

THE *MILLER* DECISION:
CONTINUING UNCERTAINTY OVER BREXIT

HATTIE MIDDLEDITCH*

I. INTRODUCTION	971
II. THE U.K. CONSTITUTION AND THE MECHANISM FOR EXITING THE EUROPEAN UNION	973
III. THE DECISION	975
IV. DEVELOPMENTS POST- <i>MILLER</i>	980
V. THE LEGISLATIVE UNCERTAINTY OF BREXIT	983
VI. CONCLUSION	986

I. INTRODUCTION

On June 23, 2016, a narrow majority of the British public voted in a historic referendum for the United Kingdom to leave the European Union. U.K. Government ministers subsequently announced that they would bring U.K. membership of the European Union to an end. Following the referendum, a legal challenge was brought concerning the steps which are required as a matter of U.K. domestic law before the process of leaving the European Union could be initiated.¹ Specifically,

* Hattie Middleditch is currently an L.L.M. candidate at New York University School of Law before which, she was an Associate in litigation and arbitration at Herbert Smith Freehills LLP in London. I would like to thank Lord Collins of Mapesbury for his assistance in drafting this note. I am also grateful to my colleagues at the Journal of International Law & Politics for comments and revisions and to friends and colleagues in the United Kingdom with whom I have enjoyed many lively discussions concerning Miller and Brexit. All mistakes and opinions are my own.

1. Of the two plaintiffs in *Miller*, one had voted for the United Kingdom to remain in the European Union and one had voted for the United Kingdom to leave. The plaintiffs were supported by a number of interested parties including a group deriving rights of residence in the United Kingdom under E.U. law on the basis of their relationship with a British national or with a non-British E.U. national exercising E.U. Treaty rights to be in the United Kingdom, a group deriving rights of residence from persons permitted to reside in the United Kingdom because of E.U. rights, including children and carers, a group of U.K. citizens residing elsewhere in the European Union, a group who are mostly non-U.K. E.U. nationals residing in the United Kingdom and the Independent Workers Union of Great Britain. The Secretary of State was supported before the Supreme Court only by an organization called Lawyers for Britain (a group which describes itself on its

the case was brought to challenge the Government's position that it could exercise its so called prerogative powers to issue the notice to effect withdrawal from the European Union without prior legislation passed in Parliament and assented to by the Queen.²

Rather than dealing with the political motivations for the vote to withdraw from the European Union, this Commentary analyses the legal challenge before the U.K. Supreme Court in *R (Miller) v. Secretary of State for Exiting the EU*.³ The Supreme Court's judgment not only touched on an extremely wide range of aspects about the United Kingdom's unwritten constitution, but also provided an important clarification of the process that the Government must comply with to initiate the United Kingdom's exit from the European Union. In essence, the Supreme Court confirmed that parliamentary approval was required before the government could set Brexit in motion. This Commentary also touches upon the political developments post *Miller* and the steps which have already been taken by the Government. Given the number of moving parts, it is

website as "a group of lawyers, legal academics, retired judges and constitutional specialists who came together to campaign for a Leave vote in the referendum." LAWYERS FOR BRITAIN, <http://www.lawyersforbritain.org> (last visited Mar. 27, 2017).

2. The most often cited definition of prerogative powers is that given by Dicey which states as follows: "The prerogative is the name for the remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name for 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." A. V. DICEY, *LAW OF THE CONSTITUTION* 421 (1915). Today prerogative powers are exercised by government minister, or else by the monarch acting personally under the direction of ministers (use of prerogative powers by the monarch include powers to appoint the prime minister, to dissolve Parliament and to give royal assent to legislation). See generally MINISTRY OF JUSTICE, *THE GOVERNANCE OF BRITAIN - REVIEW OF THE EXECUTIVE ROYAL PREROGATIVE POWERS: FINAL REPORT* (Oct. 15, 2009), <http://www.peerage.org/genealogy/royal-prerogative.pdf>. See also, *Attorney General v. De Keyser's Royal Hotel, Ltd.* [1920] AC 508, 526 (*per* Lord Dundee confirming Dicey's definition of prerogative powers, impliedly accepted by the other Law Lords in that case); *Burmah Oil Co. Ltd v. Lord Advocate* [1964] SC (HL) 117, 120 (*per* Lord Reid referring to Dicey's definition as being "always quoted with approval").

