

# MILLER AND NORTHERN IRELAND: A CRITICAL CONSTITUTIONAL RESPONSE

Professor Christopher McCrudden FBA<sup>†</sup>

Professor Daniel Halberstam<sup>\*</sup>

## 1 Introduction

There are many unfortunate results of Brexit, but one of the most problematic is the adverse effects that Brexit has had on current and future relationships between Britain and Ireland, and within Northern Ireland. These adverse effects were entirely predictable and show little sign of abating. In the story of what contributed to this deterioration, the UK Supreme Court's (the Court's) failure to address head-on the adverse implications of triggering Brexit for the Belfast/Good Friday Agreement in *Secretary of State for Exiting the European Union v R (Miller)* (Miller)<sup>1</sup> has attracted little comment in Britain, but is nevertheless of critical importance. *Miller* will come to be seen, we suggest, as a significant misjudgement, a case in which the Court was asked to become a truly constitutional court for the UK as a whole, but failed to live up to that challenge. The Court provided, correctly in our view, a robust defence of Parliamentary authority and a nuanced understanding of the constitutionally grounded relationship between the UK and the EU against the simple claims to unfettered executive power exercised under the royal prerogative. And yet, the Court unfortunately proceeded to deploy a very traditionalist, and rather blunt, approach to Parliamentary sovereignty when it came to Northern Ireland, adopting a view of the

<sup>†</sup> Barrister, Blackstone Chambers; Professor of Human Rights and Equality Law, Queen's University, Belfast; William W Cook Global Professor of Law, University of Michigan Law School. Junior counsel for Mr Agnew and others in the Reference from Northern Ireland in *Secretary of State for Exiting the European Union v R (Miller)* [2017] UKSC 5, [2017] 2 WLR 583. The authors are grateful to Gordon Anthony, who also appeared as junior counsel for Mr Agnew and others in *Miller*, for comments on an earlier draft. The views expressed are those of the authors alone.

<sup>\*</sup> Eric Stein Collegiate Professor of Law, University of Michigan Law School; Director, European Legal Studies Program, University of Michigan Law School. Legal advisor for Mr Agnew and others in the Reference from Northern Ireland in *Secretary of State for Exiting the European Union v R (Miller)* [2017] UKSC 5, [2017] 2 WLR 583.

<sup>1</sup> [2017] UKSC 5, [2017] 2 WLR 583.

British constitution at odds with what is required to accommodate Northern Ireland's evolving constitutional development, potentially undermining the Belfast-Good Friday Agreement.

## 2 Shifting understandings of the British constitution, EU membership, and devolution

Writing separately, each of us had previously commented not only on the intricate constitutional relationship between the UK and the EU, but also on the promise and precariousness of constitutionalism in the relationship between the UK as a whole and Northern Ireland.

On the former issue, Halberstam suggested that the UK had constitutionally embraced its participation in the EU, both in terms of a transfer of powers and in terms of its respect for the separateness and autonomy of EU institutions and EU governance.<sup>2</sup> He argued, for example, that 'Member States need not control the political outcome at the European level of governance as a way to make sense of their respect of EU law.'<sup>3</sup> Their 'constitutional commitments' to the EU 'whether in terms of constitutional provisions as in Germany or France, or constitutionally significant statutes as in the United Kingdom' take the EU properly 'as an extension of the Member State's own constitutional project of limited collective self-governance.'<sup>4</sup>

Approaching the question of devolution in the United Kingdom from a comparative federalism perspective, Halberstam emphasised that 'traditional forms of federalism are generally understood to be constitutional arrangements.'<sup>5</sup> He noted that 'the extent to which constitutional law serves as the foundation' for devolution in the UK was still 'contested.'<sup>6</sup> To be sure, this did not undermine the claim of constitutional embeddedness that many – including the authors of this article – attributed (and, in an important sense, still attribute) to devolution. And yet, given that in the UK the constitutional rank of a principle, tradition, or statute tends to be definitively established only in retrospect, once courts and other actors accord it

<sup>2</sup> Daniel Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law' in Matej Avbelji and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 85.

<sup>3</sup> *ibid* 100.

<sup>4</sup> *ibid*.

<sup>5</sup> Daniel Halberstam, 'Federalism: Theory, Policy, Law', in Michel Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 577.

<sup>6</sup> *ibid*.

that particular status, he added that whether devolution in the UK `will be deemed constitutional, only time can tell.<sup>7</sup>

Focusing more specifically on Northern Ireland devolution, McCrudden contrasted two differing approaches to constitutionalism: `a pragmatic empiricist approach, which is traditionally British, and a more ideological constitutional approach, more prevalent, for example, in the United States and Canada.<sup>8</sup> McCrudden suggested that `the twentieth-century history of Northern Ireland demonstrates that the pragmatic approach, the then dominant Westminster model of British political and constitutional practice, was not a successful transplant in Northern Ireland between the 1920s and the 1960s' and that a `tradition based on pragmatic empiricism was unable to cope with a major challenge to the legitimacy of government and the state' that became embedded there.<sup>9</sup> McCrudden argued that from the early 1970s, `an approach based [...] on constructing a more explicitly ideological constitutionalism ha[d] been adopted in relation to Northern Ireland, concentrating on the development of explicitly normative principles and the construction of institutional arrangements designed to mesh these with local needs.<sup>10</sup> This approach, he continued, was `most clearly reflected in the Belfast Agreement between the British and Irish Governments and most of the main political parties in Northern Ireland.<sup>11</sup> Northern Ireland devolution was a `unique constitutional settlement' in that it included `an international agreement between two sovereign, independent countries.<sup>12</sup> More fundamentally, the constitution in Northern Ireland differed significantly from that in the rest of the UK in another critical respect that goes to the role of constitutionalism itself: `In Northern Ireland, given the absence of consent from a significant proportion of the population in the recent past, it has been necessary to attempt to construct consent in part on the basis of constitutional guarantees.<sup>13</sup>

McCrudden identified a key question for the future relationship between Northern Ireland and the rest of the UK: whether `the British constitution [will be] a barrier to [...] maintaining Northern Ireland constitutional politics, becoming Ireland's British problem,' or whether it will `assist such constitution building.<sup>14</sup> At the time of writing that article in the mid-2000s,

---

<sup>7</sup> *ibid.*

<sup>8</sup> Christopher McCrudden, `Northern Ireland and the British Constitution Since the Belfast Agreement' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (6<sup>th</sup> edn, OUP2007)227, 227.

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.* 268.

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.* 269.

McCrudden considered that it was 'too soon to reach a definitive judgement', given that the institutions established to handle such tensions had by that time operated so sporadically. He proposed a tentative answer, however, predicting that: 'British constitutional approaches are likely over time to reassert themselves, submerging the *sui generis* aspects of the Northern Ireland constitution unless the latter are continually safeguarded and reinforced,' but he did not consider that British constitutional traditions were necessarily or inherently hostile to the type of constitutional developments that had emerged in Northern Ireland.<sup>15</sup>

We were not alone in our view that the British constitution was evolving in the light of both EU membership *and* devolution. Given that the Court in *Miller* embraced the former but not the latter, we elaborate only on the devolution point here. The effect of devolution of powers from Westminster to Scotland, Wales, and Northern Ireland was significantly affecting British constitutional analysis, both academic and judicial, in ways that were generally favourable to a view that the Northern Ireland developments could be integrated into an emerging new conceptualisation of the British constitution. Several judges commented judicially and extra-judicially on the changing nature of the British constitution. In *R (Jackson) v Attorney General* ('*Jackson*'), Lord Steyn observed how, in his view, '[t]he classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom.'<sup>16</sup> More recently, in *AXA General Insurance Ltd v HM Advocate*, Lord Hope left open the question of whether the supremacy of the UK Parliament is absolute or may be subject to limitation in exceptional circumstances.<sup>17</sup> Lady Hale said in an extra-judicial speech that: '[t]he United Kingdom has indeed become a federal state with a Constitution regulating the relationships between the federal centre and the component parts.'<sup>18</sup> The need to pay appropriate respect to the legitimacy of the devolved institutions in Northern Ireland was expressly recognised by the House of Lords in *Robinson*<sup>19</sup> and by the Northern Ireland Queen's Bench Division in *McComb*.<sup>20</sup> A purposive approach to the devolution acts with their 'generous settlement of legislative authority' was also recognised in *Imperial Tobacco Ltd v Lord Advocate*.<sup>21</sup> In his speech in *Jackson*, Lord Steyn

<sup>15</sup> *ibid.*

<sup>16</sup> [2005] UKHL 56, [2006] 1 AC 262, [102].

<sup>17</sup> [2011] UKSC 46, [2012] 1 AC 868, [50]-[51].

<sup>18</sup> Lady Hale, 'The Supreme Court in the UK Constitution' (Legal Wales 2012 conference, 12 October 2012) <[www.supremecourt.uk/docs/speech-121012.pdf](http://www.supremecourt.uk/docs/speech-121012.pdf)> accessed 30 September 2017.

<sup>19</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390.

<sup>20</sup> *Re McComb* [2003] NIQB 47.

<sup>21</sup> [2012] UKSC 61, [2013] SLT 2, [12]-[15] (Lord Hope).

spoke of a 'divided sovereignty' arising from the Scotland Act 1998 as an example of how the orthodox 'pure and absolute' notion of parliamentary sovereignty was now outmoded.<sup>22</sup>

Academically, too, one could point to a distinct shift occurring. Vernon Bogdanor described the UK as a 'quasi-federal state' with a constitution that is 'quasi-federal in nature'.<sup>23</sup> He considered that:

The legislation providing for devolution to Scotland, Wales and Northern Ireland, establishes a new constitutional settlement amongst the nations comprising the United Kingdom. The United Kingdom is, as a result of devolution, in the process of becoming a new union of nations, each with its own identity and institutions—a multi-national state rather than, as the English have traditionally seen it, a homogeneous British nation containing a variety of people.<sup>24</sup>

Political constraints on the centre were increasingly analysed in constitutional terms by other English constitutional scholars as well. Mark Elliott argued that 'the devolution schemes both acknowledge and conjure into life a constitutional principle – that of devolved autonomy – whose fundamentality is increasingly difficult to dispute'.<sup>25</sup> This demanded, he suggested, 'that the authority of devolved institutions be respected, and implies the general impropriety of UK legislation impinging upon self-government within the devolved nations'.<sup>26</sup> 'The devolved competences', he continued, 'can thus properly be regarded as benchmarks by reference to which the constitutionality – as distinct from the legal validity – of UK legislation may be assessed'.<sup>27</sup> For Elliott:

The reality of the contemporary UK constitution is that Parliament's legislative authority falls to be exercised against the backdrop of a normatively rich constitutional order and in the light of the restraining influences of multi-layered and common law constitutionalism.<sup>28</sup>

---

<sup>22</sup> Jackson (n 16) [102].

<sup>23</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 116.

<sup>24</sup> *ibid.*

<sup>25</sup> Mark Elliott, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (6<sup>th</sup> edn, OUP 2007) 38, 42-43.

<sup>26</sup> *ibid.* 43.

<sup>27</sup> *ibid.* 44.

<sup>28</sup> *ibid.* 65.

All that was before Brexit and, in particular, before *Miller* was decided by the Court. These assessments now need to be substantially reviewed, in light of *Miller*. Why that is so requires a detailed analysis of *Miller* from a Northern Ireland constitutional perspective, an analysis that we attempt in this chapter. Before plunging into detail, however, a simple point needs to be borne in mind from the start: *Miller* was actually a combination of two sets of cases. One set of cases arrived in the Court on a leapfrog appeal from the Divisional Court of the High Court of England and Wales ('the Divisional Court') in London, focusing primarily on whether the European Communities Act 1972 and the common law required Parliamentary legislation before art 50 of the Treaty of European Union ('TEU') could be legitimately triggered (the 'London litigation').<sup>29</sup> There was, however, a second set of cases that arrived from various Northern Ireland courts, focusing on a host of arguments from a specifically Northern Ireland constitutional perspective ('the Belfast litigation').<sup>30</sup> The London litigation and the Belfast litigation were heard together by the Court in *Miller*.

