

BREXIT AND THE CONSTITUTION

PRELIMINARY

1. Let me start with two propositions. (1) Many great events are not quite what they seem. This is true of the legal aspects of our membership of the EU. I think it is misleading to claim that our membership of the EU cost us sovereignty, at least in an important sense of that term, and I will explain what I mean. (2) The full implications of great events may not be apparent when they happen. This is true of the legal aspects of our impending departure from the EU. As for this, I shall mainly discuss the recent judgment of the Supreme Court in *Miller*¹, in which judgment was given on 24 January 2017. But before that I shall have something to say about referendums.

HISTORY

2. Allow me first to sketch a little history. At the risk – not the risk, rather the certainty – of over-simplification I may describe the legal means of our entry into the EU and the prospective means of our exit by reference to very few materials. The tale is much more fully told in the majority judgment in *Miller* delivered by Lord Neuberger. On 22 January 1972 ministers signed a Treaty of Accession, subject to later ratification. The Treaty provided that the United Kingdom would become a member of the EEC (as it was then known) on 1 January 1973. A Bill was then laid before Parliament and received Royal Assent on 17 October 1972, when it became the European Communities Act 1972. The next day ministers ratified the 1972 Accession Treaty on behalf of

¹ [2017] UKSC 5.

the United Kingdom, which accordingly became a member of the EEC on 1 January 1973, the day on which the European Communities Act came into force.

3. S.2(1) of the 1972 Act is pivotal to our relationship with the EU, and I must cite it a little later. The history shows that the place of EU law within our municipal constitutional arrangements was provided by two kinds of legal instrument: domestic statute, initially in the shape of the 1972 Act, and international treaty, initially in the shape of the 1972 Accession Treaty which admitted the UK to the Treaty of Rome. This bilateral source of legal power (I use the expression so as to beg no questions) is, as I shall show, the engine at the heart of the dilemma in the *Miller* case.
4. Article 50 of the Lisbon Treaty, which entered into force on 1 December 2009, provides in part as follows:
 - “1. Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements.
 2. A member state which decides to withdraw shall notify the European Council of its intention...
 3. The Treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the member state concerned, unanimously decides to extend this period. ...”
5. A referendum on the question of our continued membership of the EU was conducted on 23 June 2016, authorized by the European Union Referendum Act 2015. As everyone knows it produced a majority in favour of leaving the European Union. On 7 December 2016 the House of Commons resolved “[to recognise]... that this House should respect the wishes of the United Kingdom as expressed in the referendum on 23 June; and further [to call] on the Government to invoke article 50 by 31 March 2017”.

6. There followed the decision of the Supreme Court in *Miller*, the European Union (Notification of Withdrawal) Act 2017, the Prime Minister’s letter of 29 March 2017 invoking Article 50, and the publication of the Great Repeal Bill White Paper on 30 March.
7. Let me add a postscript to this history. Only 16 months after the United Kingdom acceded to what was then known as the Common Market in January 1973, Lord Denning MR delivered judgment in the Court of Appeal in *Bulmer v Bollinger*². The judgment includes a much-quoted *dictum*:

“But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.”

The Treaty was, of course, the Treaty of Rome, whose 60th anniversary was recently celebrated in Rome with much grand rhetoric.

8. Although Lord Denning’s observation was very striking, and seen as such at the time, in two respects it was an understatement. First, European Union law (as we would now call it) is not merely “equal in force to any statute”. The decision of the House of Lords in *Factortame (No 1)*³ shows that substantive Community rights prevail over the express terms of any domestic law, including primary legislation, made or passed after the coming into force of the ECA, even in the face of plain inconsistency between the two. Secondly, I cannot think that in 1974 Lord Denning – or, indeed, many others – can have contemplated the enormous range of territory which EU law would come to occupy.

SOVEREIGNTY

² [1974] Ch 401.

³ [1990] 2 AC 85.

