

**[Jo Eric Khushal Murkens](#)**

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# Mixed Messages in Bottles: the European Union, devolution, and the future of the constitution

Jo Eric Khushal Murkens\*

**Keywords:** *Miller*, EU law, EU withdrawal, UK Supreme Court, judicial reasoning, devolution, Sewel Convention.

**Abstract:** An unprecedented eleven-member UK Supreme Court decided *R (Miller) v Secretary of State for Exiting the European Union* on 24 January 2017. 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 comprehensively defeated by an 8:3 majority. However, the Government also secured a unanimous verdict that it did not need the consent from the devolved legislatures in Scotland, Wales, and Northern Ireland before invoking Article 50 of the TEU. I explore the judicial argumentation in light of Philip Bobbitt's six modalities of constitutional argument, five of which feature, and one of which ought to have featured, in this seminal case.

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\* Department of Law, London School of Economics and Political Science. I am grateful to Colin Murray, Alison Young and the anonymous reviewer for their constructive comments. All errors are mine.

## INTRODUCTION

The highly anticipated decision by the United Kingdom Supreme Court (UKSC) in *Miller*<sup>1</sup> comes at a critical constitutional moment. Winding up the UK's existing relationship with the EU will also alter the politically sensitive terms and conditions of the devolution settlement between the centre and the regions. It will take years for the full extent of the technical details and political consequences to be worked out, if they ever are. For now, the UKSC was called upon to provide clarity over two considerations: Westminster's constitutional entanglement with the EU and with the devolved legislatures. The UKSC reached the same conclusions as the Divisional Court's ruling on 3 November 2016 with respect to Article 50 of the Treaty on European Union (TEU), but it does so from a completely different starting point. With respect to EU law, the UKSC makes an unprecedented and audacious statement. With respect to devolution, however, it passes up on a pioneering opportunity for the UK's quasi-federal constitution. It is part landmark ruling, and part dispiriting wavering. The implications of both aspects of the Court's intervention will be re-visited for years to come.

I wish to discuss *Miller* as an example of the different types of constitutional reasoning that were explored by the US scholar Philip Bobbitt in his book on the topic in 1991. According to Bobbitt, a proper, sound, or legitimate argument is one that uses one of the following modalities

historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street"); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule).<sup>2</sup>

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<sup>1</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>2</sup> P. Bobbitt, *Constitutional Interpretation* (Oxford: Blackwell, 1991) 12-13.

These modalities clearly do not translate neatly into the context of the UK's uncodified constitution; but neither does that hurdle render them unusable as a series of deployable benchmarks. Aside from the prudential argument, the five main forms are methods of interpreting legal texts generally and the text of a constitution in particular. Prudential reasoning does not interpret a text, but considers non-textual matters, such as public policy or the social costs and benefits of particular decisions. The first four modalities – historical, textual, structural, and doctrinal – clearly feature in *Miller*. In the context of devolution, I will argue that the UKSC might have been guided by ethical reasoning. Instead, possibly due to concerns about over-politicisation, the UKSC relied on prudential reasons for restraint rather than ethical reasons for intervening.

### **GENIE OUT OF THE BOTTLE**

The most astonishing aspect of the *Miller* decision is the UKSC's conceptualisation of EU law. It marks the culmination of a peculiarly British struggle with the validity of EU law just as its application looks set to end. Lord Denning's 'construction' approach in *Macarthys v Smith*<sup>3</sup> and Lord Bridge's 'disapplication' approach in *Factortame*<sup>4</sup> were practical attempts to resolve the question whether to accord priority of application to the national or to the European norm. UK courts successfully avoided pronouncing on the priority of validity (an obscure and theoretical question) by reiterating that Community law derived its validity from a purely domestic source, namely the European Communities Act 1972 (ECA).

