The Supreme Court and the *Miller* Case: More Reasons Why the UK Needs a Written Constitution

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Abstract

The United Kingdom's constitution is obscure and open textured. The powers of the state are vested in the Crown which is subject to diverse and contradictory interpretations of its identity. The obscurity of the UK constitution is dysfunctional and needs to be reformed by way of a written constitution. The shortcomings of the UK's unwritten common law constitution is illustrated in the Supreme Court's majority judgment in the 2017 *Miller case*.[1] The common law constitution makes the judges the constituent power and especially vulnerable to criticism when dealing with intensely disputed political matters. In the absence of a written constitution the Supreme Court may lack institutional confidence in its role and authority and seek to portray its decisions as merely technical applications of the law rather than assertions of creative and active constitutional law making. A written constitution would be an opportunity to design an integrated and coherent body of constitutional law, transform the Supreme Court's status and improve the clarity of its constitutional decision making.

Keywords: Common law, common law constitutionalism, crown, European Union, Miller case, royal prerogative, Supreme Court, written constitution

Introduction

The United Kingdom's constitution is dependent upon deep historical forms of power that are fundamentally obscure and open textured. The powers of the state are vested in the Crown but the Crown itself is subject to diverse and contradictory interpretations of its identity. For example, is the Crown a corporation sole or a corporation aggregate or both?[2] The Queen is the embodiment of the Crown and in strict legal theory the powers of the state are hers. In practice, most of those powers are exercised by the government of the day. Although not overtly directing policy the monarch has a significant role in government as a non-executive head of state, seeing state papers and holding regular audiences with her Prime Minister and other leading ministers. The monarch possesses so called reserve powers where there is a need for her to step in in a situation where there is a significant impasse that the normal political process cannot resolve. A head of state possessing reserve powers is constitutionally sensible but in the UK context of an unwritten constitution those reserve powers are uncertain and likely to be contentious where a hereditary monarch is intervening in a political crisis. The uncertain scope of the monarch's powers in

[1] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

[2] For a detailed elaboration of the conceptual issues relating to the Crown and its identity see Maurice Sunkin and Sebastian Payne (eds) (1999) *The Nature of the Crown.* Oxford: Oxford University Press.

terms of her political authority is matched by an inverse issue with regard to the government of the day: what are the limits of its legal authority when acting under the powers of the Crown with regard to the royal prerogative?

The main proposition this article advances is that the obscurity of the UK constitution is dysfunctional and needs to be reformed by way of a written constitution. The shortcomings of the UK's unwritten constitution (the common law constitution) can be seen in many contexts but here I focus on the Supreme Court's majority judgment in the 2017 *Miller* case to illustrate my central proposition.[3] My criticisms of that judgment are not intended as an attack on the judges but are directed towards identifying the structural problems that flow from having an obscure constitution that depends upon the judiciary to piece together. Those structural problems become especially acute when the courts have to deal with a matter that is divisive, politically sensitive and demanded to be answered at short notice. The common law constitution makes the judges the body that defines the constitution and so in effect the constituent power. This makes the judiciary especially vulnerable to criticism when dealing with intensely disputed political matters. In the absence of a written constitution designating the role of a top constitutional court, the Supreme Court may lack institutional confidence in its role and authority and seek to portray its decisions as merely technical applications of the law rather than assertions of creative and active constitutional law making.

The *Miller* case provides an excellent basis to assess the operation of the constitution under pressure: the subject matter touched on key elements of power in the state, namely, the role and power of the executive, the legislature and the judges. The method of divination of those powers is through the judges who use an assortment of strategies. The shortcomings of this 'method' were evident in the *Miller* case. With regard to the constitutional background, the majority's reasoning seems doubtful or plain wrong in places and the way in which the devolution issue was dismissed reveals a reluctance to look at the constitution as an integrated whole.

What was the *Miller* case about?

After the UK voted to leave the European Union (EU) in a referendum held on 23 June 2016 the Conservative Government wished to give effect to that vote by notifying the European Council of its intention to withdraw under Article 50 of the Lisbon Treaty.

