

<b>Institution:</b> University of Cambridge		
<b>Unit of Assessment:</b> UoA 18		
<b>Title of case study:</b> Shaping judicial and parliamentary consideration of Brexit		
<b>Period when the underpinning research was undertaken:</b> 2000-present		
<b>Details of staff conducting the underpinning research from the submitting unit:</b>		
<b>Name(s):</b>	<b>Role(s) (e.g. job title):</b>	<b>Period(s) employed by submitting HEI:</b>
Professor Mark Elliott	Professor of Public Law (2015)	01.10.2000-present
<b>Period when the claimed impact occurred:</b> 2015-2019		
<b>Is this case study continued from a case study submitted in 2014?</b> No		
<p><b>1. Summary of the impact</b> (indicative maximum 100 words)</p> <p>Mark Elliott has contributed to two pivotal legal developments relating to Brexit; the Supreme Court's landmark judgments in the <i>Miller I</i> and <i>Miller II</i> cases and the enactment of the European Union (Withdrawal) Act 2018 ('EUWA'). Publications on Elliott's blog influenced the way in which the Government argued its case in <i>Miller I</i> and the way in which the claimant argued its case in <i>Miller II</i>. Elliott's role advising (along with Stephen Tierney, University of Edinburgh) the House of Lords Constitution Committee on the EUWA led to a heightened awareness in Parliament of constitutional risks. Subsequent amendments to the Bill, made directly on the committee's recommendations, significantly improved the constitutional coherence of this vital piece of legislation. Elliott's further advice to the Committee and a related publication on his blog in respect of the European Union (Withdrawal) Act 2019 were both cited in debate in the House of Lords and informed amendments that were moved in respect of the legislation.</p>		
<p><b>2. Underpinning research</b> (indicative maximum 500 words)</p> <p>The impact is informed by work on the UK constitution conducted by Elliott over two decades. Both the <i>Miller</i> case and the EUWA engage fundamental constitutional questions concerning the rule of law, the separation of powers and parliamentary sovereignty. Elliott has written extensively about these matters and, in particular, about the relationship between them as interlocking facets of the UK's constitutional order.</p> <p>On the rule of law, Elliott's research publications [R1] [R2] [R3] [R4] [R6] on the status of EU law within the UK legal system have addressed constitutional issues that arise from uncertainties as to that status. These issues identified in Elliott's research, along with research conducted by Tierney, led Elliott and Tierney to advise the Constitution Committee that the Government needed to tread very carefully in categorising 'retained EU law' in the Bill. This it failed to do, and Elliott and Tierney were able to put forward detailed recommendations as to how the Bill could be improved, which helped inform the final terms of the Act.</p> <p>On separation of powers, Elliott and Tierney [R5] offer a detailed doctrinal critique of executive law-making powers within the UK constitution, the dangers to Parliament of such an approach, and the risks it brings to the balance of powers within an unwritten constitution. In advising the Constitution Committee, they used this research to offer detailed, practical suggestions for how Section 8 of the Act could be improved. The structure of these recommendations were in the end accepted by the Government, helping to rebalance powers under the Bill in favour of Parliament.</p> <p>Elliott has written extensively about parliamentary sovereignty and its relationship with the doctrine of the supremacy of EU law [R2] [R3] [R4] [R6]. His research findings in this area inform his understanding of the constitutional implications of the European Communities Act 1972 ('ECA') which, in turn, shaped his analysis of the issues at stake in the <i>Miller I</i> case. This</p>		

led him to argue that the ECA should be understood in a way that did not encroach upon the Government's legal capacity to trigger the Article 50 process using its prerogative powers.

### 3. References to the research (indicative maximum of six references)

- [R1] Elliott, M. (2016). On why, as a matter of law, triggering Article 50 does not require Parliament to legislate. *Public Law for Everyone* blog, 30 June. [\[Link\]](#)
- [R2] Elliott, M. (2014). Constitutional legislation, European Union law and the nature of the United Kingdom's contemporary constitution. *European Constitutional Law Review*, 10(3), 379-392. [\[DOI\]](#)
- [R3] Elliott, M. (2015). The principle of parliamentary sovereignty in legal, political and constitutional perspective. In J. Jowell, D. Oliver and C. O'Connell (Eds.), *The changing constitution* (8th ed., pp. 38-66). Oxford University Press. ISBN: 9780198806363.
- [R4] Elliott, M. (2018). Sovereignty, primacy and the common law constitution: What has EU membership taught us? In M. Elliott, J. Williams and A. Young (Eds.), *The UK constitution after Miller: Brexit and beyond* (Chapter 10). Hart Publishing. ISBN: 9781509916405.
- [R5] Elliott, M. and Tierney, S. (2019). Political pragmatism and constitutional principle: The European Union (Withdrawal) Act 2018. *Public Law*, 2019 (Jan.), 37-60. [\[Link\]](#)
- [R6] Elliott, M. (2017). The Supreme Court's judgment in Miller: In search of constitutional principle. *Cambridge Law Journal*, 76(2), 257-288. [\[DOI\]](#)