3. *R (Miller) v. Secretary of State for Exiting the EU* [2017] UKSC 5 (on appeal from *R (Miller) v. Secretary of State for Exiting the EU* [2016] EWHC (Admin) 2768 (Eng.)). References below to *Miller* are to the Supreme Court decision.

extremely difficult to predict with any certainty what will happen in the long run. What is, however, clear from the political developments to date is that it is unlikely that the decision in *Miller* will create any obstacle to the United Kingdom's exit from the European Union. Indeed, the process which the court in *Miller* set out to clarify has now been completed. What is also clear, is that despite *Miller's* restatement that Government is accountable to Parliament in the Brexit process, there still remains a worrying lack of clarity regarding what the United Kingdom's exit from the European Union might look like. This is particularly so with regards to the legislative uncertainty which Brexit will create.

II. THE U.K. CONSTITUTION AND THE MECHANISM FOR EXITING THE EUROPEAN UNION

For those unfamiliar with the detail and exigencies of the United Kingdom's unwritten constitution, the Supreme Court's judgment in *Miller* may appear overwhelming. Indeed, there are few aspects of the British constitution which were not examined. The case raised questions about:

[T]he nature of parliamentary sovereignty, the extent of the executive's prerogative authority, the status within the domestic legal system of [E.U.] law, the proper scope of the judicial role, and the extent to which the contemporary territorial constitution, and the conventions relating to it, serve as a brake upon the powers of U.K. constitutional actors.⁴

The Supreme Court also dealt with a number of issues relating to the devolved powers: Northern Ireland, Scotland, and Wales.⁵ Rather than dealing exhaustively with the various constitutional clarifications that both judgments contain, this

4. Mark Elliot, *Miller and the Modern British Constitution*, PUB. LAW FOR EVERYONE (Feb. 1, 2017), <https://publiclawforeveryone.com/2017/02/01/miller-and-the-modern-british-constitution/>.

5. The devolution issues were raised by way of references from Northern Ireland and interventions raised by the Lord Advocate for the Scottish Government and the Counsel General for Wales for the Welsh Government. These references raised the issue of whether the terms on which powers have been statutorily devolved to Northern Ireland, Scotland, and Wales require consultation with, or the agreement of, the devolved legislatures of those countries before the Notice can be served. These aspects of the decision are not dealt with any further in this Commentary.

Commentary focuses on the interrelationship between parliamentary sovereignty and executive prerogative powers (vested in Government). The clarification of this relationship, especially in light of the procedural requirements for exiting the European Union, is most important for understanding the steps subsequently taken in the wake of the decision.

The key political bodies implicated in this matter are Parliament—the U.K. legislature—and the Government. Parliament has two constituent bodies: (i) the House of Commons—made up of elected representatives from different territorial areas of the United Kingdom—where new laws and amendments are debated; and (ii) the House of Lords—made up of a mix of life peers (members appointed by the Queen on the advice of the prime minister),⁶ archbishops and bishops, and elected hereditary members—where amendments to laws are proposed and discussed. The Government, however, refers to the Executive. It is made up of members of parliament from the political party or parties holding the majority in the House of Commons. The Executive may exercise its prerogative powers in connection with foreign affairs, defense, and national security. In addition, the Executive may exercise its prerogative to enter into and terminate treaties.

When a change in U.K. law resulting in a change in private rights is contemplated, executive powers typically yield to the sovereign authority of Parliament. This is an uncontroversial and long accepted principle of the U.K. constitution.⁷ The

6. Peers is the term used for members. Life peers come from a range of backgrounds, some political, others not. They represent a wide range of professions including medicine, law, business, the arts, science, sports, education, the armed forces, diplomacy and public service. *See generally Diverse Experience*, U.K. PARLIAMENT, <http://www.parliament.uk/business/lords/whos-in-the-house-of-lords/members-and-their-roles/diverse-experience/> (last visited Apr. 1, 2017).