The matter seemed settled until Eleanor Sharpston QC, appearing on behalf of Sunderland City Council in *Thoburn*,<sup>5</sup> adopted the reasoning in the ECJ's jurisprudence. She argued that EU law took effect in domestic law not because of 'incorporating' legislation like the ECA, but because of its autonomous status as EU law. Leaning heavily on established

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<sup>3</sup> [1981] QB 180.

<sup>4</sup> *R v Secretary of State for Transport, ex p. Factortame Ltd. (No.2)* [1991] 1 AC 603.

<sup>5</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151.

principles of Community law, Ms Sharpston submitted that the Treaty of Rome as amended was unlike other international treaties in that it had created a new and unique legal order that ranked above the legal systems of the Member States. Upon becoming a member in 1973, the UK bowed its head to the supremacy of Community law.<sup>6</sup> It followed that the validity of EU law did not depend upon its incorporation by the ECA, but upon the free-standing doctrines of direct effect and supremacy as established in *Van Gend en Loos*<sup>7</sup> and *Costa v ENEL*.<sup>8</sup>

From the perspective of the UK constitution, the submissions by Ms Sharpston had gone rogue. Not only did the arguments recognise a plurality of legal orders, but also a plurality of rules of recognition. Furthermore, Ms Sharpston went so far as to assert that ‘so long as the UK remains a Member State, the pre-accession model of Parliamentary sovereignty is of historical, but not actual, significance.’<sup>9</sup> This line of argument was summarily rejected as ‘false’ by Laws LJ.<sup>10</sup> Almost a decade later, the House of Commons’ European Scrutiny Committee, chaired by William Cash MP, remained sufficiently irritated by the Divisional Court’s decision in *Thoburn* to hear evidence on the merits of Ms Sharpston’s submissions. In the words of the Committee, these submissions had treated EU law as entrenched by virtue of an autonomous principle of EU law rather than incorporated by virtue of the ECA. Although the Committee assured itself that ‘the “entrenchment” argument made by Sunderland City Council was bold rather than strong’, it clearly feared Ms Sharpston’s line of argument as a potent challenge to the legislative supremacy of Parliament.<sup>11</sup> Political reassurances followed in the form of the European Union Act 2011 (EUA): section 18 reinforced the domestic position that EU law was applicable and effective in the UK ‘only by virtue of’ the ECA. The Explanatory Notes to section 18 of the EUA state

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<sup>6</sup> *ibid* at [53].

<sup>7</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1.

<sup>8</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585; see also *Thoburn* n 5 above at [55].

<sup>9</sup> Submission cited in *Thoburn* n 5 above at [53].

<sup>10</sup> *ibid* at [58].

<sup>11</sup> European Scrutiny Committee, Tenth Report of Session 2010-11, ‘The EU Bill and Parliamentary Sovereignty’ 6 December 2010, 27-28.

This declaratory provision was included in the Act in order to address concerns that the doctrine of parliamentary sovereignty may in the future be eroded by decisions of the courts. By providing in statute that directly effective and directly applicable EU law only takes effect in the UK legal order through the will of Parliament and by virtue of the European Communities Act 1972 or where it is required to be recognised and available in law by virtue of any other Act, this will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law and principles which has become an integral part of the UK's legal system independent of statute.

The President of the UKSC along with seven colleagues has, intentionally or not, thrown that orthodoxy out of the window. Lord Neuberger makes two points. He agrees that the ECA gives effect to the Treaty of Rome and is the source of EU law. That is to say, EU law originates from the institutions of the European Union, and then becomes effective in UK law via the gateway of the ECA. But instead of leaving it there he goes on to say that, more fundamentally and more realistically, 'it is the EU institutions which are the relevant source of that law.' For as long as the ECA remains in force, the entire *acquis communautaire*, ie, the EU Treaties, EU legislation, and the jurisprudence of the Court of Justice, 'are direct sources of UK law.'<sup>12</sup> In other words, the validity of EU law does *not* originate from the ECA. Instead, the effect of the Act is to 'constitute' (a better term would be 'to recognise') EU law as 'an independent and overriding source of domestic law.'<sup>13</sup> Should this make you blink twice, the UKSC repeats the point by positing 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.'<sup>14</sup>

The consequences of referring to the EU as an independent and overriding source of law are three-fold. First, after decades of paying lip-service to sovereignty,<sup>15</sup> preserving 'the

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<sup>12</sup> *Miller* n 1 above at [60]-[61].