### 3 The Brexit Referendum and the Northern Ireland applications for judicial review

Another critical point is that the results of the referendum on EU membership, held on 23 June 2016, were distinctly different in Northern Ireland (and Scotland) from the UK as a whole (and particularly England and Wales). In the UK as a whole, of the valid ballots cast, 51.9% voted to leave the EU, whilst 48.1% voted to remain. In Northern Ireland, the result was the opposite: 55.8% voted to remain, with 44.2% voting to leave. Notwithstanding the preference of the majority of voters in Northern Ireland to remain within the EU, the UK Government's position, immediately following the referendum, was that there would be no 'special status' for Northern Ireland. An art 50 notification to the European Council would simply be provided to the effect that the UK (that is to say, the entirety of the UK, including Scotland – which also voted to remain – and Northern Ireland) intended to leave the EU under art 50(2) of the TEU. The UK Government's intention was to provide notification from the relevant Secretary of State, in purported exercise of the royal prerogative and without Parliamentary authority contained in legislation, that the whole of the UK intended to leave EU.

<sup>29</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2017] 2 WLR 583.

<sup>30</sup> *Re McCord* [2016] NIQB 85.

By two proceedings for judicial review commenced in the Queen's Bench Division of the High Court of Justice in Northern Ireland ('the NI High Court'), two sets of applicants challenged the method proposed by the UK Government by which it planned to notify the European Council of the UK's intention to withdraw.<sup>31</sup> In the first proceeding, three groups of applicants combined in one case. The first group were Members of the Legislative Assembly in Northern Ireland ('MLAs') and prominent politicians, drawn from the Green Party, the Social Democratic and Labour Party, the Alliance Party and Sinn Féin, and including three party leaders and several former Ministers of the Northern Ireland Executive. The second group comprised those with close associations to the voluntary and community sector in Northern Ireland. The third group comprised two well-respected human rights organisations operating in Northern Ireland. This combined case went under the name of *Agnew*, who was one of the MLA litigants. The second proceeding, the *McCord* case, consisted of a single applicant who identified himself as a working-class unionist. Mr McCord had for many years acted as a victims' campaigner following the murder of his son, Raymond McCord Jnr, by loyalist paramilitaries in 1997.

Although the *Agnew* and *McCord* cases proceeded on somewhat differing grounds, there was a common concern among all the parties in the Belfast litigation that leaving the EU would adversely affect Northern Ireland – particularly in its relationship with the Republic of Ireland – in ways that were specific to Northern Ireland, and more severely than would be the case in any other part of the UK. Northern Ireland is the only part of the UK which, after Brexit, would share a land border with the EU. It is a part of the UK where its citizens are entitled to Irish passports as well as UK passports, and where many have only Irish passports or both Irish and UK passports. Its close relationship – geographically and politically – with the Republic of Ireland, another member state of the EU, is unique to Northern Ireland.

Some of the issues of serious concern to Northern Ireland, in particular in the context of Brexit, had been raised in correspondence from the First and deputy First Ministers of the Northern Ireland Executive in August 2016, and been identified and discussed in the House of Commons Northern Ireland Affairs Committee report ('the NIAC report').<sup>32</sup> The NIAC report noted that 'there are good reasons why Northern Ireland warrants special attention in the EU referendum'.<sup>33</sup> It is 'the part of the UK whose economy is most dependent on EU trade'; and 'it will be the only part of the UK

---

<sup>31</sup> *ibid.*

<sup>32</sup> Northern Ireland Affairs Committee, *Northern Ireland and the EU Referendum* (First Report of Session 2016-17, HC 48, 25 May 2016).

<sup>33</sup> *ibid* para 5.

that has a land border with a Member State which will, in effect, become the external frontier of the EU.<sup>34</sup> The NIAC report also noted that the ability of the Governments to undertake continued cooperation in a range of areas is `fundamental to the potential impact on Northern Ireland.<sup>35</sup> The report concluded by noting that there were major concerns in respect of the impact of Brexit in Northern Ireland in the fields of trade and commerce, agriculture and the border, and cross-border issues (including cross-border policing cooperation).<sup>36</sup>

Many more such concerns were referred to in the affidavit evidence of the applicants in the Belfast litigation. These included: a likely hardening of the border between Northern Ireland and the Republic; effects on the identity of citizens in Northern Ireland; reduction in financial support and resources provided by the EU, particularly in the form of peace funds and EU programmes; a loss of fundamental rights under EU law enforceable in Northern Ireland; reduced cooperation with the Republic of Ireland in a variety of fields including tackling terrorism and organized crime; the effect on families who relied upon, or wished to rely upon, free movement rights; and reduced effectiveness in advancing equality issues which are particularly important in Northern Ireland.

A pervasive background to the Belfast litigation is the role that membership of the EU by both Ireland and the UK in the EU has played, not only in downgrading the importance of the physical border between Northern Ireland and the Republic of Ireland but, more importantly perhaps, in reducing the significance of sovereignty and national identity. That is not to say that either had disappeared in Northern Ireland, but to the extent that they were seen as of continuing importance, they were framed in a context which saw both Irish and British identity as parts of a European identity, and which viewed sovereignty as pooled. It is hard to overestimate the extent to which this brought significant conceptual flexibility into discussions in Northern Ireland, and between Ireland and the UK. It is difficult to conceive an alternative mechanism that can fill the vacuum likely to be caused by Brexit, particularly where that exit was brought about by an increased concern with British (better: English) identity, resurgent English nationalism, and a perceived need to strengthen national sovereignty.

There is also a further aspect of the referendum result which needs to be appreciated in order to demonstrate the sensitivity of the Brexit issue in Northern Ireland. Brexit has become a central question in the continuing conversation in Northern Ireland about national identity between the

---

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

<sup>36</sup> *ibid* para 11.

communities, and that is a dangerous situation. Statistical analysis indicated that:

89% of nationalists voted to remain, against only 35% of unionists. Some 88% of those identifying as Irish say they identify as having voted to remain, against 38% of British identifiers. Some 85% of Catholics, against only 41% Protestants, voted to remain; 86% of Sinn Féin voters, against only 30% of DUP voters; and 92% of SDLP voters, against 46% of UUP voters [voted to remain].<sup>37</sup>

As Jonathan Tonge explained in his evidence to the House of Lords EU Committee presenting these statistics, 'the binary divide is being reinforced in Northern Ireland by Brexit.'<sup>38</sup>

## 4 Sources of the Northern Ireland Constitution

The 'constitution of Northern Ireland' is made up of those constitutional norms which apply across the UK generally and those which are more specifically related to Northern Ireland (regulating the exercise of public power within Northern Ireland, and relations between the Northern Ireland governmental institutions on the one hand and those in Westminster on the other). It will be useful at this point to sketch, briefly, the complex statutory and treaty-based underpinnings of the Northern Ireland constitutional settlement, before considering how these played out in the Court.

### 4.1 Three texts

Three texts are of paramount importance. The primary statutory source of constitutional norms for Northern Ireland is the Northern Ireland Act 1998 (as amended) ('NIA 1998'). This provides for the establishment of a Northern Ireland Assembly, a Northern Ireland Executive (formed on a power-sharing basis), and the allocation of powers and responsibilities between Parliament and the UK Government in London and the institutions in Belfast. Responsibility over certain areas of policy is retained by London (termed 'reserved' or 'excepted' areas).<sup>39</sup> Those areas not so reserved

<sup>37</sup> House of Lords, European Union Committee, *Brexit: Devolution Inquiry* (Tuesday, 21 February 2017) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/brexit-devolution/oral/48137.html>> accessed 30 September 2017, response to Q 92 (Professor Jonathan Tonge).

<sup>38</sup> *ibid.*

<sup>39</sup> Northern Ireland Act 1998, ss 4, 6, schs 2-3.

are 'transferred' to the Northern Ireland institutions.<sup>40</sup> The pillars of the Northern Ireland constitution which define and constrain the powers of the devolved administration include EU law, in addition to other fundamental elements defining and constraining the exercise of devolved executive and legislative powers such as rights under the European Convention on Human Rights,<sup>41</sup> the constitutional prohibition on political and religious discrimination,<sup>42</sup> and the distinction between transferred and excepted matters.<sup>43</sup> There is a commitment, in s 1(1) of the NIA 1998, that Northern Ireland 'shall not cease to be [part of the UK] without the consent of a majority of the people of Northern Ireland voting in a poll' and, should the majority wish that 'Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland', the UK would give effect to that wish. Concerns about ensuring equality are also evident in the legislation, not least in the requirement that policy proposals should be subject to equality impact analysis.<sup>44</sup>

In addition to the NIA 1998, however, the Belfast-Good Friday Agreement, and the related British-Irish Agreement between the Governments of the UK and of the Republic of Ireland (which is appended to the Belfast Agreement) are critically important texts. The Belfast Agreement, concluded in April 1998, and resulting from the multi-party talks between the UK and Irish Governments and Northern Ireland political parties, contains three strands. Strand One provides for new democratic institutions in Northern Ireland. Strand Two provides for the creation of a North/South Ministerial Council ('NSMC') and North/South Implementation Bodies. Strand Three provides for new East/West institutions (a British-Irish Council and British-Irish Intergovernmental Conference).

The text of the British-Irish Agreement, with the status of an international treaty, is an annex to the Belfast Agreement, and the 'Validation and Implementation' section of Strand Three of the Belfast Agreement notes a new British-Irish Agreement 'embodying understandings on constitutional issues'<sup>45</sup> and affirming the Governments' commitment to, and implementation of, the Belfast Agreement. In art 2 of the British-Irish Agreement, the two Governments affirm their solemn commitment to support and implement the Belfast Agreement. Accordingly, the UK Government committed itself (as a matter of international law) to establish the agreed institutions

---

<sup>40</sup> *ibid.*

<sup>41</sup> Northern Ireland Constitution Act 1973, ss 6(2)(c), 24(1)(a).

<sup>42</sup> Northern Ireland Constitution Act 1973, ss 6(2)(e), 24(1)(c)-(d).

<sup>43</sup> Northern Ireland Constitution Act 1973 ss 6(2)(b), 23(2).

<sup>44</sup> Northern Ireland Act 1998, s 75.

<sup>45</sup> The Belfast Agreement, Annex A, 'Validation, Implementation and Review: Validation and Implementation' (1998), para 1.

`in accordance with the provisions of' the Belfast Agreement. In the Belfast Agreement, the UK Government also committed itself to introducing and supporting `such legislation as may be necessary to give effect to all aspects of this agreement'.<sup>46</sup> This commitment was effected principally, although not exclusively, in the provisions of the NIA 1998. Lord Hoffman in *Robinson* stated that: `According to established principles of interpretation, the Act must be construed against the background of [...] the principles laid down by the Belfast Agreement for a new start. These facts and documents form part of the admissible background for the construction of the Act'.<sup>47</sup> Similarly, in *McComb*, Kerr J (as he then was) held that the Belfast-Good Friday Agreement is important when interpreting and applying statutory provisions made under its aegis, such as the NIA 1998.<sup>48</sup>

#### 4.2 The consent principle

The strong principle of consent embedded in this constitutional structure is exemplified by and embodied in four important features. The combination of these disparate arrangements amounts to a powerful recognition that the principle of consent is at the heart of the new relationships established by the Agreement: new relationships between Catholics and Protestants; between North and South on the island of Ireland; and between the Republic of Ireland and the UK. The principle of consent is not simply a *political* principle in the Northern Ireland governmental context, but also a *constitutional* principle of the first order.

The first manifestation was the use of a referendum to approve the Belfast-Good Friday Agreement itself. Following the successful negotiations in April 1998, concurrent referenda were held in Northern Ireland and the Republic of Ireland which each approved the Agreement by substantial majorities. The second is the requirement that there can be no change in the constitutional status of Northern Ireland as part of the UK without the consent of a majority of people in Northern Ireland, voting in a referendum, an issue to which we shall return. The third is the set of requirements that characterise the consociational form of government that is established in Northern Ireland, reflected in the formation of the Executive and decision-making in the Assembly. In both the Executive and the Assembly, considerable efforts were made to ensure that cross-community support is demonstrated, even to the extent of ensuring a mutual veto by both communities, requiring a super-majority where representatives of either nationalists or unionists generate a `petition of concern'.<sup>49</sup> The fourth is the operation of

<sup>46</sup> *ibid* para 3.

<sup>47</sup> *Robinson* (n 19) [33].

<sup>48</sup> *McComb* (n 20) [31].

<sup>49</sup> Northern Ireland Act 1998, s 42.



the Sewel Convention. We shall return to consider this fourth point in greater detail, but the important point to bear in mind is that, although the UK Parliament retains the ability to legislate for Northern Ireland,<sup>50</sup> a constitutional convention developed under which Westminster will not normally legislate in devolved areas without the consent of the Northern Ireland Assembly. The method by which such agreement is demonstrated is by way of a Legislative Consent Motion ('LCM') passed by the Assembly on a request from Westminster.