Article 50 (1) says:

> Any member state may decide to withdraw from the Union in accordance with its own constitutional requirement.

Article 50 (3) says that the Treaties of the European Union will cease to apply to the member state from the date of the withdrawal agreement, or failing that after two years unless the European Council and the member state unanimously decide to extend this period. Notwithstanding that one of the key arguments of those in favour of leaving the European Union was about the sovereignty of parliament, the government did not want to get the permission of parliament to serve the Notice by way of an authorising Act of Parliament. Instead they proposed to use the royal prerogative to give notice. The key issue in this case was whether the royal prerogative extended to giving notice to leave the EU. The giving of notice would

[3] *Miller* (see note 1)

lead to the EU Treaties no longer applying thereby, arguably, terminating an extensive legal order, namely EU law, which had been applicable and binding in the UK. The UK is a dualist state with regard to international treaties; the European Communities Act 1972 was the means by which EU law was made effective domestically. That Act said, in effect, apply EU law in all its forms as required by the EU Treaties.

Crucial to the case was an interpretation of what the 1972 Act was doing: was it a mere channel or conduit to put into effect whatever flowed from the treaty obligations OR did it do something more, namely, introduce a new and binding legal order thereby transforming the legal structures of the state? Related to this was the question of whether a royal prerogative could effectively terminate the contents of an act of parliament and demolish a legal order? The government disputed this interpretation of the effect of giving notice, claiming that the 1972 Act would be unchanged until repealed and that all the Act was doing was implementing whatever Treaty obligations existed.

The other key element in this case related to the devolution arrangements in the UK, dating to 1998, and put in place by acts of the UK parliament. The devolved assemblies and executives had limited competence: one legal obligation being to apply EU law and not to act or legislate contrary to that body of EU law. As the devolution arrangements developed an understanding or convention had arisen that the UK government would not normally legislate on devolved matters without the consent of the devolved legislatures. This was called the Sewel Convention and it had been enshrined in law in the Scotland Act 2016. The question that arose in the *Miller* case was whether the agreement of the devolved legislatures was needed prior to the giving of notice to the EU because the effect of giving notice would change devolved competencies. In other words, leaving the EU would have an effect on the devolved bodies because it would change the legislative requirement imposed on them by UK law, in for example the Northern Ireland Act 1998 and the Scotland Acts, to act and legislate consistently with EU law.

The majority decision in *Miller* (eight of the judges, with the remaining three dissenting) was that the prerogative power relating to treaty making did not extend to this scenario of giving notice to withdraw from the EU because to do so would undermine provisions embodied in an act of parliament. They said that an act of parliament was needed to authorise the notice to leave. The court dismissed the devolution arguments on the basis that the Sewel Convention was merely a political understanding and not law.

The Constitutional Background

A crucial part of the court's judgment is their section on the constitutional background. It underpins their reasoning and of course Article 50 requires a notice to leave to be consistent with the country's constitutional requirements.

The Court's Account of the Constitutional Background

At paragraph 40 of the judgment the majority state: 'Unlike most countries, the United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law.' That statement is true, albeit an understatement. What the UK has is a multitude of precepts of varying status, which do not form a coherent whole. The so-called constitutional principles or precepts may or may not be applied as law depending upon what the court feels at any one time is the 'right answer'. Indeed, the court quotes Dicey as saying that the UK

constitution was 'the most flexible polity in existence'. The Court goes on to say at paragraph 41:

> Originally sovereignty was concentrated in the Crown … Accordingly the Crown largely exercised all the powers of the state … However … those prerogatives powers … were progressively reduced as parliamentary democracy and the rule of law developed.

This potted history by the majority judges can be called the Whig account of history suggesting evolution and progress but what should be noted is that the powers of the state in the UK are still exercised by the Crown though, for the large part by ministers and not by the monarch in person. (As mentioned already, the Queen does retain reserve powers and the powers of a head of state). Furthermore, key governmental attributes, held by virtue of the prerogative, remained in the hands of the Crown until this century and still do with some recent limitations.[4]

The majority proceed to describe the role of judges in dealing with cases. At paragraph 42 they say:

> [j]udges impartially identify and apply the law in every case brought before the courts. That is why and how these proceedings are being decided.

