy between the European Communities Act 1972 and the Taxation (International and Other Provisions) Act [TIOPA] 2010 [80], stating that *"treaty-based UK rights"* introduced by the s. 2(1) ECA 1972 are strictly similar to the treaty-based UK rights arising under double-taxation treaties. As Finnis explains in his blog, section 2 of both treaties – The ECA 1972 and the TIOPA 2010 [81] – create statutory rights in the sense that Acts in question are *"a necessary condition for the rights' legal efficacy in the UK".* However, the author also specifies that the

[77] R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 280.
[78] M. Elliott, *The Supreme Court judgement in Miller: In search of constitutional principle*, 2017.
[79] J. Finnis, *Terminating Treaty-based UK Rights,* in UK Const. L. Blog, 26 October 2016.
[80] *"These treaty-based UK rights for which s. 2(1) ECA is a necessary condition are closely analogous to the treaty-based UK rights acquired under double-tax treaties, treaties given statutory effect in UK law as they have international effect from time to time."*
[81] Section 2 of the Taxation (International and Other Provisions) Act specifies, among other things, that *"If Her Majesty by Order in Council declares – (a) that arrangements specified in the Order have been made in relation to any territory outside the United Kingdom with a view to affording relief from double taxation in relation to taxes within subsection (3), and (b) that it is expedient that those arrangements should have effect, those arrangements have effect".* With regards to section 2 of the ECA 1972 see footnote 16 above.

rights generated should more correctly be considered as non-statuary, since the Parliament has given efficacy to them *"contingently on their coming into effect and remaining in effect 'from time to time' as treaty-based UK rights"*.[82] The purpose of Finnis' argument is to affirm that treaties can be not only modified, but also eliminated, without Parliament intervening.

Finnis also points out that the High Court judgment ignored the argument referred to above. However, the issue in question is tackled in paragraph 98 of the UKSC judgement. In this regard, it is highlighted by the majority judges that the analogy between the ECA 1972 and DTTs is fallacious and *"unsatisfactory"*. The judges explain that, while the ECA states that EU law rights will automatically become part of UK law, "*arrangements agreed by ministers in a DTT at international level will have effect in national law, but only if those arrangements are specified in an Order in Council which is approved by the House of Commons."*[83]

1.6 Summary of the respective positions

The focal point of the *Miller* case is posed on fundamental constitutional principles: the rule of law, the independence of the judiciary, and parliamentary sovereignty.

The claimants maintained that the Secretary of State does not have the power to trigger Article 50 TEU without prior authorisation of Parliament: even though the competence of making and unmaking treaties is generally detained in the hands of the government in virtue of its prerogative powers, rights recognised to citizens cannot be cut out if not by an Act of Parliament. The counterargument of the government is based on the view that notification of withdrawal is a purely administrative action executing a mandate conferred to the government by the people. Within this dispute it is possible to identify the core constitutional question left up to the judges: the relationship between the Royal Prerogative and parliamentary sovereignty.

The Divisional Court accepts the thesis advocated by the claimants and the Supreme Court confirms this decision, enriching it with further notions relating to the essence of the ECA 1972 which is regarded as a direct source of EU law. The decision of the UKSC was not reached unanimously. The dissenting opinions can be summarised in the view expressed by Lord Reed, according to which EU law is not to be considered as a source of domestic law, thus the domain of international relations is reserved to the government.

[82] J. Finnis, *Terminating Treaty-based UK Rights*, in UK Const. L. Blog, 26 October 2016.
[83] R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 98.

Chapter II

Checks and balances: judicial independence in *Miller*

2.1 Separation of powers within the UK constitution

The *Miller* decision has brought into focus another cornerstone of the British constitution: the independence of the judiciary.

According to the doctrine of separation of powers, the three branches of the State (executive, legislative and judicial) are kept separate. Each branch has the capacity to exercise distinct powers, and each branch is not allowed to exercise the powers of the other branches. In *The Spirit of Laws* Montesquieu argued that *"there would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."*[84] The rationale behind the doctrine of separation of powers lies in the idea that in a democratic country served by a constitution, either codified or uncodified, power must be limited, and cannot be concentrated in the hands of a single body or person. Limits to such power cannot but derive from a division of power itself. [85]

In the definition of separation of powers given by Professor Vile [86] the notion of *"political liberty"* emerges, which is thought of as a moral value that constitutions should achieve. This is concretely expressed in a duty to arrange the state into three branches, which will achieve the condition of liberty.[87]

John Locke, unlike Montesquieu, asserts there are two powers instead of three: the legislative and the executive, downgrading the judicial power to a simple branch of the executive. While not distinguishing the executive from the judicial he accepts legislative supremacy: *"There can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate ... For what gives laws to another must needs be superior to him."*[88] The idea which lies behind Locke's twofold interpretation of the separation of powers is the crucial

[84] Baron de Montesquieu, *De L'Esprit des Lois,* 1748, Book XI, ch 6.
[85] P. Leyland, *The Constitution of the United Kingdom – A Contextual Analysis*, 2nd edition, Hart Publishing, Oregon 2012.
[86] M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), p.13.
[87] R. White, *Separation of powers and legislative supremacy*, Law Quarterly Review, 2011.
[88] J. Locke, *Second Treatise of Civil Government,* ch.XIII, paras. 149-150.

distinction between law-creation and law-application, where the latter is subordinate to the former. This view implies that creation – and thus the creator – of law, prevails over its enforcement – and enforcer. [89] This hierarchical division was also mentioned by Dicey in his work on the English constitution [90]; it is asserted that his principle of the rule of law under which government is subjected to law is based on the idea of independent courts and a notional separation of powers. [91]

Separation of powers, traditionally, has not been regarded as a vital feature of the British constitution. In fact, no clear separation of powers exists in a system where functions tend instead to overlap. It would be more appropriate to refer to a system of checks and balances, rather than to one of separation of powers. The British journalist Walter Bagehot argued that the efficiency of the constitution of the United Kingdom was to be found not in the separation but rather in the fusion of the executive and legislative functions.[92]

2.1.1 The Lord Chancellor and the Constitutional Reform Act 2005

A tangible historical proof of this overlapping of powers in the UK was until recently represented by the figure of Lord Chancellor. Originating as secretary to the medieval Monarchs of England, over time the role of Lord Chancellor came to endorse additional administrative and judicial functions. He was head of the judiciary and President of the Chancery Division of the High Court: this allowed him to sit personally as a judge in the House of Lords and the Judicial Committee of the Privy Council. The Lord Chancellor also acted as the Speaker of the House of Lords, he could participate in debates and introduce legislation. By the 13th century, the Lord Chancellor had become in effect, the most senior judge in the land apart from the King himself.[93] However, the Constitutional Reform Act 2005 redesigned the role of the Lord Chancellor, whose judicial functions were transferred to the President of the Courts of England and Wales, the Lord Chief Justice. He also ceased to be the Speaker of the Lords, and was replaced by the Lord Speaker.

89 R. White, *Separation of powers and legislative supremacy*, Law Quarterly Review, 2011.
90 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 1885.
91 C. Munro, *Studies in Constitutional Law*, Butterworths, 1999; P. Leyland, *The Constitution of the United Kingdom. A contextual Analysis*, 3rd edition, Hart Publishing, Oregon, 2016.
92 W. Bagehot, *The English Constitution* (London: C.A. Watts & Co, 1964), p.64.
93 UK Parliament website: https://www.parliament.uk/

A key change brought by the 2005 Act was the establishment of an independent Supreme Court, separate from the House of Lords.[94] This reform marked the enshrinement of the independence of the judiciary in the constitution and, at the same time, ended the judicial role of the Lord Chancellor and it also introduces greater judicial accountability. [95]

2.1.2 Judicial independence in the UK

In this regard, it is essential to ask ourselves to what extent the United Kingdom has an impartial judiciary, independent from the other branches of the state and from external pressures and influences (e.g. the media, the State, litigants). An independent judiciary is by far the first condition for the rule law to be upheld correctly. According to Professor Dicey, the constitution is based on the principles of sovereignty and the rule of law, where the rule of law in turn depends on an independent judiciary. [96] The "rule of law", however, must be distinguished from the "rule of judges": the judges are subject to the laws as enacted by Parliament. [97] The fundamental concept of judicial independence came into being in England and Wales in 1701 with the enactment of the Act of Settlement, which established that judges were to hold office on good conduct, not appointed on grounds of their political affiliation, and protected against removal without proper mechanisms.

The relations between judges and the executive have always been complex. In older times, judges were not as willing to challenge the legality of public bodies and their behaviour. Recently, judicial review cases extremely increased, also as a result of the Human Rights Act 1998, which provides that courts have the power to declare primary legislation to be incompatible with Convention rights. If legislation is challenged as being incompatible with Convention rights, the courts may be able to quash it. [98] *M v Home Office*[99] represents an example of a clash between ministers and courts, where the main question concerned whether the court was in a position to compel government ministers to obey to its orders.