9. Now let me turn to what I think is the misleading claim that our membership of the EU cost us sovereignty. Much of the constitutional debate about Brexit has centred upon the idea of sovereignty. It is said that we have ceded our sovereignty to the European Union; and that Brexit will give it back to us.
10. Clearly we can have no sensible conception of losing or regaining sovereignty without a clear idea of what we mean by the term, sovereignty. No doubt as a matter of language it may mean many things. Two meanings are relevant for our purpose. There is first State sovereignty: that is, the independence of the State as an autonomous nation, recognized as such in international law. Secondly there is the sovereignty of Parliament, of the legislature: as A V Dicey put it in *The Law of the Constitution*, “Parliament... has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”
11. There is another sense in which the term sovereignty is used, to which I should refer in passing: the sovereignty of the people. Lord Steel of Aikwood stated in a letter to *The Times* on 15 March 2017 that he “wholly subscribe[d] to the sovereignty of the Scottish people and to our right to go independent if we so wish”. The US Constitution begins with the words “We the People of the United States... do ordain and establish this Constitution...” The Constitution of the Philippines states that “Sovereignty resides in the people”. There must be many other examples. But this is rhetoric, or at least no more than an expression of democratic aspiration. The people as a whole do not make constitutions. The sovereignty of the people, like the will of the people, is

simply a grand phrase for the ideal of democratic government. It does not enlighten our present discussion.

12. Let me return to the other, rather more concrete, meanings of sovereignty. The first was State sovereignty. Notwithstanding the actual or alleged aspirations of some politicians and others across the Channel to create a federal European State, that has not yet happened. Accordingly, and despite the rhetoric of many Brexiteers, it cannot sensibly be suggested that by force of our membership of the EU the United Kingdom has ceased to be an independent State, recognized as such in international law. The focus of our discussion, therefore, must be on the second meaning: the legislative sovereignty of Parliament. Did we hand it over to the EU?

13. What would it mean to hand it over? On the face of it, it would mean that the Parliament had abandoned the fullness of its power to legislate. Plainly that has not happened. The European Communities Act 1972, together with the 1972 Accession Treaty, took us into the EEC (as it was then named) and created the essence of our relationship with the Union. But nothing in the 1972 Act disables the fullness of Parliament's legislative power; no one suggests that Parliament lacks the power to repeal the 1972 Act, or indeed to pass any other legislation; even a statute which violated a duty owed by the UK under international law would still be a statute, valid and effective in British law. So the bottom line of legislative sovereignty is untouched by our membership of the EU.

14. I considered the legal relationship between the lawmakers of Westminster and Brussels in the *Thoburn* case⁴ in 2002:

“[T]here is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of

⁴ [2003] QB 151.

Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands."⁵

I have not seen this reasoning contradicted in other cases.

15. If Parliament's ultimate power to legislate as it chooses is unaffected, what *was* the constitutional effect of our membership of the EU? Did it modify Parliamentary sovereignty in some lesser way? What difference to our constitution did EU membership make? Here I need to remind you of the terms of s.2(1) of the 1972 Act:

"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly ..."

16. The "Treaties" are of course the international treaties creating the Union, beginning with the Treaty of Rome of 1957. They include the Lisbon Treaty. The effect of s.2(1) of the 1972 Act was to constitute the EU legislative institutions as a source of law applicable and enforceable in the UK; Parliament, by the 1972 Act, empowered the EU to legislate for the UK. The nature of that empowerment – the bilateral source of legal power, as called it earlier, both treaty and statute – was at the core of the recent Brexit litigation, the *Miller* case.

⁵ Paragraph 59.

I will turn to the rights and wrongs of that case shortly; let me first indicate what I think is the true constitutional effect of membership of the EU.

DELEGATION OF THE POWER TO LEGISLATE

17. I think the best description is that Parliament has delegated to the EU power to legislate for the UK: but it has done so only *in part*, and *revocably*. *In part*: because (as I suggested in *Thoburn*) there was in my view no delegation of any power to legislate for constitutional fundamentals, nor (and this, though obvious, is not to be forgotten) any power to legislate for matters which are anyway outside the competence of the EU. *Revocably*: because (as I put it earlier) Parliament has not abandoned the fullness of its power to legislate.
18. But that is not the end of the story. The delegation of power includes a delegation of judicial power. We have accepted the jurisdiction of the Court of Justice of the European Union at Luxembourg (the ECJ) to adjudicate upon issues arising here which involve EU law: see s.3(1) of the 1972 Act.
19. The delegation of power effected by the 1972 Act has been very profound. As I said earlier, the enormous range of territory which EU law would come to occupy surely cannot have been foreseen when we joined the EEC. Two features of the delegation are especially striking: (1) the primacy of EU law over other domestic law; and (2) the supervening jurisdiction of the ECJ.
20. I should add this. The influx into our law of European legal ideas through the jurisdiction of the ECJ, together with the influence of the European Court of Human Rights at Strasbourg (which is not, of course, a EU institution) has had important effects not only upon our substantive law, but also upon the legal principles through which our domestic law – the common law – works. I said