7. As Dicey put it, the principle of parliamentary sovereignty requires that Parliament possesses “the right to make or unmake any law whatever,” so that “no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.” DICEY, *supra* note 2, at 3–4. Parliamentary authorization of executive action is given via an Act of Parliament which is debated in the House of Commons and voted on before passing to the House of Lords who will either confirm their approval or (more rarely) send it back to the House of Commons. Technically speaking the Queen must then give assent to legislation although such assent is never in practice withheld. Very broadly speaking, prerogative powers where

novel issue which *Miller* raised was whether the initiation of the process by which the United Kingdom will formally leave the European Union, engaged the principle of parliamentary sovereignty in the first place.⁸

Article 50 of the Treaty on the European Union (TEU) contains the basic mechanism for member states to withdraw from the European Union.⁹ Article 50(1) provides as follows: “[a]ny Member State may decide to withdraw from the [European] Union in accordance with its own constitutional requirements.”¹⁰ The member state in question then serves a notice on the other member states (Notice). When Notice has been served, and once two years have elapsed, the treaties which govern the European Union (the “E.U. Treaties”) cease to apply to the exiting member state unless an alternative withdrawal agreement is negotiated. The two-year timeframe can be extended but only with the agreement of the European Council acting unanimously.

III. THE DECISION

The issue of how the United Kingdom can leave the European Union first came before the High Court of England and Wales in November 2016. Deciding in favour of the plaintiffs, the High Court held that the Government does not have prerogative powers to serve Notice under Article 50 and initiate the process of withdrawal from the European Union. Instead, an Act of Parliament would be required before Notice could be given. The Government appealed to the Supreme Court in December 2016. In January 2017, the Supreme Court dismissed the Government’s appeal confirming the High Court’s decision.

The Supreme Court’s analysis focused on the interpretation of the European Communities Act, 1972 (ECA).¹¹ The

no prior parliamentary authorization is required normally relate to issues such as foreign affairs, defence and national security.

8. Elliot, *supra* note 4.

9. Consolidated Version of the Treaty on European Union art. 50, June 7, 2016, 2016 O.J. (C 202).

10. *Id.*

11. European Communities Act 1972, C. 68 (Eng.). The key provision of the ECA relevant to *Miller* is section 2, entitled “General implementation of Treaties.” Section 2(1) (in its current form) provides as follows: “(1) All such rights, powers, liabilities, obligations and restrictions from time to time cre-

ECA gave effect to the United Kingdom's membership in the European Union. Construction of its terms and effect was thus key to resolving the issue of how the United Kingdom could exit. The court considered whether the terms of the ECA were consistent with the exercise by ministers of any power to withdraw from the E.U. Treaties without the prior authorization of an Act of Parliament as the Government claimed they were. Both entering into treaties and terminating them is normally a matter for executive prerogative; however, such prerogative power does not extend to acts which result in a change to U.K. domestic law.

The Government argued that the ECA did not preclude the use of its prerogative powers to withdraw from the E.U. Treaties. The case was that the relevant provisions of the ECA were "ambulatory" in nature. Put another way, the ECA "gives effect to whatever may *from time to time* be the international obligations of the United Kingdom under or pursuant to EU Treaties" (emphasis added).¹² The Government highlighted that changes in E.U. law were brought into domestic law through the ECA and that once the United Kingdom was no longer bound by the E.U. Treaties, there would be no rights and remedies to which the ECA could apply and no E.U. obligations requiring delegated legislation. In other words, service of Notice would not in itself effect a change in U.K. domestic law that would alter private rights. The possibility of withdrawal from the E.U. Treaties, it was argued, was effectively provided for in the wording of the ECA itself.

The majority rejected the Government's analysis. It held that under the terms of the ECA, E.U. law became a source of U.K. law and took precedence over all U.K. domestic law.¹³ Essentially, the ECA changed U.K. law in two "closely related"

ated 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 recognized and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies." *Id.* § 2(1).

12. *R (Miller) v. Secretary of State for Exiting the EU* [2017] UKSC 5, at ¶ 74.

13. *Id.* ¶ 60.

but “legally and conceptually distinct” ways.¹⁴ First it “provided that rights, duties and rules derived from EU law should apply in the United Kingdom as part of its domestic law.”¹⁵ In other words, the ECA provided the source of E.U. law because “without that Act, EU law would have no domestic status.”¹⁶ Thus “[t]he content of the rights, duties and rules introduced into [U.K.] domestic law as a result of the [ECA was] exclusively a question of EU law.”¹⁷ Second, “it provided for a new constitutional process for making law in the United Kingdom.”¹⁸ That constitutional process was not however, a question of E.U. law. Rather it was “exclusively a question of domestic law.”¹⁹ This was because so long as the ECA remains in force “its effect [was] to constitute EU law an independent and overriding source of domestic law.”²⁰ The ECA therefore operated as a partial transfer of law making powers by the U.K. Parliament to E.U. institutions, unless and until Parliament decided otherwise.²¹

The majority accepted that the rights and remedies incorporated into U.K. domestic law through the ECA varied with the United Kingdom’s obligations from time to time under the E.U. Treaties.²² The majority also accepted that Parliament could not have intended that the variable content of E.U. law would continue to apply once the United Kingdom was no longer bound by the E.U. Treaties.²³ Yet, the majority concluded that through the ECA, “Parliament endorsed and gave

14. *Id.* ¶ 62.