M was a citizen of Zaire seeking asylum in the UK, who challenged a decision to deport him made by the Immigration service, a section of the Home Office. Since the date of the hearing

[94] Section 3(1) of the 2005 Act provides, that *"The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary".*

[95] Constitutional reform - The Constitutional Reform Act 2005, Courts and Tribunals Judiciary.

[96] A.V. Dicey, *An introduction to the study of the Law of the Constitution,* 1885.

[97] Judicial Independence and Accountability: Pressures and Opportunities – a lecture given by Sir Jack Beatson FBA at Nottingham Trent University, April 2008.

[98] Lord Phillips, Lord Chief Justice at the Commonwealth Law Conference, Kenya, September 2007.

[99] [1994] 1 AC 377.

coincided with that of the removal of M, the judge ordered that M could not be deported until he had decided whether to grant leave. Due to a communication error between the Home Office and the Immigration Service, M was flown out of the country. The Home Office was accused and proceedings started, as a court order was ignored. In the end, it was held by the House of Lords that the breach of an undertaking issued to the court at first-instance by removing him was lawful. This case shows that interfering with a court's authority leads ministers to be challenged through judicial review. It is also crucial to refer to a case where the court has been more cautious towards the government, and did not overthrow government decisions: *R v Secretary of State for the Home Department, ex parte Cheblak* [100]. In this case the Home Secretary decided to deport a person under section 3(5)(b) of the Immigration Act 1971 for reasons of national security. The court held that a statement to that effect was a valid and sufficient *"statement of the reasons for the decision"* and the Home Secretary was not required to specify any further reasons. Accordingly, the appellant's detention was held to be lawful.

2.2 The role and harm of the media in *Miller*

2.2.1 The political nature of the case

Miller has been generally regarded as a landmark judgement that has redefined the limits and the framework within which the government will be able to act without parliamentary consent. It is therefore easy to affirm that the legal dispute at stake, which arose from a political disagreement, will set a binding precedent for future governments, as it has great political significance and strong implications. [101] The result of the Brexit referendum is one of the most evident signs of the populist wave manifesting itself around the world. Populist and far-right parties have more than tripled their share of votes in Europe in the past 20 years, according to a study conducted by The Guardian in 2018.[102] Fear of immigration and consequential Euroscepticism are the key issues used by such parties to capture a large share of the world population. We could state that this sort of political sentiment has culminated into the Brexit referendum held in 2016.

[100] [1991] 1 WLR 890.
[101] P. O'Connell and N. Sultany, *Miller and the Politics of the Judiciary*, in UK Const. L. Blog, 10 November 2016.
[102] Available at: https://www.theguardian.com/world/ng-interactive/2018/nov/20/revealed-one-in-four-europeans-vote-populist

Given the intertwinement between law and politics, it is not surprising that there are two key opposing discourses concerning the Courts' approach to the issue in *Miller*: the *"popular"* one and the *"legalist"* one.[103] According to the former, the judgement is a political account responding to an equally political question. According to the latter outlook, the decision is far from being political: it is rather a technical, legal, analysis. Even though the High Court expressly stated that the case had nothing to do with any of the political issues surrounding withdrawal from the EU [104], it is clear that debates and litigations concerning core constitutional principles such as parliamentary sovereignty and prerogative powers are not purely legal: these are non-objective questions which touch both law and politics, and this is the reason for their complexity.

Miller represented political success for those opposing Brexit, not only because the opinion of the Conservative government on the process of withdrawal was undermined, but also because ministers were forced to enter the Brexit proceedings in a more cautious manner. However, those supporting Brexit, interpreted this decision as an undue interference with the will of the people, coming from an unelected judiciary. [105]

2.2.2 Public criticism of judicial performance – Miller judges as "Enemies of the people"

It has been widely asserted that freedom to report court proceedings is one of the most important aspects of freedom of expression.[106] However, the House of Lords Select Committee held the view that *"the media, especially the popular tabloid press, all too often indulge in distorted and irresponsible coverage of the judiciary, treating the judges as 'fair game'."* [107] The Latimer House Guidelines [108] advocate for the legitimacy of public criticism of judicial performance, believing it to be a measure to ensure accountability. The Guidelines further state that "*the criminal law and contempt proceedings are not appropriate*

[103] P. O'Connell and N. Sultany, *Miller and the Politics of the Judiciary*, in UK Const. L. Blog, 10 November 2016.

[104] The Divisional Court judges, in fact, ensure to clearly delineate the limits of the question posed to them by stating that *"nothing we say has any bearing on the question of the merits or demerits of a withdrawal by the United Kingdom from the European Union; nor does it have any bearing on government policy, because government policy is not law".*

[105] M. Sheldrick, *Brexit Miller case – the impact of the UK's exit from the European Union on immigration,* The In-House Lawyer, 2017.

[106] Lord Phillips, Lord Chief Justice at the Commonwealth Law Conference, Kenya, September 2007.

[107] Sixth Report from the House of Lords Select Committee on the Constitution, HL 151 of 2006-07, paras 191-4.

[108] Commonwealth (Latimer House) Principles.

mechanisms for restricting legitimate criticism of the courts."[109] What is crucial, however, is to delineate the boundary between freedom of expression – legitimate criticism – and harm to judicial independence. Sir Louis Blom-Cooper claimed in 1966 that a convention existed which commanded that judges should not be criticised in public at all. In his words: "*Criticism of the judiciary over the last fifty years has been confined to conversations over the coffee cups and to the seclusion of private solicitors' offices and barristers' chambers … The English have cloaked their judges with an immunity from public criticism …"* [110] In 2007 the House of Lords Select Committee on the Constitution reported that it has been widely agreed that it is *"acceptable for Ministers to comment on individual cases"*.[111] However, what cannot be tolerated, he said, is personal criticism: a statement which expressly or impliedly claims that there is something wrong with the judge who ruled upon the matter.[112]

In deciding upon the Miller case, the courts had to deal with a divisive, politically sensitive question, which made them vulnerable to unprecedented criticism: the case was presented as an attempt to prevent Brexit from happening rather than to make sure that the process of withdrawal happened lawfully.[113] The reaction from some newspapers to the November's High Court ruling was surprising.[114] The *Daily Mail*, questioning the independence of *"unelected"* High Court judges, branded them in its headline as *"Enemies of the people"* and criticised them for being *"out of touch"*. The *Daily Telegraph* referred to the *Miller* judgment, as *"the day democracy died"*.[115]

Sections of the media attacked the credibility of judges and forged public opinion towards conceiving the Divisional Court's judgement as a judicial interference with the will of the people expressed by the referendum.[116] The judges also faced some severe criticism from prominent politicians, for example from the business secretary, Sajid Javid, who commented that *"This was an attempt to frustrate the will of the British people and it is unacceptable"*.[117] However, instead of referring to an intervention of the judicial authority as a threat to popular

[109] Commonwealth (Latimer House) Principles, Part VI, section 1(b).
[110] Blom-Cooper, *The Judiciary in an Era of Law Reform*, 1966, 37 Political Quarterly 378.
[111] HL Select Committee on the Constitution, Relations between the executive, the judiciary and Parliament, 6th Report of Session 2006-07, para 42.
[112] Lord Dyson, *The Master of the Rolls – The third annual BAILII lecture criticising judges: Fair game of off – limits?* 27 November 2014.
[113] The *Daily Mail* claimed the court's decision purposefully blocked the Brexit process.
[114] It is interesting to highlight how this smear campaign coming from the press also targeted Gina Miller as a person.
[115] Front pages of the *Daily Mail* and the *Daily Telegraph*, 4 November 2016.
[116] The power of the press has been defined by Edmund Burke as *the Fourth Estate* or *the fourth power*. He used this term for the first time in a parliamentary debate in 1787 on the opening up of press reporting of the House of Commons. This term has come to refer to the press as a segment of society that has an indirect but crucial role in influencing the political system.
[117] Sajid Javid MP, speaking on Question Time, BBC 1, 3 November 2016.

sovereignty, it is indeed this political intrusion in strictly judicial matters from important exponents of the government, which takes the shape of a danger to the basic principle of the separation of powers outlined above: all ministers have a responsibility to protect the independence of the judiciary.[118] It has been held that political criticism of the judiciary and media criticism are often intertwined with one another. It is not uncommon for politicians to take personal political advantage by using the media as a platform to attempt to influence the judges. [119] Because of the extremely divisive character of the case itself, whatever decision made by the court would have been unwelcome to substantial sections of the public, and would have attracted major criticism.