in the third of my Hamlyn Lectures in 2013⁶ that European legal implants such as legitimate expectation, proportionality and legal certainty have greatly enriched our domestic public law. They are increasingly part of our municipal system; and, no doubt with home-grown modifications, they will survive Brexit.

BREXIT - REFERENDUMS

21. Now I will come to Brexit itself. First, the referendum. The Brexit referendum of June 2016, and more particularly the responses to its result, raise important questions about our constitutional arrangements.
22. There have been arguments as to the circumstances in which the device of the referendum is a justified means of public or constitutional decision-making. Professor Vernon Bogdanor has said in the *Financial Times* that “[i]t is a weakness in the doctrine of parliamentary sovereignty that some decisions are so fundamental that a decision by parliament alone does not yield legitimacy for them”. The referendum on Scottish independence in 2014 was perhaps an example. Whether the same can be said of the Brexit referendum may be more doubtful.
23. However I am not concerned to argue the specifics of that question, but rather to suggest (and it is hardly an original suggestion) that the use of referendums creates a potential constitutional danger. It is that the referendum appears to offer a source of democratic power which challenges the democratic power of Parliament. It creates two democratic poles, one representative – the elected legislature – and one direct – the people’s vote. Lord Patten – Chris Patten – has said that referendums “undermine Westminster”.

⁶ *The Common Law Constitution*, CUP 2014.

24. If after a referendum a majority of our elected representatives in Parliament are inclined on principle to disagree with the result of the people's vote, what is their duty? To bow to the seeming will of the people expressed in the referendum result, or to act according to their judgment and conscience?

25. In 1774 Edmund Burke made a speech to the electors of Bristol. He said this:

“[Your representative's] unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not derive from your pleasure; no, nor from the law and the constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.”

26. It is plain that Burke's letter to the electors of Bristol has matured into a constitutional principle. The difference between direct democracy and representative democracy is not merely that in the latter case the people do not literally make the laws themselves. It is also that the people's representatives are not their proxies or their delegates: they owe their constituents their judgment, not their obedience. Now, it is I think clear that the European Union (Notification of Withdrawal) Act 2017 obtained Royal Assent on 16 March with the support of many Members of both Houses of Parliament whose personal judgment was opposed to Brexit. Our Parliamentarians have given effect to what they evidently regard as an imperative mandate from the people, expressed in the referendum result. Those who voted against their better judgment as regards the merits of Brexit were, I think, caught between two democratic poles. It is noteworthy that on *Question Time* on the day of Royal Assent, 16 March, the Conservative MP Jacob Rees-Mogg (a constitutionalist, one would have thought, if ever there was one) stated that “the fundamental point is the referendum was authoritative”.

27. The roller-coaster of the referendum may have made this inevitable; and it may, in the service of public tranquillity and perhaps the long term interests of the UK, have been the right thing to do. But for MPs to treat a referendum as a mandate represents a new kind of constitutional morality. For my part I hope it will not take root. We are not a direct democracy like that of ancient Athens. If Edmund Burke's conception of the duty of an elected representative is undermined, our politics will, at the least, become increasingly confused and perhaps unprincipled.
28. Moreover the pressure of the referendum result may have generated a new realm of controversy for the courts. You will remember the vilification of the Divisional Court judges last year, following their decision that the initiation of the procedure provided by Article 50 of the Lisbon Treaty required Parliamentary authority: "enemies of the people", shouted the *Daily Mail*. What excited some of the newspapers – and, to their shame, some of the politicians – was the perception that the decision was an affront to the sacred voice of the people. So coarse a view of democracy is no companion of the R of L.