15. *Id.*

16. *Id.* ¶ 61.

17. *Id.* ¶ 62.

18. *Id.*

19. *Id.*

20. *Id.* ¶ 65.

21. *Id.* ¶¶ 67–68. It is worth highlighting a basic tension inherent in the majority’s reasoning here. On the one hand, the majority holds that the ECA is the source of E.U. law by virtue of the fact that it gives E.U. law domestic status; on the other hand, it suggests that the E.U. institutions are themselves a source of U.K. law by virtue of the fact they constitute an “independent and overriding source of domestic law” through the transfer effected by the ECA. *Id.* ¶ 65. Commentators have criticized the majority for their failure to resolve this tension. As one constitutional law scholar asks “[q]uite how EU law can be an independent source of U.K. law while being dependent for that status upon the [ECA] is never revealed.” Elliot, *supra* note 4.

22. *Miller*, [2017] UKSC 5, ¶ 76.

23. *Id.* ¶ 77.

effect to the United Kingdom's membership of . . . the European Union under the EU Treaties in a way which is inconsistent with the future exercise by ministers of any prerogative power to withdraw from such Treaties."²⁴ The majority took pains to emphasize the distinction between variations in U.K. law resulting from changes in E.U. law and variations in U.K. law resulting from withdrawal from the E.U. Treaties.²⁵ The latter would effect "a fundamental change in the constitutional arrangements of the United Kingdom" by cutting off the source of E.U. law.²⁶ The serving of Notice to trigger Article 50 would result in constitutional change and it was this issue which the Government's argument failed to address. Major changes in the U.K. constitution "must be effected in the only way that the U.K. Constitution recognises, namely by Parliamentary legislation."²⁷ Moreover, the fact that withdrawal from the European Union would remove existing domestic rights of U.K. residents also rendered it impermissible for the Government to withdraw from the E.U. Treaties without prior parliamentary authority.²⁸

The dissenting justices broadly gave effect to the Government's argument, although the emphasis of their conclusion was that the ECA accommodates the abrogation of E.U. law by exercise of prerogative (as opposed to contemplating it).²⁹ Lord Reed (with whom Lord Carnwath and Lord Hughes agreed) viewed the effect of E.U. law under the ECA as inherently conditional on the application of the E.U. Treaties to the United Kingdom and thus on the United Kingdom's membership in the European Union. Contrary to the majority's view that the ECA effectively "constitute[s] EU law an independent and overriding source of domestic law,"³⁰ the dissent opined that "EU law is not itself an independent source of domestic

24. *Id.*

25. *Id.* ¶ 78.

26. *Id.*

27. *Id.* ¶ 82.

28. *Id.* ¶ 83.

29. *See id.* ¶¶ 87–88 (the "contemplation" argument would have been much harder to justify given that—as the majority noted—the ECA does not contain any clear wording authorising ministers to withdraw from the E.U. Treaties); *id.* ¶ 95 (the ECA envisages ministers taking part in the E.U. law making processes: withdrawing from the European Union is doing the opposite).

30. *Id.* ¶ 65.

law, but depends for its effect in domestic law on the [ECA].”³¹ The ECA amounts to nothing more than a “scheme under which the effect given to EU law in domestic law reflects the United Kingdom’s international obligations under the Treaties, whatever they may be.”³² On this basis, the dissent felt that the ECA “imposes no requirement, and manifests no intention, in respect of the United Kingdom’s membership of the EU.”³³ Thus the terms and function of the ECA do not restrict or impact the Government’s exercise of prerogative powers over U.K. membership. The triggering of Article 50 remained a matter of foreign relations, thus bringing it within the scope of executive prerogative power.