2.3 Criticism as a harm to judicial independence

Judicial independence is arguably harmed by criticism of judges. Judicial independence is a tool of governance, protected *"significantly by tradition"*[120]; it can be seen as the set of guidelines, conventions and cultural practices that have built up around judges and conducted them towards preserving an impartial attitude. It follows from this that potential harms to judicial independence might also damage judicial impartiality: they might create a real risk of bias in the judge.[121] The risk of such invasion is clearly doubled in countries whose legal order is not founded on a codified constitution, like the United Kingdom. The Mount Scopus Standards on Judicial Independence say, for example, that *"judicial independence does not render judges free from public accountability, however, the media and other institutions should show respect for judicial independence and exercise restraint in criticism of judicial decisions."* [122] As far as the balance between freedom of expression and harm to judicial independence is concerned, Art. 10 of the European Convention on Human Rights, guaranteeing freedom of expression, specifically refers to the need to protect judges and allows restrictions on freedom of expression *"for maintaining the authority and impartiality of the judiciary"*. The two concepts of impartiality and judicial independence are clearly overlapping and closely intertwined. While the former is understood as a mental attitude, the

[118] K. Ewing, *A Review of the Miller Decision*, in UK Const. L. Blog, 10 November 2016.
[119] P. O'Brien. *"Enemies of the People": Judges, the media, and the mythic Lord Chancellor*, 2017.
[120] R. Stephens, *A Loss of Innocence? Judicial Independence and the Separation of Powers*, 1999, 19 O.J.L.S. 365, 376.
[121] P. O'Brien. *"Enemies of the People": Judges, the media, and the mythic Lord Chancellor*, 2017.
[122] Article 6.1 of the Mount Scopus International Standards of Judicial Independence, International Association of Judicial Independence and World Peace, 19 March 2008 (version of 2015).

latter is best described as a set of rules and practices, used to protect impartiality as a mindset, which would otherwise be intangible. [123]

Besides undermining impartiality, judicial criticism can act as a source of worry for the judges, considering the context within which criticism occurs, especially if the latter is highly personalised. In March 2017, the Lord Chancellor and the Lord Chief Justice**,** Lord Thomas of Cwmgiedd gave evidence before the House of Lords Constitution Select Committee. Lord Thomas, when asked about the media attacks following the Divisional Court's judgment in *Miller*, responded pointing out that there is a crucial difference between *criticism* and the *abuse* of which they are a victim following the *Miller* decision.[124]

2.3.1 Lord Chancellor's role and view on criticism of the judiciary

As highlighted above in this chapter, the Constitutional Reform Act 2005 redesigned the role of Lord Chancellor, as well as introducing several obligations relating to judicial independence. Section 3 of the Act places such duties on ministers and all those responsible for the administration of justice, who *"must uphold the continuing independence of the judiciary"*.[125] A special responsibility is imposed on the Lord Chancellor to defend judicial independence, to provide support for the judiciary in exercising their functions, and to represent the public interest in matters relating to the judiciary and the administration of justice. [126] However, it should be noted that an obligation of the Lord Chancellor to intervene in public debate does not follow as a direct consequence from the duty placed on her by the 2005 Act: Section 3, focusing on the protection of the culture of judicial independence, seems to possess a more political significance rather than a legal one.[127] After the Constitutional Reform Act, the Lord Chancellor ceased to act as a guardian of judicial independence as it was once intended. [128] With these premises, the approach adopted by Lord Chancellor Liz

[123] See e.g. *Prager & Oberschlick v Austria* (1996) 21 EHRR 1, *Nikula v. Finland* (2004) 38 EHRR 45 and *Morice v. France*, Grand Chamber judgment of 24 April 2015.

[124] "*I also believe that people ought to criticise us. […] Criticism is very healthy. If you have got something wrong, fine, but there is a difference between criticism and abuse, which I do not think is understood."*, Select Committee on the Constitution, Corrected Oral Evidence: Oral Evidence Session with the Lord Chief Justice, 22 March 2017.

[125] Section 3 (1) Constitutional Reform Act 2005.

[126] Section 3 (6) Constitutional Reform Act 2005.

[127] House of Lords Constitution Committee, *Corrected oral evidence: with the President and Deputy President of the Supreme Court*, 29 March 2017, Q.7. E.g. Lord Neuberger refers to s.1 of the 2005 Act, which commands that nothing about the Act is meant to change the Lord Chancellor's function in relation to the rule of law.

[128] Graham Gee defines the Lord Chancellors after the reform as *"political guardians […] who defend judicial independence in ways sensitive to, and limited by, the distinctive demands of the political process"* G. Gee, *What are Lord Chancellors for?*, 2014, P.L. 13.

Truss in her press release relating to media criticism to *Miller* judges should not come as a surprise. In her statement, Ms Truss, who is also justice secretary, said: *"The independence of the judiciary is the foundation upon which our rule of law is built and our judiciary is rightly respected the world over for its independence and impartiality."* However, Ms Truss' intervention has been widely criticised as being *"too little"* [129]. The Bar Council expressed that it falls under her set of responsibilities to uphold the rule of law, and commented that what they were looking for was an actual condemnation of the attacks on the judiciary. [130]
Lord Thomas of Cwmgiedd, in an evidence before the House of Lords Constitution Select Committee, also expressed his disappointment with regards to the reaction of the Lord Chancellor, stating that "*It is not understood either how absolutely essential"* it is that the judiciary be protected; this is so, he explains, because judges have to act as required by their oath *"without fear or favour, affection or ill will".*[131] According to other theories[132], given the reform of the role of the Lord Chancellor, whose functions are now held by the senior judiciary and the Lord Chief Justice, the judges should cease to turn to the Lord Chancellor when seeking for protection – they should instead start acting as the defenders of themselves.
This account shows that the judiciary as well as legal commentators still continue to regard the Lord Chancellor as a defendant of the judges, as someone who should speak up when the judiciary's independence is in danger. [133] However, as it has been argued above, the figure of the Lord Chancellor as a special guardian of judicial independence has weakened over time, politically as well as legally, in a way that does not meet the expectations of the judiciary.

2.3.2 Legal scholars on judicial criticism in Miller

Several legal scholars commented on the judicial criticism sparked by *Miller* and defended the judges. They argued that the decision is entirely legal, not linked to the surrounding political context, and this is why judges should be immune to unfair criticism challenging

[129] Shadow justice secretary Richard Burgon, defined her statement as *"too little, much too late"* and said she had failed to *"adequately stand up to attacks on [the] judiciary". Brexit Ruling: Lord Chancellor Backs Judiciary Amid Row,* BBC, 5 November 2016.
[130] David Boffey, *Brexit: Lawyers Confront Liz Truss over "Dangerous" Abuse of Judges*, The Guardian, 6 November 2016.
[131] Select Committee on the Constitution, Corrected Oral Evidence: Oral Evidence Session with the Lord Chief Justice, 22 March 2017.
[132] I. Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Oxford: Hart Publishing, 2002), S. Shetreet and S. Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary*, 2nd edn (Cambridge: CUP, 2013).
[133] See Lord Neuberger's intervention in House of Lords Constitution Committee, Corrected oral evidence: with the President and Deputy President of the Supreme Court, 29 March 2017, Q.7.

their honesty and the democratic nature of their rulings.[134] The Chairman of the Bar Council, Chantal-Aimeé Doerries QC, firmly condemned attacks to judges, stating that the judiciary has to ensure that the British constitutional system continues to hinge on the rule of law, as it did in *Miller*; if judges did not correctly fulfil this vital role, it would not be as easy to hold the Government accountable.[135] She also said that public criticism cannot but undermine and weaken the judicial function, and *"it also does no favours to our global reputation"*.[136]

According to Barber and King, the *Miller* judgement was far from being concerned with the political issues at stake; the question was rather which institution had the faculty and the power to set off the withdrawal procedure. Referring to the reaction from certain media outlets, the authors stated that such outrageous response to a judgement which is clearly completely divorced from politics, represents a *"grave threat to our constitutional order, a threat both to the rule of law and to the very structure of democracy in the United Kingdom"*.[137] Mark Elliot and Hayley Hooper, stating the imperativeness of judicial independence and its capacity to resolve legal disputes, equally expressed disappointment towards political and media criticism, defining the latter as misguided, wrong and dangerous.[138] In their blog, Elliot and Hooper label as irresponsible politicians and the media who adopt a critical stance vis-à-vis judgements. They affirm that the ruling does not affect the outcome of the referendum as it *"has nothing to do with the wisdom of triggering Article 50"*. The decision on the legal dispute, the authors argue, is nothing more than an exercise of the court of its *"ordinary constitutional function"*: a presentation of the legal evidence explaining why the government does not hold the power to invoke the withdrawal procedure.

However, Griffith highlighted in his work *"The Politics of the Judiciary"* that judges "*cannot avoid making political decisions"*[139] when facing controversial cases. He argued that believing that a judge is merely finding the law is an illusion: in his view, judges will constantly be driven by personal convictions.

It is not the first time that judges face criticism. In *R (Q) v Secretary of State for the Home Department* [140] Collins J was criticised over a decision about the provision of support to

[134] P. O'Connell and N. Sultany, *Miller and the Politics of the Judiciary*, U.K. Const. L. Blog (10th Nov 2016).
[135] Judicial independence and accountability have been described as *"two sides of the same coin"* by Stephen Burbank in *"The Architecture of Judicial Independence*" (1998).
[136] E.g. the Bar Council statement of 4 November 2016, *Judiciary must ensure rule of law underpins our democracy.*
[137] N. Barber and J. King, *Responding to Miller*, in UK Const. L. Blog, 7th November 2016.
[138] M. Elliot & H.J. Hooper, *Critical reflections on the High Court's judgment in R (Miller) v Secretary of State for Exiting the European Union* in UK. Const. L. Blog, 7 November 2016.
[139] J. A. G. Griffith, *The Politics of the judiciary.* Fontana Press, 1997.
[140] [2003] EWHC 195 (Admin).

destitute asylum seekers. The Home Secretary David Blunkett, told the News of the World that he was *"personally fed up"* with judges overturning decisions made by politicians. *"It's time for judges to learn their place",* he said.[141]

[141] News of the World (23 February 2003).

