12

Litigating Brexit

Christopher McCorkindale and Aileen McHarg

INTRODUCTION

The long process of deciding whether, and if so on what terms, to leave the European Union was one marked by hyper-litigation. In remarkable volume and with increasing frequency over time, a wide range of litigants either sought or threatened recourse to the courts – both in the United Kingdom and elsewhere in Europe – in an attempt to influence the process, substance and/or the politics of Brexit.

Such 'strategic litigation'[1] – 'the continuation of politics by other means'[2] – is not unknown in the United Kingdom: in their pioneering study of *Pressure Through Law*, Harlow and Rawlings document examples dating back to the eighteenth century, albeit they note an increased volume of pressure group litigation from the 1970s onwards.[3] Nevertheless, the use of strategic litigation during the Brexit process is, we argue, unusual in two main respects. First, the sheer intensity of litigation on a single issue over a relatively short period of time was, we believe, unprecedented in the UK context, as were the range and diversity of legal arguments and litigants involved. This was not a single, coordinated litigation strategy in pursuit of a clearly defined objective, but rather a reactive and opportunistic resort to litigation by parties with differing political motivations. This is all the more remarkable given that, in the UK context, decisions to change aspects of the constitution have traditionally been regarded as purely political. Secondly – in contrast with earlier attempts at

[1] We prefer the term 'strategic litigation' as a more encompassing label than similar terms like 'public interest litigation', 'test-case litigation', or 'cause lawyering'. See Michael Ramsden and Kris Gledhill, 'Defining Strategic Litigation' (2019) 38 *Civil Justice Quarterly* 407–26.

[2] Aidan O'Neill, 'Strategic Litigation before the CJEU: Pursuing Public Interest Litigation within the EU Judicial Architecture', paper delivered at NYU Paris, 7 March 2019, on file with the authors, p. 3.

[3] Carol Harlow and Richard Rawlings, *Pressure Through Law* (Abingdon: Routledge, 1992).

strategic litigation over EU membership, which were invariably rejected as non-justiciable and/or unarguable[4] – Brexit-related litigation had a surprising degree of success. Although the vast majority of the cases were rejected or abandoned, the process was punctuated by very high-profile victories which pushed at the boundaries of constitutional justiciability. Insofar as the factors encouraging hyper-litigation are applicable beyond the Brexit context, we believe that this may represent a further step-change in the use of strategic litigation in the UK constitutional context.

In this chapter, we do four things. First, we document the cases; identifying who, where, about what, and with what aims parties were litigating Brexit. Secondly, we discuss the impacts of the litigation, both in legal terms – seeking to identify why some cases succeeded where others did not – and in terms of their broader political effects. Thirdly, we try to account for hyper-litigation, identifying the various factors encouraging resort to the courts. Finally, we consider the likely long-term impacts of Brexit-related strategic litigation.

While many lawyers have welcomed – indeed, encouraged[5] – Brexit-related strategic litigation, often casting the courts as guardians of the constitution, we take a more sceptical view. First, we are doubtful about both the doctrinal and practical benefits of many of the cases, both as regards the handling of the Brexit process and on wider constitutional questions. Secondly, given the well-recognised tension that strategic litigation creates for the courts in terms of balancing the openness required to enable them to uphold the rule of law whilst avoiding being drawn too overtly into political controversies which might undermine their reputation for political impartiality,[6] we fear a backlash against strategic litigation from both the courts themselves and political actors.

[4] See, on the decision to join the (then) EEC: *Blackburn* v. *Attorney-General* [1971] 1 WLR 1037; *Jenkins* v. *Attorney-General*, *The Times*, 14 August 1971; *McWhirter* v. *Attorney General* [1972] CMLR 882; *Gibson* v. *Lord Advocate* 1975 SC 136. On the Maastricht Treaty: *McWhirter & Atherton* v. *Hurd and Maude*, Hexham Magistrates Court, 9 September 1993, unreported; *R* v. *Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552. On the draft Constitutional Treaty: *R* v. *Secretary of State for Foreign and Commonwealth Affairs ex p Southall* [2003] 3 CMLR 18. On the Nice Treaty: *McWhirter* v. *Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA (Civ) 384. On the Lisbon Treaty: *R (Wheeler)* v. *Office of the Prime Minister* [2008] 2 CMLR 57. On the European Arrest Warrant: *Wheeler* v. *Office of the Prime Minister* [2015] 1 CMLR 46.

[5] See, e.g., Richard Ekins and Graham Gee, 'Miller, Constitutional Realism, and the Politics of Brexit', in Mark Elliott, Jack Williams, and Alison L Young (eds.), *The UK Constitution after* Miller: *Brexit and Beyond* (Oxford: Hart Publishing, 2018); and see further below.

[6] See generally Harlow and Rawlings *Pressure Through Law*, chap. 7.

BREXIT-RELATED STRATEGIC LITIGATION

The Case Sample

Table 1 includes fifty-seven instances of Brexit-related strategic litigation conducted (though not necessarily concluded) between May 2015, when the EU referendum became a concrete prospect, and 31 January 2020, when the United Kingdom formally left the EU. Litigation was a prominent feature throughout the Brexit process, with two cases arising even before the referendum itself (*Tomescu* and *Shindler UK*), and applications being made within days of the referendum result in *Miller 1*. However, the bulk of the cases arose in 2019, peaking as the intended Brexit dates of 29 March and then 31 October approached. Unsurprisingly, most of the cases occurred in the United Kingdom's domestic courts, but we also found significant attempts to involve other European courts, either by raising actions before the EU General Court,[7] or in other EU member states, usually with the aim of securing preliminary references to the CJEU.[8]

The sample includes only cases in which at least a formal step towards litigation (such as issuing a pre-action letter) was taken, although not all cases were subsequently pursued to a hearing. And it includes only those cases which, in our judgement, were intended to have an impact, directly or indirectly on Brexit – whether by changing decision-making processes, affecting the substance of Brexit-related decisions, or simply influencing public opinion. We have therefore excluded cases arising contextually or defensively out of the Brexit process (such as commercial litigation, or appeals against Electoral Commission fines), and cases in which arguments about Brexit were tactically deployed in service of some non-Brexit-related objective (for example, to resist extradition).[9] We also excluded cases which were relevant to the politics of Brexit, but where we judged the connection to be too indirect to justify inclusion.

Cases were discovered primarily by paying close attention to news and social media reports about Brexit-related litigation. Some cases received

[7] *Fair Deal for Expats*; *Shindler EU1*; *Walker*; *Shindler EU2*; *Shindler EU3*.

[8] Two cases were raised in Ireland (*GLP Ireland*; *McCord Dublin*); one in the Netherlands (*Williams*) and three in France (*Watson*; *B*; *AB*). One preliminary reference was heard by the CJEU, referred by the Court of Session (*Wightman*).

[9] For differently constituted case samples, see Vaughne Miller and Sylvia de Mars, 'Brexit Questions in National and EU Courts', HC Library Briefing Paper, No. 8415 (1 November 2019); Steve Peers, 'Litigating Brexit – a Guide to the Case Law', EU Analysis Blog, 27 July 2020, http://eulawanalysis.blogspot.com/p/litigating-brexit-guide-to-case-law.html.

TABLE 1 *Brexit-Related Strategic Litigation (by year of commencement)*

2015	2016	2017	2018	2019		2020
R (Tomescu) v. *Lord President of the Council and Others* [2015] EWHC 3293 (Admin)	*R (Shindler)* v. *Chancellor of the Duchy of Lancaster* [2016] 3 WLR 1196 (*Shindler UK*) *R (Miller & dos Santos)* v. *Secretary of State for Exiting the European Union* [2017] UKSC 5 (*Miller 1*) *Reference re the matter of applications for judicial review by Agnew & Others and Raymond McCord* [2017] UKSC 5 *Fair Deal for Expats* v. *Commission* Case T-713/16	*The Good Law Project and ors* v. *Ireland (GLP Ireland)* *Application for Judicial Review by Martyn Truss* CO/3008/2017 *Shindler and Others* v. *Council* Case T-458/17, C-755/18 [2019] 2 CMLR 12 (*Shindler EU1*) *R (Good Law Project)* v. *Electoral Commission* [2018] EWHC 2414 (Admin) [2019] EWCA Civ 1567 (*GLP Electoral Commission*)	*State of Netherlands* v. *Williams et al.* Gerechtshof Amsterdam, 19 June 2018, ECLI:NL:GHAMS:2018:2009, NJ 2018/460 *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64 *R (Webster)* v. *Secretary of State for Exiting the European Union* [2019] 1 CMLR 8	*Trimble and ors* v. *Secretary of State for Exiting the European Union* *Watson et al.* No 428134 4429442, Conseil d'Etat, 1/7/20 *R (Good Law Project)* v. *Secretary of State for Health and Social Care* [2019] EWCA Civ 1211 (*GLP Serious Shortage Protocols*) *Ball* v. *Johnson* [2019] EWHC 1709 *Leave Means Leave* v. *Minister for the Cabinet Office* *Wolchover & Silver* v. *the Prime Minister*	*Cherry et al.* v. *Advocate General for Scotland* [2019] UKSC 41 *McCord et al.* v. *Prime Minister and Secretary of State for Exiting the European Union* [2019] NICA 49 (*McCord et al.*) *Shindler and ors* v. *Council* Case T-541/19 (*Shindler EU2*) *R (Liberty)* v. *Prime Minister* [2019] EWCA Civ 1761 *Vince et al.* v. *Prime Minister and Advocate General for Scotland* [2019] CSIH 51	*AB* v. *Minister of the Interior* ECLI:FR:CEOR-D:2020:438696. 20200221 *Watt* v. *Prime Minister and Advocate General for Scotland (Watt 2)*