<sup>13</sup> *ibid* at [65].

<sup>14</sup> *ibid* at [80].

<sup>15</sup> M. Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1997) 71.

formal veneer of Diceyan orthodoxy while undermining its substance’,<sup>16</sup> and statutorily fastening the existing relationship between EU law and UK domestic law,<sup>17</sup> the highest court in the UK has let the EU genie out of the bottle. It appears to have defied the doctrine of parliamentary sovereignty by aligning its case law with the ECJ’s famous words in *Costa* that ‘...the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions...’<sup>18</sup>

Secondly, this recognition of the EU as a source of law allows the UKSC to reject the Government’s claims that EU membership merely results in changes to domestic law ‘from time to time’ as provided for under section 2(1) of the ECA. Contrary to four decades of judicial precedent and the statutory prescription in section 18 of the EUA, the UKSC holds that withdrawal would give effect to ‘a fundamental change in the constitutional arrangements of the United Kingdom’.<sup>19</sup>

Finally, the UKSC claims the constitutional high ground by recognising EU law as an *independent* source of domestic law. The majority establishes a clear link between the triggering of Article 50 of the TEU, the loss of a domestic source of law, which represents a fundamental constitutional change, and the resulting need for statutory authorisation. In so arguing, the Court torpedoed the Government’s comparatively unsophisticated link between triggering Article 50, which will merely alter UK foreign relations, and therefore falls squarely within its prerogative power. Interestingly, neither does the UKSC follow the legal reasoning of the Divisional Court, which linked the triggering of Article 50 to the inevitable and irretrievable loss of certain individual rights guaranteed under EU law.

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<sup>16</sup> P.P. Craig, ‘Sovereignty of the United Kingdom after *Factortame*’ (1991) *Yearbook of European Law* 221, 251

<sup>17</sup> The Explanatory Notes to the EUA, referred to above, make clear that EUA, s 18 ‘does not alter the existing relationship between EU law and UK domestic law; in particular, the principle of the primacy of EU law.’

<sup>18</sup> *Costa* n 8 above, 594.

<sup>19</sup> *Miller* n 1 above at [78].

I do not wish to push the point too far. I am not saying that the UKSC's dicta have effected a 'technical revolution' by departing from the principle of parliamentary sovereignty.<sup>20</sup> Indeed, the UKSC is adamant that the recognition of EU law as a domestic source does not result in a change to the rule of recognition: Parliament can repeal the ECA at any point in time.<sup>21</sup> But enhancing the status of EU law forms the basis of the UKSC's 'structural' argument (in Bobbitt's terms). The Court embellishes the domestic constitutional architecture through the innovative step of recognising EU law as source. It then infers that the loss of that source would require statutory authorisation. The conclusion is indeed reached via 'the ordinary application of basic concepts of constitutional law to the present case'.<sup>22</sup> However, the UKSC's starting point is far from ordinary in a doctrinal sense.

The Government's lawyers did not help their case by placing a weak argument at its core. This rested on the absence of any provision in the ECA that curtailed ministers' prerogative powers to withdraw from international treaties. It followed, the Government claimed, that withdrawing from the EU Treaties under the prerogative was not precluded by the ECA.<sup>23</sup> Lord Reed agrees with this position: since the ECA does not require the UK to be a member of the EU, it also does not affect the Government's power to begin the process of withdrawal without an Act of Parliament.<sup>24</sup> However, the Government's argument was ultimately deemed insubstantial in that it tried to prove a negative by transforming absence of evidence into positive proof of its existence. It was roundly rejected with words that echo

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<sup>20</sup> H.W.R. Wade, 'Sovereignty - Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568-575.

