



BREXIT
SPECIAL 2

The Constitutional Context to Triggering Article 50 TEU

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The Constitutional Context to Triggering Article 50 TEU

The mythical Art.50 TEU gives Member States the option to withdraw from the EU 'in accordance with its own constitutional requirements'. But what are the constitutional requirements of a country with no written constitution? And which institution is best placed to resolve the competing constitutional claims regarding prerogative powers, Acts of Parliament, conventions, and individual rights that were voiced by the government, the devolved administrations, and by the claimants?

An unprecedented eleven-member UK Supreme Court ('UKSC') decided *Miller* – supposedly the constitutional case of the century – on 24 January 2017. As had been generally predicted, the government's argument, that it could start the process of withdrawing from the EU using a prerogative power instead of an Act of Parliament, was roundly rejected by an 8:3 majority.

The *Miller* case will no doubt be discussed for years to come. The government's unconstitutional attempt to bypass Parliament was thwarted by confident and convincing reasoning in a single judgement signed by eight SC Justices.

Beyond the headline-grabbing defeat and the subsequent focus on statutory authorisation in the form of the [European Union \(Notification of Withdrawal\) Bill](#), the government also secured a strong victory on the question whether it needed the consent from the devolved legislatures (Scotland, Northern Ireland, and Wales) before the invoking Art 50 TEU. The UKSC unanimously held that such consent was not required. The UKSC had already required parliamentary legislation in relation to the first question, which

took some of the heat out of the second question. Yet the government's victory on the devolution question is likely to be short-lived.

Since the referendum in June 2016, the government's official policy towards the regions has been inclusive. In his statement to Parliament on Brexit on 27 June 2016, PM [David Cameron](#) said that: 'we must ensure that the interests of all parts of our United Kingdom are protected and advanced, so as we prepare for a new negotiation with the European Union we will fully involve the Scottish, Welsh and Northern Ireland Governments.' On her first visit to Scotland after becoming Prime Minister on 15 July 2016, [Theresa May](#) said that:

'I've been very clear with the first minister today that I want the Scottish government to be fully engaged in our discussion. I have already said that I won't be triggering Article 50 until I think that we have a UK approach and objectives for negotiations. I think it is important that we establish that before we trigger Article 50.'

In contrast to the inclusive approach, PM May has also repeatedly made clear that agreeing a UK-wide approach did

not mean giving any of the regions a veto. The devolved legislatures would **not be allowed to 'block Brexit'**. This appears particularly problematic with reference to Northern Ireland and Scotland, whose populations voted to remain in the EU.

The UKSC has now stepped into the breach by concluding that the consent of the devolved legislatures is not constitutionally necessary before official notice to withdraw from the EU is given under Art. 50 TEU. The question it had to address was whether any UK legislation that sought, for instance, to repeal the European Communities Act 1972 would be subject to the Sewel Convention.

This question opens up a gulf between constitutional law and constitutional politics. The UK government will claim, correctly, that EU law falls within the jurisdiction of the Westminster Parliament. The devolution legislation in Scotland, Wales, and Northern Ireland *assumes* that the UK would be a member of the EU, but does not *require* the UK to remain a member. It follows that there can be no 'parallel legislative competence' by with the devolved legislatures could withdraw from the EU (*Miller* [129]).

However, the devolved administrations will point out equally correctly, that to give effect to EU withdrawal Westminster would have to relieve the devolved legislatures of their statutory obligation to respect EU law. This would require changing the devolution legislation. The NIA 1998 has been described as the '**constitution**' for Northern Ireland. It involves a delicate three-way power sharing structure between the Republic of Ireland, the devolved administrations and

legislatures, and the UK. Amending the NIA 1998 unilaterally would be especially reckless, if not actually impossible as a matter of international relations and practical politics.

As a matter of constitutional law, Westminster may of course repeal the European Communities Act 1972 or amend the devolution legislation at any time. However, as a matter of constitutional politics, the UK government will not normally invite Westminster to legislate on devolved matters or on the extent of devolved powers without first obtaining the consent of the relevant devolved legislature. That understanding stems from the Sewel Convention, which exists in two forms: first, as an uncodified constitutional convention for Northern Ireland; second, in statutory form for Scotland and Wales. [The Smith Commission](#) was established in the aftermath of the Scottish Independence referendum of 2014. As part of the overall drive to create a stronger and more autonomous Scottish Parliament it proposed that that ‘the Sewel Convention will be put on a statutory footing’. The Scotland Act 2016 inserted this recommendation into the 1998 Act¹, and the Wales Act 2017 has now similarly amended the Government of Wales Act 2006.²

Ultimately, the devolution question disguises a clash between law, the constitution, and politics. The UKSC is undoubtedly correct that the consent of the devolved legislatures is not *legally* required for the purposes of triggering Art.50 TEU – or for the purposes of amending the devolution legislation. However, so long as the Sewel Convention is in place, it is a *constitutional* requirement that the devolved assemblies pass a legislative

consent motion under the Sewel convention before those parts of the devolution legislation incorporating EU law can be amended. *Politically*, there is a danger that the UKSC’s retreat to constitutional formalism will be interpreted as constitutional intransigence in the regions. Withdrawing from the EU will certainly alter the general and special arrangements of the Northern Irish peace process. Moreover, the outcome of the Northern Ireland assembly elections in March 2017 throws down the gauntlet for the future of political power-sharing and joint government. The Miller decision allows the [SNP](#) to proclaim that the UK government’s promises to enhance the Sewel Convention are ‘not worth the paper they were written on’, and that Scotland cannot be an equal partner in the UK so long as its ‘voice is simply not being heard or listened to within the UK’.

In conclusion, the UKSC adds to the government’s humiliation by turning the loss of individual rights into a loss of a domestic source of law. It then appears to throw the government some rope on the devolution question. On current evidence, however, it is unclear whether that rope is a lifeline or a noose. The single most important constitutional requirement for the UK lies in prioritising the Northern Irish and Scottish questions as a matter of urgency. Devolution happens to be intrinsically tied up with the UK’s membership of the EU. It is unfortunate that the British tradition steadfastly refuses to discuss politics through a constitutional matrix. That is an old habit that needs to fade quickly. Finding an answer to the devolution question is not just indispensable to working out the legal process of withdrawal under Art.50 TEU. More than that, it is constitutionally important, politically urgent and, in relation to the long-term national interest, vital.

1 S. 28(8) Scotland Act 1998, as amended by s.2(2) Scotland Act 2016.

2 S.2 Wales Act 2017.

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