[R2, R3, R4, R5, R6] have all been peer reviewed. [R1] distils this research for a legal and policy audience. The items cited above therefore meet the 2\* minimum threshold.

### 4. Details of the impact (indicative maximum 750 words)

Elliott has contributed to two pivotal legal developments relating to Brexit; the Supreme Court's landmark judgments in the *Miller I* and *Miller II* cases and the enactment of the European Union (Withdrawal) Act 2018 ('EUWA'). The *Miller* cases concerned the legal preconditions to the initiation of the process for the UK's withdrawal from the EU and the legality of the Government's attempt to prorogue Parliament at a particularly sensitive time in relation to Brexit. The EUWA is widely considered to be the most constitutionally significant piece of legislation since the ECA.

Elliott's impact in respect of these two matters has been secured via publications posted on his blog, *Public Law for Everyone*, and his role (with Tierney, University of Edinburgh) as legal adviser to the House of Lords Select Committee on the Constitution. Elliott served as one of the Committee's two legal advisers from 2015 to 2019.

#### The *Miller I* case

The *Miller I* case concerned whether the UK Government had legal authority to trigger the Article 50 withdrawal process under the royal prerogative. In a blog post in June 2016, Elliott argued that it did. The Divisional Court and subsequently the Supreme Court rejected that view. However, Elliott's arguments on this point were influential in two ways. First, the UK Government adopted Elliott's arguments when arguing the case before the UK Supreme Court. Second, the leading dissenting judgment, given by Lord Reed, accepted key aspects of the Government's argument, which were themselves premised upon arguments first advanced by Elliott [E1]. Elliott's work thus impacted on how the *Miller* case was argued by the UK Government and upon the leading dissenting judgment.

Elliott's impact has been clearly acknowledged by other leading scholars. Phillipson [E2] comments that by the time *Miller* ended up in the Supreme Court, the Government had 're-tooled', 'formulating a set of more sophisticated arguments that drew heavily on academic commentary, in particular that published by John Finnis, a notable legal philosopher and constitutional theorist, and Mark Elliott, one of the UK's leading public lawyers'. Phillipson goes on to say that a 'new line of argument' used by the Government in the Supreme Court was 'taken directly from commentary written by Finnis and Elliott', while another argument 'was first

advanced' by Elliott. Phillipson thus says that Elliott's arguments 'were adopted wholesale by the Government' and that its printed case 'appears to quote Elliott directly' (but without attribution).

### **The *Miller II* case**

In its historic judgment *Miller II*, the UK Supreme Court held that the Government's attempt to prorogue Parliament for a five-week period was unlawful. Prior to the hearing, Elliott published a blog post arguing that, contrary to the view of many of the High Court's judgment in *Miller II*, it would not be constitutionally improper for the Supreme Court to consider and to rule unlawful the Government's attempt to prorogue Parliament. During the hearing, Lord Pannick QC, lead counsel for one of the parties, relied and quoted extensively from Elliott's blog post, summarising and distilling his wider research on this matter [E3].

*"In seeking to persuade the Supreme Court in favour of Mrs Miller's case, I heavily relied on the blogs published by Professor Elliott addressing the issues in the case. His analysis of justiciability, the role of the courts in assessing prerogative powers and whether the Prime Minister may use his powers in a manner which avoids Parliamentary scrutiny were central to the arguments which I advanced ... and central to the reasoning of the Supreme Court in favour of Mrs Miller ... he was able - at great speed, given the urgency with which the case came before the courts - to apply that knowledge to the circumstances of the Gina Miller case and explain its application in this novel context. I have no doubt that Professor Elliott's contribution was very significant in helping the Supreme Court to understand the constitutional law context and implications, and in assisting them to the answer at which they arrived. [E4]*

The Supreme Court held both that this was a question it was constitutionally entitled to consider and that the attempt to prorogue was unlawful [2019 UKSC 41].

