18
The Emperor has no clothes

Brexit and the UK constitution

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Introduction

In the nine months between the Brexit referendum and the triggering of Article 50, the principal development in the UK was not a search for what Brexit might mean – that search was cordoned off by the drawing of red lines, and was vacuously substituted with ‘Brexit means Brexit’. The main development was a legal one: the Miller litigation, which decided the question of whether the Brexit referendum afforded sufficient authority for the UK government to notify the EU of the UK’s intention to withdraw from the EU, or whether instead an Act of Parliament was required.¹ The litigation was conducted under conditions of unprecedented public attention, ranging far beyond the traditional echo chambers of lawyers and legal academics. For months the mainstream media focused on Gina Miller – now a celebrity – and her daring challenge to the government’s plans. Concepts such as ‘the royal prerogative’ and the ‘Sewel Convention’, and cases like De Keyser Royal Hotel,² normally the preserve of sophisticated constitutional lawyers, became items of popular debate. In academia there was a veritable blogfest on what the litigation was about, and how it should be resolved.³ This was the case of the century, and possibly of the last one too. The hearings before the Supreme Court were live-streamed in an unprecedented reality show, populated by star-studded barristers and a fearsomely erudite panel of Justices. The outcome was a set of judgments – one by the Divisional Court and one by the Supreme Court – which considered and analysed
a range of constitutional instruments, across the UK’s history, reaching back to Magna Charta and the Bill of Rights. Constitutional lawyers revelled in the judgments, and the litigation was seen as crowning an era which confirmed that the UK constitution was as thick as any other, even if unwritten.

This chapter challenges this conception. It argues that the Brexit saga reveals that UK constitutional law is threadbare, much more so than previously thought. The only constitutional principle that really stands, and indeed emasculates all others, is the principle that Parliament is sovereign. The constitutional version that this principle is said to confirm is called political constitutionalism, but its proponents seem oblivious to the idea that a true constitution – as its name suggests – constitutes politics as much as it is the product of politics. The chapter makes its claim in two parts. The first one looks at Miller, and what it revealed about the intensely political limits to UK constitutional law. The second focuses on the UK’s external constitution: the principles governing international treaty-making and the treatment of foreign affairs. This chapter is no more than an attempt at an initial challenge and the analysis is not a complete one, for there is much more that could be said about the defects of the UK constitution.

**Miller and the limits of UK constitutional law**

The claim this chapter makes appears to fly in the face of the intensive and extensive constitutional scrutiny of Miller. Both the Divisional Court and the Supreme Court focused on grand constitutional principles (though the former more so than the latter). The judgments were no less than a full judicial tour of the historical foundations of the division of powers between the legislature and the executive. It was on the basis of the lessons from that tour, and of an analysis of how EU exit would interfere with existing statutes, particularly the European Communities Act (ECA), that both courts concluded that legislation was required to trigger Article 50.

But consider the following assessment of Miller, focused on the positivist and doctrinal reading of UK constitutional law which the judgments offered, and on the approach towards devolution.

**A positivist and doctrinal reading**

This subsection looks at the unprecedented nature of the Brexit decision, and how the debate (judicial and academic) responded to this. The
triggering of Article 50 is not just any international withdrawal notification. Article 50 itself speaks of a Member State’s decision to withdraw, taken in accordance with its constitutional requirements. In virtually all other Member States such a decision would require a constitutional debate, about the country’s approach towards European integration, and could also require constitutional amendment. Given the extent to which EU policies and laws penetrate the domestic sphere – and in many areas contribute to constituting the domestic public sphere – withdrawal is a wholly unprecedented decision, with massive political, economic, financial, legal and indeed constitutional consequences. One year into the Brexit process, this much one can say as an established fact. However, the Miller debate did not conceive of Brexit in this way. It focused immediately on judicial precedents regarding the royal prerogative, much of them pretty antiquated. Complex doctrinal analyses were put forward to distinguish the various cases, and the different forms of royal prerogative and their relationships with legislative power (Craig 2016). The Brexit tiger, most of the legal community thought, had to be put back in the antiquated cage of positive, doctrinal law, and it was perfectly possible to contain it in that way. An astute analysis of past judicial statements was all that was needed.

This ‘reading’ of the UK constitution had its mirror image in the interpretation of the effect of the ECA. All that was required here was a proper characterisation of this Act of Parliament, with the aid of ingenious devices, such as the concept that the ECA is a mere ‘conduit’ (pipes and all) for EU law to flow into UK domestic law. The ultimate crowning of this positivist reading, focused on form rather than substance, was (with great respect) the dissent by Lord Justice Reed. He considered that when Parliament adopted the ECA, shortly before the government ratified the EEC and other European Treaties, it was not prejudging the government’s ultimate act of joining the EEC. Parliament did not decide to join; it merely made this possible.