TABLE 1 (*continued*)

2015	2016	2017	2018	2019	2020
	R (Yalland) v. *Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin)	*Miller and International Workers Union of Great Britain* v. *HM Treasury* *R (Good Law Project Ltd)* v. *Secretary of State for Exiting the European Union* [2018] EWHC 719 (Admin) (*GLP Impact Studies*) *R (Hardy)* v. *Prime Minister* CO/5012/2017 *Wightman & Others* v. *Secretary of State for Exiting the European Union* [2018] CSIH 62; Case C-621/18, [2019] QB 199	*R (Wilson)* v. *the Prime Minister and the Electoral Commission* [2019] EWCA Civ 304 *R (Good Law Project Ltd)* v. *Electoral Commission and Democratic Unionist Party (GLP DUP)* *Fair Vote UK* v. *Prime Minister* *Rush* v. *Information Commissioner and Cabinet Office*	*R (English Democrats)* v. *Prime Minister and Secretary of State for Exiting the European Union* CO/1392/2019 *Legg* v. *Prime Minister and Secretary of State for Exiting the European Union* *Allmann* v. *Prime Minister* *B* v. *Minister of the Interior* ECLI:FR:CECHR:2019:430008.20190515 *R (MCS & ClientEarth)* v. *Secretary of State for the*	*R (Fratila & Tanese)* v. *Secretary of State for Work and Pensions* [2020] EWHC 998 (Admin) *Shindler and Others* v. *Commission* Case T-627/19 (*Shindler EU3*) *JR90* *R (Independent Workers Union of Great Britain) and others* v. *Prime Minister* (*IWUGB 2*) *Public Law Project* v. *HM Treasury* *Maugham* v. *Advocate General for Scotland* [2019] CSOH 80

McCord v. *An Taoiseach & others (McCord Dublin)*

Re McCord's Application for Judicial Review [2020] NICA 23 (*McCord Border poll*)

R (Watt) v. *Prime Minister and President of the European Council* CO/5050/2017 (*Watt 1*)

Environment Food and Rural Affairs [2019] EWHC 2682 (Admin)

Brake et al. v. *Commissioner of the Metropolitan Police*

Walker and Others v. *Parliament and Council* Case T-383/19; C-789/19

R (Keighley) v. *British Broadcasting Corporation* [2019] EWHC 3331 (Admin)

R (Miller) v. *Prime Minister* [2019] UKSC 41 (*Miller 2*)

R (thethreemillion) v. *Prime Minister and Secretary of State for Exiting the European Union*

Bryson v. *Prime Minister*

R (Liberal Democrats and Scottish National Party) v. *ITV Broadcasting Ltd* [2019] EWHC 3292 (Admin)

Liberal Democrats v. *BBC (Lib Dems BBC)*

The Bureau of Investigative Journalism v. *Prime Minister (BIJ)*

considerable publicity, but many did not and were essentially stumbled upon, or brought to our attention by the litigants themselves, by Brexit campaigners, and by other academics. We therefore make no claims as to the exhaustiveness of our sample. Citations or other official identifying numbers have been included in Table 1 where available, but these do not exist, or we have been unable to find them, for all cases.

What Was Being Litigated?

Table 2 groups the cases into seven broad categories (although some cases appear more than once because they raised multiple issues).

Unsurprisingly, the largest group concerned various aspects of the withdrawal process under Art. 50 TFEU. Immediately following the referendum, in *Miller 1* and *Agnew & McCord*, the courts were asked to decide whether the United Kingdom's 'constitutional requirements' for a decision to leave the EU had been complied with. The Supreme Court's ruling that the UK government could not use the foreign affairs prerogative to trigger Art. 50, but required specific legislative authorisation, spawned a series of satellite cases. Some questioned the adequacy of the ensuing legislative response – the European Union (Notification of Withdrawal) Act 2017. *Yalland* (and later *Watt 2)* argued that the Act was not sufficient to authorise withdrawal from the EEA. Various cases claimed that, although the prime minister had been empowered to *notify* the European Council of the United Kingdom's decision to withdraw from the EU, no valid *decision* to withdraw had in fact been made (*Truss*; *Hardy*; *Watt 1*; *Webster*; *Watt 2*). Similarly, *Wilson* and *Wolchover* argued that the prime minister had improperly exercised the discretion to notify the United Kingdom's intention to withdraw conferred by the 2017 Act. Other 'child of *Miller*' cases argued that further legislation was required at later stages of the Brexit process – to authorise an extension to the Art. 50 negotiating period (*English Democrats; Legg*), to revoke the Art. 50 notification (*Allman*), or to authorise a 'no deal' Brexit (*Cherry et al.*). Other Art. 50 litigation sought to establish whether, and if so by whom, the United Kingdom's notification could be revoked (*GLP (Ireland)*; *Wightman*) or whether an implementation period was permitted under Art. 50 (*Watt 1*). Litigation also challenged the EU's refusal to begin negotiations before the Art. 50 notification had been made (*Fair Deal for Expats*) and, conversely, the validity of the decision to open negotiations (*Shindler (EU1)*). In addition, clarification was sought regarding the effect of the first Art. 50 extension on the United Kingdom's participation in the May 2019 European Parliament elections (*Leave Means Leave*).

TABLE 2 *What Was Being Litigated?*

Article 50 process	Conduct of the referendum	Government-parliament relations	Territorial constitution	Access to information and impartiality	Citizens' rights post-Brexit	Other substantive effects of Brexit
Miller 1	*Tomescu*	*Miller 1*	*Miller 1*	*GLP (Impact Studies)*	*Fair Deal for Expats*	*GLP (Serious Shortage Protocols)*
Agnew & McCord	*Shindler (UK)*	*Miller/IWUGB 1*	*Agnew & McCord*	*Rush*	*Shindler (EU1)*	*MCS & ClientEarth*
Fair Deal for Expats	*Shindler (EU1)*	*Watt 1*	*McCord (Dublin)*	*Keighley*	*Williams*	
Yalland	*GLP (Electoral Commission)*	*Miller 2*	*McCord (Border poll)*	*Lib Dems & SNP*	*Watson et al.*	
GLP (Ireland)	*Wilson*	*Cherry et al.*	*Continuity Bill Reference*	*Lib Dems (BBC)*	*Leave Means Leave*	
Truss	*GLP (DUP)*	*McCord et al.*	*Trimble*	*BIJ*	*B*	
Shindler (EU1)	*Fair Vote UK*	*Liberty*	*McCord et al.*		*Walker*	
Hardy	*Ball*	*Vince et al.*	*Bryson*		*thethreemillion*	
Wightman	*Wolchover*	*JR 90*	*Lib Dems & SNP*		*Shindler (EU2)*	
Watt 1	*Brake et al.*	*IWUGB 2*	*Watt 2*		*Fratila*	
Webster	*BIJ*	*Public Law Project*			*Shindler (EU3)*	
Wilson		*Maugham*			*AB*	
Leave Means Leave					*Watt 2*	
Wolchover						
English Democrats						
Legg						
Allman						
Cherry et al.						
Watt 2						

Process themes dominated the litigation more generally. Overlapping with the Art. 50 cases were those questioning the conduct of the referendum. One set of cases questioned the validity of the franchise, which excluded British expat voters (*Shindler (UK)*; *Shindler (EU1)*) and other EU nationals resident in the United Kingdom (*Tomescu*). The other set alleged various irregularities in the conduct of the referendum campaign, either trying to force action to be taken against those responsible (*GLP (Electoral Commission)*; *GLP (DUP)*; *Fair Vote UK*; *Ball*; *Brake et al.*; *BIJ*), or claiming that the irregularities made it unlawful to implement the referendum result (*Wilson*; *Wolchover*).

