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Parliamentary sovereignty and the protocol pincer

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Abstract

It is May 2030 and Stormont heads into its fourth Assembly election in eight years. Voters walk past election posters loudly praising and denouncing the Northern Ireland Protocol. As with the other Assembly elections since Brexit, the Protocol occupies centre-stage. Voters are under no delusion: the new Assembly will be as polarised as ever, no matter its party-political make-up.

The legal backdrop to this (not entirely unfeasible) future is complex: the UK's Withdrawal Agreement has meant the emergence of a regulatory border between Great Britain and Northern Ireland. The consequences which flow from this have been swift and myriad: trade barriers and social unrest, barely a year after withdrawal.

The focus of this paper, however, is the impact of these changes on the UK constitution. I will examine two landmark judgments of the UK Supreme Court, applying the themes arising in these cases to the legislation which incorporated the Protocol into UK domestic law. In so doing, I will argue that, far from 'taking back control', the UK Parliament has instead erected significant new barriers to its ability to 'make or unmake any law whatever' for the whole of the UK.

Keywords: constitutional law; parliamentary sovereignty; democracy; Brexit; Northern Ireland

Introduction

The Withdrawal Agreement between the United Kingdom (UK) and the European Union (EU), in theory, bookended the political and legal saga that was Brexit. In reality, however, the consequences of the Withdrawal Agreement continue to unfold on an almost-daily basis. In particular, its consequences for Northern Ireland speak to issues which lie at the very foundations of the UK constitution, namely the sovereignty of the Crown in Parliament.

In this paper, I explore the arrangements which govern Northern Ireland, through the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement (the Protocol) and the implications of these arrangements for parliamentary sovereignty and parliamentary law-making when viewed through the prism of two landmark judgments of the UK Supreme Court: *Miller v Brexit Secretary*[1] (*Miller 1*) and *Miller v Prime Minister*[2] (*Miller 2*). I divide what follows into three sections: first, the specific provisions of the Protocol as well as the statute which incorporates it into UK domestic law, and how these interact with the ability of the Northern Ireland Assembly to make law; secondly,

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[1][2017] UKSC 5, [2018] AC 61.

[2][2019] UKSC 41, [2020] AC 373.

an analysis of *Miller 1* and *Miller 2*, exploring the reasoning in these judgments which speaks to the doctrine of parliamentary sovereignty and how it applies; and thirdly, how the incorporation of the Protocol, when viewed through the lens of *Miller 1* and *Miller 2*, strikes at the normative heart of parliamentary sovereignty. I conclude that the manner in which the UK Parliament incorporated the Withdrawal Agreement, including the Protocol, into domestic law, adversely impacts the normative foundations of its sovereignty, placing parliamentary sovereignty itself in jeopardy.

1. The Protocol and its incorporation: consequences for devolution in Northern Ireland

It is often said that the Protocol created a border in the Irish Sea, with wholly different customs and regulatory conditions between Great Britain and Northern Ireland.[3] However, the supposed centrality of the Protocol to the different customs and regulatory regimes is somewhat reductive, as this section explores.

Instead, both the Protocol and the Trade and Cooperation Agreement between the UK and the EU (TCA) provide for differential treatment between Great Britain and Northern Ireland, covering different areas and in different ways. For example, the Protocol continues to apply the EU's customs and regulatory code to Northern Ireland only, so that trade in goods between Northern Ireland and the EU remains covered under the rules of the EU's single market.[4] At the same time, the TCA also provides for different rules between Northern Ireland and Great Britain, for example in relation to road passenger transport operators, so that a British operator based in the UK outside of Northern Ireland requires specific authorisation to both pick up and set down passengers in the EU (and vice versa),[5] while a Northern Ireland operator may do so in the Republic of Ireland (and vice versa) without specific authorisations from the Republic.[6]

For the purposes of this paper, however, the specific content of both the Protocol and the TCA is not the issue – it is their respective scope and implementation. In terms of scope, the purpose of the Protocol is to 'address the unique circumstances on the island of Ireland' as a consequence of Brexit.[7] As a result, there is considerable potential for dynamism in the future relationship between the UK in respect of Northern Ireland and the EU,[8] whereby the Protocol itself provides a mechanism for the adoption in Northern Ireland of future EU law which may fall within the scope of the Protocol.[9] In this regard, the Protocol *strongly* envisions that such laws will be adopted, providing for 'remedial measures' to be taken by the EU if the Joint Committee of the UK and EU (which oversees the implementation and application of the Withdrawal Agreement)[10] cannot agree to adopt any such law.[11] Crucially, new EU laws which may be adopted as being within the scope of the Protocol may include laws which fall outside the scope of Articles 5–10 of the Protocol. The Northern Ireland Assembly may vote to end the application of only this part of the Protocol.[12] By contrast, while the TCA exhorts the UK and the EU to adopt ever higher labour[13] and environmental standards for example,[14] it lacks the

[3]See eg T Edgington and C Morris 'Brexit: what's the Northern Ireland Protocol?' *BBC News* (London, 21 July 2021) https://www.bbc.co.uk/news/explainers-53724381 (accessed 9 May 2022).

[4]Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/94–98, Arts 5–10.

[5]Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L 149/623, Art 475.4.

[6]TCA, ibid, Art 475.5.

[7]Protocol, above n 4, C 384 I/93, Art 1.3.

[8]See eg K Hayward '"Flexible and imaginative": the EU's accommodation of Northern Ireland in the UK-EU Withdrawal Agreement' (2021) 58(2) International Studies 201 at 210.

[9]Protocol, above n 4, C 384 I/99–100, Art 13.4.

[10]Withdrawal Agreement, above n 4, C 384 I/83, Art 164.3.

[11]Protocol, above n 4, C 384 I/100, Art 13.4.

[12]Ibid, C 384 I/102, Art 18.

[13]TCA, above n 5, Art 387.4.

[14]Ibid, Art 391.5.

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Protocol's depth of process for maintaining at least some parity between the two legal systems. Consequently, while the Protocol has both eyes set firmly on the future, with ways of expanding its application, the TCA is a much less ambitious agreement which, if it provides for any future ambition, does so with a languidness bordering on moribundity.

The upshot of the above is that the UK Government need not positively diverge from EU legal provisions (including goods standards) in order to cause divergence between Great Britain and Northern Ireland. Were Whitehall simply to stand still while Brussels moved, divergence may *ipso facto* be achieved.

The implementing statutes of both the Protocol and the TCA are buttressed by broad Henry VIII powers. There are, however, notable and important differences between these powers. The main power to implement the Protocol is contained in section 8C of the European Union (Withdrawal) Act 2018 (EUWA 2018), as amended by the European Union (Withdrawal Agreement) Act 2020. This section authorises the making of any regulations that UK Ministers consider appropriate in relation to the Protocol, including the modification of any Acts of Parliament (including the EUWA 2018).[15] The only restrictions on this power relate to the UK Internal Market Act 2020[16] and Article 11.1 of the Protocol which allows the UK and the Republic of Ireland to build on the provisions of the Belfast (Good Friday) Agreement (GFA).[17] By contrast, the equivalent power in relation to the TCA contains a series of restrictions, including enumerating Acts of Parliament which cannot be amended or repealed.[18]

The breadth of the section 8C power was evident in a recent regulation made thereunder. The Northern Ireland Secretary made the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 in order to give effect to the Protocol's requirements of democratic consent from the Northern Ireland Assembly (in relation to the application of Articles 5–10, as covered earlier in this section). These regulations disapplied the petition of concern mechanism by which certain matters on which the Northern Ireland Assembly votes may be subject to cross-community consent.[19] This disapplication was required neither by the Protocol, nor by the UK Government's declaration on the issue[20] which the Protocol required to be followed.[21] Arguably, it would also have breached the duty on ministers under the EUWA 2018 to act 'in a way that is compatible with the terms of the Northern Ireland Act 1998'.[22] However, the disapplication was nevertheless achieved by amending the Northern Ireland Act 1998 (NIA 1998) itself, to give effect to the new schedule to that Act which provided for the democratic consent process.[23] In the Northern Ireland High Court, this *fait accompli* was held to be an entirely lawful use of section 8C.[24]

[15]EUWA 2018, s 8C(2).

[16]Ibid, s 8C(5A).

[17]Ibid, s 8C(7).

[18]European Union (Future Relationship) Act 2020, s 31(4).

[19]Northern Ireland Act 1998, s 42 disapplied by Sch 6A, para 18(5).