### **The European Union (Withdrawal) Act 2018**

The House of Lords Constitution Committee issued three reports on the EUWA, in March 2017 [E5], September 2017 [E6] and January 2018 [E7]. Each was designed to influence a crucial stage of the process: the drafting of the Bill, its Commons stages and its Lords stages. The reports are widely considered to have played a key role in causing the Government to accept amendments to the Bill (the Government tabled 170 amendments to the Bill, many in direct response to the Committee's recommendations), and, in doing so, alleviating a number of serious constitutional problems in the original Bill. Elliott and Tierney were actively involved in advising the Committee on the Bill's constitutional defects, influencing the deliberations of both the Committee in frequent meetings and the Government Bill Team in a closed session, and in helping to draft each report.

*"Professor Elliott's work was crucial in enabling the Constitution Committee to understand the problems, to produce a report explaining them, and to propose amendments to remedy the defects. Almost all of those amendments were accepted by the Government during the passage of the Bill through Parliament. Professor Elliott played a very major role in these matters."* Statement from Lord Pannick, member of the House of Lords Constitution Committee. [E4].

The committee and its parliamentary support also made use of Elliott's expertise, accessed via his blog summarising his wider research on these issues. According to a testimonial from the Senior Library Clerk, House of Commons Library:

*"Mark Elliott's blog, Public Law for Everyone, was widely read by officials in the House of Commons, including myself. Elliott's analysis in his posts was especially valued because they produced so quickly on topical public law issues that are often the focus of officials working with MPs and because of their analytical rigour. Elliott's posts were also valued because his work is studiously non-political. I relied on his posts a great deal in my work briefing MPs on EU (Withdrawal) Bill, before and after it was published" [E8].*

*“My first briefing on the subject Legislating for Brexit: the Great Repeal Bill cited Elliott’s blog posts 5 times - including the post from 2 October: Theresa May’s “Great Repeal Bill”: Some preliminary thoughts. This briefing was one our most viewed briefings for a number of months. It also received positive feedback from MPs and their staff.” [E8].*

Elliott also gave briefings to parliamentary officials on the bill. The Senior Library Clerk writes:

*“I organised a seminar in Parliament for officials in both Houses to discuss the Bill. The seminar was well attended by staff from the Committee office, the Office of Speaker’s Counsel and the Libraries of both Houses. Elliott was the main speaker, and he gave an incredibly detailed but also accessible analysis of all the constitutional issues in the Bill, which given the Bill’s complexity was extremely valuable. This analysis played a major role in informing my work on the briefing on the Bill for members, which was published before second reading in September 2017. [E8].*

Some of the main changes to the Bill which were influenced by Elliott’s and Tierney’s input include the following:

#### Status of ‘retained EU law’ after Brexit

The Constitution Committee identified a number of serious problems relating to the status of ‘retained EU law’ under the Bill. The Government accepted that the Committee had highlighted an ‘undeniably important issue’ (letter to Committee [E9]). This led the Government to radically reshape the status of retained EU law, delineating different forms of retained direct EU legislation as respectively ‘principal’ and ‘minor’ to which different forms of parliamentary scrutiny will apply [E10]. This significantly enhances parliamentary control over retained EU law.

#### Status of European Court of Justice case-law after Brexit

The Constitution Committee raised concerns about a lack of clarity in the Bill on this issue. Elliott and Tierney helped formulate a detailed alternative approach which the Committee adopted [E7]. In light of the Committee’s recommendations, the Bill was amended and a much clearer formulation is now contained in Section 7(2) of the Act. This is likely to have highly significant consequences for how EU law will continue to apply in the UK after Brexit.

#### Delegated powers: International obligations

A major area of concern with the original version of the Bill was the extensive delegated powers it gave to the Government and how this would unsettle the balance of executive-legislative power, which is crucial to the UK constitution [E7 pp. 45-50, E6 pp. 11-15]. Elliott and Tierney in their capacity as legal advisors informed the Committee’s strong critique of an international obligations-related power in the Bill (original clause 8). This was removed by the Government through an amendment tabled in the Lords.