This particular assertion is noteworthy in so far as it seeks to give new life to a doctrine, the declaratory theory of justice, that has long been regarded by many as a fantasy or, as Lord Reid famously described it, 'a fairy tale'. In the *Miller* case, the courts are being asked to determine the extent of the royal prerogative in an entirely novel situation. To curtail the treaty prerogative in this novel situation the majority judges are making up a new rule. I do not regard making up a new rule as a problem but the majority in the Supreme Court is keen to pretend that they are not doing so.

At paragraph 43 they state:

> The legislative power of the Crown is today only exercisable through Parliament. This power is initiated by the laying of a Bill containing a proposed law before Parliament….Thus, Parliament, or more precisely the Crown in Parliament, lays down the law through statutes – or primary legislation as it is also know – and not in any other way.

It may seem surprising to say but their statement is false in so far as it suggests that the only way to create primary legislation is through acts of parliament. Orders in Council issued by the Privy Council, as well as creating statutory instruments by way of an authorising act of parliament, also create prerogative legislation.[5] The source of authority to create such prerogative Orders is 'the Crown outwith Parliament'. In the *GCHQ* case[6] such prerogative Orders were referred to as primary legislation. In that case Lord Fraser said:

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[4] See the *Constitutional Reform and Governance Act 2010* for changes to the status of the civil service and the requirement to seek parliamentary approval before the ratification of treaties.

[5] For a discussion of this see Andrew Le Sueur, Maurice Sunkin and Jo Murkens (2016) *Public Law: Texts, Cases and Materials.* 3rd edn, Oxford: Oxford University Press, p. 465.

[6] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

> The Order in Council of 1982 was described by Sir Robert Armstrong in his first affidavit as primary legislation; that is, in my opinion, a correct description, subject to the qualification that the Order in Council, being made under the prerogative, derives its authority from the sovereign alone and not, as is more commonly the case with legislation, from the sovereign in Parliament.[7]

Indeed the Chagos Island case (*Bancoult No. 2*),[8] involved the use of Orders in Council under the royal prerogative to remove the whole population of the Chagos Islands, against their will and dump them in the slums of Port Louis in Mauritius so that the USA could build a military base on the Chagos Islands. As well as reaffirming that Orders in Council are primary legislation, the court in *Bancoult (No.2)* affirmed the Foreign Secretary's power to remove a whole population by act of the royal prerogative. This more recent case demonstrated the potency of such prerogative legislative acts, not least for transforming for the worse the lives of a whole population.

Later in the judgment in *Miller*, at paragraph 46, the majority do mention, in passing, a limited power of the prerogative to regulate. But their qualification is somewhat misleading. They say at paragraph 52,

> The fact that the exercise of the prerogative powers cannot change the domestic law does not mean that such an exercise is always devoid of domestic legal consequences.

This analysis is doubtful. Orders in Council issued under the prerogative can create law and so in that sense change the law. To support their proposition that prerogatives cannot change the law, the majority give two examples, one of which is,

> [t]he Crown has a prerogative power to decide on the terms of service of its servants, and it is inherent in that power that the Crown can alter those terms so as to remove rights.

That was an accurate account but the court appears to have forgotten that the Constitutional Reform and Governance Act 2010 put the regulation of the civil service on to a statutory footing.[9] Notwithstanding that omission with regard to recent legislation, it is strange that the court thinks that the power of the Crown to issue orders in council under the prerogative to change the terms of employment of civil servants so as to remove rights is not to change the law.

The Court, at paragraph 52, refers to a second category where prerogatives can have 'consequences' as the court puts it (whilst maintaining the idea that prerogatives cannot change domestic law). The Court attempts to bolster their interpretation with reference to authority. At paragraph 53 they say:

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[7] *Council of Civil Service Unions v Minister for the Civil Service* (see note 6), per Lord Fraser, p. 399 at C.

[8] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No. 2) [2008] UKHL 61.

[9] Under the 2010 Act there were exceptions to the application of the statutory scheme for the security and intelligence services, the Northern Ireland Civil Service and civil servants overseas.