[20]*Declaration by Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland concerning the operation of the 'Democratic consent in Northern Ireland' provision of the Protocol on Ireland/Northern Ireland* (19 October 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840657/Declaration_by_Her_Majesty_s_Government_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_concerning_the_operation_of_the__Democratic_consent_in_Northern_Ireland__provision_of_the_Protocol_on_Ireland_Northern_Ireland.pdf (accessed 9 May 2022).

[21]Protocol, above n 4, C 384 I/102, Art 18.2.

[22]EUWA 2018, s 10(1).

[23]NIA 1998, s 56A. Colin Murray and Clare Rice make the point that the s 10 duty applies only to the original EUWA 2018, not to s 8C as subsequently inserted into that Act. See C Murray and C Rice 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72(1) Northern Ireland Legal Quarterly 1, at 12.

[24]*Allister and others' Application for Judicial Review* [2021] NIQB 64, [165]–[172] per Colton J. See also A Deb 'The union in court: *Allister and others' Application for Judicial Review* [2021] NIQB 64' (2022) 73(1) Northern Ireland Legal Quarterly 138.

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Although the Protocol was incorporated via the EUWA 2018, it is important to appreciate that the statute's impact goes far beyond the incorporation of an international agreement. In the Northern Ireland context, the EUWA 2018 has four important effects. First, it privileges the effect of the Withdrawal Agreement and Protocol over '[e]very enactment' in domestic law.[25] This stands in contrast with the equivalent provision as regards the TCA, which only requires such modifications in domestic law as are 'necessary for the purposes of complying with the international obligations of the United Kingdom under [the TCA]'.[26] Secondly, the EUWA 2018 says nothing on how UK Ministers may act or exercise their powers in the Joint Committee. The most notable prescription relevant today[27] is in fact a restriction on ministers agreeing recommendations in relation to North-South cooperation under the GFA.[28] Among the rare mentions of the Joint Committee in the EUWA 2018, section 15B specifies that the UK co-chair of the Joint Committee may only be a minister of the Crown. But the section prescribes who may exercise the powers of the UK co-chair, not *how* such powers may be exercised. Thirdly, the EUWA 2018 adds a further restriction on the competence of the Northern Ireland Assembly, in the form of certain kinds of retained EU law as specified in regulations made by UK ministers.[29] Finally, the European Union (Withdrawal Agreement) Act 2020 also amends the NIA 1998 to qualify how the EUWA 2018 is protected from modification by the Northern Ireland Assembly.[30] It does so by barring the Assembly from modifying the EUWA 2018 except for certain 'excluded provisions' of that statute,[31] which includes section 8C,[32] but not section 7A.

Thus, it would appear that the Protocol has direct effect (in much the same way that EU law previously had effect),[33] that in its implementation, Parliament has authorised potentially vast quantities of ministerial law-making, that parliamentary control of (the UK half of) Joint Committee decision-making is very light-touch and that while the Assembly may not modify the direct effect of the Protocol, it can modify significant elements of its implementation (including the crucial section 8C power). However, appearances can be deceiving when it comes to devolved legislative competence in Northern Ireland.

The legislative competence of the Assembly is set out in sections 6, 6A and 7 of the NIA 1998, with the EUWA 2018 protected against modification by the Assembly because of its inclusion in section 7 (aside from specifically excluded provisions which may be modified), as set out earlier. Sections 6 and 7 cannot be read in isolation from one another, because entrenched enactment under section 7 is one of six ways in which an Act of the Assembly may be outside the Assembly's competence under section 6(2). However, it is axiomatic that these three sections do not contain the totality of devolved competence for Northern Ireland. In particular, the complexities of the different legislative provisions necessitate looking to restrictions on devolved competence by necessary implication. Especially relevant is the extent to which the subject of the EUWA 2018 provisions which devolved authorities may modify under section 7(2B) are nonetheless difficult because they straddle the boundary between excepted matters and other matters under the NIA 1998. Excepted matters may include, for example, the democratic consent vote provided for by regulation under section 8C, if the vote itself would 'come under the ambit of international relations'[34] and thus lie outside the Assembly's competence as an excepted matter.[35] Relatedly, the Northern Ireland Secretary has broad powers to forbid the

[25]EUWA 2018, s 7A(3).
[26]European Union (Future Relationship) Act 2020, s 29(1).
[27]Ministers were also forbidden from agreeing an extension to the implementation period under the EUWA 2018, s 15A.
[28]EUWA 2018, s 10(3).
[29]Ibid, s 12(6), inserting s 6A into the NIA 1998.
[30]European Union (Withdrawal Agreement) Act 2020, Sch 5, para 24.
[31]NIA 1998, s 7(2A)(ba).
[32]Ibid, s 7(2B)(b).
[33]European Communities Act 1972, s 2(1).
[34]*Allister*, above n 24, at [189].
[35]NIA 1998, Sch 2, para 3. See also the article cited above n 24, at 109–110.

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'making, confirming or approving' of subordinate legislation,[36] or to revoke such subordinate legislation as has already been made,[37] should it be incompatible with the UK's international obligations, including those under the Protocol. The nature of the Northern Ireland Secretary's powers in relation to devolved law-making is quite expansive in Northern Ireland: in addition to exercising both ex ante and ex post control over subordinate legislation, it is the Northern Ireland Secretary who presents Assembly Bills for Royal Assent and may decide not to do so if such a Bill, inter alia 'would be incompatible with any international obligations'.[38] One may argue that the Northern Ireland Secretary's powers of control do not imply that legislation made in breach of international obligations is outwith devolved competence, strictly speaking,[39] particularly when the power to control such law is discretionary and thus has a considerably political character. However, the degree of control exercised over such law, rendering it in effect almost impossible to be enacted or made, begs the question of the ability to make such law in the first place.[40]

Now, given that the EUWA 2018 is largely silent on the Joint Committee, it might appear as though Stormont might be able to make law concerning the Joint Committee insofar as within its competence, for example to express its views should the Northern Ireland statute book be expanded through future Joint Committee decisions. However, such decisions are not merely the mechanical consequences of Northern Ireland remaining within the customs and regulatory orbit of the EU; they may also be decisions on *how close* Northern Ireland remains tied to the evolving EU *acquis* while it remains within this orbit. These decisions may therefore speak directly to the character of the future relations between the UK in respect of Northern Ireland and the EU, which is outside Stormont's devolved competence. Any laws made at Stormont in this context, therefore, run the risk of cutting across the UK Government's conduct of international relations. Moreover, this risk is difficult to predict with any certainty. Although the implementation of international obligations is within Stormont's competence, so that it exists as an exception to the bar on interference with the conduct of international relations,[41] no part of the Withdrawal Agreement or the Protocol makes this distinction in the context of the Joint Committee. On one level, such a distinction would be impossible, because, as set out above, the proximity of Northern Ireland's laws to the evolving EU *acquis* is a matter both of preserving the integrities of the UK and EU customs areas and markets[42] as well as of determining the character of the continuing relations between the UK and the EU. Thus, the legality of such legislation is, at best, debatable. If, instead, Stormont were to legislate to modify or otherwise interfere with the use of section 8C of the EUWA 2018 to implement Joint Committee decisions concerning the Protocol, such legislation may risk putting the UK Government in breach of its own obligations under the Protocol if Stormont's modifications delayed or otherwise hampered the implementation of Joint Committee decisions.[43]

Seen in this light, Stormont's powers to modify or otherwise interfere with the implementation of the Protocol is subject both to the overriding effect of the Protocol as enacted in the EUWA 2018 and the concomitant restrictions on legislative capacity (whether express or by implication).

However, the UK Parliament wears none of Stormont's legislative shackles; its powers to direct the conduct of UK-EU relations through prescriptive legislation is, moreover, a matter of recent historical

[36]Ibid, s 26(1).

[37]Ibid, s 26(4).

[38]NIA 1998, s 14(5).

[39]This being defined in ss 6–7 of the NIA 1998, as previously discussed.

[40]An analogous point was made by the Supreme Court, in relation to the legislative competence of the UK Parliament, in *The Scottish Continuity Bill Reference* [2018] UKSC 64, [2019] AC 1022, at [51].

[41]NIA 1998, Sch 2, para 3(c).

[42]Protocol, above n 4, C 384 I/93, recitals.

[43]While space does not permit the consideration of hypothetical examples of how this may be done, a recent speech from the leader of Stormont's largest party (and member of the Northern Ireland Executive) 'pledged' to ensure that Protocol obligations, including any future aspects of the EU *acquis*, are never implemented, see 'DUP Leader Sir Jeffrey Donaldson's keynote speech on the NI Protocol' (*The News Letter*, 9 September 2021) https://www.newsletter.co.uk/news/politics/in-full-dup-leader-sir-jeffrey-donaldsons-keynote-speech-on-the-ni-protocol-3376466 (accessed 9 May 2022).

