

Do events since 23 June 2016 strengthen or weaken the case for the United Kingdom adopting a written, codified Constitution?

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Introduction

On the 23rd of June 2016, the United Kingdom (UK), voted in what was called by the then Prime Minister David Cameron, “a once in a lifetime opportunity” referendum, over the country’s continued membership of the European Union (EU).¹ The referendum ballot asked only whether the UK should “Remain a Member of the European Union” or “Leave the European Union” and by the early hours of the morning of the 24th June 2016, it was clear that leave had won by a narrow majority of 51.9% of the 33 million, who turned out to vote, in favour of leaving the EU against 48.1% who wished to remain.²

Upon learning the outcome of the referendum, Prime Minister Cameron resigned, and the ruling Conservative party elected Theresa May as successor, tasked with the role of withdrawing the UK from the EU. Immediately, the new Prime Minister and the Government ran into legal, political, and constitutional difficulties in seeking to utilise the Royal Prerogative (the residual powers of the Crown which now reside in Ministers of State) to “trigger” Article 50 of the Treaty on European Union (TEU). The subsequent legal challenge to this decision in the case of *R (Miller) v Secretary of State for Exiting the European Union*,³ has arguably crystallised some of the long-standing questions that have raged over the extent and limits of the UK’s constitutional foundations. The commonly accepted view of the UK’s constitutional settlement is that whilst the country does in fact have a constitution, it is one which is unwritten, therefore fundamentally uncertain in many respects.⁴

This article will consider whether the events which the EU referendum have now strengthened, or even weakened, the case for the adoption of a written, codified, constitution in the UK.

The UK’s unwritten constitution

The UK takes some degree of pride with the lack of a codified, written constitution.⁵ The fact that the UK’s constitution is unwritten is testament to the ancient, and unbroken nature of, and legal continuity of the State, the Crown, and its subjects. Outside of this, however, the major advantage offered by an unwritten constitution is its flexibility and its pragmatism; an unwritten constitution can change and adapt along with society, and political change itself.⁶

The unwritten constitution which now presides over the UK has developed over centuries and has exhibited this flexibility throughout. Historically, the Crown operated with almost absolute power, subject to continuing support from the feudal barons who formed the military and financial backers. Over time, Parliament slowly accreted powers and privileges, and became responsible for ensuring taxation could

1 Kylie MacLellan, Elizabeth Piper, ‘Cameron Says No Second EU Referendum if Result is Close’ Reuters May 17 2016, available online at: <<https://uk.reuters.com/article/uk-britain-eu-cameron/cameron-says-no-second-eu-referendum-if-result-is-close-idUKKCN0Y81VK>> accessed 5 August 2019

2 Electoral Commission, ‘Results and Turnout at the EU Referendum’ 29 July 2019, available online at: <<https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum>> accessed 6 August 2019

3 [2017] UKSC 5

4 John Baker, ‘Our Unwritten Constitution’ (2010) 167 Proceedings of the British Academy 91, 92

5 Anthony Brudage, Richard A Cosgrove, *The Great Tradition: Constitutional History and National Identity in Britain and the United States 1870-1960* (1st edn SUP 2007) 107

6 Ibid.

be gathered.⁷ This operated as a basic check on the otherwise absolute power of the Crown, but it was not until the aftermath of the English civil war and the events of the Glorious Revolution of 1688, that the constitutional settlement in its present form was reached.⁸ Following this, the current, accepted position of the constitution is one in which Parliament is regarded as the sovereign, and supreme law-making body in the land.⁹

The position reached by this settlement is known as the doctrine of Parliamentary sovereignty, and, as was noted by constitutional theorist and historian AV Dicey in the 19th century espoused that Parliament, as the sovereign body in the land, is free to make any law it sees fit.¹⁰ Under this conceptualisation of the UK's constitution, any body or court can call into question, or review the legality of an Acts of Parliament that have passed both houses and received Royal Assent.¹¹ In other words, as argued by Bogdanor, the UK's constitution can be summed up as meaning, very simply; "Whatever the Crown in Parliament enacts is law".¹²

By contrast, in countries with a written constitution, such as the United States for example, a written constitution expressly sets out the separation of powers of the different branches of government, and allows the courts particular power to assess the legality, or "constitutionality" of the actions, and laws, made by the legislature and executive.¹³

In the light of the UK's unwritten constitutional settlement, it can therefore be said that there is no way in which certain statutes, or pieces of legislation which are somehow "constitutional" in nature, or in effect, can in fact ever be anything of that kind. If Parliament is truly sovereign, it can always repeal legislation which appears, at first glance, to bind it.