Chapter III

Devolution and *Miller*

The term *devolution* refers to a form of decentralisation and regionalism, where Scotland, Wales and Northern Ireland are granted a certain degree of decision-making power. More precisely, a Scottish Parliament, a National Assembly for Wales, a Northern Ireland Assembly, and an Assembly for London were introduced. Brexit has given rise to another leading pressing constitutional challenge, concerning the way in which the devolved legislatures should be involved in the process of implementing EU withdrawal, and if they are to be involved in the first place.

Devolution points were widely discussed in the Supreme Court, where the issue was given much greater importance than it was in the Divisional Court.[142] This is so both because of the joining of the Northern Irish appeals and devolution references with the *Miller* proceedings, and because of the decision by the Scottish and Welsh governments to intervene in the case.[143] The main questions on which the Court ruled are two: the existence of legislative competences owned by the devolved Parliaments relating to the withdrawal from the European Union, and the possibility to recognise a legal value rather than a merely political one to the Sewel Convention.

The Supreme Court unanimously excluded that before invoking Art. 50 TEU, Westminster had to obtain the consent of devolved administrations. It has been argued that even though they are bound to absorb obligations and rights deriving from the EU legal order, this does not extend their legislative capacity to defining their supranational relations with the Union.[144] It could be argued that the Court adopted a traditional understanding of the territorial administrations; an account which sees the decentralised constitutional authorities operating merely as political arms in the shadow of the strong legal power owned by the Westminster Parliament. [145] Concerning the second issue, it has been argued that although the

[142] [2016] EWHC 2768 (Admin), [2017] 1 All ER 158, at [102].
[143] A. McHarg *Constitutional Change and Territorial Consent: the Miller case and the Sewel Convention*, 2017.
[144] R (on the application of Miller and another) v. Secretary of State for Exiting the European Union, para. 129.
[145] A. McHarg *Constitutional Change and Territorial Consent: the Miller case and the Sewel Convention*, 2017. See the written submissions of the Lord Advocate, Counsel General for Wales, and the Agnew claimants, available at: https://www.supremecourt.uk/news/article-50-brexit-appeal.html.

convention is not legally enforceable,[146] it possesses a prominent political and constitutional significance.

3.1 Devolved legislatures and the European Union

The context of European Union membership was crucial in drafting the devolution Acts.[147] As it has been held, this is so because the powers which were granted to devolved legislatures could potentially have been used by one of the three institutions in a way that could place the UK as a whole in breach of its obligations as an EU member state.[148] In order to prevent this misuse of authority, a restriction was introduced in the devolution Acts, making all provisions that resulted to be conflicting with EU law, outside of the legislative competence of the devolved administrations. The provision in question could be quashed if found to be in contrast with the Union legislation.[149] As a result, in many policy areas whose control is nominally devolved – such as environmental regulation, agriculture, transport, energy – the autonomy of the institutions is substantially constrained in practice. The EU and devolved administrations also have a strong financial link, since the EU has always been committed to supporting regional and local governments within its member states: a significant portion of the Union's budget is allocated on regional policies.[150] Politically, connection is showed by the existence of a European Committee in Scotland and a European and External Affairs Directorate in Wales.

3.1.1 After-Brexit setting

Following the UK withdrawal from the EU, if no further changes are made than the removal of the statutory requirement to comply with EU law, the conduct of the domains mentioned above will fall completely under the control of devolved institutions. Brexit, therefore, would permanently cut out a core pillar from the constitutional structures of the devolved systems.

[146] R (on the application of Miller and another) v Secretary of State for Exiting the European Union para. 242.
[147] The three devolution Acts which established the devolved legislatures are: the Scotland Act 1998, the Northern Ireland Act 1998, and the Government of Wales Act 1998 (which was later effectively superseded by the Government of Wales Act 2006).
[148] This was explained by Alan Page, Professor of Public Law at University of Dundee during the Public Administration and Constitutional Affairs Committee, Oral evidence: Devolution and Exiting the EU, HC 484, 31 October 2017.
[149] See for example Scotland Act 1998, section 29(2)(d).
[150] P. Leyland, *The Constitution of the United Kingdom. A contextual Analysis*, 2nd edition, Hart Publishing, Oregon, 2012.

Tensions have emerged over the EU Withdrawal Bill [151] – the legislative act giving effect to Brexit which will determine where competences and authority exercised in Brussels will return to. Disagreement concerned the new framework that will be required to rebalance powers over those policy areas which will no longer be devolved after withdrawal takes place.[152] The position of the UK Government, shown through the drafting of the original Clause 11 of the Bill, saw the default destination of legislative authority over certain areas of policy previously held at EU level to be Westminster. On the contrary, the Scottish and Welsh Governments advocated for these powers to return directly to their capitals. If the UK government's view was claimed to be based on a desire for continuity and certainty [153], in contrast, in a joint statement, the First Ministers of Scotland and Wales, described the Bill as:

"... a naked power-grab, an attack on the founding principles of devolution and could destabilise our economies."[154]

3.2 The Sewel Convention

The convention takes its name from a statement made by Lord Sewel during a Parliamentary debate about what then became the Scotland Act 1998 [155] : *"as happened in Northern Ireland earlier in the century, we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament"*[156]. Only at a point of standstill should the *"ultimate route"* be taken, and the UK Parliament be allowed to enact primary legislation to modify the reserved matters listed in Schedule 5 of the Scotland Act 1998.[157] Parliament, however, remains

[151] The European Union (Withdrawal) Bill was published and received its First Reading in the House of Commons on 13 July 2017. Eleven months and 13 days later it received Royal Assent on 26 June 2018.

[152] House of Commons Public Administration and Constitutional Affairs Committee, Devolution and Exiting the EU: reconciling differences and building strong relationships, eighth Report of Session 2017–19.

[153] M. Jack, J. Owen A. Paun J. Kellam, *Devolution after Brexit Managing the environment, agriculture and fisheries*, Institute for Government, 2018.

[154] Responding to the introduction of the European Union (Withdrawal) Bill, First Minister of Scotland Nicola Sturgeon and First Minister of Wales Carwyn Jones, 13 July 2017.

[155] Section 28(8) of the Scotland Act 1998 provides that *"it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament".*

[156] HL Debates, vol no 592, part no 191, col 791 (21 July 1998).

[157] HL Deb 21 Jul 1998 Vol 592 c 791. As Schedule 5 of the Act provides: The following aspects of the constitution are reserved matters, that is:
(a)the Crown, including succession to the Crown and a regency,
(b)the Union of the Kingdoms of Scotland and England,
(c)the Parliament of the United Kingdom,
(d)the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal,
(e)the continued existence of the Court of Session as a civil court of first instance and of appeal.

sovereign, and holds the power to amend the devolution Acts and to legislate, with consent of devolved institutions, on devolved matters.[158] The essential idea behind the Sewel Convention is to ensure that devolution works in a stable manner that respects the roles of the UK Parliament and those of the devolved legislatures and allows for consultation in advance of legislation.

The Sewel Convention was originally regarded as a constitutional convention, and a fundamental component of the devolution arrangements. The Convention was first set out in the Memorandum of Understanding (MoU) with the devolved institutions in 2001, and was then included in every updated MoU. [159] The ambiguous character of the Sewel Convention lies in the fact that, as we will see later on, the Courts have over time ruled that the Convention does not provide a legal veto power for the devolved bodies even though in 2014, the Smith Commission recommended that the Sewel Convention be placed on a statutory footing.[160] This recommendation was adopted in the Scotland Act 2016 which amended the Scotland Act 1998 to set out the Sewel Convention in section 28(8).[161] The Wales Act 2017 also set out the Sewel Convention, amending the Government of Wales Act 2006 to set out the Sewel Convention in section 107(6).[162]

Important statements about the nature of devolution were also made in the Supreme Court's ruling in *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill.*[163] The Applicant referred to the Supreme Court the question whether the enactment of the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – which sought to recover NHS related medical costs from private insurers – fell within the legislative powers of the Welsh

[158] Guidance, Devolution of powers to Scotland, Wales and Northern Ireland, GOV. UK, 18 February 2013 https://www.gov.uk/guidance/devolution-of-powers-to-scotland-wales-and-northern-ireland.

[159] Memorandum of understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee, Cm 5240 18 December 2001. Devolution: memorandum of understanding and supplementary agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee, Cm 7864, 29 March 2010. Memorandum of Understanding and supplementary agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, 30 June 2011. Memorandum of understanding and supplementary agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, September 2012. Memorandum of Understanding and supplementary agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, October 2013.

[160] The Smith Commission: Report of the Smith Commission for further devolution of powers to the Scottish Parliament, 27 November 2014, para 22.

[161] Scotland Act 2016, section 2.