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record.[44] Against this backdrop, what Parliament has enacted in the EUWA 2018 jars by comparison, especially with regard to the statute's silence on the Joint Committee. This silence strikes at the normative heart of parliamentary sovereignty (which, along with the Joint Committee, I explore in detail in the third section below) when examined through the lens of two landmark decisions of the UK Supreme Court, as I set out in the next section.

2. Sovereignty, democracy and giving Parliament a chance: analysing Miller 1 and Miller 2

This section examines, in some detail, the reasoning and conclusions of two important judgments of the UK Supreme Court: *Miller 1* and *Miller 2*. Much analytical ink has been spilled over these judgments, as I set out below, and it is not possible simply to point to specific parts of either judgment as encapsulating a clear conclusion or a clear *ratio*. As a result, insofar as I analyse these judgments, I do so against the unavoidable backdrop of some of the major scholarship surrounding them. In this section, I distil two main points from *Miller 1* and *2*: only Parliament may give effect to significant constitutional change through legislation, and Parliament must be free of external restrictions to its legislative ability.

In *Miller 1*, the crux of the Secretary of State's case lay in the argument that treaty-making (and withdrawal) was an exercise of the Royal prerogative, rather than a power prescribed by statute.[45] Thus, armed with the certainty of 'Brexit means Brexit[46] in the aftermath of a bitterly polarising referendum,[47] the UK Government alone could initiate the process of terminating the UK's four-decade-old membership of the EU by giving notice under Article 50 of the Treaty on European Union (TEU). However, first the Divisional Court[48] and then the Supreme Court declared such a course of action to be unlawful and contrary to constitutional principle in the UK.

Both courts in *Miller 1* placed the sovereignty of the Crown in Parliament at the heart of their reasoning, but in noticeably different ways. In the Divisional Court, the question whether the Crown could make a valid notification under Article 50 TEU by use of the prerogative turned on the purpose of the European Communities Act 1972 (ECA 1972). The Divisional Court held that the purpose of the ECA 1972 was to 'introduce EU law into domestic law … in such a way that this could not be undone by exercise of Crown prerogative power'.[49] This was said to be on the basis that the ECA 1972, by introducing EU rights into domestic UK law, covered the entire field of the domestic applicability and availability of those rights, including covering any action to extinguish the domestic availability of those rights by severing the link between the ECA 1972 and the EU Treaties (that is, through withdrawal from the EU).[50] Summarising its reasoning, the Court stated:

> Parliament having taken the major step of switching on the direct effect of EU law … by passing the ECA 1972 as primary legislation, it is not plausible to suppose that it intended that the Crown should be able by its own unilateral action under its prerogative powers to switch it off again.[51]

In the Supreme Court, the most important question was whether the Crown could use its prerogative powers to effect a constitutional change as 'significant' and as 'far-reaching'[52] as removing 'EU law as

[44]See the European Union (Withdrawal) (No 2) Act 2019.

[45]*Miller 1*, above n 1, at [34].

[46]M Mardell 'What does "Brexit means Brexit" mean?' *BBC News* (London, 14 July 2016) https://www.bbc.co.uk/news/uk-politics-36782922 (accessed 9 May 2022).

[47]See generally, C Vaccari et al 'The United Kingdom 2017 election: polarisation in a split issue space' (2020) 43(3) West European Politics 587.

[48][2016] EWHC 2768 (Admin).

[49]Ibid, at [92].

[50]Ibid, at [94].

[51]Ibid, at [87].

[52]*Miller 1*, above n 1, at [81].

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an entirely new, independent and overriding source of domestic law'[53] by initiating the withdrawal process. The Court, by a considerable majority, answered the question emphatically in the negative.

Whereas the Divisional Court upheld the sovereignty of the Crown in Parliament by giving effect to the purpose of the ECA 1972 (as it interpreted), the Supreme Court's understanding of sovereignty is less clear. For one thing, the majority in that Court did not set out what part of the ECA 1972 would be breached by the Crown's exercise of its prerogative powers. Two of the Court's conclusions loomed large: the first was that the ECA 1972 was the conduit rather than the source of EU rights in domestic law.[54] The second was the acceptance of a metaphor put forward by Lord Pannick (for the respondents): that '[n]otification [under Article 50 TEU] is … the pulling of the trigger which causes the bullet to be fired, with the consequence that the bullet will hit the target and the Treaties will cease to apply'.[55]

However, the use of metaphors here demonstrates the difficulty in understanding how EU law figured within the UK constitutional framework, and indeed the reality that its existence domestically was simply accepted without trying to definitively understand its nature. Considering the ECA 1972 as a conduit implies that the statute is the 'channel or medium by which [EU law] is conveyed',[56] with the implication that removing EU law by withdrawal (via the prerogative) merely takes away the thing conveyed rather than affecting the conduit in any way. This analysis featured prominently in Lord Reed's dissent in *Miller 1*:[57]

> EU law is not itself an independent source of domestic law, but depends for its effect in domestic law on the 1972 Act: an Act which … has to be interpreted and applied in the wider context of the constitutional law of the UK.[58]

By contrast, in the majority's reasoning in *Miller 1*, EU law was held to be an 'independent and overriding source of domestic law' by operation of the ECA 1972 (as above). Mark Elliott has strongly criticised this conclusion, in large part because the majority clearly stated that the application of EU law domestically *depended* upon the operation of the ECA 1972, while simultaneously characterising it as an *independent* source of domestic law.[59] Elliott offers two ways to explain the majority's reasoning – first, that the ECA 1972 itself established EU law as an independent source of domestic law, but in Elliott's analysis, this fails because in this scenario, the 'independence' of EU law would be meaningless if it could be snuffed out by repealing the ECA 1972.[60] Secondly, the majority's characterisation of EU law as 'independent' is legally meaningless, and instead simply describes the 'reality that the EU makes laws that have effects in the UK'.[61]

A possibility not considered by the Court is that the precise nature of EU law in the domestic plane did not matter because, in order to be legitimate from a UK constitutional perspective, EU law had to be normatively compatible with the requirements of the UK constitution. Trevor Allan makes this point in his analysis[62] of the *Factortame (No 2)* case,[63] as an answer to Sir William Wade's claim that UK membership of the EU had fundamentally changed the UK's rule of recognition.[64] From Allan's perspective, no such change had occurred because the democratic credentials of EU law complied with the democratic foundations of the UK constitution, and thus its rule of recognition.[65] Thus,

[53]Ibid, at [80].
[54]Ibid, at [65].
[55]Ibid, at [94] and [261].
[56]*Oxford English Dictionary Online* (Oxford University Press, 2021).
[57]*Miller 1*, above n 1, at [204].
[58]Ibid, at [228].
[59]M Elliott 'The Supreme Court's judgment in *Miller*' (2017) 76(2) Cambridge Law Journal 257 at 270.
[60]Ibid, at 272.
[61]Ibid.
[62]TRS Allan 'Parliamentary sovereignty: law, politics, and revolution' (1997) 113 Law Quarterly Review 443.
[63]*R v Transport Secretary, ex p Factortame Ltd* [1991] 1 AC 603 (HL).
[64]HWR Wade 'Sovereignty – revolution or evolution?' (1996) 112 Law Quarterly Review 568.
[65]Allan, above n 62, at 445–446.

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with regard to EU law as it was available domestically, there is little normative difference between it and domestic law, regardless of whether the former is a form of domestic law, parachuted international law or some chimeric hybrid thereof. In any case, the use of the prerogative to interfere with the availability of the law would be normatively unconstitutional. The normative legitimacy of EU law within the UK constitution is an important point to which I return in the third section of this paper.