It is worth briefly commenting on the aspect of the judgment which dealt with the impact of the 2016 referendum. The majority dismissed the Government’s argument that the response to the referendum result should be a matter for ministers without the participation of Parliament. Instead, it held that the legal significance of the referendum could only be determined by the terms of the statute authorizing it, namely, the European Union Referendum Act, 2015.³⁴ That statute merely provided for a referendum to be held. Unwisely, as it turned out, it did not specify the consequences. It followed that the U.K. constitution only permitted Parliament to change the law so as to implement the referendum’s outcome.³⁵ The Supreme Court was also careful to emphasize that the popular referendum did not make the issues raised in *Miller* non-justiciable.³⁶ This emphasis was made necessary by

31. *Id.* ¶ 228.

32. *Id.* ¶ 187.

33. *Id.* ¶ 177.

34. European Union Referendum Act 2015, C. 36 (Eng.).

35. *See generally*, *Miller*, [2017] UKSC 5, ¶ 116–124.

36. *See id.* ¶ 3. The Supreme Court clearly delineated the scope of the question and the differences between the legal issues at stake and political issues such as “the wisdom of the decision to withdraw from the European Union, the terms of withdrawal, the timetable or arrangements for withdrawal, or the details of any future relationship with the European Union” which were “matters for ministers and Parliament to resolve.” *Id.* The court went on to point out that “[s]ome of the most important issues of law which judges have to decide concern questions relating to constitutional arrangements of the United Kingdom.” *Id.* ¶ 4. Since these proceedings raised such issues they were justiciable “not because they concern the United Kingdom’s membership of the European Union” but “because they concern (i) the ex-

the criticism directed towards the judges in the High Court following the first instance decision. Those judges were accused of interfering with political issues, for seeking to thwart the will of the people and for expressing pro-E.U. bias.³⁷ Such criticisms were evidently displaced. All the parties, including the Government, accepted that the case concerned U.K. constitutional requirements and hence domestic law. These matters were clearly justiciable.

IV. DEVELOPMENTS POST-*MILLER*

It seems that the Government has taken the decision in *Miller* to heart. In a recently published “white paper” which sets out further details of the United Kingdom’s exit and future partnership with the European Union, the Government goes to great lengths to stress, somewhat disingenuously given its position in *Miller*, the “critical role” that Parliament will play as Brexit plays out.³⁸ The white paper states that “legislation

tent of ministers’ power to effect changes in domestic law through exercise of their prerogative powers at the international level, and (ii) the relationship between the U.K. Government and Parliament on the one hand and the devolved legislatures and administrations of Scotland, Wales and Northern Ireland on the other.” *Id.*

37. See James Slack, *Enemies of the People: Fury Over ‘Out of Touch’ Judges Who Have ‘Declared War on Democracy’ by Defying 17.4m Brexit Voters and Who Could Trigger Constitutional Crisis*, DAILY MAIL (Nov. 03, 2016), <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>; Peter Dominiczak et al., *Judges v. The People: Government Ministers Resigned to Losing Appeal against High Court Ruling*, TELEGRAPH (Nov. 03, 2016), <http://www.telegraph.co.uk/news/2016/11/03/the-plot-to-stop-brexit-the-judges-versus-the-people/>.

38. HM GOVERNMENT, *THE UNITED KINGDOM’S EXIT FROM AND NEW PARTNERSHIP WITH THE EUROPEAN UNION* (Feb. 02, 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf. White papers are policy documents produced by the Government that set out their proposals for future legislation. The white paper sets out twelve basic priorities in very broad terms. Several of these priorities reflect what are generally to be seen the key factors driving the Brexit vote in the June 2016 referendum. These include “taking control of our own laws,” *id.* at 13–15, and “controlling immigration,” *id.* at 25–28. Others appear to seek to redress some of the key concerns raised in the wake of the Government’s confirmation that it would respect the leave vote and ensure that Brexit was actually effected. Specifically, these include: “securing rights for EU nationals in the United Kingdom and U.K. nationals in the EU,” *id.* at 29–30;

will be needed to give effect to [the United Kingdom's] withdrawal from the EU and the content of such legislation will . . . be determined by Parliament."³⁹ On February 7, 2017, following further parliamentary debate, the Government also accepted that Parliament will need to authorize any deal negotiated by the United Kingdom with the European Union.⁴⁰ This indicates a recognition on the Government's part that Parliament needs to be closely involved in every step of the process beyond the triggering of Article 50.