BREXIT – THE MILLER CASE

29. Now I will turn to the Article 50 litigation: the *Miller* case. As I have said, the Supreme Court gave judgment on 24 January 2017. The question in the *Miller* case was whether the executive government was in law entitled of itself to give notice under Article 50, or whether it could only do so if so authorized by an Act of Parliament. The question engaged three doctrines of our constitutional law. (1) The executive government has no legal power to change "any part of the common law, or statute law": so said Sir Edward Coke CJ in the *Case of*

Proclamations in 1611⁷, and it has been established law since the end of the 17th century. (2) International treaties may be made and unmade by the executive government by means of the Crown's residual common law power known as the Royal Prerogative. This second doctrine is only consistent with the first on the footing that international treaties are not part of our domestic law: see Lord Neuberger at paragraph 56 of the majority judgment. (3) A prerogative power will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute: *Attorney General v De Keyser's Royal Hotel Ltd*⁸. For the purposes of this lecture, however, I need say no more about the third of these, important though it is.

30. The Supreme Court upheld by a majority of 8 to 3 the Miller claimants' contention that the government was only entitled to give notice under Article 50 upon the authority of an Act of Parliament. The judgments are very full, scholarly and painstaking. There were ancillary issues concerning the devolved administrations of Scotland, Wales and Northern Ireland. I will not embark upon a critique of the whole judgment; that would be a lengthy and daunting task. I will focus upon the fundamental point of disagreement between the majority judgment delivered by Lord Neuberger and that of the leading dissenter, Lord Reed. As I shall explain, it teaches a constitutional lesson.
31. The resolution of the issue – statute or no statute? – turned on the question, which of our two principal constitutional doctrines applied. Was the EU's power – its delegated power, as I would put it – to legislate for the UK to be treated as a source of domestic law which could only be changed on the

⁷ (1611) 12 Co. Rep. 74.

⁸ [1920] AC 508.

authority of Parliament (doctrine (1))? Or was it to be regarded as an incidence of an international treaty or treaties (the European Treaties referred to in s.2(1) of the 1972 Act) so that its abrogation could be initiated by the government's use of the Royal Prerogative power (doctrine (2))? This is the dilemma revealed by what I called earlier the bilateral source of legal power – statute and treaty. The constitutional importance of the question is obvious. In short: was the executive government entitled of itself to start the Brexit process, or did they require the permission of the sovereign legislature?

32. The majority in the Supreme Court concluded that a statute was required. The minority concluded that it was not. The reasoning on both sides of the argument is lengthy and intricate. I will just pick out some key passages.

33. Lord Neuberger speaking for the majority said that “it is the EU institutions which are the relevant source of that law [sc. EU law in the UK]... In our view... although the 1972 Act gives effect to EU law, it is not itself the originating source of that law... One of the most fundamental functions of the constitution of any state is to identify the sources of its law... [T]he 1972 Act effectively constitutes EU law as an entirely new, independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning.”⁹ Lord Reed, the leading dissenter, said that “the effect which Parliament has given to EU law in our domestic law, under the 1972 Act, is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK's membership of the EU... [R]ights given direct

⁹ Paragraphs 61, 65, 80.

effect by section 2(1) of the 1972 Act are inherently contingent, and can be altered without any further Act of Parliament...¹⁰”.

34. These citations do much less than justice to the depth of reasoning on both sides; but at the risk of over-simplification they identify, I think, the essential difference between them. Lord Neuberger’s emphasis is on the autonomous law-making powers of the institutions; the ECA gives effect to their products. Lord Reed’s emphasis is on the fact that EU law is dependent on the ECA for its validity in the UK; the ECA gives domestic effect to our international obligations. Thus Lord Neuberger is able to categorise the institutions as a source of substantive domestic law which by force of the *Case of Proclamations* can only be abrogated by Parliament; whereas for Lord Reed, EU law’s relevant characteristic is as the product of an international treaty which can be abrogated by use of the Royal Prerogative. In short the majority concluded that the EU’s power to legislate for the UK has to be treated as a source of domestic law which could only be changed by Parliament. The minority thought that the EU’s power to legislate for the UK is rooted in the Treaties, which may be made and unmade by the executive government by means of the Royal Prerogative, so that no Act of Parliament was necessary. Which view is right?