Whatever the analytical lens, it cannot satisfactorily pierce the fog of obscurity surrounding the majority's *ratio* in *Miller 1*. This is especially true of the majority's multiple references to the sovereignty of Parliament, which Elliott has criticised, observing:

> To suggest that the doctrine of parliamentary sovereignty assists in reaching the conclusion that the ECA should be construed as foreclosing [the use of the prerogative to initiate withdrawal] (because withdrawal is too great a constitutional matter for the prerogative) does no more than beg the question.[66]

This is, of course, true, and the Supreme Court's one-line conclusion on this point[67] neither illuminates its reasoning nor provides an answer to Elliott's critique. Nevertheless, the Supreme Court's ruminations on the ECA 1972 could be considered as being its conclusions on the purpose or effect of that Act: to prevent the UK's exit by use of the prerogative. This analysis is supported by the majority's rejection of the idea that the prerogative needed to be displaced only by express statutory provisions.[68] To be clear, I am not saying that the Supreme Court concluded that this was *in fact* the purpose of the ECA 1972, only that, if prerogative powers need not be constrained only by explicit statutory text, then it stands to reason that they may be constrained by implication, including by statutory purpose. Despite the doctrinal obscurity apparent in *Miller 1*, the principal theme in the majority judgment of the Supreme Court was that significant and far-reaching constitutional change is properly left only to Parliament.

Miller 1 was handed down together with two devolution references from Northern Ireland: *Agnew and others' application for judicial review* and *McCord's application for judicial review*. The Northern Ireland references were restricted to devolution questions, of which the Supreme Court answered one in some detail: whether the Northern Ireland Assembly (and by implication the Welsh Assembly and Scottish Parliament) had to consent before notice under Article 50 TEU could be given.[69] In substance, this question asked whether the Sewel convention was judicially enforceable, requiring as a matter of law that the UK Parliament should obtain the consent of its devolved counterparts before legislating to terminate membership of the EU.[70] The Supreme Court pointed to the political character of conventions in dispatching this question, remarking, 'judges … are neither the parents nor the guardians of political conventions; they are merely observers'.[71] This was the only issue on which the Supreme Court was unanimous. Although the Supreme Court was correct on one level – the political nature of conventions rendering them unenforceable as a matter of law – the Supreme Court's observations on the Sewel convention having 'an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures'[72] has a particular significance to the post-Brexit arrangements in Northern Ireland as enacted by the UK Parliament. I return to this point in the third section below.

Miller 2, much like its predecessor, was no stranger to doctrinal obscurity. The first main point in that case which is important here is the Supreme Court's unanimous statement that the Crown's

[66]Elliott, above n 59, at 267.

[67]*Miller 1*, above n 1, at [77].

[68]Ibid, at [85]–[86], rejecting the statement of Lloyd LJ in *R v Foreign and Commonwealth Secretary, ex p Rees-Mogg* [1994] QB 552.

[69]*Miller 1*, above n 1, at [136]–[151].

[70]Ibid, at [136].

[71]Ibid, at [146].

[72]Ibid, at [151].

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prerogative powers were forbidden from encroaching, not merely on the expressed will of Parliament (statute law) but also on Parliament's *ability* to express that will:

> The sovereignty of Parliament would … be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased.[73]

This point has perhaps been most extensively scrutinised in an illuminating exchange between Martin Loughlin and Paul Craig.

Loughlin, in his paper for Policy Exchange,[74] asserted that parliamentary sovereignty 'has always been understood to be a formal legal rule that grants supremacy to the laws enacted by the Crown in Parliament', with the Supreme Court's understanding of it being an 'attempt to transform a formal principle into a functional principle' which 'converts orthodoxy into heterodoxy' and is 'misconceived'.[75]

In his article,[76] Craig answers Loughlin by pointing to the capacity of the doctrine of parliamentary sovereignty to express 'capacity and constraint'.[77] Mark Elliott largely echoes this view, asserting, 'The principle of parliamentary sovereignty … is a fundamental principle that determines and reflects the nature of constitutional democracy in the UK'.[78]

Craig's (and Elliott's) reflections provide only a partial answer to Loughlin because of the context in which they must be understood. Invoking parliamentary sovereignty in the courts is useful when a breach of the doctrine can be remedied. An important distinction exists between the substance and effect of sovereignty and this distinction exists for a powerful reason: judicial intervention is possible in the latter, but not in the former.

Consider what Craig says in refuting the idea that parliamentary sovereignty exclusively concerns the supremacy of statute law:

> The principle of parliamentary sovereignty has … always contained conditions for its exercise, which embody a choice made by the players in the UK constitutional order. Discourse about such conditions occupies centre stage in much judicial and academic discourse concerning parliamentary sovereignty … This discourse forms the cornerstone for discussion in countless undergraduate law essays. If you removed such material from academic literature on parliamentary sovereignty, the stock of material would be diminished by circa 90 per cent.[79]

It is indeed true that the discourse around the existence and scope of conditions on the exercise of parliamentary sovereignty has animated – and continues to animate – considerable judicial and academic discourse. For the purposes of argument, let us also accept Craig's rhetorical flourish at the end of the above passage as empirical fact. The reality remains that none of this discourse has translated into judicial intervention to provide *relief* in the event that any of the conditions on the exercise of

[73]*Miller 2*, above n 2, at [42]. See also A McHarg 'The Supreme Court's prorogation judgment: guardian of the constitution or architect of the constitution?' (2020) 24(1) Edinburgh Law Review 88 at 94.

[74]M Loughlin *The Case of Prorogation: The UK Constitutional Council's ruling on appeal from the judgment of the Supreme Court* (London: Policy Exchange, 2019) https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf (accessed 9 May 2022).

[75]Ibid, p 16.

[76]P Craig 'The Supreme Court, prorogation and constitutional principle' (2020) Public Law 248.

[77]Ibid, at 254.

[78]M Elliott 'A new approach to constitutional adjudication? Miller II in the Supreme Court' (*Public Law for Everyone* 24 September 2019) https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/ (accessed 9 May 2022). Curiously, this statement appears to contradict Elliott's previous characterisation of parliamentary sovereignty: 'The sovereignty doctrine is […] pertinent only insofar as it prevents the prerogative from being used in opposition to the statute': see Elliott, above n 59, at 267.

[79]Craig, above n 76, at 254.

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parliamentary sovereignty are threatened. Craig (and the Supreme Court in *Miller 2*) lists some seminal cases as supportive of the Supreme Court's reasoning. In *Proclamations*, Cooke CJ famously declared, 'the King hath no prerogative, but that which the law of the land allows him'.[80] *Proclamations* was an advisory opinion, delivered by some of England's premier judges (including all three of its chief judges), on questions put to them by the Privy Council.[81] Although important, its principal points concerning the limitations of the prerogative relative to Parliament were not codified until the Bill of Rights nearly a century later, and only gained wide acceptance at that time.[82] Even so, *Proclamations* prohibited the use of the prerogative from changing the law *as it existed*, rather than from encroaching upon the law-making ability of Parliament. The other three authorities,[83] namely *De Keyser*,[84] *Fire Brigades Union*[85] and *Laker Airways*[86] all involved the use of prerogative powers to frustrate statute law (even in *Fire Brigades Union*, where the statute had been enacted but not yet brought into force).[87] Craig acknowledges that the Supreme Court essentially went *further* than these cases by preventing the prerogative from frustrating the power of Parliament to enact statutes.[88] However, he then appears to draw a specific line between these authorities and the Supreme Court's reasoning in *Miller 2*. Craig states that the prorogation affected '[Parliament's] capacity to exercise the totality of its legislative authority, and authority to scrutinise government action, thereby severely curtailing the opportunity for parliamentary voice on [Brexit]',[89] treating this as an attack on the normative foundations of parliamentary sovereignty (Parliament's democratic mandate),[90] thus justifying the Supreme Court's approach.[91]

Craig's approach is, with respect, unconvincing. Even assuming that the specific prorogation at issue in this case was a conclusive attack on the democratic foundations of Parliament, it is unclear why the Supreme Court needed to make the doctrinal leap from enforcing sovereignty through statute, to casting the enforceability net over parliamentary ability. This was because Parliament had already enacted legislation prohibiting a no-deal Brexit without parliamentary authorisation,[92] and the timing of the prorogation gave rise to a risk of precisely such an outcome, and thus the risk of the prerogative frustrating clear statutory purpose. Using the previously cited authorities to prevent such a risk would have been entirely orthodox. Instead, the Supreme Court's concern with the protection of Parliament's legislative ability completely glossed over the myriad complex processes which legislative ability *entails*.[93] I return to this point in the third section of this paper.

In addition to Parliament's legislative authority, the prorogation was also said to impact upon its responsibility 'for the supervision of the executive',[94] referencing the function of Parliament to hold the executive to account. Indeed, parliamentary accountability was characterised by the Court as

[80] *Case of Proclamations* (1610) 12 Coke Reports 74, at 75.

[81] Ibid, at 74.

[82] See J Goldsworthy *The Sovereignty of Parliament* (Oxford University Press, 2001) pp 159–164.