> Likewise, in *Post Office and Estuary Radio Ltd* [1968] 2 QB 740 the Crown's exercise of its prerogative to extend UK territorial waters resulted in the criminalisation of broadcasts from ships in the extended area, which had been previously lawful.

This related to radio stations operating from ships outside territorial waters. The Court says:

> [T]he exercise has not created or changed the law, merely the extent of its application.

Apparently turning lawful actions into criminal ones, at the stroke of an executive pen, is not to change the law. It appears that the court is conflating the accepted principle that prerogative cannot be used to over-ride statute with the idea that prerogatives do not change the domestic law.

Devolution and Conventions

Since the majority of the court had concluded that legislation was needed prior to the giving of notice under Article 50, they had to address the arguments put to them with regard to that legislation and the Sewel Convention and the Scotland Act 2016. The relevant submissions were that the agreement of the devolved bodies had to be obtained by way of legislative consent motions since the devolved competencies would be inevitably affected by legislation permitting the giving of notice.

Devolution is a key part of the UK constitution but the legal arguments in relation to the Sewel Convention and the fact that it had been written into the Scotland Act 2016 were dismissed by the court. They said that the Sewel Convention was merely a political convention operative only in the political sphere. At paragraph 148 they say that the fact the Sewel convention was put into the Scotland Act 2016 did not mean that parliament was converting it into a rule, which could be interpreted by a court. The court said that the Scotland Act 2016 was simply 'recognising the convention for what it is, namely a political convention' and declaring it a permanent feature of the devolution settlement. The approach of the court represents a refusal to give constitutional weight to the structure of the UK as a devolved union of separate nations. The reason why the Sewel Convention was put into the Scotland Act 2016 was to underline its constitutional significance – and such a commitment had been used by the UK government to encourage the Scottish electorate to vote in favour of the union in the Scottish referendum.

The Supreme Court, by refusing to engage with the UK's devolution settlement as a major constitutional feature of the UK and in effect saying that conventions were nothing to do with the role of a court, were implying that their role was passive, merely identifying what the law is and applying it or, supposedly, identifying something as non-law and ignoring it. By contrast the court made frequent references throughout their judgment to parliamentary sovereignty, the rule of law and constitutional principles to bolster their preferred answer to the legal issues. Those principles are not law any more than conventions are but that did not stop the court from using them as essential building blocks to reaching their decision. The court did not say with regard to those principles, 'these are not laws so we will not apply them'.

The stance adopted by the court with regard to conventions ignored the structural similarities between what the courts do with regard to prerogatives and what some courts have done with regard to conventions: namely interpret the concept, state the scope of it and apply it in making their decision. Of course, prerogatives have features

that are distinct from conventions but courts have played an active role with regard to both those concepts.

Conventions

In the majority judgment the court gives a particular meaning to a convention as an established practice in the political sphere which is not enforceable by the court. But that definition makes an assumption that begs the very question to be decided, namely the status of a convention vis-a-vis a court. It is a proposition that is only true by definition but is not a valid conclusion of a logical argument.[10] The court's reading of conventions is very limited and does not acknowledge that changing practices and realities do influence the court. A hypothetical scenario can illustrate this. The war prerogative is exercised by the prime minister and not the monarch. It is a convention that the prime minister takes that decision. A judicial review of the exercise of the war prerogative based on the fact that the prime minister took the decision rather than the monarch would be immediately dismissed. Aside from any justiciability question, a court would not say 'this is an unauthorised exercise of power because the prime minister took the decision'. The convention has been embedded into the lawfulness of the decision making by the prime minister and courts would give effect to that.

Conventional factors, or at least a changing view of what is appropriate, are exactly what has influenced courts in their determination of the limits of the prerogative. A line of authority, subjecting the prerogative to increased judicial oversight, has responded to a changing sense of what is politically appropriate and those determinations equal the law. Whereas the decisions are part of the common law what influenced the decisions were changes in the culture of society and politics. For instance, in the *GCHQ* case (1985) the court rejected the government's contention that prerogatives were unreviewable and that the Crown could change the terms and conditions of its civil servants at will. The common law device deployed was *legitimate expectation* but that recently developed principle must have been in response to a changing sense of the limitations on the appropriate exercise of public power. The decision in that the case was ultimately determined by a security related element, which exceptionally ousted the legitimate expectation.