Those hoping that the decision in *Miller* would create some obstacle to Brexit will be disappointed with developments to date, especially in light of the fact that Article 50 has now been triggered.⁴¹ In the wake of the Supreme Court decision, the U.K. Prime Minister, Theresa May, published a bill to trigger Article 50, entitled the European Union (Notification of Withdrawal) Bill (Brexit Bill).⁴² The bill contained just one substantive clause in the following terms: "The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU."⁴³ The Brexit Bill's passage through the U.K. Parliament began with a two-day debate in the House of Commons which resulted in a vote in favour of sending the legislation to its next parliamentary stage.⁴⁴ Debates on the Brexit Bill continued in both the House of Lords and the House of Commons.⁴⁵

"protecting workers' rights," *id.* at 31–33; "ensuring free trade with European markets," *id.* at 35–49; "securing new trade agreements with other countries," *id.* at 51–56; "ensuring that the United Kingdom remains the best place for science and innovation," *id.* at 57–59; and "cooperating in the fight against crime and terrorism," *id.* at 61–64. More generally, the Government states that it will prioritize "providing certainty and clarity," *id.* at 9–12, and "delivering a smooth, orderly exit from the EU," *id.* at 65. Finally, the Government sets out priorities regarding the devolved powers.

39. *Id.* at 10.

40. See 621 Parl Deb HC (2017) (U.K.).

41. See *Prime Minister's Letter to Donald Tusk Triggering Article 50*, HM Gov.: PLAN FOR BRITAIN (Mar. 29, 2017) [hereinafter *Prime Minister's Letter*], <https://www.planforbritain.gov.uk/news/prime-ministers-letter-donald-tusk-triggering-article-50/>.

42. European Union (Notification of Withdrawal) Act 2017, c. 9 (Eng.).

43. *Id.* § 1(1).

44. See 620 Parl Deb HC (2017) (U.K.).

45. For a list of the debates on the Brexit Bill in both the House of Commons and House of Lords see Parliamentary Debate Search for European Union (Notification of Withdrawal) Bill, U.K. PARLIAMENT, <https://hansard.>

Although concerns were raised in both Houses—for example over the tight timetable imposed for passage of the bill—the approach which Parliament has taken to date suggests that there is little appetite to significantly disrupt the Government’s agenda.⁴⁶ Indeed the Government has kept to the timetable envisaged for initiating the Brexit process.⁴⁷ The British Prime Minister has now written to the President of the European Council to notify him of the United Kingdom’s intention to leave the European Union thus triggering the Article 50 mechanism.⁴⁸

In addition, those who hoped that the decision would prompt more clarity from the Government about what Brexit might look like are also likely to be disappointed. Despite the publication of various documents publicizing the Government’s tentative plans for Brexit there remains significant structural uncertainty. Rather than deal with each of the struc-

parliament.uk/search/Debates?searchTerm=European%20Union%20%28 Notification%20of%20Withdrawal%29%20bill (last visited Apr. 1, 2017). One issue which has not been specifically addressed in Parliament but which is the topic of some debate among legal scholars is whether the Brexit Bill that is presently before Parliament authorizes Brexit at all or, whether a further Act of Parliament is required to effect Brexit in such a way that is lawful in the United Kingdom. Compare Sir David Edward KCMG PC QC et al., *In the Matter of Article 50 of the Treaty on European Union*, BINDMANS (Feb. 10, 2017), https://www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf (maintaining the further Parliamentary action is needed before the United Kingdom can exit), with Mark Elliott, *The Three Knights Opinion” on Brexit: A Response*, PUB. LAW FOR EVERYONE (Feb. 17, 2017), <https://publiclawforeveryone.com/2017/02/17/the-three-knights-opinion-on-brexit-a-response/> (responding to Sir David Edward KCMG PC QC et al. and arguing that no further Parliamentary action is necessary).

46. See, e.g., SELECT COMMITTEE ON THE CONSTITUTION, EUROPEAN UNION (NOTIFICATION OF WITHDRAWAL) BILL, 2016-17, HL 119 (U.K.), <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldconst/119/119.pdf> (highlighting concerns over the fast-tracking of the Brexit Bill through Parliament and also concerns over the question of devolved consent to the Bill). The House of Lords specifically delineates the scope of the decision in *Miller* on the devolution issues (not addressed in this article) concluding that the issue of devolved consent to the Brexit bill falls outside the scope of the Miller decision and that it may be that devolved consent is required. *Id.* ¶¶ 11–12.