#### 4.3 The role of the courts in politicised disputes in Northern Ireland

There is another dimension of the constitutional settlement that requires a preliminary comment, involving the role that *courts* play in this structure. Formally, the role of the courts adjudicating in and about Northern Ireland does not differ from the role of courts elsewhere in the UK. The reality, however, is somewhat different. It has become broadly accepted that one of the significant problems in the years before civil rights demonstrations erupted onto the streets in the late 1960s was the absence of effective legal methods of addressing grievances about discrimination and conflicts in national identities. As a result, since the early days of 'The Troubles', there has been an acceptance of the idea that courts and litigation have an important confidence-building function that they can and should perform. Courts provide a mechanism for the resolution of politicised disputes that prove to be difficult, if not impossible, to resolve politically, and lessen the perceived need to return to the streets in protest, with the likelihood of renewed violence. The European Court of Human Rights was, perhaps, the first court to fully recognise its role in this regard, but the UK courts have increasingly recognised this as well, particularly in judicial review cases following the Belfast-Good Friday Agreement. Put simply, courts dealing with Northern Ireland need to be sensitive to the unique constitutional function they play. It is not surprising, therefore, that there was such heavy representation of Northern Ireland politicians among the applicants in the Belfast litigation. This participation was simply the latest in a long line of such uses of judicial review over the past twenty years. What was new about the case was the extent to which the issue to be resolved involved an East-West dispute, rather than a dispute within Northern Ireland. Generally, intra-Northern Ireland disputes predominate in judicial review proceedings in Belfast.

---

<sup>50</sup> *ibid* s 5(6).

## 5 The Northern Ireland High Court and Brexit

The applicants in the Belfast litigation advanced five main arguments in the NI High Court, and subsequently in the UK Supreme Court. The first four arguments were particularly associated with the *Agnew* case, although several were also made by the applicant in the *McCord* case, and the fifth was unique to the *McCord* case. Maguire J, in his judgment in the NI High Court,<sup>51</sup> referred to these five arguments as issues 1 to 5 respectively; in the Supreme Court, for reasons to be explained subsequently, they were translated into questions 1 to 5.

### 5.1 European Communities Act, Northern Ireland Act 1998 and associated Agreements

The first argument was that an Act of Parliament authorising the giving of notice under Article 50(2) of the TEU was required before the UK Government may lawfully do so. The applicant's case was that the powers under the royal prerogative that the Government intended to use to give notice had been displaced by statute. This was based upon the terms and effect of a number of statutory provisions, including the European Communities Act 1972 ('ECA 1972') and the NIA 1998. As originally submitted, part of this argument built on a parallel construction of the legal and constitutional significance of the ECA 1972 and the NIA 1998. It was also based on the understanding that '[f]or as long as the [ECA] 1972 remains the law, the government of the UK is subject to the requirements of EU law, including Article 50,' and that '[I]legally, no other method of exit from the EU is currently possible.'<sup>52</sup>

More specifically, regarding the ECA 1972, it was submitted that triggering art 50 of the TEU would have the consequence of setting the UK on a road to exit, which could only be reversed with the agreement of the remaining 27 member states ('EU-27'). Thus, giving notice would place any rights protected by the ECA 1972 as a consequence of EU membership at the mercy of the remaining EU-27, and hence beyond Parliament's control, regardless of whether the ECA 1972 formally remained in place. Triggering art 50 thus involved, 'in effect, an amendment of the [ECA] 1972, since it will result in reduction or removal of the right conferred by that Act, even though the Act continues in force.'<sup>53</sup> Triggering Article 50 was, therefore, 'inconsistent with the purpose and objects of the 1972 Act,' which is 'a constitutional statute' at common law with considerable

<sup>51</sup> *McCord* (n 30).

<sup>52</sup> Pre-action Letter in *Agnew* Litigation (22 July 2016), para 5.9.

<sup>53</sup> *ibid.*

implications for the status of the [ECA 1972] in general, and limiting implied repeal in particular.<sup>54</sup> Giving notice by royal prerogative violated not only 'the constitutional principle that the Royal Prerogative cannot be used to remove or abrogate rights without Parliamentary authority,' but also the fact that any existing prerogative powers have been 'abrogated [...]' or at least suspended until the 1972 Act has been repealed.<sup>55</sup>

The NI High Court declined to hear argument on the effect of the ECA 1972 and stayed that ground, contrary to the submissions of the applicants, on the basis that that argument was being addressed by the Divisional Court in the London litigation.<sup>56</sup> Accordingly, Issue 1 in the NI High Court focused only on the effect of the NIA 1998, related legislation, and the provisions of the Belfast Agreement and the British-Irish Agreement.<sup>57</sup>

Turning, then, to the effect of the NIA 1998 and related Agreements, it was argued that the NIA 1998 expressly envisaged the continuing application of EU law in Northern Ireland, and continuing Northern Ireland membership of the EU, as part of the constitutional arrangements established by the Belfast Agreement and the British-Irish Agreement, which are implemented in the NIA 1998. The applicants submitted that the NIA 1998 displaced the prerogative power to provide notification under art 50(2) of the TEU for several reasons. First, the effect of the notification would be to deprive Northern Ireland citizens of rights granted (or given effect to) by the NIA 1998 and it was a long-established principle that the Crown could not by its prerogative remove rights granted by Parliament. In this respect, the NIA 1998 argument went further than the argument concerning ECA 1972. The NIA 1998 was not merely a domestic footnote about the way EU law would be handled internally in the wake of the ECA 1972. Instead, the NIA 1998 reflected a separate, domestic constitutional settlement that itself relied immediately on EU law – and hence on the continuation of UK membership in the EU – as the structural basis for that constitutional settlement. Second, the effect of the notification would be to alter the distribution of powers between the Northern Ireland Assembly and the UK Parliament by eliminating the constitutive role that EU law currently plays in the definition of competences under the NIA 1998. Third, the effect of the notification would, additionally, frustrate the purposes and intentions of the constitutional settlement enacted in the NIA 1998 (or be contrary to the scheme of the 1998 Act), including: the continued application of EU law within Northern Ireland, particularly as one of the

---

<sup>54</sup> *ibid* para 5.25.

<sup>55</sup> *ibid* para 5.24.

<sup>56</sup> *Miller* (EWHC) (n 29).

<sup>57</sup> In particular, the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999, as amended.

pillars of Northern Ireland's constitution; and continued membership of the EU in the context of North-South and East-West relations, including in particular cross-border cooperation between Northern Ireland and the Republic of Ireland.

Particular emphasis was given to the requirement apparent in Strand Two of the Belfast-Good Friday Agreement for both the UK (including Northern Ireland) and the Republic of Ireland both to remain EU members, in particular, because of the way the activities of the North/South Ministerial Council ('NSMC') and its related implementation bodies were described.<sup>58</sup> Put shortly, there was an obligation in the Belfast-Good Friday Agreement that the NSMC and its related implementation bodies *will* implement EU policies and programmes *North and South of the border*, on an all-island and cross-border basis.<sup>59</sup> It was argued that this was simply impossible if Northern Ireland was no longer part of the EU. A central function of the NSMC – indeed, a requirement placed upon it – simply fell away.

On Issue 1, Maguire J rejected the submissions of the applicants. The NI High Court distinguished between the test to be applied 'when determining the issue' of whether statute had displaced the prerogative, and the application of the test 'to the alleged displacing provisions.'<sup>60</sup> As regards the test of whether displacement of the prerogative by statute has occurred, Maguire J considered that this may be accomplished directly by express language, or 'by necessary implication.'<sup>61</sup> As there were no express provisions bearing on the issue in the Belfast litigation, the issue, therefore, became one of determining 'whether the prerogative has become unavailable by reason of any necessary implication arising out of any of the statutory provisions read in the light of their status and background.'<sup>62</sup> In applying the 'necessary implication' test, Maguire J distinguished 'between what occurs upon the triggering of Article 50(2) and what may occur thereafter.'<sup>63</sup> The NI High Court cited with approval the argument of the Attorney General for Northern Ireland ('AGNI'), who had intervened in the case, that:

[T]he actual notification [under art 50 of the TEU] does not in itself alter the law of the United Kingdom. Rather, it is the beginning of a process which ultimately will probably lead to changes in United Kingdom law. On the day after the notice

<sup>58</sup> The Belfast Agreement, Annex A, 'North/South Ministerial Council' paras 1, 11 and 17.

<sup>59</sup> *ibid* paras 8-9.

<sup>60</sup> *McCord* (n 30) [69].

<sup>61</sup> *ibid* [83].

<sup>62</sup> *ibid* [103].

<sup>63</sup> *ibid* [105].

has been given, the law will in fact be the same as it was the day before it was given.<sup>64</sup>

The NI High Court dismissed the applicant's argument that the various statutory or 'other provisions' could be seen as displacing the prerogative power. The various provisions in the NIA 1998, and in Strand 2, regarding the EU and EU law, were not concerned with 'the limitation of prerogative powers but the operation of the new institutions in circumstances where an on-going reality of life, in accordance with the then existing law, was membership of the EU.'<sup>65</sup> The court, therefore, considered it 'inapt for the applicants to talk in terms of notification [under Article 50] changing the rights of individuals or of the operation of institutions becoming transformed by reason of the invocation of Article 50(2).'<sup>66</sup> The court continued:

This simply will not happen by reason of the step of notification *per se*. The reality is, at this time, it remains to be seen what actual effect the process of change subsequent to notification will produce. In the meantime, sections 6 and 24 of the 1998 Act will continue to apply; the North/South and East/West institutions will continue to operate; and the work of implementation bodies will go on.<sup>67</sup>

## 5.2 The Sewel Convention and the need for a Legislative Consent Motion

The second argument was that, if it was the case that primary legislation in Westminster was necessary, a LCM from the Northern Ireland Assembly should also be (at the very least) sought in advance of the laying of such a Bill. It was argued that the Memorandum of Understanding ('MOU') between Westminster and the devolved administrations set out 'the principles that will underlie relations' between the UK Government at Westminster and the Northern Ireland administration.<sup>68</sup> There was an express commitment in the MOU on the part of the UK Government in the following terms:

<sup>64</sup> *ibid*. It should be noted that the UK Government's legal representative made no equivalent concessions regarding the effect of triggering art 50 of the TEU in the Belfast litigation as was subsequently made in the London litigation.

<sup>65</sup> *ibid* [106].

<sup>66</sup> *ibid* [107].

<sup>67</sup> *ibid*.

<sup>68</sup> See the Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (October 2013) para 1.

The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide whether to make use of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.<sup>69</sup>

The applicants submitted that this meant that the four institutions whose roles were described in the MOU each had a separate constitutional role. The *UK Parliament* retained authority to legislate on any issue and it is for it – Parliament – to decide whether it will legislate with regard to a devolved matter. The convention is that it will not normally do so without agreement of the relevant devolved legislature. The *UK Government*, distinct from the UK Parliament, committed itself to proceed in accordance with the view that Parliament will not normally legislate with regard to devolved matters without the agreement of the devolved legislature. The *devolved legislature* has the role of giving consent (or not) where that consent is sought by a devolved administration (ie a devolved executive). The *devolved executive* is responsible for seeking the consent of the devolved legislature where this is required, prompted by an approach from the UK Government.

Importantly, it was argued that it was not for the UK Government to pre-judge whether or not the UK Parliament would choose to legislate with regard to a devolved matter without consent. That was a decision only for the UK Parliament itself. As far as the UK Government was concerned, it had committed itself that it 'will proceed' on the basis that Parliament would not normally legislate without such consent. The outworking of this commitment was that the UK Government must – where Westminster legislation with regard to devolved matters is proposed – seek the consent of the devolved legislature. If such consent was given, Parliament would be able to observe the convention. If such consent was not given, Parliament would be able to decide, on an informed basis, whether to (exceptionally) depart from the convention. The consent of the Northern Ireland Assembly in respect of an Act of Parliament authorising the giving of an art 50(2) notification was, therefore, required to be sought if such authorisation constitutes legislation 'with regard to' devolved matters.