[83] Cited by Craig, above n 76, at 256 and the Supreme Court in *Miller 2*, above n 2, at [41], though only Craig cites *Laker Airways*.

[84] *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL).

[85] *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513 (HL).

[86] *Laker Airways Ltd v Department of Trade* [1977] QB 643 (CA).

[87] *De Keyser*, above n 84, at 509 (headnote), the relevant statute being the Defence Act 1842; *Fire Brigades Union*, above n 85, at 514A, the relevant statute being the Criminal Justice Act 1988; and *Laker Airways*, above n 86, at 645G, the relevant statute being the Civil Aviation Act 1971.

[88] Craig, above n 76, at 256–257.

[89] Ibid, at 257.

[90] Ibid, at 254–255.

[91] Ibid, at 257.

[92] The European Union (Withdrawal) (No 2) Act 2019, s 1(2) and (3).

[93] See D Howarth 'Westminster versus Whitehall: what the Brexit debate revealed about an unresolved conflict at the heart of the British constitution' in O Doyle et al (eds) *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (Cambridge: Cambridge University Press, 2021) pp 228–231.

[94] *Miller 2*, above n 2, at [50].

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being crucial enough to protect through judicial enforcement, lest a lengthy prorogation should undermine the democratic foundations of such accountability.[95] Accountability is an unremarkable feature of the UK constitution – the executive, comprising many MPs elected only in *that* capacity, is collectively responsible to Parliament, which in turn holds the executive to account.[96] The democratic foundations of such accountability are obvious.[97] However, *Miller 2* marks the first time (implicit in the Court's own judgment)[98] that accountability has been held to be a legally cognisable function of Parliament capable of judicial protection. This aspect of *Miller 2*, although precedentially novel, is clearer than the Supreme Court's ruminations on parliamentary sovereignty. This is for two main reasons: first, unlike with its reasoning concerning parliamentary sovereignty, the Supreme Court was clear that it was expanding or developing the law. Accountability having been previously invoked in order to justify judicial restraint, it was *applied* in *Miller 2* because of the risk that the bypass of parliamentary scrutiny would seriously impact domestic law should the UK crash out of the EU without sufficient time for parliamentary scrutiny of such a drastic step (which, by all accounts was a real risk).[99] Secondly, given this risk, the circumstances of the prorogation were extraordinary.[100]

Richard Ekins asserts that prorogation may only be extraordinarily refused by the monarch, but that otherwise the power to prorogue is uncontrollable by law.[101] Viewed in this way, accountability is a principle limited to the purely political field and not cognisable by the courts. But this is, with respect, a narrow view on how accountability functions in practice. Far away from the theatre of a Government defeat, everyday accountability in the Houses of Parliament involves debate, discussion and questioning by its members. The importance of MPs airing the views and concerns of their constituents to a government which has no democratic legitimacy independent of the Commons cannot be overlooked.[102] Thus, even if Parliament would not deprive the Government of office (as in fact it would not, following its return from the prorogation-that-wasn't) it would still hold the Government to account in the wider, more everyday sense. The reason why this accountability was *legally* relevant is explained in the Supreme Court's reasoning:

> A fundamental change was due to take place in the Constitution of the United Kingdom on 31st October 2019 … And the House of Commons has already demonstrated, by its motions against leaving without an agreement and by the European Union (Withdrawal) (No 2) Act 2019, that it does not support the Prime Minister on the critical issue for his Government at this time and that it is especially important that he be ready to face the House of Commons.[103]

The Supreme Court thus concluded that there was a risk that the executive was embarking on constitutional change for which it had no support from Parliament. Further, although the Supreme Court did not comment on the matter, the Prime Minister had, by the time judgment had been handed down in *Miller 2*, commented publicly about his intention to defy the requirements of the Bill that

[95]Ibid, at [47]–[48].

[96]Ibid, at [46].

[97]Ibid, at [48].

[98]Ibid, at [47]: 'The principle of Parliamentary accountability has been invoked time and again throughout the development of our constitutional and administrative law, as a *justification for judicial restraint* as part of a constitutional separation of powers' (emphasis added).

[99]*Miller 2* (above n 2), at [57].

[100]Ibid, at [56].

[101]R Ekins 'Parliamentary sovereignty and the politics of prorogation' (*Policy Exchange*, 2019) p 26 https://policyexchange.org.uk/wp-content/uploads/2019/09/Parliamentary-Sovereignty-and-the-Politics-of-Prorogation3.pdf (accessed 9 May 2022).

[102]See the distinction made by Vernon Bogdanor between sacrificial and explanatory accountability in Parliament, in 'Parliament and the judiciary: the problem of accountability' (*Third Sunningdale Accountability Lecture, UK Public Administration Consortium*, 9 February 2006) https://ukpac.wordpress.com/bogdanor-speech/ (accessed 9 May 2022).

[103]*Miller 2*, above n 2, at [57].

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would become the 2019 Act.[104] Accordingly, the need for the Prime Minister to face Parliament was a matter of constitutional importance, with the spectre of the prerogative being used to cause drastic legal change in plain and defiant frustration of statute law, looming large.

A criticism of this view might be that even if a risk existed of the prerogative being used in the aforementioned manner, risk does not always translate to reality and the Court should not have become embroiled in a hypothetical question. This is a criticism Loughlin makes, going as far as suggesting that the Court's engagement with hypothetical questions 'influence[s] the manner of presentation of constitutional narratives, which in turn shape[s] and even determine[s] constitutional requirements'.[105] There are two answers to this: first, refusing to determine an issue for the reason that it has not come to pass is itself engagement with a hypothetical question: that the issue in question *may not come to pass*.[106] Secondly, the risk in this case, while not pinpointed with mathematical precision, was certainly more than fanciful, while the nature of the risk (drastic constitutional change unauthorised by Parliament) was unprecedented. In such circumstances, the Supreme Court was perfectly justified in sidestepping doctrinal puritanism without sacrificing clarity of reasoning.

In *Miller 2*, like in *Miller 1* before it, the Supreme Court was concerned with allowing Parliament to decide whether and how to enact far-reaching constitutional changes. The significant addition made by *Miller 2* was its focus on the democratic credentials underlying Parliament's ability to make choices and its insistence that Parliament, as the only democratically legitimate forum, had both a right and a function to scrutinise such choices properly.

From exploring *Miller 1* and *2*, I distil two main points against which to analyse the impact on Northern Ireland of the incorporation of the Protocol. First, that significant constitutional change is a parliamentary function *par excellence*; and secondly, that Parliament has an uncurtailable role in scrutinising the actions of the Government. Grounding both points are Parliament's democratic credentials.

3. The impact of the Protocol's incorporation on parliamentary sovereignty

In this section I explore the way in which the incorporation of the Protocol into domestic law threatens the normative foundations of parliamentary sovereignty when viewed through the lens of *Miller 1* and *Miller 2*.

I begin with the functioning of the Joint Committee of the UK and the EU established by the terms of the Withdrawal Agreement, explored in the first section. Legislative prescription of UK ministers' functions in the Joint Committee is, for the most part, non-existent. The Joint Committee has several enumerated functions,[107] one of which clearly relates to the Protocol, including its stated objective in addressing issues which arise on the island of Ireland as a result of Brexit. Moreover, any Joint Committee decision to accept new EU law results in such law automatically becoming part of the Protocol[108] and thus, the Withdrawal Agreement.[109] Even if Articles 5–10 of the Protocol should cease to apply as a result of the Northern Ireland Assembly voting to confirm such cessation, the rest of the Protocol, including its wide objective and EU laws which fall within the scope of this objective (even those which fall outside the scope of Articles 5–10) carries on regardless.[110] The upshot of this is that UK ministers, as part of Joint Committee decision-making, may continue to add significant

[104]K Proctor and P Walker 'Boris Johnson: I'd rather be dead in ditch than agree Brexit extension' *The Guardian* (London, 5 September 2019) https://www.theguardian.com/politics/2019/sep/05/boris-johnson-rather-be-dead-in-ditch-than-agree-brexit-extension (accessed 9 May 2022).

[105]Loughlin, above n 74, p 16.

[106]Craig makes a similar point by holding that courts could refuse to judicially scrutinise vast domains of both statutory and prerogative powers on the basis that future statutory reform is always possible: above n 76, at 268.

[107]Withdrawal Agreement, above n 4, C 384 I/83–84, Arts 164 and 166.

[108]Protocol, above n 4, C 384 I/99, Art 13.4(a).

[109]Withdrawal Agreement, above n 4, Art 166.2.