47. Rt Hon David Davis MP, Article 50 to Be Triggered on 29 March, HM Gov. (Mar. 20, 2017), <https://www.gov.uk/government/news/article-50-to-be-triggered-on-march-29>.

48. *Prime Minister’s Letter*, *supra* note 41.

tural issues which the white paper raises, the remainder of this Commentary focuses on one fundamental deficiency: the legislative uncertainty which the United Kingdom's exit from the European Union might create and which the Government has not, to date, dealt with adequately.⁴⁹

V. THE LEGISLATIVE UNCERTAINTY OF BREXIT

The Government confirms in the white paper that Parliament will determine the content of legislation that the Government will implement in remedying the legislative deficit which will result from Brexit.⁵⁰ This legislation, which as yet is unpublished, is currently entitled the "Great Repeal Bill."⁵¹ It aims to remove the ECA from the U.K. statute book and convert existing E.U. law into domestic law. The Government explains this procedure as resulting in a situation where "the same rules and laws" apply in the United Kingdom after the

49. More general criticisms of the content of the white paper can be made. The lack of substantive content is striking. Indeed, as Professor Steve Peers points out, the paper appears to be a slightly fuller version of a speech given by Theresa May on the Government's negotiating objectives for exiting the European Union, Theresa May, Prime Minister, United Kingdom, The Government's Negotiating Objectives for Exiting the EU (Jan. 17, 2017), <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>. See Steve Peers, *As Bad as it Gets: The White Paper on Brexit*, EU LAW ANALYSIS (Feb. 3, 2017), <https://eulawanalysis.blogspot.ie/2017/02/as-bad-as-it-gets-white-paper-on-brexit.html?m=1>. In the same article, Professor Peers also highlights that of the content that is included: much of the information simply refers back to the status quo; some information given is "inaccurate" (although these inaccuracies, such as the suggestion that British workers get 14 weeks paid holiday a year, have since been corrected); some statistics are out of date (for example the statistics on U.K. citizens resident in the European Union date back to 2011); and some statistics are only partial (the migration statistics omit Irish people in the United Kingdom and vice versa). *Id.*

50. HM GOVERNMENT, *supra* note 38, at 10–11, 18, 31, 65.

51. The form of the Great Repeal Bill was introduced to Parliament on October, 10 2016. It has three primary elements. First, it will repeal the ECA so as, in the words of the white paper, to "return power to UK politicians and institutions." *Id.* at 10. Second it will "preserve EU law where it stands at the moment before [the United Kingdom] leaves the EU." *Id.* The bill envisages that Parliament will then be able to decide whether to keep, amend or repeal those various pieces of legislation once the United Kingdom has left the European Union. Finally, the bill will ensure the proper functioning of secondary legislation once the United Kingdom has left the European Union. *Id.*

exit from the European Union “wherever practical and appropriate.”⁵² It posits that this will “preserve the rights and obligations that already exist in the UK under EU law and provide a secure basis for future changes to [the United Kingdom’s] domestic law.”⁵³ The objective is that such a process will provide as much security as possible for both businesses in respect of trade regulations which might affect them and individuals in respect of their rights and obligations.

The Great Repeal Bill is the best indication, at this stage, of what the legislative landscape in the United Kingdom post Brexit might look like. Yet despite the optimistic tone of the white paper there are undoubtedly serious uncertainties with the proposed operation of the bill which have not yet been addressed in adequate detail. As clarified in a recent evidence session before the House of Lords Constitution Committee, a task of “monumental scale and astonishing complexity” lies ahead.⁵⁴ The process embodied in the Great Repeal Bill raises “profoundly difficult legal and constitutional questions” including “the range of EU laws that can sensibly be domesticated, how those laws will be identified [and] how EU laws that need to be adjusted to make sense post-Brexit will actually be adjusted.”⁵⁵ In addition, there is the issue of how to deal with U.K. domestic legislation which expressly relies on interpretations by European agencies.⁵⁶ Once the United Kingdom has left the European Union, will it wish to continue to be bound by European interpretations of provisions which form part of U.K. domestic law? Will it wish to transfer ongoing interpreta-

52. *Id.* at 9.