In the applicants' submission in the *Agnew* case, legislation triggering art 50 was included within the scope of legislation 'with regard to' devolved

---

<sup>69</sup> *ibid* para 14.

matters in Northern Ireland because, although international relations, including relations with the EU, were excepted matters, there were certain *elements* of international relations which were expressly *not* excepted matters and, so, were transferred (devolved matters).<sup>70</sup> These included: the exercise of legislative powers to give effect to agreements or arrangements entered into in the context of the NSMC, or in relation to any of the implementation bodies under Strand Two of the Belfast Agreement; observing and implementing international obligations, including those under the British-Irish Agreement; and observing and implementing obligations under EU law. The observation and implementation of EU law – in all of the areas within devolved responsibility which it touched – was therefore a devolved matter, *including* where these functions involved international relations (albeit not 'relations with [...] the EU' itself).<sup>71</sup> The observance and implementation of all aspects of the British-Irish Agreement were also transferred matters.<sup>72</sup> Observing and implementing international obligations under both the British-Irish Agreement and under EU law were *not* excepted matters.<sup>73</sup>

The removal of EU rights and obligations would radically alter the legal landscape in every devolved department (especially in relation to agriculture but also in respect of matters such as the environment, procurement, employment law, equality law, etc.). It would radically alter relations with the Republic of Ireland, in particular regarding the operation of the Strand Two institutions discussed above. The withdrawal of EU peace and structural funding would also have significant effects on many areas of administration in Northern Ireland which are devolved, including regeneration and infrastructure projects. In these areas, among others, withdrawal from the EU would directly impact and touch on devolved matters: that would involve Parliament legislating 'with regard to' devolved matters.

There was, however, a broader view of the circumstances when an LCM was required. The Lord Advocate provided written submissions in the *Agnew* proceedings in the High Court in Northern Ireland in support of this wider view (and in response to submissions on the part of the AGNI advancing the narrower view). The broader approach arose from the text of Devolution Guidance Note 8 ('DGN8'); and was also reflected in the Standing Orders of the Northern Ireland Assembly. Paragraph 10 of that Order read:

---

<sup>70</sup> Northern Ireland Act 1998, sch 2, para 3.

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.*

<sup>73</sup> *ibid.*

In this order a 'devolution matter' means (a) a transferred matter, other than a transferred matter which is ancillary to other provisions (whether in the Bill or previously enacted) dealing with excepted or reserved matters; (b) a change to (i) the legislative competence of the Assembly; (ii) the executive functions of any Minister; (iii) the functions of any department.<sup>74</sup>

In light of the impact which the cessation of the operation of EU law would have on the Northern Ireland Assembly's legislative competence and Ministerial executive functions in Northern Ireland (when the constraints on those powers imposed by reference to EU law in ss 6 and 24 of the NIA 1998 respectively are removed), this was a further basis on which an LCM would plainly be required.

The UK Government's principal objection to the applicant's contentions was that any relevant constitutional convention was merely convention and was not binding. However, the applicants in *Agnew* argued that this was to ignore both the importance and the normative nature of conventions in the UK constitution. At the very least, the court had a role in declaring that a convention existed and applied in the circumstances of a particular case. The Canadian Supreme Court case of *Re A Resolution to Amend the Constitution* was an example of a court declaring the existence and parameters of a constitutional convention of great significance and giving a ruling on whether it was engaged in the particular case (even though the consequences of non-compliance were political, not legal).<sup>75</sup>

Maguire J rejected the applicants' submissions. He held that, since he had decided, under Issue 1, that the UK Government was 'entitled to proceed to notify under Article 50(2) using prerogative power and that an Act of Parliament is legally unnecessary for this purpose, the second issue, strictly, does not arise for consideration.'<sup>76</sup> However, the court did go on to consider the issue, 'in case it is wrong in its conclusions in respect of Issue 1 and an Act of Parliament is required for pulling the Article 50 trigger.'<sup>77</sup> The court proceeded on the basis that a convention did exist, but only 'along the lines of the narrower of the two views' set out above, rejecting the broader view advanced by the Lord Advocate, at least as far as Northern Ireland was concerned.<sup>78</sup> The test the court applied, therefore, was 'whether

<sup>74</sup> Northern Ireland Assembly, Standing Orders, Order 42A ('Legislative Consent Motions') para 10.

<sup>75</sup> *Re A Resolution to Amend the Constitution* [1981] 1 SCR 753.

<sup>76</sup> *McCord* (n 30) [109].

<sup>77</sup> *ibid* [110].

<sup>78</sup> *ibid* [119].

[...] Westminster legislation [triggering art 50] is 'with regards to devolved matters'.<sup>79</sup> According to Maguire J, 'the better view is that any legislation for the purpose of notification under Article 50(2) would be legislation relating to an excepted matter ie it would be legislation concerning relations with the European Communities and their institutions.'<sup>80</sup> It would not, in the court's view, be legislation 'with regards to devolved matters', 'even if one was to adopt a broad approach to the meaning of this phrase.'<sup>81</sup> Accordingly, the convention had no application in this case. Even if the court was wrong on this, however, Maguire J had:

[G]reat difficulty in seeing how this convention could, in any event, be viewed as enforceable *via* legal proceedings given its status as a convention, where such a status is associated with unenforceability in a court of law, the use of the word 'normally' in the provision, the essentially political nature of the decision which would then be at issue, and the clear terms of section 5(6) of the 1998 Act, which preserved the overriding legislative authority of the UK Parliament in Northern Ireland.<sup>82</sup>

### 5.3 Constraints on the operation of the royal prerogative

A third argument was advanced, in the alternative, in case the applicants were wrong that an Act of Parliament was required. This argument was, even if Parliamentary legislation was not required, that there nonetheless remained constraints on the lawful exercise of the royal prerogative imposed by UK public law. The applicants asked the High Court to confirm that, before exercising any prerogative power, all relevant considerations must be properly taken into account. These included: Northern Ireland's unique position when it comes to Brexit (both geographically and constitutionally); the serious effects which Brexit would have on Northern Ireland; and, crucially, whether there were any alternatives to Brexit, including alternatives which may see some special status for Northern Ireland. If the court were to make clear that such matters required careful consideration before the decision to leave was finally given effect to, the applicants hoped that the UK Government might approach the issues in respect of Northern Ireland more reflectively.

The court rejected these arguments. It 'confesse[d] to having some difficulty in appreciating how grounds of the broad nature of these grounds are

<sup>79</sup> *ibid* [120].

<sup>80</sup> *ibid* [121].

<sup>81</sup> *ibid*.

<sup>82</sup> *ibid* [122].

to be assessed by it.<sup>83</sup> It considered that '[m]uch of what underlies the propositions which have been put forward appear to the court to depend on assessments within government which are wide ranging and multi-factoral and beyond the abilities of the court to assess.'<sup>84</sup> Essentially, the court accepted the UK Government's view that the issues raised in this context were all non-justiciable. 'The court has grave doubts,' wrote Maguire J, 'about the justiciability of much of the ground covered under this heading.'<sup>85</sup> He accepted that:

While the time has long gone when it could be said that the manner in which prerogative power is used is beyond the power of the court to inquire into, there still remain some exercises of prerogative power which are viewed as inappropriate for judicial review because of their subject matter.<sup>86</sup>

In the court's view, 'it is difficult to avoid the conclusion that a decision concerning notification under Article 50(2) made at the most senior level in United Kingdom politics, giving notice of withdrawal from the EU by the United Kingdom following a national referendum, is other than one of high policy.'<sup>87</sup> Such a decision, 'does not lend itself to the process of judicial review and remains an example of the sort of decision which properly should be viewed as non-justiciable.'<sup>88</sup>

#### 5.4 Equality proofing before triggering art 50 of the Treaty of European Union

The fourth argument of the applicants in the *Agnew* case was that, before an art 50 notice was served, the Northern Ireland Office must undertake an equality proofing exercise pursuant to s 75 of the NIA 1998, so that it properly understands the impact of notification to leave on protected groups in Northern Ireland and could provide advice to the UK Government accordingly. The purpose of the s 75 obligations was, it was argued, to ensure that public authorities in Northern Ireland carefully considered and sought to understand the effect of policy positions they adopted on the people of Northern Ireland and to do so, in particular, where

---

<sup>83</sup> *ibid* [127].

<sup>84</sup> *ibid*.

<sup>85</sup> *ibid* [131].

<sup>86</sup> *ibid*.

<sup>87</sup> *ibid* [133].

<sup>88</sup> *ibid* [134].

a policy is likely to have a disproportionate effect on vulnerable people, a discriminatory effect, or an effect which raised tensions on political or religious grounds. The authority must not only seek to appreciate the effects of the policy position it adopted, but must carefully weigh what might be done to seek to mitigate adverse impacts and consider alternative approaches.

This obligation arose, it was submitted, in the event that an Act of Parliament was not required and the decision whether and when to give an art 50(2) notification fell simply to the UK Government in the exercise of prerogative powers. In that event, the applicants in *Agnew* contended, the Northern Ireland Office ('NIO') should conduct an equality screening exercise (and most probably thereafter an equality impact assessment)<sup>89</sup> in order to determine the likely effects a UK withdrawal from the EU would have on the need to promote equality of opportunity on persons with protected characteristics. The applicants in the *Agnew* case were concerned that the UK Government had not followed such an approach in relation to its consideration of the way forward following the EU referendum. More particularly, the NIO – whose job it is to speak up for Northern Ireland in the central Government in Westminster on such issues – had also failed to conduct any appropriate equality analysis before adopting a position.

The applicants in the *Agnew* case thus distinguished between the role played by the Secretary of State for Northern Ireland, and the role of the Northern Ireland Office. The distinction is important because only the NIO was designated under s 75 as a body to which the section applied for these purposes. This role of the Secretary of State for Northern Ireland, of representing Northern Ireland interests in the UK Cabinet, was seen to be supported by his Department, the NIO, which would conduct the empirical research and analysis, and undertake any necessary equality screening and assessment, to enable this role to be carried out properly. The NIO's Equality Scheme recognised that it had its own function of representing Northern Ireland's interests in Westminster.<sup>90</sup> The applicants contended that, in representing Northern Ireland's interests at Westminster, the NIO must take a position on whether Brexit was good or bad for Northern Ireland. It was submitted that it was plain that Brexit would have severe implications for many in protected groups, and for good relations more generally. Any decision on whether the UK Government should use prerogative powers to trigger art 50(2) of the TEU should be fully informed, including by a clear statement from the NIO as to whether it was in the interests of Northern Ireland for an art 50(2) notification to be given,

<sup>89</sup> Northern Ireland Act 1998, sch 9, paras 4(2)(b), 9(1), 9(2).

<sup>90</sup> Northern Ireland Office, 'Equality Scheme' (Northern Ireland Office, 2014) para 1.11.

especially in light of the result of the Brexit referendum in Northern Ireland.

The court also rejected this argument. The 'primary reason' for this rejection lay in the nature of the impugned decision, namely the notification of an intention on the part of the UK to withdraw from the EU. The court considered that this 'cannot properly be regarded as the carrying out a function relating to Northern Ireland.'<sup>91</sup> The court characterised the decision as:

[A] function relating to the United Kingdom in its capacity as a Member State of the European Union. It is a function being carried out by the Prime Minister or the Secretary of State for Exiting the European Union or, perhaps, the Secretary of State for Foreign Affairs, and is not a function being carried out by the Secretary of State for Northern Ireland or by the Northern Ireland Office.<sup>92</sup>

As a result, in the court's view, s 75 of the NIA 1998 had 'no purchase on this issue and is not engaged'.<sup>93</sup> In any event, the claim under s 75 was 'premature'.<sup>94</sup> This was because 'the point at which consultation, screening and impact assessment may be viewed as being required is yet to occur'.<sup>95</sup> The invocation of art 50(2) 'represents the start of a lengthy process which lies ahead and that it would be much too early to seek to subject the process to the sort of analysis referred to. The simple fact is that the effects which would have to be considered are far from clear at this stage'.<sup>96</sup>

## 5.5 The consent of the people of Northern Ireland

In addition, and separately, a fifth argument was advanced in the *McCord* case: that triggering art 50, without a majority of the people of Northern Ireland supporting such a change, would be contrary to section 1 of the NIA 1998. The applicant argued that the invocation of art 50 at all, either by prerogative or by an Act of the UK Parliament, would be unconstitutional, as to do so would breach the historic constitutional compact between Northern Ireland and the other constituent nations of the UK and undermine the unique position of Northern Ireland within it as guaranteed by s 1 of the NIA 1998 and the Belfast-Good Friday Agreement.

<sup>91</sup> *McCord* (n 30) [144].

<sup>92</sup> *ibid* [144].

<sup>93</sup> *ibid*.

<sup>94</sup> *ibid* [145].

<sup>95</sup> *ibid*.

<sup>96</sup> *ibid*.