35. There is a strong body of academic opinion – certainly here at Cambridge – which favours the minority. That was the view expressed by Professor David Feldman in his thoroughgoing critique of the Divisional Court judgment in *Miller*. Professor Mark Elliott’s comment on the Supreme Court decision includes this:

¹⁰ Paragraphs 177, 216.

“It is hard to see in what sense the EU’s legislative and constitutional apparatus can be an ‘independent source’ of UK law if the source of EU law’s validity in the UK is itself UK law (in the form of the ECA).”

The majority view – “[T]he 1972 Act effectively constitutes EU law as an entirely new, independent and overriding source of domestic law” – seems to suggest a new kind of originating, substantive law: introduced by a statute, but consisting in Treaty provisions. This would be, to use Professor Herbert Hart’s term of art, a new “rule of recognition”. But no such new rule is asserted or recognised. Indeed Lord Neuberger stated in terms¹¹ that “we would not accept that the so-called fundamental rule of recognition (ie the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal”. To the minority, there is a tension or even a contradiction here: is there or is there not a new rule of recognition?

THE MILLER CASE – DIFFICULTIES

36. I am afraid I think that the opposing views of the majority and minority in *Miller* obscure more than they reveal. What are we to make of these two propositions: (1) “[W]here EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law” (Lord Neuberger) and (2) “[T]he effect which Parliament has given to EU law in our domestic law, under the 1972 Act, is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK’s membership of the EU” (Lord Reed)? Why are the EU institutions the relevant source of law “in a more fundamental sense” (Lord Neuberger)? Why does the fact that EU law’s domestic application is

¹¹ Paragraph 60.

“conditional on the UK’s membership of the EU” disqualify the EU as an originating, or relevant, source of UK law (Lord Reed)?

37. I can see that there is a logical purity to the view of the minority: it points to the seeming fact that the majority appears to assume but in fact denies a new rule of recognition. That, I think, is an important source of the minority’s appeal to legal scholars. It seems to me, however, that this approach addresses too narrow a question. We should not lose sight of the issue at the heart of the case: should our constitutional law allow the executive to initiate our departure from the EU without legislative authority to that effect? Behind this question there is a larger one: how far should our constitutional law allow the executive to make or unmake domestic law?

38. In confronting these questions, it does not seem to me (with great respect to the Supreme Court) to be very helpful to categorise the EU institutions as on the one hand an “originating” or “independent” source of EU law in the United Kingdom, or on the other hand merely a “conditional” or “contingent” source. The scope or reach of Lord Coke’s principle in the *Case of Proclamations* – that the executive is not generally an original source of law – was not set in stone in the 17th century. In the *Miller* case Lord Neuberger observed¹²:

“Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions. Reflecting its development and its contents, the UK constitution was described by the constitutional scholar, Professor AV Dicey, as ‘the most flexible polity in existence’ - Introduction to the Study of the Law of the Constitution (8th ed, 1915), p 87.”

I see no good reason to conclude that in present circumstances the application of Lord Coke’s principle should be critically dependent on distinctions such as

¹² Paragraph 40.

those made by Lord Neuberger or Lord Reed. Those distinctions arise, I think, because the bilateral source of legal power, as I have put it, has proved too seductive: the reasoning on both sides in *Miller* proceeded on the footing that there was a rigid divide between the domain of Parliament's law and the domain of the Prerogative. That is of course a familiar dichotomy; but Lord Neuberger stated¹³ that "in constitutional terms the effect of the 1972 Act was unprecedented".

And so it was. The 1972 Act's uniqueness consisted in its delegation, as I have described it, to the EU institutions of the power to legislate for the UK. The delegation was effected, as we have seen, by giving the force of domestic law to the laws of the EU made by the EU institutions pursuant to the Treaties. That being so, it seems to me that the antithesis between the opposing positions of Lords Neuberger and Reed is in the end barren. The answer to the constitutional question, does the invocation of Article 50 require the authority of a statute, cannot sensibly depend on whether you choose to categorise the EU as an "originating" or only a "conditional" source of law in the UK. Apart from anything else, both categorisations are in a real sense true; the EU institutions are undoubtedly a source – and if you like an originating source – of UK law; equally, the application in the UK of that law is undoubtedly conditional on the UK's membership of the EU.