Some of the reasoning of the court in the *Miller* case seems disingenuous in its desire to emphasise its political neutrality. At paragraph 146 they say:

> Judges therefore are neither parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question (as in the Crossman diaries case – *A.G. v Jonathan Cape Ltd* [1976] 1 QB 752), but they cannot give legal ruling on its operation or scope, because those matters are determined within the political world.[11]

If one reads the *Jonathan Cape* case it is unambiguously clear that it is the court that is determining whether cabinet documents are covered by confidentiality arising from a convention of collective cabinet responsibility. In that case there was a dispute as to what the convention was, both sides calling on leading politicians to support their view. It was left to the judge to determine the scope and meaning of the convention. The court was clearly not a mere observer. Lord Chief Justice Widgery concluded that the Attorney General had made out his claim that confidentiality

[10] The court is committing the logical fallacy of *affirming the consequent*.

[11] *Miller* (see note 1), [146].

applied because 'the doctrine of joint responsibility within the cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual Ministers'. In this case the judge did refuse an injunction because the information was sufficiently old as not to require it. It is clear from the judgment that the judge is determining what the convention is, its scope and the legal effect of it. None of which you would know from the Supreme Court's reference to it in the *Miller* case.

Common Law Constitutionalism

In an interesting work by Masterman and Wheatle entitled *Unity, Disunity and Vacuity,*[12] the authors examine common law constitutionalism in the UK and specifically 'the development and deployment by the courts of specific and substantive constitutional rights and principles'[13]. The authors identify a lack of specificity and detail implicit in common law constitutionalism, for example, they say:[14]

> Yet common law rights are – by their very nature – lacking in the definitional certainty of rights allocated under a Bill of Rights or other legislative instrument. Whatever vagueness persists in the definition of each right guaranteed in a Bill of Rights, courts can be more sure-footed by reliance on both the wording of the rights provisions and the context of the overall instrument.

A key part of their analysis is that the growth of constitutional type reasoning threatens the unity of the common law method and the legitimacy of judicial decision making: 'Our concern is that seeking to substantiate – and enforce – principle based constitutionalist reasoning holds the potential to undermine the stability of the common law and therefore its legitimacy'.[15] They note that courts need to provide 'fully reasoned and supported decision making'.[16] Implicit in their comment is the failure by the courts to supply this. Fully reasoned and supported decision making should be an essential requirement of all judgments but my contention here is that the courts have great difficulty providing this in constitutional cases because of the obscurity of the UK constitution and also for the reason that Masterman and Wheatle identify:[17] 'The external constraint imposed by parliamentary sovereignty is perhaps a more serious indicator of potential inconsistencies between common law constitutionalism's ascendency and longstanding constitutional pillars.'

Masterman and Wheatle's preferred solution to the disunity they see emerging from the tension between modern constitutionalism with the common law is for an approach they characterise as 'sustained incrementalism'. This would consist of

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[12] Roger Masterman and Se-shauna Wheatle (2018) Unity, Disunity and Vacuity, Constitutional Adjudication and the Common Law, in M. Elliot, J.N. Varuhas and S. Wilson Stark (eds) *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives*, Oxford UK; Portland, Oregon: Hart Publishing, pp. 123–148.

[13] Masterman and Wheatle (see note 12), p. 123, footnote 2.

[14] Masterman and Wheatle (see note 12), p. 128.

[15] Masterman and Wheatle (see note 12), p. 143.

[16] Masterman and Wheatle (see note 12), p. 143.