In more recent years, this accepted position has come under increasing threat, as the nature of some types of legislation (such as the Human Rights Act 1998)¹⁴ and the UK's membership of the EU appeared to complicate this picture.¹⁵ This has been furthered by the UK's changing internal relationship between its constituent states, with "Devolution",¹⁶ from the 1990's onwards becoming an ever more important issue as more and more powers are devolved from Westminster to the constituent states of the UK.¹⁷ There are now some who argue that the UK's unwritten constitution is outdated, obsolete, and unwieldy.¹⁸ The extent to which these arguments are fair will now be considered.

The Miller Case: The relational architecture of the UKs unwritten constitution under strain?

One of the main criticisms of the UK's unwritten constitution is that it results in inherent uncertainty as to what the outer-limits of the constituent branches of the UK state are. For example, questions arise to what kind of power the Crown actually retains; or in what areas the executive is entitled to exercise these residual and prerogative powers? Further questions arise as to how far the courts are entitled to review the legality of the executive in cases where legislation granting significant discretion to

7 Anthony Brudage, Richard A Cosgrove, *The Great Tradition: Constitutional History and National Identity in Britain and the United States 1870-1960* (1st edn SUP 2007) 108

8 RC Van Caenegem, 'Constitutional History: Chance or Grand Design?' (2009) 5 ECL Review 447, 447

9 AV Dicey, *An Introduction to the Study of the Law of the Constitution* (First Published 1885 10th edn MacMillan 1965) 44

10 *ibid*

11 *Edinburgh and Dalkieth Railway Co Ltd v Wauchope* (1842) 8 Cl & Fin 710

12 Vernon Bogdanor, *The New British Constitution* (1st edn Hart 2009) 12

13 Mark Garnett, Philip Lynch, *Exploring British Politics* (1st edn Pearson 2007) 84

14 Human Rights Act 1998

15 Taunabh Khaitan, "' Constitution" as a Statutory Term' (2013) 129 QJR 589, 590

16 Alan Page, Andrea Batey, 'Scotland's Other Parliament: Westminster Legislation About Devolved Matters in Scotland Since Devolution' (2002) PL (Aut) 501, 502

17 Jeffery Goldworthy, *Parliamentary Sovereignty: Contemporary Debates* (1st edn CUP 2010) 311

18 *Ibid*.

Government Ministers to adapt, or alter legislation through the use of statutory instruments, are lawful. Many of these issues were raised in the *Miller* case.

In *Miller*, the applicant contended that the Government's attempt to trigger Article 50 through the use of the prerogative was unlawful.¹⁹ This claim was based on the suggestion that by using the prerogative in this manner, the executive would, effectively, be repealing and undermining the effect of an Act of Parliament in the form of the European Communities Act 1972.²⁰ The Supreme Court, ruling in favour of the applicant, agreed and held that by withdrawing, or beginning withdrawal proceedings from the European Union, the European Communities Act 1972 would in fact be impliedly repealed by the executive, rather than by Parliament itself in a manner which was not lawful as decided in the case of *Laker Airways v Department of Trade* as far back as 1977.²¹

As a case that highlights constitutional issues, *Miller* might have re-affirmed the orthodox Diceyan notion of Parliamentary sovereignty, which states that Parliament, and not the executive, is the sovereign law-making body in the land. The executive could not get around this by withdrawing from the EU without an Act of Parliament authorising this. Whilst this was subsequently achieved through the passing of the European Union (Withdrawal) Act 2018, the UK, some three years after the Brexit vote, remains within the EU, and Parliament has still failed to ratify the draft Withdrawal Agreement negotiated by Theresa May and the EU's negotiating representatives.²²

More pertinently, even after the *Miller* case, significant issues remain as to how and where, the repatriated powers of sovereignty will reside once the UK do withdraw from the EU entirely. One of the more interesting elements of *Miller* is the intervention of the Scottish Government and the Welsh National Assembly, who asserted that the withdrawal of the UK from the EU in this manner was a breach of the so-called Sewel Convention. That the UK was altering the legislative competence of these bodies without their consent.²³ The potential breach of the Sewel Convention, and the relationship between the devolved Governments and Westminster, is certainly one area in the lack of a written constitutional settlement does lead to some difficulty.