39. How then is the question to be approached? We are concerned, surely, with substantial constitutional reality. I said earlier – and it is obvious – that the delegation of power effected by the 1972 Act has been very profound. It has allowed the EU legislative institutions to make law for the United Kingdom

¹³ Paragraph 60.

over a vast range of topics, law which takes precedence over domestic statutes in the case of conflict, and whose interpretation is in the hands of an international court whose judgments prevail over all British courts. In *Thoburn*¹⁴ I observed that “it may be there has never been a statute having such profound effects on so many dimensions of our daily lives”. As the majority in *Miller* stated, “for the first time in the history of the UK, a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts”. This is the substantial constitutional reality of our membership of the EU. It is not, nor could it be, contradicted by the minority in the *Miller* case.

40. Yet for Lord Reed in the minority all this seems legally irrelevant. Lord Reed considered that there was “no basis in the language of the 1972 Act” for drawing any distinction between “variations in the content of EU law arising from new EU legislation, and changes resulting from withdrawal by the UK from the European Union”.

41. That may be entirely right so far as the language of the 1972 Act is concerned. But the substantial constitutional reality of our membership of the EU remains. That reality is not altered by variations in the content of EU law from time to time. But it *is* radically altered – indeed extinguished – by withdrawal from the EU. Our departure from the EU thus represents a monumental change in the legal arrangements under which the UK is governed. There will be a new constitutional reality; and our law must confront it.

42. The development of our constitutional law means more than applying fixed principles, or deducing conclusions from established premises. Like the

¹⁴ Paragraph 62.

English common law in general, it is dynamic, not static. It may require a new, or a revised, response to a new situation. In my opinion the new constitutional reality to be ushered in by our departure from the EU imperatively requires that the executive government should not be allowed to fire the Article 50 starting-gun without the authority of an Act of Parliament. Withdrawal from the EU will revoke the delegation of legislative power which Parliament effected by the 1972 Act. It should be for Parliament to effect the revocation. Such a conclusion follows the spirit, even if it revises the letter, of Lord Coke's principle. Parliament, surely, bears the ultimate constitutional responsibility for the content and source of directly effective law that is not judge-made. That is why I think that the result of the Supreme Court appeal in *Miller* was the right one.

43. There has been a debate in some circles as to whether notification of withdrawal under Article 50 of the Lisbon Treaty is itself revocable; it was common ground in the *Miller* litigation that it was not. If it were otherwise, if the government were able to revoke the Article 50 notice, the imperative of Parliamentary scrutiny might be less pressing. But it would still, in my opinion, be irresistible.

44. There is a further point. I spoke earlier of the dangers of referendums: two poles of democratic power in opposition. Had the minority in *Miller* prevailed, the voice of the referendum vote would have dictated Brexit with all the changes that will entail: our representative Parliament would have said nothing.

CONCLUSIONS

45. In all this I would like to emphasise an old lesson, but one which is renewed, I think, by the *Miller* litigation. It is that our constitutional law must rise to the occasion. It is part of the common law of England and it is the dynamism of

the common law, not the strict words of statute, that made it right for the judges to insist that the trigger of Article 50 can only be pulled by the authority of Parliament. Our constitution is old and new at the same time. The laws of Europe, of devolution and of human rights are new colours in the kaleidoscope. Our joining and leaving the EU is a chapter, not a new book.

46. There will be more constitutional questions to come. The most readily foreseeable will turn on the use of Henry VIII powers in what is being called the Great Repeal Bill, which, we are given to understand, will not only repeal the 1972 Act but also bring existing substantive EU law onto the statute book. At least it will be the engine for doing so; the scale and complexity of the task will require the new statute to empower government to fashion the detailed process by the use of secondary legislation – it may be to a very substantial extent. That will present its own challenges. We shall have to await the publication of the Bill before we can get to grips with them.

47. The constitutional lessons to be learnt from Brexit are not, therefore, all yet revealed. But I think there is an overriding lesson. It is that, so long at least as the common law is allowed to function, there will be no new legal voice to which it cannot give an answer. The common law is a book without an ending. Our duty is to see that what it says always rises to the occasion.