[17] Masterman and Wheatle (see note 12), p. 131. I would note here that the *Miller* case is an example of the first type of problem (obscurity) as the majority's conclusion was that the sovereignty of parliament prevailed.

developing the law on a piecemeal basis, in accordance with the common law method, whilst requiring the judges to add greater depth to their constitutional reasoning in particular cases. This, apparently, would allow the judges to reconcile conflicting concepts whilst not overstepping their authority as the non-elected branch of government.[18]

For my part, I do not agree with their overall conclusion on how to deal with the disunity that they have identified. Constitutionalism clashes with the notion of parliamentary sovereignty with its implication that anything goes so long as parliament has authorised it. In essence, the body of existing constitutional expectations and legal structures that the courts depend upon (in particular the sovereignty of parliament, the royal prerogative and the Crown) are on a collision course with modern constitutionalism where it seeks to curtail executive power by extending the principle of legality and even contemplates invalidating legislation in an extreme scenario.

Conclusions

The Supreme Court was under pressure in the *Miller* case. The Government had made plain that they wanted to trigger Article 50 by March 2017. The Court allowed itself to be intimidated into a rushed timetable that did not allow itself time to think through the issues with care. The court was also clearly on the defensive after the terrible press attacks on the divisional court when that court delivered its judgment in the *Miller* case. The majority judgment in the Supreme Court looks as if it was stitched together by a committee with rushed research by judicial assistants.

The common law approach looks very unsatisfactory especially when the court is under pressure and lacks confidence to assert its role as the top constitutional court of the country. The fundamental obscurity of the UK's non-constitution with the accompanying paraphernalia of the Crown and the prerogative must have contributed to the lack of precision in the judgment and its failure to offer a compelling and integrated constitutional analysis.

I would suggest that the biggest improvement to be made would be for the UK to have a written constitution that identifies what are the key concepts and principles of the constitution. A written constitution that defined the powers of a supreme court and enshrined its status and independence would arguably empower a supreme court to act with confidence and set its own timetable when being harassed by politicians and the press. A written constitution would encourage the judges to think in deep terms about the constitutional structure of the country and give effect to that analysis in their judgments.

On one analysis the court in *Miller* could have upheld the Sewel Convention as embodied in the Scotland Act 2016 but that would have given a potential veto to the devolved institutions on the decision to trigger Article 50. Even if that had been a reasonable judicial decision to reach it seems unlikely the court would have had the confidence to reach that decision given the political paralysis it would have caused. This provides another good reason to have a written constitution: to define properly the constitutional status of the devolution settlement in Scotland, Wales and Northern Ireland. The doctrine of parliamentary sovereignty ultimately gives maximum authority to the executive that controls parliament. A written constitution would replace that doctrine with *The Constitution* as the fundamental set of guiding principles.

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[18] Masterman and Wheatle (see note 12), pp. 43–147.

Attacks on the judiciary for over-stepping their authority will always be a risk when the courts have to rule on politically sensitive matters. The more assertive the judges are in advancing those constitutional principles, the more vulnerable the judiciary is to attack, both crass and sophisticated, on the grounds that they are overstepping their role, usurping democracy and taking over from parliament, or taking upon themselves the role of policy entrusted to the executive. That type of attack is made much more likely by the common law constitution because, by its nature, the primary construction of the constitution falls to the judges. By contrast, a written constitution would transform the position of the courts because they would not be the constituent power that had constructed the constitution. The constituent power would be those groups that had drafted the constitution and had authorised it – the people, a constituent assembly, parliament or whatever configuration is decided upon. Under a written constitution the courts would be interpreting a constitution that they had not created.

The current constitutional dispensation is obscure and open textured so as to be amenable to opposite and contrary interpretations. A written constitution does not immunise the judiciary from criticism nor does it remove the need for interpretation but the absence of a written constitution creates structural and interpretative problems that this article has attempted to indicate. The fact that countries with written constitutions may have bad governments that abuse their powers is not a very convincing argument against the UK having a written constitution. The political and cultural factors that condition respect for the rule of law in the UK would be elements that would make fidelity to a written constitution all the more likely.

What a written constitution can do is locate the authority and role of each branch of government and the means by which that role can be upheld and limited. A written constitution would be an opportunity to design an integrated and coherent body of constitutional law drawing on over two hundred years of constitution making from across the globe and the common law world assisted by comparative constitutional scholarship and the practical experience of governments and lawmakers.