[162] House of Commons Public Administration and Constitutional Affairs Committee, Devolution and Exiting the EU: reconciling differences and building strong relationships, eighth Report of Session 2017–19.

[163] [2015] UKSC 3, [2015] AC 1016.

Assembly.[164] The two implied questions concerned how far the Court should go in scrutinising a legislative choice of the Welsh Assembly and whether comparisons with legislative choices of the UK Parliament were legitimate. [165] Two crucial views were those expressed by Lord Mance and Lord Thomas. Lord Mance, while acknowledging that he should give importance to the Welsh Assembly's public interest choice, stated that there was no need from his side to rule on the *"difficult"* issue of whether *"there is a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other legislative and executive decisions"*[166] . In contrast, Lord Thomas examined this question in great detail, pointing out that there should be made no difference between legislative choices. The judge argued that, taking into account the UK's devolved constitutional structure, it is illogical to make any distinction between devolved institutions and the UK Parliament in evaluating the significance of different legislative decisions *"in respect of matters which are within the primary competence of the legislatures"*. He concluded that he could not: *"see why in principle the United Kingdom Parliament in making legislative choices in relation to England (in relation to matters such as the funding of the NHS in England) is to be accorded a status which commands greater weight than would be accorded to the Scottish Parliament and the Northern Ireland and Welsh Assemblies in relation respectively to Scotland, Northern Ireland and Wales"*.[167]

3.2.1 The relevance of constitutional conventions

Constitutional conventions are a crucially important source of the constitution of the United Kingdom, as they, in the words of Sir Ivor Jennings, *"provide the flesh which clothes the dry bones of the law"*.[168] Conventions, while being easily associable with law, maintain a distinct character. Thanks to their evolving nature, conventions allow the legal framework to be flexible, to keep up to date with the constantly changing needs of the political system. [169] One of the most influential definition of conventions, which celebrated their practical dimension,

[164] *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*, Press summary, 9 February 2015.
[165] House of Commons Public Administration and Constitutional Affairs Committee, Devolution and Exiting the EU: reconciling differences and building strong relationships, eighth Report of Session 2017–19.
[166] *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016, 1041, paras 56-67.
[167] *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016, 1059-1060, paras 118-119 and 122.
[168] Sir Ivor Jennings, *The Law and the Constitution*, 5th edn (London, University of London Press, 1959) 81 and 113.
[169] P. Leyland, *The Constitution of the United Kingdom. A contextual Analysis*, 3rd edition, Hart Publishing, Oregon, 2016, p. 33.

has been given by AV Dicey, who stated that they consist *"of maxims or practices which, though they regulate the ordinary conduct of the Crown, of ministers, and of other persons under the constitution, are not in strictness law at all"*[170]. Maintaining that a law *"may, for our present purpose, be defined as 'any rule which will be enforced by the courts'"*,[171] Dicey accepted that there exists a sharp distinction between laws and conventions, since the former are valid in the courts and the latter are not, being simply formed of practices, maxims, understandings, crucial to the administration of the conduct of the sovereign, the Prime Minister, and government officials.

Sir Ivor Jennings adopted a different approach which identifies three questions that should be posed in order to identify the validity of a convention.[172] The first question includes an analysis of the quantity of times a certain practice or habit has been recognised, as well as the the level of consistency with which such practice has been applied. The second question, less descriptive and more problematic in nature,[173] concerns whether constitutional players have acknowledged the binding character of the practice. The third question of the Jennings test has a less abstract character, relating instead to the content of the convention: it asks whether there is a good political reason for its very existence. This account shows that Jennings tends to confer to conventions a political importance rather than a legal one.

Typical example of constitutional conventions are: that royal assent to legislation be given; that the Prime Minister be chosen among the members of the House of Commons; that the office of Prime Minister be conferred by the Queen to the leader of largest party; that the Queen accept the advice of her ministers. According to some, also the so-called "Prime Minister's Questions", is to be counted among conventions, consisting in the constitutional obligation for the Prime Minster to answer questions before the House of Commons every Wednesday.[174] This is a typical example of a convention that provides crucial check on executive power and being vital for the functioning democracy. Its importance derives from the fact that this way, ministers are collectively and individually accountable to Parliament.[175] As the "2010 cash for influence"[176] scandal shows, where Stephen Byers[177]

[170] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th edn (Basingstoke, Macmillan, 1959), p. 24.
[171] *Ibid*. p. 40.
[172] Sir Ivor Jennings, *The Law and the Constitution*, 5th edn, London, University of London Press, 1959, 131.
[173] P. Leyland, *The Constitution of the United Kingdom. A contextual Analysis*, 3rd edition, Hart Publishing, Oregon, 2016.
[174] Lord Wilson of Dinton, *The robustness of conventions in a time of modernization and change*, 2004, p. 216.
[175] *Ibid*, p. 110.
[176] Asthana A. and Helm T. , *MPs targeted in undercover sting over cash for influence*, 2010, The Guardian

was involved, this convention implies not only accountability of the executive to parliament, but also to the electorate, suggesting that if a minister misleads Parliament he or she is expected to resign. However, refusal to resign would be seen as an unconstitutional action, rather than as an illegal one.[178]

The issue concerning whether conventions should be translated into statute is a debated one. It has been argued that codifying conventions into law would result in great clarity and put an end to legal uncertainty [179]

In the *Miller* judgement, the judges were required to consider the role of the courts in relation to constitutional conventions.[180] In previous case law, the nature of political conventions was addressed in *Re Resolution to Amend the Constitution* by the Supreme Court of Canada.[181] It has been held in that occasion that there exists a *"fundamental difference"* between legal rules and conventional rules; this difference lays in the fact that a breach of the former leads to *"legal consequences"*, which are to be addressed by the courts, while a breach of the latter entails only political consequences, namely loss of office.[182]

3.3 *Miller* and Sewel

After holding that an Act of Parliament was required to begin the withdrawal procedure, the Supreme Court considered whether approval of the devolved administrations was required. This question raised from the awareness that EU withdrawal would have strong implications for devolved policy areas, as well as for powers of the three legislatures: EU law as a bind on their competences would be cut out. On this matter, the UKSC decided legal constraints posed by EU law on the devolved legislatures play a merely protective role in the regards of the United Kingdom, in order to prevent institutions to *"place the United Kingdom in breach of its EU law obligations."*[183] However, it is true that the withdrawal of the UK from the Union will result into the loss of the above mentioned legal constraints imposed by EU law on devolved administrations. This will, therefore, entail an alteration, or better, an

[177] British Labour Party politician who was the Member of Parliament (MP) for Wallsend between 1992 and 1997, and North Tyneside from 1997 to 2010. He retired from politics in 2010.

[178] L. Smith, *Constitutional Conventions and Codification*, December 2013.

[179] Dr. H. Evatt, *The King and his Dominion Governors*, 1936 (1967), p. 268.

[180] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union [2017] UKSC 5, para. 141.

[181] [1981] 1 SCR 753.

[182] *Re Resolution to Amend the Constitution* [1981] 1 SCR 753, para. 853.

[183] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union [2017] UKSC 5, para. 130.

enhancement of their competences.[184] As it is stated in the Sewel Convention, changes made by the Westminster Parliament which either enlarge or reduce devolved competences, require the consent of the three institutions.[185]

As stated above, the ambiguous character of the Sewel Convention came from case law surrounding the Convention itself, where, even if not directly, the non-enforceable character of the document has emerged, even after its codification into the Scotland and Wales Acts. In *Miller*, the justiciability of the Sewel Convention was considered at paragraphs 136 – 152 of the decision, where the majority judges ruled that neither *"the policing of its scope"* nor *"the manner of its operation"* are a responsibility held by the judiciary, whose remit is that of protecting the rule of law. [186] The judges accepted Dicey's classic definition of constitutional conventions holding that they may be recognised by the courts but that they differ from laws in not being legally enforceable.[187] Even though the Convention has been explicitly incorporated into statute, the Court held that the intention of Parliament was that of producing a merely *political* convention, not a *legal* one.[188] Therefore, section 28(8) of the Scotland Act 1998, which echoes the wording of the Sewel Convention, does not create any legal requirement according to which Parliament should obtain the consent of devolved legislatures before allowing Art. 50 TEU to be triggered.[189] The assumption that the Court is making here is that a political convention does not cease being a solely political convention even when it is recognised in a validly-enacted statute.[190] In making this point, the Court justified the legislative recognition of the convention which took place in 1998, as having the only purpose to *"entrench it as a convention"*[191]. At paragraph 145 of the decision it was argued that Article 9 of the Bill of Rights, which imposes that parliamentary proceedings not be

[184] *Ibid.*

[185] A. Trench, *Legislative consent and the Sewel convention – Devolution Matters*, June 2016.

[186] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union [2017] UKSC 5, para. 151.

[187] In this regard, it is relevant to refer to *Attorney-General v Jonathan Cape Ltd [1976] QB 752*, where it was ruled that a convention could not represent the cause of an injunction.

[188] Political conventions have been defined as *"rules of constitutional behaviour which are observed by the Queen, ministers, members of Parliament, judges and civil servants".* A Bradley, K Ewing, and C Knight, *Constitutional and Administrative Law*, 16th edn, 2015, p 18.