Another overlapping theme was the separation of powers between the UK Parliament and executive. In addition to the cases on the use of prerogative powers in the Art. 50 process, the government's loss of control of the House of Commons after the 2017 general election produced challenges on various other issues. These included: the Conservative/DUP confidence and supply agreement (*Miller/IWUGB 1*); the attempted prorogation of Parliament in September/October 2019 (*Miller 2*; *Cherry et al.*; *McCord et al.*); potential or alleged failures by the government to comply with statutory duties (*Vince*; *Liberty*; *JR90*; *IWUGB 2*; *Maugham*); the impact of Brexit on Queen's Consent (*Watt 1*); and the extent of ministerial powers to amend primary legislation (*Public Law Project*).

A fourth set of cases concerned the internal territorial impacts of Brexit. Again, most focused on process issues: the need for territorial consent to constitutional change (*Miller 1*; *Agnew & McCord*; *McCord et al.*; *Bryson*; *Watt 2*); the territorial distribution of powers to implement Brexit (*Continuity Bill Reference*); issues of territorial representation (*Lib Dems & SNP* – which concerned the SNP's exclusion from leaders' debates at the 2019 general election); and the circumstances in which Irish reunification referendums might be held, as a possible consequence of Brexit (*McCord (Dublin)*; *McCord (Border Poll)*).

A final process-related theme concerned access to information. Three cases (*GLP (Impact Case Studies)*; *Rush*; *BIJ*) attempted to force the publication of Brexit-related information, and another three (*Keighley*; *Lib Dems & SNP*; *Lib Dems (BBC)*) raised questions of impartiality in Brexit-related broadcasting.

On matters of substance, the most frequently litigated issue was the impact of Brexit on citizens' rights. Some cases focused on the loss of EU citizenship rights generally (*Leave Means Leave*; *Watt 2*), or the rights of other EU nationals living in the United Kingdom (*thethreemillion*; *Fratila*), but most concerned British citizens living elsewhere in the EU. In general, these cases aimed to preserve EU citizenship rights, but even here there was a particular emphasis on voting and other political process rights (*Shindler EU1*; *Leave Means Leave*; *B*; *thethreemillion*; *Shindler EU2*; *Shindler EU3*; *AB*). Also focusing on substantive issues, two of

the territorial constitution cases challenged the constitutionality of the Northern Irish Protocol on grounds of its differential impact on Northern Ireland compared with Great Britain (*Trimble*; *Bryson*). Finally, two cases sought to challenge particular substantive policy decisions taken in consequence of Brexit (*GLP (Serious Shortages Protocol)*; *MCS & ClientEarth*).

Two general points stand out about the subject matter of the cases. First, there were multiple cases on some issues, either in sequence or in parallel (sometimes in different jurisdictions), or even combined in the same proceedings. For instance, the initial Art. 50 litigation involved two parallel sets of litigation in England and Northern Ireland, both combining cases initiated by different sets of litigants. The second point is the way some cases fed off or built upon one another. We have already noted how the successful outcome of *Miller 1* opened up a range of related challenges. Less directly, the lowering of the bar for formal justiciability in *Wightman* and for substantive justiciability in *Cherry* and *Miller 2* also encouraged and facilitated later cases. Thus, whereas the litigants in *Wightman* had struggled at first instance to establish that there was a live issue to be determined,[10] the more liberal approach taken on appeal meant that the petitioners in *Cherry* had no difficulty in securing permission for judicial review although their case was equally hypothetical when it was first raised. Similarly, the Supreme Court's decision in *Cherry/Miller 2* that the prorogation was justiciable despite raising issues of extreme political sensitivity, and that the challenge did not breach parliamentary privilege, undoubtedly encouraged subsequent litigation to force the prime minister to comply with the duty under the Benn-Burt Act[11] to seek a further extension to Brexit (*Vince*; *Liberty*; *JR90*; *IWUGB*), as well as the daring attempt in *Maugham* to claim that Parliament was barred from voting to approve the Withdrawal Agreement by s. 55 of the Taxation (Cross-Border Trade) Act 2018.

Who Was Litigating?

Table 3 groups those initiating legislation, along with interested parties and intervenors,[12] into six categories.

[10] See [2018] CSOH 8; [2018] CSOH 61.

[11] The European Union (Withdrawal) (No. 2) Act 2019.

[12] Interventions were typically in support of the claimants. Exceptions include *Miller 1*, where the Attorney General for Northern Ireland intervened in support of the UK government; *Wightman*, where the European Council and Commission argued against a right of unilateral revocation of the Art. 50 notification; and the *Continuity Bill Reference*, where the Welsh and Northern Ireland Law Officers intervened in support of the Scottish government.

TABLE 3 *Who Was Litigating? Claimants/Petitioners, Interested Parties and Interveners*

Institutional actors	Expats/EU nationals	Politicians/political parties	Lawyers	Campaigners/campaign groups		Others
*Miller**	*Tomescu*	*Agnew*	*Shindler (UK)*	*Tomescu*	*Trimble*	*Miller*
*Agnew**	*Shindler (UK)*	*Good Law Project (Ireland)*	*Good Law Project (Ireland)***	*Shindler (UK)*	*Good Law Project (Serious Shortage Protocols)***	*Truss*
*Wightman**	*Miller*	*Good Law Project (Impact Studies)*	*Good Law Project (Electoral Commission)***	*Miller 1*	*Ball*	*Hardy*
Continuity Bill Reference	*Fair Deal for Expats*	*Wightman*	*Good Law Project (Impact Studies)***	*Agnew & McCord*	*Leave Means Leave*	*Watt 1*
*Miller 2**	*Yalland*	*Trimble*	*Wightman***	*Fair Deal for Expats*	*English Democrats*	*McCord et al.*
*Walker*****	*Shindler (EU1)****	*Brake et al.*	*Webster*	*Yalland*	*Legg*	*Vince*
*Cherry et al.**	*Williams*	*Cherry et al.*	*Good Law Project (DUP)***	*Good Law Project (Ireland)***	*Allmann*	*JR 90*
	Wilson	*Vince et al.*	*Rush*	*Shindler (EU1)*	*MCS & ClientEarth*	*Watt 2*
	*Watson et al.****	*Lib Dems & SNP (ITV)*	*Good Law Project (Serious Shortage Protocols)***	*Good Law Project (Electoral Commission)***	*Keighley*	
	*B****	*Lib Dems (BBC)*	*Wolchover*	*Miller/IWUGB 1*	*Miller 2*	
	thethreemillion		*MCS & ClientEarth*	*Good Law Project (Impact Studies)***	*thethreemillion*	
	*Walker****		*Cherry et al.***	*Wightman***	*Cherry et al.***	
	*Shindler (EU2)****		*Vince et al.***	*McCord (Dublin)*	*McCord et al.*	
	Fratila		*Maugham***	*McCord (Border poll)*	*Liberty*	
	*Shindler (EU3)****		*BIJ*	*Williams*	*Vince et al.*	
	*AB ****			*Webster*	*Fratila*	
				Wilson	*IWUGB 2*	
				*Good Law Project (DUP)***	*Public Law Project*	
				Fair Vote UK	*Maugham*	
					Bryson	
					BIJ	

*Interveners **Jo Maugham QC ***Represented by Julien Fouchet ****Governments of Spain and Gibraltar as interveners

The largest set of cases – predictably – were brought by individual campaigners or campaign groups. The sizeable group involving other EU nationals or British expats is also unremarkable, given the amount of litigation on citizens' rights. By contrast, institutional actors featured mainly as respondents to litigation. There was only one instance of inter-institutional litigation – the *Continuity Bill Reference*, raised by the UK government against the Scottish government – although both domestic and foreign governments, as well as EU institutions, intervened in several cases. There were, however, a surprising number of cases involving individual sitting politicians, which is very rare in British politics (though more common in Northern Ireland). Also notable is the amount of litigation brought by lawyers themselves, either via cause lawyering groups (such as the Good Law Project (GLP), ClientEarth, the Public Law Project, and Liberty), or in their own name (*Shindler UK*; *Wightman; Rush; Wolchover; Cherry; Vince*; *Maugham*).

Echoing the pattern of repeat litigation noted above, there was also a pattern of repeat *litigators*. Gina Miller, Joanna Cherry QC MP, Jolyon Maugham QC, the Good Law Project, Harry Schindler, and Raymond McCord were all high-profile repeat players, along with other less prominent repeat litigators and/or intervenors. Indeed, the repeat player phenomenon was more pronounced than it appears, since behind many of the cases, as instigators and/or funders, were two entrepreneurial lawyers – Jolyon Maugham QC in the United Kingdom and Julien Fouchet in France.[13] We also find behind-the-scenes networks of mutual support, particularly through crowdfunding efforts. Further, as in previous examples of successful strategic litigation, there were clear instances of 'plaintiff stacking' – a tactic used to suggest to the court a broad constituency of support for the case.[14] This was most pronounced in *Cherry*, which ultimately had seventy-nine petitioners, including seventy-three MPs from a range of political parties.