<sup>21</sup> *Miller* n 1 above at [61].

<sup>22</sup> *ibid* at [82].

<sup>23</sup> *ibid* at [85]; accepted by Lord Reed (dissenting) at [161]: 'Since there is no statute which requires the decision under article 50(1) to be taken by Parliament, it follows that it can lawfully be taken by the Crown, in the exercise of the prerogative.' (See also [194]).

<sup>24</sup> *ibid* at [177].



Lord Camden's famous dictum in *Entick v Carrington*:<sup>25</sup> '... unless that Act positively created such a power in relation to those Treaties, it does not exist'.<sup>26</sup>

*Miller* was widely billed as a case of great constitutional importance – and in relation to EU law it undoubtedly breaks new ground. But in holding that legislative authority is required for the exercise of political power it merely serves as the kind of constitutional reminder that courts occasionally hand out to governments. Moreover, although the UKSC upholds the Divisional Court's ruling it does not do so for the same reasons. The question for the Divisional Court involved the inevitable and irrevocable loss of individual rights once the Article 50 negotiations had run their course.<sup>27</sup> The outcome of that case was effectively pre-determined by 400 years of consistent case law dating back to the *Case of Proclamations*,<sup>28</sup> and the court said nothing about the constitutional quality of EU law. In contrast, the UKSC says almost nothing about individual rights.<sup>29</sup> The different approach is of little practical significance. The courts' conclusions are the same irrespective of whether triggering Art 50 results in the loss of rights or in the loss of a source of law: such a 'a major change to UK constitutional arrangements' cannot be achieved solely by executive fiat.<sup>30</sup>

### **BOTTLING UP THE DEVOLUTION QUESTION**

The second question before the UKSC related to the terms of the Northern Ireland Act 1998 (NIA), and whether they required the agreement of the devolved legislature before notice under Article 50 could be given. The UKSC conceded that because it had already found that an Act of Parliament was required to authorise notification the devolution question had either

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<sup>25</sup> (1765) 19 Howell's State Trials 1029: '...if this is law it would be found in our books, but no such law ever existed in this country...'

<sup>26</sup> *Miller* n 1 above at [86].

<sup>27</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) at [57]-[66].

<sup>28</sup> (1611) 12 Co Rep 74; see also *R (Miller) ibid* at [26]: 'This subordination of the Crown (i.e. the executive government) to law is the foundation of the rule of law in the United Kingdom. It has its roots well before the war between the Crown and Parliament in the seventeenth century but was decisively confirmed in the settlement arrived at with the Glorious Revolution in 1688 and has been recognised ever since.'

<sup>29</sup> See only *Miller* n 1 above at [76]-[79].

<sup>30</sup> *ibid* at [82]

been superseded or become less significant. As a result, it holds that the provisions of the NIA are not constructive to the case, and that the Sewel Convention does not give rise to a legally enforceable obligation.

One way of interpreting the UKSC's response to the devolution question combines Bobbitt's textual interpretation with his idea of prudential reasons for restraint. The Court's unanimous rejection of the devolution question reads like a reassertion of the English principle of absolute legislative supremacy that traces back to Blackstone and Dicey. Such legalism must be understood in light of a political atmosphere in which the UKSC was momentarily under the spotlight and perhaps anxious not to over-politicise the devolution question. It may, therefore, have been judicious to bottle up the devolution question for a later day.

The UKSC's textualism arguably sends a chilling message to the regions. First, with respect to EU relations, the UKSC holds that 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.<sup>31</sup> Constitutionally, EU relations are an 'excepted' matter<sup>32</sup> or reserved to Westminster.<sup>33</sup> It follows that there can be no 'parallel legislative competence' by which the devolved legislatures could withdraw from the EU.<sup>34</sup>

Moreover, the UKSC adopts a technical understanding of the Sewel Convention, which is the mechanism by which the UK Parliament constrains its formal power to legislate on matters that have been devolved to the regions.<sup>35</sup> Curiously, the Sewel Convention exists in two forms: as an uncodified constitutional convention for Northern Ireland, and in

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<sup>31</sup> *ibid* at [129].