This positivist and doctrinal approach, focused on ancient precedent and textual construction, meant that there was hardly any debate on what the respective roles of the legislature and the executive ought to be in an age of globalisation and European integration. It was simply presumed that European integration is a branch of international relations, and that it was right for the executive to be in control, with a single proviso, namely, that it cannot use those executive powers (its ‘royal prerogative’) to make any changes to the law of the land. It is because of this approach that the question of whether the Article 50 notification is revocable became so significant. For Lord Pannick to make Gina Miller’s
case it was necessary to establish that the Article 50 bullet, once it left the notification arm, would irrevocably reach the target of the UK leaving the EU, and that Parliament would not be able to reverse course. For else the notification would not, in and of itself, change domestic law. The government, of course, agreed with the irrevocability thesis, clearly for political reasons. Both courts in Miller could base themselves on that consensus between the parties, and avoid an embarrassing reference to the CJEU on the question of revocability – a question of interpretation of EU law, which can ultimately only be answered by that Court. In the meantime it is clear that most academic commentary argues that Article 50 is revocable (Eeckhout & Frantziou 2017, 711–14), but that does not mean that Miller was wrongly decided. Whatever precedent says about the scope of the royal prerogative, the decision to leave the EU is so far-reaching that it simply cannot be left to the executive.

The outcome of this positivist reading of the enormous constitutional questions which Miller raised is a decidedly narrow judgment. All the Supreme Court in the end established was that an Act of Parliament was needed to notify the EU of the UK’s intention to withdraw. Nothing else was said about the process of withdrawal, or about Parliament’s role in the Brexit negotiations, or indeed its role at the end of the process, when the withdrawal agreement (if there is one) will need to be ratified, and may need to be incorporated in UK domestic law. Parliament duly did what the government asked it to do, in an Act which is so short and exclusively focused on the Article 50 notification that there are still voices claiming that the UK has not yet decided to leave the EU, at least not in accordance with its constitutional requirements.7

Devolution

Antecedents and context are important here. For a couple of decades the UK has been embarking on a process of devolution of powers – in an asymmetrical manner – to Scotland, Wales and Northern Ireland. That process has reached its furthest extent in Scotland, culminating in the 2014 referendum on independence. Even if a majority voted against independence at the time, it is clear that Scotland regards itself as a country, rather than a mere region, with far-reaching powers. The political response to the referendum was to strengthen devolution.

The outside observer might therefore conclude that, in its own quirky constitutional way, the UK has become something of a federal state. But Brexit and Miller show that that is not the case. Notwithstanding
the fact that withdrawal from the EU affects significant devolved powers (e.g. in agriculture, fisheries and the environment), the EU Referendum Act 2015 completely disregarded devolution by not requiring any specific majorities in the UK’s constituent parts. A simple majority of voters across the UK were empowered to launch Brexit, as indeed they did, notwithstanding majorities for ‘remain’ in Scotland and Northern Ireland. As a small excursus, it may be noted here that this disregard for devolution is but one manifestation of the constitutional failure to frame referendums. The EU Referendum Act regulated hardly anything at all – indeed, it was even silent on the referendum’s very authority and legal force, thereby creating the juridical space for the Miller litigation.

Devolution became a significant component of that litigation. The debate focused mostly on the Sewel Convention. This is a constitutional convention according to which the UK Parliament will not normally legislate with regard to devolved matters without the consent of the affected devolved assembly. Such conventions are, as a rule, not embodied in legislation, even if they establish significant constitutional principles. However, the Sewel Convention is an exception in that it is incorporated in the Scotland Act 2016 (Section 2(8)). The central issue of Miller was whether an Act of Parliament was required to trigger Article 50 and set the UK on the course of withdrawal. Clearly, such legislation ‘affects’ the powers devolved to e.g. the Scottish Parliament, as those powers extend to matters of EU law. But the Supreme Court rejected the relevance of the Sewel Convention, unanimously, on the simple basis that such conventions are not legally enforceable, and that it is not for judges to give legal rulings on their operation and scope, because those matters are determined within the political world. The fact that the Sewel Convention was incorporated in the Scotland Act 2016 did not modify that assessment: the Supreme Court stated that it would have expected the UK Parliament ‘to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts’.

It is not the aim of this chapter to critique Miller, even if such a critique is called for. All this chapter seeks to do is to invite the reader to contemplate what Miller reveals about the UK constitution. The ECA has been called a constitutional statute, but all that is needed, constitutionally, to trigger its demise is a two-section act allowing the government to notify the UK’s intention to withdraw. The Brexit process is tremendously complex and wide-ranging, and will fundamentally change the law of the UK, but there is no role for Parliament in the withdrawal negotiations which the constitution demands, other than that any changes to UK law will at the end of the day need to be approved by Parliament. Brexit is the
outcome of a referendum, but there is no constitutional law framing such referendums, and Parliament can do as it likes with them. That is so even for referendums that affect devolved powers. There is a constitutional convention on the need to obtain the consent of the devolved assemblies, partially enshrined in legislation, but that convention has no force of law whatsoever.

The external constitution

The UK’s approach towards the Brexit negotiations is characterised by a very traditional approach towards the conduct of ‘foreign affairs’, as opposed to domestic matters (Endicott 2016). Even if Miller decided that a statute was required to trigger Article 50, neither the Supreme Court nor Parliament went any further than the bare minimum such a statute had to contain. Neither of those constitutional actors determined any further role for Parliament in the Brexit negotiations. The UK government is adamant that it should completely control those negotiations, which are about the ‘best deal’ for Britain.