Why Were They Litigating?

Table 4 categorises the cases according to the litigants' political motivations. Again, this classification reflects our judgement about what the parties were aiming to achieve, based upon what they said about their reasons for litigating, as well as background information about their political views and objectives.

[13] This is by no means a new phenomenon – see Harlow and Rawlings, *Pressure Through Law*, p. 291.

[14] See Harlow and Rawlings, *Pressure Through Law*, pp. 195–6.

TABLE 4 *Political Motivation*

Pro-Remain		Pro-Leave	Protection of NI peace process	Upholding parliamentary authority/executive subjection to law	Brexit outcomes	Quality of democratic process
Tomescu	*Good Law Project (DUP)*	*Trimble*	*Agnew & McCord*	*Miller 1*	*Fair Deal for Expats*	*Tomescu*
Shindler (UK)	*Good Law Project (Serious Shortage Protocols)*	*Leave Means Leave*	*McCord (Dublin)*	*Miller/IWUGB 1*	*Yalland*	*Shindler (UK)*
*Miller 1**	*Ball*	*English Democrats*	*McCord (Border poll)*	*Continuity Bill Reference*	*Williams*	*Shindler (EU1)*
Agnew & McCord	*Wolchover*	*Legg*	*Trimble*	*Miller 2*	*Watson et al.*	*GLP (Electoral Commission)*
Good Law Project (Ireland)	*Cherry et al.*	*Allman*	*McCord et al.*	*Cherry et al.*	*GLP (Serious Shortages Protocol)*	*GLP (Impact Studies)*
Truss	*Vince*	*Keighley*	*Bryson*	*Liberty*	*B*	*Webster*
Shindler (EU1)	*IWUGB 2*	*Bryson*		*Vince et al.*	*Walker*	*Wilson*
Good Law Project (Electoral Commission)	*Maugham*			*JR90*	*MCS & ClientEarth*	*GLP (DUP)*
Miller/IWUGB 1	*Lib Dems & SNP (ITV) Lib Dems (BBC)*			*IWUGB 2*	*Fratila*	*Fair Vote UK*
Good Law Project (Impact Studies)	*Watt 2*			*Public Law Project*	*Shindler (EU3)*	*Rush*
Hardy				*Maugham*	*AB*	*Ball*
Wightman					*Watt 2*	*Wolchover*
Watt 1						*Brake et al.*
Webster						*Keighley*
Wilson						*thethreemillion*
						Shindler (EU2)
						Shindler (EU3)
						Lib Dems & SNP (ITV)
						LIb Dems (BBC)
						BIJ

* Dos Santos was a Leave voter, but the preponderance of *Miller* litigants were pro-Remain

Most cases can be crudely classified as either pro-Remain or pro-Leave, with the former clearly dominant. However, there was an uptick of pro-Leave cases in 2019 as the risk that Brexit would be postponed, or even abandoned altogether, increased. Nevertheless, both overlapping with and separate from these broad political motivations, litigants cited various more specific concerns. For instance, much of the focus on process was undoubtedly instrumental, as parties sought to shift decision-making into more politically favourable forums, to change the terms of debate by increasing the range of options available or undermining the political authority of the referendum, or simply to buy more time, for example by ensuring that a further extension to the withdrawal period was sought. However, there was also evidence of sincere concern with upholding what litigants saw as the rightful role of Parliament vis-à-vis the executive in the withdrawal process (for example, one of the parties in *Miller 1* – Dier Dos Santos – was in fact a Leave voter). Similarly, we find genuine concerns about the quality of democratic debate during the referendum and subsequent withdrawal process, and about the impact of Brexit on the Northern Ireland peace process. In some instances, these other motivations were probably *more* important than Brexit-related objectives. For example, Harry Shindler's various cases form part of long-standing campaign for the extension of expat voting rights, while Raymond McCord also has a history of Northern Ireland peace process-related litigation pre-dating Brexit. Finally, some litigation was (ostensibly at least) neutral on the question *whether* the United Kingdom should leave the EU, but nonetheless concerned with the *form* that Brexit should take – particularly, though not exclusively, regarding the protection of citizens' rights.

OUTCOMES AND IMPACT

In relation to strategic litigation, legal outcomes and political impact must be assessed separately.[15] While a successful legal outcome may amplify the political impact of a case, as Harlow and Rawlings have said, the assumption 'that the sole motive for litigation is the desire to win' is often misplaced.[16] Even where litigation is doomed to fail, it might nevertheless be used, inter alia, to delay the implementation of policy or legislation, to attract publicity to a political cause, to exert political pressure, to 'harass' those in power, or to change or improve policy through settlement.[17] At the same time, strategic

[15] See generally Genevra Richardson and Maurice Sunkin, 'Judicial Review: Questions of Impact' (1996) *Public Law* 79–103; Harlow and Rawlings, *Pressure Through Law*, pp. 299–310.
[16] *Pressure Through Law*, p. 300.
[17] Ibid.

litigation might produce negative or unintended political impacts, such as an adverse ruling that narrows or closes off political channels for change or that strengthens the resolve of political opponents, or a positive ruling that generates significant political pushback or problematic side effects, or the effect of which is easily side-stepped.

Legal Outcomes

As Table 5 indicates, only five cases in our sample resulted in a final judgment wholly or partially in the claimants' favour. One further case – *GLP (Electoral Commission)* – was initially successful, but reversed on appeal, while in *Public Law Project*, a pre-action letter was sufficient to secure the legal outcome sought.[18] In addition, *Vince* was instrumental in securing compliance with the Benn-Burt Act. Undertakings to that effect given by the government's lawyers were sufficient to persuade the first instance judge that there was no reasonable apprehension of breach of statutory duty.[19] However, on appeal, the court chose to continue rather than dismiss the case until it became clear whether the prime minister would, in fact, comply.

Nevertheless, the vast majority of cases were unsuccessful, with most either rejected at the permission, or equivalent admissibility, stage without a full hearing on the merits, or alternatively abandoned or suspended. Why, then, did some cases succeed where most failed? A number of factors can be identified which might affect the outcome of strategic litigation.

According to Harlow and Rawlings, 'Success [may] depend on skilful "forum shopping" for favourable judges.'[20] There is some evidence in our sample of deliberate forum shopping, for example in the two cases promoted by Jolyon Maugham QC on the revocability of the Art. 50 notification – *GLP (Dublin)* and *Wightman*. The matter appears to have been raised in Ireland initially in the belief that the request for a CJEU reference would be welcomed, but was discontinued when it became clear that the Irish government opposed the reference, and hence that proceedings were likely to be prolonged, expensive, and uncertain of success.[21] The issue was then reopened in *Wightman* in Edinburgh, again as a matter of conscious litigation strategy in

[18] HM Treasury agreed to revoke the Cross Border Trade (Public Notices) (EU Exit) Regulations 2019, SI 2019/1307 because they created a sub-delegated Henry VIII power which was ultra vires the parent statute.

[19] *Vince et al.* v. *Johnson and Lord Keen of Elie* [2019] CSOH 77.

[20] *Pressure Through Law*, p. 309.

[21] 'Dublin Case Update: Our Decision to Discontinue', Good Law Project, 30 May 2017, http://goodlawproject.org/update/dublin-case-update-3/.

TABLE 5 *Legal Outcomes*

Successful	Rejected on merits	Rejected at permission/admissibility stage		Abandoned/suspended	Ongoing
Miller 1	*Shindler (UK)*	*Tomescu+*	*Allman+*	*Fair Deal for Expats*	*thethreemillion*
Wightman	*Agnew & McCord*	*Yalland**	*B+*	*Good Law Project (Ireland)*	
Continuity Bill Reference	*Good Law Project (Electoral Commission)*	*Truss+*	*MCS & ClientEarth**	*Miller/IWUGB 1*	
		*Shindler (EU1)***	*Walker***	*Rush*	
Cherry et al.	*McCord (Border poll)*	*Good Law Project (Impact Studies)****	*Keighley****/+*	*Trimble*	
Miller 2	*McCord et al.*	*Hardy*/*****	*McCord et al.*/+++*	*Leave Means Leave*	
	Vince	*McCord (Dublin)***	*Shindler (EU2)***	*Wolchover*	
	Fratila	*Watt 1****/+*	*Liberty*/++++*	*Legg*	
	AB	*Williams**	*IWUGB 2 ++++*	*Brake et al.*	
		*Webster****/+*	*Shindler (EU3)+*	*JR90*	
		*Wilson ****/+*	*Lib Dems and SNP+**	*Vince et al.*	
		Good Law Project (DUP)/+*	*Watt 2+*	*Public Law Project*	
		*Fair Vote UK****/+*		*Maugham*	
		Watson et al.+++		*Bryson*	
		Good Law Project (Serious Shortage Protocols)+		*Lib Dems (BBC)*	
		Ball++		*BIJ*	
		English Democrats+			

*Premature **Lack of Standing ***Failure to exhaust alternative remedy ****Out of time +Unarguable on the merits ++Quashed +++Non-justiciable ++++Repetitive of existing litigation +*Outwith scope of JR

the belief that Scotland's Remain vote meant that the case would receive a more sympathetic hearing than it would in London.[22] The success of *Wightman* then appears to have encouraged Maugham and others to bring further cases in Scotland in the latter stages of the Brexit process (*Cherry*; *Vince*; *Maugham*; *Watt 2*).[23] Whether the Scottish courts were, in fact, more sympathetic than the English courts is difficult to say. The cases were invariably *un*successful in the Outer House of the Court of Session, but more successful on appeal to the Inner House. Anecdotal evidence suggests that the Inner House may be more receptive to novel claims appealing to issues of principle. However, the case sample is too small to allow firm conclusions to be drawn.