[189] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union [2017] UKSC 5, para. 148.

[190] E. Velasco and C. Crummey, The Reading of Section 28(8) of the Scotland Act 1998 as a Political Convention in *Miller* in UK Const. L. Blog, 3 February 2017.

[191] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union [2017] UKSC 5, para. 149.

criticised or put into question *"in any Court or Place out of Parliament"*, stands as a further reason why the courts cannot rule on the operation of the Sewel Convention.[192]

Nevertheless, the UKSC stated that the purpose of its decision is not that of downplaying the essential constitutional significance of political conventions. Rather, the importance of this type of conventions has been stressed, with particular reference to the Sewel Convention, and to its crucial *"role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures"* [193]. It was accepted that judges might recognise *"the operation of a political convention in the context of deciding a legal question."*[194]

The Supreme Court's ruling has attracted a substantial quantity of comments, some of which has disapproved its extremely restricted look on the extent to which the judiciary is engaged with the nature of conventions and their application.[195] Even though section 2 of the Scotland Act 2016 (former s. 28(8) of the Scotland Act 1998) is, according to Feldman,[196] a type of declaratory legislation which does not create a binding legal norm but rather simply articulates a commitment, it has been argued that the Court remains excessively silent on the precise nature of this "commitment", and on the actual meaning of "political convention".[197]

It has been argued by Professor Gordon Anthony, that the *Miller* judgement is a *"very strong reassertion of Parliamentary Sovereignty"* which rejects any idea of the existence of a *"divided sovereignty"*[198] in the UK, also rejecting any possibility that the Sewel Convention be understood in that light. [199] Professor Page, commenting on the Supreme Court's ruling, considered that placing the convention into primary legislation constitutes a *"binding*

[192] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union [2017] UKSC 5, para. 145.

[193] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union [2017] UKSC 5, para. 151.

[194] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union [2017] UKSC 5, para. 146.

[195] M Elliott, *The Supreme Court judgment in Miller: in search of constitutional principle*, 2017, Cambridge Law Journal 257, at 276.

[196] D. Feldman, *Legislation as Aspiration: Statutory Expression of Policy Goals* - A Lecture for the Statute Law Society delivered at the Institute of Advanced Legal Studies, London, 16 March 2015.

[197] J. Atkinson, *Parliamentary Intent and the Sewel Convention as a Legislatively Entrenched Political Convention*, in UK Const. L. Blog, 10 February 2017.

[198] With regards to the concept of a *"divided sovereignty",* it had previously been pointed out by Lord Steyn in *Jackson*, that *"The settlement contained in the Scotland Act 1998 also points to a divided sovereignty [within the UK] ... The classic account ... of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern [UK]"* Jackson v Attorney-General [2005] UKHL 56, [2006] 1 AC 262, 302, para [102].

[199] Public Administration and Constitutional Affairs Committee, Oral evidence: Devolution and Exiting the EU, HC 484, Tuesday 23 January 2018.

commitment. […] the most solemn expression of intention that you can provide under our constitution."[200]

To summarise, the Miller judgement admitted that the Sewel Convention had been set out in statute law in order to entrench the convention, however this did not confer it with a legally enforceable status. The Court clarified that the matter was to be followed as a matter of political practice, not to be regulated by the judiciary. [201] Despite explicitly avoiding commenting on the Sewel convention, this decision was seen by many as a strong reassertion of Parliamentary sovereignty against the conception of shared sovereignty, which had recently gained some popularity.

[200] Public Administration and Constitutional Affairs Committee, Oral evidence: Devolution and Exiting the EU, HC 484, Tuesday 31 October 2017.
[201] See footnote 8

Conclusion

The *Miller* case arose as part of the troubled and complex Brexit scenario, which, still is far from being resolved. The courts have expressed a clear judgement, although not unanimously shared, on crucially important issues in the field of British constitutional law. The two decisions draw attention not only to the EU legal order and the UK-EU relationship, but mostly to the internal constitutional order, to some of its inborn principles and instruments – namely parliamentary sovereignty and constitutional conventions. In comparison to the constitutions of other European the case demonstrates a number of peculiarities. The courts have been required to analyse and develop the internal relationship between Parliament and government in resolving a conflict in the exercise of State powers.

In regard to the first and leading question, the Supreme Court confirmed the ruling given by the High Court, which stated that the British government could not invoke Royal Prerogatives to activate the withdrawal from the EU without prior authorisation of the legislator. However, while the Divisional Court sank the roots of its judgement in some of the cornerstones of the classical British constitutional doctrine, the Supreme Court took a more innovative path. Accepting that the transposition of EU law into national law thanks to the ECA 1972, created a new and autonomous source of domestic law, stands as an overcoming of the dualist principle, representing an evolutionary interpretation.

In confronting such a politically sensitive dispute, the courts have been largely exposed to criticism coming from several sides. This criticism represented a sort of test for stability of the judicial independence in the UK. While many scholars argued that in their rulings, judges never express political views, but only apply law as it is, part of the literature asserted that generally, when dealing with politically divisive matters, the decision of the courts cannot but respond to political convictions rather than to pure interpretation and application of law.

As to the devolution issue, the UKSC ruled that devolved legislatures did not have to be consulted before triggering the withdrawal procedure, for the Sewel Convention. This was because constitutional conventions are not legally enforceable even if included in a statute. This interpretation was supported by long-established British constitutional doctrine, clearly not leaving room for evolution and change. In this matter, the efficacy of managing complex

issues through unwritten constitutional rules might be called into question. This is especially true in times of low political and constitutional harmony, as the present and probably the future ones.

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Abstract

Come il caso *Miller* ha trasformato la Costituzione britannica

Introduzione

Il processo di integrazione europea ha conosciuto negli ultimi anni una inattesa battuta di arresto dovuta all'affermarsi, in diversi Stati membri, di partiti e movimenti populisti ed euroscettici. Questa tendenza ha avuto il suo momento culminante a giugno del 2016, allorquando i cittadini del Regno Unito, tramite un referendum, hanno espresso la loro volontà di recedere dall'Unione europea. L'art. 50 del Trattato sull'Unione europea (TUE), nel riconoscere a tutti gli Stati membri il diritto di recedere dall'Unione in conformità alle proprie norme costituzionali, stabilisce che tale intenzione debba essere notificata al Consiglio europeo e che dalla data della notifica si apre un periodo di negoziato tra le parti volto a raggiungere un accodo circa le modalità del recesso. In mancanza di accordo, i trattati cessano di essere applicabili allo Stato interessato allo scadere del termine di due anni, prorogabile col voto unanime del Consiglio europeo.

All'indomani dell'imprevisto esito del referendum, la premier Theresa May, succeduta al dimissionario David Cameron, ha subito affermato di ritenersi investita, in virtù delle cosiddette prerogative reali, del potere di attivare da sé, senza alcuna autorizzazione del Parlamento, la procedura di recesso come delineata dall'art. 50 del TUE. Questa presa di posizione è stata contestata dalla donna d'affari Gina Miller, la quale ha deciso di sottoporre la questione al controllo giurisdizionale dell'Alta Corte di Giustizia.

Nel novembre 2016 l'Alta Corte ha dato ragione alla Miller, con una decisione che, a seguito dell'impugnazione proposta dal Segretario di Stato, è stata poi confermata, a gennaio del 2017, dalla Corte Suprema del Regno Unito.

Le due pronunce rivestono una notevole rilevanza per gli studiosi del diritto costituzionale britannico, investendo esse principi fondamentali, tra i quali spicca quello della sovranità parlamentare.

Questa tesi si propone di analizzare i diversi percorsi argomentativi seguiti dalle due Corti per giungere alla decisione del caso, nel quadro dei principi costituzionali fondamentali, e di evidenziarne le implicazioni e le conseguenze.

L'opera è divisa in tre capitoli. Il primo capitolo analizza i principali temi trattati nel contesto

del caso, le contrapposte argomentazioni addotte dalle parti contendenti e le questioni di diritto costituzionale che esse sollevano, senza trascurare le opinioni espresse dai tre giudici dissenzienti della Corte suprema.
Il secondo capitolo è dedicato al tema della indipendenza della magistratura, e a quello connesso della separazione dei poteri, i quali vengono in risalto nella fattispecie a causa delle feroci critiche che i giudici si sono attirate da parte dei media e di esponenti politici.
Il terzo capitolo indaga su un altro punto nodale dell'applicazione nel Regno Unito dell'art. 50 TUE, ossia se le amministrazioni decentrate di Scozia, Irlanda del Nord e Galles debbano dare il loro consenso all'attivazione della procedura di recesso del Regno Unito dall'Unione. In questo contesto, dominato dall'analisi della Convenzione Sewel, ampio spazio viene dedicato alla rilevanza delle convenzioni costituzionali in generale.