[110]For example, the non-diminution guarantee in respect of rights, safeguards and equality of opportunity (and all attendant laws that fall within the scope of this guarantee): Protocol, above n 4, C 384 I/99, Art 2.1.

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new EU laws to Northern Ireland's statute book, without seeking any specific authorisation from Parliament, in the complete absence of any legislative provision requiring such authorisation (whether positively or by implication). And nor can the Northern Ireland Assembly, ministers or Departments make laws which control or otherwise prescribe this process of adding new law without coming up against the hurdles previously set out. All of this resurrects the spectre that the Supreme Court emphatically worked to exorcise in *Miller 1*: significant or far-reaching constitutional change without parliamentary authorisation.

Now, there are two possible answers to the above problem: first, that *Miller 1* concerned the use of prerogative powers to change statute law and this principle is inapplicable in the present context. This is because the Withdrawal Agreement, which establishes the Joint Committee and authorises it to add EU law which it accepts as falling within the scope of the Protocol, was statutorily endorsed by Parliament. While that is true on a general level, this argument does not provide a satisfactory answer to the lack of statutory prescription for the exercise of ministerial powers in the Joint Committee. While *Miller 1* was markedly imprecise on how prerogative powers would frustrate statute law, one could arguably infer such frustration by implication (as in the first section of this paper). In the context of the EUWA 2018, it is not possible to make such an inference, because while the purpose of the that Act was to provide for the Withdrawal Agreement to have effect in domestic law, the Withdrawal Agreement itself contains multiple purposes within its overall purpose (Brexit), one of which, being the circumstances on the island of Ireland, finds no equivalent expression in the EUWA 2018. Section 10 of the EUWA 2018 is no satisfactory answer to this conundrum, because it is concerned with keeping intact North-South arrangements as they existed *prior* to Brexit,[111] whereas the Protocol looks decidedly to the future. Thus, in the absence of a statutory provision which occupies the field of the UK's involvement in the Joint Committee vis-à-vis the Protocol, these powers must be located in the foreign relations prerogative. The alternative conclusion, that the EUWA 2018 *permits* UK ministerial action to expand the Northern Ireland statute book without legislative involvement, would be tantamount to Parliament having enacted arguably one of the most significant qualifications to its own sovereignty, if viewed through the lens of *Miller 2* and its refusal to countenance executive attempts to restrict Parliament's legislative ability.

We therefore face at least a similar, if not the same, situation in this context as the Supreme Court faced in *Miller 1*: the prerogative making significant changes to the Northern Ireland statute book without parliamentary approval for the same. While it may be thought that another Brexit-sized constitutional change is unlikely, the concerning change is not in what the Joint Committee might decide – the change is that the Joint Committee decisions have automatic effect (without UK legislative scrutiny) at all. This is a crucial point: the direct effect of new EU law in Northern Ireland under the Protocol differs normatively from its effect under the EU Treaties (that is, during the UK's membership of the EU). I return to this point in greater detail.

It might be thought that the Supreme Court's 'reasonable justification' test in *Miller 2*[112] may provide an answer to this problem. Applied here, it would allow the expansion of the statute book by prerogative action alone if there was reasonable justification for such a step. But what is the reasonable justification? No part of the Protocol requires UK ministers in the Joint Committee to avoid parliamentary scrutiny when making decisions as part of that committee. Nor are such decisions inherently of a character which could not countenance parliamentary involvement through debate and scrutiny. On the contrary, Joint Committee decisions which expand the Northern Ireland statute book are legislative decisions *par excellence*.

The second answer lies in the scant democratic 'controls' as part of the Protocol implementation process. According to the Northern Ireland High Court, these controls lie with the Joint Committee, in which the UK Government plays a 'full role',[113] the Assembly with its democratic consent

[111]See eg EUWA 2018, s 10(2).
[112]*Miller 2*, above n 2, at [50].
[113]*Allister*, above n 24, at [260]. Endorsed by the Court of Appeal in [2022] NICA 15, at [268].

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mechanism[114] and Parliament itself.[115] However, as set out above, these scarcely provide a satisfactory answer when, although Parliament and the Assembly are democratic in their mandates, neither institution is able to exert any real control over the potentially large expansion of the Northern Ireland statute book. While a related point would be Parliament's sovereign ability to legislate in breach of the Withdrawal Agreement (as a matter of domestic law), perhaps to bar UK Ministers from agreeing the implementation of any further EU law, such legislation may invariably be disapplied in the same manner as in *Factortame*, because the Withdrawal Agreement[116] and section 7A of the EUWA 2018 demand such a step.

The normative critique of Parliament's incorporation of the Protocol arises precisely because of the *manner* of this incorporation: that in enacting provisions which effectively sidestep parliamentary scrutiny with ease, the resultant democratic deficit risks placing the normative foundations of the UK's rule of recognition in jeopardy.

There is no universally accepted normative foundation for the rule of recognition that the Crown in Parliament is the highest source of law in the UK. However, democracy plays a large part in such a foundation. Craig states 'the modern rationale is that the democratically elected Parliament represents the will of the people, with the consequence that there should be no judicially enforceable limits to its power'.[117] Jeffrey Goldsworthy provides an expanded explanation:

> To recognize any kind of ultimate legal authority is necessarily to trust that it will not be abused, and to take the risk that it will be. If that kind of trust is in principle justifiable, partly because it is unavoidable, then a doctrine that reposes it in a democratically elected legislature must surely be justifiable.[118]

It is worth noting that democracy as the standout (if not necessarily sole) foundation for legitimating the legal supremacy of the Crown in Parliament is reflected in several judicial decisions of the highest authority, both recent[119] and less recent.[120] Thus, despite the caution expressed on this point,[121] my analysis here proceeds by examining the democratic impact of Protocol incorporation, when assessed against the democratic mandate which was said to characterise Brexit.

Jo Murkens observes that the character of democracy at the heart of parliamentary sovereignty is decidedly procedural, rather than substantive.[122] At no other time in recent memory has this point been laid absolutely and painfully bare than during and after the Brexit referendum. Concerns about the legitimacy of the referendum,[123] a plethora of possible outcomes, a Parliament which failed to agree a withdrawal agreement three times[124] and unconvincing uses of idioms involving cake[125] were all swept aside by the political juggernaut of the referendum representing the will of the UK electorate and the duty on the Government and Parliament to deliver on its result.[126]

[114]Ibid, at [258].
[115]Ibid, at [266].
[116]Withdrawal Agreement, above n 4, C 384 I/4, Art 4.2.
[117]Craig, above n 76, at 254–255.
[118]Goldsworthy, above n 82, p 254.
[119]*R (SC, CB and Others) v Work and Pensions Secretary* [2021] UKSC 26, [2022] AC 223, at [169].
[120]*R (Bancoult) v Foreign and Commonwealth Secretary* [2008] UKHL 61, [2009] 1 AC 453, at [35].
[121]A McHarg 'Giving substance to sovereignty: parliamentary sovereignty and parliamentary effectiveness' in B Dickson and C McCormick (eds) *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Oxford: Hart Publishing, 2021) p 219.
[122]J Murkens 'Democracy as the legitimating condition in the UK constitution' (2018) 38 Legal Studies 42, at 50.
[123]See eg S Kröger 'The democratic legitimacy of the 2016 British referendum on EU membership' (2019) 15(3) Journal of Contemporary European Research 284.
[124]See M Thimont Jack 'Parliament's "meaningful vote" on Brexit' (*Institute for Government*, 18 February 2020) https://www.instituteforgovernment.org.uk/explainers/parliament-meaningful-vote-brexit (accessed 9 May 2022).
[125]'Post-Brexit trade: UK having its cake and eating it, says Boris Johnson' *BBC News* (London, 30 December 2020) https://www.bbc.co.uk/news/uk-politics-55486081 (accessed 9 May 2022).
[126]O Wright 'Second Brexit vote would be a betrayal, says Theresa May' *The Times* (London, 18 December 2017) https://www.thetimes.co.uk/article/second-brexit-vote-would-be-a-betrayal-says-theresa-may-k2zkc0mzt (accessed 9 May 2022);

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However, the centrality of the referendum result in the justification behind the biggest constitutional change in the UK in generations cements the position of (some version of) democracy in the normative foundation of parliamentary sovereignty, at least in relation to Brexit. In short, the people voted to leave the EU and Parliament enacted that decision into law, thereby legitimating its position as the highest source of law in the eyes of the people. In its legislative choices on the implementation of the Protocol, however, it is this very democracy that Parliament has risked diminishing. This is plain when considering the Joint Committee.