The applicant in *McCord* rejected a narrow construction of s 1, under which there is a constitutional binary choice of Northern Ireland's status being either a part of a united Ireland or the UK. Such an interpretation, it was submitted, would not fulfil the requirements of the Belfast-Good Friday Agreement, which was itself justiciable. The applicant argued that there was a requirement to read s 1 of the NIA 1998 compatibly with the Belfast-Good Friday Agreement which enshrined rights of self-determination derived from international human rights law that went beyond the narrow reading of s 1, which could, and indeed must, be looked at through the lens of international law. Read in that light, the NIA 1998 and the Belfast-Good Friday Agreement enshrined the consent principle relating to *any* change in the constitutional status of Northern Ireland, including leaving the EU, and in particular created a legitimate expectation that no change would make it more difficult for a united Ireland to be achieved, as would occur if Northern Ireland were to leave the EU.

Maguire J comprehensively rejected all of these arguments for three main reasons. First, the court considered that there was no *explicit* textual support in either the NIA 1998 or the Belfast-Good Friday Agreement which 'establishes a norm that *any* change to the constitutional arrangements for the government of Northern Ireland and, in particular, withdrawal by the United Kingdom from the EU, can only be effected with the consent of the people of Northern Ireland.'<sup>97</sup> Nor was there any basis for *implying* such a limitation. Second, rejecting the broader reading advanced by the applicant based on the Belfast-Good Friday Agreement, s 1 of the NIA 1998 dealt only with the issue of 'whether Northern Ireland should remain as part of the United Kingdom or unite with Ireland.'<sup>98</sup> Third, since s 5(6) of the NIA 1998 explicitly preserved the UK Parliament's ability to legislate for Northern Ireland, 'any suggestion that a legitimate expectation can overwhelm the structure of the legislative scheme is not viable.'<sup>99</sup> Finally, in a passage that arguably explains much of the reasoning that lies behind the rejection of all the other grounds as well as this particular ground, the NI High Court indicated that it was not prepared to set aside what it termed 'constitutional orthodoxy', by which Maguire J appeared to mean the view of the British constitution associated with AV Dicey.<sup>100</sup>

<sup>97</sup> *ibid* [152] (emphasis in original).

<sup>98</sup> *ibid* [153].

<sup>99</sup> *ibid* [155].

<sup>100</sup> *ibid* [156].

## 5.6 Contrasts with the Divisional Court's Approach in the London Litigation

We have seen that the core of the argument in the Divisional Court in *Miller*, that the ECA 1972 had displaced the prerogative, was not permitted to be argued in the High Court in Belfast. However, where there was an overlap between the issues before the Divisional Court in *Miller* and those addressed in Issue 1 before the NI High Court in the *Agnew* case, the contrast between the two courts could hardly have been greater. In part, the differences were due to the contrasting approaches adopted by the UK Government in the two cases; in the Belfast litigation, there were fewer concessions by the Government than in the London litigation. That aside, however, it is clear that the Divisional Court differed from Maguire J in its substantive analysis of the extent of the Crown's prerogative powers, in the interpretation of the ECA 1972, and in the effect of giving notice under art 50 of the TEU. Perhaps in a bow to judicial comity, or perhaps in order to avoid undermining the legitimacy of the judiciary when the full disparity between the two judgments became clear, the Divisional Court inferred that this difference 'reflected the way the case appears to have been argued' before Maguire J.<sup>101</sup> Thus, the Divisional Court appears to have assumed that the argument by counsel for the applicants before Maguire J on these issues was such as to mislead him as to the correct starting point, or to have inadequately highlighted the relevant legal principles. The truth was potentially more disturbing: two courts, contemporaneously, arrived at polar opposite conclusions on the most important constitutional issue for many generations.

The nature and status of EU law in the UK is a particularly dramatic example of this divergence. The UK Government's approach was that EU law is mere international law, no different from other treaty obligations, from the perspective of UK law. The NI High Court's decision in *McCord* and the Divisional Court's decision in *Miller* were diametrically opposed on this issue. Whereas the NI High Court treated EU law simply as a fact referenced in an ordinary statute (ie the NIA 1998),<sup>102</sup> the Divisional Court treated EU law as having become an integral part of the law of the land by virtue of the relevant constitutional Act (ie the ECA 1972).<sup>103</sup> This basic difference in vision of the two courts had considerable consequences. For the NI High Court, this meant the royal prerogative could only be pre-empted expressly or by absolutely necessary interpretation of what it viewed as an ordinary statute, which simply happened to reference the fact

<sup>101</sup> *Miller* (EWHC) (n 29) [104] (Lord Thomas CJ, Sir Terence Etherton MR and Sales LJ).

<sup>102</sup> *McCord* (n 30) [106] (Maguire J).

<sup>103</sup> *ibid.*

of EU membership. For the Divisional Court, this meant that the use of the royal prerogative must be fundamentally compatible with the workings of a constitutional statute of the UK which made EU law part of UK law; and that this meant that it was severely constrained in what could be done under it. The difference could hardly have been starker. Two questions arose from this and other significant differences in approach. What would the UK Supreme Court do with these differences? And, from the Northern Ireland point of view, would the particularities of Northern Ireland be taken into account in the Court's considerations?

## 6 Appeal routes for cases from Northern Ireland to the UK Supreme Court

The timetable that was established by the UK Supreme Court to hear the London appeal was extremely tight, even for the parties in the London litigation. The decision by the Divisional Court was handed down on 3 November 2016, permission for a leapfrog appeal from the Divisional Court to the UK Supreme Court, cutting out the Court of Appeal of England and Wales, was given immediately following that judgment, and the Court established a timetable of the first week in December for the appeal hearing. If, as would be usual, the NI High Court judgment had been appealed to the Court of Appeal in Northern Ireland ('the NI Court of Appeal'), before going on to a further appeal to the UK Supreme Court, then it was uncertain whether any appeal of this kind could be heard and determined in time for the Belfast litigation to be heard by the UK Supreme Court at the same time as the London litigation. All the parties, including the UK Government, wanted to participate in the UK Supreme Court hearing in the London litigation, on the assumption that the Court would go ahead without the Belfast litigation if an appeal from the decision of Maguire J in the NI High Court were not lodged in time. The Court would determine many of the issues relevant for the Belfast litigation without the benefit of argument from the Northern Ireland parties. The issue was how to enable all the cases to be heard together, and there was a problem.

In England and Wales, it was much easier than in Northern Ireland to have a leapfrog appeal. The 1969 Act had been amended in 2015 to insert 'alternative conditions' which were a lot more flexible than the original conditions.<sup>104</sup> The leapfrog route was much more constrained in Northern Ireland, however, since the new provisions containing these wider conditions for leapfrog appeals in England and Wales expressly did

<sup>104</sup> Administration of Justice Act 1969 s 12(3A).

not apply in Northern Ireland.<sup>105</sup> The statutory conditions that needed to be satisfied in Northern Ireland were thus narrower than in England and Wales; in particular, the case must 'relate wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings.'<sup>106</sup> It was not clear that the Belfast litigation related to the construction of the NIA 1998, as opposed to the scope of the royal prerogative. In any event, a leapfrog appeal would need the consent of all parties; even then, the judge had a discretion whether or not to grant a certificate. Maguire J subsequently refused to certify the Belfast litigation to leapfrog the NI Court of Appeal. Instead, an alternative route was followed, deriving from the fact that the Northern Ireland cases involved 'devolution issues'.<sup>107</sup> Before the proceedings in the NI High Court had been heard, the NI High Court had issued a devolution notice.<sup>108</sup> The AGNI had then entered an appearance in the proceedings. After judgment had been given by the NI High Court, but before any final order was made in the relevant proceedings, the AGNI – given the constitutional significance of the issues raised in the proceedings and in the absence of certification by Maguire J for a leapfrog appeal – required the NI High Court to refer to the UK Supreme Court four issues which were set out in a notice from the AGNI to the NI High Court dated 8 November 2016.<sup>109</sup> By order dated 14 November 2016, the NI High Court referred those four issues to the UK Supreme Court, leaving less than two weeks to submit skeleton arguments.

The four issues referred for a decision by the Court at the AGNI's instigation were plainly designed to reflect, in broad terms, the first four issues addressed in the judgment of Maguire J in the NI High Court. They were as follows:

- (i) Does any provision of the [NIA 1998], read together with the Belfast Agreement and the British-Irish Agreement, have the effect that an Act of Parliament is required before Notice can be given [to the European Council under art 50(2) TEU]?
- (ii) if the answer is "yes", is the consent of the Northern Ireland Assembly required before the relevant legislation is enacted?
- (iii) If the answer to question (i) is "no", does any provision of the [NIA 1998] read together with the Belfast Agreement

<sup>105</sup> Administration of Justice Act 1969 s 16(1A).

<sup>106</sup> Administration of Justice Act 1969 s 12(3)(a) (emphasis added)

<sup>107</sup> Northern Ireland Act 1998, sch 10, para 1(d) (any issue arising under the Northern Ireland Act 1998 in relation to excepted or reserved matters is a 'devolution issue').

<sup>108</sup> Northern Ireland Act 1998, sch 10, para 5; RCJ Order 120, rule 3.

<sup>109</sup> By virtue of the power conferred on him by the Northern Ireland Act 1998, sch 10, para 33.

and the British-Irish Agreement operate as a restriction on the exercise of the prerogative power to give Notice [to the European Council under art 50(2) TEU]?

(iv) Does section 75 of the [NIA 1998] prevent exercise of the power to give Notice [to the European Council under art 50(2) of the TEU] in the absence of compliance by the Northern Ireland Office with its obligations under that section?<sup>110</sup>

We have seen that there was a further issue, Issue 5, which was argued on behalf of Mr McCord whose case was heard alongside the *Agnew* case. But that issue was not advanced by the applicants in the *Agnew* case. The AGNI, in effect, referred the *Agnew* case but not the *McCord* case, on the basis that he thought that the latter had less merit given the points Mr McCord was seeking to argue. That left both Mr McCord and the UK Government in some difficulties. Requiring Mr McCord to appeal the NI High Court's decision in *McCord* insofar as it concerned him to the NI Court of Appeal, before an appeal could proceed to the UK Supreme Court, was likely to mean that Mr McCord could not appeal to the Court at the same time as the other Brexit cases. There was one other alternative available, however, short of a full appeal to the NI Court of Appeal. Hearings took place in the NI Court of Appeal on 16 and 19 November 2016 to consider an application for referral *by the Court of Appeal itself* of the devolution issues which arose in the proceedings.<sup>111</sup> The NI Court of Appeal then referred Issue 5 to the UK Supreme Court with the consent of the parties on 18 November 2016. Issue 5 was:

(v) Does the giving of Notice [to the European Council under art 50(2) of the TEU] without the consent of the people of Northern Ireland impede the operation of section 1 of the [NIA 1998]?<sup>112</sup>

The issue of the appropriate appeal route to take was not yet exhausted, however. After the UK Supreme Court had heard argument in *Miller*, but before it delivered its judgment, a significant complication arose in the *Agnew* case, involving a decision by the NI Court of Appeal in the entirely unrelated case of *Lee v McArthur*,<sup>113</sup> in which the AGNI also participated in order to argue several devolution issues. The AGNI sought to refer that

<sup>110</sup> *Miller* (UKSC) (n 1) [126] (i)-(iv).

<sup>111</sup> Northern Ireland Act 1998, sch 10, para 9.

<sup>112</sup> *Miller* (UKSC) (n 1) [126] (v).

<sup>113</sup> [2016] NICA 39.

case to the UK Supreme Court under the same powers he had exercised in the *Agnew* case. In both cases, the AGNI issued a notice to the relevant court – ie to the NI High Court in the *Agnew* case and to the NI Court of Appeal in *Lee v McArthur* – after judgment was delivered, but before a final order had been made by the court. The NI Court of Appeal ruled in the *Lee v McArthur* case, on 22 December 2016, that this was an improper use of his power in that case, and that the power was designed to be used before, rather than after, the judgment of the relevant court.<sup>114</sup> This directly impacted the *Agnew* referral to the Court, as well as the referral of the *Lee v McArthur* case, since it indicated that the AGNI should not have required the NI High Court to refer the 4 issues after Maguire J delivered his judgment in the *Agnew* case. The Court's attention was drawn to the problem. In its judgment, the Court decided to proceed in any event: 'Given that the issues raised in that reference were fully debated, and that no party to these proceedings has sought belatedly to rely on the decision of the [NI] Court of Appeal, we think it appropriate to deal with the reference.'<sup>115</sup>

## 7 Assessment of the UK Supreme Court's hearing and judgment in *Miller*

### 7.1 The problematic conduct of the hearing

As a result of the timetable set by the UK Supreme Court, and requested by the UK Government, there was a severely reduced time for counsel to prepare and submit skeleton arguments, and a reduced time for the judges of the Court to consider these before the oral hearing. With the benefit of hindsight, it is not at all clear what the urgency was to adjudicate the London litigation. Looking back from the vantage point of October 2017, it is apparent that the UK government was woefully under-prepared to engage in the negotiations that would follow the triggering of art 50 of the TEU. Had the Court not accepted the UK Government's timetable, the Court would have had considerably more time to properly consider the significant constitutional issues involved in *Miller*. Delaying the triggering of art 50 of the TEU would also have given the UK Government more time to prepare for the consequences of giving notice under art 50(2) of the TEU, including the subsequent Brexit negotiations. It was clear immediately after the Brexit referendum that the two years that art 50(3) of the TEU allows for the conclusion of an agreement to exit the EU was always going to be challenging.