#### Delegated powers: Scope

The Committee, in the light of analysis provided by Elliott and Tierney, criticised the unlimited range of discretionary powers in what is now Section 8 of the EUWA. The Government accepted this criticism. The Bill was amended so that the Section 8 power could not be used to create new public authorities, or amend the devolution statutes for Scotland and Wales. [E6 p.18]

#### Delegated powers: Scrutiny

Elliott and Tierney gave detailed advice on how to improve scrutiny of delegated powers under the Bill. The Committee recommended the more extensive use of affirmative procedure for regulations which make policy changes and a sifting procedure by committees to decide if negative or affirmative procedure should be used [E5 p.32-33]. The Act now makes provision for a ‘sifting’ process in respect of statutory instruments that do not automatically fall within the affirmative procedure. The Committee also recommended that the use of the powers should be time limited. The Bill was amended to include a sunset clause in respect of Section 8. These

detailed changes give Parliament a significantly greater role in controlling the Government's delegated law-making power after Brexit.

### **The European Union (Withdrawal) Act 2019**

In early 2019, Yvette Cooper MP and Oliver Letwin MP steered legislation through Parliament in unprecedented circumstances to try to avert a no-deal Brexit. When the Bill, which later became the European Union (Withdrawal) Act 2019, was published, Elliott wrote a blog post on it and advised the House of Lords Constitution Committee which then produced a report in only 24 hours to inform the House of Lords debate. The blog post and the report highlighted concerns relating to the drafting of the Bill, including one aspect that might in fact have *increased* the prospect of a no-deal Brexit by eviscerating the Prime Minister's negotiating discretion. The Bill was amended in the House of Lords. During the Lords' debate both the Constitution Committee's report and Elliott's blog post were cited. Lord Hunt of Wirral described Elliott's analysis of the Bill as "brilliant", while Lord Anderson of Ipswich said that Elliott, in his blog post, had "done a very thorough job" and that "we in Parliament should all be very grateful to him for the work that he has done" [E11].

### **5. Sources to corroborate the impact** (indicative maximum of 10 references)

[E1] Policy paper: *Supreme Court printed case of the Secretary of State for exiting the European Union* (18 November 2016) [\[Link\]](#)

A blog post by Elliott (co-written with Hayley Hooper) is cited on p. 26; more generally, the Government's printed case and oral arguments in the Supreme Court in *Miller* relied heavily on arguments first advanced by Elliott (as noted by Phillipson in [E2]).

[E2] Phillipson, G. (2017). EU Law as an agent of national constitutional change: *Miller v Secretary of State for Exiting the European Union*. *Yearbook of European Law*, 36, 46-93.

[\[DOI\]](#)

[E3] Testimonial: Clerk to the House of Lords Select Committee on the Constitution.

[E4] Testimonial: Member of House of Lords Constitution Committee, Lead Counsel for claimant in *Miller II*.

[E5] House of Lords. Select Committee on the Constitution. 9th report of session 2016-17. *The 'Great Repeal Bill' and delegated powers*. 7 March 2017, HL 123. [\[Link\]](#)

[E6] House of Lords. Select Committee on the Constitution. 3rd report of session 2017-19. *European Union (Withdrawal) Bill: Interim report*. 7 September 2017, HL 19. [\[Link\]](#)

[E7] House of Lords. Select Committee on the Constitution. 9th report of session 2017-19. *European Union (Withdrawal) Bill*. 29 January 2018, HL 69. [\[Link\]](#)

[E8] Testimonial: Senior Library Clerk, House of Commons Library.

In advance of the publication of the Committee's final report on the EUWA, he tweeted: 'The @UKHouseofLords Select Committee on the Constitution will publish its report on the #EUwithdrawalbill this week. It will have a major impact on how the Bill is scrutinised in the Lords. It is likely to be the most significant report the committee has ever published.'

[E9] Letter from the Minister of State for Exiting the European Union, to the Chair, Constitution Committee in which he acknowledges that the Government's amendments respond to the Committee's recommendations. 30 April 2018. [\[Link\]](#)

[E10] Letter from the Minister of State for Exiting the European Union, to the Chair, Constitution Committee in response to House of Lords Constitution Committee report on the European Union (Withdrawal) Bill, in which the impact of the Committee's report on the Bill is acknowledged. 11 April 2018. [\[Link\]](#)

For one example among many, see p. 11: 'As stated in the House, the Government is very grateful for the thoughts of the Committee on this issue, which have helped to frame the thinking going into Report.'

[E11] (i) Parliament. House of Lords. Hansard, Volume 797, 4 April 2019, Business of the House. See: 6pm, Lord Hunt [\[Link\]](#)

(ii) Parliament. House of Lords. Hansard, Volume 797, 4 April 2019, European Union (Withdrawal) (No. 5) Bill. See: 8:14pm, Lord Anderson [\[Link\]](#)