The democratic credentials of Joint Committee decision-making are guaranteed, according to the Northern Ireland High Court, by the role that the UK Government plays in the Committee (as above). Now, the UK Government has no democratic mandate independent of the House of Commons, to which it is responsible. This practice of responsible government is said to be indicative of democratic legitimacy in the Westminster style of governance.[127] However, in circumstances where party discipline and party whips mean that the role of an MP is sometimes to merely support Government measures,[128] the idea of scrutiny as a significant indicator of democratic legitimacy can be reduced to little more than a paper tiger.[129] It is in this context that the complete absence of a statutory role for parliamentary scrutiny is even more concerning: Government business dominates the Commons by its own rules of procedure, meaning that unless the Government is under an express statutory duty to provide for MPs to debate and vote,[130] it may choose not to allocate any time for such a process. Admittedly, while 20 days are allocated to opposition business, the order of business on those days depends entirely on the Leader of the Opposition and the leader of the second largest opposition party,[131] neither of whom are Northern Ireland MPs. Thus, an issue of democratic deficit concerning Northern Ireland may be included in the order paper if it accords with the political priorities of parties *outside* Northern Ireland. This reality accords with the experience of insufficient attention given by Westminster to Northern Ireland business.[132]

It may be said that, in enacting section 7A of the EUWA 2018 (as amended), the 2020 Parliament merely did what the then Parliament did in respect of the ECA 1972 – that is, laws adopted under the Protocol (and thus the Withdrawal Agreement) would have effect without any further enactment. However, this is only a superficially attractive point. Membership of the EU did not turn the UK into a 'rule-taker' with no seat at the tables in Brussels and Luxembourg where the rules were made. UK residents voted members to the European Parliament,[133] UK Ministers were members of the Council of the European Union[134] and the UK Government recommended Commissioners to the European Commission[135] to be proposed by the Council of the European Union and voted into office by the European Parliament.[136] Finally, the overarching direction of travel of the EU was decided at the European Council,[137] which included the UK Prime Minister among its members.[138] While this was by no means a perfect system and suffered from criticisms of democratic

'Brexit: May vows no compromise with EU on Brexit plan' *BBC News* (London, 2 September 2018) https://www.bbc.co.uk/news/uk-politics-45385421 (accessed 9 May 2022).

[127]See eg Ekins, above n 101, p 7 and Loughlin, above n 74, p 17.

[128]A point made by Loughlin, above n 74, p 17.

[129]Murkens, above n 122, at 49.

[130]Cf the (now repealed) EUWA 2018, s 13.

[131]HC SO No 14(2).

[132]See D Birrell 'Northern Ireland business in parliament: the impact of the suspension of devolution in 2002' (2007) 60(2) Parliamentary Affairs 297 and A Evans 'Northern Ireland, 2017–2020: an experiment in indirect rule' (2021) Public Law 471.

[133]European Assembly Elections Act 1978 (repealed), s 3C.

[134]Consolidated version of the Treaty on European Union [2012] OJ C 326/24, Art 16.2.

[135]Although Commissioners are required to 'neither seek nor take instructions from any Government' (see ibid, C 326/25, Art 17.3), the scholarship on this issue demonstrates greater nuance: see A Wonka 'Decision-making dynamics in the European Commission: partisan, national or sectoral?' (2008) 15(8) Journal of European Public Policy 1145.

[136]Treaty on European Union, above n 134, C 326/26, Art 17.7.

[137]Ibid, C 326/23, Art 15.1.

[138]Ibid, C 326/23, Art 15.2.

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deficit,[139] the democratic credentials of governance at Westminster are not perfect either. More to the point, there was never a requirement (from a UK constitutional perspective) of EU membership to produce perfect democratic credentials in order to be democratically legitimate. If democratic credentials support the authority of the Crown in Parliament as the highest source of law in the UK, then that authority is surely reinforced when the European law to which it gives effect is itself backed by democratic credentials which are comparable to those in the UK.[140] The significant change ushered in by the implementation of the Protocol is the future incorporation of EU law without even *these* democratic credentials. This is why Joint Committee decisions having automatic effect under the terms of both the Protocol and section 7A of the EUWA 2018 is a sizeable and significant constitutional change in itself, the significance and impact of which is not lessened by pointing to the enactment of the EUWA 2018.

There is no prior scrutiny by UK or Northern Ireland authorities of EU legislative proposals before they are enacted (of course, there could not be, in light of Brexit). The body with the capacity to scrutinise new EU law with a view to determining whether it should be added to the Protocol and thus have effect in domestic law is the Joint Committee. Neither the Protocol nor any UK statute provides for any mechanism by which the Joint Committee may consult Stormont authorities in respect of these decisions. In respect of the first known potential addition to the Protocol, it was a committee of the Westminster Parliament that enquired if and how such an addition would be made.[141] Post-addition scrutiny of new EU law by Parliament is not guaranteed, and even if guaranteed may not legally stem, far less reverse, the tide, due to the likelihood of disapplication of statutory attempts to restrict the effect of the Withdrawal Agreement in domestic law.

In respect of the Northern Ireland Assembly, the situation is no better. First, it is statutorily barred from modifying the effect of the Withdrawal Agreement in domestic law (as above). Secondly, although the Assembly may vote to end the application of certain parts of the Protocol, its actions have no consequence on the remaining parts of the Protocol. Thirdly, in respect of exercising its consent vote, the Assembly is given opportunities to do so every four or eight years, depending on the outcome of the previous such vote.[142] Whether four years' worth of potential expansions of the Northern Ireland statute book can be given due attention by the Assembly during a period which could be as long as almost six weeks[143] and as short as less than a full day[144] remains to be seen. Finally, the effective *carte blanche* with which the Joint Committee may add new EU law to the Protocol is itself concerning from a normative perspective. This is because, as previously examined, unlike section 2(1) of the ECA 1972, section 7A of the EUWA 2018 gives effect to a treaty with an expansive potential, *unsupported* by democratic credentials for such expansion (from a UK perspective). Parliament's incorporation of such a treaty therefore differs *normatively* from its having given effect to EU law while the UK was a Member State.

The relevant context here is not treaty incorporation, but Brexit, with its foundations in democratic legitimacy. Driven by the conviction that Brussels constrained the democratic choices of the UK electorate while the UK was a Member State, the referendum was the chance to 'revive democracy in Britain'.[145] If the will of the people therefore necessitated exiting the EU, then the replacement of EU membership with a law-making process which is in fact undemocratic is normatively jarring. It is especially jarring when considered against the statutory backdrop to EU membership: successive

[139]K Nam-Kook and J Sa-Rang 'Democratic deficit, European constitution, and a vision of the federal Europe: the EU's path after the Lisbon Treaty' (2010) 17(2) Journal of International and Area Studies 53, at 55–58.

[140]As covered in the first section, with reference to Allan, above n 62, at 445–446.

[141]See two letters from the Chair of the European Scrutiny Committee to the Minister of State for Northern Ireland: letter of 26 May 2021 https://committees.parliament.uk/publications/6117/documents/68332/default/ (accessed 9 May 2022) and letter of 19 July 2021 https://committees.parliament.uk/publications/6984/documents/72834/default/ (accessed 9 May 2022).

[142]Protocol, above n 4, C 384 I/102, Art 18.5.

[143]NIA 1998, Sch 6A, para 4(2).

[144]Ibid, Sch 6A, para 10(5)(a).

[145]E Bell 'Brexit and the illusion of democracy' (2017) 31(3) Socialism and Democracy 52, at 53.

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statutory restrictions on UK ministers agreeing changes to the EU treaties, especially those which expanded the EU's competences relative to Member States, in the absence of specific parliamentary authorisation and referendums,[146] pointing to the increasing importance of democratic authorisation which Parliament had built into the UK's relationship with the EU.