Capitolo I: Il caso *Miller*

Nel gennaio 1973, il Regno Unito ha aderito alla Comunità Economica Europea (CEE), ora Unione europea (UE). Ciò è avvenuto attraverso il trattato di adesione del 1972 e la legge sulle Comunità europee (ECA) emanata dal Parlamento britannico nello stesso anno.
Come si è detto, le decisioni *Miller* sono di grande rilevanza costituzionale, giuridica e politica, investendo esse alcuni principi giuridici fondamentali dello Stato di diritto, quali l'indipendenza della magistratura e la sovranità del Parlamento.
La questione giuridica centrale affrontata nel caso *Miller* attiene alla legittimità della pretesa del governo di procedere, in virtù delle cosiddette "prerogative reali", alla comunicazione del recesso dall'UE senza la previa approvazione da parte del Parlamento in forma di legge.
Ulteriori profili di contestazione attengono al ruolo delle assemblee decentrate nel campo delle relazioni sovranazionali, ossia se Scozia, Galles e Irlanda del Nord dovevano essere consultati prima della notifica del recesso.
Laddove il governo britannico ha manifestato la ferma convinzione che l'invio della comunicazione di recesso prevista dall'art. 50 TUE rientrasse tra gli atti di prerogativa reale, esercitabili autonomamente dall'esecutivo, diametralmente opposta è stata la prospettazione propugnata dai ricorrenti. Secondo la Miller, le prerogative della Corona non possono, per basilare principio costituzionale, modificare i diritti attribuiti ai cittadini dal Parlamento, a meno che quest'ultimo non lo consenta. I ricorrenti osservavano, altresì, che la rimozione di diritti derivanti dall'ordinamento giuridico dell'Unione europea sarebbe stata comunque

impedita dalla legge sulle Comunità europee del 1972 (ECA), in mancanza di una sua abrogazione da parte del Parlamento.

A questi argomenti il Segretario di Stato ha replicato in termini formalistici, configurando la notifica del recesso come un mero atto amministrativo, avente effetto esclusivamente sul piano del diritto internazionale, che il governo era obbligato a porre in essere in virtù del mandato in precedenza ricevuto dal popolo in sede di referendum.

Il nucleo della controversia è costituito, quindi, dalla contrapposizione tra il potere del governo di fare e disfare i trattati, da un lato, e la supremazia del Parlamento, dall'altro. Storicamente, le prerogative reali affondano le proprie radici nel periodo medievale, quando il monarca era un signore feudale e il capo del regno, che concentrava in sé tutti i poteri. Questo stato di cose è mutato nel XVII secolo, dopo l'approvazione del *Bill of Rights*. Ancora oggi, definizione di prerogativa reale comunemente accolta è quella enunciata nel XIX secolo da Dicey, secondo il quale essa designa i residui poteri discrezionali lasciati nelle mani della Corona ed esercitabili o dal re stesso o dai suoi ministri. Attualmente, l'ambito di applicazione di siffatti poteri si esplica in materia di difesa, di affari internazionali e di sicurezza nazionale.

Per quanto riguarda, invece, il principio della sovranità parlamentare, esso è considerato una pietra angolare della costituzione inglese da cui tutto il resto dipende, ed impone di affermare che non esiste altra fonte del diritto più autorevole di una legge del Parlamento e che nessun altro potere dello Stato può contestare la validità delle leggi fatte dal Parlamento.

La legge, quindi, prevale sulla prerogativa e sulle decisioni dei giudici. In questo senso, milita una vasta giurisprudenza.[202]

Come evidenziato dalla Corte divisionale, nonostante sia regola generalmente riconosciuta che la gestione delle relazioni internazionali, così come il potere di fare e disfare i trattati, sono di competenza del governo in virtù delle sue prerogative, l'azione del governo opera solo sul piano esterno, mentre non è idonea a produrre effetti sul piano dell'ordinamento giuridico britannico interno, rendendosi a tal fine necessario un atto legislativo da parte del Parlamento.

È, questo, il principio cosiddetto dualistico, al quale si informa la regolamentazione delle relazioni internazionali nel Regno Unito: diritto interno e diritto internazionale costituiscono due sistemi diversi, composti da norme indipendenti le une dalle altre.

[202] *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508; R v Secretary of State for the Home Department, ex parte Fire Brigates Union [1995] 2 All ER 244; The Case of Proclamations [1610] EWHC KB J22.

Il rispetto del principio dualistico si complica nel rapporto tra ordinamento britannico e ordinamento dell'Unione europea, atteso che quest'ultimo produce effetti diretti nella sfera giuridica dei cittadini dei singoli Stati membri. L'ECA 1972 sancisce il principio per cui tutte le situazioni giuridiche attive e passive derivanti dalle fonti comunitarie hanno effetto nel Regno Unito, senza che sia necessaria una legge interna che dia loro attuazione. La logica dualistica, quindi, non riesce a cogliere compiutamente la natura peculiare dell'UE. Ne consegue che – come argomentato dalla Corte divisionale – non può essere consentito all'esecutivo di procedere autonomamente, senza una legge del Parlamento, a una disdetta dei trattati che determina il venir meno, nel sistema giuridico britannico, dei diritti conferiti ai cittadini dalle norme unionali.

La Corte suprema, nel confermare la sentenza della High Court, ribadisce anch'essa che il recesso dall'Unione europea determina rilevanti modifiche nel sistema giuridico interno del Regno Unito, investendo i diritti soggettivi introdotti nell'ordinamento britannico dalle fonti comunitarie. La Corte, inoltre, confutando la fragile difesa allestita sul punto dal Segretario di Stato, si è condivisibilmente spinta ad affermare, nel solco di una interpretazione evolutiva del quadro costituzionale, che l'ECA 1972 non si è limitato a trasporre nell'ordinamento interno del Regno Unito la legislazione europea, ma ha trasferito a Bruxelles parte della sovranità legislativa di Westminster. La sentenza della Corte Suprema, quindi, va oltre l'argomento incentrato sulla tutela dei diritti dei singoli e sulle relazioni tra Unione europea e Regno Unito, per concentrare la sua attenzione su come l'adesione del Regno Unito al consesso europeo ne abbia modificato i principi e gli equilibri costituzionali interni, e su come l'ECA 1972 abbia dato vita a una nuova fonte del diritto.

In quest'ottica, il recesso dall'Unione europea, non solo pregiudica i diritti individuali, ma influenza il sistema costituzionale delle fonti del Regno Unito, eliminando dall'ordinamento giuridico interno il diritto comunitario che era entrato a farne parte. Si tratta, pertanto, di un effetto così dirompente da non poter essere tollerato senza che il Parlamento abroghi l'ECA 1972.

La decisione della Corte suprema è stata pronunciata a maggioranza dei suoi membri, con le opinioni contrarie di Lord Reed, Lord Carnwath e Lord Hughes.

Lord Reed propone un'interpretazione restrittiva dell'ECA1972, nel senso che, a suo avviso, i diritti riconosciuti dall'UE non possono essere considerati come facenti parte del diritto interno in senso tradizionale, dunque essi potrebbero essere rimossi dal sistema giuridico britannico anche senza l'approvazione parlamentare. Lord Reed sostiene inoltre che la facoltà del governo di agire nell'ambito delle relazioni internazionali, in forza delle prerogative reali,

non subisce limiti. Secondo Lord Carnwath, così come secondo Lord Reed, i tribunali non possono indagare sui metodi con cui il Parlamento esercita il controllo sull'esecutivo, né la loro adeguatezza.
Analogamente, Lord Hughes osserva che l'abrogazione da parte del Parlamento dell'ECA 1972 non sarebbe necessaria, essendo essa, fin dalla sua emanazione, destinata ad operare solo in vigenza dei trattati. La tesi secondo cui l'esercizio della prerogativa reale può legittimamente determinare una modifica nella legislazione nazionale è stata propugnata da John Finnis. A questo fine, egli parifica l'ECA 1972 al TIOPA 2010 (trattato contro le doppie imposizioni), inferendone che il governo non ha soltanto il potere di modificare questi due trattati, ma anche quello di eliminarli senza l'intervento del Parlamento.

Capitolo II: Pesi e contrappesi - l'indipendenza della magistratura e il caso *Miller*

La decisione *Miller* si è misurata con un altro caposaldo della costituzione britannica: il principio della indipendenza della magistratura. Secondo la dottrina della separazione dei poteri, che ha avuto in Montesquieu il suo massimo interprete, ogni potere dello Stato (esecutivo, legislativo e giudiziario) è autonomo nel proprio campo e non può invadere il campo di competenze riservato agli altri. In un paese democratico retto da una costituzione, codificata o non codificata che sia, il potere deve essere limitato e non può essere concentrato nelle mani di un singolo organismo o persona. Tradizionalmente, la separazione dei poteri non è stata considerata come una caratteristica fondamentale della costituzione britannica, in cui prevale piuttosto la concezione fondata su un sistema di controlli ed equilibri.
Una prova tangibile della sovrapposizione di poteri che caratterizza l'organizzazione statale del Regno Unito è stata rappresentata, fino alla riforma costituzionale del 2005, dalla figura del Lord Cancelliere, la quale sommava in sé le funzioni amministrative e giudiziarie supplementari. Tuttavia, la legge di riforma costituzionale 2005 ne ha ridisegnato il ruolo, trasferendo le sue funzioni giudiziarie al Presidente dei Tribunali di Inghilterra e Galles e quelle di presidente della House of Lords al Lord Speaker. L'elemento particolarmente caratterizzante della riforma costituzionale del 2005 è stata la creazione di una Corte Suprema indipendente, separata dalla Camera dei Lord, grazie alla quale è possibile affermare che la riforma ha segnato la consacrazione della indipendenza della magistratura nella costituzione.