<sup>114</sup> *Lee v McArthur* [2016] NICA 55.

<sup>115</sup> *Miller* (UKSC) (n 1) [127].

The pressure on counsel and judges was increased by the sheer weight of documentation provided to the court in the run-up to the oral hearing. In addition to the complex UK Government representation (comprising the Attorney General for England and Wales, the Advocate General for Scotland and the Northern Ireland Crown Solicitor's Office), there were six parties represented before the court (the AGNI, Agnew, Dos Santos, McCord, and Miller), two 'interested parties' (Pigney and AB), and five interveners (Birnie, the Lord Advocate of Scotland, the Counsel General of Wales, TWGB, and Lawyers of Britain). All-in-all, over fifty counsel were involved in preparing arguments for the Court. From the point of view of the issues that specifically concerned Northern Ireland, in addition to the AGNI, counsel for Mr Agnew and Mr McCord, and counsel instructed by the Crown Solicitor, the key players were the Advocate General for Scotland, the Lord Advocate of Scotland and the Counsel General of Wales, all of whom were involved in submitting arguments on the 'devolution issues', as they came to be called.

When it came to the allocation of time for oral presentations before the Court, the bulk of the time was given to those instructed in the London litigation, with severely truncated amounts of time for those making the arguments on the 'devolution issues'. There was a strong impression among many present that the devolution issues were dealt with largely as an afterthought by the Court. This is partly due to the way in which the Belfast litigation came before the Court, on a highly-compressed timetable through references from the NI High Court and the NI Court of Appeal, late in the day, in the absence of any consideration of the issues by the NI Court of Appeal, and with very limited speaking time allowed to the parties instructed in the Belfast litigation, and to the intervenors from Scotland and Wales. It might be thought that this is not the way in which arguably the most important constitutional case affecting Northern Ireland since its foundation should be decided. There was, however, another critical dimension; this was the unarticulated, yet dominant, consensus that existed among those *not* directly involved in the 'devolution issues' that the only real issue was parliamentary sovereignty versus the royal prerogative, and that everything else was a side-show. The effect of all this was that arguments on the devolution issues that challenged that narrative were not only side-lined but perceived by some as distinctly unwelcome. What resulted, in the main, was a distinctly *English* constitutional debate. To put the point more theoretically, borrowing from Ronald Dworkin,<sup>116</sup> Northern Ireland, Scottish and Welsh counsel were making arguments that were clearly outside the London-based legal interpretive community that dominated the public arguments, and subsequently became hegemonic. The best way of

<sup>116</sup> Ronald Dworkin, *Law's Empire* (Harvard UP 1986) 255.

evidencing this view was the apparently natural way in which the Court divided the issues in the judgment of the majority. This separated `the main issue,'<sup>117</sup> apparently that presented in the London litigation, from the `devolution issues'<sup>118</sup> as presented in the Belfast litigation. This separation occurred despite the fact that the London litigation and the Belfast litigation were formally of equal status. Despite appearances, the Belfast litigation did not `join' the London litigation, as an intervenor or an interested party might join some other party's case; the Belfast litigation was before the Court in its own right, but it did not feel that way.

## 7.2 The cursory judgment on issues relating to Northern Ireland

The marginalisation of the Belfast litigation was not only reflected in its separation from the `main' issue (ie the London litigation), but also in the brief dismissal of the arguments made in the Belfast litigation. The approach taken by the Court to the `devolution issues' was, essentially, to address only two questions (ie the Sewel Convention and `consent of the people' issues) directly and even then somewhat cursorily, giving support to the impression at the hearing that the Court shared the view that the devolution issues were diversions from the `main issue'. The *process* adopted, then, was not calculated to produce a result that would fully reflect the complexity of the issues before the Court in the Belfast litigation.

The problems that the judgment generated, however, go beyond a failure to grapple with the complexity of the Belfast litigation. There are three main features of the court's substantive approach that, taken together, can be seen as undermining important aspects of the Northern Ireland constitutional settlement.

The first problematic feature is the Court's failure to give appropriate weight to the asymmetrical nature of `devolution' in the UK. The Court recognised that the NIA 1998 `is the product of the Belfast Agreement and the British-Irish Agreement, and is a very important step in the programme designed to achieve reconciliation of the communities of Northern Ireland,'<sup>119</sup> and that it has `established institutions and arrangements which are intended to address the unique political history of the province and the island of Ireland.'<sup>120</sup> But, having mentioned these features, the Court then proceeded to ignore them, stressing instead the `relevant commonality in the devolution settlements in Northern Ireland, Scotland and Wales', both in `the statutory constraint on the executive and legislative competence of

---

<sup>117</sup> *ibid* [5].

<sup>118</sup> *ibid* [6].

<sup>119</sup> *ibid* [128].

<sup>120</sup> *ibid*.

the devolved governments and legislatures that they must not act in breach of EU law', and 'in the operation of the Sewel Convention'.<sup>121</sup> As a result, the Court failed to address the international legal underpinnings of the Northern Ireland constitution. This is particularly problematic in the Court's approach to the first question referred by the AGNI. So, although the Court cites the British-Irish Agreement,<sup>122</sup> there is no legal analysis of that Agreement or its status in the law of the UK. There is, therefore, no analysis either of the extent to which there are any legal constraints on the UK Government arising from that Agreement that are cognizable in UK courts, despite this being a central aspect of the case presented in both the *Agnew* and *McCord* written arguments in the Belfast litigation. The Court's emphasis is on *domestic* statutory constraints only. The Court's approach, it seems, is to want to 'kill two birds with the one stone', as it were, thereby dealing with arguments concerning Scotland in the same breath as dealing with arguments concerning Northern Ireland. Any serious attention to the international legal dimensions of the Northern Ireland constitutional arrangements would, of course, have upset that conveniently simple narrative.

Second, the Court failed to appreciate the *constitutional* nature of the devolution settlements, especially (though not only) with regard to Northern Ireland. The Court simply spoke of statutory constraints inherent in the devolution settlements without exhibiting a proper understanding that these settlements, again in particular as expressed in the NIA 1998, are of constitutional significance akin to the ECA 1972 and other constitutional acts. To be sure, the Court acknowledged the constitutional nature of the ECA 1972, properly in our view and in accordance with the arguments originally submitted in the *Agnew* case on the matter. But, as a result of its failure properly to heed the constitutional nature of the devolution settlements themselves, the Court trained its constitutional sights exclusively on the ECA 1972. The Court thereby ignored any separate harm that might be deserving of Parliament's special attention in undermining Northern Ireland's constitutional settlement.

The third problematic feature arises out of a combination of the first two. In failing to appreciate the constitutional nature of the devolution settlements, and in failing to take seriously the additional *sui generis* nature of the settlement in Northern Ireland, the Court provides no analysis, let alone application, of consent as a pervasive underlying principle of the Northern Ireland constitutional arrangements. Ignoring this aspect allowed the Court to deal with particular arguments on Sewel and s 1 of the NIA 1998 in

---

<sup>121</sup> *ibid.*

<sup>122</sup> *ibid* [126], [128].

isolation from each other, rather than instantiations of an overarching principle. This feature is particularly pervasive in the Court's treatment of questions two and five (as set out above), but is also reflected in the approach taken to the first question, as we shall see.

One can trace these three failures throughout the Court's cursory responses to the questions put. On the first question – ie whether the NIA 1998 displaced the prerogative and required legislation – the Court held that it was `not necessary to reach a definitive view on the first referred question.<sup>123</sup> The Court gave a broad hint that, had it not decided the ECA 1972 point in the way it did, it would have decided that the NIA 1998 also meant that the triggering of art 50 of the TEU required legislation. This was because, as the Court put it, `it would be incongruous if constraints imposed on the legislative competence of the devolved administrations by specific statutory provisions were to be removed, thereby enlarging that competence, other than by statute.<sup>124</sup> Thus the Court considered that:

A related incongruity arises by virtue of the fact that observance and implementation of EU obligations are a transferred matter and therefore the responsibility of the devolved administration in Northern Ireland. The removal of a responsibility imposed by Parliament by ministerial use of prerogative powers *might* also be considered a constitutional anomaly.<sup>125</sup>

The Court did not finally determine any of this, however, considering that, because it had held that primary legislation was necessary to authorise the giving of notice under art 50 of the TEU due to the ECA 1972, the question regarding the NIA 1998 was `less significant than it otherwise might have been.<sup>126</sup> In so doing, the Court seemed to treat the impact of repealing the ECA 1972 on devolution in Northern Ireland as a kind of statutory knock-on effect, like, for example, the end of the applicability of the Working Time Directive in the UK, without any particular *constitutional* significance of its own. The extent of the Court's failure in this regard is revealed in the Court's suggestion that `withdrawal will affect devolved competence unless new legislative constraints are introduced.<sup>127</sup> The Court here fails to recognize that new legislative constraints could never

---

<sup>123</sup> *ibid* [132].

<sup>124</sup> *ibid*.

<sup>125</sup> *ibid* (emphasis added). The `constitutional' nature of the anomaly, it should be added, referred solely to the relationship between Parliament and the Executive, not the anomaly of having a `constitutional' settlement undermined by royal prerogative.

<sup>126</sup> *ibid* [129].

<sup>127</sup> *ibid* 130.

replicate the constraints (including EU remedies) that are constitutionally imposed on the devolved legislature as a result of actual EU membership and EU law. Some restraints might be imagined that take the place of these EU constraints to some degree, but the fundamental legal structure of devolution will be forever altered once the UK leaves the EU. In neglecting separate consideration of this fact, the Court swept the need for legislation as a result of the NIA under the rug of the ECA 1972. In so doing, the Court disregarded the separate, transformative impact of leaving the EU on the Northern Ireland constitutional settlement, and invited (rather successfully, it seems) Parliament and the Executive to do the same.

The Court's sidestepping of the issues put did not end there, however. There is no analysis whatsoever of the specific legal and practical difficulties arising for the operation of the North-South bodies, again a central plank of the argument in the *Agnew* case.

The third and fourth questions (on the limits of prerogative power arising from public law principles even if legislation to trigger art 50 of the TEU was not required, and on the operation of the equality impact requirement in s 75 of the NIA 1998), were dealt with even more cursorily. The third question was 'superseded' given that the Court had concluded that primary legislation was required.<sup>128</sup> As regards the fourth question, it too was superseded, because the Court held that there was no prerogative power to give notice to which s 75 of the 1998 Act applied. The Court did go on to consider, however, whether s 75 imposed any obligations on the Secretary of State insofar as he or she may have a role in the measures taken by the UK Parliament to give notice. The Court was 'satisfied that section 75 imposes no obligation on him in that context.'<sup>129</sup> That, of course, was not the issue presented to the Court, which concerned the role of the NIO, not the Secretary of State. In so finding, the Court ignored the distinction drawn between the functions of the Secretary of State for Northern Ireland, and the functions of the NIO. As a result, it held (correctly) that the Secretary of State does not fall within the ambit of s 75 of the NIA 1998,<sup>130</sup> without addressing the implications of the fact that the NIO plainly does, as was argued by the applicants in *Agnew*. In any event, the Court considered that the decision to withdraw from the EU and to give notice of this intention was not a function carried out by the Secretary of State for Northern Ireland 'in relation to Northern Ireland within the meaning of section 75',<sup>131</sup> without considering how its decision in this regard was consistent with its analysis of the *sui generis* relationship between EU law and Northern Ireland

---

<sup>128</sup> *ibid.*

<sup>129</sup> *ibid* [133].

<sup>130</sup> *ibid* [132].

<sup>131</sup> *ibid* [133].

when addressing the first question, and again side-stepping the question of whether the NIO itself had functions regarding Brexit 'in relation to Northern Ireland.'