Returning briefly to the Supreme Court's discussion of the Sewel convention in *Miller 1* (from the first section of this paper), it is important to recall that *none* of the devolved legislatures granted their consent in respect of the European Union (Withdrawal Agreement) Act 2020, which incorporated the Withdrawal Agreement (and Protocol) into domestic law.[147] In the context of the normative foundations of parliamentary sovereignty residing in democratic legitimacy (as explored earlier), the manner of this incorporation has significant consequences. At the time of *Miller 1*, Brexit was going ahead in spite of democratic wishes to the contrary in Scotland and Northern Ireland.[148] In 2020, the new withdrawal arrangements were enacted in spite of even greater (albeit indirect) democratic rejection. As Aileen McHarg notes, democratic demand has a particular resonance in the context of the operation and role of the Sewel convention:

> In practice, the contemporary history of devolution is not one of a top-down transfer of power from Westminster to the devolved territories, but rather of bottom-up demand for increased autonomy to which Westminster has given effect. Accordingly, the constitutional arm of the Sewel convention secures the *sharing* of political and legal authority in relation to the determination of the scope of devolved autonomy (emphasis in the original).[149]

The centrality of democratic legitimacy in the relationship between Westminster and the devolved administrations was absent in the Supreme Court's discussions of the Sewel Convention in *Miller 1*, and effectively threatened at the point of exiting the EU. Over its express objections, Northern Ireland lost considerable say (through the Assembly, Westminster and the European Parliament) in the laws to which it is subject, in the final act of a geopolitical saga which its residents had already rejected four years earlier. In such circumstances, pointing to the fact of Parliament having incorporated the Protocol effectively empties its sovereignty of considerable democratic, and thus normative, value. Devoid of such normative value, what remains to justify the authority of the Crown in Parliament as supreme?

From the perspective of Northern Ireland authorities, the consequence is considerable. The Joint Committee, in which Northern Ireland authorities play no explicit part,[150] provides no effective answer to the glaring problem of laws being made *for* Northern Ireland, with no real (even indirect) democratic input *from* Northern Ireland. The idea that Parliament will function effectively as the democratic forum in which to scrutinise such issues unravels when one considers that Northern Ireland elects 18 MPs to a 650-member House, and of those 18 MPs, 7 do not take their seats. This is even before the problem identified above, of Government control of House business, so that truly *effective* scrutiny may well be at the pleasure of the Government. The impact this has on the principle of parliamentary accountability, as the Supreme Court held in *Miller 2*, is concerning. If the principle is placed in jeopardy by a five-week shutdown of parliamentary business, how much more is it impacted in respect of a process of law-making that largely avoids Parliament altogether?[151]

[146]See *Miller 1*, above n 1, at [27]–[29].

[147]See eg E Dellow-Perry and R McCaffrey 'Legislative consent motions' (NIAR 87-2020) (Northern Ireland Assembly Research and Information Service) (25 September 2020), 22 (fig 1) available at http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2020/procedures/5920.pdf (accessed 8 May 2022).

[148]See A McHarg 'Constitutional change and territorial consent: the Miller case and the Sewel convention' in M Elliot et al (eds), *The UK Constitution after Miller: Brexit and Beyond* (Oxford: Hart Publishing, 2018) p 156.

[149]Ibid, p 165.

[150]Even in the Specialised Committee constituted under Art 165.1(c) of the Withdrawal Agreement, above n 4, C 384 I/83, or the Joint consultative working group constituted under Art 15.1 of the Protocol, above n 4, C 384 I/100.

[151]In answer to the point that *Miller 2* was concerned with the specific impact of prorogation on parliamentary accountability, the Supreme Court manifestly drew a much broader application of accountability in *Miller 2*, above n 2, at [46].

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Now, the impact of the Protocol's incorporation goes beyond creating a democratic deficit. Democratic deficits are concerning from a normative perspective, but do not per se threaten the sovereignty of Parliament. This is because the law does not recognise restrictions on the ability of the Crown in Parliament to enact law, regardless of its composition[152] or the regularity[153] or recentness[154] of its popular legitimacy. However, as the Supreme Court held in *Miller 2*, parliamentary sovereignty is threatened if Parliament's *ability* to make law is threatened by external factors. It is at this juncture that we return to the Protocol's dynamism, which centres around two matters: the Joint Committee and new EU legal provisions which replace or amend those listed in the Protocol.[155] First, let us be clear that the Joint Committee *is* a law-making body for the UK, albeit that its ability to make law is in respect of Northern Ireland. Secondly, there are categories of new EU law which have automatic effect without Joint Committee involvement.

The Joint Committee is an unprecedented anomaly in the understanding of parliamentary sovereignty. Two classic statements of principle are applicable here: treaty-making and treaty-fulfilment in the international plane are prerogative functions beyond the purview of municipal courts,[156] and treaties are not self-executing, in that they must be incorporated by statute to be enforceable by municipal courts.[157] The upshot to both principles is that the prerogative to make and fulfil treaties in the international plane does not alter domestic law. However, what if the incorporation of a treaty left considerable room for the prerogative to do exactly that? The EUWA 2018 (as amended), by remaining completely silent on *how* UK ministers may exercise their functions as part of Joint Committee decision-making, gives rise precisely to this risk. The democratic deficit is at its most glaring when looking at new EU law which applies automatically *without* Joint Committee involvement. This is new law in which the post-Brexit UK plays absolutely no decisional role, either in content or in applicability. And nor are there any restrictions on this aspect of the Protocol contained in the text of the Protocol itself (or in the text of the EUWA 2018), in relation to the scope of amendment or replacement. This is why the treatment of the democratic deficit arguments in *Allister* is glaringly cursory: what does a court do when faced with changes to domestic law over which Parliament has no control, and neither does the Government which holds office with the confidence of the Commons? It is important to recall that, although the increasing trend towards a legal understanding of parliamentary sovereignty as a substantive doctrine[158] is not anchored to a *particular* understanding of democracy, it is nevertheless anchored to democracy.[159] To that extent, appreciating the reality of the EUWA 2018 – the almost complete removal of democratic input into the laws to which Northern Ireland will be subject – subverts this understanding of parliamentary sovereignty. The *Allister* litigation provides worrying insights in this regard: two courts providing three different ways of explaining the effect of the EUWA 2018,[160] none of them convincing enough to be adopted generally.

Conclusion: a tentative way forward

The critiques made in this paper are far from exhaustive; the normative difficulties of the implementation of the Protocol may lead to consequences unforeseeable at this early stage in the post-Brexit era. In its choices, Parliament has authorised potentially significant constitutional change which bypasses democratic choice and accountability.

[152]For example, through alterations to membership made by the House of Lords Act 1999.

[153]For example, the Septennial Act 1715.

[154]For example, through incremental, albeit temporary, extensions to the parliamentary lifetime during the Second World War through the Prolongation of Parliament Acts 1940–1944.

[155]Protocol, above n 4, C 384 I/99-100, Art 13.3.

[156]*Rustomjee v The Queen* (1876) 2 QBD 69 (EWCA), 74 per Lord Coleridge CJ.

[157]*JH Rayner Ltd v Department of Trade* [1990] 2 AC 418 (HL), at 500B per Lord Oliver.

[158]McHarg, above n 121, p 217.

[159]*Miller 2*, above n 2, at [41] and [58].

[160][2021] NIQB 64, at [114] (EUWA 2018 has overriding effect); [2022] NICA 15, at [202] (subjugation by the EUWA 2018 of other statutes); and [2022] NICA 15, at [391] (modification by the EUWA 2018 of certain other statutes).

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In the end, the risk that Parliament, by enacting its will as it has, has started to hollow out the normative foundations of its own sovereignty, may only be ameliorated by widespread reform to the political constitution for which Northern Ireland has neither time nor patience. More to the point, such reform will require careful consideration, especially to address the normative concerns raised here. Such consideration is outside the scope of this paper. A comparatively minor reform which may be achievable with sufficient political will is to agree a process by which Northern Ireland authorities may be consulted in respect of new EU law which is likely to fall within the scope of the Protocol, whether or not within the scope of Articles 5–10.[161] This would not necessitate any changes either to the Withdrawal Agreement (and the Protocol) or the EUWA 2018. However, such a reform would not provide a complete answer to the critiques made here.

In the annals of Brexit, the constitutional narrative would be one of steadfastly upholding the sovereignty of the Crown in Parliament by repeatedly (though confusedly) providing it the chance to make decisions of monumental scale. It would be a bitter irony for the annals to then record that, having been given such chances, Parliament allowed itself to be caught in the jaws of a pincer of its own making.

[161]A suggestion also made by David Phinnemore and Katy Hayward: see D Phinnemore and K Hayward, 'Northern Ireland's voice on the protocol needs to be heard' *The Irish Times* (5 September 2021) https://www.irishtimes.com/opinion/northern-ireland-s-voice-on-the-protocol-needs-to-be-heard-1.4665483 (accessed 9 May 2022). See also K Hayward et al *Anticipating and Meeting New Multilevel Governance Challenges in Northern Ireland after Brexit* (QUB and The UK in a Changing Europe, 2020) pp 47–50, available at https://ukandeu.ac.uk/wp-content/uploads/2020/05/UKICE-Post-Brexit-Gov-NI-Report.pdf (accessed 9 May 2022).

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