Ci si chiede spesso se il Regno Unito abbia un sistema giudiziario imparziale, indipendente dagli altri poteri dello Stato e immune da pressioni ed influenze esterne. I rapporti tra i giudici e l'esecutivo sono sempre stati complessi e se, in passato, i giudici erano restii a censurare la condotta dei governanti, oggi i processi di questa natura sono esponenzialmente aumentati, e ciò anche per effetto dell'Human Rights Act del 1998, che ha concesso ai tribunali il potere di dichiarare la legislazione primaria incompatibile con i diritti della Convenzione.

L'esito del caso *Miller* costituirà sicuramente un precedente vincolante per i governi futuri, venendo così ad assumere un rilevante significato politico. Sebbene i giudici in *Miller* abbiano ripetutamente dichiarato di voler mantenere le loro argomentazioni distanti da ogni implicazione politica, a beneficio di un'analisi meramente tecnico-giuridica, ciò non ha impedito ai detrattori della Brexit di accogliere la decisione come un successo della loro parte politica e, per converso, ai sostenitori della Brexit di scorgervi una indebita volontà di contrastare la volontà popolare. La facoltà di commentare e criticare l'operato dei giudici viene comunemente considerata come uno degli aspetti più significativi della libertà di espressione, da bilanciare, comunque, con l'altro principio fondamentale della indipendenza della magistratura. Ebbene, nel caso di specie, la natura intuitivamente divisiva della materia trattata ha esposto i giudici a critiche senza precedenti, essendosi essi visti accusare da più parti di aver agito al fine di impedire la Brexit, piuttosto che nell'esercizio del potere di accertare quali fossero le corrette modalità del recesso. In quest'onda mediatica, si inseriscono molteplici articoli di stampa che additano i giudici della Corte Suprema come "nemici del popolo" "fuori dal mondo", autori di una sentenza che segna "la morte della democrazia"!

L'assoggettamento dei giudici a critiche eccessive e smodate è suscettibile di sconfinare in un danno non solo per l'indipendenza della magistratura, ma anche per l'imparzialità dei giudici, la cui serenità di giudizio, specie di fronte ad accuse di carattere personale, potrebbe risentirne fino al punto di essere compromessa.

A proposito delle critiche rivolte ai giudici del caso *Miller*, l'attuale Lord Cancelliere Liz Truss ha si è limitata a dichiarare: *"L'indipendenza della magistratura è il fondamento su cui si basa il nostro stato di diritto e il nostro sistema giudiziario è giustamente rispettato in tutto il mondo per la sua indipendenza e imparzialità."*. La signora Truss ha a sua volta ricevuto numerose critiche a causa del suo intervento eccessivamente "ridotto".

Diversi studiosi hanno commentato la critica giudiziaria innescata dal caso Miller, esprimendosi nel senso che la decisione è giuridicamente ineccepibile e non influenzata dal

contesto politico circostante. Il Presidente del Consiglio nazionale forense ha condannato fermamente gli attacchi ai giudici, affermando che la magistratura deve assicurare che il sistema costituzionale britannico continui a difendere lo stato di diritto, così come avvenuto nel caso *Miller*. Secondo altri, i commenti sguaiati riservati ai giudici rappresentano una grave minaccia per l'ordine costituzionale e democratico del Regno Unito.

Capitolo III: Devolution e caso *Miller*

Il termine *devolution* designa il complesso di poteri decisionali decentrati concessi a Scozia, Galles e Irlanda del Nord. Le criticità di natura costituzionale sollevate dalla Brexit hanno riguardato anche l'eventuale coinvolgimento delle legislature devolute nel procedimento di attuazione del recesso del Regno Unito dalla UE. Sul punto, le questioni principali sulle quali la Corte Suprema si è pronunciata sono due: quali siano le competenze legislative riservate ai Parlamenti devoluti e se sia possibile riconoscere valore legale, e non solo politico, alla Convenzione Sewel. La Corte Suprema, per un verso, ha escluso all'unanimità che le amministrazioni decentrate dovessero esprimere il loro consenso all'avvio del procedimento di recesso *ex* art. 50 TUE e, per altro verso, ha manifestato il convincimento che la Convenzione Sewel, ancorché priva di valore legale, riveste comunque un valore politico e costituzionale di primo piano.

Con riferimento alla relazione tra le legislature devolute e l'Unione, è chiaro che l'appartenenza del Regno Unito all'UE ha svolto un ruolo fondamentale nella stesura del *Devolution Act*, il quale si è premurato di prevenire, nei modi esposti nel paragrafo in argomento, il rischio che atti delle amministrazioni decentrate potessero esporre lo Stato ad infrazioni dei suoi obblighi comunitari. Da questo punto di vista, gli ambiti di competenze nominalmente attribuite alle amministrazioni devolute (ambiente, agricoltura, trasporti, energia) sono state in pratica esercitate fin qui sotto l'egida delle istituzioni europee, anche sotto il profilo del reperimento delle relative risorse finanziarie. A seguito del recesso del Regno Unito dalla UE, le materie sopra menzionate e in atto gestite a Bruxelles dovrebbero restare esclusivo appannaggio di queste ultime, anche se, sul punto, si è accesa una disputa tra Westminster e i parlamenti decentrati circa la formulazione dell'EU withdrawal Bill, ossia dell'atto legislativo destinato a dare effetto alla Brexit.

A questo proposito, un ruolo centrale è rivestito dalla cosiddetta *Sewel Convention*. La convenzione prende il nome dal discorso pronunciato da Lord Sewel nel corso di un dibattito parlamentare avente ad oggetto il disegno di legge che sarebbe poi diventato lo Scotland Act

1998. L'idea che sta alla base della Convenzione Sewel è che il decentramento debba operare in modo da rispettare i ruoli del Parlamento del Regno Unito e delle assemblee delle legislature devolute, mediante preventive consultazioni. Westminster, dunque, non dovrebbe legiferare nell'ambito di materie devolute, senza il consenso delle tre amministrazioni. Il carattere ambiguo della Convenzione risiede nel fatto che i tribunali hanno costantemente enunciato il principio secondo cui essa non attribuisce agli organismi decentrati alcun potere di veto. Le convenzioni costituzionali, costituite da prassi e principi non scritti, costituiscono una fonte di primaria importanza della costituzione del Regno Unito, che, per quanto assimilabili alle leggi, da esse si distinguono nettamente. Esse, infatti, grazie alla loro continua evoluzione nel tempo, introducono nel sistema giuridico elementi di flessibilità, che le caratterizza come fonti dinamiche con funzione integrativa delle leggi.

Il problema della natura legalmente vincolante della Convenzione Sewel è affrontato dalla Corte Suprema nei paragrafi 136 - 152 della decisione *Miller*. È opinione del giudici che la convenzione non sia giuridicamente vincolante, dovendosi riconoscere ad essa esclusiva valenza politica. Ne consegue che non sussiste alcun obbligo del Parlamento di Westminster di ottenere il consenso delle legislature devolute prima di autorizzare l'attivazione della procedura di cui all'art. 50 TUE. Questa decisione è stata vista da molti come una perentoria riaffermazione della sovranità parlamentare contro la concezione della sovranità condivisa.

Conclusione

Il caso Miller si inserisce prepotentemente nello scenario della tormentata vicenda Brexit, ancora oggi ben lungi dal trovare soluzione. I tribunali hanno espresso un giudizio chiaro, anche se non unanime, su questioni di importanza cruciale per il diritto costituzionale britannico.

Le due decisioni si rivelano di straordinaria importanza non solo e non tanto sul piano dei rapporti del Regno Unito con l'ordinamento giuridico dell'UE, ma soprattutto per i loro riflessi diretti sull'ordine costituzionale interno.

Per quanto riguarda la prima e principale questione, la Corte Suprema ha confermato la decisione dell'Alta Corte, che ha escluso che il governo potesse invocare le prerogative reali per attivare il recesso del Regno Unito dall'UE senza la previa autorizzazione del legislatore. Tuttavia, la Suprema Corte è giunta a questo risultato attraverso un percorso argomentativo più innovativo rispetto a quello classico posto a fondamento della decisione di primo grado.

Infatti, affermare che l'ECA 1972 ha creato una nuova e autonoma fonte di diritto interno, si pone come un sostanziale superamento del principio dualistico.

Le Corti sono state esposte a graffianti critiche provenienti da più parti, che hanno messo alla prova l'effettività della indipendenza della magistratura nel Regno Unito.

Per quanto concerne la *devolution*, la Corte Suprema, pur sottolineando la rilevanza politica delle convenzioni costituzionali, e in particolare della Convenzione Sewel, ha stabilito che non sussisteva alcun dovere di consultare le legislature devolute prima che fosse attivata la procedura di recesso.