The Sewel Convention, also called "legislative consent motion" is a "constitutional convention" which provides that the devolved Governments of Scotland, Wales, or Northern Ireland must grant their consent to the UK's Parliament before the UK Parliament legislates on matters which have been devolved to them.²⁴ In *Miller*, the Scottish and Welsh governments argued that no such consent had been given, and that in fact voters in Scotland and Northern Ireland had overwhelmingly voted to remain in the EU.²⁵

The Supreme Court, however, confirmed that constitutional conventions are not legally binding on the Government, and are merely political in nature. As such, the Court could not rule on the legality of the alleged breach of the Sewel Convention. The fact that constitutional conventions are not binding is now a well-acknowledged fact of law. Ultimately, this is because the UK's unwritten constitution is built largely (if not exclusively) on the notion of Parliamentary sovereignty, and if a constitutional convention could prohibit Parliament from acting in a certain manner, then Parliamentary sovereignty itself would be undermined. In other words; in a battle between "constitutional" conventions and Parliamentary sovereignty, Parliamentary sovereignty always wins.

19 R(Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5

20 European Communities Act 1972

21 [1977] 1 QB 643

22 European Commission, 'Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as Agreed at Negotiators' Level on 14 November 2018' available online at: < https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en > accessed 6 August 2019

23 R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5

24 Jane Munro, 'Thoughts on the 'Sewel' Convention' (2003) 23 SLT 194, 194

25 R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5

Therefore, there is no such thing as a “constitutional” restraint to the convention that prevents it from being breached by the Government. Any harm that might be done to the Government or indeed to Parliament if such a convention is breached is merely political, and not legal in nature.

Could a codified constitution help?

If a written constitution were to be drafted in such a way to ensure that the devolved Governments were legally required to give legislative consent, the new UK constitution would, by its very nature, undermine the traditional notion of Parliamentary sovereignty. Given the arguments put forwards by the “leave” side during the EU referendum campaign, many of which were based on returning sovereignty to the UK’s Parliament from Europe, this would be politically difficult to say the least. This is a point made by Craig, who argues that it is difficult to see how a written constitution could help resolve the difficulties that have arisen within the UK’s internal constitutional settlement since the Brexit vote.²⁶

On the other hand, it might be suggested that a constitution which set out the specific rights of each of the constituent parts of the United Kingdom would lend greater certainty to the position of each of these states. There has, in recent years, been a significant upswing in nationalist support and sentiment in Scotland. Part of the rationale behind this movement appears to be the disproportionate weight which England carries as part of the Union, by virtue of its greater population making the UK have higher representation in Parliament. This leads to the concern amongst some Scottish nationalists that “what England wants, England gets”, even when the other parts of the UK have seemingly different priorities.²⁷

If this was indeed the purpose of devolution, it failed almost completely. The legislation that created the devolved governments is legislation made by Parliament, Diceyan constitutional theory dictates that Parliament will ultimately retain its absolute sovereignty over even a devolved system.²⁸ Whilst there were, in more recent years, many theorists who suggested that this notion of Parliamentary sovereignty was becoming outdated, or that Parliament now shared sovereignty with the courts who operated in a sort of review role akin to the constitutional courts of the USA, this now appears to have been rejected by the Supreme Court in *Miller*. Historically, the argument that Parliamentary sovereignty was somehow reduced has been made on the back of the growing assertiveness of the courts following the introduction of the Human Rights Act 1998, and the famous decision of the European Court of Justice (ECJ) in *R (Factortame) v Secretary of State for Transport*. In this case the ECJ held that the English courts must disapply Acts of Parliament which contradicted EU law, and apply conforming EU law in their place. This led in turn to some arguing that the courts now “shared” sovereignty with Parliament,²⁹ and that some statutes were “constitutional” in nature and so could not be so simply overridden (at least impliedly).³⁰ This approach now appears to have reached its high-water mark in the case of *R (Jackson) v Attorney-General*, and following *Miller* it might be suggested that this approach is no longer one that is based on any real understanding of the UK’s constitutional settlement, which has been re-affirmed by the Supreme Court itself.³¹

On the other hand, it is suggested that even if the doctrine of Parliamentary sovereignty is applied, there are still constitutional issues that remain unsolved due to the lack of a written and codified constitutional settlement. This is something that came up in the statements made by the new Prime Minister, Boris Johnson. The Prime Minister has stated that if changes are not made to the draft withdrawal agreement so far negotiated, the UK would leave the EU without an agreement. In response to this, Members of Parliament have indicated that they would pass a motion of no-confidence in the Government and in

26 Robert Craig, ‘Miller Supreme Court Case Summary’ (2016) available online at: <

<https://ukconstitutionallaw.org/2017/01/26/robert-craig-miller-supreme-court-case-summary/>> accessed 6 August 2019

27 Mark Elliott, ‘The Supreme Court’s Judgment in Miller: In Search of Constitutional Principle’ (2017) 76 CLJ 257, 258

28 Charlie Jefferey, Daniel Wincott, ‘Devolution in the United Kingdom: Statehood and Citizenship in Transition’ (2006) 36 *Publius* 3, 4