Choice of litigants is a second important strategic consideration. Standing in the formal sense does not appear to have been a barrier in any domestic case, though several cases failed on this ground before the EU courts,[24] where the requirement of 'direct and individual concern' is a significant obstacle to strategic litigation.[25] So, too, did Raymond McCord's attempt to force the Irish government to publish its policy on a reunification referendum (*McCord (Dublin)*). Nevertheless, in *Wightman*, the litigants – members of the Scottish, UK, and European Parliaments from a range of political parties – were carefully chosen to send a message to the courts that they were representative 'of the wider body politic and civil society in Scotland', with a legitimate interest in seeking authoritative resolution of the legal issue at stake.[26] This was indeed a factor in persuading the Inner House to grant permission.[27] The identity of the litigant was also relevant in a negative sense in *Ball* – the attempted private prosecution of Boris Johnson for misconduct in public office due to misleading statements made during the referendum campaign. Given clear evidence of Marcus Ball's political motivations for bringing the prosecution, the High Court quashed the summons granted by the District Judge inter alia because it could detect no reasoning to support her conclusion that the prosecution was not vexatious.[28]

[22] O'Neill, 'Strategic Litigation', pp. 16–17.

[23] An additional consideration in *Cherry* was that the courts continued to sit in Scotland over the summer, allowing the case to be heard more quickly than the parallel proceedings in London in *Miller 2*. See Jo Maugham, 'Suspending Parliament is the act of a dictator. We can't allow it', Crowd Justice, www.crowdjustice.com/case/dont-suspend-parliament/.

[24] *Shindler (EU1)*, *Walker* and *Shindler (EU2)*.

[25] See O'Neill, 'Strategic Litigation', pp. 4–8.

[26] O'Neill, 'Strategic Litigation', pp. 17–18.

[27] See [2018] CSIH 18 at para. 12. Although, in its substantive judgment, the Inner House was doubtful whether MSPs, and MEPs, as distinct from MPs, had standing – see [2018] CSIH 62 at para. 27.

[28] [2019] EWHC 1709 at paras. 41–46.

A more significant issue in our sample was the timing of litigation. Six cases were refused permission because they were out of time, while another seven were deemed premature (see Table 5). In addition, several cases were discontinued because they were effectively overtaken by events (*GLP (Impact Studies)*; *Rush*; *Trimble*; *Watson et al.*; *Leave Means Leave*; *Allman*; *Vince*; *Maugham*). However, evolving facts could also work in litigants' favour. For example, in *Wightman*, the enactment of the requirement in s. 13 of the European Union (Withdrawal) Act 2018 for the House of Commons to hold a 'meaningful vote' on the Withdrawal Agreement was material in persuading the Inner House to reverse the Lord Ordinary's decision that the issue of revoking the Art. 50 notification was purely hypothetical.[29] Similarly, in *Miller 2*, *Cherry*, and *Vince*, press reports during the course of proceedings casting doubt on whether the UK government would comply with the courts' rulings may have encouraged the higher courts to take a more robust line in those cases than the lower ones.

Nevertheless, the treatment of timing issues was not consistent. In *Yalland*, the Administrative Court refused to rule on evolving facts because,

> [where the] relevant legal and factual situations against which the various claims made will need to be assessed have not yet occurred … the court cannot … identify with precision, first, what, if any, justiciable issues will arise for adjudication by the courts and, secondly, the full factual and legal context in which any such issues will fall to be assessed.[30]

This dictum was subsequently relied upon by McCloskey LJ to refuse permission in *McCord et al.*, which sought to argue that a no-deal Brexit would breach the Northern Ireland Act 1998.[31] By contrast, as noted, the Inner House in *Vince* chose to continue the appeal to see if the issues would become live ones. Similarly, while the hypothetical nature of the claim was initially a barrier to the *Wightman* litigation, it was not even raised as an issue in *Miller 1* or *Cherry* (which gained permission before it became clear that Parliament would in fact be prorogued).

A final factor affecting success or failure is the nature of the legal claims being made. Table 5 shows that fourteen cases were refused permission or ruled inadmissible because they were unarguable on their merits. Similarly, the summons initially granted in *Ball* was quashed by the High Court because the essential ingredients of the offence of misconduct in public office were not

[29] [2018] CSIH 62 at para. 27.
[30] [2017] EWHC 630 (Admin) at paras. 48–51.
[31] [2019] NIQB 78 at para. 52. The court's reasoning was confirmed on appeal.

prima facie present. Three further cases were refused permission on the basis that essential elements of the claim were not made out (*GLP (Impact Studies)* – failure to exhaust alternative remedies; *McCord et al.* – issues not justiciable; *Lib Dems and SNP* – issue outwith the scope of judicial review). And influencing the decision to abandon some of the other cases must surely have been an appreciation that the legal arguments were weak.

However, it is too simplistic to see success or failure as directly linked to the strength or credibility of the claim. After all, many of the cases raised during the Brexit process, including those which ultimately succeeded, were highly speculative. In four out of the five successful cases, judges reached differing conclusions on their arguability and/or merits at different stages of the litigation; and although the fifth – the *Continuity Bill Reference* – produced a unanimous decision, the Supreme Court rejected most of the grounds on which the vires of the bill had been challenged. Conversely, some of the unsuccessful cases had heavyweight academic support.[32]

More important seems to be what Harlow and Rawlings term achieving a 'good fit' with the ideology of the law,[33] or as Feldman puts it, appealing to the judge's 'constitutional ethic'.[34] Thus, in keeping with the United Kingdom's prevailing constitutional ethic of representative democracy and responsible government,[35] those cases which succeeded either involved relatively straightforward exercises in statutory interpretation (i.e., giving effect to the intention of Parliament – *Continuity Bill Reference*)[36] or which sought to empower Parliament and parliamentarians against the executive – in *Miller 1*, by requiring statutory authorisation of the withdrawal process; in *Wightman*, by clarifying and extending the range of outcomes open to Parliament; and in *Miller 2/Cherry*, by insisting that Parliament must be allowed to exercise its constitutional function of overseeing the government's Brexit policy.

These latter three cases undoubtedly involved a degree of constitutional creativity – in *Miller 1*, by insisting in the face of legislative silence that a constitutional change of the magnitude of EU withdrawal must be authorised by Parliament; in *Wightman*, by pushing at the boundaries of reviewability of hypothetical decisions; and in *Miller 2/Cherry*, by significantly extending the scope of review of the prerogative, and by using

[32] See Table 6, below.
[33] *Pressure Through Law*, pp. 10, 307.
[34] David Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) 55 *Modern Law Review* 44–72.
[35] Ibid., p. 44.
[36] As did *GLP (Electoral Commission)*.

constitutional principle to discover limits to the prorogation power. Importantly, though, it was creativity of a 'constitutionally conservative' kind. Claims which would have required the courts to act outside their constitutional comfort zone – for example, to recognise principles of devolved consent, or the ability to regulate voting rights and electoral outcomes at common law – were invariably unsuccessful. Where the UK government sought to depart from accepted principles of devolution jurisprudence in the *Continuity Bill Reference*, its arguments were also rejected,[37] while in the proceedings before the CJEU in *Wightman*, it was a deliberate tactic to persuade the court that a power of unilateral revocation was the more *communautaire* interpretation of Art. 50.[38]

Conversely (with the initial exception of *Ball*), cases which involved a direct challenge to the legitimacy of political decisions or political conduct were unsuccessful. This again is consistent with the UK courts' prevailing constitutional ethic.[39] In both respects, therefore, the courts were careful – in highly politically charged territory – to limit their vulnerability to accusations of political decision-making.

Political Impacts

What, then, of the political impacts of Brexit hyper-litigation?