<sup>32</sup> NIA, Sched 2.

<sup>33</sup> Scotland Act 1998, s 30(1) and para 7(1) of Sched 5; Government of Wales Act 2006, s 108(4) and Pt 1, Sched 7.

<sup>34</sup> *Miller* n 1 above at [130].

<sup>35</sup> NIA, s 5(6); Scotland Act 1998, s 28(7); Government of Wales Act 2006, s 107(5).

statutory form for Scotland and Wales. The Smith Commission was established in the aftermath of the Scottish Independence referendum of 2014 to create a stronger and more autonomous Scottish Parliament. It proposed that ‘the Sewel Convention ... be put on a statutory footing’.<sup>36</sup> The Scotland Act 2016 inserted this recommendation into the 1998 Act,<sup>37</sup> and the Wales Act 2017 has now similarly amended the Government of Wales Act 2006.<sup>38</sup> The infringement of a convention usually attracts political consequences (eg, loss of office), but not any legal penalty imposed by a court of law. But what happens in the case of a convention that has been inserted into an Act of Parliament? Does its statutory form grant the courts jurisdiction over its scope and meaning?

The UKSC unanimously rejects this view. The Sewel Convention is ‘a statement of political intent [that does] not create legal obligations.’<sup>39</sup> The purpose of recognising the convention in statutory form was to ‘entrench’ it, ie, give it greater political weight, as a convention.<sup>40</sup> The UKSC’s jurisdiction is entirely passive: ‘the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary’.<sup>41</sup> Applied to the present case, section 1 of the NIA<sup>42</sup> provides only that Northern Ireland shall not cease to be part of the United Kingdom without the consent of a majority of the people of Northern Ireland.<sup>43</sup> The giving of notice under Article 50 has no bearing on section 1 of the NIA. As a result, the UK Parliament could in law unilaterally alter the structure of the devolution

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<sup>36</sup> Smith Commission, ‘Report of the Smith Commission for further devolution of powers to the Scottish Parliament’, 27 November 2014, at [22].

<sup>37</sup> Scotland Act 1998, s 28(8) as amended by Scotland Act 2016, s 2(2).

<sup>38</sup> Wales Act 2017 s 2.

<sup>39</sup> *Miller* n 1 above at [139].

<sup>40</sup> *ibid* at [149].

<sup>41</sup> *ibid* at [151].

<sup>42</sup> NIA, s 1 reads ‘(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty’s Government in the United Kingdom and the Government of Ireland.’

<sup>43</sup> *Miller* n 1 above at [135] and [157].

settlement and remove those provisions that bind the devolved governments and legislatures to EU law.<sup>44</sup>

In a critical section in *Miller*, the UKSC discusses the rights conferred on the citizens of Northern Ireland by the NIA, eg, to judicially review the Executive or the Assembly where EU law has been breached.<sup>45</sup> The impending loss or diminution of individual rights could have provoked a strongly-worded statement – as it did for the Divisional Court in *Miller*. But voicing concerns about future changes is hampered by the UKSC’s textual approach. This part of the judgement is characterised by lack of certainty and cautious language: statutory rights would ‘normally’ not be removed by prerogative powers; and it would be ‘incongruous’ if the EU law requirements in the NIA were removed other than by statute.<sup>46</sup> On the specific question whether the NIA requires specific legislation before Article 50 is required, the UKSC deems it ‘not necessary to reach a definitive view’ and refrains from finally deciding this question of constitutional law.<sup>47</sup> The UKSC’s unanimous approach to textual interpretation in the context of devolution reflects a distinct loss of confidence: it is hard to avoid the conclusion that the judges did not want to determine the devolution question.