29 Jeffery Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (1st edn CUP 2010) 311

30 *Thoburn v Sunderland City Council* [2001] EWHC Admin 195 (Laws LJ) [53]

31 Mark Elliott, ‘The Supreme Court’s Judgment in Miller: In Search of Constitutional Principle’ (2017) 76 CLJ 257, 258

the Prime Minister. The Prime Minister has indicated that he would not necessarily resign in such a situation, calling into question what the legal effect of such a position would be. Some have suggested that if the Prime Minister did refuse to “resign” after a vote of no-confidence the Queen could intervene using her reserve prerogative powers to force the Prime Minister to resign.³²

Whilst this might appear to be a power which the Crown retains, even the exercise of this power would be dependent on Parliament being able to put forwards another potential Prime-Minister who could then form a government within 14 days provided that a motion of confidence can be made under s3(5) of the Fixed-Term Parliament Act 2011.³³

Ultimately, the UK Parliament retains control over the UK’s withdrawal from the EU, and could simply repeal the Act, and pass a vote of no-confidence to allow a general election to be called. The lack of a codified, written constitution does not appear to impact on this, as the law in this area is relatively clear.

The future for the union: A federal UK with a codified constitution?

Whilst the Brexit saga has reignited concerns about the UK’s unwritten constitutional settlement amongst those in Scotland, Northern Ireland and Wales, there are also many who argue that devolution itself has left England in an asymmetrical position in comparison to these other states of the UK.³⁴ England is now the only country within the UK that lacks its own national assembly, able to make law affecting only England without the input of Members of Parliament from the other parts of the UK. One-way of correcting this, which preserves the Sovereignty of Parliament, would be to make a unified all-UK Parliament “sovereign”. Exacting law-making powers only over matters affecting the UK as a whole, and for a legislative consent motion to be required legally, instead of merely politically, before the all UK Parliament did make “national” legislation impacting on matters otherwise devolved. A written constitution, at the heart of a new constitutional settlement, perhaps built around a federal-UK system might be better placed to resolve some of these sentiments by creating a more ‘just’ basis of political governance, whereby the largest region (England) in terms of population, is not capable of exerting its will over the rest of the UK combined.³⁵

The most obvious difficulty is that the UK would risk diverging in terms of legislative and regulatory standards in a manner which might impact negatively on the UK’s own internal market, or on the UK’s external trade relations. Furthermore, this approach, under which both Federal and State law were found to exist side-by-side would naturally increase the complexity of the law, and its divergence from region to region, potentially further undermining the cultural hegemony of the UK as a whole, and risking increasing support for separatist, nationalist movements which might seek to undermine the Union. Finally, the greatest difficulty faced by such an approach is that the traditional, Diceyan notion of Parliamentary sovereignty itself, would be required to be jettisoned under a Federal system. Whilst Parliament might retain sovereignty over England, under a truly Federal system, it could not retain this authority over the entirety of the UK. In any event, by its very nature, a written, codified constitution would constrain Parliament by setting out the limits of its power.³⁶ This is entirely inconsistent with the current understanding of the UK and its constitution.

32 Caroline Davies, ‘Could the Queen Sack Boris Johnson? The Experts are Divided’ *The Guardian* 7 August 2019

33 s3(5) Fixed-Term Parliament Act 2011

34 Pavlos Eleftheriades, ‘The Coming Constitutional Instability’ (2017) *PL* (Jul) 347, 348

35 *ibid*

36 Jeff King, ‘The Democratic Case for a Written Constitution’ (2019) *Current Legal Problems*, available online at <<https://academic.oup.com/clp/advance-article-abstract/doi/10.1093/clp/cuz001/5494555?redirectedFrom=fulltext>> accessed 6 August 2019

Conclusion

Whilst it is clear that the events following the UK's vote to withdraw from the EU have brought to light some of the most difficult paradoxes and anomalies of the UK's constitutional settlement, it remains difficult to suggest that an alternative, codified, system would resolve any of the problems satisfactorily. This is because, the UK's current system is based fundamentally on the acknowledgement of Parliament as being the sovereign law-making body in the land. Parliamentary sovereignty is defended primarily because it places power in the hands of those who are directly elected by the governed populace. Meaning that democratic consent and legitimacy are placed at the heart of the settlement. This does however stand in the way of a written constitution, which essentially "freezes" the rights of Parliament and the other branches of state at a particular point in time and so a written constitution is incompatible with this approach to sovereignty. Ultimately, if the UK wishes to adopt a written, codified constitution, it must first decide whether or not it wishes to retain the principle of Parliamentary sovereignty itself.

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