The fifth question concerning the effect of s 1 of the NIA 1998 was also answered in the negative, in one short paragraph.<sup>132</sup> Section 1 of the 1998 Act, said the Court, only 'gave the people of Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland.'<sup>133</sup> That section did not 'regulate any other change in the constitutional status of Northern Ireland nor require the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union.'<sup>134</sup> There was no legitimate expectation to that effect that could be derived from the section. No mention was made of the extensive supporting arguments seeking to support such an expectation derived from the Belfast-Good Friday Agreement and the British-Irish Agreement, and no analysis was forthcoming, therefore, as to why these Agreements did not support the applicant's case in relation to Issue 5.

The Court spent significantly longer in addressing the second question, concerning the application of the Sewel Convention in the Scottish, Welsh and Northern Ireland contexts, but there are several equally problematic aspects of the treatment of this issue from a Northern Ireland constitutional perspective. First, the function of the constitutional convention in issue was consistently analysed in pragmatic rather than principled terms. The Convention, it was said, recognises the:

[P]ractical benefits of achieving harmony between legislatures in areas of competing competence, of avoiding duplication of effort, of enabling the UK Parliament to make UK-wide legislation where appropriate, such as establishing a single UK implementing body, and of avoiding any risk of legal challenge to the vires of the devolved legislatures.<sup>135</sup>

The Convention was seen as having 'an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures,'<sup>136</sup> but the extent to which the convention was an institutionalised method by which the principle of consent was instantiated was nowhere acknowledged.

---

<sup>132</sup> *ibid* [135].

<sup>133</sup> *ibid*.

<sup>134</sup> *ibid*.

<sup>135</sup> *ibid* [137].

<sup>136</sup> *ibid* [151].

Second, the Court's consideration of the role of the courts *vis-à-vis* conventions adopts a binary approach to their justiciability, such that conventions are legally enforceable by the courts, or they are not: 'Judges [...] are neither the parents nor the guardians of political conventions; they are merely observers.'<sup>137</sup> This does not, however, reflect the subtlety with which the courts have treated conventions in practice, when they considered it advisable to do so. Recognising the constitutional role of conventions and the importance of the issue for the devolved administrations, an importance demonstrated by the interventions of the Lord Advocate of Scotland and the Counsel-General for Wales, this question should have elicited a response from the Court that was more attuned to its constitutional function of staving off a potential constitutional crisis, as the Supreme Court of Canada had done previously in an equivalent context.<sup>138</sup>

Third, the Court dramatically simplified the arguments put to them, describing the issue as being whether the Scottish Parliament, the Welsh Assembly, or the Northern Ireland Assembly had a 'veto' on Westminster parliamentary legislation on Brexit. In fact, the arguments put presented a much more nuanced understanding of the issue, in particular asking whether there was an obligation on the UK *Government* to seek an LCM, irrespective of whether a failure to pass such a motion was ultimately able to be overridden by Parliament. As with the previous two issues concerning Sewel, the Court appeared to wish to rush to judgment, pushing to one side any subtler distinctions that would have elicited a subtler response. Given these features, the final paragraph of the judgment extolling the virtues of constitutional conventions rings somewhat hollow.<sup>139</sup> Even if the Court, ultimately, decided against judicial 'enforcement', it could have gone considerably further in embracing and even establishing a judicial role in recognizing the general existence and scope of a convention, stressing the vital role that the convention played in the constitutional architecture, and even finding that the convention was engaged here. None of this would have required the Court to step outside its fundamental role as an 'observer', albeit perhaps not a 'mere' observer but an appropriately privileged one, as the UK's highest court.

---

<sup>137</sup> *ibid* [146].

<sup>138</sup> *Re A Resolution to Amend the Constitution* (n 75) (in which the Supreme Court of Canada declared the existence and parameters of a constitutional convention of great significance and gave a ruling on whether it was engaged in the particular case (even though the consequences of non-compliance were political, not legal)).

<sup>139</sup> *ibid* [151].

### 7.3 The content of the judgment relating to the 'Main Issue'

If the approach to the 'devolution issues' seems sometimes to border on the cavalier, this is partly explained by the fact that these issues were, apparently, marginal to the 'main issue'. We might, optimistically, conclude from this that the Court's approach to the devolution issues might be dismissed as an aberration, relatively unimportant, and subject to revision when the Court is required to face similar issues in the future in a case solely concerned with devolution. Unfortunately, however, the implications of the judgment for the Northern Ireland constitution go beyond the Court's treatment of the 'devolution issues'. The Court's approach to the 'main issues' helps identify what the Court views as the essential underpinnings of the British constitution, and helps to explain why the Court took the substantive approaches it did, however briefly, to the 'devolution issues'. Viewed through a Northern Irish lens, what emerges from the Court's treatment of the 'main issue' is an understanding of the British constitution that bodes ill for the future of the Northern Ireland constitution, at least as conceptualised earlier in this article, although it must be admitted that this understanding emerges not so much from what the Court said, as from what it did *not* say.

In addressing the 'main issue', the Court was confronted with a stark choice as to the nature of the British constitution. On the one hand, the UK Government's case was simply to deny that any profound constitutional shift has occurred in the UK, whether because of devolution or because of the UK's membership in the EU, and that the royal prerogative operated in the context of EU law to the full extent that it would have operated prior to 1972, whether in the devolution context, or otherwise. The Government's argument was simply to assert that we continue to live in a unitary state in which the traditional dualistic understanding of the relationship between national and international law persisted unchanged. This approach was particularly evident in the Government's assertion that EU law is merely international law, no different from any other Treaty obligations, from the perspective of UK law, and in the Government's rejection of any legal weight being given to the British-Irish Agreement in UK courts.

The Court rejected the Government's approach to some degree, focusing on the inherent 'flexibility' of the British constitution, and recognising that the role of EU law had changed the constitutional scene, accepting that the ECA 1972 was a statute of a 'constitutional character'.<sup>140</sup> 'Our constitutional arrangements', said the Court, 'have developed over time in a pragmatic as much as in a principled way, through a combination of

---

<sup>140</sup> *ibid* [72].

statutes, events, conventions, academic writings and judicial decisions.<sup>141</sup> The Court adopted Dicey's characterisation of the UK constitution as 'the most flexible polity in existence'.<sup>142</sup> When it went beyond this, however, the Court adopted the most conservative constitutional approach possible in justifying its decision that Parliamentary legislation was needed to remove rights granted previously by statute or the common law, with Dicey also being invoked in the Court's consideration of parliamentary sovereignty.<sup>143</sup> Dicey's particularly orthodox description of parliamentary sovereignty is adopted, namely that Parliament has 'the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament'.<sup>144</sup> This is described, unadorned, as a 'fundamental principle of the UK constitution'<sup>145</sup> and, later, as 'the principle which is [...] fundamental to the United Kingdom's constitutional arrangements'.<sup>146</sup>

This analysis was central to the Court's way of justifying why it was willing to require that Parliamentary legislation authorise the triggering of art 50 of the TEU. In expressing itself in such stark terms, however, the Court harkened back to the pre-1972 constitution of the UK, which might best be described as encompassing a unitary state (with the exception of Northern Ireland between 1922 and 1972), with a dualist understanding of the distinction between national law and international law. The unitary state primarily operated in such a way as to concentrate and centralize power in Westminster and Whitehall; and the interests of Scotland, Wales and Northern Ireland were represented at the centre through the establishment of Departments of (central) Government and membership in the Cabinet of the Secretaries of State of these Departments. In this pre-1972 model of UK constitutionalism, international affairs were left to the Executive, exercising powers that remained under the royal prerogative, whilst any international agreements that were entered into under the prerogative could have direct effects in national law only where Parliament enacted incorporating legislation. Viewed from Northern Ireland, this was not a success. The combination of a unitary state, extreme constitutional flexibility, unconstrained parliamentary sovereignty, and no recognition of a role for international legal standards was precisely what the Northern Ireland settlement was meant to limit.

<sup>141</sup> *ibid* [40].

<sup>142</sup> *ibid* citing Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 87.

<sup>143</sup> See, in particular, *Miller* (UKSC) (n 1) [40]-[46].

<sup>144</sup> Dicey (n 148) 38.

<sup>145</sup> *Miller* (UKSC) (n 1) [43].

<sup>146</sup> *ibid* [67] (emphasis added).

What is missing from the Court's analysis, an analysis that was conservative even from pre-1972 standards, is any recognition that something fundamental occurred with the enactment of the statutes devolving powers to the Scottish Parliament and the Northern Ireland and Welsh Assemblies. There is no recognition that Parliament had overseen a transformation of the UK constitution, whilst preserving its ultimate authority, and no understanding that one major effect of these changes was to create a multi-level system of government, in which there is a complex relationship between the institutions of the devolved nations, the central Government, and the EU, and that this complex relationship requires to be managed in ways that Dicey would hardly relish.

The applicants in the *Agnew* case argued that the effect of these constitutional changes went beyond the simple creation of new institutional structures, and instead embedded what they termed 'constitutional pluralism' at the heart of the UK constitution. This built on a similar idea discussed in the context of EU law, and one which the Court, in that context, even seemed to embrace. The argument was that Parliament not only had accepted that several differently constituted legal systems operated over the same territory in different subject areas, but also that these legal systems claimed authority on their own terms. Again, when it came to the EU, the Court seemed receptive to such arguments. For example, the Court rejected the notion that the ECA 1972 was the source of EU law. To be sure, EU law only applied in the UK as long as Parliament allowed. At the same time, 'in a more fundamental sense and [...] a more realistic sense, where EU law applies in the UK, it is the EU institutions which are the relevant source of that law.'<sup>147</sup> Thus, the ECA 1972 provided 'a new constitutional process for making law in the United Kingdom,'<sup>148</sup> which is why the ECA has 'constitutional character.'<sup>149</sup> The Court, therefore, rejected the notion that 'as a source of law, EU law can properly be compared with [...] delegated legislation.'<sup>150</sup> Instead, the ECA 1972 'operates as a partial transfer of law-making powers, or an assignment of legislative competences, by Parliament to the EU law-making institutions (so long as Parliament wills it), rather than a statutory delegation of the power to make ancillary regulations.'<sup>151</sup> Acknowledging the magnitude of this constitutional change, the majority of the Court agreed with Lord Reed's statement in dissent that 'rules which would [...] normally be incompatible with UK constitutional principles, became part of our constitutional arrangements as a result of the 1972 Act and the 1972 Accession

---

<sup>147</sup> *Miller* (UKSC) (n 1) [61].

<sup>148</sup> *ibid* [62].

<sup>149</sup> *ibid* [67].

<sup>150</sup> *ibid* [68].

<sup>151</sup> *ibid*.

Treaty for as long as the 1972 Act remains in force.<sup>152</sup>

When the court turned to the NIA, the Belfast-Good Friday Agreement, and the British-Irish Agreement, however, any such openness and flexibility seemed to vanish, and with it any serious constitutional analysis. The Court did not so much as respond to the applicants' argument in the *Agnew* case that, in virtue of this *constitutional* act and related agreements, the constitution of the UK had changed along similar lines in its relationship with Northern Ireland. It was argued in the *Agnew* case that the NIA 1998 and related measures had changed the 'constitutional process' regarding Northern Ireland, as well. There were several avenues available to the Court to reach this conclusion: applying a similar idea of 'constitutional pluralism' to devolution, accepting that different constitutional understandings regarding Northern Ireland could co-exist, or even simply requiring the continued operation of 'consent' as a constitutional principle in Northern Ireland devolution. Roundly ignoring this argument, and each of the possible avenues identified, was a step back for the Court. In the *Jackson* case, Lord Steyn had implicitly recognized such ideas when he spoke of EU membership *and devolution* giving rise to a 'divided sovereignty' in the UK.<sup>153</sup> It is noteworthy that *Jackson* is not cited, Lord Steyn is noticeable by his absence, and the 'devolution' legislation is not accorded the status of 'constitutional statutes',<sup>154</sup> or even statutes of a 'constitutional character' – ie the term that is applied to the ECA 1972 – with the increased status that would have brought.<sup>155</sup>

## 8 Implications for the Brexit negotiations

At the beginning of this chapter, we contrasted two differing approaches to constitutionalism: 'a pragmatic empiricist approach'; and 'a more ideological constitutional approach'.<sup>156</sup> If the Court failed to adopt the latter – ie the application of a principled approach to the devolution issues – was its adoption of a more pragmatic approach at least a successful problem-solving technique? We think not. In this part, we seek to explain and justify this assessment before moving on to make some general conclusions in the final part of this chapter.