As we might expect, even unsuccessful or abandoned cases sometimes had significant effects. In some instances, the mere prospect of litigation prompted the government to alter its position. In *Yalland*, for example, where permission was refused for prematurity, the prospect of subsequent litigation on whether the United Kingdom's withdrawal from the EEA was valid, seems to have caused the government to abandon its position that withdrawal from the EU meant automatic withdrawal from the EEA. The government argued instead that Brexit would deprive the United Kingdom's EEA membership of any practical effect, hence formal withdrawal was unnecessary. Following *GLP (Impact Studies)* and *Rush*, the litigants have argued that the legal proceedings influenced subsequent decisions by the government to put into the public domain information that it had previously been reluctant to publish. In the former case, GLP claimed that the government's partial release of Brexit impact case studies was influenced by – and pre-empted – its (consequently abandoned) legal action to force publication of that

[37] See Aileen McHarg and Christopher McCorkindale, 'The Supreme Court and Devolution: the Scottish Continuity Bill Reference' (2019) *Juridical Review* 190–97.
[38] O'Neill, 'Strategic Litigation', pp. 26–32.
[39] Feldman, 'Public Interest Litigation', p. 50.

information.[40] Similarly, in *Rush*, the claimant abandoned an appeal to the First Tier Tribunal to force disclosure, under the Freedom of Information Act 2000, of government mapping exercises on the impact of Brexit on north-south cooperation under the Belfast/Good Friday Agreement (the 1998 Agreement), when some of those documents were (in Rush's view, pre-emptively) published.[41]

Other unsuccessful cases nevertheless had the effect of mobilising political support for the litigants' cause. Most notably, a string of unsuccessful cases attacking the legitimacy of the referendum process – various GLP cases, *Webster*, *Wilson*, *Ball*, *Walchover* – seemed only to intensify the belief amongst 'ultra-Remainers' that Brexit itself was illegitimate. This arguably had the effect of focusing attention on the legitimacy of Brexit and away from the process by which Brexit would be delivered and the form it would take. In *GLP (Serious Shortages Protocol)*, we saw an attempt to leverage that political support back on the legal process in order to pre-empt an unsuccessful outcome or to influence a positive outcome. In a series of tweets, Jolyon Maugham drew his followers' attention not only to what he believed to be the 'pro-government' reputation of the judge, Swift J, who had refused permission on the papers but also – and more controversially – that of the judge, Supperstone J, who was *still to hear* the appeal against that refusal, urging the latter to 'defy his reputation' and do the right thing.[42]

Finally, we saw in the course of Brexit litigation, and most clearly in cases around Brexit and the territorial constitution, that unsuccessful or abandoned cases could change the dynamics of the decision-making process. McCrudden and Halberstam, for example, have argued that the Supreme Court's treatment of Northern Ireland-specific issues in *McCord and Agnew* – downplaying the legal significance of constitutional protections afforded by the 1998 Agreement, and the need for legislative consent by the Northern Ireland Assembly to 'unpick' the existing devolution settlement – hardened the resolve of the EU-27 to prioritise 'sufficient progress' on the Ireland/Northern Ireland dimensions of Brexit in their Brexit negotiations with the United Kingdom.[43]

[40] See this thread of tweets by Jolyon Maugham in which, owing to the government's release of the studies, he includes *GLP (Impact Studies)* (tweet 3 in the thread) as part of what he considers GLP's 'extraordinary record of success' (tweet 7) in the conduct of strategic litigation – Jo Maugham, @JolyonMaugham (23 March 2018), https://twitter.com/JolyonMaugham/status/977128368733859841.

[41] Communication with the authors.

[42] CJ McKinney, 'Jolyon Maugham QC suffers backlash on Twitter after calling High Court judge "pro-Government"', Legal Cheek, 26 March 2019, www.legalcheek.com/2019/03/jolyon-maugham-qc-suffers-backlash-on-twitter-after-calling-high-court-judge-pro-government/.

[43] Christopher McCrudden and Daniel Halberstam, '*Miller* and Northern Ireland: A Critical Constitutional Response' (2016–17) 8 *Supreme Court Yearbook* 299–343.

Similarly, it may be argued that the Supreme Court's approach to the Sewel Convention in *Miller 1* – depriving s. 2 of the Scotland Act 2016 of legal effect, thereby leaving the necessity of legislative consent to be determined in the political arena and, in so doing, signposting the weakness of the constitutional protections for devolution – encouraged the UK government to adopt a hard line on devolution issues during the passage of the subsequent Withdrawal Act.

Conversely, the political impacts of *successful* cases have been complex and – sometimes – less favourable to the parties than they might initially have appeared. In *Miller 1*, for example, the claimants won an important formal victory by requiring Parliament explicitly to authorise the government to trigger Art. 50. However, the political impact of the win was somewhat limited. First, Parliament's *use* of that power was simply to hand the government an unconditional discretion to trigger Art. 50, a decision which undermined Parliament's ability to control the conduct and terms of Brexit negotiations at an early stage. Secondly, the approach taken by the Supreme Court – downplaying the constitutional significance of the referendum and placing greater weight on Parliament's (politically, but not legally, consequent) decision to leave – closed off the possibility of later challenges to the legitimacy of the referendum process or result. Thirdly, the court's refusal to engage with the Sewel Convention undermined the capacity of the devolved governments to exert meaningful influence on the UK government.

In *Wightman*, the CJEU's ruling that a member state may unilaterally withdraw its Art. 50 notification in line with its own constitutional requirements had the desired effect of changing the political dynamics – with the (then) minority UK government shifting its rhetoric from 'no deal' to 'no Brexit' as the inevitable alternative to its Withdrawal Agreement. However, by adding to and further complicating the range of options on the table, it is arguable that the case contributed to the parliamentary stalemate that required the government to seek extensions in order to ward off the prospect of a 'no deal' Brexit by default.

In the *Continuity Bill Reference*, whilst the government was – ultimately – successful in defeating the Scottish government's bill,[44] this too came at a political cost. The UK government's use of the reference procedure to change the rules of the game – delaying the bill's submission for Royal Assent, and using that delay in order to amend the Scotland Act 1998 and *retrospectively* place the bill outwith competence – arguably handed the Scottish government a political and moral victory, whilst sparing it the practical headache of how to implement a parallel scheme.

[44] UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2018.

Finally, where the litigants in *Cherry/Miller 2* achieved a significant legal victory, the political impacts of that case were more complex. First, by restoring the status quo ante – an embattled minority government that had struggled to find support in Parliament for its flagship Brexit policies[45] – *Cherry/Miller 2* was arguably an important catalyst for the December 2019 general election at which the Conservative Party was returned to power with an eighty-seat majority. Secondly, whilst the Supreme Court Justices – aware of the political fallout that was sure to follow – were extremely careful to disguise the novelty of their judgment in orthodox reasoning and in defence of parliamentary democracy, the political responses to that judgment were unsurprisingly partisan. Amongst Remain supporters, there was an unhelpful outburst of 'court- (and Lady Hale-) worship', which was doubly problematic. On the one hand, the praise for judges as 'Heroes of the People'[46] by implication validated the infamous criticism of judges as 'Enemies of the People' by pro-Brexit supporters and media.[47] On the other hand, with the emotional, political, and constitutional stakes so high – and where hyper-litigation had been felt by the government to have disrupted its ability to deliver Brexit *on its terms* – the conditions were ripe for political pushback. This has manifested in the government's commissioning of an Independent Review of Administrative Law. The review panel has been set broad terms of reference to consider, inter alia, codification of the grounds of judicial review, the proper scope of judicial review, the impact and remedial effects of judicial review on government decision-making, as well as the 'stream-lining' of judicial review, including a return to the question of standing in public law cases.[48] Although set in ostensibly neutral terms, the desired outcome of the review is hinted at in the terms of reference. The panel, this said, 'should bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law'.[49] The agenda behind the

[45] See chapters by Howarth and Petrie in this volume.

[46] As one headline reacted to the Court of Session's decision in *Cherry*, see Jim Cormack, 'Heroes of the People', *Scotsman*, 12 September 2019, www.pressreader.com/uk/the-scotsman/20190912/281487868045940.

[47] James Slack, 'Enemies of the People: Fury over "out of touch" judges who have "declared war on democracy" by defying 17.4m Brexit voters and who could trigger constitutional crisis', *Daily Mail*, 3 November 2016, www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html.

[48] See further the government's press release announcing the review, gov.uk, 31 July 2020, www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review.