On another day, it might have combined structural reasoning with (to recall Bobbitt’s fifth modality) ethical motives for intervening. Since 1998, the ethos of the UK constitution has shifted from that of a unitary state with centralised government to that of a quasi-federal state with devolved administration. These new and evolving constitutional arrangements give rise to ethical arguments, which recognise that certain rights, obligations, and interests lie outwith the power of any one government. Ethical and structural arguments are similar in one respect: neither depends ‘on the construction of any particular piece of text, but rather on the

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<sup>44</sup> Scotland Act 1998, s 29(2)(d); Government of Wales Act 2006, s 108(6)(c); NIA, s 6(2)(d).

<sup>45</sup> NIA s 6(2)(d) and s 24(1).

<sup>46</sup> *Miller* n 1 above at [132].

<sup>47</sup> *ibid* at [132].

necessary relationships that can be inferred from the overall arrangement expressed in the text'.<sup>48</sup> The modality of ethical argument would have allowed the UKSC to draw on broader commitments that are reflected in the UK's constitutional settlement, such as the NIA. Borne of the Belfast Agreement,<sup>49</sup> it was signed by the leaders of eight political parties and by the heads of the British and Irish Governments, and subsequently put before the electorates of both Northern Ireland and of the Republic of Ireland for approval. A number of observations follow from this starting point.

First, in the earlier House of Lords decision of *Robinson v Secretary of State for Northern Ireland*,<sup>50</sup> Lords Hoffmann and Bingham (respectively) expressly refer to the NIA as 'a constitution for Northern Ireland',<sup>51</sup> which means that 'the provisions should, consistently with the language used, be interpreted *generously and purposively*, bearing in mind the values which the constitutional provisions are intended to embody'.<sup>52</sup>

Secondly, the Good Friday Agreement was supported by a referendum held simultaneously in Northern Ireland (71.1 per cent in favour) and in the Republic of Ireland (94.4 per cent in favour). The holding of a referendum could have been seen by the UKSC Justices in *Miller* as establishing a principle that there would be no change to NI's constitutional status without the consent of its citizens.

Thirdly, instead of reiterating doctrinal Westminster-centric notions of sovereignty, the UKSC could have conceived of the relationship between the centre and the regions with reference to these wider constitutional considerations. The UKSC could have built on its view that the loss of EU law amounts to a fundamental change to the UK constitution to express concern that such a loss would destabilise cooperation in the North-South Ministerial Council

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<sup>48</sup> Bobbitt, n 2 above, 20.

<sup>49</sup> Cm.3883 (April 1998).

<sup>50</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; [2002] NI 390.

<sup>51</sup> *ibid* at [25] per Lord Hoffmann.

<sup>52</sup> *ibid* at [11] per Lord Bingham (emphasis added).

as established under the Belfast and British-Irish Agreements.<sup>53</sup> This institution has a wide remit which certainly can include implementation of certain EU policies and programmes on an all-Ireland and on a cross-border basis. The observance and implementation of EU law is expressly a ‘transferred matter’,<sup>54</sup> and as such forms part of the responsibilities of the devolved administration in Northern Ireland. A reasonable case can be made that Westminster legislation that amended those provision in ways that affected the ‘complex power-sharing’ arrangements<sup>55</sup> between the Republic of Ireland, the devolved administrations and legislatures, and the UK would not fall under the Sewel Convention and would, therefore, require the consent of the devolved legislatures.

From the UKSC’s perspective, therefore, the Sewel Convention is the key constitutional mechanism by which boundary questions between the centre and the regions are framed. The UKSC recognises that some conventions perform ‘a fundamental role in the operation of our constitution’, and the particular function of the Sewel Convention is to facilitate ‘harmonious relationships’ between the centre and the regions.<sup>57</sup> It acts as the key to an interlocking and interdependent constitutional structure. It can be used as the mouthpiece for cross-community and cross-border dialogue. However, the Sewel Convention creates no legal obligations, and the UKSC will not police the fundamental role that the convention plays, notwithstanding its statutory form.