This traditional approach to the conduct of foreign affairs, which, paradoxically, leaves the royal prerogative unscathed, is based on the assumption that the executive is best placed to determine and implement external policies, and that Parliament’s input is required only at the point of incorporating an international treaty in domestic law. However, the Brexit process, more than any other ‘foreign’ policy, shows how fundamentally outdated these constitutional concepts are.

As analysed in greater depth elsewhere, Brexit constitutes a massive interference with the vast body of individual rights conferred by EU law (Eeckhout & Frantziou 2017, 699–703). Most of those rights are concerned with cross-border matters: rights to live and work in the UK and in the EU27; rights to trade; rights to provide services, such as passporting in financial services or aviation; rights to have judgments enforced; rights to put products complying with EU regulations on the market and so on. Those rights are as much part of domestic law as they are rights involving ‘foreign affairs’. Indeed this body of individual rights to cross-border activity would make no sense if the rights were not fully incorporated in the domestic laws of the EU Member States. One could even say that these rights constitute globalisation, in its European manifestation.

The process through which these rights have been defined and conferred – the process of making EU law – is one involving a range of constitutional actors. They principally include: Member State governments,
which negotiate the EU founding treaties, but in this century with the aid of wider conventions;\textsuperscript{12} those governments, in the Council, acting together with the Commission and the directly elected European Parliament for the purpose of enacting EU legislation; and the CJEU, which interprets and enforces the treaties and legislation, and ensures the coherence of EU law as a legal system. The claim is not that this is an ideal constitutional model, rather that it must be characterised as a legislative model – one in which a range of constitutional actors participate, which includes checks and balances, and published proposals which are debated and amended in open fora, under deliberative processes which are open to public participation. These legislative processes have in effect determined the bulk of the UK’s foreign affairs, insofar as relations with other EU Member States are concerned, from 1973 onwards. In this respect, EU law has become the UK’s external constitution.

The Brexit process, whose function it is to determine the future relations between the UK and the EU, is projected to be entirely different. The UK government will ‘negotiate’ a ‘deal’, and would have preferred to do that in conditions of secrecy, which the EU side have (fortunately) resisted. A traditional intergovernmental, rather than legislative, model. Few checks and balances, no deliberative processes in public fora, no formal public participation.

To illustrate the contrast, it may be useful to refer to the first negotiation ‘offer’ the UK government has made, at the time of writing, on the acquired rights of EU/UK citizens (HM Government 2017e). This proposal is intended to define the rights of around three million people, to work, to reside, to be reunified with family members, and to benefits and social security – rights which are clearly central to their lives. The UK government generated this offer in conditions of complete secrecy, without giving Parliament any opportunity to debate its terms, and it intends to conduct the subsequent negotiations in the same intergovernmental manner. It has emphasised that the resulting deal (if there is one) will come before Parliament in a take-it-or-leave-it vote, which in the leave-it version would mean that Parliament becomes responsible for there being no rights at all. The constitutional concept is that 3 million people can be stripped of a range of basic rights by mere executive action.

UK constitutional lawyers may retort that, whatever happens in the Brexit negotiations, at least some of the acquired rights will continue to be protected through the Human Rights Act (HRA), which incorporates the European Convention on Human Rights (ECHR). That is indeed the case, but even a quick glance at the HRA reveals further weaknesses of the UK’s constitution. The UK courts cannot protect ECHR rights in
the face of inconsistent primary legislation. Any treatment of acquired rights which Parliament would endorse and incorporate in domestic legislation could not be judicially overturned. Moreover, the HRA itself can be repealed at any time, and on the traditional understanding of the royal prerogative any UK government could decide to withdraw from the ECHR itself, without the need to involve Parliament.

Conclusions

For many years now UK constitutional lawyers have argued that the UK's unwritten constitution is thriving. One of the ways in which that constitution was said to be reinforced was through the presence of so-called constitutional statutes, with the ECA and the HRA as prime examples. However, the Brexit process reveals the extent to which these foundations of UK constitutional law are not as solid as they have at first seemed. A very short act allowing the government to notify under Article 50 is sufficient, so it seems, to emasculate the ECA. Of course that act followed a popular referendum, but that referendum, ill-defined as it was, is itself a manifestation of constitutional instability and shallowness. Brexit and the Miller litigation further confirm that core principles of the UK's devolution are not legally enforceable. Paradoxically, Miller seems to promote rather than halt the traditional approach towards the preeminence of the royal prerogative in foreign affairs. The government's position is that the Brexit negotiations, which are concerned, on one perspective, with a range of individual rights, do not require parliamentary involvement. That position is as yet unchallenged, by either the courts or Parliament itself.

Ultimately, the only principle that stands is that of parliamentary sovereignty. Any Parliament can always do as it likes, with any statute, at any time. Parliament can also choose to leave any 'foreign affairs' to the government, however much those affairs are intertwined with domestic ones, provided any negotiated changes to domestic law are ultimately incorporated by Parliament. Whether this is the best system for a twenty-first-century constitutional democracy which aspires to be 'global' is, however, an open question.