First, the approach taken by the UK Government towards the Northern

<sup>152</sup> *Ibid* (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge), citing [182] (Lord Reed).

<sup>153</sup> *Jackson* (n 16) [102] (emphasis added).

<sup>154</sup> See *Thoburn v Sunderland City Council* [2003] QB 151 [58]-[59] (Laws LJ); *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3, 1 WLR 324 [78]-[79] (Lord Reed), [206]-[207] (Lord Neuberger and Lord Mance).

<sup>155</sup> *Miller* (UKSC) (n 1) [72].

<sup>156</sup> McCrudden (n 8) 227.

Ireland settlement in *Miller* and, in particular, regarding the status of the Belfast-Good Friday Agreement, and the lack of resistance to that position by the Court, seriously worried many significant political actors in Northern Ireland. This concern was taken up by the Irish Government. Once the withdrawal process was formally underway, with the transmittal of the Prime Minister's letter triggering art 50 of the TEU in March 2017, the European Council set out its negotiating guidelines, which indicated that the Irish Government had persuaded the EU to seek to safeguard the Good Friday Agreement in the negotiations.<sup>157</sup> The Guidelines referred, in particular, to the 'unique circumstances on the island of Ireland,' which required 'flexible and imaginative solutions', including to avoid 'a hard border, while respecting the integrity of the Union legal order.'<sup>158</sup> In this context, 'the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law.'<sup>159</sup> These 'agreements and arrangements' include the Belfast-Good Friday Agreement, 'in all its parts'.<sup>160</sup> The EU-27's commitment to protecting the Belfast-Good Friday Agreement in the negotiations was significantly enhanced, when it made clear that it considered that there are two separate phases in the negotiations with the UK.<sup>161</sup> The first set of negotiations concern the exit (or 'divorce') arrangements, before the second phase (of conducting negotiations on the future relationship between the EU and the UK, including trading relationships) can take place. The EU-27 has identified three key issues on which 'sufficient progress' needs to be made in the first phase of exit negotiations.<sup>162</sup> These are: (i) the financial settlement concerning existing and future UK commitments; (ii) the position of EU citizens in the UK, and vice versa; and (iii) addressing the problems that arise for Ireland and NI from Brexit, including the threat to the Belfast-Good Friday Agreement. On 20 October 2017, the European Council called for work to continue on the divorce negotiations so that the second phase of negotiations could take place as soon as possible.<sup>163</sup> Sufficient progress had not yet been achieved.

Second, the extent to which the Court in *Miller* failed to address the myriad sets of rights that the applicants in the Belfast litigation identified as under

<sup>157</sup> European Council, (*Art 50*) *guidelines for Brexit negotiations* (European Council Press Release 220/17, 29 April 2017) <[www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/](http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/)> accessed 24 October 2017 ('the Guidelines').

<sup>158</sup> *ibid* para 11.

<sup>159</sup> *ibid*.

<sup>160</sup> *ibid* paras 11-12.

<sup>161</sup> *ibid* paras 4-6, 18-24.

<sup>162</sup> *ibid* paras 4-5.

<sup>163</sup> European Council, *Conclusions from the meeting of Delegates on 20 October 2017* (European Council (Art 50), 20 October 2017) <[www.consilium.europa.eu/en/meetings/european-council/2017/10/20-euco-art50-conclusions\\_pdf/](http://www.consilium.europa.eu/en/meetings/european-council/2017/10/20-euco-art50-conclusions_pdf/)> accessed 24 October 2017, paras 1-3.

threat as a result of withdrawal contributed to a more intense focus on such rights in the subsequent Brexit negotiations. The aim of the divorce negotiations from the perspective of the EU-27 is now that the UK `should ensure that *no diminution of rights* [in Northern Ireland] is caused by the United Kingdom's departure from the European Union, including in the area of protection against forms of discrimination currently enshrined in Union law.<sup>164</sup> This is a powerful statement of intent, committing the EU 27 to engaging with the UK to ensure that it will provide for the non-regression of a significant part of the existing *acquis* of rights protection in Northern Ireland. At the time of writing, there remains a significant gap between the EU-27 and the UK on this, particularly concerning the protection of general equality and human rights protections other than those concerned with citizenship. Had the Court specifically identified this problem, it would presumably have been addressed earlier by the UK Government.

Third, in dealing with the Sewel Convention, the Court stressed that it was concerned only with `the rule of law', but viewed this entirely from a narrowly British constitutional law perspective, ignoring a critical EU law issue raised by the applicants in the *Agnew* case.<sup>165</sup> Article 50(1) of the TEU stipulates that: `Any Member State may decide to withdraw from the Union *in accordance with its own constitutional requirements*.'<sup>166</sup> But what, exactly, does `constitutional requirements' mean in this context? The applicants in the *Agnew* case suggested that the Sewel Convention was potentially a relevant `constitutional requirement', even if the convention was not *legally enforceable* in UK constitutional law. The Court did, after all, stress `the importance of constitutional conventions, some of which play a *fundamental role* in the operation of our constitution.'<sup>167</sup> If so, was the UK required to comply with this convention before art 50 of the TEU could lawfully be triggered, *under EU law*? Did this, by implication, give jurisdiction to the Court to consider the legal enforceability of the convention, or the clear articulation whether the convention had been engaged? The Court was specifically asked to decide whether seeking an LCM was part of the relevant constitutional requirements, but it failed to do so, perhaps because discussing this issue would have raised the prospect of a referral to the Court of Justice of the European Union (`CJEU'), a possibility that all the parties to the `main issue' seemed to go to exquisite lengths to avoid. Although this

<sup>164</sup> European Commission, *Guiding Principles for the Dialogue on Ireland/Northern Ireland* (TF50 (2017) 15 – Commission to UK, 20 September 2017) <[https://ec.europa.eu/commission/sites/beta-political/files/dialogue\\_ie-ni.pdf](https://ec.europa.eu/commission/sites/beta-political/files/dialogue_ie-ni.pdf)> accessed 26 October 2017, 4.

<sup>165</sup> *Miller* (UKSC) (n 1) [136]-[151].

<sup>166</sup> Emphasis added.

<sup>167</sup> *Miller* (UKSC) (n 1) (UKSC) [151] (emphasis added).

issue was not addressed in *Miller*, it may yet surface again in any assessment by the CJEU of the compatibility of any withdrawal agreement with EU law.

Fourth, we saw earlier that in *Miller* the Northern Ireland parties argued that the Agreement between the UK and Ireland, incorporating the Belfast/Good Friday Agreement, was binding in international law, and should be taken into account in the interpretation of domestic law.<sup>168</sup> Leave aside whether there was such a breach. The point is rather that the Supreme Court entirely ignored this question, apparently agreeing with the UK government's flat denial that the Agreement was even worth considering in UK law.<sup>169</sup> The approach adopted by the Court to Parliamentary sovereignty in *Miller* and, in particular, the easy way in which a binding international agreement was virtually ignored, brought home to those previously unfamiliar with the finer points of UK constitutional law the difficulty in trusting UK commitments in a future withdrawal agreement, in general and not just in the context of issues concerning Northern Ireland. In light of such non-engagement with international law in the context of Ireland, why should the EU trust the British courts to uphold international legal obligations in any withdrawal agreement?<sup>170</sup>

The UK government has belatedly discovered that the rhetoric of 'taking back control' and the reassertion of Parliamentary sovereignty of the most traditional kind is a problem when it re-enters the brave new world of international trade negotiations. Although the issue first arose in the context of the future rights of EU citizens living in the UK, it is by no means confined to this issue; rather, it goes to the credibility of British offers of guarantees in all other areas under negotiation, as well. The essential point is that any agreement between the EU and the UK will be an agreement binding in *international* law not in UK law, unless the UK Parliament incorporates this international law into domestic law and makes it enforceable in UK courts. Where it has *not* been incorporated in this way, it has effectively no binding force in domestic law, and British judges will not recognise it. Even if it *is* so incorporated into domestic law, although

<sup>168</sup> Christopher McCrudden, 'An Early Deal-Breaker? EU Citizens' Rights in the UK after Brexit, and the future role of the European Court of Justice' (*UK Constitutional Law Association*, 27th June 2017) <<https://ukconstitutionallaw.org/2017/06/27/christopher-mccrudden-an-early-deal-breaker-eu-citizens-rights-in-the-uk-after-brex-it-and-the-future-role-of-the-european-court-of-justice/>> accessed 24 October 2017.

<sup>169</sup> *ibid.*

<sup>170</sup> *ibid.* A similar deferential approach is adopted by the British courts in the face of the British government's continuing refusal to implement repeated findings of the European Court of Human Rights that the UK's ban on prisoners' voting is in violation of the UK's international law obligations under the European Convention on Human Rights. The courts have admitted that, essentially, there is nothing they can do to force the government's hand. See eg *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] 2 AC 271.

British judges will enforce it, this is only so for as long as Parliament keeps that law in force.

Any agreement will, therefore, from the British constitutional perspective, be entirely subject to the principle of Parliamentary sovereignty, which as we have seen states that Parliament can make or unmake any law whatever, and that no Parliament can bind future Parliaments. To put it crudely, but not inaccurately, any agreement with the EU may not be worth the paper it is written on, if only domestic methods of legal protection are available to enforce it. The much-vaunted independence of the British judiciary, their rectitude, their intelligence, and their legal skills, are all beside the point in the face of the brutal constitutional reality that the British courts will eagerly do what a future Parliament tells them, irrespective of whether that means the UK is in breach of its international legal obligations.

From the EU perspective, if any agreement on EU citizens' rights, for example, is not to be worthless in the longer term, a mechanism is needed for interpretation and enforcement that means that the UK cannot conveniently avoid its obligations by invoking Parliamentary sovereignty. But how is that to be achieved? For the time being, the EU-27 have adopted the position that the CJEU must have a role in enforcing these rights. But rejection of the jurisdiction of the CJEU appears to be a red line for the UK Government. If the UK Government wants to be taken seriously in its offer to protect EU citizens' rights post-Brexit, however, it will need to come up with a much stronger proposal as to how precisely those rights will be legally enforceable by EU citizens well into the future and not subject to the whims of a future Parliament (assisted by the courts). If not the CJEU, then something that is to all intents and purposes equivalent to the CJEU, and equally credible, will be necessary. Had the UK Supreme Court been somewhat less absolutist in its defence of Parliamentary sovereignty in *Miller*, the problem would have been much less stark, and the need for external judicial guarantees perhaps less pressing.

Paradoxically, if the Court had focused more on principle, it would have helped subsequent problem-solving. If pragmatic problem-solving is what was driving the approach adopted by the UK Supreme Court in *Miller*, then the irony is that the Court may have *increased* the problems that must now be addressed, adding immeasurably to the difficulties faced by both the EU-27 and the UK government in the Brexit negotiations and thereafter.

## 9 Conclusion

From the start, the litigants in the *Agnew* case treated the ECA 1972 and the NIA 1998 questions with equal constitutional significance and attention.

As soon as the two issues became severed, it seems, the first issue took on the quality of the main event, with the latter becoming a side-show. The UK Supreme Court, in particular, gave every indication that the Belfast litigation was a diversion from the 'main' issues presented in the London litigation in *Miller*. As a result, critically important questions of Northern Ireland constitutional law were ignored entirely, or were decided in almost indecent haste. The most orthodox possible understanding of the principles of British constitutional law were drawn on to override any more nuanced understanding of constitutional developments relating to Northern Ireland.

It is tempting to hope that, were future litigation to arise in which the Belfast litigation issues arose in a different atmosphere, the Court might be persuaded to reconsider its approach towards the Northern Ireland devolution settlement. But, as things stand at the moment, traditional British constitutional orthodoxy seems ascendant with significantly adverse effects for devolution and Northern Ireland constitutional developments, including the Belfast-Good Friday Agreement.

The Court's approach to the arguments presented from Northern Ireland in *Miller* leave one to wonder whether much academic and political thinking in and about Northern Ireland on these issues is fundamentally at odds with the understanding of the most senior members of the judiciary in the UK. A necessary, but of course not sufficient, condition for future stability in Northern Ireland is a rethinking of the British constitutional underpinnings of the relationship between Britain and Ireland, one which explicitly transcends what appears to be the existing legal orthodoxy and limits the doctrine of Parliamentary sovereignty (in the Northern Ireland context at least). It would, of course, be an irony of the highest order if the clearest and most robust articulation of the fundamental nature of that doctrine was also the cause of its demise.