The UKSC is speaking here in the coded language of political constitutionalism and, by prioritising prudential reasons for judicial restraint over ethical reasons for intervening, sending out mixed messages. The need for judicial restraint is matched by a clarion call to

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<sup>53</sup> The Belfast Agreement, Northern Ireland Office, 10 April 1998.

<sup>54</sup> Section 6(1)(d) NIA 1998.

<sup>55</sup> B. O’Leary, ‘Complex Power-Sharing in and over Northern Ireland: A Self-determination Agreement, a Treaty, a Consociation, a Federacy, Matching Confederal Institutions, Intergovernmentalism, and a Peace Process’, in M. Weller and B. Metzger (eds), *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (Boston: Martinus Nijhoff, 2008).

<sup>57</sup> *Miller* n 1 above at [151].

Westminster MPs to pay heed to the complexities of a new, evolving, and fragmented constitution. English politicians are still prone to refer to the UK as a unitary or as a centralised state based on the traditional Westminster model of government.<sup>59</sup> The political reality, however, is that devolution has already transformed the UK's unitary system of government 'irreversibly' and will continue to evolve.<sup>60</sup> As Brigid Hadfield noted in 2011:

Any idea that the sovereignty of Westminster may here be regarded as the unilateral assertion of the UK Parliament's legal powers does not fit the political reality. The embedded relationship between the governments of the UK and Ireland, and the requirements of the 1998 model of devolution, agreed by the Northern Ireland and Irish Republic, regarding the fullest expression within Northern Ireland of both the British and Irish dimensions indicate the parameters of the UK Parliament's supremacy.<sup>61</sup>

Given the approach it adopted to the issue, the UKSC is undoubtedly correct that the consent of the devolved legislatures is not strictly speaking required for the purposes of triggering Article 50 – or for the purposes of amending the devolution legislation. However, for so long as the Sewel Convention is in place, the devolved assemblies need to pass a legislative consent motion under the Sewel Convention before those parts of the devolution legislation incorporating EU law can be amended. True to British form, recognising this as a constitutional requirement is very different from giving it any legal effect.

In trying to defuse one political bomb by not over-politicising devolution the UKSC may find that it has ignited at least another one. The UKSC's self-perceived need for restraint will be interpreted in the regions as a retreat to constitutional formalism and Westminster intransigence. Withdrawing from the EU will certainly alter the general and special

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<sup>59</sup> Chancellor Philip Hammond: 'This is a United Kingdom issue and the will of the people of the United Kingdom was to leave. We're clear that we can't have a different deal or a different outcome for different parts of the United Kingdom', quoted in 'Chancellor Philip Hammond dashes Nicola Sturgeon's hope of bespoke Brexit deal for Scotland', *The Herald*, 1 December 2016.

<sup>60</sup> House of Commons Justice Committee Fifth Report, 'Devolution: A Decade On' Session 2008-9 at [4].

<sup>61</sup> B. Hadfield, 'Devolution: A National Conversation?', in J. Jowell and D. Oliver (eds) *The Changing Constitution* (Oxford: Oxford University Press, 3<sup>rd</sup> ed, 2011) 234.

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. Elsewhere, the *Miller* decision allows the SNP to proclaim that the Smith Commission'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'.<sup>62</sup>

A better reading of *Miller* suggests that the impact assessment of EU withdrawal on devolution is, for now at least, one for constitutional politics rather than constitutional law. Westminster politicians will need to step up and implement what the UK constitution requires. For now that involves squaring the English principle of sovereignty with the written constitutions of the regions and the result of EU referendum. At some point in the future it will additionally implicate the European institutions, the Member States, and especially the Republic of Ireland. And at some other point in the future, it may well involve again a differently-constituted and differently-minded UKSC.