[49] Ibid.

review has been made explicit too, in leaks that the government had instigated the review in order to 'curb' the powers of judicial review and in so doing 'prevent a repeat' of its 'humiliating defeat' in *Cherry/Miller 2*.[50]

THE DRIVERS OF LITIGATION

Another question that requires attention is *why* Brexit has been the subject of hyper-litigation. The *potential* for litigation arises largely from the uncertainty that has defined the project. There has been uncertainty about the legitimacy and conduct of the referendum process, about the constitutional authority of the referendum result, about the constitutional boundaries between government and parliament, between central and devolved governments, and between the shape and various effects of a harder or softer Brexit. However, uncertainty can also play against the potential for success given the high constitutional stakes and the conduct of prolonged negotiations that leave issues locked in the political arena (for example, *Yalland*; *Williams*; *Trimble*; *Vince*). In addition, while uncertainty generates the potential for litigation, something more is needed to convert interesting legal questions into litigation. Within our case sample, we have identified several factors which *discourage* actors away from the political process and *encourage* potential litigants towards the legal process.

Factors Discouraging Pursuit of Political Solutions

A significant factor that has discouraged actors from pursuing their aims through the political process has been their feeling of political *exclusion*. We see this most clearly in the various challenges brought by those excluded from the UK Parliament, referendum, and European Parliament election franchises (*Tomescu*; *Shindler UK*; *Shindler EU 1*; *B*). Exclusion was a factor, too, in *Agnew & McCord* and *Miller 1* where it was felt that the UK government had marginalised the devolved institutions during withdrawal negotiations. The *Continuity Bill Reference*, initiated by the UK government's Law Officers,

[50] Gordon Rayner, 'Boris Johnson ready to curb the scope and power of judicial reviews', *Telegraph*, 24 July 2020, www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review. As justice is devolved to Scotland and Northern Ireland, the review terms are mostly confined to judicial review in England and Wales. However, the prospect of push back does influence judicial thinking in other UK jurisdictions – see Lord Hope's warning to litigants in the Scottish courts to use strategic litigation responsibly or risk political backlash in 'A Judicial Perspective on Strategic Litigation' (paper delivered at the Development of Strategic Litigation Seminar hosted by the Faculty of Advocates and the Equality and Human Rights Commission, March 2014, on file with the authors).

was born of a double exclusion. On the one hand, the devolved institutions in Scotland and Wales were frustrated that their concerns about the proper return of competences from the EU had been ignored. This caused both governments to retaliate with indigenous Continuity Bills to apply in devolved areas, which were then referred to the Supreme Court.[51] On the other hand, the exclusion – by the Scottish government in the formulation of their Continuity Bill – of the UK Law Officers from the three-week pre-introduction period, when concerns about competence are usually addressed and resolved through political dialogue, left those concerns instead to be raised and addressed in the process of litigation.[52] Finally, in *Cherry/Miller 2* the use of prorogation by the executive to 'stymie' further parliamentary input into the Brexit process[53] was an important factor in pushing political actors away from the political process and towards litigation.

In *Cherry/Miller 2*, there were important additional factors in play that explain why so many MPs turned to law rather politics in their opposition to prorogation. Unlike *Wightman*, which was born of political stalemate, the politicians party to this litigation had political options on the table to face down prorogation. They might have pursued a vote of no confidence in the government, the passage of legislation to block or condition prorogation, a vote of contempt against the PM, or a Humble Address motion inviting the Queen to disregard the PM's advice.[54] However, a range of considerations – the pressures of time (reports that the PM had sought legal advice about prorogation were published just two weeks before its intended implementation),[55] and concerns about the efficacy of political remedies (for example, a no confidence vote leading to dissolution would have had a similar effect to prorogation; the PM might have ignored the contempt order, or advised the monarch to refuse Royal Consent to any legislation affecting the

[51] Albeit that the Welsh reference was abandoned due to the Welsh Assembly repealing its Continuity Act and consenting to concessions made to the UK bill.

[52] See Christopher McCorkindale and Janet Hiebert, 'Vetting Bills in the Scottish Parliament for Legislative Competence' (2017) 22 *Edinburgh Law Review* 319–51, esp. pp. 341–8. In Wales there is no equivalent practice of sharing bills with UK Law Officers prior to their introduction.

[53] *Cherry and others* v. *The Advocate General* [2019] CSIH 49, para. 55.

[54] See David Howarth, 'Threat of Prorogation: What Can the Commons Do?', LSE Blog, 29 August 2019, www.democraticaudit.com/2019/08/28/threat-of-prorogation-what-can-the-commons-do/ (noting the author's view that the chances of obtaining a legal remedy were slim).

[55] Toby Helm and Heather Stewart, 'Boris Johnson seeks legal advice on five week parliament closure ahead of Brexit', *Guardian*, 24 August 2019, www.theguardian.com/politics/2019/aug/24/johnson-seeks-legal-advice-parliament-closure.

prerogative power to prorogue)[56] seem to have motivated politicians to run political and legal strategies in tandem.

Another factor that has discouraged recourse to the political process has been the perception or the effects of elite control. This has resulted in litigation aimed at improving access to information held by government (*GLP (Impact Studies)*; *Rush*) and the adequacy of consultation exercises conducted by government (*GLP (Serious Shortages Protocol)*), both of which are essential to wider public understanding and participation.

A final set of considerations has been disillusionment with the available political choices. In some instances, this has manifested in efforts to constrain or close off undesirable political choices through law (for example, recourse to the 1998 Agreement to contest the legality of the NI backstop (*Trimble*) and the revised border solution (*Bryson*)). Conversely, law has been used to open up new choices in the face of political stalemate (as with the prospect of unilateral Art. 50 revocation in *Wightman*). In other cases, litigants have sought to shift the locus of decision-making power to alternative forums where more desirable choices might present themselves (from the executive to Parliament in *Miller 1* and *Yalland*, and in various challenges to the extension of Art. 50; from the devolved institutions to the centre in the *Continuity Bill Reference* and vice-versa in *Miller 1*; from the executive to the Court of Session in *Vince*).

Factors Encouraging Pursuit of Legal Solutions

The very high profile, high stakes, and controversial nature of Brexit created a strong motivation for people to take action to advance their preferred outcome by whatever means were open to them. What, then, are the factors that push or pull those who are disillusioned with the political process towards the courts?

First, academic visibility and engagement – enabled by more immediate and accessible (to litigants and to practitioners) means of publication, such as widely read constitutional and EU law blogs, and incentivised by government and academic institutions by the measure and reward of research 'impact' – has made a measurable impact on litigation patterns. Table 6 shows the very high number of cases that have been triggered – or at least significantly informed – by academic engagement and discussion or that have involved direct input by academic experts.

[56] Howarth, 'Threat of Prorogation'.

TABLE 6 *Expert Involvement*

Cases triggered by expert discussion	Direct expert involvement in litigation
Miller 1	*Miller 1 (Prof Dan Sarooshi)*
Agnew & McCord	*Agnew & McCord (Prof Chris McCrudden, Prof Gordon Anthony)*
Yalland	*Wightman (Prof Piet Eeckhout)*
Good Law Project (Ireland)	*Wilson (Prof Pavlos Eleftheriadis)*
Wightman	*GLP (Serious Shortage Protocol) (Prof Tammy Harvey)*
Williams	*Cherry (Prof Kenneth Armstrong)*
Continuity Bill Reference	*Cherry/Miller 2 (Public Law Project interveners)*
Webster	*Public Law Project*
Wilson	*Maugham (Prof Alan Winters)*
Trimble	
GLP (Serious Shortage Protocols)	
Leave Means Leave	
Wolchover	
English Democrats	
Allman	
Miller 2	
Cherry et al.	
McCord et al.	
Liberty	
Vince et al.	
JR90	
IWUGB 2	

Secondly, as noted above, litigants were pulled to court by entrepreneurial lawyers generating arguments and seeking – indeed, in *Fair Deal for Expats*, advertising for – clients.

Thirdly, time pressures were an important factor in converting potential to actual cases. Because the Art. 50 negotiating periods were time limited – with a 'no deal' Brexit the default if those periods were to expire without a negotiated agreement or agreed extension – there were only limited windows of opportunity to influence the political process. This, in part, explains the number of unsuccessful and abandoned cases in the sample. Since there was a very fine window of opportunity to bring cases in which the issues had sufficiently crystallised to be reviewable, yet avoid bringing the courts into a head-on collision with high stakes political decisions that had already been made, this may have incentivised risky litigation in the hope that *some* of it might stick.[57] The political significance of time pressures also explains

[57] We are grateful to Adam Tucker for this point.

a number of cases that were taken with the aim of extending the time available for a successfully negotiated outcome, taken to mean a 'softer' Brexit (*Liberty*; *Vince*; *JR90*; *IWUGB 2*) or opposing any extension in order to make a 'harder' or 'no deal' Brexit the more likely outcome (for example, *English Democrats*; *Legg*).