53. *Id.*

54. Mark Elliot, *House of Lords Constitution Committee Takes Evidence on ‘Great Repeal Bill,’* PUB. LAW FOR EVERYONE (Feb. 3, 2017), <https://publiclawforeveryone.com/2017/02/03/house-of-lords-constitution-committee-takes-evidence-on-great-repeal-bill/> (referring to the House of Lords Constitution Committee evidence session, *Constitution Committee*, UK PARLIAMENTLIVE.TV (Feb. 1, 2017), <http://parliamentlive.tv/event/index/75194d6a-b303-436b-8bd8-e4b1dec58b3f>, where evidence was given to the Committee by three constitutional law scholars: Professor John Bell from the University of Cambridge and Professors Paul Craig and Alison Young from the University of Oxford).

55. *Id.*

56. This issue was highlighted by Professor Alison Young at the evidence session before the House of Lords Constitution Committee. *Constitution Committee*, *supra* note 54, at 11:25:51.

tion of these provisions to U.K.-based agencies or continue to follow the interpretations produced by European entities? These, as well as a multitude of additional questions, remain unanswered.

Specific examples of issues which might arise in this regard abound. One example concerns E.U. law which comes into effect post-Brexit. The current white paper suggests that such law should be interpreted in the “same way as it is at the moment.”⁵⁷ This raises two problems. First, it suggests that E.U. law, presumably including the decisions of the Court of Justice of the European Union (“CJEU”), will continue to be relevant. But no indication is given of how such law will be interpreted outside of the European Union once the United Kingdom has freed itself of the jurisdiction of CJEU, as the paper promises will be the case. Moreover, the paper does not address how amendments to E.U. legislation post Brexit will affect E.U. derived legislation transposed into domestic law through the Great Repeal Bill. A second more fundamental concern is that some E.U. legislation simply cannot operate once Brexit comes into effect by virtue of its wording. To give just one example, Article 36 of the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) states that a “judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.”⁵⁸ But post Brexit, the United Kingdom will no longer be a member state. Thus, a judgment given in the United Kingdom post Brexit *cannot* fall within the European regime for recognition of judgments.

Another structural concern links back to the ongoing roles of Parliament and the Executive in the course of Brexit. Commentators highlight future uncertainty regarding “the respective roles that Parliament and the Government will play in relation to such matters, and the degree of oversight that the former will exercise over the latter when it exercises the extensive delegated powers that the Bill will almost inevitably confer.”⁵⁹ While *Miller* restated the principle of Parliamentary sovereignty for the purposes of the trigger process, the Supreme

57. HM GOVERNMENT, *supra* note 38, at 10.

58. Council Regulation 1215/2012, Recital 27, 2012 O.J. (L351) 1.

59. Elliot, *supra* note 54.

Court did not consider how the relationship between Parliament and Government would play out in the context of the Great Repeal Bill once enacted because the issue was not before it. The question is one which constitutional legal scholars continue to grapple with, noting that this kind of legislative “manoeuvre” has never been attempted in British history.⁶⁰ Given the scale of the exercise, effective parliamentary scrutiny of the implementation of new legislation and review of E.U. derived legislation does not appear feasible. A reconfiguration of the process by which legislative amendments and new legislation is tabled and approved might be required.⁶¹ Therefore despite the breadth of the issues dealt with in *Miller*, there remains legal uncertainty regarding the relationship between Parliament and the Government in the context of Brexit.

VI. CONCLUSION

The Supreme Court’s decision in *Miller* has undoubtedly provided welcome clarity as to the role of Parliament as a check on executive government authority in the United Kingdom’s exit from the European Union. But any clarity as to what Brexit is ultimately going to look like remains deeply uncertain. This ambiguity is particularly stark with respect to the legislative reconfiguration that will need to take place in the United Kingdom. Given the monumental task facing Parliament, it may be that the traditional approach to parliamentary scrutiny of legislation will need to be reconfigured which may again create legal uncertainty regarding the proper relationship between Parliament and the Executive in navigating this novel situation. The Government has confirmed that there will be a further white paper dealing with the Great Repeal Bill.⁶² In light of the deficiencies highlighted above, this is clearly required. One thing is certain though: if the Government wants to provide substantive, as opposed to superficial, assurances to businesses operating in the United Kingdom and individuals whose rights and obligations will be affected, it will need to provide significantly more detail on how it is going to

60. Paul Craig, *Constitution Committee*, *supra* note 54, at 11:32:40.

61. This issue was discussed in further detail at the evidence session before the House of Lords Constitution Committee. *Constitution Committee*, *supra* note 54.

62. HM GOVERNMENT, *supra* note 38, at 9.

deal with the potential legislative deficit which exiting the European Union will generate.