### **OLD WINE IN OLD BOTTLES**

Lord Reed's dissent with respect to Article 50 is premised on two assumptions. First, the giving of notification under Article 50(2) does not in itself alter any laws in force in the UK; it merely initiates a process of negotiation. Second, ministers of the Crown are politically accountable to Parliament for the manner in which this prerogative power is exercised. With respect to the latter premise, Lord Reed's reasoning may be described as 'historical'. He appears to adopt a 19<sup>th</sup> century understanding of how the English constitution is supposed to work. The dicta reveal his faith in, rather than a constitutional commitment to, the parliamentary process. He says it is 'open' to Parliament to authorise and debate the exercise

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<sup>62</sup> 'Nicola Sturgeon responds to UK Supreme Court ruling', SNP website, 24 January 2017, [https://www.snp.org/nicola\\_sturgeon\\_uk\\_supreme\\_court\\_ruling](https://www.snp.org/nicola_sturgeon_uk_supreme_court_ruling) (last accessed 8 March 2017).



of the prerogative power;<sup>64</sup> at the end of the negotiation process, the procedures of the Constitutional Reform and Governance Act 2010 ‘are likely to apply’; and, in any case, Parliament will ‘be invited’ to enact legislation to complete the formal withdrawal process from the EU.<sup>66</sup>

Lord Reed’s dissent with respect to the ECA is similarly grounded on a tried and tested understanding of the relationship between EU and national law. First, contrary to the majority view, Lord Reed asserts that EU law is not an independent source of law, but is rather dependent on the UK’s rule of recognition.<sup>67</sup> Second, the ECA is a gateway statute that gives effect to the *acquis communautaire*, but it does not create the kind of rights and obligations that other statutes do.<sup>68</sup> Lord Reed draws a distinction between the validity of the Treaties as a matter of EU law and their application to the UK as a matter of domestic law. If the Treaties cease to apply as a matter of international law (to which the prerogative power applies), then there are no rights, powers etc which could be given legal effect in the UK in accordance with the Treaties. In other words, there is no obligation to give effect to EU law merely because it is directly effective. The ECA is not an independent source of law. It simply gives rise to a ‘scheme’ by which domestic law dynamically reflects the UK’s changing obligations under EU law. That obligation ceases when the Treaties no longer apply.<sup>69</sup> Lord Reed’s dissent errs on the side of orthodoxy.

There is nothing wrong with orthodoxy when it is backed up by doctrinal argument. There is little to distinguish Lord Reed’s conceptualisation of EU law from earlier judicial articulations, especially Laws LJ’s decision in *Thoburn*, and Lords Neuberger and Mance’s

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<sup>64</sup> *Miller* n 1 above at [161].

<sup>66</sup> *ibid* at [163].

<sup>67</sup> *ibid* at [224].

<sup>68</sup> *ibid* at [216] per Lord Reed.

<sup>69</sup> *ibid* at [190]-[191] and [217] per Lord Reed.

(with which Lord Reed agreed) in *HS2*.<sup>70</sup> It is not Lord Reed's dissent that is surprising, but the position taken by Lords Neuberger and Mance for the majority.

## CONCLUSION

The UKSC has opened up one bottle and put the cap on another. It has certainly broken some old ones in the process of referring to EU law as an independent and overriding source. But it has also placed another message in a bottle for politicians to decipher, and for future courts to re-open when they come to assessing the legal and constitutional impact of amending the devolution legislation with respect to the EU. The UKSC's approach provides further evidence for the aptness of Hegel's famous remark about the owl of Minerva spreading her wings only with the falling of the dusk.<sup>71</sup> It is only as the UK's membership of the EU comes to an end that the domestic courts are starting to characterise EU law in line with the Court of Justice's own understanding. Conversely, as the UK starts to re-constitute itself outside the EU, domestic politicians are being called on to square Westminster's ancient model of government in accordance with the contemporary requirements of constitutional pluralism. Failure to do so is likely to shatter the United Kingdom as a state. The Government may have secured a unanimous win on the legality of the domestic power balance but time will reveal it to be little more than a Pyrrhic victory.

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<sup>70</sup> *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324.

<sup>71</sup> G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (Frankfurt: Suhrkamp, [1821] 1970) 28.