Finally, the courts have become much more receptive in recent years to strategic litigation. Judges in the United Kingdom, and in particular those who sit in the Supreme Court, are much more comfortable with constitutional adjudication than they were in the past; standing at least for domestic cases has been significantly liberalised; and litigation costs are much less of a barrier than they once were. One factor here is the willingness of courts to make protective costs orders in public interest cases, which has been a feature of some Brexit cases. A much more significant factor, however, has been the emergence of crowdfunding.

In *Pressure Through Law*, Harlow and Rawlings exposed the tension in a system where clients' ability to raise public interest litigation greatly depended on their ability to secure funding from the state through legal aid.[58] Writing at a time when the provision of legal aid was, they thought, 'relatively generous',[59] they nevertheless considered that the legal aid system was individualist in its application and so tended to discourage group litigation.[60] In more recent years, there has been a steep decline in the percentage of judicial reviews funded by legal aid in England and Wales[61] and within our sample only the various McCord cases and *Bryson* – all arising in Northern Ireland – were funded in this way. Crowdfunding has emerged as a way to overcome cost barriers to strategic litigation for those who do not qualify for legal aid and who do not have the independent means or backing to pursue their rights or interests in court. Moreover, it does so in a way that allows potential litigants quickly to raise money more or less directly from the public and to establish channels of communication between themselves and their donors about the legal arguments to be advanced, the progress of the case, and how their money has been used. In other words, not only does crowdfunding fill the gap that legal aid reform has left behind, it does so in

[58] *Pressure Through Law*, p. 115.
[59] Ibid. pp. 115–20.
[60] Ibid.,
[61] See Joe Tomlinson, 'Crowdfunding Public Interest Judicial Reviews: A Risky New Resource and the Case for a Practical Ethics' (2019) *Public Law* 166–85. On the inadequacies of the Scottish Legal Aid regime for strategic litigants, see Mhairi Snowden and Janet Cormack, 'Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland' (2018), esp. p. 13, https://scotland.shelter.org.uk/__data/assets/pdf_file/0005/1621526/Discussion_Paper_Overcoming_Barriers_Public_Interest_Litigation_Scotaland.pdf/_nocache.

a potentially democratising way that is more encouraging and enabling of group actions.

Although there were attempts to use crowdfunding in public interest cases before and outside of the Brexit context,[62] Table 7 demonstrates that crowdfunding has had a profound impact on the number of Brexit cases that have been brought. It has been a feature in at least twenty-seven of our fifty-seven cases (with public donations sought in at least a further four cases). In some instances, the sums involved have been very large indeed, reaching well into six figures. However, the sheer volume of cases has shone a light on ethical considerations around crowdfunding that remain to be addressed. In some cases, litigants have been able to raise significant sums of money to advance arguments that were always unlikely to succeed (for example, in *Ball*, £700,000 to support the failed private prosecution of Boris Johnson; in *Webster*, £190,000 to support a dubious challenge to the validity of the prime minister's Art. 50 notification). In highly emotive contexts such as Brexit, it seems that non-expert donors may part with their money on the basis of their emotional or political preferences rather than on the merits of the legal argument. At the same time, whilst there are examples of good practice with regard to the sharing of arguments and other key documents with donors, the democratising impact of crowdfunding is undermined in other instances[63] where very little is offered by way of arguments, documents or case updates. In addition, crowdfunding has drawn lawyers (and clients) inexperienced in judicial review into that space and this has caused some judicial pushback against lawyers who are therefore ill-prepared for such proceedings (*GLP (Electoral Commission)*) and against 'hopeless' arguments being pushed too far up the appeal chain (for example, the exceptional award of costs at the permission stage against the claimants in *Webster* and *Wilson*). Attention to the need for better regulation and scrutiny of crowdfunding in legal cases in order to realise its democratising potential might therefore be one more positive outcome of its intense use so soon in its development.[64]

CONCLUSION: STRATEGIC LITIGATION AFTER BREXIT

In *Pressure Through Law*, Harlow and Rawlings challenge the view that the use of pressure through law is a 'modern phenomenon' that began in 1954 with

[62] An early, and high profile, use of crowdfunding of this kind was *Justice for Health* v. *Secretary of State for Health* [2016] EWHC 2338.

[63] Tomlinson, 'Crowdfunding Public Interest Judicial Reviews', esp. pp. 175–6, citing *Webster* as an example of a 'less well managed' example of a crowdfunded judicial review.

[64] Ibid.

TABLE 7 *Litigation Funding*

Crowdfunded		Party-funded	Legal aid	Pro-bono	Other	Unknown
Miller 1	*Good Law Project (Serious Shortage Protocols)*	*Tomescu*	*McCord*	*Miller 1*	*Williams*	*Shindler (UK)*
Agnew	*Ball*	*Miller 1*	*McCord (Border poll)*	*Good Law Project (Impact Studies)*		*Truss*
Yalland	*English Democrats*	*Agnew*	*McCord et al.*	*Williams*		*Hardy*
Good Law Project (Ireland)	*Brake et al.*	*Fair Deal for Expats**	*Bryson*	*Watson*		*McCord (Dublin)*
Shindler (EU1)	*Keighley*	*Continuity Bill Reference*		*thethreemillion*		*Watt 1*
Good Law Project (Electoral Commission)	*thethreemillion*	*Rush*		*Miller 2*		*Legg*
Good Law Project (Impact Studies)	*Cherry et al.*	*Leave Means Leave**				*B*
Wightman	*Liberty*	*Wolchover**				*Walker*
Williams	*Maugham*	*Allman*				*Miller 2*
Webster	*BIJ*	*MCS & ClientEarth**				*Shindler (EU2)*
Wilson	*AB*	*Miller 2*				*Fratila*
Good Law Project (DUP)	*Watt 2 (intention to seek)*	*Vince*				*Shindler (EU3)*
Fair Vote UK		*IWUGB 2*				*JR90*
Trimble						*Lib Dems & SNP (ITV)*
Watson et al.						*Lib Dems (BBC)*

*Donations sought

Brown v. *Board of Education of Topeka*.[65] Instead, they say, pressure through law might be as old as the existence of pressure groups themselves.[66] Collectively, then, the cases that we have highlighted here take their place within a long tradition of strategic litigation used to influence a wider political context.

What is new, however, and what marks this body of strategic litigation out as being worthy of study on its own terms, is three-fold. First, it is clear that the unusual interplay of factors which gave rise to Brexit hyper-litigation will continue to feed efforts to influence Brexit even now that the United Kingdom has left the EU.[67] More interestingly, there is evidence already that these factors – and patterns of hyper-litigation – have spilled over from the Brexit context and into other areas of political controversy. In June 2020, a study by Tomlinson et al. found that there had been at least sixty-three cases (and counting) relating to aspects of the United Kingdom's response to the Covid-19 pandemic.[68] In Scotland, meanwhile, a legal challenge concerning the power to hold an independence referendum has drawn explicit inspiration from Brexit litigation, in particular the decision in *Cherry/Miller 2*.[69]

Secondly, Brexit hyper-litigation has had enormous constitutional impacts. It has expanded the scope of justiciability both in terms of substance (*Miller 1*; *Cherry/Miller 2*) and in terms of remedies (*Wightman*). It has extended judicial control over prerogative powers (to determine whether prerogative powers are engaged at all (*Miller 1*) as well as their lawful exercise (*Cherry/Miller 2*). And it has accelerated the advance of common law constitutionalism by recasting parliamentary sovereignty (*Continuity Bill Reference*; *Cherry/Miller 2*) and responsible government (*Cherry/Miller 2*) as substantive legal principles capable of judicial enforcement.

Thirdly, whilst hyper-litigation and judicial activism might be defended as necessary responses to the executive's unconstitutional behaviour, our case sample does not necessarily bear this out. Behind the majority of cases we find partisan political motivations disguised as constitutional concerns. This finding might not be surprising – but it is problematic. Overt politicisation of the courts by those bringing claims risks *undermining* respect for the rule of law, as

[65] 347 US 483 (1954).
[66] *Pressure Through Law*, p. 12.
[67] Peers, 'Litigating Brexit'.
[68] Joe Tomlinson, Jo Hynes, Jack Maxwell and Emma Marshall, 'Judicial Review during the COVID-19 Pandemic (Part III)', Administrative Law in the Common Law World Blog, 28 May 2020, https://adminlawblog.org/2020/05/28/joe-tomlinson-jo-hynes-jack-maxwell-and-emma-marshall-judicial-review-during-the-covid-19-pandemic-part-ii/.
[69] See Forward as One's crowdfund page in support of their 'People's Action on Section 30', www.crowdjustice.com/case/pas30/.

highly partisan reactions to *Miller 1* and *Cherry/Miller 2* demonstrate. Indeed, the final irony of Brexit hyper-litigation is that its legacy might not be the use of legal techniques by lawyers and their clients to advance political positions, nor the development by the judiciary of a richer common law constitutionalism – but the hollowing out, by a 'humiliated' government, of judicial review itself.